CITATION: *P Papadakis Nominees Pty Ltd v The Commissioner of Taxes* [2007] NTMC 050

PARTIES:	P Papadakis Nominees Pty Ltd
	v
	The Commissioner of Taxes
TITLE OF COURT:	Taxation and Royalty Appeals Tribunal
JURISDICTION:	Stamp Duties Appeals
FILE NO(s):	20713365
DELIVERED ON:	9 August 2007
DELIVERED AT:	Darwin
HEARING DATE(s):	On Papers
JUDGMENT OF:	Acting Magistrate Fong Lim

CATCHWORDS:

Taxation Appeals – Stamp Duties – Aggregation of Duty for dutiable property – exercise of Commissioner's discretion - Section 52A Taxation (Administration) Act.

Attorney –General v Cohen [1937] KB 478
Jeffrey v Commissioner of Stamps [1980] SASR 398
Old Reynella Village Pty Ltd v Commissioner of Stamps [1989] 51 SASR 378
Chief Commissioner of State Revenue v Pacific General Securities Ltd & Finmore Holdings Pty Ltd (2)[2004]NSW ADTAP 51
Chief Commissioner of State Revenue v Pacific General Securities Ltd and Finmore (No 2) [2005] NSWADTAP 54

REPRESENTATION:

Counsel:

Appellant:	Mr Stewart
Respondent:	Mr Anderson

Solicitors:

Appellant:	Ward Keller
Respondent:	Solicitor for the Northern Territory

Judgment category classification:	C
Judgment ID number:	[2007] NTMC 050
Number of paragraphs:	92

IN THE TAXATION AND ROYALTIES APPEALS TRIBUNAL
AT DARWIN IN THE NORTHERN
TERRITORY OF AUSTRALIA

No.20713365

[2007] NTMC 050

BETWEEN:

P Papadakis Nominees Pty Ltd
Appellant

AND:

Commissioner of Taxes
Respondent

REASONS FOR JUDGMENT

(Delivered 9th August 2007)

Acting Magistrate Fong Lim:

1. The Appellant appeals the determination of the Respondent to aggregate the stamp duty payable for the transfer of 35 lots of land pursuant to section 52A of the Taxation (Administration) Act. It is common ground that the Appellant purchased from Kinsmen Pty Ltd 35 lots of land, and the properties were adjoining within the Mitchell Creek subdivision in Palmerston. The purchase of all of those lots was effected on the same date and each purchase was evidenced by a separate contract.

2. The Appellant lodged contracts and transfers for assessment on the 22nd of June 2006 and they were assessed as part of a single or a series of transactions pursuant to section 52A of the Taxation Administration Act. The Appellant objected to the assessment and the Respondent rejected that objection.

3. Section 52A of the Taxation Administration Act provides:

“52A. Computation of duty where 2 or more instruments

(1) This section applies to the following instruments:

(a) an instrument by which, or evidencing a transaction or part of a transaction by which, dutiable property is conveyed;

(b) a statement under section 83B; and

(c) a memorandum created for the purposes of section 94, where the memorandum relates to an instrument under paragraph (a) or the failure to lodge a statement under section 83B.

(2) In this section, "relevant transaction" means a transaction which is or should be evidenced by an instrument referred to in subsection (1)(b) or (c).

(3) Where 2 or more instruments to which this section applies together form, or arise from, substantially one transaction or one series of transactions, those instruments shall, unless the Commissioner is satisfied that it would not be just and reasonable in the circumstances, be chargeable with ad valorem duty as a single transaction calculated at the rate appropriate to the dutiable property conveyed on the sum of the amounts by reference to which ad valorem duty on each of those instruments would, but for this subsection, have been calculated, and that duty shall be apportioned to the various instruments as determined by the Commissioner.

(4) Where a person conveys dutiable property to the same person (whether that person takes alone or with the same or different persons) by an instrument to which this section applies –

(a) which has been, or appears to have been, executed within 12 months of –

(i) another such instrument; or

(ii) a relevant transaction; or

(b) being a statement under section 83B or a memorandum under section 94 evidencing a relevant transaction which, in the opinion of the Commissioner, was entered into within 12 months of –

(i) another relevant transaction evidenced by such a statement or memorandum; or

(ii) the execution of an instrument referred to in paragraph (a),

it shall be presumed, unless the Commissioner is satisfied to the contrary, that the instruments arose out of one transaction or one series of transactions.

(5) Where ad valorem duty has been paid in respect of an instrument referred to in subsection (3), the duty otherwise payable under that subsection shall be reduced by the amount of duty already paid.

(6) Except as provided by subsection (5), this section does not operate to reduce the duty payable on any instrument."

4. In assessing the duty payable on the transfer of the 35 lots of land the Respondent applied the presumption section 52A (3) and could not be convinced to the contrary by the Appellant. Ad valorem duty was applied to the transfers on the aggregate value of the contracts which was considerably more than if each contract had been assessed separately.

5. The Appellant submits that even if the presumption applied to these contracts there were reasons for the Respondent to find it would not be "just and reasonable" to aggregate the value of the contracts and impose the ad valorem duty on that aggregate value. The Respondent disagreed.

6. **Nature of Appeal –** This Tribunal is established by Part VA of the Taxation (Administration) Act. The nature of the appeal is an appeal de novo (see section 105A). Any appeal to the Tribunal must be made within 60 days of the decision complained of (unless there has been an extension of time granted) and the provisions of the Act contemplate the appeal to be heard on the papers. The submissions are specifically not limited to the arguments that may have been put before the Respondent or the reasons provided to the Appellant by the Respondent (see 105C (e) and 105E (2)).

7. In determining an appeal the Tribunal has the following options available to it:

105F. Determining appeal

(1) In determining the appeal, the Tribunal may –

(a) confirm the decision appealed against;

(b) vary the decision appealed against;

(c) substitute another decision that would have been available to the decision maker; or

(d) remit the matter to the decision maker for reconsideration, either generally or in respect of specified matters, and for variation of the decision appealed against or substitution of another decision.

8. **Facts** : In about August/ September 2005 the vendor, Kinsmen Realty Pty Ltd ("Kinsmen"), and the director of the Appellant, Tony Papadakis had a meeting about the acquisition of some of the development marketed as Mitchell Creek Estate "prior to general market release" (see letter 6th September 2005 from Kinsmen to Papadakis).

9. On the 3rd of October 2005 the Appellant wrote to Kinsmen accepting an offer to "purchase 35 Residential, Duplex and D2 lots at Mitchell Creek, Farrar Stage 3E at the reserve price of $3,085,000.00". The Appellant also stipulated that "Any blocks not sold prior to 30 days of titles being issued will go into P Papadakis Nominees name as one settlement, prior to this all blocks sold will go into individual client's names." The Appellant's offer was accepted by Kinsmen on the 5th of October 2005.

10. In October 2005 Minter Ellison, Kinsmen's solicitor, prepared a "put option" deed between Kinsmen and the Appellant for the "purchase" of the relevant lots, all deeds were executed by the parties on the 8th of October 2005. According to Minter Ellison (letter to the Respondent of the 14th September 2006), it was decided to prepare deeds instead of contracts of sale to allow the Appellant to find buyers for the properties (as house and land packages) without having to buy the land themselves but giving Kinsmen the security that if lots weren't sold by a particular time then the Appellant would purchase the balance. The deed gave Kinsmen the right to

require the Appellant to purchase the properties but did not prevent Kinsmen from selling the properties to other persons.

11. On the 12th of October 2005 the Appellant paid a single deposit of $154250.00 to the real estate agent handling the sales for Kinsmen. Minter Ellison in their letter described this as an "initial fee" not a deposit. The fee was to demonstrate to Kinsmen some financial capacity of the Appellant. The letter from the Appellant to the stakeholder, Knight Frank, described the payment as a 5% deposit on the properties.

12. The Appellant then changed its mind about how the purchases were to go forward and subsequently executed separate contracts of sale for each lot.

13. Minter Ellison had no knowledge of why the parties changed their minds and signed contracts for sale of land instead of relying on the deeds of put options which had already been executed.

14. In its response to a notice of furnish information from the Respondent of the 31st of August 2006, the Appellant states that the reason he decided to purchase the properties outright was because he wanted to have control over when to enter into building contracts and to be assured that he had some control over the "types of homes being built including types of houses and landscape" in stage 3E. Further in the words of the director of the Appellant was

> "concerned because I did not want PPN to enter into fixed cost building contracts and then find that because of a delay in land being released combined with the skills shortage pushing up construction costs, that PPN was unable to build the houses within the cost agreed under a building contract, I felt that by owning the lots, PPN would have control over when to enter into building contracts."

15. The Appellant also explains that the "initial fee" paid on the 12th of October was refundable to the Appellant should Kinsmen choose to sell the

properties to someone else however it was later converted to a “deposit” once the contracts for sale were signed.

16. Contracts for sale of the property were executed by the parties on the 7th of March 2006 and lodged for assessment in June of 2006.

17. It is clear from the correspondence between the solicitors for the Appellant, Ward Keller, and Kinsmen and the financier that they were aware that the Respondent was likely to assess the purchase of these properties as a single transaction pursuant to section 52A and they attempted to address the issue before it arose.

18. On the 25th of May 2006 Leon Loganathan, an associate of Ward Keller, sent an email to Duncan Lock from Kinsmen requesting a letter from them confirming details which he no doubt thought would help to convince the Respondent not to assess the contracts as a single or series of transactions. It is important to note the content of that email and accordingly I have reproduced the content below:

> “Hi Duncan,
>
> I’d like to lodge the 35 contracts for stamping with the Revenue office - even though titles have not yet been issued as I am anticipating some resistance from the Revenue Office to treating each property as a separate purchase. I’d rather deal with these issues now than when the titles issue as settlement could be delayed if we have a bun fight with the Revenue Office.
>
> For this purpose, I was wondering whether you could provide me with the following:
>
> 1. A letter from Kinsmen stating the following:
>
> a. Duncan Lock from Kinsmen, Peter McVann from Knight Frank and Tony Papadakis from PTM were the people involved in the negotiations
>
> b. Each block of land had a price fixed by Kinsmen prior to release as pre the Price List of Stage 3E. PTM did not

receive any discount for buying the 35 lots. PTM was able to secure 35 blocks because they were on e of the first purchases to approach Knight Frank to purchase the release.

c. Kinsmen understands that PTM intends to sell the land as house and land packages to individual purchasers

d. No contract for the purchase of land was dependent on another contract for the purchase of land. That is the contract were not interdependent.

e. The properties were advertised as single lots (Duncan can you or Peter provide me with some marketing material to show this other than the price list?)

2. A letter from Knight Frank confirming the above including copies of the marketing or advertising even if it is generic.

19. A draft letter was sent to Ward Keller by Duncan Lock (see his email of the 26th May 2005) and that letter was "approved" by Mr Loganathan. A letter was then produced by Kinsmen dated 30 May 2006. The body of the letter provided confirmation of those matters requested by Ward Keller in Kinsmen's own words as follows:

1. Tony Papadakis of PTM Homes negotiated the purchase of 35 individual allotments with Peter McVann of Knight Frank, Korgan Hucent, formerly of Knight Frank, Gregg Downer and Duncan Lock of Kinsmen in September 2005.

2. The 35 allotments comprise the whole of stage 3E , as identifies in the Master Plan for Mitchell Creek Estate land sub – division located in Farrar

3. Agreement to purchase 35 individual allotments was based on tan original retail price list. No reduced price or grouped discount was offered by Kinsmen.

4. Kinsmen understand that PTM Homes will further develop each allotment by way of a "house and land package".

5. The number of allotments purchase by PTM Homes was at the request of PTM home and did not involve any interdependency. That is to say that each of the 35 lots purchased were individual and unrelated transactions.

6. The Lots in question were not offered to the general market as the sales were made prior to general release of the project. Nonetheless, the intended full retail price for each allotment was achieved and is noted in the individual contracts."

20. The information requested by Mr Logantham directly related to the Respondent's Stamp Duty Lodgement Guidelines published in May of 2005 which indicated when considering exercising its discretion the Respondent would require the following information:

> "The original contracts
>
> Full details of how the sale of each property was negotiated, including the names of the person(s) negotiating on behalf of the vendor(s) and the purchaser(s)
>
> Was a single price negotiated then split between the contracts
>
> Was any discount negotiated as a result of the multiple purchases? Would the discount etc have been available to any other person if they had acquired the property separately?
>
> Are the properties adjoining or adjacent to each other?
>
> What is the present use of the properties and what is the purchaser's intended use
>
> Are the contracts conditional on the purchase of each other and what would be the consequences if one contract failed to proceed to completion (ie would with either the vendor or the purchaser withdraw from any of the others)
>
> Were the properties advertised or offered sale as a single parcel of separately? Provide a copy of any newspaper or other publication advertising the properties for sale."

The role of these guidelines will be discussed later.

21. The marketing material of the properties from for sale to the general public was in the form of promotion of the Mitchell Creek Estate in general and the advertisements provided to the court showed that house and land packages from three companies were also promoted in the general advertising of Mitchell Creek Estate. There was also some more specific advertising of the release of stage 3E as exclusive to PTM homes (see documents 81,82 & 83 in brief filed in court).

22. Other evidence that was supplied to the Respondent in support of the Appellant's submissions was a letter from the financier of the Appellant, the National Australia Bank. The letter was also solicited by Ward Keller and stated:

> "I refer to our discussion last Friday and specifically the question of Papadakis financing of the 35 individual allotments acquired.
>
> The NAB is currently completing its documentation to assist the financing of these blocks when titles become available.
>
> As with previous arrangements the financing will be in one tranche to reduce the cost of financing and administration however, each individual allotment is mortgaged as a discrete /individual security.
>
> Accordingly, each individual allotment is subject to internal calculation to assess the NABs security position and amendments to the finance available as allotments (security) is sold as a house and land package."

23. This letter was produced after some discussion between Mr Loganathan and the bank as is evidenced by the email correspondence between the parties as set out below:

> At 6:29pm on the 10th of July 2006 from the Bank to Loganathan.
>
> "Leon
>
> Thanks for your time on Friday
>
> Please has a look at the attached letter and advise what amendments are required.

At 10:51 on the 11th July 2006 from Loganathan to the bank.

"Michael,

Looks fine, I'd only suggest that you remove the following paragraph as it kind of repeats the facts in the first sentence and also opens the door for the Revenue Office to ask other unnecessary questions like how many cheques were used to pay the deposit etc:

"As you are aware Papadakis has negotiated the purchase of 35 individual allotments and have paid 5% deposit on each allotment from their own resources."

If you could finalise this letter today I can send off a letter to the Revenue Offie tomorrow."

24. The letter from the NAB was hand delivered to Ward Keller the next day.

25. It is clear to me that the solicitor for the Appellant solicited correspondence from other parties to shore up their submission that section 52A did not apply to this purchase. The information requested and the suggested answers were tailored to meet the information suggested by the guidelines published by the Respondent.

26. All of this information was provided to the Respondent with supporting documentation.

27. **Issues to be decided –** The task before this Tribunal is to decide whether the Respondent erred in law in applying section 52A to the subject contracts of sale in finding that they were one transaction or a series of transactions and refusing to set aside the presumption. If the Tribunal finds that the Respondent did not err in not setting aside the presumption then it must then consider whether to aggregate the duty payable on those contracts is in all of the circumstances "just and reasonable".

28. **Single transaction or series of transactions?**

There are no relevant authorities which consider the application of section 52A of the Taxation (Administration) Act of the NT ("section 52A")

however there are some persuasive authorities to consider. The Tribunal has been referred to relevant English and other authorities which have considered similar provisions in relevant legislation.

29. In Attorney –General v Cohen [1937] KB 478 their honours were considering the application of section 73 of the Finance (1909-10) Act,1910 which provided that the duty payable on a conveyance, transfer or sale of any property shall be double the amount provided for in a schedule:

> "Provided that this section shall not apply to …a conveyance or transfer where the amount or value of the consideration for the sale does not exceed five hundred pounds and the instrument contains a statement certifying that the transaction thereby effected does not from part of a larger transaction or of a series of transactions in respect of which the consideration exceeded 500 pounds."

30. The majority agreed that there must be some interdependence between contracts for two or more contracts could be found to be part of a larger transaction. The majority also found that for two or more transactions to be classified to be "part of ….a series of transactions" there must be a relationship between the various transactions. In my view the most articulate expression of this view was contained in Slesser J's judgement at page 482-483 where His Honour says in the circumstances of that case the "arbitrary coincidence of time or place" did not constitute "any such interdependence as to form a series".

31. The facts of Cohen's case (supra) were there were a row of houses for sale by auction, the defendants were successful in purchasing 6 of the properties through separate bidding, two at a price higher than 500 pounds and the other 4 less than. It was the 4 of the lesser value which were subject of the litigation. The vendor and purchasers were the same but each property was put up for sale separately and the purchaser had to make separate bids for each. There were separate contracts drawn for each property and separate deposits paid. The judge at first instance found that there was nothing in the

circumstances of the matter which led him to find that the transactions were not entirely independent and the majority of the court of appeal agreed.

32. Greene J in Cohen's case also analyses the difference between a contract which is part of a larger transaction and a contract which may be part of a series of transactions in his judgement and gives an example as follows:

> "Again, a builder developing a building estate might have under one contract an option to purchase different plots at different times , so that each option, when exercised would create a separate contract. In each of these cases it would at the least be a matter of doubt whether a particular order or conveyance could be said to form part of a larger transaction, but there would , I think be in each case such an integral relationship between the transactions as to constitute each indubitable part of series of transactions."

33. His Honour also ruled that the evidential onus was on the plaintiff to "to point to some quality in them (*the number of transactions)* which upon some intelligible grounds removes them from a category of separate transactions and unites them under the head of a series."

34. Cohen's case was applied in Jeffrey v Commissioner of Stamps [1980] SASR 398 in which His Honour Justice Jacobs considered the application of section 66ab of the Stamp Duties Act (SA). Section 66ab is in similar terms to section 52A subject of the present litigation and reads as follows:

> "(1) Where land or interests in land is or are conveyed by separate conveyances –
>
> (a) that arise from a single contract of sale;or
>
> (b) that together from or arise from, substantially one transaction, or one series of transactions
>
> the conveyances shall be chargeable with ad valorem duty calculated upon the total consideration given for the whole of the property, and that duty shall be apportioned to the various conveyances as determined by the Commissioner.
>
> (1a) Where-

(a) land or interests in land is or are conveyed between the same parties by separate conveyances; and

(b) the conveyances have been, or appear to have been, executed within twelve months of each other,

it shall be presumed, unless the Commissioner is satisfies to the contrary, that the conveyances arose out of one transaction, or one series of transactions."

35. While distinguishing the legislation considered in Cohen's case Jacobs J found the reasoning in that matter instructive. His honour agreed with the proposition that whether or not a presumption is raised by the legislation as applied to the facts "it will be necessary to find a relationship or connection or interdependence between the transactions that gives them the essential unity at which s.66ab is directed."

36. The facts in the Jeffreys' case were that a mother & son bought two separate but adjoining properties. The properties were owned by the same vendors and agreements for the purchases were made at the same time and through the same agent however the agreements were executed about 16 days apart. The second agreement was expressed to be conditional on the fulfilment of special conditions in the first contract. Essentially the mother's contract was subject to her selling her other property and the son's contract was subject to that condition being fulfilled. Other conditions of the contract were identical and the sales were settled on the same day. The son's contract was also subject to him obtaining approval to build on his mother's property. The mothers' contract stands independently of the son's contract but she did provide all or most of the purchase price for both parcels of land.

37. His Honour Jacobs J found that those factors combined "to give the integration and essential unity at which the section is aimed". His view was that the contracts fell squarely within the terms of the section and the ad valorem duty on the whole of the consideration for both purchases was properly imposed.

38. Jeffreys case was then applied in the Old Reynella Village Pty Ltd v Commisioner of Stamps [1989] 51 SASR 378. In that case the purchasers acquired 17 properties for the purpose of amalgamation so that a shopping complex could be developed. The properties were purchased over a period of time and from different vendors and the Commissioner assessed the duty payable on the purchases on the total consideration pursuant to section 66ab of the Stamp Duties Act (SA) it was that determination that was appealed and sent to the court for a case stated. His Honour Mohl J agreed with Jacobs J in his application of Cohen's case (supra) in that he agreed that to assess whether contracts were one of a series of transactions the substance of the transactions must be scrutinized.

39. While His Honour distinguished the facts of the matter before him and those of Jeffreys' case as he agreed that the facts in Jeffreys' case would have to lead to the application of section 66ab and approved the reasoning. His Honour agreed with Jacobs J's reasoning in Jeffrey's case where Jacobs J found that the word "substantially" in section 66ab must be given some meaning and that can only mean:

> "that can only mean that the Commissioner is required to look at 'the substance' of several transactions and determine whether they are 'in substance' one transaction."

40. Mohl J went onto to characterise the several conveyances under scrutiny as "clearly part of a series of transactions" and therefore within the meaning of section 66ab. Mohl J found the relationship between the transactions was "an integral and not a fortuitous one".

41. All of these authorities are considered in the more recent case of Chief Commissioner of State Revenue v Pacific General Securities Ltd &Finmore Holdings Pty Ltd (2)[2004]NSW ADTAP 51 in which the New South Wales Administrative Decision Tribunal Appeal Panel considered the reasoning of the Revenue Division of the Tribunal to set aside the Commissioner's

decision not to reduce the assessment of duty. The provision considered in that matter was section 25(1) of the Duties Act which reads:

> "25. Aggregation of dutiable transactions
>
> (1) Dutiable transactions relating to separate items of dutiable property, or separate parts of, or interests in, dutiable property are to be aggregated and treated as a single dutiable transaction if:
>
> (a) they occur within 12 months, and
>
> (b) the transferee is the same or the transferees are associated persons, and
>
> (c) the dutiable transactions together form , evidence, give effect to or arise from what is, substantially one arrangement relating to all of the items or parts of, interests in , the dutiable property."

42. The facts were that the purchasers acquired options to buy five adjoining properties with a plan to redevelop the land into a residential and commercial development and vendors gave consent to development applications and were required to sign all relevant documentation relating to that development application. There was also a joint venture agreement between the purchasers' related companies, a financier and a third company regarding the development. The options on the properties were exercised and the development application was approved. The Commissioner aggregated the duty payable on the contracts for sale of the properties under section 25 and the Tribunal overturned the Commissioner's decision. The Tribunal came to the conclusion that the Commissioner's inquiry into the joint venture and other circumstances was outside of what was intended by the legislation. The Tribunal disagreed with the approach in Old Reynellas' case and limited itself to the circumstances "relating" to the actual transactions:

> "My view in relation to paragraph 25(1) (c) is that it merely requires an inquiry into whether the "dutiable transactions" fall within the scope of the paragraph. As indicated, earlier, "dutiable transactions"

> are clearly defined in the Duties Act. In the present matter, the dutiable transactions are the five separate conveyances."

43. The Tribunal then went on to find that the inquiry should be confined to the matters directly related to the actual transactions although he did concede that the Commissioner is entitled to look at surrounding circumstances to understand the relevant dutiable transactions

44. The Panel found that the Tribunal's refusal to take into account circumstances outside of the actual transactions being considered was an error in law. The Panel was of the view that in making a decision whether particular transactions are caught under section 25 the whole of the surrounding circumstances should be consider and indeed have to be considered if the true nature of the transactions is to be determined. The Panel remitted the matter to the Tribunal for reconsideration.

45. In the Chief Commissioner of State Revenue v Pacific General Securities Ltd and Finmore (No 2) [2005] NSWADTAP 54 the Panel stated that:

> "In the present instance, it is clear beyond doubt, that section 25 is attaching duty consequences to circumstances where several transactions have been undertaken with a common purpose in mind and can properly be found to involve substantially one transaction"

46. Considering these authorities I agree that together they stand for the propositions that:

- the legislation subject of the court's consideration in each case required the Commissioner of Taxes, or his equivalent, to look at the substance of the transactions under consideration before the aggregation of stamp duty is to be applied;

- the circumstances surrounding the subject contracts, deeds, conveyances must be considered before the Commissioner can come to a conclusion whether they are part of one transaction or a series of transactions;

- even though section 52A of the Taxation (Administration) Act creates a presumption in favour of duty being assessed on an aggregate basis when the conditions in section 52A(4) are satisfied this Tribunal should still consider the surrounding circumstances when deciding if that presumption should stand.

47. There is no dispute in the present case that the presumption in section 52A has been activated. Clearly there have been instruments which evidence the purchase of 35 lots of land, in separate contracts between the same vendor and purchaser and within 12 months of each other. It is for the Appellant to rebut that presumption.

48. It is clear from the authorities that it is proper for this Tribunal to consider all of the surrounding circumstances and facts in the present matter when reviewing the Commissioner's decision not to disaggregate the duty payable. To make a decision on whether or not to disaggregate the duty then the Tribunal needs to understand the substance of the dutiable contracts. To understand the substance of the contract this Tribunal is required to consider the negotiations which led to the purchase, the reason for the purchase and other more obvious factors such as the fact that the contracts were all purchased on the same date.

49. In the present case the Appellant agreed with Kinsmen to purchase the whole of a stage of the Mitchell Creek subdivision and by it's own response to the Respondent's request for particulars the Appellant states that while the original agreement was that the Appellant and Kinsmen execute put option deeds in relation to each property the Appellant changed its mind and decided to buy the properties outright. In its submissions the Appellant denies that there is any evidence that the Appellant bought the whole of Stage 3E however that is just not so. There are advertisements which show that the Appellant was claiming to have the exclusive rights to Stage 3E and

the maps shown of the Mitchell Creek subdivision show that the lots purchased by the Appellant comprised of the whole of Stage 3E.

50. Further, the Appellant's reason for deciding to buy the properties instead of leaving them subject to a put option was to ensure that that it had control over the types of houses built in that area, the economics of building houses in a row, the ability to control how that part of the subdivision looked, and the ability to keep sub contractors employed in the competitive skills market all of which translated into better profits for the Appellant. The financing for the purchase was all done by the one institution and even though it was secured by separate mortgages over the separate lots (based on valuations done by the bank) the loan of the funds for the purchases was clearly seen as a single loan by the bank and the Appellant. The letter from NAB shows that the bank even though separate securities were registered over each property saw the lots as security for the whole loan which could be adjusted as the lots were sold. In the penultimate paragraph of that letter reads:

> "Accordingly, each individual allotment is subject to internal valuation to assess the NABS security position and amendments to the finance available as allotments (security)is sold usually as a house and land package."

51. That paragraph can only mean that as lots were sold the finance available could be amended under that same loan depending on what is paid out on settlement and what security is left available to the bank. The bank was allowing for some flexibility within that loan.

52. The Commissioner was also provided with a copy of the "Client Evaluation" completed by the "Business Banker" (document 95) which recommends the approval of finance to the Appellant in the form of a "Bill facility" to assist in the purchase of the 35 lots. It is stated in that evaluation that the intent by the Appellant was to pay off the facility from sales. The actual terms of the bill facility were not provided to the Commissioner. However in this Tribunal's view the evaluation shows that the Banks' intention was to offer

a single loan to the Appellant for the purchase of the lots and at the stage of that evaluation there was no fixed repayment schedule eg an amount to be paid upon the sale of each property.

53. The Appellant also paid one initial fee upon agreeing to place the lots on option and converted that one fee to a single deposit payment to be split between the contracts for sale for the lots when it contacted to buy the properties.

54. Contrary to the Appellant's submission that the contract prices for each lot was separately negotiated in this Tribunal's view that is clearly not true. The Appellant was approached by Kinsmen to discuss pre public release purchase of the subdivision and expressed an interest in purchasing the whole of one section of that subdivision. The expression of interest was followed by Kinsmen advising the price they had put on the subject lots and the Appellant accepted those prices. There is no evidence of any consideration of each lot separately just information on the value placed on the properties by the vendor and the Appellant's acceptance to first have an option on the properties based on those values and then later for the purchase of the properties. It is clear from the correspondence between Kinsmen and the Appellant that it was always Kinsmen's intention to sell properties to the Appellant as a developer and bulk purchaser of properties and always the intention of the Appellant to do so with the advantages as expressed above in mind. There was no negotiation of the prices of individual lots.

55. The coaching by the Appellant's solicitor of Kinsmen's representatives and the NAB representatives to tailor their correspondence to address what they thought would be the deciding factors for the rebuttal of the presumption is also an acknowledgement that the Commissioner at the first instance would categorise these transaction as either one transaction or one of a series of transaction.

56. The Appellant submits that there is no evidence that the contracts are interdependent with one another because there is no evidence to show that if one party were unable to complete one contract then the others would fall over. The Commissioner relied on the presumption that the contracts are part of a single transaction or part of a series of transactions given they fulfilled the criteria within section 52A(4). The Commissioner did not make a finding that the contracts for the purchase of the 35 lots were part of a single transaction or a series of transactions because the Commissioner was not required to do so given the presumption created by the Act. In his letter of the 19th September 2006 the Commissioner indicated to the Appellant that he was of the view that there evidence did not support the presumption being set aside because there was sufficient "oneness" to the transaction nor was he satisfied that it would be unjust or unreasonable to aggregate the duty.

57. The Appellant's submission is that the authorities stand for the proposition that there has to be some interdependence for the contracts to be characterised as one transaction or a part of a series of transactions and that the evidence in the present case is that there was no interdependence in these contracts. In this Tribunal's view interdependence of the contracts can be evidence that support a ruling that contracts are part of a single transaction or part of a series of transactions however it is not a necessary element. It has to be accepted there is no overt interdependence in the subject contracts that is there is no evidence that if one of the contracts did not go ahead the others would fall or that one contract was conditional on the others going ahead however that is not the only test. In this Tribunal's view the test is whether in all the surrounding circumstances there is some unity or "oneness" of the contracts which makes parts of one transaction or one of a series of transactions.

58. The evidence provided to the Commissioner by the Appellant does not in this Tribunal's view rebut the presumption that the contracts were a series of transactions. It was always the intention of the Appellant to have control

over the development of Stage 3E and its resolve to do so is evidenced by the change of mind to move away from the option deed to actual contracts of sale. It was so important to the Appellant to have control that it wasn't willing to allow Kinsmen to have control over whether they were able to sell the properties to purchasers as house and land packages. The actual purchase of the properties gave the Appellant security in its plans for the area and the economics of the development. The Appellant's financing arrangements show that it was always intended by the Appellant to be a bulk purchase of the properties and for its related company PTM Homes to benefit from the properties being offered as a house and land package to the general public.

59. In it's submissions the Appellant argues that the use of individual contracts meant that if any contracts were terminated for any reason (eg title defect) the remainder of the transactions would still have been completed. There is no dispute that this is the situation however that is not inconsistent with the view that whatever contracts out of the 35 were completed they would still be part of a series of transactions put together by Kinsmen and the Appellant for the one purpose of ensuring that the Appellant, and its related building company, had the ability to develop stage 3E of the Mitchell Creek in the fashion which netted those companies the most profit.

60. The Respondent submits that even though both Kinsmen and the Appellant insist that there was no discount on the purchase price there was in fact a discount taking into account the market prices obtained for the properties on sold. The Respondent argues that effectively the Appellant received a discount because it bought the properties earlier in time than Kinsmen would have been able to sell the properties individually to member of the public. This argument cannot be accepted and it was ridiculous for the Respondent to even argue it before this Tribunal. If the Commissioner or this Tribunal is to take into account any discount in deciding the true nature of the transactions then it has to be a "discount" gained at the purchase of the properties not something worked out retrospectively after some of the

properties had been onsold. At the time of the sale of these properties to the Appellant they and Kinsmen could not have known what the future value of these properties would be and therefore unless the asking price had been reduced by an amount on the basis that the Appellant purchase the lots within a certain time or on the basis that the Applicant buy so that number of lots, or some other condition then in my view no discount has been given.

61. Nevertheless, taking into account all of the above this Tribunal's view is that the subject transactions are a series of transactions of the sort that section 52A was intended to capture and therefore there was no error of law by the Respondent to find that the evidence did not support the rebuttal of the presumption.

62. "**Just and reasonable" -** The Appellant further submits that should this Tribunal find that the evidence does not support a rebuttal of the presumption then the Tribunal should overrule the Commissioner's refusal to disaggregate the duty on the grounds that not to do so would be unjust and unreasonable.

63. Section 52A(3) requires aggregation of the ad valorem duty on a series of transaction, "unless the Commissioner is satisfied that it would not be just and reasonable in the circumstances".

64. Section 25(2) of the Duties Act NSW makes the same provision for the exercise of a similar discretion by the Commissioner of revenue. Section 25(2) provides:

> Dutiable transactions would are not to be aggregated under the section if the Chief Commissioner is satisfied that it would be just and reasonable to do so in the circumstances"

65. This section was considered by the Administrative Decisions Tribunal Appeal Panel in Chief Commissioner of State Revenue v Pacific General Securities Ltd and Finmore Holdings Ltd [No2] (RD) [2005] NSWADTAP 54. In this decision the Panel was considering the Tribunal's decision to

uphold the Commissioner's decision not to exercise the discretion in taxpayer's favour. At paragraph 29 of its decision that Panel found that even though the discretion is wide and unfettered it must be exercised in the context of the legislation, "the discretion must be applied in a manner which does not defeat the fundamental legislative objectives of the scheme of regulation within which the dispensing power is located".

66. The Panel referred to the High Court decision in Giris Pty Ltd v Federal Commissioner of Taxation [1968-69] 119 CLR 365. In Giris'case the High Court was considering the constitutional validity of a provision in the Income Tax and Social Services Contribution Assessment Act which gave the Commissioner an unfettered discretion to decide whether it was "unreasonable" to apply at particular section and hence the imposition of a tax. In their discussion their honours were in agreement that even though the discretion was unfettered it had to be applied in the context of the section to which it applied, the Commissioner had the power to look at extraneous matters when considering exercising his discretion and that the discretion granted to the Commissioner was constitutionally sound.

67. The Panel held that the purpose of section 25(2) was to "provide a measure of discretion to deal with unforseen consequences, anomalies or unexpected outcomes." The Panel was also of the opinion that "revenue law should seek to uphold… equitable treatment of taxpayers. It is important that a relief discretion is exercised consistently as between taxpayers in like circumstances." I respectfully agree.

68. The Panel went on to analyse its role when reviewing the decision made by the Tribunal in relation the exercise of the Commissioner's discretion. It is clearly undesirable for the Appeal Panel to be the framer of policy behind the exercise of discretion and therefore desirable to have regard to the policies and guidelines issued by the administrator of a scheme. The Panel

referred to guidelines published by the Chief Commissioner of State Revenue the relevant portion being:

> "As a consequence, the discretion to not aggregate will only be exercised in exceptional circumstances, and would depend on the facts of each case. The mere fact that the use of separate transactions was not for the purpose of avoiding duty is not sufficient reason to exercise the discretion. As a general rule, the situation would have been an unintended consequence of the broad wording of the legislation."

69. Even though the Panel was of the opinion that the guidelines produced by the Commissioner were important because they give the taxpayer some insight into how the discretion might be exercised, the Panel found these guidelines of little use because they do not indicate what may constitute an unintended consequence of the operation of section 25(1). The Panel did agree with the general policy and sentiment contained in that statement.

70. In the present case before this Tribunal was provided with a copy of the Respondent's "Information Circular 1991" issued subsequent upon the insertion of section 52A into the Act which indicated how the Commissioner envisaged that section operating, the relevant paragraphs are reproduced below:

> "In determining whether separate acquisitions of dutiable property are liable under these aggregation provisions, the Commissioner would consider the extent to which there is a degree of "oneness" in the overall transaction. If he is satisfied that one acquisition is conditional on the other and would not proceed if the other fails, the section would be applied. However, if separate sales occur to the same or other purchasers and the acquisition of each property was separately negotiated at individual prices and it was clear that the purchase of one property would proceed regardless of the other, each acquisition would be separately assessed at the rate applicable to the individual price involved.
>
> It is important to note that the aggregation provisions apply to all types of dutiable property. Examples where they may apply are acquisitions of two or more items of real property at different

> locations or acquisition of business goodwill and of the premise upon which the business is conducted.
>
> The Commissioner has the discretion, where it would not be just and reasonable to apply these aggregation provisions, to assess duty upon the basis of separate acquisitions. Application for exercise of this discretion should set out the full circumstances of the transaction and the reasons why it would not be just and reasonable to apply them. An example where the discretion might be exercised could be where the vendor created the "oneness" of the transaction by insisting that a sale would not proceed unless all unrelated purchasers acquiring individually negotiated purchases agreed to proceed to completion. On this basis, it would not be just to aggregate all purchases and make the purchasers pay a higher rate of duty than that payable on each separate acquisition."

71. While this information circular gives some idea of when the discretion would be exercised in the taxpayers favour the example given clearly does not apply in the present instance.

72. In May 2005 the Commissioner also published a booklet titled "Stamp Duty Lodgement Guide" in which he gives some guidance to taxpayers what information the Commissioner considers relevant in the exercise of his discretion. The Guidelines are prefaced by the following words:

> "This guide sets out the standard information required by TRM (Territory Revenue Management) to assist in the prompt and accurate assessment of dutiable instruments, and to enable the payment of ht dure without penalty in the timeframes provided by the legislation…… . Although it will not completely eliminate the need for further requisitions, in most cases assessment should be able to be issued an exemption determined with the need for further information."

73. Section 5 of the Guidelines state that the following information is required for the Commissioner to consider whether it would not be just or reasonable for the duty to be assessed on the aggregated value. The information includes:

- The original contracts

- Full details of how the sale of each property was negotiated, including the names of the person(s) negotiating on behalf of the vendor(s) and the purchaser(s)

- Was a single price negotiated then split between the contracts

- Was any discount negotiated as a result of the multiple purchases? Would the discount etc have been available to any other person if they had acquired the property separately?

- Are the properties adjoining or adjacent to each other?

- What is the present use of the properties and what is the purchaser's intended use

- Are the contracts conditional on the purchase of each other and what would be the consequences if one contract failed to proceed to completion(ie would with either the vendor or the purchaser withdraw from any of the others)

- Were the properties advertised or offered sale as a single parcel of separately? Provide a copy of any newspaper or other publication advertising the properties for sale."

74. In this publication the Commissioner seems to indicate that if he is provided with all the above information then he will be able to assess whether the aggregated duty is unjust and unreasonable. The answers to these questions are clearly aimed at establishing whether the contracts or instruments before the Commissioner for assessment are either part of a single transaction or part of a series of transactions. Some of the questions are also clearly those that the solicitor for the Appellant tried to get the "right" answers for by arranging the responses from Kinsmen and the NAB. The publication creates some expectation that the exercise of the Commissioner's discretion will depend on whether he is of the view that the instruments or contracts he is assessing are part of a single transaction or series of transactions. It is important to note however that the Guideline is just that a guideline and does not bind the Commissioner or this Tribunal in the exercise of the discretion. There is notably an indication that more information may be

needed in the preamble ie “it will not completely eliminate the need for further requisitions..”.

75. If the Commissioner is of the opinion that the discretion should only be used in favour of the taxpayer if he can convince the Commissioner that the instruments are not of a single transaction or series of transactions then it is the view of this Tribunal that has to be a too restrictive view of the exercise of that discretion. In the situation where the presumption has been raised and upheld by the Commissioner or the Commissioner has positively decided on the evidence that the transactions are in fact a single transaction or a series of transactions then it would make no sense for the Commissioner to revisit that issue in considering whether to exercise his discretion.

76. It is clear from the correspondence between the Appellant and the Respondent regarding the aggregate assessment that Commissioner has thoroughly investigated the circumstances surrounding the transactions and the purpose of that investigation (having regard to the information sought and questions asked by the Commissioner) was to establish whether there was sufficient “oneness” to the transactions to determine that the presumption stands.

77. In this Tribunal’s view the process must be a two staged process that is, when the presumption is raised and the Commissioner decides that the evidence of the nature of the transactions does not rebut the presumption then the Commissioner should look to other factors and circumstances to decide whether to exercise his discretion. It would be pointless for the Commissioner to merely revisit the issue of the nature of the transactions after already deciding that the transactions are part of a single transaction or a series of transactions, there would be no point to the discretion. This view is supported by the fact that section 52A has a broader application in relation to transactions to which the presumption in subsection (4) does not apply. In its broader application the Commissioner has to first decide

whether the transactions are part of a single transaction or a series of transactions and then decide whether it is "just and reasonable" to apply the aggregation. It would be senseless for the discretion to exercised differently in instances where the presumption has been raised.

78. I respectfully agree with the Appeal Panel in The Chief Commissioner of Revenue v Pacific General Securities Ltd and Finmore Holdings Pty Ltd (no 2) where the Panel finds that:

> "the discretion must be applied in a manner which does not defeat the fundamental legislative objectives of the scheme of regulation within which the dispensing power is located. It is relief mechanism for hard cases",
>
> "there would have to be some unusual or special considerations which would take the case outside the normal application of duty. To use the discretion to relieve a purchaser from duty would require special justification. A dispensing power should not be lightly applied"

79. There has to be something special about the circumstances for the discretion to be exercised in the favour of the taxpayer.

80. The Panel also stated that:

> "Another important value that revenue law should seek to uphold is that of equitable treatment of taxpayers. It is important that a relief discretion is exercised consistently as between taxpayers in like circumstances"

81. The fundamental purpose section 52A is to ensure the taxpayer who has acquired dutiable property of a certain value pays duty on the whole of that value and cannot avoid paying the higher rate by structuring the documentation accordingly but the operation of that section must be just and reasonable to the particular taxpayer and between all taxpayers. It should be noted however that this Tribunal agrees with the approach taken by the Appeal Panel in Finmore's case [no2] at paragraph 51 where the Panel ruled:

"An intention to evade or avoid tax may count against them when a discretion comes to be exercised. This is acknowledged in the area of application of penalty tax. But an intention not to evade o avoid tax is a neutral factor, we think. It does not count in favour of the taxpayer."

82. In its Notice of Appeal the Appellant submits that the aggregation of the value of the contracts is not just and reasonable on the following grounds:

(a) the appellant will have to pay approximately double the stamp duty on each lot compared with the duty which would apply if the transactions were not aggregated;

(b) anyone purchasing an individual lot in the Mitchell Creek sub- division with the intention of using for the same purpose (to build a house) would have paid about half the stamp duty assessed on the same lot when purchased by the appellant;

(c) The appellant will have to pass on the extra stamp duty to the purchaser of the house and land package for each lot thereby making the price more expensive than if the end purchaser had purchased the lot directly from the developer;

(d) In refusing to exercise his discretion not to aggregate, the respondent did not consider the history of the provision including its operation as an anti-avoidance measure and the circumstances when this discretion would be exercised including how other jurisdictions deal with the issue. In this respect Victorian Revenue Ruling (DA.026) in relation to the equivalent provision in Victoria provides a fair statement of the circumstances in which the Commissioner's discretion not to aggregate will be exercised:

the Commissioner's discretion not to aggregate is likely to be applied to dutiable transactions arising from the purchase of multiple lots of land, or properties, which were genuinely available for separate sale (and the purchase of which was not dependent of the purchase of other properties). This

would by the case whether or not the purchase was made for development or investment purposes."

83. The concern expressed in ground (a) is merely a statement as to the effect of the operation of section 52A, that is the intended effect of the section and if the Respondent was to exercise his discretion in favour of the taxpayer on that basis then the section would have no effect. The argument is nonsensical as is ground (b) for the same reason.

84. The argument contained in ground (c) is in this Tribunal's view going beyond the circumstances which should properly be considered by the Respondent when considering the exercise of his discretion. The equality between taxpayers of like circumstances is of proper concern not whether or not the taxpayer chooses to pass on the cost of the stamp duty to his customers. If the Appellant had argued that there was another developer who had purchased a number of properties in like circumstances and that taxpayer was not required to pay duty on the aggregate values of the properties then that may be a strong argument that to require the Appellant to pay the duty on the aggregated value would not be "just and reasonable".

85. There was a reference by the Respondent and the Appellant to another group of contracts for sale of land (in which the Appellant was the purchaser) over which the Commissioner did not aggregate the value for the purposes of calculating the duty.

86. In their letter to the Commissioner of the 13th June 2006 the Appellant raised the question of a previous purchase made by a related company of 17 lots in another subdivision upon which stamp duty was assessed on each individual contract and not aggregated. The properties were bought for the purpose of resale as house and land packages. In response to that query the Commissioner distinguished that purchase from the one under scrutiny in his stamp duty requisition of the 5th of July 2006 as follows:

> "Aggregation was not carried out in that instance; however there seems to be some distinct differences between those purchases and the present ones. Most notably in the earlier deal the blocks were spread throughout the suburb whereas the current group of transactions relate to the whole of Stage 3 of the development."

87. This Tribunal does not have the whole of the circumstances of the previous dealings before it so it is unable to compare them with the facts of the present matter. What this Tribunal can say is that the fact that the properties subject of the present matter are adjoining and the fact that the Appellant decided to purchase all of them to take advantage of that fact in relation to construction costs and marketability of the properties are factors influential in the decision to characterise the transactions as a series of transactions.

88. If those factors were part of the circumstances in its previous purchase then there may not be parity in the Commissioner deciding to aggregate the duty in this matter and without that parity it may not be "just and reasonable" for the Commissioner to aggregate the duty in relation to the subject transactions. The Commissioner should apply duty in the same manner for taxpayers of like circumstances over transactions of like nature. There must be equitable treatment between taxpayers and the Commissioner's discretion is the tool that he can use to ensure that equity.

89. In relation to section 52A once the presumption in subsection (4) is raised and the duty under section 52A(3) becomes applicable it is then the taxpayer's role to either prove the presumption should not stand or to establish the lack of parity or equity in the operation of the section to convince the Commissioner to exercise his discretion. The Appellant has not provided this Tribunal with the details of the previous dealings to allow the Tribunal to consider and compare the circumstances of those purchases and given that the Appellant was the purchaser in that matter then that should have been relatively easy for them to provide those details. Therefore as the Appellant has not pressed this point not provided the relevant information then this Tribunal cannot make any finding to the contrary in relation to the

parity or otherwise of the Commissioner's decision in relation to the earlier purchases.

90. In ground (d) the Appellant complains that the Respondent did not take into account the history and purpose of section 52A as an anti avoidance provision and suggests that the Respondent should adopt the Victorian Commissioner of Revenue's view as to the operation of the discretion as set out in the Victorian Revenue Ruling (DA.026). While the Victorian Commissioner's view is interesting it is not in anyway binding upon Respondent nor has it been subject to challenge in the Courts and is therefore of little weight. In any event if the application of that ruling was considered desirable it is this Tribunal's view that while on one level the purchase of each of the lots in the present was not dependent on one another on another level, considering all the circumstances, they were related to each other because of the reason why the Appellant purchased them. The reference in the Victorian ruling regarding development could refer to development such as a shopping centre or a block of units, a recreational facility such as a theme park, a cultural and arts precinct or any number of projects, it could also include development as was intended in the present matter however the deciding factor in that ruling is whether, "the purchase of which was not dependent on the purchase of the other properties." If there is a dependency found then it doesn't matter whether or not the purchase was made for development or investment purposes. In the present case it is the unity or oneness of the transactions which is the deciding factor and if the Victorian Ruling had been applied to these facts there would have been no change to the finding.

91. Given all of the above the only conclusion that this tribunal must come to is that the appeal must fail on all grounds.

92. The following orders are made:

92.1 The determination of the Respondent is confirmed.

92.2 Upon the concession of the Respondent each party to bear their own costs of the Appeal.

Dated this 9th day of August 2007.

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Tanya Fong Lim
ACTING MAGISTRATE