

## VENDORS' DIFFICULTIES WITH UNSTAMPED CONTRACTS: PROPOSALS FOR REFORM

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A series of cases decided in the Supreme Court of Western Australia in 1989 highlight the difficulties a vendor of property can face if he wishes to enforce his contract with a purchaser and the contract has not been stamped with duty under the Stamp Act 1921 (WA) ("the Act"). The cases are concerned with contracts for the sale of land, but there is no reason why contracts for the sale of other forms of property should not give rise to the same issues.

The difficulties arise from section 27(1) of the Act which provides, in general terms, that an instrument chargeable with duty may not be pleaded or given in evidence or be admitted to be good, useful, or available in law or equity unless it is duly stamped in accordance with the law in force at the time when it was first executed. A contract for the sale of land in Western Australia is an instrument chargeable with duty.<sup>1</sup> The person liable to pay the duty on such a contract is the purchaser.<sup>2</sup> If the purchaser fails to pay the duty on a contract for the sale of land, the vendor cannot be compelled to pay it in his stead. Almost invariably, such a contract will follow the Act and will contain a term to the effect that the purchaser is to pay the stamp duty on it.

Section 27(1) does not sit easily with section 39(1). The former section operates as an absolute bar to an unstamped contract for the sale of land being pleaded or given in evidence. In other words, it is immaterial whether the person seeking to plead the contract or give it in evidence is the vendor (who was not liable to pay the duty on the contract) or the purchaser (who was liable to pay the duty). The effect of the section is that the contract must be stamped

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1. See s 74(1) and item 4(1) of the 2nd Schedule to the Act.

2. See s 39(1) and item 4(1) of the 2nd Schedule to the Act.

if it is to be pleaded or given in evidence and the Act, in this respect, is not concerned with whether the person who pays the duty could otherwise have been compelled to do so. The section thus operates fairly when it is the purchaser who is seeking to rely on the contract, because the Act imposes the liability to pay the duty on him and the section may be regarded as simply reinforcing that obligation; but it does not operate fairly when it is the vendor who is seeking to rely on the contract and the purchaser, in breach of section 39(1), has failed to pay the duty on it.

What avenues are open to a vendor who wishes to enforce an unstamped contract for the sale of land against a purchaser? One course open to the vendor is to pay the duty on the contract and seek to recover the duty so paid from the purchaser, possibly relying on the decision in *Shenstone v Hewson (No 2)*.<sup>3</sup> Not surprisingly, most vendors are reluctant to adopt this course of action, particularly when the financial soundness of the purchaser is suspect.

A second possibility is for the vendor to lodge an original of the contract with the Commissioner of State Taxation, with a request that he issue the assessment direct to the purchaser, as the person liable to pay the duty on the contract under the Act. Whilst this provides a theoretical answer to the problem caused by the purchaser's failure to stamp the contract, it raises a number of difficulties in practice. In the first place, the vendor may not have an original of the contract in his possession but simply a duplicate or a photocopy of the original. The general rule is that the original of the instrument is charged with ad valorem duty whilst the duplicate is charged with nominal duty. A photocopy of an original is not chargeable with any duty. Accordingly, the Commissioner may well refuse to assess the duplicate or photocopy to duty and may insist on the original being produced. As the purchaser is unlikely to co-operate by producing the original to the Commissioner, the vendor will have to persuade the Commissioner to stamp the duplicate or photocopy under section 28(3) of the Act. That section provides that where an original has not been duly stamped and the Commissioner is satisfied that it is not reasonably practicable to present the original for stamping, he may stamp the duplicate or copy as if it were the original.

The second practical difficulty is the length of time that may elapse between the time of issue of the assessment and the payment of the duty if, indeed, it is paid at all. The effect of section 20(3) of the Act is that the duty must be paid within three months of the date of issue of the assessment. If the duty is not paid within this period, the purchaser is liable to a fine equal to 20

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3. (1928) 29 SR (NSW) 39.

per cent of the duty and, in addition, commits an offence against the Act.<sup>4</sup> The Commissioner may also sue for the unpaid duty.<sup>5</sup> It follows from this that, even if the vendor were to lodge the original of the contract with the Commissioner, the purchaser could delay paying the duty until three months have elapsed from the date of issue of the assessment. Such a delay may be unacceptable to the vendor. If the purchaser is impecunious and is unable to pay the duty, the contract will remain unstamped. In such circumstances, it is unlikely that the Commissioner will sue the purchaser for the unpaid duty. The fact that an assessment has been raised assessing a particular instrument to duty does not mean that the instrument has been “duly stamped”.<sup>6</sup>

If an assessment is issued and the purchaser refuses to pay the duty, can the vendor compel the purchaser to pay the duty? This issue arose in the case of *Re Exbea Pty Ltd; Ex parte M & W Holdings Pty Ltd*.<sup>7</sup> The facts were that M & W Holdings had entered into a contract for the sale of certain land to Exbea as the purchaser. The Commissioner had issued an assessment to Exbea assessing the contract to duty but Exbea had refused to pay. M & W Holdings applied for a writ of mandamus, seeking to compel Exbea to pay the duty. The Supreme Court of Western Australia refused to issue the writ on the basis that M & W Holdings needed to prove the contract in order to establish the statutory duty owed by Exbea to pay the duty. As the contract was unstamped, it could not be proved by virtue of section 27 of the Act.

The same result was reached in *Re Odin Inns Pty Ltd; Ex parte Greenpark Pty Ltd*,<sup>8</sup> in which Greenpark agreed to sell certain land to Odin Inns. The contract was not stamped. Greenpark sought to recover the deposit payable under the contract, but appreciated that it could not rely on the contract in court proceedings unless it was stamped. For its part, Odin Inns refused to submit the contract to the Commissioner for assessment or to pay the duty estimated to be payable on the contract. Eventually Greenpark applied for a writ of mandamus directing Odin Inns to submit the contract to the Commissioner and to pay any duty assessed on the contract.

It was held by Commissioner O'Connor QC that a writ of mandamus was available to enforce the performance of a public duty owed by a public authority, such as the duty of a housing authority to provide houses. The emphasis was on a duty owed *to* the public, as opposed to a duty owed *by* the

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4. See ss 20(3) and 39(1a).

5. See s 39A.

6. See *M & W Holdings Pty Ltd v Exbea Pty Ltd* 89 ATC 4335.

7. (1989) 1 WAR 287.

8. 89 ATC 4931.

public. As the obligation to pay stamp duty was a duty owed by the public rather than to the public, Greenpark's application was refused.

## REFORM

It is apparent from the foregoing that a vendor who wishes to plead an unstamped contract or give it in evidence faces considerable difficulties. In most cases, he will have to pay the duty himself and seek to recover the duty so paid from the purchaser. Having regard to the fact that the clear intention of the Act is to impose the liability for duty on the purchaser, what can be done to alleviate this problem?

The simplest solution would be to incorporate in the Act a provision similar to section 29(4) of the Stamp Duties Act 1920 (NSW). Section 29(1) of the New South Wales Act corresponds to section 27(1) of the Western Australian Act. Section 29(4) provides, in broad terms, that section 29(1) does not apply to an instrument, or a copy of an instrument, tendered as evidence on behalf of a party (not being the person who is liable to duty in respect of the instrument) if the party has informed, or will inform, the Chief Commissioner of Stamp Duties of the name of the person liable to duty in respect of the instrument and will lodge the instrument, or a copy of it, with the Chief Commissioner. The Stamp Duties Act 1931 (Tas) contains a similar provision.<sup>9</sup> A provision in similar terms to section 29(4) of the New South Wales Act would clearly overcome the problems faced by a vendor under an unstamped contract for the sale of land and there is no reason why such a provision should not be incorporated in the Act.

On a more fundamental level, the rationale for the continued retention of section 27(1) must be open to question. At one time, the section represented the only sanction for failing to stamp an instrument liable to duty. Its importance in this regard is now completely overshadowed by the statutory right of the Commissioner to sue for unpaid stamp duty and to prosecute the person liable to pay the unpaid duty for the commission of an offence against the Act. In short, the preferable solution to the problem described in this note may be to repeal section 27(1) in its entirety.

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9. See s 28(2).