

*Tourism Holdings Australia Pty Ltd v Commissioner of Taxes*  
[2007] NTSC 22

PARTIES: TOURISM HOLDINGS AUSTRALIA  
PTY LTD  
(ACN 001 789 957)

v

COMMISSIONER OF TAXES

TITLE OF COURT: SUPREME COURT OF THE  
NORTHERN TERRITORY

JURISDICTION: SUPREME COURT OF THE  
NORTHERN TERRITORY  
EXERCISING TERRITORY  
JURISDICTION

FILE NO: LA 9 of 2003 (20321824)

DELIVERED: 3 April 2007

HEARING DATES: 8, 13 & 14 December 2005

JUDGMENT OF: SOUTHWOOD J

APPEAL FROM: Decision of Commissioner of Taxes

**CATCHWORDS:**

STAMP DUTY – appeal from Commissioner of Taxes – conveyance of  
goodwill – apportionment of goodwill to the Northern Territory – business  
carried on in the Northern Territory and elsewhere

Taxation (Administration) Act 1978, s 9BA

*Briggs v Commissioner of Taxation (WA) (1987) 87 ATC 4,278; Federal  
Commissioner of Taxation v Murry (1998) 193 CLR 605; Geraghty v Minter*

(1979) 142 CLR 177; *Hepples v Federal Commissioner of Taxation* (1992) 173 CLR 492, applied

*Alcan (NT) Alumina Pty Ltd v Commissioner of Taxes* [2007] NTSC 9; *Allstate Life Insurance Co v Australia and New Zealand Banking Group Ltd (No 6)* (1996) 64 FCR 79; *Churton v Douglas* (1859) Johns 174; *Conogra Inc v McCain Foods (Aust) Pty Ltd* (1992) 106 ALR 465; *Haberle Crystal Springs Brewing Co v Clarke, Collector of Internal Revenue* (1929) 30 F 2d (2<sup>nd</sup> Cir) 219; *Inland Revenue Commissioners v Muller & Co's Margarine Ltd* [1901] AC 217; *Maxim's Ltd v Dye* [1977] 1 WLR 1155; *Orkin Exterminating Co Inc v Pestco of Canada Ltd* (1985) 11 DLR (4<sup>th</sup>) 84 (HC Ont); *Orkin Exterminating Co Inc v Pestco of Canada Ltd et al* (1985) 19 DLR (4<sup>th</sup>) 90; *Taco Bell Pty Ltd v Taco Co of Australia Inc* (1981) 40 ALR 153; *Taco Co of Australia Inc and Another v Taco Bell Pty Ltd and Others* (1982) 42 ALR 177; *Tourism Holdings Australia Pty Ltd v Commissioner of Taxes* (2005) 15 NTLR 80; *Pete Waterman Ltd and Others v CBS United Kingdom Ltd* (1990) 20 IPR 185, cited

## **REPRESENTATION:**

### *Counsel:*

Appellant:	D Russell SC and B O'Loughlin
Respondent	J Durack SC and T Anderson

### *Solicitors:*

Appellant:	Ward Keller
Respondent:	Solicitor for the Northern Territory

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IN THE SUPREME COURT  
OF THE NORTHERN TERRITORY  
OF AUSTRALIA  
AT DARWIN

*Tourism Holdings Australia Pty Ltd v Commissioner of Taxes*  
[2007] NTSC 22  
No LA 9 of 2003 (20321824)

BETWEEN:

**TOURISM HOLDINGS AUSTRALIA  
PTY LTD**  
Appellant

AND:

**COMMISSIONER OF TAXES**  
Respondent

CORAM: SOUTHWOOD J

REASONS FOR JUDGMENT

(Delivered 3 April 2007)

**Introduction**

- [1] On 11 May 2000, under the Taxation (Administration) Act 1978 (NT) (the Act), the respondent assessed the amount of stamp duty payable in the Northern Territory (the Territory) on a written asset sale agreement dated 31 August 1999 (the asset sale agreement) as \$775,417.60. By letter dated 17 January 2002 the appellant lodged an objection against the assessment of stamp duty made by the respondent. On 19 September 2003 the respondent allowed the appellant's objection in part. He reduced his assessment of the stamp duty payable on the asset sale agreement from \$775,417.60 to \$773,375.50 (the taxation decision).

- [2] The appellant appeals against the taxation decision made by the respondent. The appellant claims that the assessment of stamp duty was excessive. The appeal is brought under s 101 of the old objection and appeal provisions of the Act. The old objection and appeal provisions apply because the taxation decision was made before the commencement of the new Part V of the Act. The old objection and appeal provisions are preserved by s 131 of the Act which states as follows:

(1) Except as provided by this Part, new Part V does not apply in relation to a taxation decision made before the commencement day.

(2) Despite their repeal, the old objection and appeal provisions continue to apply in relation to a taxation decision to which new Part V does not apply.

- [3] The appeal is a hearing de novo. The court is exercising its original jurisdiction: *Tourism Holdings Australia Pty Ltd v Commissioner of Taxes* (2005) 15 NTLR 80; *Alcan (NT) Alumina Pty Ltd v Commissioner of Taxes* [2007] NTSC 9. The burden of proving that the assessment of stamp duty was excessive falls upon the appellant.
- [4] The asset sale agreement relates to the sale of the Britz International motor vehicle rental business (which was owned and operated by a number of companies) to Tourism Holdings Limited and the appellant. Both Australian assets and overseas assets were sold under the asset sale agreement. The vendors of the Australian assets under the asset sale agreement were Britz Australia Rentals Pty Ltd, Britmore Pty Ltd and Koala Campervans Pty Ltd.

The purchaser of the Australian assets was the appellant. The appellant acquired the Australian motor vehicle rental business which was conducted in the Territory and elsewhere by the Australian vendors. The “Australian Business” is defined in the asset sale agreement as the vehicle rental business “conducted by the Australian Vendors in Australia using the Australian Assets”. The motor vehicles that were rented by the Australian vendors were camping vehicles, campervans and mobile homes. The Australian business relied on and was oriented towards the overseas tourist market.

- [5] The Australian assets are defined in the asset sale agreement to mean the Australian Owned Fleet of motor vehicles, Australian Hire Purchase Fleet of motor vehicles, the benefit of the Australian Fleet Lease Agreements, Australian Owned Plant and Equipment, Australian Hire Purchase Plant and Equipment, the benefit of the Australian Plant and Equipment Leases, Australian Intellectual Property, Australian Consumables, the benefit of the Australian Business Contracts, Australian Book Debts, the benefit of the Australian Property Leases and Australian goodwill. The Australian goodwill was defined in the asset sale agreement as “the goodwill of the Australian business” and includes “the exclusive right to carry on the Australian Business in Australia”.
- [6] The total value of the consideration paid for the Australian Assets was \$102,973,606. The asset sale agreement valued the Australian goodwill to

be the equivalent of \$46,469,744 in Australian currency. That value was accepted by the respondent and is not in issue in the appeal.

- [7] The respondent decided that the dutiable property assessable under the Act in the Territory amounted in value to \$14,321,679 and included a proportion of the Australian goodwill valued at \$14,033,862 that related to that part of the Australian business undertaking carried on in the Territory. The appellant claims that the value of the goodwill taken into account and the stamp duty assessed by the respondent are excessive and resulted in an overpayment of stamp duty by the appellant. Stamp duty should have been assessed at \$160,920 or thereabouts. There is no dispute about the balance of the respondent's assessment of stamp duty which relates to the intellectual property and chattels transferred under the asset sale agreement.

### **The grounds of appeal**

- [8] The grounds of appeal pleaded in the amended notice of appeal filed on 3 February 2004 are as follows:

1. By Agreement dated 31 August 1999, the appellant acquired certain business assets therein described as the Britz international rental business ("the business assets").
2. The business assets included assets within the Northern Territory ("the Territory").
3. In assessing the stamp duty payable on the said agreement, the respondent assessed duty in purported compliance with s 4 of the Stamp Duty Act 1978 and s 9BA of the Taxation (Administration) Act 1978 ("the Act") on the basis that the proportion of the dutiable property situated in the Territory or related to the business undertaking carried on in the Territory

within the meaning of those terms as contained in the Act amounted in value to \$14,359,585 including intellectual property rights of \$242,240 and goodwill of \$14,071,038.

4. In determining the objection against the assessment of stamp duty payable on the said agreement, the respondent assessed duty in purported compliance with s 9BA of the Act on the basis that the proportion of dutiable property situated in the Territory or related to the business undertaking carried on in the Territory within the meaning of those terms as contained in the Act amounted in value to \$14,321,769 including intellectual property rights of \$241,600 and goodwill of \$14,033,862.
5. At the material time the proportion of dutiable property situated in the Territory or related to the business undertaking carried on in the Territory within the meaning of those terms contained in the Act amounted in value to \$3,079,945 including intellectual property rights of \$51,361 and goodwill of \$2,982,277 or alternatively to some other sum less in amount than \$14,321,769.
6. The respondent in determining the objection was required by law to proceed on the basis of the values set out in the preceding paragraph.
7. The respondent wrongly based his assessment of the value of dutiable property situated in the Territory or related to the business undertaking carried on in the Territory within the meaning of those terms contained in the Act upon an apportionment of the total value of intellectual property rights and goodwill by applying to the total values of those assets the proportion of the Territory revenues of the business to the total Australian revenues. Such an apportionment did not accurately identify the value of the dutiable property for the purposes of the Act or the Stamp Duty Act 1978.
8. In the premises the decision of the respondent was contrary to law and the assessment was excessive.

[9] The appellant submits that the respondent wrongly based his assessment of the value of dutiable property upon an apportionment of the total value of the Australian goodwill that was determined by applying to the total value

of the Australian goodwill the proportion of Territory revenues of the motor vehicle rental business to the total Australian revenues of the business. It is claimed that such an apportionment does not correctly identify the value of the proportion of goodwill that is dutiable under the provisions of the Act and the Stamp Duty Act because a large part of the Australian goodwill was situated overseas and in particular in Germany.

### **The issue for determination in the appeal**

- [10] The principal issue for determination by the court is what is the correct value of the portion of Australian goodwill that is dutiable under the Act? In my opinion the respondent correctly determined the portion of Australian goodwill that related to the business undertaking carried on in the Territory and thereby correctly determined the value of Australian goodwill that was dutiable under the Act. The stamp duty assessed by the respondent on the assets sale agreement was not excessive and the appeal should be dismissed.

### **The statutory framework**

- [11] Under s 4(1) of the Stamp Duty Act (NT) stamp duty is imposed on conveyances of dutiable property. Ad valorem duty at the rates specified in item 5 of schedule 1 of the Stamp Duty Act is payable on the amount of the consideration for or the unencumbered value of the property the subject of the conveyance or transfer, whichever is higher. On dutiable amounts over \$500,000 the rate of duty is 5.4 per cent. The Act deals with the assessment of dutiable property and the collection of stamp duty.

[12] At the time that the asset sale agreement was subject to stamp duty in the Territory “dutiable property” was defined by s 4 of the Act as follows:

#### **4. Interpretation**

“dutiable property” means –

- (a) land;
- (b) *the goodwill of a business undertaking carried on or to be carried on in the Territory, or in the Territory and elsewhere, including any restraint of trade arrangement which, in the opinion of the Commissioner, enhances or is likely to enhance the value of the business* [emphasis added];
- (c) a right to use in the Territory a business name, trading name or trade mark that is used in connection with such a business undertaking;
- (d) a right to use in the Territory a thing, system or process that is used in connection with such a business undertaking and is the subject of a patent, a registered design or copyright, or a right to use an adaption or modification of such a thing, system or process;
- (e) a right to use in the Territory information or technical knowledge connected with such a business undertaking;
- (f) a patent, a registered design or a copyright;
- (g) a statutory licence or permission given, granted or issued under a law of the Commonwealth and used in connection with such a business undertaking, including a licence or permission for which an application for renewal is not made and the licence or permission, or a similar licence or permission, is given, granted or issued to another person where, in the opinion of the Commissioner, the giving, grant or issue amounts to or has the same effect as a transfer of the licence or permission;
- (ga) a statutory licence or permission given, granted or issued under a law of the Territory and used in connection with a business undertaking wherever the undertaking is carried on or to be carried on, including a licence or permission for which an application for renewal is not made and the licence or permission, or a similar

licence or permission, is given, granted or issued to another person where, in the opinion of the Commissioner, the giving, grant or issue amounts to or has the same effect as a transfer of the licence or permission;

- (h) an option to purchase dutiable property or an interest in dutiable property; and
- (j) chattels, if part of a transaction in which other dutiable property is conveyed, acquired or created or the beneficial ownership is changed, other than –
  - (i) goods, wares or merchandise that are stock-in-trade;
  - (ii) materials held for use in manufacture;
  - (iii) goods under manufacture;
  - (iv) livestock;
  - (v) any motor vehicle in respect of which a motor vehicle certificate of registration is or will, in the opinion of the Commissioner, be issued;
  - (vi) cash or money in an account at call; or
  - (vii) negotiable instruments, and money on deposit with any person, and includes an estate or interest (which may be a partnership interest) in dutiable property.

[13] In certain circumstances dutiable property is to be apportioned before stamp duty is assessed. At the relevant time s 9BA of the Act provided as follows:

#### 9BA Apportionment

Where in the opinion of the Commissioner, dutiable property is wholly or partly situated in the Territory or is wholly or partly related to a business undertaking carried on in the Territory, stamp duty shall be assessed in respect of that portion of the dutiable property situated in the Territory or related to the business undertaking carried on in the Territory.

[14] The relevant dutiable property for the purposes of this appeal is the Australian goodwill of the Australian business, which is a business undertaking that is carried on in the Territory and elsewhere. Therefore stamp duty is to be assessed by apportioning the Australian goodwill in accordance with the provisions of s 9BA of the Act. Stamp duty is not to be assessed on any portion of the dutiable property that is situated outside the Territory and is unrelated to a business undertaking carried on in the Territory.

## **Goodwill**

[15] The law about the nature of goodwill is complex. In *Federal Commissioner of Taxation v Murry* (1998) 193 CLR 605 at 611 Gaudron, McHugh, Gummow and Hayne JJ made the following statements about the nature of goodwill:

[A]s Dawson J pointed out in this Court in *Hepples v Federal Commissioner of Taxation*, " [g]oodwill' is notoriously difficult to define". One reason for this difficulty is that goodwill is really a quality or attribute derived from other assets of the business. Its existence depends upon proof that the business generates and is likely to continue to generate earnings from the use of the identifiable assets, locations, people, efficiencies, systems, processes and techniques of the business. As Dixon CJ, Williams, Fullagar and Kitto JJ pointed out in *Box v Federal Commissioner of Taxation*, "[g]oodwill includes whatever adds value to a business, and different businesses derive their value from different considerations". Another reason is that courts have been called on to define and identify goodwill in greatly differing contexts. In some cases, the nature of goodwill as property may be the focus of the legal inquiry. In other cases, the value of the goodwill of a business may be the focus of the inquiry. And in still other cases, identifying the sources or elements of goodwill may be the focus of the inquiry. It is unsurprising that in these varied situations courts have defined goodwill in ways that,

although appropriate enough in one situation, are inadequate in other situations.

[16] As to goodwill as property, Gaudron, McHugh, Gummow and Hayne JJ

stated in the same case that:

The definitions of Lord Lindley, Lord Macnaghten and Judge Swan bring out the point that goodwill has three different aspects -- property, sources and value which combine to give definition to the legal concept of goodwill. What unites these aspects is the conduct of a business. As Barwick CJ pointed out in *Geraghty v Minter*, "goodwill is not something which can be conveyed or held in gross: it is something which attaches to a business. It cannot be dealt with separately from the business with which it is associated." (par 22)

From the viewpoint of the proprietors of a business and subsequent purchasers, goodwill is an asset of the business because it is the valuable right or privilege to use the other assets of the business as a business to produce income. It is the right or privilege to make use of all that constitutes "the attractive force which brings in custom". Goodwill is correctly identified as property, therefore, because it is the legal right or privilege to conduct a business in substantially the same manner and by substantially the same means that have attracted custom to it. It is a right or privilege that is inseparable from the conduct of the business. (par 23)

...

Goodwill, as property, is "inherently inseverable from the business to which it relates". (par 30)

...

[T]he two fundamental premises of the law of good will [are] that goodwill has no existence independently of the conduct of the business and that goodwill cannot be separated from the business which created it. (par 36)

...

Once goodwill as property is recognised as the legal right or privilege to conduct a business in substantially the same manner and

by substantially the same means which in the past have attracted custom to the business, it follows that a person acquires goodwill when he or she acquires that right or privilege. The sources of the goodwill of a business may change and the part that various sources play in maintaining the goodwill may vary during the life of the business. But, as long as the business remains the "same business", the goodwill acquired or created by a taxpayer is the same asset as that which is disposed of when the goodwill of the business is sold or otherwise or transferred. (par 45)

...

[G]oodwill for legal purposes includes everything that adds value to the business -- "every positive advantage" as Wood V-C pointed out in *Churton v Douglas*. (par 50)

- [17] In *Inland Revenue Commissioners v Muller & Co's Margarine Ltd* [1901] AC 217 at 235 Lord Lindley said:

"Goodwill regarded as property has no meaning except in connection with some trade, business, or calling. In that connection I understand the word to include whatever adds value to a business by reason of situation, name and reputation, connection, introduction to old customers, and agreed absence from competition, or any of these things, and there may be others which do not occur to me. In this wide sense, goodwill is inseparable from the business to which it adds value, and, in my opinion, exists where the business is carried on. Such business may be carried on in one place or country or in several, and if in several there may be several businesses, each having a goodwill of its own."

- [18] Lord Macnaghten gave the following, much cited, definition of goodwill in the same case:

"What is goodwill? It is a thing very easy to describe, very difficult to define. It is the benefit and advantage of the good name, reputation, and connection of a business. It is the attractive force which brings in custom. It is the one thing which distinguishes an old-established business from a new business at its first start. The goodwill of a business must emanate from a particular centre or source. However widely extended or diffused its influence may be,

goodwill is worth nothing unless it has power of attraction sufficient to bring customers home to the source from which it emanates. Goodwill is composed of a variety of elements. It differs in its composition in different trades and in different businesses in the same trade."(p 223 to 224)

- [19] In *Haberle Crystal Springs Brewing Co v Clarke, Collector of Internal Revenue* (1929) 30 F 2d (2<sup>nd</sup> Cir) 219 at 221 to 223 Judge Swan pointed out that:

"A going business has a value over and above the aggregate value of the tangible property employed in it. Such excess of value is nothing more than the recognition that used in an established business that has won the favour of its customers, the tangibles may be expected to earn in the future as they have in the past. The owner's privilege of so using them and his privilege of continuing to deal with customers attracted by the established business are property of value. This latter privilege is known as good will."

- [20] Various cases have also considered the location of goodwill or where goodwill is situated. While there is broad acceptance of the notion that goodwill is situated where the business undertaking is carried on, there are authorities which have held that goodwill may be situated in places other than where a business is carried on.

- [21] *Maxim's Ltd v Dye* [1977] 1 WLR 1155 was a case about the world famous Paris restaurant, "Maxim's", that was owned by a company, Maxim's Ltd, which was registered in England in 1907. The facts of the case were as follows. The Paris restaurant was well known in England and the restaurant had customers who lived in England. Maxim's Ltd did not carry on business in England. In June 1970 another company opened a restaurant named

“Maxim’s” in Norwich. In an action by Maxim’s Ltd against that company the latter undertook not to operate any restaurant under that name and to obliterate permanently the name “Maxim’s” on their premises. In December 1975 the defendant in the case opened a restaurant at the same address under the same name. The plaintiff issued a writ seeking an injunction to restrain the defendant from operating a restaurant under any name or style consisting of or including the word “Maxim’s” and in any other manner passing off or attempting to pass off the defendant’s restaurant business as and for the plaintiff’s business or a business connected therewith. The court decided that the plaintiff’s existing goodwill in England which derived from and was based on a foreign business might be regarded as prospective, in the sense of enabling the plaintiff to start trading in England when the plaintiff decided to do so in the future, but nonetheless was real in relation to such future business and the plaintiff was entitled to protection by the court. In the case Graham J stated that:

[T]hough, of course, goodwill cannot exist in vacuo without an associated business, nevertheless its extent in any given case must be a question of fact.

*La Société Anonyme des Anciens Establissemens Panhard et Levassor v Panhard-Levassor Motor Co Ltd* (1901) 18 RPC 405, *Sheraton Corporation of America v Sheraton Motels Ltd* [1964] RPC 202 and *Globe-elegance B V v Sarkissian* [1974] RPC 603 were also cited to me, the first being I think important as establishing that a foreign company with no place of business in England may, nevertheless, as a matter of fact, have such a reputation in its name in England as to justify the grant of relief for passing off against a defendant setting up in this country under a similar name.

...

If it is in law correct to say that a plaintiff cannot establish that he has goodwill in England which will be protected by our courts without actually showing that he has a business in England, then of course, that is the end of the matter and the plaintiff cannot recover here, but in my judgment that is not the law. The true position is, I think as I stated in the Baskin-Robbins case [1976] 2 FSR 545 and I would like to quote my conclusion in that case on the point, at p 548:

“Some businesses are, however, to a greater or lesser extent truly international in character and the reputation and goodwill attaching to them cannot in fact help being international also. Some national boundaries such as, for example, those between members of the EEC are in this respect becoming ill-defined and uncertain as modern travel, and Community rules make the world grow smaller. Whilst therefore not wishing to quarrel with the decisions in question, if they are read as I have suggested, I believe myself that the true legal position is best expressed by the general proposition, which seems to me to be derived from the general line of past authority, that that existence and extent of the plaintiffs’ reputation and goodwill in every case is one of fact however it may be proved and whatever it is based on.”

If writing the passage again I would, for purposes of clarity, add the words “in his business” after the words “reputation and goodwill” towards the end of the quotation. In circumstances such as the present it also seems to me that a plaintiff’s existing goodwill in this country, which derives from and is based on a foreign business, such as one in Paris or elsewhere in the common market, may be regarded as prospective but none the less in relation to any future business which may later be set up by the plaintiff in this country.

[22] *Maxim's Ltd v Dye* (supra) was applied in *Pete Waterman Ltd and Others v CBS United Kingdom Ltd* (1990) 20 IPR 185 and *Orkin Exterminating Co Inc v Pestco of Canada Ltd* (1985) 11 DLR (4<sup>th</sup>) 84 (HC Ont) and cited in *Conogra Inc v McCain Foods (Aust) Pty Ltd* (1992) 106 ALR 465 and *Taco Co of Australia Inc and Another v Taco Bell Pty Ltd and Others* (1982) 42 ALR 177. The appellant relies on what Ellicott J said at first instance in

*Taco Bell Pty Ltd v Taco Co of Australia Inc* (1981) 40 ALR 153. His Honour stated:

“Goodwill” has been said to be the benefit and advantage of the good name, reputation and connection of a business. It is the attractive force which brings in custom: *Inland Revenue Commissioners v Muller & Co's Margarine Ltd* [1901] AC 217 per Lord Macnaghten at 223 – 4.

A business has goodwill attached to it in a particular place if there is an attraction among people there to do business with it. Even if it has no place of business there people residing there may, nevertheless, be attracted to do business with it. For example, by buying goods which it produces and are sold there by importers, or by ordering goods from it by mail or by travelling from their residence to its place of business in an adjoining country. This “attractive force” is usually created because there has been some business activity in that place on the part of the owner of the business or those dependent on it, intended to so attract people. One cannot, in logic, exclude the possibility that it could exist because people who live there are prompted to seek out the business by a knowledge gained by them whilst travelling or living in another country where the place of business exists (eg a Hong Kong tailor). However, one thing, in my opinion, is clear, namely, knowledge by people in Sydney that a successful business is being conducted in the United States under a distinctive name does not give that business a reputation or goodwill here unless people in Sydney are attracted to do business with it despite the distance separating them. Only then could it be said that there existed in Sydney “the attractive force which brings in custom”. In many cases distance or the nature of the business will make it highly improbable that anybody could be so attracted. (at 169)

[23] In *Orkin Exterminating Co Inc v Pestco of Canada Ltd* (supra) the High Court of Justice of Ontario granted an injunction restraining the defendant from passing itself off as the plaintiff by using the plaintiff’s name and trade mark. There were customers in Canada that used the services of the plaintiff for their residences in the United States of America. Fitzpatrick J held that it was not necessary for a company to be carrying on business in Canada in

order to have goodwill which a Canadian court will protect in a passing-off action. Goodwill may be based on a company's reputation among Canadian customers for services performed for them in the United States. A company's good reputation in an area where it does not carry on business is like a capital asset which has yet to be put to work. The decision of the High Court was upheld by the Ontario Court of Appeal in *Orkin Exterminating Co Inc v Pestco Co of Canada Ltd et al* (1985) 19 DLR (4<sup>th</sup>) 90.

- [24] For the reasons which appear below the principles applied in the passing-off cases are not determinative of this case.

### **The accounting notion of goodwill**

- [25] The accounting notion of goodwill differs from legal notions of goodwill. In *Federal Commissioner of Taxation v Murry* (supra) Gaudron, McHugh, Gummow and Hayne JJ said:

Goodwill is also an accounting and business term as well as a legal term. The understanding of accountants and business persons as to the meaning of the term differs from that of lawyers. That has added to the difficulty of achieving a uniform legal definition of the term, particularly since accounting and business notions of goodwill have proved influential in the valuation of goodwill for legal purposes.  
(par 13)

Australian accounting standards describe goodwill as comprising "the future benefits from unidentifiable assets which, because of their nature, are not normally individually brought to account." Some accounting theorists see goodwill as representing the difference between the present value of the future earnings of the business and the normal return on its identifiable assets. Business people see goodwill as concerned with the notion of excess value, a notion colourfully expressed in the statement of an American funds manager that "[i]f you pay \$450 million for a TV station worth \$2.5 million on

the books, the accounts call the extra \$447.5 million 'goodwill'." Accountants adopt a similar approach in the case of purchased goodwill. Approved Accounting Standard ASRB 1013 states that:

"Goodwill which is purchased by the company shall be measured as the excess of the cost of acquisition incurred by the company over the fair value of the identifiable net assets acquired."

- [26] Their Honours went on to say when discussing the value of goodwill that:

Goodwill has value because it can be bought and sold as part of a business and its loss or impairment can be compensated for by an action for damages. An existing business is the sine qua non of goodwill which cannot exist independently of the business which created and maintains it. The value of the goodwill of a business is therefore tied to the fortunes of the business. It varies with the earning capacity of the business and the value of the other identifiable assets and liabilities. It is seldom constant for other than short periods. (par 48)

When a business is profitable and expected to continue to be profitable, its value may be measured by adopting the conventional accounting approach of finding the difference between the present value of the predicted earnings of the business and the fair value of its identifiable net assets. Admittedly this approach can cause problems in valuing goodwill for legal purposes because the identifiable assets need to be valued with precision. Particular assets, as shown in the books of the business, may be under or over valued and may require valuations of a number of assets and liabilities which may be difficult to value. However in a profitable business, the value of goodwill for legal and accounting purposes will often, perhaps usually, be identical. (par 49)

## **The evidence**

- [27] Only the appellant called evidence about the primary facts. During the course of the hearing the appellant read the affidavits of Mr Kevin John Murray, Mr Steven Dusho Kropf and Mr Ian Edwin Lewington; and, tendered the respondent's index of records, a letter dated 21 May 2004 from

Mr Steven Stevens of Freehills to Mr Carter, various profit and loss statements of the appellant and a brochure published by the Australian Vendors entitled “Britz Campervan Rentals and Tours Australia 1999/2000”.

- [28] The appellant did not call either of the two sales managers, who were retained by Britz International in Germany, to give evidence about the nature and scope of any marketing activities they undertook in Germany nor did they call evidence from any of the employees of the German wholesalers to give evidence about how they introduced German customers to the Australian business.
- [29] Other than what amounted to some forceful criticism by Senior Counsel for the respondent that the evidence about the primary facts was vague, lacking in detail and incomplete and therefore should be carefully scrutinised, there was little conflict about the primary facts. The major evidentiary contest was about the expert opinion evidence sought to be relied on by the parties.
- [30] The appellant sought to tender a report and supplementary report of Mr Carter who is an accountant. The respondent objected to the reports of Mr Carter going into evidence and the reports were received by the court subject to the objections of the respondent. Some short oral evidence was also led from Mr Carter and he was cross examined. Mr Carter was asked to provide his opinion about the proportion of goodwill that should be attributed to the Northern Territory. In order to do so he was asked to assume the correctness of what Ellicott J said in *Taco Bell Pty Ltd v Taco*

*Co of Australia Inc* at 169 (see par 22 above). In Mr Carter's opinion the goodwill of a business is located at the place where customers are attracted to the business or caused to transact business and the appropriate methodology for geographical allocation of goodwill is by reference to the location of the customers who choose to use the services of the Australian business and by reference to the relative levels of revenue generated by the customers at each location. Implicit in Mr Carter's opinions is the premise that s 9BA of the Act requires goodwill to be apportioned on a geographical basis according to where the goodwill is situated. For the reasons given later in this judgment this premise is incorrect.

- [31] The respondent objected to the report and supplementary report of Mr Carter on the following grounds. Mr Carter was not qualified to give the opinions contained in the reports that were sort to be tendered in evidence by the appellant. There is no reliable body of knowledge identified as the basis of Mr Carter's opinion. Mr Carter's opinions are the result of his application of what he was told were the relevant legal principles to assumed facts and "to admit such evidence would be to permit abdication of the judicial duty and usurpation of the judicial function; such evidence cannot be allowed to be probative or to rise higher than a submission; such evidence is necessarily irrelevant": *Allstate Life Insurance Co v Australia and New Zealand Banking Group Ltd (No 6)* (1996) 64 FCR 79 per Lindgren J at 83.

- [32] I accept the submissions of the respondent about the admissibility of the reports of Mr Carter and I reject the tender of the two reports of Mr Carter.

However, consistent with what I told Senior Counsel for both parties I have taken the two reports into account as part of the appellant's submissions.

[33] Even as a submission I have not given Mr Carter's reports a lot of weight.

In order to identify where the goodwill of the Australian business was located Mr Carter said that it is necessary to identify the sources of the goodwill; and to determine where the customers are attracted and where the business is generated. He stated:

As set out in Section III I have assumed that goodwill arises from and is therefore embodied within sources. In addition, the location of goodwill is not directly dependent on the sources themselves, but is dependent on the location of the customers who generate income, ie where the sources of goodwill generate the attractive force to bring in customers.

Therefore, in order to identify the location of goodwill of Britz, it is necessary in my opinion to identify the sources of the goodwill, and to determine where the customers are attracted and where the business is generated.

As a first step in this process it is clearly necessary to identify the sources of goodwill for the Britz business. Bearing in mind that ultimately goodwill is defined as the "attractive force which brings in custom", in my opinion customers are likely to patronise Britz as a result of the following factors:

- (a) customers who have previously utilised the services offered by the Britz business may provide repeat business or make referrals to potential customers. In my opinion, it is reasonable to assume these customers are primarily located overseas, but are also located throughout Australia, in the proportions referred to in paragraph 25 above
- (b) Britz provides attractive services (ie goes to the desired locations) at prices acceptable in the marketplace. Clearly the provision of the desired product is a key factor for a customer

- (c) the existence of a network of wholesalers and agents who promote the Britz business to potential customers. These are primarily located overseas but are also located within Australia
- (d) the ‘Britz’, ‘Koala’ and ‘Backpacker’ trading names, which are used by the Britz business and which are supported by marketing carried out throughout Australia and overseas.

In my opinion (b) above is likely to be more a function of geography, rather than Britz. If there are a number of competitors each providing the same service as Britz, and in similar locations, then the attractive force to Britz is more likely a function of other factors, such as (a), (c) and (d).

Essentially therefore, in my opinion, the reasons why a customer goes to Britz to hire a campervan may be because:

- (a) they have previously done so, and were satisfied with the service, and are providing repeat business
- (b) they are recommended or directed to Britz by a previous customer
- (c) they are recommended or directed to Britz by a wholesaler or an agent, or
- (d) they become aware of Britz through marketing or advertising activities, including the use of the trade names.

It can be seen from the above that the goodwill arises in Britz due to customers making a positive decision to purchase a Britz service as opposed to a competing product. This can be contrasted with the situation of, for example, a petrol station where the main reason a customer stops at a particular petrol station is due to its location or price, and is not primarily dependent on the quality or brand of the product (that, is most customers will not differentiate between Caltex or BP or Mobil petrol). The source of goodwill for Britz is therefore a combination of the provision of appropriate services at acceptable prices, the reputation of Britz, and the marketing and promotion in the locations where potential customers live (and where those customers make their bookings).

In order to allocate the goodwill to the relevant locations it is necessary to identify a financial parameter that can be used in order to make such an allocation.

In my opinion, in this case it is appropriate to allocate goodwill to locations by reference to the revenues generated at each location.

The value of goodwill in the Britz business as a whole is directly and immediately dependent on the level of revenue that is generated. The greater the revenue, the greater is the level of goodwill. Further, the level of revenue that is generated at a location is the direct result of the attractive force that brings customers to Britz, and therefore can be regarded as a measure of the level of goodwill that exists in each location.

- [34] There are a number of problems with the above reasoning of Mr Carter.

There is no basis for Mr Carter's opinion that, "(b) above is likely to be more a function of geography, rather than Britz. If there are a number of competitors each providing the same service as Britz, and in similar locations, then the attractive force to Britz is more likely a function of other factors, such as (a), (c) and (d)." It is common sense that price, quality and reliability of service are likely to be factors that attract customers regardless of where the customers are located and regardless of whether the customers are individual tourists or wholesalers. The pamphlet that was published by the Australian vendors and distributed in Europe contains photographs and details of the type and range of motor vehicles that may be hired including the contents of the campervans and motor homes, describes the scenery that may be experienced in Australia giving particular emphasis to the Territory, contains details of all add-ons such as insurance and the rental rates for each motor vehicle. It was not proven that the arrangements that the Australian vendors had with the German wholesalers were exclusive.

[35] It is also common sense that the business carried on by the Australian business was generated in part by the fact that it offered tourists a reliable service of a particular quality and price at a desired tourist destination, the Territory. It is a reasonable inference that if the business was not carried on in the Territory or rental prices were too high or the rental motor vehicles were unreliable that the total revenue and value of goodwill of the Australian business would be reduced.

[36] Mr Carter conceded in cross examination that the “out” revenue received in the Territory is some indication of the portion of goodwill, wherever it is situated, which relates to the business undertaking carried on in the Territory. “Out” revenue allocates the rental revenue for each vehicle according to the branch from which the hired vehicle is first collected by a customer and is accounted for on a cash basis. His evidence was as follows:

Q: So that if you hadn’t done that, the goodwill acknowledged as located in the Territory would have been, I suggest, minuscule?

A: No. Sorry, if I hadn’t used the walk up basis I would have had to have determined another basis. That is the walk up basis that I have assumed relies on an assumption that all of the business that came to the Northern Territory via the walk up category was actually attracted in the Northern Territory according to my approach to goodwill. It’s likely to overstate the goodwill the way that I have done it.

Q: Yes. So the goodwill is likely to have been even less than you have suggested in the approach you take?

A: Yes, but I’m reacting to the point that it would have been minuscule, that is, the answer would be it is likely to have been less than the 1.7 million I have allocated.

Q: All right, now and still in relation to out revenue, you say in paragraph 104 that out revenue is a relevant statistic primarily for determining the proportionate value of turnover that is conducted through the Britz Northern Territory operations. I merely suggest to you that on that basis it provides some indication, doesn't it, even in your view of the level of business activity in the Northern Territory in terms of rental contracts concluded there?

A: I think that's fair if I make an assumption that's where the rental contracts are concluded.

Q: And just going back to that letter of instructions, P6, that letter asks you might recall on the fourth and fifth lines on page 2, it asks for your opinion on the proportion of the goodwill sold by the agreement which is situated or is wholly or partly related to a business undertaking carried on in the Territory. Now you didn't in fact give your opinion on the proportion of goodwill wholly or partly related to the business undertaking in the Territory, did you?

A: I do not believe I have explicitly answered those words, the question.

Q: Is that just an oversight?

A: I understood what I had written, according to my instructions, to be the proper answer to the question. Certainly the instructing solicitors did not suggest there was any oversight on my part.

Q: But accepting that you are correct as to the goodwill being located elsewhere you would agree, wouldn't you, that the proportion of out revenue received in the Northern Territory is some indication of the proportion of the goodwill wherever it is situated which relates to the business carried on in the Territory?

A: I'm unsure as to the significance of the word, 'relates' in a general sense. If someone put to me the proposition that there are vans in the Northern Territory and there is goodwill in Germany and the goodwill relates to customers coming to the Northern Territory, I would say it related.

Q: I am merely – I asked you a question before about whether you thought the out revenue provides some indication of the level of business activity in the Northern Territory and you suggested it did?

A: Yes.

Q: I'm merely suggesting to you that on that basis, it provides some indication of the proportion of goodwill which might relate to the business in the Territory?

A: Yes, and I'd – sorry, I thought I was answering that point. I'm merely making sure that I don't misunderstand your use of the word, 'relate'.

Q: So that in your view, the answer is yes?

A: In the way that I've previously answered that question.

[37] The respondent tendered, subject to the appellant's objections, an expert statement of Mr Wayne Lonergan. I accept Mr Lonergan's opinion that while it would be preferable to allocate goodwill based on the profits generated at each location rather than "out" revenue (due to the fact that the value of goodwill is largely dependent on the profitability of the underlying business), in this instance, because the profitability of the Australian business by branch location was not provided, "out" revenue statistics are likely to be the best estimate of the value of goodwill that is attributable to the Territory. His opinion is consistent with *Hepples v Federal Commissioner of Taxation* (1992) 173 CLR 492 per McHugh J at 542 – 543 and with *Federal Commissioner of Taxation v Murry* (supra) at par [45] and par [49]. In the absence of all of the information which is peculiarly within the possession of the appellant, the respondent is entitled to make an assessment of the stamp duty payable by the appellant which remains *prima facie* right until the appellant shows that it is wrong: *Briggs v Commissioner of Taxation* (WA) (1987) 87 ATC 4,278 at 4,292 – 4,294. The appellant has

not in the alternative sought to argue that the taxation decision of the respondent is wrong because the profitability of the Australian business by branch location would have led to a lesser assessment of stamp duty.

### **The facts**

- [38] Having considered all of the evidence I make the following findings of fact in addition to the facts referred to in pars 1 to 7 above.
- [39] For some years before 31 August 1999 Britz Australia Rentals Pty Ltd, Britmore Pty Ltd and Koala Campervans Pty Ltd conducted a motor vehicle rental business in Australia (the Australian business) specialising in camping vehicles or recreational vehicles. The Australian business was established by Gunther Gschwenter and Christine Gschwenter in 1982. The Australian business was carried on in each State of Australia and in the Territory with branches or agencies in Darwin, Alice Springs, Cairns, Brisbane, Sydney, Hobart, Adelaide, Perth and Broome. The head office of the Australian business was in Melbourne. The Australian business was oriented towards the overseas tourist market.
- [40] Eight to ten people were employed in the head office in Melbourne. The head office housed the Australian business's world wide reservation centre. The employees at head office dealt with reservations and bookings, information technology, administration, management, operations, marketing, finance and communications.

[41] Customers of the Australian motor vehicle rental business were able to hire a range of mobile camping vehicles including two person campers, four wheel drive vehicles and self-contained six berth motor homes. Customers could collect the motor vehicles that they hired from any of the branches located at Darwin, Alice Springs, Cairns, Brisbane, Sydney, Melbourne, Hobart, Adelaide, Perth or Broome. The majority of customers collected the motor vehicle that they hired from either the Darwin or Alice Springs branch. Customers could either return the motor vehicle which they hired to the branch from which they hired the motor vehicle or they could pay an additional one way fee and return the motor vehicle which they hired to a different branch at the end of their journey. Approximately 50 per cent of motor vehicle rentals in Australia were one way hires and the majority of motor vehicles that were hired for one way journeys would be returned by the customer to a branch in a different State or Territory from the branch where the motor vehicle was collected by the customer.

[42] The Australian business was part of the Britz International motor vehicle rental business which also carried on business in New Zealand and southern Africa. The owners and operators of the Britz International rental businesses that were carried on in New Zealand and southern Africa were the various companies that are listed as vendors in the asset sale agreement, other than those companies who are referred to as the Australian vendors.

[43] The majority of the Australian business's customers come from overseas.

The following table lists the percentage of total bookings by customers from the major countries for the three years ended 30 June 1996, 1997 and 1998:

	1998 %	1997 %	1996 %
Germany	44.5	45.4	51.1
Australia	18.9	15.1	12.6
Switzerland	10.3	11.5	10.9
United Kingdom	5.4	5.2	4.7
Austria	4.0	4.2	4.3
Total	81.1	84.9	87.4

[44] 90 per cent of the revenue of the Australia business is derived from overseas customers.

[45] Customers may be categorised as pre-book customers or walk-up customers.

Both overseas and local customers are included in each of these two categories of customer. Pre-book customers consist of those customers who have pre-booked their travel either through a wholesaler or agent or by contacting the reservation centre in Melbourne prior to collecting a rented motor vehicle. Walk-up customers consist of those customers who negotiate the hire of a motor vehicle by simply walking into a branch of the Australian business in Australia and asking to hire a motor vehicle. Walk-up customers provide about 10 per cent of the revenue of the Australian business with the remaining 90 per cent or thereabouts of the revenue being provided by pre-

book customers. Over the period from 1 July 1996 to 31 March 1999 approximately 88.4 per cent of the revenue of the Australian motor vehicle rental business was derived from pre-booked customers. 77 per cent of customers of the Australian business were pre-book customers from overseas.

- [46] The following table shows the revenue of the business undertaking allocated according to whether the customers are pre-book or walk-up customers:

<b>Booking Type</b>	<b>Booking Location</b>	<b>9 Months to 31 March 1997 \$'000</b>	<b>12 months to 31 March 1998 \$'000</b>	<b>12 months to 31 March 1999 \$'000</b>	<b>3 Period Total \$'000</b>	<b>%</b>
<b>Walk-Up's</b>	Adelaide	266	168	216	650	1.17
	Alice Springs	176	205	246	627	1.12
	Broome	25	26	84	135	0.24
	Brisbane	105	178	208	491	0.88
	Cairns	424	346	373	1,143	2.05
	Darwin	448	401	420	1,269	2.28
	Perth	310	323	343	976	1.75
	Sydney	368	256	420	1,044	1.87
	Melbourne	35	31	49	115	0.21
	<b>Total Walk Up's</b>	<b>2,157</b>	<b>1,934</b>	<b>2,359</b>	<b>6,450</b>	<b>11.57</b>
<b>Pre-Books</b>	Direct					
		Melbourne	1,728	2,080	3,300	7,108
			14,770	11,535	15,903	42,208
	<b>Total Pre-Books</b>		<b>16,498</b>	<b>13,615</b>	<b>19,203</b>	<b>49,316</b>
<b>Grand Total</b>		<b>18,655</b>	<b>15,549</b>	<b>21,562</b>	<b>55,766</b>	<b>100.00</b>

- [47] Approximately 30 to 40 per cent of the pre-bookings of rental motor vehicles were made by three wholesalers in Germany namely, Cafern, DER

and Meiers. The last two companies have since merged. The wholesalers in Germany had a direct real time link with the Australian business's computerised reservation system. The wholesalers were permitted to sell "the products" of the Australian business to their customers at a price of their own choosing, thus determining their own margin. The wholesalers engaged in significant advertising and promotion of their own business and Britz International relied on them to direct their customers to the Australian business and the other businesses in New Zealand and southern Africa.

- [48] The Australian business established successful business relationships with the German wholesalers. There was a Britz Sales Manager or consultant based in Munich and another in Stuttgart. The two sales managers were totally committed to marketing Britz International products which were located in Australia, New Zealand and southern Africa. Not all of their time was spent conducting marketing activities on behalf of the Australian business. Both consultants had the job of promoting the Britz International business in Germany. They liaised with the wholesalers and attended various events that promoted tourism in Australia, New Zealand and southern Africa. They were subject to the directions of head office in Melbourne. In return for their work they were paid a monthly retainer. Both the consultants and the Managing Director of the Britz International business had a close personal relationship with the senior executives of the three German wholesalers. However, it was not proven that the relationships with the German wholesalers were exclusive relationships that

precluded the wholesalers from referring customers to other motor vehicle rental companies. Nor was it established that the reason the German customers went to the wholesalers was because the wholesalers could introduce them to the Australian business.

- [49] Employees of the Australian business travelled to Germany to install appropriate links in the German wholesalers' computers and to train their staff so that the German wholesalers could use the FBS computer and reservation system that had been developed by Britz International. The computerised reservation system allowed a large number of travel agencies in Germany to perform real time enquiries about the availability and price of rental motor vehicles. Communication lags were largely eliminated by the computerised system. Smaller wholesalers and direct customers could use the computer reservation system by accessing the internet.
- [50] The Australian business maintained no branches outside Australia at which any dealings with individual rental customers took place. The Australian business published a brochure that was available overseas. The brochure was entitled, "Britz Campervan Rentals and Tours Australia 1999/2000". The brochure showed the various features and functions of the motor vehicles that were available for rent, the locations where the vehicles were available in Australia, prices and insurance details. It contained a booking form with the international fax number of the head office in Melbourne.

- [51] The terms of the pre-booking arrangement were as follows. The customer was required to pay a deposit of \$200 at the time of the booking in order to confirm the reservation. If a booking of a rental motor vehicle was cancelled by the customer within 24 to seven days of the motor vehicle collection date, the customer was required to pay a cancellation fee of 15 per cent of the total price of the hire of the motor vehicle. If the booking of the rental motor vehicle was cancelled by the customer within six days of the motor vehicle collection date, the customer was required to pay a cancellation fee of 40 per cent of the total price of the hire of the motor vehicle.
- [52] It is also possible to allocate the revenue of the Australian business according to the branch where the hired motor vehicle is collected by the customer. Of the total revenue of the Australian business, 30.2 per cent of revenue averaged over the three years prior to the execution of the asset sale agreement was generated by vehicle hire contracts signed by customers of the Australian business in the Darwin and Alice Springs branches. Branch revenues provide a good indication of the place where the business undertaking is carried on.

- [53] The following table shows the distribution of revenue according to the branch where the hired vehicle is collected by the customer:

	<b>1997</b> \$'000	<b>%</b>	<b>1998</b> \$'000	<b>%</b>	<b>1999</b> \$'000	<b>%</b>	<b>3 Year Total</b> \$'000	<b>%</b>
NT	6,609	32.01	4,902	30.81	6,358	28.12	17,869	30.20
SA	1,220	5.91	935	5.87	1,412	6.24	3,567	6.03
WA	3,056	14.80	2,514	15.80	3,594	15.89	9,164	15.49
QLD	4,313	20.89	3,382	21.26	4,647	20.55	12,342	20.86
NSW	1,658	8.03	1,152	7.24	1,897	8.39	4,707	7.95
VIC	<u>3,789</u>	<u>18.36</u>	<u>3,026</u>	<u>19.02</u>	<u>4,705</u>	<u>20.81</u>	<u>11,520</u>	<u>19.47</u>
<b>TOTAL</b>	<b><u>20,645</u></b>	<b><u>100.00</u></b>	<b><u>15,911</u></b>	<b><u>100.00</u></b>	<b><u>22,613</u></b>	<b><u>100.00</u></b>	<b><u>59,169</u></b>	<b><u>100.00</u></b>

[54] There are two branches of the Australian business in the Territory, one in Darwin and the other in Alice Springs. The Darwin branch included a vehicle holding yard that could hold up to 200 motor vehicles. There was a mechanical work shop for minor repairs and detailing motor vehicles. At the peak period of the tourist season a dozen detailers were employed at the Darwin depot. Subcontractors were retained to do oil and grease changes, tyre changes and repairs. The vehicles were fitted out with appropriate living kits which included linen, towels and cooking utensils. There was a waiting room for customers with tea and coffee making facilities. There were storage facilities for customers' luggage. A vehicle security deposit was paid by customers and there were staff available to provide the hire contract for the motor vehicle to customers and to advise customers about and sell insurance and other add-ons including motor cycles, fridges, baby

seats, booster seats and satellite safety beacons. The customer vehicle rental agreement was executed by customers at the branch at which they collected the rented motor vehicle. Customers were also supplied with maps and other tourist information and a Super Savers card or an Australian card which enabled customers to get a discount at various tourist facilities in the top end of the Territory. Customers were given directions to Ban Ban Springs Station which was only open to customers of the Australian business. The features and functionality of the rental vehicles were shown to the customers. Every effort was made to ensure that customers were happy with the camping vehicle that they hired. The quality of customer service was very important to the overall success of the Australian business. Although less than 10 per cent of total revenue, repeat business generated an annual revenue of slightly in excess of \$1 million.

- [55] The facilities of the branch in Alice Springs are not as extensive as the branch in Darwin. Six motor vehicle detailers were employed at the height of the tourist season. Customers were provided with a toilet and a shower, a lounge area to wait in and tourist information. Customers were also provided with the hire contract and insurance and other add-ons if requested. The branches were largely a mirror of each other. A high quality service was provided both in Darwin and Alice Springs.

- [56] In total 30 people, who were employed by the Australian vendors, worked in the Darwin and Alice Springs branches of the Australian business. This

figure represents approximately 34 per cent of the 88 employees who work in the Australian business.

- [57] Approximately two-thirds of purchases of “add ons” including insurance packages were purchased at the Australian branches of the business. Most customers of the Australian business purchased insurance at the Australian branch at which they collected the rented motor vehicle. The motor vehicles available for hire were insured. However, the customer was responsible for the payment of any excess. There was a strong incentive for customers to take out additional insurance. If they did not do so, they were required to leave a security deposit of up to \$5000 in cash, travellers’ cheques or by their credit card. The purchase of insurance packages accounted for approximately 20 per cent of the total revenue of the Australian business.
- [58] Senior counsel for the respondent accepted that a small part of the operations of the Australian business were carried on in Germany and that a small portion of the goodwill of the Australian business would be locally situated in Germany. He said that it would be possible to maintain a passing off action in Germany. However, he submitted that the goodwill in Germany was related to the business undertaking that was carried on in the Northern Territory.
- [59] I find that the Australian vendors did carry on business in Europe and in particular in Germany and that the Australian business did have goodwill in Europe and in particular in Germany. The sources of the Australian

goodwill included the Australian business's connections with German wholesalers and the provision of services at acceptable prices in the Territory. Part of the attractive force of the Australian business was the provision of services in the Territory. The Australian business would be less attractive to overseas customers if it did not provide a reliable and suitably priced service in the Territory.

### **The reasons for the taxation decision of the respondent**

- [60] On 19 September 2003 the respondent wrote to the solicitors for the appellant stating that:

I refer to your objection letter of 17 January 2002, your letter of 2 February 2001 requesting an amended assessment and my letter of 11 November 2002. I apologise for the delay in responding.

I have carefully considered the objection lodged by you on behalf of Tourism Holdings Australia Pty Ltd (ACN 001 789 957) ("THA") pursuant to section 100 of the Taxation (Administration) Act (NT) ("the Act"), in respect of the assessment of stamp duty issued on 11 May 2000 in the amount of \$775,417.60 ("the Assessment").

Based on all the information placed before me, including the submissions in support of the grounds of objection, I have allowed the objection in part for the following reasons.

The business undertaking that is the subject of the Assessment consists of the motor vehicle rental business identified in your objection as the "Australian Britz rental business ("Britz business undertaking"). In acquiring the Britz business undertaking, THA has obtained the right or privilege to conduct that business in substantially the same manner and by substantially the same means that in the past have attracted custom to the business. That is, in acquiring the Britz business undertaking in the Territory, THA has obtained all of the goodwill related to that undertaking.

I note that paragraph (b) of the definition of “dutiable property” in section 4(1) of the Act includes “the goodwill of a business undertaking carried on or to be carried on in the Territory, or in the Territory and elsewhere”. Accordingly for the purposes of this definition all of the goodwill relating to the Britz business undertaking carried on in the Territory is dutiable property for the purposes of the Assessment.

At the relevant time, section 9BA of the Act provided that: “Where, in the opinion of the Commissioner, dutiable property is wholly or partly situated in the Territory or is wholly or partly related to a business undertaking carried on in the Territory, stamp duty shall be assessed in respect of that proportion of the dutiable property situated in the Territory or related to the business undertaking carried on in the Territory”.

The phrase “related to” in section 9BA of the Act is of wide import and should not, in the absence of compelling reasons to the contrary, be read down (see, for example, *Fountain v Alexander* (1982) 150 CLR 615 at 629). Similarly, the words “in respect of” in section 9BA of the Act connotes some connection or relation between the business undertaking carried on in the Territory and the dutiable property (see, for example, *McDowell v Baker* (1979) 144 CLR 413 at 419).

For the purposes of section 9BA of the Act, the Commissioner is of the opinion that the goodwill acquired by THA is partly related to a business undertaking in the Territory, and has assessed stamp duty in respect of the portion that is related to the THA business undertaking in the Territory.

In *Hepples v Federal Commissioner of Taxation* (1992) 173 CLR 492 at 542 - 543, McHugh J held that the value of goodwill may be calculated by capitalising the expected future net profits or by estimating the worth of purchasing several years of the past profits of a business. This principle was also acknowledged in *Commissioner of Taxation v Murry* (1998) 193 CLR 605 at 624.

Following this principle, in this case, the proportion of goodwill to the business undertaking carried on in the Territory can be determined by estimating the worth of purchasing several years of the past profits earned by the Britz business undertaking in the Territory. However, THA and PricewaterhouseCoopers (“PwC”) were unable to provide details on the profits contributed by the Britz business undertaking in the Territory for a relevant period.

In the absence of this information, the apportionment was based on the “geographical allocation of historical ‘out’ revenues” because of the correlation between earnings potential (and hence goodwill) and the amount of sales related to the Britz business undertaking carried on in the Territory. This approach is supported by *Briggs v Commissioner of Taxation* (WA) 87 ATC 4,278 at 4,292 – 4,294.

As such, the method adopted in the Assessment for assessing the proportion of goodwill that relates to the Britz business undertaking in the Territory is not erroneous.

I note that the analysis of the ‘nature of goodwill’ provided at pages 18 - 23 of the PwC report on the Geographic Allocation of the Goodwill of the Australian Britz Business (“the PwC Report”) does not take into account the operation of paragraph (b) of the definition of “dutiable property” in section 4(1) of the Act and section 9BA of the Act.

For instance, goodwill created by the international promotion of the services of a business undertaking carried on in the Territory falls into paragraph (b) of the definition of “dutiable property” in section 4(1) of the Act. Similarly, while superior management practices and an efficient reservation centre may be sources of goodwill, which may originate in the Victorian headquarters, section 9BA of the Act operates to cause the goodwill from these sources to be assessable to the extent that it is related to the business undertaking in the Territory.

Consequently, I am of the opinion that the location of the sources of the goodwill does not fetter the operation of paragraph (b) of the definition of “dutiable property” in section 4(1) and section 9BA of the Act.

I have also obtained through the Western Australian Taxation (Reciprocal Powers) Act 1989, a copy of the Tourism Holdings Australia Pty Ltd – Britz Forensic Accounting Report prepared by McKessar Tielemann Chartered Accountants (“the McKessar Tielemann Report”) from the Western Australian Commissioner of State Revenue. The report provides an opinion on the appropriate methodology for apportioning goodwill between States and considers whether the methodology used in the PwC Report is appropriate.

The McKessar Tielemann Report considers the PwC report to be incorrect in its basis of apportionment of goodwill. It also supports the use of “out of revenue” as a basis of apportionment. While the

findings of this report are compelling, I note that it did not consider the implications of section 9BA of the Act, as the Western Australian stamp duty legislation does not have a similar provision.

Notwithstanding the above, a review of the Assessment has revealed that duty has been assessed on the basis that Northern Territory “out revenue” comprised 30.28% of the total Australian “out revenue” whereas the PwC report quotes a proportion of 30.20%. I note the difference arises from the method used in averaging prior year “out revenues”. For the purposes of consistency, the PwC report figure has been adopted for the Assessment and as a consequence, pursuant to section 97(2) of the Act, an amended assessment decreasing the duty payable from \$775 417.60 to \$773 375.50 is enclosed. The following details the composition of this adjustment.

	Assessment	Amended Assessment
Goodwill	\$14 071 038	\$14 033 862
Intellectual Property	\$242 240	\$241 600
Dutiable Chattels	\$46 307	\$46 307
Total	\$14 359 585	\$14 321 769

Consequently, the amount of duty overpaid in respect of the asset sale agreement along with interest will be refunded to THA in the near future. As a result of this error, the Agreement will need to be re-lodged with this Office for amended stamping.

If THA is dissatisfied by this decision, an appeal to the Supreme Court of the Northern Territory may be lodged under section 101 of the Act. An appeal must be commenced within 30 days after services of notice of this decision.

#### Amended assessment

Your letter of 2 February 2001 requested an amended assessment based on the grounds that the goodwill was incorrectly allocated to the Territory and as a result of part of the purchase price being repaid to THA.

The first ground has been addressed as part of the objection. With regard to the second ground, reading the Act and the Stamp Duty Act

(“the SDA”) as a whole, the term “consideration” in item 5(1) of Schedule 1 to the SDA connotes consideration paid or payable, including consideration that is payable contingently or conditionally.

Where stamp duty is payable on an instrument by reference to a sum payable, duty is charged not only by reference to any sum which is unconditionally payable but also by reference to a sum specified in the instrument, which is payable contingently or conditionally (see *Coventry City Council v Inland Revenue Commissioners* [1978] 1 All ER 1,107 at 1,112 and 1,117). Stamp duty has been assessed on a fixed conditional amount, notwithstanding that it may not have been actually paid (see *Pacific Fair Shopping Centres Pty Ltd v Commissioner of Stamp Duties* [1979] Qd R 410 at 414 and 416). Accordingly, I decline to exercise my discretion under section 97 of the Act in the circumstances outlined in your 2 February 2001 letter.

### **The arguments of the appellant**

- [61] The appellant contends that the correct method of apportioning goodwill to the Territory under s 9BA of the Act is to exclude the revenue of the Australian business that is derived both from customers who made pre-bookings elsewhere and from customers who walked up to hire motor vehicles at branches elsewhere than in the Territory. The apportionment of goodwill to the Territory must be based on an estimate of the amount of pre-booking revenue emanating from customers in the Territory together with the proportion of walk up revenue that is generated by customers of the Australian business in the Territory.
- [62] In support of the appellant’s contention Senior Counsel for the appellant argued as follows. Section 9BA of the Act provides for the apportionment of two kinds of dutiable property. First, dutiable property which is wholly or partly situated in the Territory. Secondly, dutiable property which is wholly or partly related to a business undertaking carried on in the

Territory. It is the intention of the legislature to exempt from stamp duty all dutiable property that is situated outside the Territory. Section 9BA of the Act provides that stamp duty is only to be assessed on the portion of dutiable property situated in the Territory.

- [63] Section 9BA of the Act does not create two alternative methods of assessment of stamp duty. It was not the intention of the legislature to create a tax that was purely dependent upon the discretion of the respondent. The normal principle is that taxes are fixed and certain. They are not imposed by discretion. In the application of s 9BA of the Act there is no scope for the application of the principle that where an instrument is subject to more than one head of charge under the Stamp Duty Act then the respondent has the right to select the charge that exacts the highest level of duty. The intention of the legislature is that there is only one relevant portion of goodwill that is subject to stamp duty. The provisions of s 9BA are not cumulative.

- [64] The meaning to be given to the words ‘related to’ in s 9BA of the Act must be determined by the context in which they appear. If property has a local situation then its situation is what must be taken into account for the purposes of determining the proportion of the dutiable property under the Act. The correct construction to be given to s 9BA of the Act is that the legislature accepts that property which is outside the Northern Territory should not be subject to a Territory tax. This recognises that such property may be taxed elsewhere. There is no provision in the legislation for credit

where property is amenable to being taxed elsewhere. The type of relationship that is being considered when the term ‘related to’ is used in s 9BA of the Act is not a relationship that extends to property locally situated outside the Territory. There is a specific provision in the Act dealing with dutiable property situated outside of the Northern Territory which is applicable to the apportionment of dutiable property that has a local situation. The words ‘related to’ might comprehend property that has no local situation, for example, copyright, but they do not extend to property which has a local situation outside of the Territory.

- [65] Goodwill is dutiable property which has a local situation. Goodwill is the attractive force that brings in customers: *The Commissioner of Inland Revenue v Muller & Co.’s Margarine Ltd* (supra) at 223 to 224. It exists where the attractive force operates and where the customer is brought into the business: *Taco Bell Pty Ltd v Taco Co of Australia Inc* (supra) at 169. Because goodwill is dutiable property that is locally situated, goodwill outside the Territory is not amenable to stamp duty: s 9BA of the Act. The apportionment provided for by s 9BA of the Act is to be determined by that proportion of the goodwill which is actually situated in the Northern Territory.

- [66] The goodwill that was transferred by the asset sale agreement was the goodwill of the Australian business. The asset sale agreement does not refer to goodwill which is only located or situated in Australia. It is necessary to identify first the Australian business and secondly the goodwill of the

Australian business. When this is done it becomes apparent that the goodwill of the Australian business is largely situated overseas at the location where the customer makes a booking of a rental motor vehicle. Customers are almost solely attracted to the Australian business by the marketing arrangements which have been established in Europe including the Australian Business's relationship or connections with the German travel wholesalers. The attractive force that brings in customers is not the delivery of the Australian business's services of a particular quality and price in a desired location. The campervans themselves are fungible. They can be got from almost anyone. What adds value to the Australian business is that the customers of the business have chosen to use the services provided by the business. They have done so because of the marketing arrangements that have been made in Europe. The contract for the hire of a rental motor vehicle is made overseas. A European customer who enters into a pre-book arrangement is required to make a deposit of \$200 at the time that the booking is made. A confirmation of the booking including a statement of the outstanding balance is then faxed to the customer within 24 hours. At the time that the deposit is paid the European customer becomes bound by the rental conditions. He or she does so because after the \$200 is paid and the booking is confirmed cancellation fees apply. If a booking is cancelled 24 to 7 days prior to collection of the motor vehicle the customer is required to pay 15% of the gross rental fee. If the booking is cancelled 6 days or less prior to the collection date of the motor vehicle or if there is a no show the

customer becomes liable to pay 40% of the gross rental fee of the booked hiring of the rental vehicle. If the motor vehicle is returned early there is no refund of the balance of the price of hiring the rental motor vehicle.

- [67] The connection that the Australian business had with Europe and in particular the wholesalers in Germany was an extraordinarily valuable connection. By far the biggest proportion of customers of the Australian business came from overseas. The Australian business's connection with the wholesale agents in Germany and Europe supplied most of the customers of the business. The relationship with the wholesalers in Europe is a significant source of the goodwill of the Australian business. The relationship should be valued where the attractive force operates which is in Europe. Neither the source of the attractive force nor its operation is locally situated in the Territory.
- [68] Alternatively, the majority of goodwill of the Australian business is located in Victoria because the vast majority of bookings for rental motor vehicles are made through the head office in Melbourne. Goodwill was generated by the information technology and operating systems that are located in Melbourne. The ability of wholesalers and overseas customers to be connected with the head office of the Australian business and to be able to obtain real time information and make direct bookings was a source of goodwill. The Australian business would not survive without the head office in Melbourne.

## **Conclusion**

- [69] In my opinion the contention of the appellant cannot be sustained and should be rejected. The instrument that was subject to stamp duty was a conveyance of dutiable property. The dutiable property included goodwill. Under s 4(1) of the Act goodwill includes the goodwill of a business undertaking that is carried on in the Territory and elsewhere. It is the whole of the goodwill of a business that is carried on in the Territory and elsewhere that constitutes the dutiable property. The relevant connection with the Territory for the purposes of the Act is that the business is partly carried on in the Territory.
- [70] The goodwill acquired by the Appellant was the whole of the Australian goodwill of the Australian business which was defined in the asset sale agreement to mean "the goodwill of the Australian Business including, but not limited to: Australian Records; and the exclusive right to carry on the Australian Business in Australia in succession to the Australian Vendors under the Australian Business Names". The appellant acquired the valuable right or privilege to use the other assets of the Australian business as a business to produce income. It acquired the right or privilege to make use of all that constitutes "the attractive force which brings in custom". The dutiable property that was transferred by the asset sale agreement was the legal right or privilege to conduct the Australian business in substantially the same manner and by substantially the same means that have attracted custom to the Australian business in the past including the right to make use

of the established connections with the German wholesalers and other travel agents in Europe. Goodwill for legal purposes includes everything that adds value to the business – every positive advantage *Churton v Douglas* (1859) Johns 174 at 188 [70 ER 385 at 391].

- [71] Goodwill by definition is something that is related to a business undertaking. “[It] is not something that can be conveyed or held in gross: it is something which attaches to a business. It is a right or privilege that is inseparable from the conduct of the business”: *Geraghty v Minter* (1979) 142 CLR 177 per Barwick CJ at 181, quoted with approval in *Federal Commissioner of Taxation v Murry* (supra) at par 22. Goodwill, as property, is “inherently inseverable from the property to which it relates”: *Geraghty v Minter* (supra) at 191, quoted with approval in *Federal Commissioner of Taxation v Murry* (supra) at par 30. An existing business is the sine qua non of goodwill which cannot exist independently of the business which created and maintains it: *Federal Commissioner of Taxation v Murry* (supra) at par 48. The two fundamental premises of the law of goodwill are that goodwill has no existence independently of the conduct of the business and that goodwill cannot be separated from the business that created it: *Federal Commissioner of Taxation v Murry* (supra) at par 36.

- [72] The manner in which the apportionment required by s 9BA of the Act is to operate is dependent upon the nature of the dutiable property which is subject to apportionment. Where the dutiable property is property which is inherently related to a business undertaking duty is to be imposed on that

portion of the dutiable property that is related to the business undertaking that is carried on in the Territory. What must be assessed is the value of the legal right or privilege to carry on a portion of the Australian business in the Territory in substantially the same manner and by substantially the same means that have attracted custom to the business that is carried on in the Territory in the past including the right to make use of the established connections with the German wholesalers and other travel agents in Europe or any other attractive force of the business. Simply because the Australian business has goodwill that is situated in Europe and in particular in Germany it does not follow that it is not related to the business that is carried on in the Territory. On the appellant's own argument the relationship that the Australian business had with the German wholesalers was a valuable relationship of the Australian business.

- [73] As the value of the goodwill of a business is tied to the fortunes of a business: *Federal Commissioner of Taxation v Murry* (supra) at par 48, and as the value of the goodwill of a business may be measured by adopting the conventional accounting approach: *Federal Commissioner of Taxation v Murry* (supra) at par 49, it was appropriate to assess the value of dutiable property upon an apportionment of the total value of the Australian goodwill that was determined by applying to the total value of the Australian goodwill the proportion of Territory revenues of the motor vehicle rental business to the total Australian revenues of the business for the three financial years immediately preceding 31 August 1999 because the relevant

profit figures were not provided by the appellant: *Briggs v Commissioner of Taxation* (WA) (supra) at 4,292 – 4,294. Based on this method of apportionment the proportion of goodwill related to the business carried on in the Territory was 30.2 per cent of \$46,469,744 being \$14,033,862.

## **Orders**

[74] I make the following orders:

1. The appeal is dismissed.
2. The respondent's assessment of stamp duty on the asset sale agreement in the sum of \$773,375.50 is confirmed.

[75] I will hear the parties further as to the costs of the appeal.

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