

UNIVERSITY OF LONDON
INSTITUTE OF ADVANCED
LEGAL STUDIES
1 0 MAY 1973
25 RUSSELL SQUARE
LONDON W.C.1

No. 20 of 1971

IN THE PRIVY COUNCIL

ON APPEAL
FROM THE FULL COURT OF HONG KONG

BETWEEN:

THE CROSS-HARBOUR TUNNEL
COMPANY LIMITED

Appellants

AND

THE COLLECTOR OF STAMP REVENUE

Respondent

10

CASE FOR THE APPELLANTS

RECORD

1. This Appeal is brought by leave of the Full Court of the Supreme Court of Hong Kong Appellate Division from an Order dated the 27th day of November 1970 of the said Full Court affirming the decision of the Respondent The Collector of Stamp Revenue (hereinafter called "the Collector") that a Debenture (hereinafter called "the Debenture") executed on the 11th day of August 1969 by the Appellants was chargeable with stamp duty of HK\$429,225 as being the principal security for sums not exceeding £14,750,000 under head 37 (1) in the Schedule to the Hong Kong Stamp Ordinance (Chapter 117) (hereinafter called "the Ordinance").

p.24

p.24

20

2. On the day of the execution of the Debenture the Appellants presented it to the Collector under the provisions of section 17 of the Ordinance for the opinion of the Collector as to the amount of duty with which it was chargeable.

30

3. On the 13th August 1969 the Collector assessed the duty with which the Debenture is chargeable as follows :-

1.

RECORD

Under Head 37 (1) in the Schedule to the Stamp Ordinance, Cap.117 £14,750,000 at \$14.55 per £ = HK\$214,612,500 @ 20c. per \$100 or part thereof HK\$429,225.

and on the same day the Appellants paid to the Collector the sum of \$429,225 in satisfaction of the duty as aforesaid.

4. On the 2nd September 1969 being dissatisfied with the assessment the Appellants appealed against the assessment in accordance with section 18 of the Ordinance and on the 6th December 1969 Messrs. Johnson, Stokes and Master as Solicitors for the Appellants formally required the Collector to state and sign a case. 10

pp.5-8

5. In due course the Collector stated a case for the Opinion of the Supreme Court of Hong Kong which came on for hearing before the Full Court in the Appellate Division (Blair-Kerr Briggs and McMullin JJ.) on the 22nd October 1970. At the hearing the said stated case was by leave amended and the print of the Stated Case in the Record of these proceedings is the print of the Stated Case as so amended. 20

pp. 5-8

6. The circumstances in which the Debenture came to be executed are set out in the following paragraphs.

7. The Appellants had entered into a contract (hereinafter called "the Construction Contract") with three construction companies for the construction of a tunnel between Hong Kong Island and Kowloon and in connection therewith entered into a contract (hereinafter called "the engineers contract") with consulting engineers for which purpose they required to raise finance. They arranged for finance from Lloyds Bank Limited (hereinafter called "Lloyds") upon the terms of an Agreement dated the 17th day of July 1969 (hereinafter sometimes called "the financial agreement"). 30

pp.27-101

8. This financial agreement contained inter alia provisions as follows :- 40

(a) Clause 1 contained several definitions including the following :-

RECORD.

"Debenture" means the charge to be executed by the Tunnel Company in favour of Lloyds in the form set out in Appendix H [to the Agreement]

p.31

"Several Guarantees" means the guarantees of payment to be given by the Subscribers in favour of Lloyds in the form set out in Appendix G [to the Agreement]

p.32

"Subscribers" means:

- 10 Wheelock Marden & Co. Ltd.
 Hutchison International Ltd.
 The Government of Hong Kong
 The Hongkong and Shanghai Banking
 Corporation
 Kwong Wan Ltd., and
 Sir Elly Kadoorie Successors Ltd.

"Trustee Letter" means the letter to be written by the Tunnel Company to Lloyds in the form set out in Appendix D [to the Agreement]

p.32

20

(b) Clause 2 provided that to assist the Appellants in making payments therein referred to in connection with the construction contract and engineer's contract Lloyds would make sums available to the Appellants by the purchase of the Appellants Notes which were to be purchased if at all between the 1st day of September 1969 and the 31st day of December 1973 and the total of such Notes was not to exceed £14,000,000 in respect of the construction contract and £750,000 in respect of the engineer's contract.

p.33

30

(c) Clause 3 provided that the Notes were to be payable in sterling in London in three series (Series 1 totalling £11,200,000 Series 2 totalling £2,800,000 and Series 3 totalling £750,000) in a form in Appendix B to the Agreement and that (sub-clause (3)) they were to be deposited with Lloyds on the terms of the Trustee Letter in paragraph 9 (c) below mentioned and were to be governed by English Law. The Notes in the form in the said Appendix are promissory notes within the

pp. 33-34

40

p.58

RECORD.

Definition in section 3 of the Ordinance which is virtually identical with the definition in section 33 of the Stamp Act 1891.

- pp.34-39 (d) Clause 4 provided that various conditions should be fulfilled to the satisfaction of Lloyds before any Notes would be purchased including the following:
- p.34 (i) (Sub Clause (A) (1) (a)) that the Appellants should have delivered to Lloyds the Trustee Letter together with Notes of series 1 and series 2 to a total amount of £9,600,000 (series 1) and £2,800,000 (series 2) as listed in Parts 1 and 2 of Appendix C to the Agreement. 10
- pp.59-64
- p.35 (ii) (Sub Clause (A) (1) (d)) the Appellants should have provided Lloyds with the Several Guarantees by the subscribers duly stamped.
- p.35 (iii) (Sub Clause (A) (1) (e)) that the Appellants should have satisfied Lloyds that the Trust Fund referred to in Clause 10 of the Agreement had been duly constituted on terms and conditions approved by Lloyds. 20
- p.43
- p.35 (iv) (Sub Clause (A) (1) (f)) that the Appellants should have provided Lloyds with the Debenture duly stamped and registered in accordance with the Laws of Hong Kong.
- p.38 (v) (Sub Clause (B) (2) (a)) that the Appellants should have delivered to Lloyds the Notes of Series 3 to the total amount of £750,000 as listed in Part 3 of the said Appendix C. 30
- pp.64-65
- pp.39-41 (e) Clause 6 provided that Notes should be purchased against the presentation of so-called Valid Claims made for payment under the construction contract and the engineer's contract and the purchase money should be applied in or towards paying such claims.
- p.42 (f) Clause 8 provided for payment of the Notes on presentation to The Hongkong and Shanghai Banking Corporation 9 Gracechurch Street London E.C.3. 40

10 (g) Clause 16 provided that certain acts or events should be events of default and that on the occurrence of any event of default which continued unremedied for a period of 10 days from the receipt of a notice to that effect a written demand might at any time so long as the event of default remained unremedied be made by Lloyds upon the Appellants and upon the issue of such document all the Notes outstanding should become repayable.

p.51

(h) Clause 21 provided that the Agreement should be carried out in London and governed by and construed in accordance with English Law.

p.53

9. In pursuance of the said Agreement the following acts (inter alia) were done:

20 (a) On the 17th day of July 1969 the Instrument constituting the Several Guarantees was signed by or on behalf of each of the subscribers and thereafter delivered to Lloyds in London duly stamped in accordance with the Law of Hong Kong.

p.70

(b) On the 24th day of July 1969 the Notes to a total nominal amount of £14,750,000 were made by the Appellants in London duly stamped as promissory notes in accordance with the Law of England and delivered to Lloyds. The Notes so far as material were in the following form:

30 "On demand, we promise to pay [Lloyds] or
"order at the Hongkong and Shanghai Banking
"Corporation ... London ... the sum of ...
"Pounds Sterling for value received".

p.58

(c) On the 11th August 1969 the Appellants signed and delivered to Lloyds the Trustee Letter. This so far as material read as follows :

40 "To Lloyds Bank Limited
"Dear Sirs,
"
"In Consideration of the sum of £1... we
"hereby irrevocably appoint you on the
"following terms and conditions as our Trustee
"to hold and deal on our behalf with the
"Notes which we shall make in accordance with

pp.66-67

RECORD

"the provisions of (the financial agreement)
"... upon presentation of Valid Claims by
"(the contractors in the construction contract)
"... you are hereby irrevocably authorised to
"release Notes... for purchase up to the
"amount of such ... Claims ... the proceeds
"of the purchase of Notes ... shall be paid to
"(the contractors) in accordance with
"paragraph 7 of (the financial agreement)."

(d) On the 11th August the Appellants executed the Debenture and presented it for stamping as mentioned in paragraphs 2 and 3 hereof and the Debenture having been stamped as assessed at HK\$429,225 was thereafter registered in accordance with the Law of Hong Kong and delivered to Lloyds. 10

10. The appeal in this case is against this assessment which was made on the basis that the Debenture was chargeable under head 37 (1) in the Schedule to the Ordinance. The Appellants do not dispute that if the Debenture was so chargeable the duty has been correctly computed and assessed. The Appellants appeal was referred directly to the Appellate Division of the Supreme Court of Hong Kong by Order of District Judge Cons made on the 18th day of April 1970 and came on for hearing by the Full Court on the 22nd October 1970. The Judgment of the Full Court was given by Mr. Justice Blair-Kerr on the 27th November 1970 when the assessment was confirmed on the ground that the Debenture although not the primary security was nevertheless the principal security for the payment of £14,750,000. 20 30

pp. 9-10

pp.10-23

11. Heads 37 (1) and 37 (2) in the said Schedule read as follows :-

MORTGAGE, BOND, DEBENTURE
COVENANT (except a marketable
security otherwise specifically
charged with duty) and WARRANT
OF ATTORNEY to confess and
enter up judgment, as
beneath. 40

37. (1) BEING the only or principal or primary security. (For tontine mortgages see section 39.)

(a) 20 cents for every \$100 or part thereof of the principal sum secured.

(b) 30 days after execution

(c) All persons executing.

10 37. (2) BEING a collateral or auxiliary or additional or sub-stituted security (other than a mortgage executed in pursuance of a duly stamped agreement for a mortgage), or being a mortgage executed by way of further assurance provided in every case that the principal security was duly stamped under sub-head

20 (1)

(a) 10 cents for every \$100 or part thereof of the total sum secured up to a maximum of \$20

(b) 30 days, after execution

(c) All persons executing.

The words opposite (a), (b), and (c) in the second column representing respectively the stamp duty the time for stamping and the person liable.

30 12. The Debenture in which the Appellants are called "the Company" and Lloyds are called "the Bank" opens with the words "Issue of a Collateral Debenture to secure liability under certain promissory notes to the extent of pounds fourteen million seven hundred and fifty thousand (£14,750,000)" and its operative Clauses include the following:

pp.102-106

40 "1.(a) In pursuance of the Financial Agreement and in consideration of the Bank purchasing the Notes in accordance with and subject to the terms and conditions thereof, the Company hereby covenants with the Bank that it will pay to the Bank all principal

p.102

RECORD

"moneys not exceeding in the aggregate
"£14,750,000 which may be or become payable
"to the Bank under or by virtue of the said
"Notes together with interest thereon as
"therein mentioned which moneys and interest
"shall be payable in Sterling in London by
"the Company to the Bank in accordance with
"the terms and provisions of the said Notes
"and of the Financial Agreement.

p.103

"2. In further pursuance of the said
"Financial Agreement and in order to provide
"the Bank with further security for due
"payment of all amounts which may be or become
"payable to the Bank under or by virtue of
"the said Notes, THE COMPANY DOETH HEREBY
"CHARGE with payment to the Bank of all
"principal moneys and interest which may be
"or become payable in accordance with the
"provisions of Clause 1 hereof and/or all
"other claims costs and expenses which may be
"incurred by the Bank in connection with this
"security (including any expenses and charges
"arising out of or in connection with the
"acts and matters referred to in Condition No.
"3 of the Conditions to this Debenture) and
"so that the charge hereby created shall be a
"Floating Charge and a continuing security
"ALL THAT its undertaking property and assets
"whatsoever and wheresoever both present and
"future including its uncalled capital for the
"time being."

10

20

30

p.104

and by Condition 2 endorsed thereon it was
provided that in certain events (closely
paralleling but not precisely corresponding with
some of the events of default in the financial
agreement) the principal moneys thereby secured
should become immediately repayable.

13. In his judgment Mr. Justice Blair-Kerr
(giving the judgment of the Appellate Division)
expressed his reason for holding the Debenture
to be the principal security though not the
primary security as follows :-

40

p.23

"In my view, the debenture is unquestionably
"the principal security. Upon any act of
"default (as defined in Clause 16 of the

10 "financial agreement,) or in any other set
"of circumstances which fall within the ambit
"of the "conditions" in the debenture, the
"money secured by the Debenture (i.e. "all
"amounts which may be or become payable ...
"under or by virtue of the ... notes")
"immediately become payable; and thereafter
"a receiver may be appointed under condition
"3. The floating charge crystallises and
"attaches to all the property and assets of
"the appellants, including their uncalled
"capital; and Lloyds will have priority over
"other creditors of the appellants whether
"secured or unsecured."

20 14. The Appellants contend that this Debenture
cannot having regard to the terms of Clause 1
have any effect independently of the Notes and
the Appellants are under no liability on the
debenture independently of the Notes and that
in these circumstances the Notes are both the
primary and the principal security for the
repayment of the money thereby secured. This
very shortly stated was the ground on which the
Appellate division held the Debenture not to be
the primary security. The Appellants contend
that the Appellate Division erred in holding
that the Debenture though not the primary
security was nevertheless the principal
security.

p.102

30 15. In support of their contention they will
rely on the reasons given by the Appellate
Division for considering the Debenture not to
be the primary security and in addition will
rely on the following points :-

- (a) The conclusion of the Appellate division
that the Debenture was not the primary
security is right.
- (b) The conclusion that the Debenture without
being the primary security was the
principal security is wrong because the
conclusion makes it possible that there
should be more than one security for the
same debt each liable to duty under head
37 (1) and this as shown in sub-paragraph
(c) below is contrary to the clear
intention of the Ordinance. This
- 40

RECORD

contention is not weakened by the fact that in the present case the conclusion did not give rise to two charges to duty under that head.

- (c) As a matter of construction it is the clear intention of the draftsman of the Ordinance that heads 37 (1) and 37 (2), which imposes a duty limited to HK\$20, are intended to be mutually exclusive and that a document such as the Debenture which is appropriately described as a collateral or auxiliary or additional or substituted security cannot also be a principal or primary security. 10
- (d) The converse does not hold good and accordingly it is possible that there should be two securities for the same sum neither of which falls within head 37 (1). This is made clear by the decision of the House of Lords (on the similar provision of the head beginning "Mortgage Bond Debenture Covenant" in the First Schedule to the English Stamp Act 1891) in Inland Revenue Commissioners v. Henry Ansbacher & Co. 1963 A.C. 191 20
- (e) If and so far as, by reason of the provisions of Condition 2 endorsed on the Debenture or otherwise, the moneys due under the Notes become repayable in any event not provided for in the Notes, this as a matter of law could only result from the Debenture operating as a contract collateral to the Notes. 30
- (f) That accordingly the Debenture is not chargeable with duty under head 37 (1). As the Notes are stamped under head 37 (1) the Debenture does not fall within head 37 (2), which in this respect differs from the corresponding head in the English Stamp Act referred to under (d). The Debenture is chargeable with a duty of HK\$20 under head 23 relating to Deeds. 40

16. The Appellants humbly submit that the present Appeal should be allowed with costs and the duty on the Debenture fixed at HK\$20 for the following amongst other

REASONS :-

- (a) The opinion of the Appellate Division that the Debenture was not the primary security for the said sum of £14,750,000 and the grounds on which it was founded were correct and on the same grounds it should have been held that the Debenture was not the principal security therefor.
- 10 (b) In any event it is over subtle to establish fine distinctions between the words "principal" and "primary" and the drawing of such a distinction could involve the simultaneous liability to full duty under head 37 (1) on one document as the primary security and another as the principal security
- (c) The Debenture was a collateral security and could not at the same time be a primary or principal security.
- 20 (d) The Debenture is chargeable with duty of ~~HK\$~~20 under head 23.
- (e) The decision of the Appellate Division was wrong and ought to be reversed.

J. G. MONROE

No. 20 of 1971

IN THE PRIVY COUNCIL

O N A P P E A L
FROM THE FULL COURT OF HONG KONG

THE CROSS HARBOUR TUNNEL COMPANY
LIMITED

- v -

THE COLLECTOR OF STAMP REVENUE

CASE FOR THE APPELLANTS

STEPHENSON HARWOOD & TATHAM
Saddlers Hall
Gutter Lane,
Cheapside,
London E.C.2.

Tel: 01-606 7733

Ref: 20

Appellants Solicitors