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25 RUSSELL SQUARE
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Judgment 17 of 1972

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 RESPONDENT

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1. This is an appeal from the judgment of the Full Court of Hong Kong (The Honourable Mr. Justice W. A. Blair-Kerr, President) delivered on 27th November 1970.

2. The Schedule to the Hong Kong Stamp Ordinance provides, inter alia, as follows :-

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(a) under Head 37 (1) a Debenture "being the only or principal or primary security" is chargeable with duty at the rate of 20 cents for every \$100 or part thereof "of the principal sum secured"

(b) under Head 37 (2) a Debenture "being a collateral or auxiliary or additional or substituted security provided in every case that the principal security was duly stamped under sub-head (1)" is chargeable with maximum duty of \$20

1.

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(c) under Head 23 a deed "of any kind whatsoever not described in this Schedule" is chargeable with \$20 duty

3. The questions raised by this Appeal are:-

(1) whether the Debenture issued by the Appellants as hereinafter mentioned is (as the Respondent The Collector of Stamp Revenue has held and the Full Court of Hong Kong have upheld) chargeable with duty under Head 37 (1) of the Schedule to the Stamp Ordinance: and 10

(2) If not, with what duty such Debenture is chargeable.

4. It is common ground between the parties that if the Debenture is chargeable under Head 37 (1) the duty has been correctly assessed at HK\$429,225 but that if the Debenture is chargeable under Head 37 (2) or Head 23 the duty chargeable thereon is HK\$20 only.

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11.10-13

5. On 26th June 1969 the Appellants entered into a contract (hereinafter called "the construction contract") for the construction of a tunnel between Hong Kong Island and Kowloon at a contract price of HK\$272,533,333: and on 26th September 1969 the Appellants entered into a further contract ("the engineer's contract") with a firm of consulting engineers for consultancy and site supervision services in connection with the construction of the tunnel for fees amounting to HK\$14,600,000. Thus (taking £1 as the equivalent of HK\$14.55) the total contract price for the construction of the tunnel was the equivalent of £19,741,000. 20

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11.19-23
p.187

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11.24-25

6. On 17th July 1969, the Appellants entered into an agreement ("the financial agreement") with Lloyds Bank Limited ("Lloyds") in which, after reciting that the Appellants had entered into the construction contract and wished to enter into the engineer's contract, it was recited that Lloyds had agreed with the Appellants to make sums available to assist the financing of the construction contract and the engineer's contract "on the terms and conditions hereinafter appearing". 40

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7. In outline, this was to be done as follows (references herein to specific Paragraphs and Appendices are to the Paragraphs and Appendices of the financial agreement):-

- 10 (a) to assist the Appellants in making payments to the contractors and the engineers under the construction contract and the engineer's contract, Lloyds were to make sums available to the Appellants from time to time by the purchase of promissory notes ("Notes") issued by the Appellants (Paragraph 2). The Notes were to be payable in sterling in London to the order of Lloyds (Paragraph 3 (1)) and were to be in the form set out in Appendix B. Details of the principal amounts of the Notes and the dates on which they were to be presented for payment were set out in Appendix C but under the proviso to Paragraph 3 (2) all Notes purchased and outstanding were to become immediately payable and might be presented for payment by Lloyds if an "event of default" (as defined in Paragraph 16) continued unremedied and a written demand was made by Lloyds in accordance with Paragraph 16 (3). A number of "events of default" were specified in Paragraph 16 (1) including a failure by the Appellants to pay the full amount of principal of any Note purchased by Lloyds or a failure of the Appellants in the performance or observance of any of their obligations under the financial agreement and a number of other events not directly connected with the Appellants' obligations in respect of the Notes.
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- 40 (b) the Appellants were to deposit the Notes with Lloyds to be dealt with in accordance with the terms of the "Trustee Letter" set out in Appendix D (Paragraph 3 (3)). In outline, the Trustee Letter, which was to be addressed by the Appellants to Lloyds, provided that on the presentation of valid claims by the contractors under the construction contract and by the engineers under the engineer's contract Lloyds were irrevocably authorised to release Notes up to the amount of such claims and were to buy such Notes for their respective principal amounts and apply the proceeds in making payments in or towards the amount of the claims (Paragraph 7).

p.11 11.9-13
p.33 11.2-5

p.11 11.24-27
p.33 11.26-29

p.12 11.30-31

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p.34 11.8-14

p.15 11.31-36
p.49 11.12-25

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p.12 1.11
p.34 11.15-16
pp.66-67

p.12 11.14-17
p.41 11.39-44

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p.13 11.12-16
p.34 11.26-29

8. Under Paragraph 4 a number of conditions had to be fulfilled to the satisfaction of Lloyds before Lloyds became bound to purchase any Note and make any sums available as contemplated by the financial agreement. These conditions included the following :-

p.13 11.18-19
p.34 11.31-32

(a) the Appellants had to deliver the Trustee Letter and the Notes to Lloyds

p.13 11.20-21
p.34 11.36-38
p.13 1.30 -
p.14 1.5

(b) the Appellants had to hand to Lloyds irrevocable Letters of Instruction in the form set out in Parts 1 and 2 of Appendix E. The Letter in Part 1 of Appendix E, which was to be written by the Appellants to the contractors, stated that until the contractors had been informed by Lloyds that all principal and interest in connection with any of the Notes purchased by Lloyds under the financial agreement had been paid and no Notes remained to be purchased "and in order to furnish to Lloyds further and collateral security for the due payment of all principal amounts and interest payable on such Notes" the contractors were irrevocably authorised to pay to Lloyds all sums which the contractors might become due to pay to the Appellants under the construction contract, including sums arising from an arbitration award.

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p.68 11.24-35

The Letter in Part 2 of Appendix E was to be written by the Appellants to the engineers and was to the similar effect as the letter in Part 1.

p.13 11.22-23
p.35 11. 1-2

(c) The Appellants had to hand to Lloyds an irrevocable Letter of Instruction in the form set out in Appendix F. This Letter, which was to be addressed by the Appellants to Lloyds, after reciting that Lloyds had entered into a performance bond for the due fulfillment of and observance of the obligations of the contractors under the construction contract, stated that the Appellants thereby agreed that "until all moneys and interest which may be or become payable to you under (the financial agreement) or the Notes issued pursuant thereto have been fully paid and satisfied" such monies as would otherwise be payable to the Appellants under the performance bond should be retained and applied in accordance with Paragraph 9 of the financial agreement.

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p.14 11.14-26
p.69

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Paragraph 9 provided in effect that any moneys which were paid to or retained by Lloyds pursuant to the three Letters of Instruction above mentioned should be applied by Lloyds first in or towards payment of the principal moneys secured by the Notes in the order of their presentment dates as set out in Appendix C and secondly in or towards payment of interest on the Notes in the like order.

p.42 1.28-
p.43 1.3

10 (d) the Appellants had to provide Lloyds with guarantees given by six named shareholders in the Appellants, including the Government of Hong Kong. These guarantees were to be in the form set out in Appendix G whereunder in consideration of Lloyds making sums available in pursuance of the financial agreement and in accordance with the terms thereof each of the six guarantors guaranteed that should the Appellants "fail to pay any amounts in sterling due to Lloyds under (the financial agreement) or due upon the (Notes) to be purchased by Lloyds in accordance with the terms of (the financial agreement)" the guarantor would pay to Lloyds in London on first demand a specified proportion of such amounts

p.13 11.24-25
p.35 11.3-4

p.15 11.2-8
p.70 11.16-22

20 (e) the Appellants had to satisfy Lloyds that the Trust Fund referred to in Paragraph 10 had been duly constituted. Put shortly, this Fund, of which The Hongkong and Shanghai Bank (Trustee) Limited was to be the trustee, was to be built up by means of periodical payments which the Appellants were to make out of their "surplus revenue" (as there defined). It was to be held in Euro-dollars or some other currency acceptable to Lloyds and was to be available (in the circumstances more particularly set out in Paragraph 10 (4) and 10 (5)) for making "payments in satisfaction of the (Appellants') obligations to Lloyds under (the financial agreement) or on the Notes or "in the event of the (Appellants) having defaulted in any of (their) obligations to Lloyds under (the financial agreement) or upon the Notes"

p.13 11.26-28
p.35 11.5-6

p.15 11.22-30
p.43 11.5-19

30 (f) the Appellants had to provide Lloyds with a Debenture executed by the Appellants in favour of Lloyds in the form set out in Appendix H.

p.13 1.29
p.35 11.8-9

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This is the Debenture which forms the subject-matter of the present Appeal and it is set out in full as Exhibit A2 in the Record of Proceedings

p.102

9. The Debenture commenced as follows :-

p.16 11.15-16
p.102 11.1-4

"Issue of a collateral debenture to secure
"liability under certain promissory notes
"to the extent of pounds fourteen million
"seven hundred and fifty thousand sterling
" (£14,750,000)"

p.102 1.8-12

The Debenture then recited that Lloyds had agreed to make sums available to the Appellants from time to time by the purchase of the Appellants' promissory notes (therein called "the Notes") not exceeding £14,750,000 in accordance with the provisions of the financial agreement and that

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p.16 11.18-22
p.102 11.15-19

"it was a term of the treaty for the
"financial agreement that the (Appellants)
"should furnish to (Lloyds) further and
"collateral security for due payment of all
"principal moneys and interest payable under
"the said Notes in accordance with the terms
"and conditions contained in the financial
"agreement"

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p.16 11.23-39
p.102 1.21-
p.103 1.6

Clauses 1 and 2 of the Debenture provide as follows :-

"1 (a) In pursuance of the financial
"agreement and in consideration of (Lloyds)
"purchasing the Notes in accordance with and
"subject to the terms and conditions thereof
"(the Appellants) hereby covenant with
"(Lloyds) that (they) will pay to (Lloyds)
"all principal moneys not exceeding in the
"aggregate £14,750,000, which may be or
"become payable to (Lloyds) under or by
"virtue of the said Notes together with
"interest thereon which moneys and
"interest shall be payable in sterling in
"London by (the Appellants) to (Lloyds) in
"accordance with the terms and provisions
"of the said Notes and of the financial
"agreement.

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" (b)

" (c) This Debenture being by way of
"collateral security for the said Notes, any
"payment of principal and/or interest
"hereunder shall discharge pro tanto the
"corresponding liability of (the Appellants)
"under the Notes.

10 "2. In further pursuance of the said
"financial agreement and in order to
"provide (Lloyds) with further security for
"due payment of all amounts which may be
"or become payable to (Lloyds) under or by
"virtue of the said Notes, (the Appellants)
"... Hereby Charge with Payment to (Lloyds)
"of all principal moneys and interest which
"may be or become payable in accordance with
"the provisions of clause 1 hereof ... so
"that the charge hereby created shall be a
"floating charge and a continuing security
20 "all that its undertaking property and
"assets whatsoever and wheresoever both
"present and future including its uncalled
"capital for the time being".

p.16 1.40 -
p.17 1.9

p.103 11.7-19

Clause 7 of the Debenture states that it
is issued "subject to and with the benefit of
the conditions endorsed hereon which are deemed
to be part of it".

p.17 11.10-12
p.104 11.1-2

30 Condition 1 of the said conditions
precludes the Appellants without the consent in
writing of Lloyds from creating any charge upon
the property and assets comprised in the
security to rank in priority to or pari passu
with the charge thereby created.

p.17 11. 12-14
p.104 11.9-11

Condition 2 reads as follows :-

p.17 11.16-31
p.104 11.12-26

"2. The principal moneys hereby secured
"shall immediately become payable on demand
"by (Lloyds):-

40 "(a) If (the Appellants) make default in
"payment of any monies which by the terms
"of this Debenture are expressed to be
"payable by (the Appellants):

"(b) If (the Appellants) make default in
"performance or observance of any of the
"covenants and conditions binding upon (them)

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"by virtue of the financial agreement or any
"other event of default occurs as defined
"in paragraph 16 of the financial agreement;

"(c) If (the Appellants) suspend (their)
"business or make any composition with
"creditors or if an order is made for the
"compulsory winding up of (the Appellants);

"(d) If (the Appellants) commit any breach
"of any of the covenants terms and
"conditions contained in this Debenture 10
"including these Conditions"

p.17 11.32-34
p.104 11.27-30

Condition 3 is to the effect that "after the
principal moneys hereby secured become payable"
Lloyds may appoint a receiver or manager of the
property and assets of the Appellants charged by
the Debenture.

10. The above-mentioned arrangements were
implemented as follows :-

(a) The construction contract was executed on
26th June 1969. 20

p.6 11.33-34

(b) The financial agreement was executed under
hand on 17th July 1969, as were the six
guarantees referred to in Appendix G.

(c) The Notes were issued and deposited with
Lloyds on 24th July 1969.

p.6 1.32

(d) The Trustee Letter referred to in Appendix
D was signed on 11th August 1969, as were the
Letters of Instruction referred to in Appendices
E and F and the Debenture referred to in Appendix
H. 30

p.6 11.21-24

(e) The engineer's contract was executed on
26th September 1969.

p.17 11.35-40

p.6 11.35-39

11. Following the execution of the Debenture,
the Appellants sought the opinion of the
Respondent, as the Collector under s.17 of the
Stamp Ordinance, as to the stamp duty chargeable
on the Debenture. The Respondent was of the
opinion that the Debenture was chargeable under
Head 37 (1) of the Schedule to the Stamp
Ordinance and, taking the Hong Kong dollar 40

equivalent of £14,750,000 (at HK\$14.55 to £1 sterling) to be HK\$214,612,500, on 13th August 1969 he assessed the duty chargeable on the Debenture at HK\$429,225. The Appellants duly paid this sum, but being dissatisfied with the assessment, on 2nd September 1969 they appealed against the assessment in accordance with s.18 of the Stamp Ordinance and on 6th December 1969, through their solicitors, they formally required the Respondent to state and sign a case.

p.17 1.40-
p.18 1.2.
p. 7 11.1-8

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12. The case stated in response to such request is dated 15th April 1970 and in Paragraph 8 thereof the Respondent set out the reasons for his decision as follows :-

p.8 1.11

"8. I, the collector, am of the opinion
"that:-

p.7 11.9-28

"(a) It is a question of fact as to
" whether the Debenture is a principal
" security or a collateral security
"

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"(b) The Debenture, which by Clause 1 (a)
" thereof created a liability on the
" Tunnel Company to repay to Lloyds
" a sum not exceeding £14,750,000 comes
" first in time before any notes are
" issued or purchased by Lloyds. In
" other words at the time of the
" execution of the Debenture there was
" no existing liability to be backed up
" or for which the Debenture could be a
" collateral security.

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"(c) Even when the Notes were purchased
" Lloyds could not sue on them in Hong
" Kong. There never would be any
" security other than the Debenture
" existing in Hong Kong which could be
" realised or enforced by Lloyds.

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"(d) The Debenture cannot be stamped as a
" deed with §20 under Head 23, as this
" head of charge applies to a deed of
" any kind whatsoever not described in
" the Schedule to the Ordinance.

"(e) The Debenture, being the principal
" security in pursuance of the financial
" arrangement under the said agreement,
" is therefore chargeable with duty under
" Head 37 (1)".

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- p.7 1.28 -
p.8 1.5
13. The grounds upon which the Appellants expressed their dissatisfaction with the Respondent's decision as being erroneous in point of law were set out in Paragraph 9 of the case stated and can be summarised as follows:-
- (a) that the Debenture was not the only or principal or primary security within the meaning of Head 37 (1) of the Schedule to the Stamp Ordinance
- (b) that it was the financial agreement and not the Debenture which created the liability of the Appellants to repay to Lloyds sums not exceeding £14,750,000 10
- (c) that the Debenture is a collateral or auxiliary or additional security and that the principal security (namely the financial agreement and/or its Appendices (other than Appendix H, the Debenture)) being duly stamped, the Debenture is chargeable under Head 37 (2) of the Schedule 20
- (d) alternatively, that the Debenture is chargeable under Head 23 of the Schedule
- p.9
14. By an Order of the District Judge (The Honourable Mr. Judge Cons) dated 18th April 1970 it was ordered that the appeal by way of case stated be transferred to the Supreme Court and after a hearing before the Full Court of Hong Kong (The Honourable Mr. Justice Blair-Kerr, President, the Honourable Mr. Justice Briggs and the Honourable Mr. Justice McMullin), the appeal was, by order dated 27th November 1970, dismissed with costs. 30
- p.10
15. Only one Judgment was delivered in the Full Court of Hong Kong (namely the Judgment of the President). Although the other Judges did not formerly record in writing their concurrence with the Judgment of the President, it is clear from the Record of Proceedings that each of them concurred with the decision that the appeal in the Full Court should be dismissed. 40
16. In his said Judgment, the President first summarised the relevant facts and documents and the grounds of appeal set out in the case stated. He then summarised the respective

submission's which had been made to the Full Court on behalf of the parties. In outline, these were as follows :-

(a) For the Appellants:

p.18 11.14-40

(i) the principal and primary security for the payment of the money to Lloyds was the financial agreement and/or the Notes;

10 (ii) by virtue of the financial agreement the Appellants incurred a binding obligation to pay money to Lloyds arising from the purchase by Lloyds of the Notes. The Notes, which were issued pursuant to the financial agreement, were merely an incident of or machinery for carrying out the Appellants' obligation under the financial agreement: so was the Trustee Letter;

20 (iii) the Letters of Instruction (Appendices E and F) and the guarantees (Appendix G) constituted collateral securities for the due performance by the Appellants of their obligations: so did the agreement to create the Trust Fund under Paragraph 10;

(iv) the Debenture was merely one more form of collateral security and it is a matter of commercial judgment as to which of the various collateral securities is the more valuable;

30 (v) the Notes may also be regarded as security for the Appellants' performance of their obligations under the financial agreement because the Notes are negotiable bills of exchange. The financial agreement is not negotiable and to that extent the Notes themselves constitute security

(vi) for the proposition that the financial agreement was the principal security, the Appellants relied heavily on the decision of the House of Lords in I.R.C. v. Ansbacher & Co. (1963 AC 191)

p.18 11.41-42

40 (b) For the Respondents

p.19 1.3 -
p.20 1.4

(i) the financial agreement does not impose any obligation on the Appellants to

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repay any sums which Lloyds may advance, nor does Lloyds thereby undertake to advance any sums. The financial agreement is nothing more than an agreement by Lloyds to purchase the Notes, as and when the Notes are released, for the amounts stated on the Notes;

(ii) the financial agreement is not a security for the payment of money since it contains no obligation to pay money. This is in direct contrast with the Ansbacher case where the agreement in question contained a positive obligation to pay money and was therefore a "security"; 10

(iii) the financial agreement contains various safeguards designed to ensure that any Notes which may have been purchased will be honoured when presented (e.g. the Trust Fund to be established under Paragraph 10). The effect of Paragraph 16 is merely to provide for the outstanding Notes to become immediately payable in the events and subject to the provisions mentioned in the Paragraph. But the Appellants' obligation to pay is created by the Notes themselves. The financial agreement is not a security for the repayment of money advanced by Lloyds by the purchase of the Notes; 20

(iv) if the Appellants default, Lloyds could not sue on the financial agreement: they could only sue on the Notes although they might also have to invoke Paragraph 16 if they claimed that the Notes had become immediately payable by virtue of the accelerating provisions of that Paragraph. The financial agreement is nothing more than a 'master plan' for the financing of the contract by Lloyds; 30

(v) the Appellants are liable on the Debenture quite independently and irrespective of their liability on the Notes. Under Clause 1 of the Debenture the Appellants covenanted with Lloyds to pay all moneys (up to a maximum of £14,750,000) which "may be or become" payable to Lloyds "under the Notes", that is to say on Notes purchased and due for presentment but not yet presented and on Notes purchased but not yet due for presentment. The Debenture thus creates an obligation on the part of the Appellants to pay before any money is due on the Notes themselves. The Debenture therefore 40

creates a 'primary obligation' which is secured by the floating charge;

(vi) in the alternative, the Debenture is the principal security because although the Notes are securities they are merely promises to pay backed by the guarantees should the Notes be dishonoured. In the Debenture, the Appellants not only covenant to pay but their covenant is backed by the floating charge which covers their entire undertaking. The ordinary meaning of the word "principal" is "first in importance" and the Debenture in this case is undoubtedly Lloyds' principal security.

p.20 11.5-15

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17. The President pointed out that the financial agreement was not under seal and stated that the Court had been informed that it had been stamped \$3 as an agreement under hand under Head 3 of the Schedule to the Stamp Ordinance. It was not know where the Notes had been stamped. In England the cost of stamping 700 promissory notes would be less than \$6: in Hong Kong the cost (under Head 11 of the Schedule) of stamping promissory notes for \$14,750,000 (or \$214,612,500) would be \$53,653.

p.20 11.16-24

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18. The President accepted that the financial agreement dealt with the whole scheme whereby the Appellants and Lloyds sought to provide for Lloyds financing the tunnel project to the extent of 75% of its total cost. But he pointed out that although under Paragraph 3 (3) the Appellants were obliged to deposit the Notes with Lloyds, Lloyds were under no obligation to purchase any of the Notes until the Appellants had provided them with the Debenture and the six Guarantees and had complied with the other conditions of Paragraph 4 and until a valid claim had been made by the contractors or the engineer. No obligation to purchase any of the Notes arose upon the execution of the financial agreement. Nor did the Appellants, by the mere execution of the financial agreement, undertake to repay any sums which Lloyds might advance. There was no provision to that effect: the Appellants' obligation arose under the Notes and was an obligation to pay in accordance with the terms of the Notes.

p.20 1.40 -
p.21 1.8

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p.21 11.16-17

p.21 11.18-21

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p.21 1.26 -
p.22 1.11

19. The President accepted that the question of Lloyds suing on any individual Note was never likely to arise. If the tunnel were to be completed by, say, early 1973, Lloyds might well by then have purchased all the Notes: and if the Appellants failed to honour their obligations when the first group of Notes were presented for payment on 1st March 1973, upon receipt of a written demand such as was provided for in Paragraph 16 (3) of the financial agreement the principal amounts of all the remaining Notes purchased by Lloyds would become immediately payable. In other words, Lloyds would then be able to sue on all the Notes. In doing so, they would have to plead Paragraph 16 and in a sense their cause of action would rest upon the terms of the Notes and upon Paragraph 16. But they could not possibly sue on the financial agreement alone. It would be on the Notes that they would sue, the due dates of many of the Notes having been advanced by virtue of the operation of Paragraph 16. In the contingency described above, the position would be similar if Lloyds wished to sue the Guarantors under the six Guarantees. Here again, Lloyds would have to plead Paragraph 16 but their cause of action against the Guarantors would arise upon the Appellants' failure to pay the principal value of the Notes, the due dates of many of the Notes having been advanced by virtue of the operation of Paragraph 16.

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p.22 11.11-30

20. As regards the Debenture, the President accepted that the Appellants' covenant to pay was in respect of principal moneys "which may be or become payable to (Lloyds) under or by virtue of the Notes" but he pointed out that the Debenture was declared to be "with the benefit of the Conditions" endorsed on it; and that under Condition 2 (a) the "principal moneys hereby secured" (i.e. in the words of Clause 2 of the Debenture "all amounts which may be or become payable to (Lloyds) under or by virtue of the Notes") are to become immediately payable on demand by Lloyds if the Appellants make default in payment of any moneys which, by the terms of the Debenture, are expressed to be payable by the Appellants.

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Those moneys are the principal moneys which may be or become payable to Lloyds under the Notes purchased by them: and Condition 2 (a) states that if the Appellants make default in payment of any of such moneys, then "the principal moneys hereby secured" (i.e. all amounts which may be or become payable to (Lloyds) under or by virtue of the Notes) shall immediately become payable on demand by Lloyds.

- 10 21. The President pointed out that Condition 2 envisaged three other sets of circumstances, any one of which would result in all the principal moneys becoming immediately payable on demand by Lloyds, and appeared to incorporate into the Debenture (by Condition 2 (b)) the twelve events of default enumerated in Paragraph 16 of the financial agreement. But under the Debenture there was no need for any "written notice" or "written demand" such as was mentioned in Paragraph 16 (2) and (3) of the financial agreement. On the contrary, under the Debenture the principal moneys immediately become payable on the occurrence of any one of the events of default: and on such an occurrence Lloyds would be entitled to sue on the Debenture alone pleading Condition 2 (b), the event of default relied on and Lloyds' demand for payment. p.22 11.31-42
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- 30 22. The President did not accept the Respondent's submission that the Appellants were liable on the Debenture quite independently and irrespective of their liability on the Notes. He accepted that in a sense the Debenture created an obligation on the part of the Appellants to pay before any money was due on the Notes themselves: so also, he stated, did Paragraph 16 of the financial agreement. But he held that without the Notes no liability of any kind could arise: and that the Notes were the core of the whole scheme. They were the primary security and the financial agreement was in no sense of the term a security of any kind for the repayment of money advanced. p.23 11.6-18
- 40
23. The President concluded that in his view p.23 11.19-28

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the Debenture was unquestionably the principal security since upon any act of default (as defined in Paragraph 16 of the financial agreement) or in any other set of circumstances which fell within the ambit of the Conditions in the Debenture, the moneys secured by the Debenture (i.e. "all amounts which may be or become payable ... under or by virtue of the ... Notes") would immediately become payable. Thereafter a receiver could be appointed under Condition 3, the floating charge would crystallise and attach to all the property and assets of the Appellants and Lloyds would have priority over other creditors of the Appellants, whether secured or unsecured. 10

p.23 11.29-30

The President therefore agreed with the Respondent that the Debenture was chargeable with stamp duty under Head 37 (1)

24. The Respondent respectfully submits that this Appeal should be dismissed with costs for the following (among other) 20

R E A S O N S

(1) BECAUSE on the true interpretation of the arrangements for financing the tunnel project as hereinbefore set forth and on the true construction of the Schedule to the Stamp Ordinance the Debenture is "the principal or primary security" and is accordingly chargeable with stamp duty under Head 37 (1) of the said Schedule. 30

(2) BECAUSE on the true interpretation of the arrangements for financing the tunnel project as hereinbefore set forth and on the true construction of the Schedule to the Stamp Ordinance the Notes are not the "principal or primary security" and, even if (as the President of the Full Court considered) they are the "primary" security, they are not the "principal" security.

(3) BECAUSE the financial agreement on its true construction is not in respect of the moneys secured by the Notes and the Debenture, a "security" at all so that it could not be "the principal or primary security" in respect of such moneys. 40

(4) BECAUSE even if (as the Appellants have contended) the financial agreement and/or the Notes are "the principal or primary security", the Debenture is "the only or principal or primary security" which attracts duty under Head 37 and is accordingly chargeable under Head 37 (1).

10 (5) BECAUSE even if (as the Appellants have contended) the financial agreement and/or the Notes are the "principal or primary security", none of them is a principal security which has been "duly stamped under sub-head (1)" within the meaning of Head 37 (2), so that the Debenture could not in any event be chargeable under Head 37 (2).

(6) BECAUSE the Debenture is not a "Deed of any kind..... not described in this Schedule" within the meaning of Head 23 so as to be chargeable under that Head.

20 (7) BECAUSE the reasons given by the Respondent in the case stated and by the President in his Judgment were correct.

Sgd. MICHAEL WHEELER

H.J. SOMERVILLE

No. 20 of 1971

IN THE PRIVY COUNCIL

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

B E T W E E N:

THE CROSS HARBOUR TUNNEL COMPANY
LIMITED

Appellants

AND

THE COLLECTOR OF STAMP REVENUE

Respondent

CASE FOR THE RESPONDENT

CHARLES RUSSELL & CO.
21 Old Buildings,
Lincoln's Inn,
London, W.C.2.