Privy Council Appeal No. 20 of 1971

The Cross-Harbour Tunnel Company Limited – – *Appellants*

v.

The Collector of Stamp Revenue – – – – – *Respondent*

FROM

THE FULL COURT OF HONG KONG

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 26TH JULY 1972

Present at the Hearing:

VISCOUNT DILHORNE

LORD SIMON OF GLAISDALE

SIR RICHARD WILD

[*Majority Judgment delivered by* SIR RICHARD WILD]

In 1969 the appellants entered into a contract with three construction companies for the building of a tunnel between Hong Kong Island and Kowloon. They also engaged engineers under a consultancy and supervision contract. The total sum they were required to pay was the equivalent of almost £20,000,000 sterling. For this purpose they arranged, under what was called a Financial Agreement dated 17th July 1969, to borrow up to £14,750,000 from Lloyds Bank.

The Financial Agreement set out the whole scheme of the loan. It provided that to assist the appellants in making the payments under their contracts Lloyds would make sums available from time to time by the purchase of the appellants' Promissory Notes, which were to be payable in sterling in London to the order of Lloyds. The form of the Notes was stated. Each was to be payable "on demand" with interest at 5½ per cent. The principal amount and the date of purchase by Lloyds were to be filled in. Details of the principal amounts of the Notes and of the dates on which they were respectively to be presented for payment (which ran to 1st September 1978) were set out in an Appendix. "On demand" is therefore liable to be misleading. There was, however, a condition that all Notes purchased and outstanding were to become immediately payable on written demand by Lloyds if an "event of default" occurred and continued unremedied for 10 days after written notice of that default. A number of "events of default" was specified.

The Financial Agreement provided that Lloyds would purchase the Notes against the presentation of what were called "valid claims" by the construction companies and engineers for payments under their contracts, and that Lloyds would apply the purchase money for the Notes to payment of those claims. In short, Lloyds, by purchasing the Notes, were to make progress payments as the work proceeded.

The Financial Agreement also provided, however, that before any Note would be purchased or sum made available by Lloyds the appellants must have satisfied a number of conditions. These included the delivery to Lloyds of the Notes and a " Trustee Letter " authorising Lloyds to purchase the Notes for the amounts of valid claims submitted, the provision of guarantees by all the shareholders in the appellants, the establishment by the appellants of a Trust Fund in respect of their other income, the furnishing of certain other letters and instructions, and the delivery to Lloyds of a Debenture duly stamped and registered after execution in a form stipulated in the Financial Agreement.

The Debenture was headed " A collateral debenture to secure liability under certain promissory notes to the extent of £14,750,000 ". It recited that Lloyds had agreed to make sums available to the appellants by the purchase of Promissory Notes up to that amount in accordance with the Financial Agreement, a term of which was that the appellants should furnish further and collateral security for due payment of all moneys payable under the Notes. In the Debenture the appellants covenanted, in pursuance of the Financial Agreement and in consideration of Lloyds purchasing the Notes, to pay Lloyds " all principal 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 . . . ". It was provided that " 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 . . . under the Notes ". It was also provided that " 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 Notes the company doth hereby charge . . . 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 . . . ". A condition provided that the principal moneys secured " shall immediately become payable on demand by the Bank " if the appellants made default in payment of any moneys payable or the performance or observance of any convenant or condition under the Financial Agreement or if any " event of default " occurred as defined in that Agreement. Lloyds were empowered " at any time after the principal moneys become payable " to appoint a receiver with the usual wide powers.

On 17th July 1969 the Guarantees were executed. On 24th July 1969 the Notes were issued and deposited with Lloyds. On 11th August 1969 the trustee letter and the other letters required by the Financial Agreement were executed, and on the same day the Debenture was executed and presented for the assessment of stamp duty.

It is desirable here to set out Heads 37. (1) and (2) of the Schedule to the Stamp Ordinance of Hong Kong (Cap. 117):

" Nature of Instrument	(*a*) Stamp Duty (*b*) Time for stamping (*c*) Persons liable
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.	

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.
37. (2) BEING a collateral or auxiliary or additional or substituted 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 (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 Collector was of opinion that the Debenture was chargeable under Head 37. (1) and assessed duty accordingly at H.K.$429,225, which is a little under £30,000. The appellants promptly paid this sum but, being dissatisfied with the assessment, appealed. The Collector accordingly stated a formal case which was removed into the Supreme Court and heard by three Judges. It is from their decision upholding the Collector's assessment that this appeal is brought.

The question being whether the Debenture is properly chargeable with duty, as assessed (admittedly correctly) by the Collector under Head 37. (1), it is first necessary to comprehend the import of that provision and then to enquire whether the Debenture, in the context of the whole transaction, is caught by its provisions.

In the first place, contrary to the view that found favour in the Supreme Court, their Lordships think that in the context of Head 37. (1) there is no real distinction between the words " principal " and " primary ". The phrase " principal or primary " is used as equivalent to " main ", " chief " or " basic ".

Reading Heads 37. (1) and (2) together it appears to their Lordships perfectly plain that in respect of the five kinds of instrument named in the heading the intention was to divide those which fell within the words " being the only or principal or primary security " in (1) from those which fell within the words " being a collateral or auxiliary or additional or substituted security . . . or being a mortgage executed by way of further assurance " in (2). An instrument in the first category was to bear *ad valorem* duty but, subject to the proviso, the maximum duty exigible in respect of instruments in the second category was to be $20. It appears that the intention was that all instruments within the five classes named in the heading should be chargeable under one or other of the numbered sub-heads. For the appellants, however, it was argued that this intention was not realised. On the authority of *Inland Revenue Commissioners v. Henry Ansbacher & Co.* [1963] A.C. 191 it was contended that there is a lacuna in Head 37. (1) and (2) which enables the Debenture in this case to escape liability. The argument was that the Promissory Notes and not the Debenture are the principal or primary security, and that accordingly the Debenture is not chargeable under (1): nor is the Debenture chargeable under (2) because the principal

security (the Promissory Notes), not being within the description of instruments to which Head 37 refers, were not chargeable at all under that Head. Thus, it was said, though the Debenture is a collateral security it is not chargeable under (2) and it is liable to duty only under Head 23 of the Schedule which imposes a nominal duty on a " deed not described ".

The *Ansbacher* case turned on the provisions of Schedule 1 to the Stamp Act 1891 (now repealed) which were in many respects similar to those in the Hong Kong Ordinance. The sale agreement in that case was not chargeable because it was not under seal and did not come within the heading " Mortgage, Bond ", etc. A Guarantee, which was the instrument in question in the case, did come within that heading but was held not chargeable under it because, the sale agreement being the principal or primary security, the Guarantee was not " the only or principal or primary security ". The Guarantee was accordingly held to be chargeable only with nominal duty under sub-head (2). In their Lordships' view the essence of the *Ansbacher* decision was that, for an instrument to be chargeable under sub-head (1), it must not only be within the heading but must also be the only or principal or primary security, and it cannot be the only security if there is another security even though that other is not within the heading. The House of Lords rejected the submission for the Revenue in the *Ansbacher* case that the words " the only or principal or primary " in sub-head (1) and the words " collateral or auxiliary or additional or substituted " in sub-head (2) do not bring in for consideration instruments which are altogether outside the five classes in the heading. But it was not necessary for the House of Lords in the *Ansbacher* case to deal with, and they expressed no opinion upon, an earlier submission for the Revenue that those two sets of words divide the instruments falling within the heading into two classes. In the opinion of their Lordships of this Board those words, read as a whole, do have that effect. We think that they form a comprehensive code relating to the charging of instruments within the five classes stated in the heading.

Does the *Ansbacher* case prevent us from giving effect to this view? Their Lordships think not. In the *Ansbacher* case Lord Morris of Borth-y-Gest (with whose speech the other members of the House agreed) felt precluded from reading the comparable heading in the Schedule to the Stamp Act in the way which we favour because it would have involved giving a different meaning to the word " security " under the heading " bonds (etc.) " to that which it bore under the heading " mortgages (etc.) ". But, in the Hong Kong Ordinance there is no separate heading " bonds (etc.) " to present that difficulty. Secondly, in the *Ansbacher* case the contention of the Revenue involved, in the view of Lord Morris of Borth-y-Gest, reading into the Schedule words which are not there—namely, " being the only or principal or primary security . . . *which attracts duty under this heading* ". It is true that these precise words do not appear in the Hong Kong Ordinance. On the other hand, there are words at the end of Head 37. (2) which have no counterpart in the English Schedule—" provided in every case that the principal security was duly stamped under sub-head (1) ". These words go some way to suggesting that the meaning of Head 37. (1) is what Lord Morris of Borth-y-Gest found specifically unstated in the comparable English heading. Their Lordships have already pointed out that it was not necessary in the *Ansbacher* case to deal with the argument advanced for the respondent in the instant case; and, in their Lordships' opinion, the two matters dealt with in this paragraph are sufficient to distinguish the *Ansbacher* case from the instant appeal. In their Lordships' view Head 37 provides a complete code governing

mortgages, debentures, etc., in such a way that one only bears full *ad valorem* duty, the other or others nominal duty, payment of the nominal duty being dependent on the principal/primary/main/chief/basic security having borne full duty.

To determine whether in this case the Debenture is the " principal or primary security " (as opposed to a " collateral or auxiliary or additional or substituted security ") it is necessary to consider its place in the whole scheme of the transaction and to have regard to its terms. In the Supreme Court the appellants appear to have contended that it was, first, the Financial Agreement and, alternatively, the Notes that were the principal or primary security. On this appeal they have abandoned reliance on the Financial Agreement and based their argument wholly on the Notes. Looking at the transaction as a whole, their Lordships cannot regard the Notes as the principal or primary security for Lloyds' advance to the appellants. In their view special significance attaches to the provision in the Financial Agreement that before any Note would be purchased or any sum made available the appellants were required (*inter alia*) to provide Lloyds with the Debenture duly stamped and registered. The Debenture contained a covenant to pay everything which might become due under the Notes and charged the appellants' whole undertaking. It is true that the indebtedness under the Debenture was in terms linked to the Notes but, in their Lordships' view of the whole of the transaction and the documents, the Notes were brought in to the loan transaction as a convenient means of drawing on Lloyds for moneys required as the construction work progressed and for arranging repayments to Lloyds in London over a prolonged period. We think the respondent's counsel was right when he said they represented the measure of the liability from time to time. They were really part of the mechanics of the loan. The principal and primary security was the Debenture which, in respect of any default, gave Lloyds rights more widely and expeditiously enforceable than did any other document in the transaction. The use of colourable expressions in the Debenture cannot alter its true character in the whole scheme. The truth and substance of the matter is that the Debenture was the principal and primary security, and their Lordships think it was correctly charged with duty.

Their Lordships will accordingly humbly advise Her Majesty that the appeal should be dismissed.

The appellants must pay the costs of the appeal to the Board.

[*Dissenting Judgment by* VISCOUNT DILHORNE]

On 13th August 1969 the Collector of Stamp Revenue in Hong Kong assessed the duty payable on a Debenture issued by the appellants to Lloyds Bank Ltd. at $429,225. The appellants, being dissatisfied, required a case to be stated. Their appeal was heard by the Supreme Court of Hong Kong and dismissed, Blair-Kerr J. the President of the Full Court delivering the judgment of the Court.

The Stamp Ordinance of Hong Kong (Cap. 117), originally made in 1921, was clearly modelled on the Stamp Act 1891 of the United Kingdom. It has been amended on a number of occasions and in 1969 the Schedule to it contained the following head of charge:—

" MORTGAGE, BOND, DEBENTURE, COVENANT (except a marketable security otherwise specificially charged with duty) and WARRANT OF ATTORNEY to confess and enter up judgment, as beneath.	(*a*) Stamp Duty . . .

37. (1) BEING THE ONLY or principal or primary security. . . .	(*a*) 20 cents for every $100 or part thereof of the principal sum secured.
	. . .
37. (2) BEING a collateral or auxiliary or additional or substituted 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 (1)."	(*a*) 10 cents for every $100 or part thereof of the total sum secured up to a maximum of $20."
	. . .

It is not disputed that if the Debenture was the only or principal or primary security in the sense in which those words are used in sub-head 37. (1), the duty was correctly assessed, and the question to be determined in this appeal is whether it was the principal or primary security within the meaning of those words.

There are two possible views. That for which the respondent contends is that "security" in sub-head 37. (1) has a limited meaning, and means only a security which comes within the heading "Mortgage, Bond, Debenture, etc." so that if the principal or primary security is a document not coming within that description, a mortgage, bond, debenture coming within the description is none the less chargeable to duty under sub-head 37. (1) as the only or principal or primary security of that kind. It is said that sub-head 37. (1) must be contrasted with sub-head 37. (2) and that they show that the division between principal and collateral securities is only a division of securities which come within the heading. Only if there is more than one of that type of security can sub-head 37. (2) apply, and it was argued that it cannot have been intended that a mortgage, bond or debenture collateral or auxiliary or additional to a security of a different description should not be assessable to duty under either sub-head.

The other view, that put forward by the appellants, is that a mortgage, bond or debenture can only be stamped under sub-head 37. (1) if it is in fact the only or principal or primary security; that if there is another security which answers that description but which does not come within the heading, then the mortgage, bond or debenture is not stampable under sub-head 37. (1).

Schedule 1 to the Stamp Act 1891 contains a similar head of charge which reads as follows:—

> "MORTGAGE, BOND, DEBENTURE, COVENANT (except a marketable security otherwise specially charged with duty), and WARRANT OF ATTORNEY to confess and enter up judgment.
>
> (1) Being the only or principal or primary security (other than an equitable mortgage) for the payment of repayment of money—
>
> Not exceeding £10 £0. 0. 3
>
> .....
>
> (2) Being a collateral, or auxiliary, or additional, or substituted security (other than an equitable mortgage), or by way of further assurance for the above-mentioned purpose where the principal or primary security is duly stamped:
>
> For every £100, and also for any fractional part of £100, of the amount secured £0. 0. 6."

The meaning to be given to the words " only or principal or primary security " in paragraph (1) was considered in *Inland Revenue Commissioners v. Henry Ansbacher & Co.* [1963] A. C. 191. Ansbacher & Co. had entered into an agreement to purchase the ordinary stock of the Oriental Telephone and Electric Co. Ltd. The price was to be paid in two instalments, the amount of the second instalment depending on what sums were paid by the Governments of the Federation of Malaya and of Singapore for purchase moneys or other compensation payable on the acquisition of undertakings previously carried on by that company. It was a term of the sale agreement that Ansbacher & Co. would procure from the National Bank Ltd. a guarantee of the second instalment and the question to be decided was whether that guarantee was stampable under paragraph (1).

The arguments advanced by the Inland Revenue were similar to those put forward by the respondent in this case. They contended that the guarantee, which clearly came within the heading, was correctly assessed for duty under that paragraph as the only or principal or primary security and that it was not a collateral security within paragraph (2). To be a collateral security within paragraph (2), it must be one described in the heading and collateral to another security which came within the heading and which had been duly stamped under paragraph (1).

These contentions were rejected by the House of Lords. With the speech of my noble and learned friend Lord Morris of Borth-y-Gest, all the other members of the House, of whom I was one, agreed. Lord Morris at p. 206 said:—

> " The words ' being the only or principal or primary security (other than an equitable mortgage) for the payment or repayment of money ' are, in my view, words which must be shown to apply to an instrument which is in the first place within the heading. If the instrument is within the heading then the word ' being ' requires that to attract the particular specified stamp duty it must also be a security for the repayment of money, and must also be ' the only or principal or primary ' such security. The guarantee is a security for the payment of money. It is not, however, the only such security unless for some reason the sale agreement is not to be regarded as a security for the payment of money. But, in my view, it clearly is. Had the words been ' Being the only or principal or primary security . . . which attracts duty under this heading ' then the sale agreement could have been disregarded and the guarantee would have been chargeable. There is, however, no justification for reading any such words into the Act."

Is there any justification for reading any such words into sub-head 37. (1) of the Stamp Ordinance? I see none. But there are two differences between the Schedule to the Act and that to the Ordinance to which I must refer. The first is that the Schedule to the Stamp Act contains another heading " BOND, COVENANT or INSTRUMENT of any kind whatsoever " under which there are two paragraphs similar in all material respects to the two paragraphs which appear under the heading " MORTGAGE, BOND, DEBENTURE ", one applying to " the only or principal or primary security " and the other to a " collateral or auxiliary or additional or substituted security " " where the principal or primary instrument is duly stamped ". The Stamp Ordinance does not, and did not when enacted in 1921, contain a heading " Bond, Covenant or Instrument of any kind whatsoever " and contains no other heading with two sub-heads similar to sub-heads 37. (1) and (2).

In his speech Lord Morris immediately after the passage I have quoted, went on to say that it would be surprising if the word " security " bore different connotations in different parts of the Act and that he did not think it did. He referred to the improbability that the word " security " should have a different meaning under the heading " Bond, Covenant " etc. to what it had under the heading " Mortgage, Bond, Debenture " etc., and concluded that the agreement for sale of the stock was the principal or primary security and consequently that the guarantee was not chargeable under paragraph (1).

It is to be noted that Lord Morris did not base his conclusion as to the construction to be placed on the words in paragraph (1) on the fact that under the " Bond, Covenant " etc. heading similar language is to be found. As I read his speech, his conclusion was based on the fact that to find in favour of the Revenue meant reading into a taxing statute words which were not there, an exercise for which he said there was no justification. His reference to the " Bond, Covenant " etc. heading supported his conclusion but was not the ground on which that was based.

I cannot think that the omission of a similar heading from the Stamp Ordinance can affect the meaning to be given to the words in sub-head 37. (1). They are identical with the words of paragraph 1 under the heading " Mortgage, Bond, Debenture " etc. in the Act and must have been intended to have the same meaning.

The other difference is that sub-head 37. (2) provides that a collateral etc. security can only be stamped under that sub-head if the principal security is stamped under sub-head 37. (1) whereas paragraph (2) under the same heading in the Act merely says that the principal security must have been duly stamped, as does paragraph (2) under the heading " Bond, Covenant " etc. In *Inland Revenue Commissioners v. Henry Ansbacher & Co.* (*supra*) it was argued for the Revenue that paragraph (2) under the " Mortgage, Bond, Debenture " heading required the principal security to have been duly stamped under paragraph (1). This again would mean reading into the Act words which are not there and this argument was rejected by Lord Morris. The fact that to come within sub-head 37. (2) the principal security must have been duly stamped under sub-head 37. (1) does not in my opinion show or indicate that " security " in sub-head 37. (1) has a limited meaning and is confined to securities within the heading. The inclusion of the words " under sub-head (1) " in sub-head 37. (2), while it limits the scope of that sub-head, affords no ground in my opinion for reading into sub-head 37. (1) words which are not there, and which, if it had been the intention that the meaning of " security " should be so limited, could easily have been put there.

If the meaning to be given to the words in paragraph (1) was correctly decided in *Inland Revenue Commissioners v. Henry Ansbacher & Co.* (*supra*), as I think it was, I see no valid reason for concluding that the identical words of sub-head 37. (1) bear a different meaning. It follows that in my view it is necessary to consider in this case as it was in that, whether the instrument coming within the heading was in fact the only or principal or primary security.

On the other hand if it be held that in sub-head 37. (1) a different meaning is to be attached to the word " security " and that in that sub-head it means only a security which comes within the heading " Mortgage, Bond, Debenture " etc., the Debenture in this case was correctly charged to duty.

Before I turn to the consideration of the various instruments in this case, there is, however, one further matter with which I must deal.

Blair-Kerr J. held that the Debenture was not the primary security but was the principal security. I do not think that a different meaning is to be given to the word "primary" to that given to "principal". If that were the case, then two securities might be stamped under sub-head 37. (1), one as the primary, the other as the principal security. It is clear from sub-heads 37. (1) and (2) that only one security falling within the heading is to be stamped under sub-head 37. (1). If there is more than one security which comes within the heading and one is stamped under sub-head 37. (1), the other security or securities fall to be stamped under sub-head 37. (2).

The inclusion of the word "primary" does not add anything of substance to the word "principal". The two words signify that the security to come within 37. (1) must be the main security.

Turning now to the question whether the Debenture was the principal or primary security, it is necessary to consider in some detail the scheme for financing the construction of the tunnel between Hong Kong and Kowloon.

On 17th July 1969 a Financial Agreement was entered into between Lloyds and the appellants. That Agreement recited that the appellants had entered into a contract dated 26th June 1969 with contractors for the construction of the tunnel for H.K.$272,533,333 and wished to enter into a contract with engineers whereby they would pay them H.K.$8,965,000, and that Lloyds had agreed to make sums available to the appellants to assist the financing on the terms contained in the Agreement.

By Clause 2 Lloyds to assist the appellants in making payments to the contractors and engineers, agreed to make sums available to the appellants up to a limit of £14,750,000 by the purchase of Promissory Notes made by the appellants. The Notes were to be payable in London in sterling to the order of Lloyds. Their form was prescribed by the Financial Agreement. They were expressed to be Notes payable on demand and they were for varying amounts. A space was left in each Note for Lloyds to insert the date on which they purchased the Note and, although expressed to be payable on demand, the Agreement provided that they could only be presented by Lloyds on dates falling between 1st March 1973 and 1st September 1978, interest being payable to Lloyds from the date of purchase until presentation. If, however, there was default as defined in Clause 16 of the Agreement on the part of the appellants which continued unremedied, and a written notice and demand was made by Lloyds in accordance with that clause, all the Notes purchased by Lloyds and outstanding became payable when the written demand was made.

Clause 4 provided that before any purchase of a Note by Lloyds a number of conditions were to be satisfied. They included (*a*) the delivery to Lloyds of a "Trustee Letter" under which Lloyds were irrevocably appointed to hold and deal on the appellants' behalf with the Notes, which they were to release for purchase upon the presentation of valid claims by the engineers; (*b*) the delivery to Lloyds of five Guarantees; and (*c*) the issue to Lloyds of the Debenture under consideration duly stamped in accordance with the laws of Hong Kong.

Clause 7 provided that Lloyds would on the presentation of valid claims by the contractors and engineers, release Notes in accordance with the Trustee Letter and buy them and apply the proceeds in discharging the valid claims.

It was contended by the appellants before the Supreme Court of Hong Kong that the Financial Agreement itself was the principal or primary security but this contention was abandoned before the Board as the agreement, unlike the sale agreement in *Inland Revenue Commissioners v. Henry Ansbacher & Co.* (*supra*) did not itself contain an obligation to pay. Before the Board they contended that the Notes were the principal or primary security.

That the Notes were securities within the meaning of the Stamp Ordinance was not disputed. They were delivered to Lloyds on 24th July 1969. What in reality was their role?

Lloyds were to pay the valid claims of the contractors and engineers as they were presented. As they were, Lloyds were to purchase Notes to cover them, the purchase money going to the contractors and engineers. Unless there was default by the appellants, Lloyds would not recover the amounts paid by them until the dates of presentation some years later. In essence, therefore, there was a loan by Lloyds secured by the Notes and, unless there was default, repayable only on the stipulated dates. Unless there was default Lloyds could not get repayment before then. This complicated arrangement thus appears to have had advantages for both parties.

I do not in the circumstances find it possible to regard the provisions in the Financial Agreement involving the use of the Notes as just a colourable device adopted to avoid the imposition of stamp duty on the Debenture under sub-head 37. (1).

The Debenture was issued on 11th August 1969. It began with the words:—

> "ISSUE OF A COLLATERAL DEBENTURE TO SECURE LIABILITY UNDER CERTAIN PROMISSORY NOTES . . ."

and it recited that it was a term of the Financial Agreement that the appellants should furnish to the bank "further and collateral security for due payment of all principal moneys and interest payable under the said Notes".

Clause 1 (*a*) of the Debenture stated that in pursuance of the Financial Agreement and in consideration of the bank purchasing the Notes, the appellants covenanted with the bank to pay all principal moneys, not exceeding in the aggregate £14,750,000 "which may be or become payable to the bank . . . together with interest thereon . . ."

Clause 1 (*c*) stated:—

> "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 company under the Notes."

Clause 2, so far as material, reads as follows:—

> "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 DOTH 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 . . . 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".

This Debenture is not to be regarded as collateral because it was so described in the deed. Whether or not it was, depends on its contents and effect. Clause 1 contained a covenant not to pay a specific sum but to pay what might be due or become payable by virtue of the Notes, in other words, to pay the bank the amount of the Notes they had purchased whether or not the date of presentation had arrived. That obligation to pay duplicated and does not appear to have added anything to the obligation arising by virtue of the Notes and Financial Agreement.

Both the covenant and the charge created by Clause 2 relate to what may be or become payable under the Notes. In my view Blair-Kerr J. was right when he said in his judgment ". . . without the Promissory Notes no liability of any kind could arise. The Notes are the core of the whole scheme . . . The Promissory Notes are the primary security."

I see no ground from consideration of Clauses 1 and 2 of the Debenture for concluding that it was other than what it was represented to be, "a collateral debenture".

I do not consider that the requirement in the Financial Agreement that Lloyds should receive the Debenture before they were bound to purchase a Note as in any way indicating that the Debenture was the principal security. A number of other conditions precedent, including the giving of the Guarantees, had to be fulfilled before they became bound to do so and to me, it does not seem unreasonable that a bank should insist on having in its possession the collateral securities it was entitled to before becoming liable to purchase the Notes. The fact that they did so insist, does not in my opinion show or tend to show that the Debenture or the Guarantees were the principal security.

Under the Financial Agreement, in the event of default on the part of the appellants, the amount of the Notes purchased would not become immediately payable. Written notice of the default had to be given before the default was remedied and a written demand made after the default had remained unremedied for 10 days from the receipt of the written notice for the Notes to become immediately payable.

Under the Debenture the amounts of the Notes became immediately payable in the event of default and the bank immediately upon default might appoint a receiver of the company.

Thus under the Debenture the bank could in the event of default without delay demand payment whereas under the Financial Agreement the bank would first have to give written notice and then after the expiry of 10 days a written demand before they could sue for the amounts due to them.

It may well be that in the event of default the bank would choose to rely on the Debenture and not on the terms of the Financial Agreement. In view of this discrepancy between the terms of the two documents, is the Debenture to be regarded as the principal or primary security? I think not. Looking at the Financial Agreement, the main document, I think it was intended that the Notes should be the main and principal security, supported by other securities, the Guarantees and the Debenture. It is odd that the provisions of the Financial Agreement as to written notice and the written demand should not have been paralleled by similar provisions in the Debenture but the provisions as to the written notice and demand cannot have been intended to be of no effect and I do not think that the discrepancy between the two documents suffices

to make the Debenture the principal security and the Notes an additional or secondary security. That in my view is contrary to the general tenor of the Financial Agreement.

I am therefore of the opinion that the Debenture should not have been stamped under sub-head 37. (1).

I recognise that this conclusion may be regarded as revealing a lacuna in the Stamp Ordinance, as indeed it may be said did the decision in *Inland Revenue Commissioners v. Henry Ansbacher & Co.* (*supra*) in the Stamp Act but if there be gaps in a taxing statute which can be remedied only by the insertion of words it is the task of the Legislature and not of the judiciary to insert them and remedy the defect.

While it is true that sub-heads 37. (1) and (2) divide the documents referred to in the heading into two classes, as do paragraphs (1) and (2) under the similar heading in the Schedule to the Stamp Act, the decision in *Inland Revenue Commissioners v. Henry Ansbacher & Co.* was that a document was only stampable under paragraph (1) if there was not principal or primary security outside the heading. The House in that case thus rejected the Revenue's argument that in considering the applicability of paragraph (1) no regard should be had to instruments which were not within the heading.

It follows that if the decision in *Ansbacher* is followed, and the Promissory Notes were in fact the principal or primary security, this appeal should be allowed.

I think that that decision was right and should be followed and that the Notes were the principal or primary security and I would allow the appeal.

3131997—2 Dd. 178189 7/72

In the Privy Council

THE CROSS-HARBOUR TUNNEL COMPANY LIMITED

v.

THE COLLECTOR OF STAMP REVENUE

Printed by HER MAJESTY'S STATIONERY OFFICE
1972