

4, 1976

32 OF 1975

IN THE PRIVY COUNCIL

ON APPEAL FROM THE SUPREME COURT OF HONG KONG

APPELLATE JURISDICTION

B E T W E E N :-

LAP SHUN INDUSTRIAL TEXTILES COMPANY  
LIMITED

Appellant

- and -

THE COLLECTOR OF STAMP REVENUE

Respondent

CASE FOR THE APPELLANT

1. This is an appeal from a Judgment dated 24th January 1975 of the Supreme Court of Hong Kong (Appellate Jurisdiction), dismissing an appeal from a Judgment of Garcia D.J. in the District Court dated 31st July 1974, whereby he dismissed an appeal by the Appellant against an assessment to stamp duty. 10

2. The Appellant bought an area of land in the New Territories of Hong Kong by arm's length bargain from an unconnected party. The price was Hong Kong \$16,465.68. Stamp Duty calculated ad valorem on that figure would be \$330. However, the Collector of Stamp Revenue ("the Collector") claimed that duty was payable on a higher figure, which after some vacillation he determined at \$37,500, the duty being \$750. His argument is that a cash purchase between unrelated parties can be treated for stamp duty purposes as a "voluntary disposition" if the price, though negotiated at arm's length, is less than his own view of the market value of the property sold. The proposition is startling and novel. The relevant statutory wording has been in force for over 60 years in the United Kingdom but in no case or text-book is there any suggestion that it has the remarkable effect for which the Collector now contends. Nevertheless his argument has been upheld by the courts in Hong Kong. The amount involved in the present case is small, but the question of principle is of major importance. In the Appellant's respectful submission, the Collector's claim that he can assess duty as he has done in this case fully merits being considered and pronounced upon by the highest appellate body. 20 30

P.117

3. In Hong Kong stamp duty is charged under the Stamp Ordinance, "the Ordinance"), which in many respects is modelled on the Stamp Acts of the United Kingdom. Section 27 and Head 53 of the Schedule impose duty on any voluntary disposition. The duty is charged on the value of the property transferred or conveyed. The wording of section 27 is largely derived from Section 74 of the Finance (1909-10) Act 1910 of the United Kingdom.

4. Before the enactment of section 74 ad valorem duty was already charged in the United Kingdom on the consideration for conveyances on sale, but there was only a small fixed duty on conveyances by way of gift. 10  
Section 74 introduced for the first time an ad valorem duty on voluntary dispositions and sub-section (5) defined the conveyances or transfers to which it applied. Section 27(4) of the Ordinance is with immaterial exceptions, in the same terms as section 74(5) of the United Kingdom Act. This appeal turns on the section 27(4), and therefore it is set out in full at this point.

"(4) Any conveyance or transfer (not being a disposition made in favour of a purchaser or incumbrancer or other person in good faith and for valuable consideration) shall for the purposes of this section be deemed to be a 20  
conveyance or transfer operating as a voluntary disposition inter vivos, and (except where a marriage is the consideration) the consideration for any conveyance or transfer shall not for this purpose be deemed to be valuable consideration where the Collector is of opinion that by reason of the inadequacy of the sum paid as consideration or other circumstances, the conveyance or transfer confers a substantial benefit on the person to whom the property is conveyed or transferred."

5. In the Appellant's submission the manifest purpose of the second 30  
part of the sub-section is to prevent avoidance of the duty on voluntary dispositions by gifts being dressed up as sales, and the property concerned being transferred at a deliberate and substantial undervalue. However, the Collector contends that the statute has a wider effect, and catches conveyances between parties at arms length made without any intention to achieve the effect of a gift, if, in the Collector's view, the property sold is worth substantially more than the price. The

Appellant submits that the Collector's interpretation is unreasonable and wrong. The provision was designed to block an obvious loophole in voluntary disposition duty, but he is seeking to use it for a difference purpose altogether; to gain additional revenue from transactions which were already fully covered by the duty on conveyances on sale.

6. The relevant facts are not in dispute and may be summarised as follows:-

- Record p.12 (a) By an assignment dated 8th February 1973 the Appellant purchased certain Crown leases of areas of land in the New Territories for \$16,465.68. The vendor was The Chartered Bank, and the parties were at arm's length. 10
- (b) The document was presented for stamping in the usual way two days later, and duty of \$330 was paid.
- Record p.3 (c) However, on 2nd October 1973 the Collector wrote to the Appellant stating that the property had been valued at \$76,800 and assessing duty on that amount on the footing that the document was deemed to be a voluntary disposition under s.27(4).
- (d) Having paid the duty claimed (as required by section 18 of the Ordinance) the Appellant appealed against the assessment. 20
- Record p.10
- Record p.7 (e) On 12th February 1974 the Collector wrote again stating that the value had been revised to \$37,500 (less than half the previous valuation) and making a new assessment of duty calculated on that figure. Like the previous one, the assessment referred to section 27(4) of the Ordinance. The Appellant maintained its appeal.

Record pp.915

Record pp.22-27

(1924)A.C.270  
at 282-3  
(1945) 1 All  
E.R. 329 at 395

7. Under section 18 of the Ordinance the appeal is by way of a Case stated formulated by the Collector. The Case and the exhibits thereto are set out in the Record. At first instance the appeal was heard by Garcia D.J. in the District Court. In a reserved Judgment he dismissed the appeal. He held that, where property is purchased at less than its current value, the conveyance, even if at arm's length and to a purchaser in good faith, "confers a substantial benefit" on the purchaser within the meaning of section 27(4) and therefore is to be treated as a voluntary disposition. He relied on two passages from English authorities - one from the speech of Viscount Finlay in Baker v. I.R.C. and the other from the Judgment of Wrottesley J. in Wigan Coal and Iron Co.Ltd. v. I.R.C.

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8. The Appellant makes three comments on the authorities referred to by Garcia J.

(a) Their facts were remote from those of the case. They were truly concerned with transactions involving conscious and deliberate bounty. The Baker case involved a family re-settlement, whereby a beneficiary conferred valuable interests on his relatives, retaining only a very small provision for himself. In the Wigan Coal case a company benefited its shareholders by transferring to each of them assets worth over £149 in return merely for the cancellation of 10/- of paid up capital.

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(b) The words of Viscount Finlay on which Garcia D.J. relied were taken and applied wholly out of their context. Viscount Finlay did not have a case such as the present one in mind. Indeed, he only reached with reluctance and "on the whole, after consideration" his conclusion that the statutory wording forced the resettlement to be treated as a voluntary disposition. The inference is that His Lordship thought the case close to the border line, and it is inherently improbable that he would have reached the same conclusion about a

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(1924) A.C. at 284

commercial sale between unconnected parties without any intention by one to confer bounty on the other.

(c) Garcia D.J. did not refer to other dicta in the Baker case which powerfully supported the Appellant's argument. In particular, Viscount Cave L.C., having referred to the words of the statute on which the Collector relies, said:

"I think that means that a conveyance, although for value, comes within the section if it confers upon the grantee a substantial benefit beyond what that grantee gives, or (in other words) if it is in substance a gift to the person taking under it after allowing for any consideration which he brings in."

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On no footing was the assignment in this case in substance a gift from the Chartered Bank to the Appellant.

9. The Appellant appealed from the decision of Garcia D.J. to the Supreme Court of Hong Kong. The Full Court (Huggins and McMillin J.J.) dismissed the appeal with costs. The Appellant submits that the Court's decision was based on onus, to which disproportionate weight was given, and that no injustice is done to the judges' reasoning to summarise it as follows: although they considered that the Collector's argument was unsatisfactory in several respects, they were not wholly persuaded that it was wrong, and therefore upheld it. For example, McMillin J. says:

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Record pp.33 to 50

Record p.49

".....notwithstanding the compelling words quoted above from the Judgment in Baker's case, neither of those cases can be said to afford conclusive support to (counsel for the appellant's) contention.....I can find no compelling reason to say that the Collector should not be allowed to interpret his powers as permitting him, in turn, to deem that there has been a "substantial benefit"

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irrespective of what the parties themselves may have felt or intended in relation to their transaction."

The learned judge appears to begin with the presumption that the Collector is right, and only if the authorities against the Collector were "conclusive" or the reasons against him "compelling" would he depart from his presumption and decide in favour of the Appellant.

10. It is submitted that the Full Court's approach was wrong. The Case Stated raises a pure question of law, and the Court should consider it without predispositions in favour of either party. If the Full Court had done so it is distinctly possible (in view of other passages in the Judgments) that the appeal would have been allowed. 10

11. The Appellant submits that the second part of section 27(4) of the Ordinance, on which the Collector relies, does not apply to a sale at arm's length where the purchaser gets a good bargain. The words "confers a substantial benefit" are at least as capable of being construed subjectively (in the sense of being intended to confer gratuitous bounty) as objectively, and should be construed in that sense, both because of the context in which they appear and because of the unreasonable results which would follow if the Collector's interpretation were correct.

12. As regards the context, section 27 as a whole is concerned with "voluntary dispositions" of which the typical instance is a gift. The clear object of section 27(4) is to prevent avoidance by sales at deliberate undervalues, which are in substance but not in form gifts. It should be interpreted accordingly. 20

13. Moreover the Collector's interpretation would lead to so unreasonable results and would create so unsatisfactory a situation that it cannot possibly have been intended by the Legislature. He and his officers would have an excessively wide discretion, apparently exercisable without any time limit, to review and appraise bargains made between independent parties and the discretion would not be subject to effective control by the Courts, particularly since section 6A of the Ordinance 30

(which has no United Kingdom equivalent) empowers him to ascertain the value of property "in such manner as he thinks fit". A purchaser of property, however much at arm's length he and the vendor may have been, will be left in a state of uncertainty unless he submitted his conveyance for adjudication. He could never be certain that he would not be subjected to a further demand for stamp duty, nor could he be sure that he had a good title to the property. A person investigating a title could never be sure that the documents were adequately stamped no matter how long ago they may have been exercised. The authorities about the effect of incorrect stamping on a document of title are unsatisfactory and inconsistent. In Powell v. London v Provincial Bank Lindley L.J. said:

(1893) 2 Ch.  
555 at 560

"No case that I know of can be cited to show that.....  
an erroneous stamp would invalidate the deed".

(1917 2 Ch.  
100 at 106

On the other hand, in re Indo-China Steam Navigation Co. Eve J. said it was

"Undoubtedly the fact that the registration of the transfer while inadequately stamped could not operate to bring about a legal transfer of the shares into the name of the transferee".

Accordingly, the practical effect of the Collector's argument, if upheld, would either be to create uncertainty in ordinary conveyancing transactions, or to stimulate a flood of requests for the stamp duty on ordinary sales to be adjudicated under section 17 of the Ordinance - a result which might resolve doubts as to title, but which would certainly increase delays and expense and would upset 60 years of accepted conveyancing practice.

14. The wording of section 27(4) does not necessitate an interpretation which might lead to such unsatisfactory results. The Appellant submits that the proper interpretation is that the sub-section does not apply at all to arm's length purchases, and that the Collector was wrong in seeking to apply it to the arm's length purchase involved in this case.

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15. The Appellant humbly submits that the appeal should be allowed with costs here and in the Courts below, that the Judgment of Garcia D.J. and the Order of the Full Court should be reversed, and that the question set out in the Case Stated should be answered in the sense that stamp duty is payable on the actual price of the property, for the following among other

REASONS

- (1) BECAUSE the purchase by the Appellant from the Chartered Bank was an arm's length bargain in favour of a purchaser in good faith and for valuable consideration. 10
- (2) BECAUSE the purchase was not a voluntary disposition and was not intended to achieve the effect of a voluntary disposition by an indirect form.
- (3) BECAUSE, having regard to the context of section 27(4) of the Ordinance, the references therein to "the inadequacy of the sum paid as consideration" and to a "conveyance or transfer (which) confers a substantial benefit on the person to whom the property is conveyed or transferred" were intended only to apply and do only apply to a transfer made at a conscious under-value with the purpose of conferring a benefit on the transferee while avoiding the form of a simple gift. 20
- (4) BECAUSE the argument of the Collector, if upheld, would place an excessive discretion in his hands, would increase substantially the requests for adjudication of stamp duty on ordinary purchases and generally would tend to create uncertainties about titles to property.