

4, 1976

O N A P P E A L
FROM THE FULL COURT OF HONG KONG
(APPELLATE JURISDICTION)

B E T W E E N
LAP SHUN TEXTILES INDUSTRIAL COMPANY LIMITED
Appellant
- and -
THE COLLECTOR OF STAMP REVENUE Respondent

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C A S E F O R T H E R E S P O N D E N T

1. This is an Appeal from the judgment of the Full Court of Hong Kong (The Honourable Mr. Justice Huggins, President, and The Honourable Mr. Justice McMullin) delivered on 24th January 1975.

RECORD

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2. The relevant subsections of Section 27 of the Stamp Ordinance, Chapter 117 (hereinafter called "the Ordinance") read as follows :-

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"27(1) Subject to subsection (1A), any voluntary disposition inter vivos, and any conveyance or transfer operating as a voluntary disposition inter vivos, shall be chargeable with stamp duty under head 53 in the Schedule.

(1A) Any transfer, including a letter of renunciation, operating as a voluntary disposition inter vivos of shares or marketable securities shall be chargeable with duty under head 48(1) in the Schedule.

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(2) Notwithstanding anything in section 17, the Collector may be required to express his opinion under that section on any conveyance or transfer operating as a voluntary disposition inter vivos, and no such conveyance or transfer shall be deemed

to be duly stamped unless the Collector has expressed his Opinion thereon in accordance with that section.

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- (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 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."

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3. The Schedule to the Ordinance provides inter alia, as follows :-

- (a) Under Head 53 (2): (voluntary disposition inter vivos of land or other property; and conveyance or transfer of land or other property operating as a voluntary disposition inter vivos other than that to which sub-head (1) of this head applies is chargeable with a duty at the rate of ₹2 for every ₹100 or part thereof of the value of the land or other property. 30
- (b) Under Head 19(2): conveyance on sale other than a conveyance on sale to which sub-head (1) of this head applies the duty to be calculated on the amount of the value of the consideration on the day of the date of the instrument is chargeable with duty at the rate of ₹2 for every ₹100 or part thereof of the amount or value of the consideration.

Neither sub-head (1) of Head 53 nor sub-head (1) of Head 19 is relevant for the purposes of this Appeal. 40

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4. On 8th February 1973 a conveyance on sale (hereinafter called "the Conveyance") was entered into between The Chartered Bank of the one part and the Appellant of the other part. The stated consideration for the conveyance was ₹16,465.68.

5. On 21st February 1973 the Conveyance was stamped with \$330.00, being stamp duty at the rate of \$2.00 per \$100 on the stated consideration in accordance with Head 19(2) of the Schedule to the Ordinance.

6. It is common ground that the Conveyance was a conveyance on sale within the meaning of the Ordinance and prima facie fell to be assessed under Head 19(2) on the amount or value of the consideration on the day of the date of the instrument.

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7. The Respondent conceded:

(a) that the stated consideration was the whole consideration for the Conveyance;

(b) that the parties to the Conveyance had bargained at arm's length; and

(c) that the Appellant, as purchaser, had acted in good faith.

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8. The District Officer, Yuen Long, assessed the value of the property to which the Conveyance related at \$76,800.00. The Respondent took the view, on this advice, that the true value of the property was \$76,800.00, that the stated consideration was inadequate and conferred a substantial benefit on the Appellant within the meaning of Section 27(4) of the Ordinance and accordingly that by virtue of Section 27(1) the Conveyance fell to be charged with stamp duty under Head 53(2) of the Schedule to the Ordinance as a conveyance operating as a voluntary disposition inter vivos. The Respondent therefore called upon the Appellant on 2nd October 1973 to pay duty assessed under Head 53(2), the additional duty so assessed being \$1,206.00 and making, with the \$330.00 originally paid, a total of \$1,536.00.

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9. Being dissatisfied with this assessment, on 19th October 1973 the Appellant appealed against the assessment in accordance with Section 18 of the Ordinance and, through solicitors, formally required the Respondent to state and sign a case. They stated that their purpose in so doing was to test whether Section 27(4) had any application to a transaction between a vendor and a purchaser in good faith and for valuable consideration and that they would contend that the Respondent had no power in such a case to raise an assessment to stamp duty otherwise than on the amount of the consideration actually paid as shown in the Conveyance. The District Officer subsequently revised his valuation of the property to \$37,500 and on

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12th February 1974 the Respondent informed the Appellant's solicitors that he was prepared to adopt that figure in substitution for the assessed value of \$76,800.00. On the basis of a value of \$37,500 (which, for the purposes of this case, the Appellant has accepted as the true value of the property), the stamp duty payable on the Conveyance under Section 27 would amount to \$750.00.

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10. The case stated in response to the Appellant's request was dated 26th March 1974 and was heard in the Victoria District Court of Hong Kong by the District Judge (The Honourable Judge Garcia) on 21st June 1974. The Respondent's contentions are summarised in paragraph 10 of the case stated. Four questions were submitted for the opinion of the Court (see paragraph 12 of the case stated) to the following effect :-

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(1) Whether in the circumstances of this case the stated consideration in the Conveyance of \$16,465.68 should or should not be deemed to be "valuable consideration" for the purposes of Section 27 of the Ordinance.

(2) Whether or not the Conveyance "conferred a substantial benefit" on the Appellant within the meaning of Section 27 of the Ordinance.

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(3) Whether the Conveyance was chargeable with stamp duty as assessed by the Respondent.

(4) If not, with what duty it was chargeable.

pp. 22-27

11. On 31st July 1974 the District Judge gave judgment in favour of the Respondent, answering the questions set out in paragraph 10 above as follows :-

(1) the stated consideration in the Conveyance is not deemed to be valuable consideration for the purpose of Section 27(4) of the Ordinance.

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(2) Yes. A substantial benefit had been conferred on the Appellant by the Conveyance.

(3) Yes. The Conveyance was chargeable with duty of \$750.00 "as assessed by the Respondent."

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12. In answering the above questions the District Judge overlooked the fact that the appeal by way of case stated was against the Respondent's assessment of 2nd October 1973 (2% on \$76,800 = \$1,536.00 - see paragraph 8 above) and not against the lower sum which the Respondent had indicated that he was prepared to accept in February 1974 (2% on \$37,500.00 = \$750.00 - see paragraph 9 above).

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Strictly therefore the District Judge's answer to question (3) ought to have been "No" and to question (4) "\$750.00".

On this basis the Appellant had paid \$786.00 too much duty. Immediately after the District Judge's judgment, therefore, the Respondent offered to refund this excess but the Appellant subsequently informed the Respondent that the excess would be collected at the final conclusion of the appeal.

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13. On 14th August 1974 the District Judge granted the Appellant leave to appeal to the Full Court of Hong Kong and after a hearing before the Full Court (The Honourable Mr. Justice Huggins, President, and Mr. Justice McMullin) the appeal was by order dated 24th January 1975 dismissed with costs.

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14. In outline, the submissions made on behalf of the respective parties were as follows :-

(a) For the Appellant

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(i) On the facts, the Conveyance was "a disposition made in favour of a purchaser in good faith and for valuable consideration". It was therefore excluded from the operation of Section 27(4) by virtue of the words in parenthesis in that subsection. The words "valuable consideration" in that parenthesis were not governed by the later words of the subsection "the consideration for any conveyance or transfer shall not for this purpose be deemed to be valuable consideration where the Collector is of opinion" etc. If it were so governed, the parenthesis would be nullified because every conveyance which was excluded by the words in the parenthesis would invariably be included in the later words of the subsection. Those later words were a proviso which was not related to the parenthesis.

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(ii) The subsection must be read as a whole. If the Respondent's contention is correct, every conveyance would necessitate an application for adjudication under Section 27(2).

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(iii) The later words of Section 27(4) referred only to cases where the Conveyance "confers a substantial benefit" on the transferee. They were therefore only contemplating cases where there was a gift or quasi-gift. A gift

involves an intention to give and a conveyance cannot "confer" a benefit which was not intended. In any event, the subsection should not be accorded a wide interpretation which would cover the conferring of an unintended benefit.

(b) For the Respondent

- (i) For a conveyance to come within the parenthesis in Section 27(4) and thus be excluded from the operation of the Section it must be made in good faith and for "valuable consideration". These last two words do not carry the same meaning as in the law of contract. They have a special meaning assigned to them by virtue of the second part of subsection (4) which provides that consideration is not for this purpose to be deemed to be valuable where (put shortly) the Respondent is of opinion that by reason of the inadequacy of the consideration the conveyance confers a substantial benefit on the transferee. 10
- (ii) Subsection (4) must be read as a whole. The words "valuable consideration" are not defined elsewhere in the Ordinance. If the reference to valuable consideration in the parenthesis is not governed by the second part of the subsection (the only other place in Section 27 where the words appear), the Section would be nugatory. Wholesale evasion of the Section would be possible by inserting in a conveyance a consideration which, although not manifestly nominal, was well below the true figure. 20
- (iii) Although the marginal note to Section 27 refers to "gifts inter vivos" this has no interpretation significance by virtue of Section 18 of the Interpretation and General Clauses Ordinance, Chapter I. 30
- (iv) The words in Section 27(4) must be given their ordinary meaning. So construed, they are not limited to gifts or quasi-gifts: they are wide enough to cover not only a gift but also a genuine case of purchase and sale where, in the Respondent's view, the consideration is inadequate. 40
- (v) There is no justification for restricting the

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ambit of Section 27(4). It applies wherever in the Respondent's opinion "the conveyance or transfer" confers a substantial benefit on the transferee. The use of these last-quoted words (in preference to some such words as "the transferor") shows that the test of substantial benefit is one of fact and does not depend on the will or intention of the parties to the conveyance or transfer.

(vi) Section 27 is similar, mutatis mutandis, to Section 74 of the Finance (1909-10) Act 1910 in the United Kingdom and although the English cases cited in the District Court were not dealing with arms-length purchases for value they are relevant when considering the ambit and extent of subsection (4).

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15. The President in his judgment remarked that the subsection is unhappily worded. However he agreed with the Respondent that "valuable consideration" has the special meaning assigned to it by the second part of the subsection.

pp. 33-39

p. 35 1.17

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16. He rejected the Appellant's contention that if the Respondent's interpretation is correct the second part of the subsection will negate the words in the parenthesis. In other words every conveyance excluded by the words in the parenthesis would invariably be included in the second part of the subsection. He said that a conveyance on sale made in good faith and for a consideration which was both valuable and adequate would be excluded and would not be affected by the second part of the subsection.

p. 35 1.15

p.36 1.17

17. The President also rejected the Appellant's view that the Respondent's interpretation would necessitate application for adjudication in every case of a conveyance on sale.

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18. The President accepted the Appellant's submission that the second part of the subsection is a proviso but said that "unless it is a proviso which relates to the words in parenthesis it seems to me to make nonsense". If the conveyance is not covered by the words in the parenthesis that conveyance "shall for the purposes of this section be deemed to be a conveyance operating as a voluntary disposition inter vivos". He said that the mandatory result could not be avoided no matter how one read the second part of the Section.

p.37 1.23

p.33 1.13 19. The President disagreed that Section 27(4) only contemplated cases where there was a gift or quasi-gift and further rejected the Appellant's contention that a conveyance could not confer a benefit which was not intended. He disagreed that a conveyance could not confer a benefit unless the assignor in fact intended to convey that benefit. He did not think that the words used by the Legislature confined them to cases of gift or quasi-gift or that to read 'benefit' as a synonym for 'gift' could be justified. 10

p.33 1.29
p.33 1.31
p.39 1.1 20. The President remarked that the only basis on which he might feel able to allow the Appeal would be if one could say that the result was one which the Legislature could not have intended. He was mindful of cases where serious injustice might result from the Respondent's interpretation but equally mindful of the purpose of the Ordinance which was to raise revenue and that a sale at an inadequate price even though unintentionally inadequate might tend to deprive the revenue of duty which could normally be payable. 20

p.39 1.13 21. The President quoted Lord Cairns in Partington v. The Attorney General (1869) 4 L.R.H.L. 100 at page 122

".... as I understand the principle of all fiscal legislation, it is this: If the person sought to be taxed comes within the letter of the law he must be taxed, however great the hardship may appear to the judicial mind to be."

p.39 1.20 and agreed with the Respondent that the District Judge had come to the right conclusion. The President was therefore in favour of dismissing the appeal. 30

p.42 1.14
p.42 1.22 22. Like the President, Mr. Justice McMullin rejected the Appellant's contention that if the Respondent's interpretation of Section 27(4) was correct the second part of the subsection would operate to sweep back into the ambit of the subsection all such transfers as had been excepted from its operation by the words in parenthesis in the first part. A transfer for valuable consideration in the ordinary sense would be exempted unless and until the Respondent after determination declared the consideration not to be valuable. That would occur only in cases which showed striking discrepancy between the market price and the purchase price paid. 40

p.42 1.33 23. Mr. Justice McMullin also did not accept the Appellant's submission that if the Respondent's

interpretation was correct there would be no occasion when the Respondent would not be requested to express his opinion under Section 27(2). He pointed out that the Respondent was given two separate powers under Section 27. Subsection (2) envisaged a situation where the parties to a voluntary disposition actually solicited the Respondent's opinion, whereas subsection (4) envisaged a case where the Respondent of his own motion queried the nature of a disposition. The learned Judge agreed that if the Respondent was of the opinion that the consideration was inadequate, he would in effect be doing so by reference to what he deemed to be the proper market value and might therefore be said to be performing his function of assessment under subsection (2) as well as under subsection (4). But the two operations were nevertheless distinct.

24. Mr. Justice McMullin considered that the main substance in the Appellant's argument lay in the contention that the final words of subsection (4) were not apt to cover a genuine situation of purchase and sale. He agreed with the Appellant that the two English cases namely Baker v. The Commissioner of Inland Revenue (1924) A.C.270 and Wigan Coal and Iron Company Limited v. Inland Revenue Commissioners (1945)

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† All E.R. 392 relied upon by the learned District Judge did not relate to purchase and sale situations and he was attracted by the argument that it was difficult to apply the notion of conferring benefit to a genuine purchase and sale situation. However he was of the view that as the Legislature instead of making the value of the property the determinant of the quantum of duty had resorted to the language of benefit it was not possible to look beyond the transfer itself to the intention of the parties. He agreed with the learned District Judge and the Respondent that by using the words "conveyance or transfer" in the subsection instead of words such as "transferor" the Legislature intended to exclude any implication of will or intention.

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25. Mr. Justice McMullin was of the opinion that the two English cases above cited were "other circumstances" cases within the meaning of subsection (4) and he said that where (as in the instant case) it was not the "other circumstances" of the transaction but merely the "inadequacy of the sum paid as consideration" which was in question he could find no compelling reason for saying that the Respondent should not be allowed to interpret his powers as permitting him to deem that there had been a "substantial benefit" irrespective of what the parties themselves might have felt or intended. Accordingly, but not without some reluctance, he

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concluded that the words of subsection (4) were to be read simply as they stood and that the Appeal must be dismissed.

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

R E A S O N S

- (1) BECAUSE on its true construction subsection (4) of Section 27 of the Ordinance applies to a purchase and sale even when conducted in good faith and at arms length. 10
- (2) BECAUSE on the true construction of the said subsection the Appellant's case does not come within the words in parenthesis in the said subsection.
- (3) BECAUSE by reason of Section 5(4) of the Ordinance the Respondent has an obligation to recover duty due on unstamped or understamped documents. 20
- (4) BECAUSE the reasons given by the Respondent in the case stated and by the learned District Judge in his judgment (save as regards the purely technical oversight in answering Questions 3 and 4 as mentioned in paragraph 12 above) were correct.
- (5) BECAUSE the reasons given by the President and Mr. Justice McMullin in their respective judgments were correct. 30

MICHAEL WHEELER

WILLIAM P.K.LEE

No.32 of 1975

IN THE PRIVY COUNCIL

O N A P P E A L
FROM THE FULL COURT OF HONG KONG
(APPELLATE JURISDICTION)

B E T W E E N

LAP SHUN TEXTILES INDUSTRIAL
COMPANY LIMITED Appellant

- and -

THE COLLECTOR OF STAMP REVENUE
Respondent

CASE FOR THE RESPONDENT

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