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to sell and the Appellant agreed to purchase for a sum of \$10,800,000 (Hong Kong Dollars ten million eight hundred thousand) various leasehold properties as specified in Parts I and III of the Schedule thereto, with the exceptions of items (1) and (2) in Part I of the said Schedule. The Agreement by Clause 3 thereof further provided that the said purchase price of \$10,800,000 should be paid in manner following: as to \$450,000.00 (Dollars Four hundred and fifty thousand) upon the completion of the assignment of the properties and as to the balance thereof by 23 equal consecutive annual instalments of \$450,000.00 each commencing on 27th October 1963 and on the 27th day of October in each succeeding year. The Agreement further provided by Clause 3 thereof that no security of any nature whatsoever should be afforded or given by the Appellant to the Vendor to secure the said annual instalments and also that the Appellant should be entitled to discharge the balance of the purchase price earlier than by the aforesaid instalments if he should so desire. By Clause 4 of the Agreement the Appellant agreed to pay to the Vendor interest on the balance of the purchase price for the time being outstanding at the rate of 1 per cent per annum such interest to be paid quarterly on the 31st day of March, the 30th day of June, the 30th day of September and the 31st day of December in each year.

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pp.10-17 (b) By an Indenture (hereinafter called "the Deed of Assignment") dated 1st November 1962 made between the Hong Kong & Shanghai Bank, Hong Kong (Trustee) Ltd. (hereinafter called "the Trustee") of the 1st part, the Vendor of the 2nd part and the Appellant of the 3rd part (which Indenture was expressed to be made in pursuance of the Agreement and in consideration of the sum of Hong Kong dollars Ten million eight hundred thousand (\$10,800,000) agreed to be paid by the Appellant to the Vendor in accordance with the Agreement), the Trustee at the request and by the direction of the Vendor assigned and the Vendor assigned and confirmed unto the Appellant the leasehold properties therein specified.

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(c) The Deed of Assignment was submitted to the Respondent (the Collector of Stamp Revenue) on 28th November 1962 for assessment of Stamp Duty.

(d) The Respondent assessed the duty with which the Assignment was, in his opinion, chargeable under the Stamp Ordinance, Cap.117 as follows:-

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Under Head 21 of the Schedule
to the Stamp Ordinance:
2% of \$10,800,000.00 - \$216,000.00

In accordance with Section 6
of the Stamp Ordinance:
Excess Stamp Duty -
3% of \$10,800,000.00 - \$324,000.00
\$540,000.00

10 (e) On 30th November 1962, Messrs. Lo and Lo on behalf
of the Appellant, paid to the Collector the sum of
\$540,000.00 in settlement of the stamp duty as assessed,
and at the same time, notified the intention of the
Appellant to appeal against the assessment.

20 (f) The Deed of Assignment was re-submitted to the
Collector on 29th December 1962 for formal adjudication
in accordance with Section 17 of the Stamp Ordinance
Messrs. Lo and Lo, in accordance with Section 18(1),
then confirmed the Appellant's intention to appeal
against the assessment and requested the Respondent
to state a case for the opinion of the District Court
for this purpose.

30 (g) On the 9th day of May 1964 the Respondent duly
stated and signed a Case for the opinion of the District
Court. By the said Case Stated the question submitted
for the opinion of the Court was whether stamp duty
was properly chargeable on the sum of \$10,800,000
appearing in the Deed of Assignment and if the said
sum was not the amount or value of the consideration
for which stamp duty was chargeable under Head 21 of
the Schedule to the Stamp Ordinance what was the amount
or value of the consideration for the said assignment
as on the date of such assignment. pp.1-5

(h) In the said Case Stated the contentions of the
Appellant were set forth as follows:- p.4

40 "(1) Under the Assignment as drawn, the
consideration is not the sum of \$10,800,000.00
simpliciter but is expressed to be the sum of
"\$10,800,000.00 agreed to be paid by the assignee
to the Vendor in accordance with the said
Agreement". The Agreement makes provisions for
\$450,000.00 to be paid upon completion of the
assignment and it is not disputed that the 5% ad
valorem duty is payable on that amount.
Paragraph 3 of the Agreement, however, makes
provisions for the balance to be paid over a
period of 23 years. For the purpose of Stamp
Duty under Head 21 of the Schedule to the Stamp

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Ordinance, Cap.117 the amount or value of the consideration must be reckoned on the day of the date of the Assignment. The balance of the consideration must therefore, be discounted in order to arrive at the value of the consideration as at the time of execution; and

(2) the consideration over a period of 24 years is \$10,800,000.00 together with interest at the rate of 1% per annum on the outstanding amount. Therefore, the consideration at the time of execution must be far less than \$10,800,000.00 and this lesser sum is the proper sum on which the stamp duty ought to be calculated in that that is the value of the consideration as on the day of the date of the instrument". 10

(i) In the said Case Stated the contentions of the Respondent were set forth as follows:-

"(i) the amount of the consideration for the sale of the various properties is clearly expressed to be the sum of \$10,800,000.00. Moreover, this sum does not include any element of interest since separate provisions are made under Clause 4 of the Agreement dated the 27th August 1962 whereby the Purchaser agrees to pay interest on the balance of the purchase price for the time being outstanding at the rate of 1 per cent per annum. The instalments of the purchase price to be paid over a period of 23 years must form part of the consideration for sale as at the date of the instrument as provided by Section 36 of the Stamp Ordinance Cap. 117, and 20 30

(ii) the stamp duty with which the Deed of Assignment dated 1st November 1962 is chargeable has been correctly assessed as set out in paragraph 4 hereof".

3. The relevant provisions in the Stamp Ordinance (Cap.117) are as follows:- 40

(a) Schedule

"21. Conveyance on Sale the duty to be calculated on the amount or value of the consideration on the day of the date of the instrument".

(b) Section 34(1) of the Ordinance provides as follows:-

"34.(1) Where an instrument is chargeable with ad valorem duty in respect of any money in currency other than the currency of the Colony, the duty shall be calculated on the value, on the day of the date of the instrument, of the money in the currency of the Colony according to the current demand rate of exchange".

(c) Section 35 of the Ordinance provides as follows:-

10 "35.(1) Where the consideration or any part of the consideration for a conveyance on sale consists of any shares or marketable securities the conveyance is to be charged with ad valorem duty in respect of the value of the shares or securities on the day of the date of such conveyance

20 (2) Where the consideration or any part of the consideration for a conveyance on sale consists of any security not being a marketable security, the conveyance is to be charged with ad valorem duty in respect of the amount due on the day of the date thereof for principal and interest upon the security".

4. Previous enactments in Hong Kong were as follows:-

(a) Stamp Ordinance of 1866. Schedule: Item 13

30 "13. Conveyance assignment or instrument of any kind or description whatsoever not specially charged with duty under this Schedule executed for the transfer for valuable consideration either by way of mortgage or otherwise of any property moveable or immovable or of any Right title Claim, or interest in, to or upon the same 25 cents for every \$100..... of the consideration money or amount secured"

(b) The last mentioned enactment was repealed and replaced by the Ordinance of 1884 which made the following provision;-

40 "14. Conveyance or assignment on sale, to be levied on the amount or value of the consideration money, such consideration money to include any sum payable by the purchaser in respect of any mortgage or other debt remaining upon the property purchased or released by such purchaser to the Vendor".

5. The history of the comparable English legislation is as follows:-

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(a) The Schedule to the Stamp Act 1850 charged ad valorem duty on:-

"Conveyance whether grant, disposition, lease, assignment, transfer, release, renunciation or of any other kind of description whatsoever, upon the sale of any lands, tenements rents annuities or other property real or personal....
.....

[Then follows ad valorem scale] 10

.....

The said Schedule also provided:-

"And it is hereby directed, that the Purchase Money or Consideration shall be truly expressed and set forth in Words at Length in or upon every such principal or only Deed or Instrument of Conveyance; and where such Consideration shall consist either wholly or in part of any Stock or Security, the Value thereof respectively, to be ascertained as hereinafter mentioned, shall also be truly expressed and set forth in manner aforesaid in or upon every such Deed or Instrument; and such Value shall be deemed and taken to be the Purchase or Consideration Money, or Part of the Purchase or Consideration Money, as the Case may be, in respect whereof the ad valorem Duty shall be charged as aforesaid 20 30

And where the Consideration or any Part of the Consideration shall be any Stock in any of the Public Funds, or any Government Debenture or Stock of the Bank of England or Bank of Ireland, or any Debenture or Stock of any Corporation, Company, Society, or Persons or Person, payable only at the Will of the Debtor, the said Duty shall be calculated (taking the same respectively, whether constituting the whole or a Part only of such Consideration) according to the average selling Price thereof respectively on the Day or on either of the Ten Days preceding the Day of the Date of the Deed or Instrument of Conveyance, or if no Sale shall have taken place within such Ten Days, then according to the average selling Price 40

thereof on the Day of the last preceding Sale; and if such Consideration or Part of such Consideration shall be a Mortgage, Judgment, or Bond, or a Debenture, the Amount whereof shall be recoverable by the Holder, or any other Security whatsoever, whether payable in Money or otherwise, then such Calculation shall be made according to the Sum due thereon for both Principal and Interest".

10 (b)(i) The Stamp Act 1850 was superseded by the Stamp Act 1870 which provided as follows:-

"Conveyance or Transfer on Sale of any property (except such stock or debenture stock or funded debt as aforesaid)

"Where the amount or value of the consideration for the sale does not exceed £5.....

Then follows ad valorem scale.

"For every £50 and also for every fractional part of £50, of such amount or value.....0. 5s. 0".

20 (ii) The Stamp Act 1870 made provision (by Section 71) for the valuation of stock or security forming the consideration or part of the consideration for a conveyance and (by Section 72) for cases where the consideration or part of the consideration consisted of money payable periodically and (by Section 73) for cases where the consideration or part of the consideration consisted of a debt and (by Section 11) for cases where the instrument was chargeable with ad valorem duty in respect of any money in any foreign or colonial currency.

30 (c) The Stamp Act 1891 provided as follows:-

"Conveyance or Transfer on sale of any property (except such stock as aforesaid) where the amount or value of the consideration for the sale does not exceed £5

Then follows ad valorem scale.

"For every £50 and also for any fractional part of £50 of such amount or value.....0. 5s. 0".

40 (d) Sections 55, 56 and 57 (with amendments) of the Stamp Act 1891 correspond to sections 71, 72 and 73 of the Stamp Act 1870. Section 6 of the Stamp Act 1891 corresponds to section 11 of the Stamp Act 1870.

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6. The appeal by way of case stated from the said assessment was heard in the Victoria District Court before His Honour Judge A.M. McMullin who delivered judgment thereon on the 25th day of July 1963 dismissing the appeal.

7. The learned Judge stated the point at issue as follows:-

"The sole matter in controversy is whether the Collector was right in regarding the amount of the consideration for the sale (i.e. \$10,800,000) stated in the Deed of Conveyance as being the figure on which falls the duty provided by Section 6 and Head 21 of the Schedule to the Ordinance, notwithstanding the provisions of Clause 3 of the Agreement of Sale between the parties whereby the stated purchase price is to be paid by 23 annual instalments of \$450,000 each plus a down-payment of the like amount on the execution of the Deed. It is agreed by both sides that the one per cent interest annually chargeable on the outstanding balance of the purchase price is not a part of the controversy in this appeal, since the Collector does not seek to charge such additional sums with any duty. The precise point at issue turns upon the meaning to be given to the words prescribing the method of calculation of duty in Head 21. These words read as follows:-

"21 CONVEYANCE ON SALE, the duty to be calculated on the amount or value of the consideration on the day of the date of the instrument".

No difficulty would arise, at least in such a case as this, if it had been stipulated simply that the duty was to be assessed on the amount of the consideration, but Mr. Litton, for the Appellant, maintains that the actual formula is specifically designed to permit the Collector to look past the capital sum stated as consideration where the mode of payment is by instalments over a period and to assess the duty on what may be termed the real value of that consideration on the day of the date upon which the instrument was executed. This value, he says, is something considerably less than \$10,800,000; it is in fact such sum as prudently invested now will yield an annuity of \$450,000 each year for the next 23 years. The consideration, in other words, is not, as he puts it, \$10,800,000 simpliciter".

8. Dealing with the analogous provisions of English law the Judge stated as follows:-

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10 "In the course of the argument, reference was made by both sides to analogous provisions in the English law. Mr. Litton pointed out that the equivalent Head of Charge in the English Stamp Act, 1891, though it has reference to the amount or value of the consideration, does not contain the words "on the day of the date of the instrument". He sought to correlate this difference with a further difference, viz: the fact that our legislation has no provision corresponding to Section 56 of the English Act which makes quite explicit provision for the manner in which consideration consisting of periodical payments is to be charged with ad valorem duty".

The Judge's conclusion as to this aspect of the case was as follows:-

20 "I think, however, that these differences between the local and the English law are to be explained more readily as a draftsman's economy than as the expression of a positive inclination on the part of the local legislature to provide a method of calculation at odds with that provided by the law in England. The presence in Head 21 of the words "on the day of the date of the instrument" on which Mr. Litton places such emphasis may more reasonably be regarded as an alternative method of making such provision as that which appears in the English

30 Section 6, than as setting up in relation to, money considerations qualified as to mode of payment, a method of calculation virtually the opposite of Section 56. To put it more shortly, I do not think that the absence of those words from the English Head is to be explained by the presence of Section 56 in the English Act nor is their presence in Head 21 of our Ordinance to be construed as a positive exclusion of the manner of calculation expressed in Section 56 of that Act. I have dealt with some

40 length on this point, because I think the Appellant places considerable reliance upon it. The differences between the parrel (sic) legislation are obvious but they are no clear guide to the intention of the local legislature. The most that can be said is that the Appellant proposes a mode of calculation which is, in express terms, prohibited by the English legislation. It does not follow from that that such a method is necessarily allowable here".

pp.22-3

50 9. As to the Appellant's contention that the consideration for the assignment was a sum certain in the present coupled with a promise for the future which

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p.23
11 11-32 consideration has a value susceptible of a calculation which would yield a figure differing in amount from the aggregate of the sums stated in the Agreement, the Judge stated that the answer to this was that neither in the Deed of Assignment nor in the Agreement had the parties chosen to disclose any intention to give and receive the property on anything other than a simple stated money consideration.

p.25
11 20-32 10. In the circumstances the Judge held that the words "or value" appearing in the phrase "amount or value of the consideration on the day of the date of the instrument" in Head 21 are apt to provide a method of calculation solely in relation to considerations other than money consideration, and that, where a consideration is expressed as a sum of money ascertainable as to its amount and whether payable immediately or over a period, it is the amount of such consideration on which the duty must fall. In the present case, that amount was the stated sum of \$10,800,000. 10

11. Accordingly the Judge dismissed the Appeal. 20

12. From that decision the Appellant appealed to the Supreme Court of Hong Kong. The appeal was heard by Sir Michael Hogan P and Rigby J.

pp.27-45 13. The Judgments of the Supreme Court were delivered on the 25th day of January 1964.

p. 39
11. 35-44 14. The learned President took the view that in Head 21 the measurements "amount" and "value" respectively are set out as alternatives and in a manner which indicates no preference for the measurement expressed in the word "amount" over that expressed in value. The fact that "amount" was mentioned first or that it appeared in the Hong Kong Stamp legislation at an earlier date than value would not give it preference nor would the fact that it might involve a more direct and simple calculation. In the view of the learned President the duty was set out in the alternative and consequently could be discharged by the payment of either amount. The learned President said that "this construction of the relevant provision seems to me consistent with its express terms and it has the merit of exacting a duty which is based on the true value of the consideration passing and not on an inflated and untrue value; a result more equitable and consistent with common sense. Section 27 would appear to safeguard the Revenue where any consideration measured in this fashion would not represent the true value of the consideration. 30 40 50

p. 40
l. 38

15. Rigby J. said that he was in entire agreement with the judgment of the District Judge. He said that in accordance with the ordinary canons of construction the words "amount or value" should be read disjunctively the former relating to a money consideration, clearly stated in figures as the purchase price and the latter to 'moneys worth' where the consideration for the purchase price whether wholly or in part is stated as something other than money for example foreign currency stock or marketable securities. In the present case the manner of payment of the consideration stated (\$10,800,000 payable over 23 years) might reduce the present value of the consideration but it did not reduce its amount. A capital sum had been stipulated by the parties themselves in the instrument of sale as the price of the property sold. The fact that, for the mutual convenience of the parties payment was to be made by instalments might detract from the value of the purchase price but not from the amount expressly stated as the consideration for the sale. Accordingly Rigby J. was in favour of dismissing the appeal.

16. By an Order of the Supreme Court of Hong Kong dated the 25th day of January 1964 it was ordered that the said appeal be dismissed.

p. 46

17. By an Order of the Supreme Court of Hong Kong dated the 8th day of February 1964 it was ordered that the Appellant should have leave to bring this appeal.

p.47

18. The Respondent will humbly submit that this appeal should be dismissed with costs for the following among other

REASONS

1. Because upon the true construction of the Stamp Ordinance the words "or value" in Head 21 of the Schedule to the Ordinance have no application to a case where the consideration for the conveyance is a sum of money expressed in the currency of Hong Kong.

2. Because the only reason for the inclusion of the said words "or value" in the said Head 21 is that the consideration for a sale may be not only Hong Kong currency but, for example, foreign currency or stock or shares.

3. Because in the Deed of Assignment the amount of the consideration is expressed to be the sum of 10,800,000 Hong Kong dollars.

4. Because the fact that the consideration is payable by instalments does not reduce the amount of the consideration.

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5. For the reasons given in the judgments of the learned District Judge and of Rigby J.

6. Because even if the said words "or value" in the said Head 21 can apply to a case where the consideration for the conveyance is an amount of Hong Kong currency payable by instalments the Crown is entitled at its option to charge duty on the total amount of such instalments.

MICHAEL FOX

No.22 of 1964

IN THE PRIVY COUNCIL

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

B E T W E E N

JOSEPH EDWARD HOTUNG Appellant

- and -

THE COLLECTOR OF
STAMP REVENUE Respondent

CASE FOR THE RESPONDENT

CHARLES RUSSELL & CO.,
37, Norfolk Street,
Strand, W.C.2.

Solicitors for the Respondent.