



should be entitled forthwith to declare all the sums payable by the Purchaser become immediately due and payable.

That agreement was duly completed by an Indenture dated 1st November 1962 made between (1) the Trustee in whom the legal estate was vested, (2) Mrs. Ketterer therein called the Vendor and (3) the Appellant therein called the Assignee. It is not necessary to refer to it in any detail for after lengthy recitals dealing with title and a recital of the agreement just mentioned the only relevant operative words were as follows: "Now this Indenture witnesseth that in pursuance of the said agreement and in consideration of the said sum of Hong Kong \$10,800,000 agreed to be paid by the Assignee to the Vendor in accordance with the said agreement" the Trustee and the Vendor assigned and confirmed to the Assignee the leasehold properties.

It is common ground that this Assignment is subject to stamp duty as a Conveyance on Sale and the whole question is whether stamp duty ought to be assessed upon the total purchase price of \$10,800,000 or whether having regard to the fact that by the terms of the Agreement and Assignment the purchase price was payable by instalments spread over 23 years, stamp duty should be paid on some lesser sum representing the value on the day of the date of the conveyance of the deferred payments.

If the latter is the correct method of assessment, as Hogan C.J. thought, it is agreed that the present value of the deferred instalments of the purchase price is \$4,250,000 to which must be added \$450,000 the amount of the first payment and, as was conceded during the course of argument by counsel for the appellant, some further sum not yet ascertained or agreed representing the 1 per cent interest on outstanding instalments. Bearing in mind that stamp duty is exigible at 5 per cent the difference in money terms between the rival contentions is substantial.

This question depends entirely on the true construction of the provisions of the Stamp Ordinance to which reference must now be made. Section 5 of the Ordinance imposes the charge to duty details of which are set out in the Schedule.

Item 21 of the Schedule is in these terms:

"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."

In view of the arguments addressed to their Lordships it is necessary to set out in full section 34 subsection (1), section 35 and section 36 of the Ordinance.

"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.  
...".

"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.

(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."

"36. Where any property is conveyed to any person in consideration, wholly or in part, of any debt due to him, or subject either certainly or contingently to the payment or transfer of any money or shares, whether being or constituting a charge or incumbrance upon the property or not, the debt, money or shares are to be deemed the whole or part, as the case may be, of the consideration in respect whereof the conveyance is chargeable with *ad valorem* duty."

Though there was much argument in the Courts below on the historical development of the Stamp legislation in Hong Kong and in England, neither side has relied on history in support of his argument before their Lordships. The argument for the appellant is presented under four heads. First that as a matter of grammar the words "on the day of the date of the instrument" in Item 21 of the Schedule govern both the amount and the value of the consideration and their Lordships are inclined to agree that grammatically this may be so. On that footing the argument proceeds, secondly that the "amount" must be ascertained on the day of the date of the instrument so that the statute contemplates that the "amount" may be a discounted "amount". Their Lordships are quite unable to accept this argument, for it comes to no more than saying that the amount must be valued. The "amount of the consideration" as a matter of language is normally the amount of the purchase price and it is quite plain from the terms of the agreement already summarised that the purchase price was regarded as the aggregate of the instalments namely the sum of \$10,800,000. Counsel for the respondents rightly conceded it would not include any element of interest payable on outstanding balances.

The third proposition depends on an ascertainment of amount as at the date of the conveyance i.e. \$450,000 together with a valuation of the deferred instalments a process which with all respect to the argument seems to their Lordships impossible. Whatever may be obscure it is at least clear that "amount" and "value" are alternatives and not complementary.

Fourthly it is argued that item 21 in the Schedule provides for measurement of the duty on the day of the date of the instrument either in terms of "amount" or in terms of "value", and where these measurements produce different figures as in the present case there is an ambiguity and the charge is satisfied by payment of duty on the lower figure. Reliance was placed on *Gurr v. Scudds* 11 Exchequer 190, *Clifford v. C.I.R.* [1896] 2 Q.B.187, *Hennell v. C.I.R.* [1933] 1 K.B. 415, *Russell v. Scott* [1948] A.C. 422 see per Lord Simon page 433 and Lord Simonds on the same page. During the course of argument on this proposition there was much comparison with the English Stamp Act of 1891 upon which in many respects the provisions of the Ordinance are based as appears from its side notes but from which it varies in some important respects. The most important difference, upon which indeed the appellant relies, is that in the corresponding schedule in the Act of 1891 the words "on the day of the date of the instrument" are omitted. These same words appear in sections 34 and 35 and in the corresponding section (section 6) of the Act of 1891. So it is argued that the reiteration in item 21 "on the day of the date of the instrument" must be given some additional meaning and cannot be treated as merely repetitive of what has already been said in sections 34 and 35. Accordingly when in item 21 you find a provision for calculating "the amount" or "the value" of the consideration the presence of these words in the schedule drives you to make a valuation on the day of the date of the instrument where there are deferred payments and compels the Crown to accept payment of the lower amount. On the other hand it is to be noted that there is no provision in the Ordinance corresponding to section 56 of the Stamp Act of 1891. That section put very shortly, provides that where the consideration consists of periodical payments spread over a definite or indefinite period, the amount of the consideration is to be ascertained by aggregating the annual payments over arbitrary fixed periods.

On behalf of the respondent it is submitted that in item 21 the words "amount or value" are to be explained in this way, that in every case save those mentioned in sections 34-36 the standard of measure for the assessment of duty is "the amount" i.e. the aggregate of the payments to be made in consideration of the purchase, in this case clearly \$10,800,000. This argument admits that the words in item 21 "on the day of the date of the instrument" are repetitive and unnecessary and further that these words do in fact govern only the word "value" and not the word "amount". These words it is submitted are to be explained solely as picking up the provisions in sections 34 and 35 of the Ordinance where it is expressly provided that a

valuation should be made when the consideration is expressed in terms of foreign currency or investments or securities and include cases under section 36 which really refers back to sections 34 and 35.

Counsel for the respondent relied on the observations of Lord Simonds in *C.I.R. v. Littlewoods Mail Order Stores Ltd.* [1963] A.C. 135 at p.151, a case not directly in point but which gives some support to his submission. It is clear that under the Act of 1891 there is no calculation of value save in those very limited cases corresponding to sections 34–36 of the Ordinance and the amount of the consideration is in every other case taken as the test subject only to the limitation on aggregation provided by section 56. This circumstance, rightly in their Lordships' view, influenced McMullin D.J. in reaching his conclusion.

Their Lordships have not overlooked the fact that the respondent's argument admits that in the absence of a provision corresponding to section 56 of the Act of 1891 there may be a lacuna in the operation of the Ordinance e.g. where there is a sale in consideration of a covenant to pay an annuity for an indefinite period. But on a consideration of the whole matter and with all respect to the contrary view of Hogan C.J. their Lordships cannot feel any doubt that in item 21 "value" is only taken as the basis of measurement for the purposes of the assessment of duty in the cases pointed out in sections 34–36. In all other cases duty is measured by reference to the amount. While this recognises that the words "on the day of the date of the instrument" in item 21 are not only otiose but ungrammatical, for they do not govern "amount" their Lordships are of opinion that the contrary argument which insists on the right of the subject to a valuation in every case where the "amount" and "value" on the day of the date of the instrument may differ is built on a foundation much too slender to be tenable.

The truth of the matter is that, no doubt for good reason, the legislature in Hong Kong when passing the Stamp Ordinance thought fit to omit any provision corresponding to section 56 of the Stamp Act 1891 which in effect limits the number of instalments to be taken into account when calculating "the amount". In the absence of any such provision all the instalments must be included when calculating the amount, harshly though this may bear on the subject where payment is spread over a long period.

For these reasons their Lordships will humbly advise Her Majesty that the appeal should be dismissed. The appellant must pay the costs of this appeal.

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In the Privy Council

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JOSEPH EDWARD HOTUNG

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THE COLLECTOR OF STAMP REVENUE

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