

NOTE OF ORAL JUDGMENT DELIVERED ON 30th JULY,
1974 BY THE HON. MR. JUSTICE W.D. MARSH

Suit No. C.L. 619 of 1973

FOR REFERENCE ONLY

BETWEEN

ALCAN JAMAICA LIMITED

PLAINTIFF

AND

THE ATTORNEY GENERAL

DEFENDANT

NORMAN MANLEY LAW SCHOOL
LIBRARY
U.W.I. MONA, JAMAICA

In this case the Plaintiff, Alcan Jamaica Limited, is seeking a declaration that an Agreement between itself, the Bank of Nova Scotia Jamaica Limited (hereinafter referred to as the "Bank") and the parent company of the Plaintiff (Aluminium Company of Canada Limited), and dated the 30th December, 1971, is to be charged to Stamp Duty under the Stamp Duty Law as — "a deed not charged in the Schedule to the Law, nor expressly exempted from all Stamp Duty" rather than as a "debenture" under the Mortgage Item of the Schedule to the Stamp Duty Law, as contended by the Defendant.

The difference in duty is substantial. If the Plaintiff is right the amount of duty due to the Crown will be \$1.38 — on the other hand if the Defendant is right the amount due would be \$12,500. The Plaintiff has paid the last mentioned sum under protest, and is now also seeking an order for the repayment with interest of that sum, less the amount of \$1.38, which it alleges is the proper amount due.

The issue in the case turns on the meaning to be given to the expression "debenture", which appears at page 6035 of the Law under the item "Mortgage" in the Schedule hereto, and which reads as follows:—

"Debenture including a debenture which either creates a debt or acknowledges it although no charge or security on the real or personal property is thereby created."

The ... /

The statute contains no definition of the term "debenture", however, the meaning of that expression has been considered by the Courts in England, and elsewhere, and must now be taken as including instruments which merely create or acknowledge debts. See for example British India Steam Navigation Company v. The Commissioners of Inland Revenue (1881) 7 Q.B. 165, per Lindley J, at page 173, where he states the following --

".... what the correct meaning of 'debenture' is I do not know. I do not find anywhere any precise definition of it. We know that there are various kinds of instruments commonly called debentures. You may have mortgage debentures, which are charges of some kind on property. You may have debentures, which are bonds.... You may have a debenture which is nothing more than an acknowledgment of indebtedness. And you may have a thing like this, which is something more; it is a statement by two directors that the company will pay a certain sum of money on a given day, and will also pay interest half-yearly at certain times and at a certain place, upon production of certain coupons by the holder of the instrument."

See also Edmonds v. Blaina Furnaces Company (1887) 36 Ch. 215, per Chitty J, at page 219 --

"The term itself imports a debt -- an acknowledgment of a debt -- and speaking of the numerous and various forms of instruments which have been called debentures without anyone being able to say the term is incorrectly used, I find that generally, if not always, the instrument imports an obligation or covenant to pay."

If I understand the arguments of Counsel for the Plaintiff correctly, he seems to accept that an instrument which merely creates or acknowledges a debt can be a debenture; he contends, however, that the Agreement in issue in this case cannot be stamped as a debenture, because it has not created,

nor /

nor has it acknowledged, any debt. He based this submission primarily on Article V of the Agreement which reads:-

"The obligation of the Bank to make the loan hereunder is subject to receipt by the Bank of a signed copy of the favourable opinion of Counsel for the Jamaican Company, satisfactory in form and substance to Counsel for the Bank, as to the matters referred to in Section 2.01 except paragraph (c) and as to such other related matters as the Bank may reasonably request.

The obligation of the Bank to make the loan hereunder shall be subject to receipt by the Bank of a certificate dated the day of such borrowings and signed by a duly authorised officer of the Jamaican Company, stating:

- (a) That the representations and warranties contained in Article Two are true and accurate on and as of the date of such borrowing.
- (b) That there has been no material adverse change in the financial condition or operation of the business and assets of the Jamaican Company since the date of the latest annual report of the Jamaican Company."

It was submitted that this article laid down certain fundamental conditions precedent to the granting of any loan under the Agreement, consequently, until these were either waived by the bank or performed by the Plaintiff, no loan could be made or debt created - because a debt payable upon a contingency which might never arise was not a debt within the statute. At best he said, the Agreement could only be regarded as an undertaking by the Bank to lend money to the Plaintiff in the future, after the contingencies of Article V were disposed of - until that point in time, however, the Agreement neither created nor acknowledged a debt.

The Defendant's case was that the document must be stamped as a "debenture" because it not only created a debt but also acknowledged the same, and was therefore within the

common law concept expressed in the cases just cited. Counsel for the Defendant stressed the wording of Article I Section 1.01, which in part reads as follows -

"The Bank agrees on the terms of this Agreement to lend to the Company the sum of \$2,000,000 Jamaican currency and the sum of £1,000,000 sterling".

It was submitted that on the execution of the Agreement Section 1.01 created a debt, the amount of which was approximately \$4,000,000 Jamaican currency, and the date of which was the 30th December, 1971, the date of execution of the Agreement.

It was further submitted that the aforesaid debt had been acknowledged partly by section 1.02 which stipulated that - all borrowings shall be due and repaid on the last day of February, 1975, and partly by section 1.03 which reads in part, as follows:-

"The Jamaican Company shall pay to the Bank on the daily amount outstanding in respect of the said loan made by the Bank interest computed from the date hereof at the rate and in the manner following"

In answer to the argument on Article V, Counsel for the Defendant submitted that the mere fact that the debt was payable on a contingency did not put the matter outside the statute. He relied on the decision in Independent Television Authority v. Inland Revenue Commissioners (1960) 2 ALL.E.R. 481 - to which case I shall presently refer in more detail.

As I understand these arguments it seems clear that both parties accept that the term "debenture" in the Stamp Duty Law is wide enough to include a document or instrument

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which merely creates or acknowledges a debt; and the only substantial issue argued before me was whether money payable upon a contingency such as allegedly exists in Article V, can properly be regarded as a debt within the statute. In the final analysis therefore what this case seeks to determine is whether the word "debt" at page 6035 of the Stamp Duty Law, to which I have already referred, applies to money payable upon a contingency or, only to money payable as an absolute and unconditional certainty.

I have considered the arguments and the Authorities cited and I have come to the conclusion that in the Stamp Duty Law the term "debt", applies to money payable upon a contingency as well as to that payable as an absolute and unconditional certainty.

In the case of the Independent Television Authority v. Inland Revenue Commissioners there is a passage in the Judgment of Lord Radcliffe at the bottom of page 485 which I consider, with respect, to be a clear statement of the principle to be applied in construing the U.K. Stamp Act upon which the Jamaican Statute is based. In the last paragraph on that page, while dealing with one of the arguments of the Appellant taxpayer, in that case, to the effect that there could be no total ascertainable amount under the Agreement there being considered, Lord Radcliffe cited with approval, a passage in an earlier decision of Collins, M.R., in Underground Electric Railways Company v. Inland Commissioners (1905) 1 K.B. 174 at page 182, which seems to me to put the matter beyond argument. The passage in Lord Radcliffe's Judgment to which I referred, reads as follows:-

"My Lords, in my opinion, this argument misconceives the significance of such words as "money payable" when

used in the Stamp Act in relation to the stamping ad valorem of contracts or other instruments. The true principle to be applied is, I think, well set out in the judgment of Collins, M.R., in the *Underground Electric Rys. Co. v. Inland Revenue Comrs.*:-

"The question is the principle underlying the construction of the Act, and it seems to me that we can get at a definite principle from those cases. The principle is that the word 'debt' applies to money payable whether upon a contingency or as an absolute and unconditional certainty It seems to me, therefore, that the words 'money payable for an indefinite period' include money which may never become payable unless the particular event happens"

I think it clear that the same principle was adopted in the decision of the case when it later reached this House.

I take it therefore, to be a well settled principle that the money payable is ascertained for the purposes of charge without regard to the fact that the agreement in question may itself contain provisions which will, in certain circumstances, prevent it being payable at all."

Faced with this clear statement of principle, Plaintiff's Counsel submitted that Lord Radcliffe was there dealing with a different item of charge, namely - "bonds, covenants etc.", and not with the mortgage or debenture item which is the item in the instant case, and consequently, that the Television Authority case ought not therefore to be considered as covering the point which I now have to decide.

I cannot accept this. In the *Underground Railway* case, cited by Lord Radcliffe, a similar contention was disposed of by Collins, M.R., at page 181 of the Report, in a passage which immediately preceeds that quoted by Lord Radcliffe supra. The passage reads:-

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"It does not seem to me that the fact that the subject-matter of the contract between the parties was one of a loan upon security makes any difference or lends itself to any suggestion that the word "debt" should have any different meaning in the case of a conveyance from that given to it in the case of a mortgage, nor do I think any argument can be based on the fact that "debt" was the word to be considered in that case, and "money payable" is the expression in this case. It seems to me that the arguments which induced the Court to hold that "debt" covered a debt not payable of necessity in any event, but payable only on a contingency, apply equally to the words "money payable", and I can see no virtue in the fact that one decision cited by the Attorney General was on a settlement, another on a mortgage, and a third on a combination of both a settlement and a mortgage. It is true that these different classes of instruments are dealt with in certain fasciculi of clauses in the statute, but it does not seem to me that there is any particular significance in the position of the sections which deal with these different subject-matters. The question is the principle underlying the construction of the Act, and it seems to me that we can get at a definite principle from these cases."

It is clear therefore, that the learned Master of the Rolls (as he then was) was enunciating a principle of general application to the construction of the statute; and the fact that I am now dealing with mortgages and debentures, whereas the House of Lords in the Television Authority case dealt with bonds, covenants etc. is not of any significance.

The matter does not cease there, however, because the reference by Collins, M.R., to the word "debt", in the passage cited by Lord Radcliffe, was in fact a reference to an earlier decision namely, Mortimore v. Inland Revenue Commissioners (1864) 2 H&C 838, in which it had been held that the words - "mortgage, debt, or sum of money" - included contingent as well as absolute debts. See page 176 of the Report of the Underground Railways case. The result is that even if the contention of Plaintiff's Counsel (as to the distinction to be drawn between the various items of charge) were to be

accepted, Mortimore's case would be directly in point since that was a decision dealing with mortgages and debts. For these reasons, therefore, I am satisfied that the Plaintiff's argument on Article V and contingent debts, is not one that I need pursue any further; since it is clear from the authorities cited, that the word "debt" in the statute includes contingent as well as absolute debts. Consequently even if Article V has the meaning contended for by Plaintiff's Counsel, that would not, in my judgment, preclude the instrument from being classified as a debenture and I so hold.

Having said that, I turn now to a consideration of the instrument itself. And here the question, of course, is - can this Agreement, construed as a whole, be properly regarded as an instrument which has either created or acknowledged a debt? I think so.

It is a long document and I do not propose to refer to it in any detail; but in my judgment Article 1.03 (which requires the Plaintiff to pay interest from the date of execution of the Agreement on the daily amounts outstanding on the loan) is a clear acknowledgment of indebtedness. It would in my view be rather odd for the Plaintiff to undertake such a burden from the date of execution of the document, if in fact no debt was in existence at that date. In fact when this article is viewed in conjunction with article 1.01, to which I also referred earlier, the matter does not seem to allow of any further discussion. It was suggested by Counsel that one way of looking at article 1.03 might be to regard it as providing for a "Finder's Fee" or some such requirement - but the point was not pressed, and I think correctly so. Looking at the substance of the Agreement I can find no basis for so construing it.

It seems to me therefore that in substance the instrument is an Agreement to lend \$4,000,000 on the 30th December, 1971 which was the date upon which the same had been executed; and putting it at its very lowest it is in my judgment, an instrument which acknowledges indebtedness and which consequently falls within the common law concept of a debenture, and is therefore to be stamped ad valorem as a debenture under the Mortgage Item of the Statute. I might also add that on the view which I have taken of Article V, it is to be read as providing conditions precedent, not merely to the loan, but also to the Agreement - since the date of the loan and that of the Agreement are the same.

In the circumstances, the application for the Declaration and Order set out at sub-paragraphs 10(1) and 10(2) of the Plaintiff's Statement of Claim is rejected, and judgment is to be entered for the Defendant with costs to be agreed or taxed.

Approved;



(W. D. Marsh)
Puisne Judge