

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO: 13/80

BEFORE: The Hon. Mr. Justice Zacca - President  
The Hon. Mr. Justice White, J.A.  
The Hon. Mr. Justice Ross, J.A.

BETWEEN NORTH AMERICAN LIFE ASSURANCE COMPANY LIMITED - PLAINTIFF/APPELLANT  
AND ATTORNEY GENERAL - DEFENDANT/RESPONDENT

Mrs. A. Hudson-Phillips and Mr. D. Jones for the plaintiff/appellant  
instructed by Messrs. Myers, Fletcher & Gordon, Manton & Hart.

Mr. E.G. Langrin and Miss Christine McDonald for the Defendant/respondent  
instructed by the Director of State Proceedings.

June 18, October 12, 13, 14, 1981 and  
December 8, 1982

ROSE, J.A.

The plaintiff/appellant ceased doing business in Jamaica on or about 1st January, 1974, and agreed to transfer some of its assets in Jamaica to Life of Jamaica Limited, a part of which assets consisted of loan stock in various companies in Jamaica and are as follows:

<u>Loan Stock</u>	<u>Consideration</u>
Pan Jamaican Investment Trust Ltd. 9% Convertible Unsecured Loan Stock.	\$ 200,000.00
Pan Jamaican Investment Trust Ltd. 9% First Mortgage Debenture Stock 1975/99.	\$1,335,690.00
Pan Jamaican Investment Trust Ltd. 9% First Mortgage Debenture Stock 1975/99	\$ 732,156.00
Jamaica Public Service Co. Ltd. 6% First Mortgage Sinking Fund Registered Debenture Stock, Series K due 1st April, 1984.	\$ 97,800.00
Jamaica Property Company Ltd Series "A" and Series "B" Debentures.	\$ 946,666.66
Pan Jamaican Mortgage Society Ltd. Guaranteed First Mortgage Debentures 1986.	\$ 153,046.00

<u>Loan Stock</u>	<u>Consideration</u>
Jamaica Public Service Co. Ltd. 6% First Mortgage Sinking Fund Registered Debenture Stock Series "J" due 1st February, 1983.	\$ 190,379.00
Jamaica Telephone Co. Ltd. 7% Debenture Stock 1972/82	\$ 120,090.00
Jamaica Telephone Co. Ltd. 6% Registered First Mortgage Debenture Stock 1966/79.	\$ 117,822.00

When the instruments of transfer were presented to the Stamp Commissioner for stamping in accordance with the Stamp Duty Act they were assessed as conveyances within the meaning of this Act and the amount of stamp duty payable was assessed at \$103,411.59. The plaintiff/appellant says that the instruments of transfer are not conveyances within the meaning of the Stamp Duty Act but are chargeable to duty as transfers of mortgages with stamp duty payable thereon in the sum of \$6,004.69.

Having paid under protest the amount claimed by the Stamp Commissioner the plaintiff/appellant by action brought in the Supreme Court claimed a declaration that the above instruments of transfer are chargeable to duty as transfers of mortgages and not as conveyances, and repayment of the amount over-paid, viz., \$97,326.90. This claim was dismissed by the learned trial judge, who dealt with the relevant amendments to the Stamp Duty Act from 1868 up to the present.

The relevant provision under "Mortgage" in the schedule to the Stamp Duty Act reads as follows:

"Transfer, assignment, disposition or assignment of any mortgage of any such security as aforesaid or of the benefit thereof, or any money or stock secured thereby or by any instrument or judgment."

As I understand the judgment of the learned trial judge, he said that when the term "transfer assignment of any such security as aforesaid" was used in the Act of 1868, it meant such securities as were expressly and individually described as "security" under the heading "mortgage" in that Act and the words did not include transfers of debentures, since those were

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never mentioned in that Act under the heading "mortgage"; in fact, it was not until 1908 that the Stamp Duty Act of that year included debentures under the heading of "mortgage", and there was no consequential amendment to include debentures among the things in relation to the transfer of which duty is payable under the heading "mortgage". On this line of reasoning he came to the conclusion that the words "of any such security as aforesaid" in the present Act do not include debentures "but only those instruments expressly mentioned which though "en face" appear to be absolute transfers are in fact only intended to operate by way of security and are in the schedule specifically as stated." He found that the instruments of transfer manifest all the attributes of conveyances on sale and are "liable to duty under the heading of conveyances on sale and under no other heading."

Several grounds of appeal were argued by counsel for the appellants. In her submissions Mrs. Hudson-Phillips dealt firstly with grounds 1 - 4, and then with the supplementary grounds 5 - 6.

On Ground 1, she submitted that the Act must be interpreted on the words of the Act in the context in which we find them when the transfers were effected, and not in the context in which they would be found in 1908; looking at what appears under "mortgage" in the schedule shows the intention of the Legislature to deal with all aspects of liability to stamp duty of securities under the heading "mortgage"; this, she said, is a comprehensive section which does not only deal with the duty payable on the creation of the security but also with the duty payable on its transfer and on its surrender.

In the section of the schedule under the heading "mortgage" there appear "mortgage", "debenture", and a list of other documents which are included under the heading "mortgage" if they are intended only as a security.

The provisions in respect of mortgages in the schedule to the Stamp Duty Act of 1868 are different from those in the present Act: Whereas under the 1868 Act there was no reference to debentures, there is in the present Act specific reference to debentures, and the word is defined. In the schedule to the present Act we have provisions for stamp duty on the creation of a mortgage, a debenture and other specified documents where they are intended only as a security. Then we have

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provisions for stamp duty on the transfer, assignment, disposition or assignment of any mortgage of any such security as aforesaid or of the benefit thereof, or of any money or stock secured thereby or by any instrument or judgment. At the trial and before us there were submissions as to the meaning of this, but it is I think quite clear that a comma was omitted after the word "mortgage", that is, that the provision is referring to the transfer, assignment, disposition or assignment of any mortgage, and the transfer, assignment ..... of any such security as aforesaid, etc.

We come to the words "such security as aforesaid"; reference has already been made to mortgage, so what are the "securities as aforesaid"? There can be no doubt that this must refer to the securities listed under the heading of "mortgage", and these are of course debentures and the other instruments listed where those other instruments are intended only as securities.

The provisions of the schedule to the 1868 Act as under the heading "mortgage" are different from the present Act in that the present Act includes "debentures", and consequently when reference is later made in both to "such security as aforesaid", the "security" to which reference is being made in each will depend on the kinds of securities which have earlier been listed in each under the heading "mortgage". In the 1868 Act there was no reference to debentures and so in that Act "such security as aforesaid" would not seem to include debentures, but in the present Act where "debentures" are specifically referred to, it seems clear that "such security as aforesaid" would include debentures, they being securities in the ordinary accepted use of the term.

I would therefore say that the plaintiff/appellant succeeds on Ground 1 as it would appear that the learned trial judge erred in law in holding that the words "transfer ..... of any such security as aforesaid" under the heading "mortgage" in the schedule to the Stamp Duty Act do not include the transfer of debentures.

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In Ground 2 the plaintiff/appellant says that the learned trial judge erred and/or misdirected himself in law in holding that the transfers, the subject of the appeal are liable to stamp duty under the heading of conveyances on sale and under no other heading in the schedule to the Stamp Duty Act. As I understand it, Mrs. Hudson-Phillips submitted that the section of the schedule under the heading "mortgage" was intended to bring all securities under a particular heading and to deal with all aspects of liability under that heading, be it creation, transfer or surrender of the security; she therefore urged that these transfers of securities should be dealt with under the section of the schedule which specifically deals with securities, and not under the section dealing with conveyances.

On the other hand, the learned trial judge pointed out that the plaintiff conceded that the instruments under consideration are in fact instruments operating as transfers of marketable securities, and these constitute property; further, the transfers, he said, "manifest all the attributes of conveyances on sale and fall to be assessed for duty under the heading of conveyances on sale." The judge went on to find that they are not assessable as transfers of mortgages, a finding with which I have already dealt.

As the learned trial judge pointed out in his judgment, the U.K. Stamp Duty Act deals specifically with "marketable securities" and sets out the stamp duty payable on their transfer, but under our Stamp Duty Act there is no such provision; he went on to find that these marketable securities being property should properly be dealt with as conveyances on sale and attract stamp duty under the heading of "conveyances."

It would seem from the nature of these instruments that they can be regarded as transfers of securities and attract stamp duty under the heading of "mortgages", or as conveyances on sale of marketable securities and attract stamp duty under the heading of conveyances.

The plaintiff/appellant conceded that the instruments of transfer were marketable securities; the rate of stamp duty which these instruments attract is the same as a conveyance on sale.

Some assistance may be derived from Monroe on Stamp Duties: at page 121 under the heading "Debentures" it is stated inter alia:

"The distinction therefore between a registered debenture which is, and a registered debenture which is not a marketable security does not affect the duty payable on it. But it may affect the duty payable on a transfer on sale or by way of voluntary conveyance. Duty on a transfer on sale of a debenture which is not a marketable security may possibly be limited to the rate of one shilling (1/-) per one hundred pounds (£100) of the nominal amount as on a transfer of mortgage, but a transfer of a marketable security on sale will be liable to two pounds (£2) per one hundred pounds (£100) on the consideration. In the case of a transfer of a debenture (even though not a marketable security) operating as a voluntary conveyance, this rate of one shilling (1/-) per one hundred pounds (£100) of the nominal amount will not apply, but instead the rate of two pounds (£2) per one hundred pounds (£100) of the value will apply."

It is to be noted that the rate of two pounds (£2) per one hundred pounds (£100) is the rate applicable generally to conveyances on sale under the English provisions. In support of the above, reference is made to the case of Anderson v. I.R.C. (1939) 1 K.B. 341 in which an instrument of transfer was presented by the appellant to the respondents, Commissioners of Inland Revenue, for their opinion as to the stamp duty with which it was chargeable. The transfer was a deed whereby the appellant transferred to a hospital by way of gift the benefit of a mortgage and the interest thereon. The Commissioners were of opinion that the transfer was liable to ad valorem duty as a "conveyance or transfer operating as a voluntary disposition inter vivos", the head of charge being "Conveyance or transfer on sale of any property", the rate thereunder being ten shillings (10/-) on every fifty pounds (£50) of the value of the property transferred.

The appellant contended that the transfer was liable to ad valorem duty as a "transfer operating as a voluntary disposition inter vivos" under the head of charge "Mortgage, Bond, Debenture, Covenant etc..... transfer, assignment, disposition or assignation of any mortgage ..... " at rate of six pence (6d) for every one hundred pounds (£100).

The appeal was brought by way of a special case stated under the Stamp Act, 1891, and was dismissed on the ground that the deed was chargeable with stamp duty as a transfer of a mortgage and also as a conveyance operating as a voluntary disposition inter vivos, but the Crown is at liberty to charge the higher duty and did so.

The authority for the latter statement is to be found in the case of Speyer Bros. v. I.R.C. (1908-10) All E.R. (Reprint) 474.

In Speyer's case Mexico issued "gold coupon treasury notes" with a promise to pay principal and interest to bearer at fixed dates either abroad or in London. There was evidence that the notes were saleable on the London and other Stock Exchanges. It was held that the notes, being in fact both promissory notes and marketable securities within the Stamp Act, 1891, they were liable to the higher duty imposed by that Act upon marketable securities.

In this case before the House of Lords, Lord Loreburn, L.C., having found that the document fell within the description both of a promissory note and of a marketable security went on to say this:

"In my view the document falls within both descriptions, and where a document is by its description chargeable under the Stamp Act as a promissory note, and is also chargeable under the statute as a marketable security the Crown has a choice whether to charge it under the one or under the other description. If the Crown does claim that the document shall be stamped at the higher rates within one part of the Act, it is no answer to say that there is another part of the Act under which the same document might be charged at a lower rate."

Having regard to the above, it would seem that it would not matter whether there was specific provision in one section for a document and a general provision in another section; in either event, once the document falls within both descriptions, the Crown has a choice whether to charge it under one or other description. If this is so, then in the instant case the Stamp Commissioner would have had the choice of whether to charge the instruments of transfer as transfer of securities or as conveyances on sale.

On the question of election Mrs. Hudson-Phillips submitted:

- (1) That the learned trial judge had held that there was question of election and therefore it was not open to the respondent to raise here again the question of election as there was no cross-appeal in respect of that portion of the judge's decision.
- (2) That the principle of election is not applicable when dealing with such wide sections as conveyances and mortgages, nor is it applicable when dealing with a wide provision and a specific provision.

In regard to the first point it seems that the respondent had no quarrel with the final decision at which the learned trial judge arrived, whether or not there was agreement as to the steps by which the judge came to his conclusion, and I would be inclined to say that this was not a proper case for a cross-appeal by the respondent. The position, in a nutshell, is that the respondent at the trial was saying that the Stamp Commissioner was correct in treating the instrument of transfer as conveyances on sale for the purpose of assessing stamp duty, but if they were also transfers of mortgages, the Commissioner had the power to elect under which heading he would assess stamp duty.

As far as the second point is concerned, as has already been set out, it is clear that the instruments of transfer were not only transfers of mortgages but also marketable securities and as such stamp duty could have been assessed under one heading or the other. The Stamp Commissioner had the power to elect under which heading to assess duty, and naturally, he elected to assess under the higher duty.

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During the hearing, consequent on leave being granted to amend the Plaintiff/Appellant's Statement of Claim, Mrs. Hudson-Phillips sought leave to produce documents in Support of her submission that the instruments before the Court are stocks secured by an instruments, be it a mortgage debenture or a trust deed. The ruling of the learned trial judge after objections to this application by counsel for the defendant/respondent, was:

"Since plaintiff, admits that on face of instruments they explain themselves unambiguously, there is no necessity for the production of trust deeds."

He therefore refused leave for the documents to be produced "notwithstanding previous request by court to see the same." Before us it was contended that:

"The learned trial judge erred and or misdirected himself in law in failing to consider whether the instruments of transfer, the subject of the dispute, evidenced transfers of stock secured by a mortgage or by any instrument as had been contended by the plaintiff in paragraph 6 of its Amended Statement of Claim.

"6. Further and/or alternatively, that the learned trial Judge erred and or misdirected himself in law in refusing to admit into evidence the trust deeds and other instruments by which the stock referred to in the instruments of transfer, the subject of the dispute were secured the examination of such trust deeds and instruments being vital to the determination of the question whether the disputed instruments of transfer evidenced transfers of stocks secured by a mortgage or by a security or by any instrument as had been contended for by the Plaintiff in paragraph 6 of its amended Statement of Claim."

The argument for the plaintiff/appellant was that, bearing in mind the description of the documents contended for (i.e. they really fell within the description of stock secured by mortgage, by security, or by an instrument) they ought to have been assessed to tax at the rate applicable to such transfers. It was said that on the face of the documents, and in the light of the state of the pleadings, it is evident that except for one item (a debenture) the items transferred fell within the description of

stock secured by a mortgage or by a security or by an instrument. The actual words of the section already quoted were invoked in aid of that submission.

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Furthermore/it was not clear from the instruments and pleadings what was the nature of the property transferred he ought to have admitted into evidence the documents which backed the transfer. By so doing he would have properly advised himself and so determined whether the transfers were secured by a mortgage etc.

In passing it should be observed that the learned trial judge while maintaining that the instruments in question are assessable to duty as conveyances for sale and under no other head, remarked:

"The transfers are for money considerations specified in the instruments and they effectively vest the property in the debenture stocks in the purchasers who are also mentioned therein. They manifest all the attributes of conveyances on sale and fall to be assessed for duty under the heading of conveyances on sale unless they are shown to be assessable to duty under some other head or are exempted from duty. They are not exempted. No such claim is made. They are not assessable to duty as transfers of mortgage. They are not assessable to duty as securities such as mentioned in the paragraph of the schedule (to the Stamp Duty Act) dealing with transfers."

The underlined sentence indicated that though he did not categorize and analyse in a detailed way the subject matter of the transfers, he did take cognizance of the lynch-pin of the plaintiff/appellant's case and in that terse way the learned trial judge expressed his views, albeit concentrating on one character of the transaction to the exclusion of the alternative. This judgment has given the corrective to that point of view. So that to an extent this complaint is not now of any great relevance, excepting the important qualification that:

"The liability of an instrument to Stamp Duty arises at the moment at which it is executed. The character of the instrument of transfer for the purposes of Stamp Duty must thus be ascertained by determining what is its legal effect at that date, by what property it transferred then and in what capacity the transferee then received it, not by what use might be made of it later in perfecting a subsequent transfer effected by some other instrument or act."

per Diplock L.J., in W.M. Cory & Sons Ltd v. IRC (1964) 3 All E.R. at p.

74. It is the instrument which is to be stamped not the transaction:

"Any instrument which operates as a record of the transaction of the property is a conveyance within the Stamp Act."

per Baron Parke in Horsfall v. Thomas Hey (1848) 2 Ex. 778; together with

these can be considered the words of Romer L.J. at p. 363 of Fleetwood

Hesketh v. Commissioner of Inland Revenue (1936) 1 K.B. 351:

"It has been pointed out on more than one occasion that the Stamp Act does not require transactions to bear Stamp Duty, it is dealing only with documents."

In Great Western Railway Co., v. Commissioner of Inland Revenue (1894) 1 Q.B.

507 Kay L.J. at page 515 stated as follows:

"The Stamp Act has nothing to do with contracts or negotiations, it stamps a conveyance upon a sale, which is the instrument by which property is transferred upon a sale."

In the final analysis although we hold that the principle of election is applicable and the Stamp Commissioner can assess tax on the instrument as conveyances for sale we are of the view that in the particular context of this case it was not essential to decide the issues raised by Grounds 5 & 6 of this Appeal.

In the result we dismiss the appeal, with costs.