

**J S HILL & ASSOCIATES LTD v COMMISSIONER OF STAMP DUTIES
and Anor (HBC0172J of 2003S)**

HIGH COURT — CIVIL JURISDICTION

5 PATHIK J

31 August 2004

10 **Taxation and revenue — stamp duty — assessment — whether Plaintiff exempt from
stamp duty — whether Plaintiff entitled to refund for paying stamp duty twice —
Stamp Duties Act s 3 — Stamp Duties Act (Cap 205) s 3, Pts II, III — Stamp Duties
(Amendment) Act No 24 of 1998 Pt I — Stamp Duties (Budget Amendment) Act 1999.**

15 The Plaintiff obtained a loan from the Bank of Hawaii (now ANZ) for \$4 million. A
stamp duty of 0.5% of the loan amounting to \$20,000 was paid as a duty payable on the
mortgage debentures.

On 9 January 1997, the mortgage debenture was stamped by \$17,500 and later
upstamped by the Commissioner of Stamp Duties (the Commissioner) for \$2500. Thus, a
total stamp duty of \$40,000 was paid on the mortgage debenture.

20 In April 2002, the Plaintiff refinanced the loan from ANZ with Westpac Banking
Corporation (WBC) totaling \$2,762,000. When the loan was refinanced by WBC the
Plaintiff's outstanding debt to ANZ was in the amount of \$1,948,268.87. Upon
presentation by WBC of the security documents to the Commissioner, a stamp duty of
\$14,168.50 was assessed.

25 On 5 May 2003, the Plaintiff sought declarations and an order that (a) the Commissioner
erred in assessing a stamp duty of \$14,168.50; (b) the Plaintiff was exempt from stamp
duty over the mortgage securing the indebtedness of \$2,762,000 and that the Plaintiff was
not obliged to make payment of any stamp duty to secure the said indebtedness of
\$2,762,000; and (c) a refund of the sum of \$14,168.50 paid as a stamp duty to the
Commissioner with interest.

30 The Commissioner and the Attorney-General of Fiji Islands (the Defendants) filed an
affidavit in response to the originating summons filed by the Plaintiff and submitted a
computation of how the sum of \$14,168.50 had been obtained. The Commissioner arrived
at the figure of \$2,389,000 as the refinancing sum from WBC by deducting the amount of
\$373,000 (which is already secured by existing security with Westbank) from the total
loan facilities on mortgage of \$2,762,000. Thereafter, the Commissioner charged the
35 Plaintiff 1% of \$2,389,000 resulting to a figure of \$23,890. The Commissioner then
deducted the already exempted sum of \$9730 from \$23,890 and came up with \$14,168.50
as stamp duty payable by the Plaintiff.

The Plaintiff on the other hand argued that the stamp duty it paid was calculated at a rate
of 1% which was the current date of duty on the sum secured by WBC deducting the sum
already secured by WBC and deducting another rate of 0.5% on the loan of Plaintiff to
40 ANZ during refinancing in which the Plaintiff sought a refund of \$14,168.50.

The issue in this case is whether or not the Plaintiff is entitled to a refund of \$14,168.50.

45 **Held** — (1) Under the Stamp Duties (Amendment) Act No 24 of 1998 (the Act), an
exemption from stamp duty on refinancing is allowed up to the amount of a debenture and
mortgage. The reason for the amendment was to keep the borrower paying twice when
there was refinancing of an existing loan and obtaining less than the original loan.
However, in the event that a greater sum was borrowed, the borrower should only pay duty
at a suitable rate on the difference between what was presently borrowed and what was
originally obtained. In the Plaintiff's case, since the debt secured by virtue of the
refinancing was the same or less than the loan secured by the original securities which are
50 being replaced on the refinancing, the Plaintiff was exempt under the Act, and was
therefore exempt from stamp duty. Thus, the Plaintiff was entitled to a refund of
\$14,168.50.

Determination made.

Cases referred to

Hari Rajesh Kumar v Attorney-General [2001] FJHC 172, applied.

5 *John Danks and Son Pty Ltd v Comptroller of Stamps* [1944] VLR 172; [1944] ALR 345, cited.

Comptroller of Stamps v Martin [1967] VR 369; *Pepper (Inspector of Taxes) v Hart* [1993] AC 593; [1993] 1 All ER 42; *Russell (Inspector of Taxes) v Scott* [1948] 2 All ER 1; *Donald Henry Bull and William John Bull v Commissioner of Inland Revenue* (Civ App Nos 17 & 18 of 1997S), considered.

10 *P. Knight* for the Plaintiff

J. Udit with *Karan* for the Defendants

15 **Pathik J.** By *originating summons* filed 5 May 2003 the Plaintiff seeks the following declarations and an order (as in summons):

- 17 (1) A declaration that the Commissioner of Stamp Duties has acted incorrectly in assessing stamp duty of \$14,168.50 on a mortgage (as described herein) lodged for stamping by the Plaintiff.
- 20 (2) A declaration that the Plaintiff is entitled to exemption from stamp duty on the said mortgage lodged by it with the Commissioner of Stamp Duties for stamping, securing indebtedness of \$2,762,000 and that the Plaintiff is not obliged to make payment of any stamp duty to secure the said indebtedness of \$2,762,000.
- 25 (3) An order that the first Defendant pays back to the Plaintiff the sum of \$14,168.50 paid by it to the Commissioner of Stamp Duties as stamp duty on the said mortgage, together with interest thereon at the rate of 7.25% pa from 18 April 2002 to the date of payment.

Background facts

30 The background facts of the case are fully set out in the Defendant's submission in writing and they are as follows:

- 32 (i) The Plaintiff has initially stamped a mortgage debenture for \$20,000 as a security for \$4,000,000 loan borrowed from Bank of Hawaii.
- 35 (ii) The above debenture was stamped for \$17,500 on 9 January 1997 and further upstamped by Commissioner of Stamp Duties for \$2500 on 3 August 1998.
- 37 (iii) The Plaintiff refinanced its loan from ANZ (Ex Bank of Hawaii) to Westpac Banking Corporation. mortgage dated 31 December 1993 was provided as a security for existing loan with Westpac Banking Corporation.
- 40 (iv) The Westpac holds mortgages over CL5381, 10874, 5363, 5897 and 15456, 15457 as security to debt of \$2,389,000, which is the company's existing loan with Westpac.
- 45 (v) The Plaintiff used its existing security \$373,000 with Westpac (mortgage dated 31 December 1993) to secure further advance of \$2,289,000 given by the Westpac Banking Corporation to *refinance* its debt with ANZ Bank (Ex Bank of Hawaii). The outstanding debt with ANZ Bank as at 2 April 2002 was \$1,948,268.57.

50 For the determination of the issue before me, I have the affidavit sworn on 29 April 2003 and filed on 5 May 2003 in support of the originating summons. An affidavit in response was filed by the Defendants on 4 August 2003. I also have for my consideration the useful submissions from both counsel.

Issue

The issue is whether the stamp duty of \$14,168.50 paid under protest to the Commissioner of Stamp Duties ought to be refunded or not to the Plaintiff.

5 Determination of the issue

I shall now deal with the issue under various heads.

(i) *The facts*

10 The Plaintiff was granted banking facilities by the then Bank of Hawaii (now ANZ). The prime security was a mortgage debenture, to secure advance of \$4,000,000. On this mortgage debenture, the sum of \$20,000 was paid as stamp duty which is 0.5% of 4 million dollars being the duty payable on mortgage debentures at the time.

15 There was upstamping of this mortgage debenture by \$17,500 as of 9 January 1997 and by a further \$2,500 on 3 August 1998. It means that a total stamp duty of \$40,000 was paid on the mortgage debenture securing advance of \$8 million.

Then in April 2002 the Plaintiff *refinanced* its debt with Westpac Banking Corporation (WBC) which provided banking facilities totalling \$2,762,000.

20 At the time of refinancing by WBC the Plaintiff's debt to ANZ was \$1,948,268.87.

When the WBC security documents were presented to the Defendant for stamping, the Defendant assessed stamp duty of \$14,168.51.

25 The Plaintiff says that the assessed duty was arrived at by calculating the duty at the rate of 1% (the current date of duty) on the sum secured by WBC securities less the sum already secured by the WBC securities and deducting therefrom the duty at the rate of 0.5% on the debt owed to the ANZ at the time of refinancing.

(ii) *Method of calculation of \$14,168.50*

30 How the sum of \$14,168.50 has been arrived at has been calculated as follows (as contained in the Defendants' submission) as the basis on which the argument is based and it is important that I set it out:

	Total loan facilities on mortgage dated 31 December 1993	\$2,762,000
35	<i>Less</i> amount already secured by existing security with Westpac dated 31 December 1993	373,000
	...	
40	<i>Balance (amount borrowed from Westpac to refinance ANZ debt.</i>	\$2,389,000
	Total stamp duty payable on mortgage dated 31 December 1993 to secure \$2,389,000	
	(1% of \$2,389,000)	23,890
45	<i>Less</i> stamp duty already paid on \$4,000,000 secured with Bank of Hawaii)	\$ 20,000
	Outstanding debt with ANZ as at 2 April 2002	\$ 1,948,268.57
50	Stamp duty exempted at the rate of 0.5%	\$ 9741.50

...
Difference payable (23,890 minus \$ 14,148.50
\$9741.50)

5 ...

With that background of the case the Plaintiff is now asking for the refund of the said sum of \$14,168.50.

(iii) The law

10 Section 3 of the Stamp Duties Act (the Act) (Cap 205) provides for instruments which will be subject to stamp duty subject to certain exemptions as stated in Pts II and III of the Schedule to the Act. Part I of the schedule lists the amounts of duty that is paid on a particular instrument. Prior to 1 January 1997 the duty payable on mortgage and debentures was 0.5% of the sum secured. But under the
15 Stamp Duties (Budget Amendment) Act 1999 the duty payable on mortgages and debentures was increased to 1% of the sum secured with effect from 1 January 1999.

As far as this case is concerned, under the Stamp Duties (Amendment) Act No
20 24 of 1998, Part I of the Schedule to the Act was amended as follows to allow an *exemption* from stamp duty on “*any refinancing or reconveyance of the stamped amount of a debenture*” and “*of a mortgage*”:

(a) Under the heading “DEBENTURE OR DEBENTURE STOCK,” in the “Exemption” provision, by adding after “authority” the words, “or any
25 refinancing or reconveyance of the stamped amount of a debenture”;

(a) Under the heading “MORTGAGE,” in the “Exemption” provision, by adding after “purposes” the words, “or any refinancing or reconveyance of the stamped amount of a mortgage”.

(iv) Application of law to facts

30 In this case the Commissioner had to decide on the amount of stamp duty payable on the documents evidencing the refinancing sum with WBC.

I have already stated hereabove how the amount of \$14,168 was calculated by the Commissioner of Stamp Duties.

35 In short, the Commissioner arrived at the figure of \$2,389,000 as the refinancing sum from WBC. She charged the Plaintiff 1% of \$2,389,000 which came to a figure of \$23,890. The Commission then deducted the already exempted sum of \$9730 from \$23,890. After the deduction the stamp duty payable by the Plaintiff came to \$14,168.50.

40 The point in this case depends on the construction one puts on the exemption from stamp duty provided on “*refinancing or reconveyance of the stamped amount of a debenture*” and “*of a mortgage*”.

I have considered the submissions made by both counsel and am inclined to agree with Mr Knight’s interpretation of the relevant sections of the act.

45 The Stamp Duties (Amendment) Act 1998 does allow for exemption on refinancing up to the amount which is secured by an existing mortgage or debenture which is replaced by a new mortgage or debenture on the refinancing.

As counsel stated and I agree that the purpose of the amendment exempting on
50 refinancing was to prevent the borrower having to pay duty twice when there was refinancing of an existing loan and borrowing not more than was secured by the original loan; but if more was borrowed on refinancing than was secured under

the original loan he should only have to pay duty at the appropriate rate on the difference between what is now being borrowed and what was secured under the original loan.

5 (v) *Reference to Hansard for meaning and purpose of amending legislation*

Although the provisions regarding exemption stand, it is clear according to my construction as to what the import and intention is behind this provision in the Stamp Duties Act, it is open to the court to refer to the objects and reasons contained in a Bill which precedes an Act.

10 I now refer to the “Explanatory Notes” to the Stamp Duties (Amendment) Bill where in para I it is stated:

This Bill seeks to amend the Stamp Duties Act as a result of the 1998 Budget. The Bill is designed to provide greater flexibility in refinancing or reconveyance of mortgages and debentures. Stamp duty is to be paid *only once* on the amount charged with duty. However, stamp duty is still payable on any amount above the original amount. [Emphasis mine]

Some interesting pronouncements have been made in regard to interpretation by reference to legislative history of an enactment. Although in this case I do not need to go to the Hansard for parliamentary debate in the amendment herein, as the explanatory notes is sufficient for our purposes, the following passages from judgment of Lord Griffiths in *Pepper (Inspector of Taxes) v Hart* [1993] AC 593 at 617–8; [1993] 1 All ER 42 at 50 have been borne in mind which I consider apt:

25 The object of the court in interpreting legislation is to give effect so far as the language permits to the intention of the legislature. If the language proves to be ambiguous I can see no sound reason not to consult Hansard to see if there is a clear statement of the meaning that the words were intended to carry. The days have long passed when the courts adopted a strict constructionist view of interpretation which required them to adopt the literal meaning of the language. The courts now adopt a purposive approach which seeks to give effect to the true purpose of legislation and are prepared to look at much extraneous material that bears upon the background against which the legislation was enacted. Why then cut ourselves off from the one source in which may be found an authoritative statement of the intention with which the legislation is placed before Parliament?

35 Lord Griffith goes on to say at AC 618; All ER 50:

I have to confess that on many occasions I have had recourse to Hansard, of course only to check if my interpretation had conflicted with an express Parliamentary intention, but I can say that it does not take long to recall and assemble the relevant passages in which the particular section was dealt with in Parliament, nor does it take long to see if anything relevant was said.

Further, with reference to having recourse to *extrinsic material* the Court of Appeal in *Donald Henry Bull and William John Bull v Commissioner of Inland Revenue* (unreported, Civ App Nos 17 & 18 of 1997S) had this to say:

45 Although in Fiji there is no statutory authority for referring to any sources external to the legislation itself in order to construe it, we consider it proper to refer to the reports of the Parliamentary debates on Bills for Acts to the extent, and for the purpose, approved for the courts in England by the House of Lords in *Pepper (Inspector of Taxes) v Hart* [1993] AC 593; [1993] 1 All ER 42. That is to say we consider it a proper development of the common law that, where the legislation is ambiguous or obscure or where to give it its natural meaning will lead to absurdity, the courts in Fiji should be able to take into account for the purpose of construing that legislation statements by the

Minister or other promoter of the Bill, provided that those statements are clear. Accordingly, we have examined the reports of the Parliamentary debates in 1994 in respect of the Bill for the present Act.

In the case before me on the question of construction as I said I do not have to go to extraneous source like Hansard as it is quite simple to interpret the wording as they are and find in favour of the Plaintiff for the crucial question is as to the meaning of the words in the said exemption section of the Act.

A similar issue as in this case arose in *Hari Rajesh Kumar v Attorney-General* [2001] FJHC 172 where Byrne J found in favour of the Plaintiff. I accept and adopt his reasoning in that case. This is what he said in interpreting the said 1998 Amendment to s 3 of the Stamp Duties Act:

I take this to mean that if a debt owing under a Debenture or Mortgage is being reconveyed or refinanced and a stamp duty has already been paid on the original Debenture or Mortgage (to secure the indebtedness), then a Debenture or Mortgage taken to secure the same debt being reconveyed or refinanced is exempt from payment of any stamp duty — to the extent of the debt being reconveyed or refinanced.

If, however, any additional debt is being taken (that is, a debt over and above the reconveyed or refinanced debt), then stamp duty is payable (at the ad valorem rate) for the additional debt.

20 Conclusion

In the outcome, because the debt secured by the new securities taken on refinancing is the same or less than the debt secured by the old securities which are being replaced on the refinancing, it falls within the purview of Stamp Duties (Amendment) Act No 24 of 1998 and hence the exemption applies to the Plaintiff in this case.

I find that it was not the intention of the legislature to make the borrowers pay stamp duty twice in the circumstances such as in the present case. There is no ambiguity in this regard in the said Amendment Act.

On the language of legislation the following words of Lord Simonds in *Russell (Inspector of Taxes) v Scott* [1948] 2 All ER 1 at 5 are pertinent:

My lords, there is a maxim of income tax law which, though it may sometimes be overstressed, yet ought not to be forgotten. It is that the subject is not to be taxed unless the words of the taxing statute unambiguously impose the tax on him. It is necessary that the maxim should on occasion be reasserted and this is such an occasion.

Finally on this aspect the following statement of Adam J in *Comptroller of Stamps v Martin* [1967] VR 369 at 372 is also apt in considering the issue:

But in any case, as one is constantly reminded, principle and reason afford no sure guide to the law on the subject of stamps, which is a matter *positivi juris* depending on the language of the legislature: see, for example, *John Danks and Son Pty Ltd v Collector of Imports* [1944] VLR 172 at 174; [1944] ALR 345 sub nom *John Danks and Son Pty Ltd v Comptroller of Stamps* [1944] VLR 172; [1944] ALR 345.

For these reasons I hold that the Plaintiff is entitled to the relief sought, namely exemption from stamp duty on the facts and circumstances of this case.

45 Order

Accordingly, I make the declarations and order sought in the originating summons. As for costs it is ordered that the Defendants pay the Plaintiff's costs in the sum of \$500.

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Determination made.