Clifford Development Pte Ltd v Commissioner of Stamp Duties
[2009] SGCA 17

Case Number : CA 133/2008

Decision Date : 24 April 2009

Tribunal/Court : Court of Appeal

Coram : Chan Sek Keong CJ; Andrew Phang Boon Leong JA; V K Rajah JA

Counsel Name(s) : Leung Yew Kwong and Tan Shao Tong (WongPartnership LLP) for the appellant; Liu Hern Kuan and Quek Hui Ling (Inland Revenue Authority of Singapore) for the respondent

Parties : Clifford Development Pte Ltd — Commissioner of Stamp Duties

Revenue Law – Stamp duties – Exemptions – Instruments liable to ad valorem stamp duty – Whether "reconstruction agreement" exempt from stamp duty – Section 15(1)(a) Stamp Duties Act (Cap 312, 2006 Rev Ed)

Words and Phrases – "Scheme for the Reconstruction" – Section 15(1)(a) Stamp Duties Act (Cap 312, 2006 Rev Ed)

24 April 2009

Chan Sek Keong CJ (delivering the grounds of decision of the court):

Introduction

1 This is an appeal from the decision of the High Court which held that a transfer of two immovable properties ("the subject properties") to Clifford Development Pte Ltd ("Clifford") pursuant to an agreement dated 11 May 2006 ("the Reconstruction Agreement") between Clifford and Overseas Union Enterprises Ltd ("OUE") was not entitled to stamp duty relief under s 15(1)(*a*) of the Stamp Duties Act (Cap 312, 2006 Rev Ed) ("the Act"): see *Clifford Development Pte Ltd v Commissioner of Stamp Duties* [2009] 1 SLR 607 ("the GD").

2 The facts leading up to the present appeal are not disputed and are as follows. Clifford was incorporated in 1990 as a wholly-owned subsidiary of OUE. It was a dormant company until it entered into the Reconstruction Agreement. By way of a letter dated 4 January 2006, PricewaterhouseCoopers Services Pte Ltd ("PwC") wrote to the Commissioner of Stamp Duties ("the Commissioner") on behalf of OUE stating, *inter alia*, that the OUE group of companies would be entering into a scheme for the reconstruction of its business operations. As part of this scheme, OUE would transfer its undertaking of operating and leasing the subject properties to Clifford. The letter requested that relief from *ad valorem* stamp duty be granted on the instruments executed in furtherance of the transfer of "this undertaking". The letter also stated that Clifford would:

> … continue the review of redeveloping the [subject properties] to renew and enhance the properties as well as to maximize the rental and leasing potential and the overall investment values. Should the redevelopment option materialize, Clifford may invite a joint venture partner to participate through a fresh share issue and an injection of funds …

3 The Commissioner replied on 26 January 2006 and requested for further information. Meanwhile, on 11 March 2006, OUE and Clifford entered into a joint-venture agreement ("the JVA") with United Overseas Land Limited ("UOL"). Clause (B) of the recitals to the JVA read as follows:

OUE and UOL have agreed to co-invest in [Clifford] to undertake the business of, amongst other things, redeveloping the [subject properties] ...

The other material terms of the JVA were as follows:

2. <u>OBJECTIVES OF THE PARTIES</u>

2.1 OUE will transfer the entire undertaking of operating and leasing the [subject properties] and the ownership of the [subject properties] to the Company [*ie*, Clifford] for a consideration of [$73,000,000], which is based on the average of the valuations (on an "as-is" basis) of the [subject properties] as at 31 December 2005 conducted by HVS International and as at 28 February 2006 conducted by Jones Lang LaSalle in accordance with Clause 3.1. In the event that an exemption pursuant to Section 15 of the Stamp Duties Act (Chapter 312 of Singapore) is not obtained, the stamp duty for the transfer of the [subject properties] to the Company shall be borne by the Company.

2.2 When the New Site [*ie*, the site located adjacent to the subject properties] is released for tender by the Urban Redevelopment Authority, the Shareholders shall bid (the **<u>"Bid"</u>**) for the purchase of the New Site through the Company and the Company shall submit a tender of the New Site to the Urban Redevelopment Authority for the acquisition by the Company of the New Site.

2.3 The business of the Company shall unless and until the Shareholders agree be confined to the following:

(a) the acquisition of the New Site and the [subject properties];

(b) the redevelopment of the [subject properties] (together with the New Site, if the Bid is successful) (the **<u>"Project"</u>**). For the avoidance of doubt, the Company shall proceed with the redevelopment of the [subject properties] even if the Bid is unsuccessful;

(c) the letting of units in the Project; and

(d) generally, to perform all acts, matters and things as may be consistent with, necessary for and incidental to the attainment of any and all of the foregoing objects,

and any other business as the Shareholders may unanimously agree.

3. <u>CAPITAL STRUCTURE OF THE COMPANY</u>

3.1 On or before 15 April 2006 or such other period as the Shareholders may mutually agree:

(a) OUE shall effect a transfer of the [subject properties] to the Company for a consideration of [$73,000,000] which shall be satisfied by the allotment and issue to OUE of [65,699,998] Shares and the sum of [$7,300,000] shall remain outstanding as a Shareholders' Loan by OUE; and

(b) contemporaneously with the transfer of the [subject properties] referred to in Clause 3.1(a), UOL shall (1) make an unconditional application in writing to the Company for the allotment to UOL of [32,850,000] Shares for cash at the subscription price of [$1.00] per Share and pay the sum of [$32,850,000] to the Company, and (2) grant the Company a

Shareholders' Loan of [$3,650,000], such payment to be by way of a cashier's order or banker's draft drawn on a bank licensed in Singapore and made out in favour of the Company or as it may direct.

…

18. PUT AND CALL OPTION

18.1 In consideration of the sum of [$1.00] paid by UOL to the Company (the receipt, sufficiency and adequacy of which the Company hereby acknowledges), the Company hereby irrevocably grants to UOL, an option (the **"Call Option"**) at any time during the Option Period to require the Company to allot and issue to UOL, free from all Encumbrances and with all rights attached thereto, as at the date of the Option Completion, the Option Shares [*ie*, 32,850,000 shares or such number of new shares which shall result in UOL holding 50% of the enlarged issued share capital of Clifford] at the Aggregate Subscription Price [*ie*, $32,850,000] and on the terms and subject to the conditions of this Clause 18.

…

18.3 In consideration of the sum of [$1.00] paid by the Company to UOL (the receipt, sufficiency and adequacy of which UOL hereby acknowledges), UOL hereby irrevocably grants to the Company, an option (the **"Put Option"**) at any time during the Put Option Period to require UOL to subscribe from the Company, free from all Encumbrances and with all rights attached thereto, as at the date of the Option Completion, the Option Shares at the Aggregate Subscription Price and on the terms and subject to the conditions of this Clause 18.

…

18.7 Against payment of the Aggregate Subscription Price by UOL, (a) the Company shall allot and issue the number of Option Shares specified in the Call Option Notice or (as the case may be) the Put Option Notice and deliver the share certificate(s) for the Option Shares to UOL, and (b) UOL shall grant the Company a Shareholders' Loan of [$3,650,000]. …

4 On 23 March 2006, PwC replied to the Commissioner and provided the requested information. The reply also informed the Commissioner that:

> [Clifford] has recently invited a joint venture partner to participate in the redevelopment of the [subject properties]. The joint venture partner will only invest or inject the funds [into] [Clifford] after the completion of the transfer of the business undertaking and [the subject properties] from OUE to [Clifford].

5 On 4 May 2006, the Commissioner replied to PwC informing the latter that the application for stamp duty relief under s 15(1)(*a*) of the Act for the proposed reconstruction exercise was not approved and that *ad valorem* stamp duty had to be paid on the transfer of the subject properties. A week later, on 11 May 2006, OUE and Clifford entered into the Reconstruction Agreement whereby OUE transferred the subject properties to Clifford. The consideration of $73m, being the value of the subject properties, was satisfied by an issuance of shares by Clifford to OUE and the entry in Clifford's books of a shareholder's loan of $7.3m.

6 On 22 May 2006, pursuant to the JVA, Clifford allotted to UOL new shares which amounted to 33.33% of its enlarged share capital. Slightly more than a week later, on 30 May 2006, UOL exercised

its call option under the JVA and raised its stake in Clifford to 50%. Sometime in October 2006, as a result of a deadlock between OUE and UOL, the deadlock mechanism provided for in the JVA was triggered and OUE purchased UOL's entire 50% shareholding in Clifford for a consideration of $212m.

7 Throughout the period of May 2006 to February 2007, Clifford, through either PwC or its solicitors, continued to make representations to and/or correspond with the Commissioner. However, the latter maintained his stance throughout, *ie*, that the Reconstruction Agreement did not come within the ambit of a "scheme for the reconstruction of any company" under s 15(1)(*a*) of the Act. Finally, on 10 March 2008, the Commissioner issued a formal notification pursuant to s 39A(5) of the Act and informed Clifford of the reasons for his decision. Clifford then appealed to the High Court. The High Court judge ("the Judge") held that the Reconstruction Agreement did not qualify for stamp duty relief. Dissatisfied, Clifford appealed to this court. After hearing counsel for Clifford and for the Commissioner, we dismissed the appeal. We now give our reasons for dismissing the appeal.

Relief from stamp duty under section 15(1)(*a*): Scheme for reconstruction

8 Section 15(1) of the Act provides relief from *ad valorem* stamp duty in respect of instruments giving effect to two types of transactions, as follows:

> **Relief from ad valorem stamp duty**
>
> **15**.—(1) If it is shown to the satisfaction of the Commissioner that the prescribed conditions have been fulfilled, ad valorem stamp duty under Articles 3 (*a*) and (*c*) and 9 (*c*) in the First Schedule shall not be chargeable on any instrument made on or after 1st July 2000 for the purposes of or in connection with —
>
> (*a*) the transfer of the undertaking [or part of an undertaking, when read together with the Stamp Duties (Relief from Stamp Duty upon Reconstruction or Amalgamation of Companies) Rules (see [19] below)] or shares in respect of a scheme for the reconstruction of any company or companies, or the amalgamation of companies;
>
> (*b*) the transfer, conveyance or assignment of any beneficial interest in any asset between —
>
> (i) companies which are associated in such manner as may be prescribed;
>
> (ii) registered business trusts which are associated in such manner as may be prescribed; or
>
> (iii) companies and registered business trusts which are associated in such manner as may be prescribed; …

Section 15(1)(*b*) of the Act has since been simplified to exempt "the transfer, conveyance or assignment of any beneficial interest in any asset between such entities that are associated in such manner as may be prescribed" from stamp duty. Article 3(*a*) of the First Schedule to the Act provides that stamp duty is chargeable on instruments relating to the conveyance, assignment or transfer "on sale of any immovable property or any interest thereof".

9 This appeal turned on the meaning of the expression "reconstruction" contained in s 15(1)(*a*) of the Act, a provision which was derived from the stamp duty legislation of England and which has been interpreted in many judicial decisions in that jurisdiction. Although the English equivalent of s 15 of

the Act (*viz* s 55 of the Finance Act 1927 (c 10) (UK), which has since been replaced by s 75 of the Finance Act 1986 (c 41) (UK)) had been described in B J Sims, *Sergeant on Stamp Duties* (Butterworths, 5th Ed, 1968) at p 252 as "one of the longest and most complicated sections in revenue legislation", and the section "remains a formidable challenge to the advisory skills of solicitors and accountants, and a problem for judges" (see Scarman LJ in *Crane Fruehauf Ltd v Inland Revenue Commissioners* [1975] 1 All ER 429 ("*Crane Fruehauf*") at 436), the meaning of the provision is now largely settled.

10 In *In re South African Supply and Cold Storage Company* [1904] 2 Ch 268, Buckley J said at 281 that the word "reconstruction" was a commercial term bearing no definite legal meaning. He then described reconstruction in general as follows (at 286):

> What does "reconstruction" mean? To my mind it means this. An undertaking of some definite kind is being carried on, and the conclusion is arrived at that it is not desirable to kill that undertaking, but that it is desirable to preserve it in some form, and to do so, not by selling it to an outsider who shall carry it on – that would be a mere sale – but in some altered form to continue the undertaking in such a manner as that the persons now carrying it on will substantially continue to carry it on. *It involves, I think, that substantially the same business shall be carried on and substantially the same persons shall carry it on*. But it does not involve that all the assets shall pass to the new company or resuscitated company, or that all the shareholders of the old company shall be shareholders in the new company or resuscitated company. Substantially the business and the persons interested must be the same. [emphasis added]

11 In *Brooklands Selangor Holdings Ltd v Inland Revenue Commissioners* [1970] 1 WLR 429 ("*Brooklands Selangor*"), Pennycuick J said, at 445, in relation to s 55 of the Finance Act 1927, that its purpose and intent was "to grant relief from duty where the underlying ownership of the undertaking transferred remains substantially unaltered". In *Crane Fruehauf*, Scarman LJ reiterated the judicial view that "substantiality" in the context of relief from stamp duty would require a capital-ownership retention of at least 90% by the shareholders of the previous entity, and that the introduction of new capital or a change in shareholding beyond a 10% tolerance might result in relief being denied. At 436–437, Scarman LJ said:

> The purpose of the section is to give relief from capital duty and transfer stamp duty when there exists for the reconstruction of any company or companies or the amalgamation of any companies a scheme which does not require either the creation of fresh capital or a transfer of interest. A tolerance of 10 per cent is, however, allowed; if the element of new capital or transfer is kept within this limit, all is well. If, subject to this tolerance, a scheme merely reconstructs or amalgamates that which already existed unreconstructed or as separate entities, the section provides relief from the two types of duty. But if a scheme for amalgamation introduces new capital or includes a substantial transfer of shares to a new shareholder, it would appear, on general grounds, to be a scheme outside the purview of the section and not entitled to the relief provided by the section; for then the shareholding does not remain substantially the same, nor does the property remain 'in the old hands'.

12 In the court below, Clifford argued that the scheme for reconstruction proposed by and eventually completed under the Reconstruction Agreement was entitled to relief from stamp duty under s 15(1)(*a*) of the Act on the following grounds:

> (a) Stamp duty was chargeable on instruments and not on transactions, and the liability of an instrument arose at the moment it was executed and depended on the law in force and the circumstances which existed at that time. Clifford's case was that the Commissioner should not

have taken into account the issuances of shares in Clifford to UOL under the JVA as they took place after the Reconstruction Agreement was concluded.

(b) Alternatively, relying on the definition of substantiality in the Income Tax Act (Cap 134, 2008 Rev Ed), so long as 50% or more of the shareholding was owned by the same persons before and after the transaction, then "substantially the same persons" would be involved, thereby fulfilling the requirement of a scheme for reconstruction.

13 The Judge rejected these arguments. He held that the Reconstruction Agreement was not a scheme for reconstruction as he was of the view that:

(a) the JVA was relevant in determining whether there was in fact a scheme for reconstruction;

(b) the phrase "substantially the same persons" was not a statutory requirement but an interpretation that had been adopted by the English courts to determine the meaning of "reconstruction", and it was "not proper to use inapplicable statutes to interpret case law" (at [92] of the GD).

14 In the appeal before us, apart from the further submission that it would also be eligible for relief under s 15(1)(*b*) of the Act, Clifford relied substantially on the same grounds and reiterated all the arguments which the Judge had rejected. Although we agreed with the conclusion of the Judge that the transfer of the undertaking of operating and leasing the subject properties from OUE to Clifford was not for the purpose of or in connection with a scheme for reconstruction, we have decided to give our reasons herein to clarify a number of propositions of law stated by the Judge which went further than necessary for his decision, and which are not correct in law.

The scope of section 15(1)(a)

15 Clifford's main argument before us was that stamp duty was a tax on instruments and not a tax on transactions, and that the Commissioner should only have looked at and have had regard to the terms of the Reconstruction Agreement and should not have looked at events that occurred after that date, which in turn meant that he should have ignored the two subsequent issuances of shares in Clifford to UOL made pursuant to the terms of the JVA. On that basis, Clifford contended that there was clearly a scheme of reconstruction falling within s 15(1)(*a*) of the Act.

16 We rejected this argument for two reasons. First, s 15(1)(*a*) provides relief from *ad valorem* stamp duty on an otherwise chargeable instrument only if it was "made ... *for the purposes of or in connection* with the transfer of [an] undertaking ... in respect of *a scheme for the reconstruction* of any company or companies" [emphasis added]. Section 15(1)(*a*) refers to "a scheme for ... reconstruction" and not merely to any "instrument of reconstruction" presented for adjudication for relief from stamp duty. If a purported scheme for reconstruction is set out in two or more instruments or documents, then there should be no reason why the Commissioner cannot look at all of them to determine what the true purpose of the scheme is. The second reason is that s 5(1) of the Act requires all the facts and circumstances affecting the liability of any instrument to duty, or the amount of the duty with which it may be chargeable, to be fully and truly set forth in the instrument. The inquiries made by the Commissioner showed that the JVA was part and parcel of the purported scheme for reconstruction, and therefore the Commissioner was entitled to look at its terms to determine the purpose of the adjudicated instrument, *ie*, the Reconstruction Agreement.

17 The legal position under the corresponding law in England is also the same. In *Swithland*

Investments Ltd v Inland Revenue Commissioners [1990] STC 448 ("*Swithland*"), Mr and Mrs Page and Mr Reece were shareholders in Swithland Estates Ltd ("Estates"). The original shareholding proportions were 75%, 15% and 10% respectively. A third party, Whitbread & Co plc ("Whitbread"), wished to acquire most of Estates' assets, and all of Estates' shareholders agreed to sell. They, however, differed on how the sale proceeds would be used. In order to accommodate the differing wishes of Estates' shareholders, a scheme, entailing various components, was devised. In this regard, three new companies were incorporated, namely Newco, Swithland Investments Ltd ("Investments") and Swithland Leisure Ltd ("Leisure"), and the following transactions were carried out:

> (a) Newco acquired the assets desired by Whitbread from Estates and its shares were sold to Whitbread.
>
> (b) Mr and Mrs Page exchanged their holding of 1,800 shares in Estates for 1,800 new shares in Investments.
>
> (c) Mr Reece transferred his holding of 200 shares in Estates to Leisure in return for 2,105 new shares in Leisure and £100,000.
>
> (d) Investments exchanged 600 of the Estates shares it held for 7,894 shares in Leisure.
>
> (e) Leisure then transferred its entire holding of 800 Estates shares to Investments for £2m.
>
> (f) Mr Page sold to Investments one share in Leisure for £1.

18 The effect of the above transactions was that Whitbread would acquire the assets of Estates it desired, while Mr and Mrs Page retained Estates, through their 100% ownership in Investments, as a vehicle for their own activities, and jointly controlled Leisure with Mr Reece for the activities which they wished to continue together. As a result, Mr Reece was able to extract some cash, while at the same time, Mr and Mrs Page would end up with 78.95% of Leisure and Mr Reece with the remaining 21.05%. On these facts, Ferris J said, at 459:

> In my judgment the transaction which I ought to look at in order to see whether there has been a reconstruction here is the wider transaction as contended for by counsel for the commissioners. It does not seem to me to be correct to try to separate the Newco part of the transaction from the rest when ... all the steps were planned and carried through as a composite whole. I cannot regard the Newco part of the transaction as a preliminary to the rest of the transaction. It was both the reason why the transaction as a whole was devised and an integral part of it.
>
> Viewed in this way I consider that the transaction was not a reconstruction in the sense in which that word is used in s 55 [of the Finance Act 1927]. …

19 Clifford had also argued that the subsequent issues of shares to UOL need not be taken into consideration for the purposes of s 15(1)(*a*) of the Act as these subsequent events could be dealt with by the anti-avoidance provision set out in s 33A of the Act or the "subsequent disallowance" provision set out under r 7 of the Stamp Duties (Relief from Stamp Duty upon Reconstruction or Amalgamation of Companies) Rules (Cap 312, R 3, 2002 Rev Ed) ("the Reconstruction Rules"). We likewise rejected this submission on the ground that it was not necessary for the Commissioner to rely on the anti-avoidance or subsequent disallowance provisions for the purposes of this case, given that the Reconstruction Agreement was not, to begin with, a scheme for reconstruction under s 15(1)(*a*) of the Act (see [20] below).

The scheme contemplated by the Reconstruction Agreement

20 We now consider whether the Reconstruction Agreement, when read with the JVA, was a scheme for reconstruction falling within s 15(1)(*a*) of the Act. Counsel for Clifford and for the Commissioner agreed that a transfer of a company's undertaking would amount to a scheme for reconstruction if both the transferor and transferee consisted of substantially the same persons and the same shareholding, and substantially the same business was carried on after the transfer. The parties, however, disagreed on what "substantially" meant in relation to the same shareholders or shareholding, and on the definition of "business".

The requirement of substantiality

(1) Substantially the same persons

21 In the present case, as a direct consequence of the JVA which the Reconstruction Agreement gave effect to, UOL acquired 33.33% of the enlarged share capital of Clifford. The JVA also resulted in OUE's 100% ownership in Clifford being reduced to 66.67%. It was on that basis that the Commissioner notified PwC on 4 May 2006 that the Reconstruction Agreement was not entitled to relief from *ad valorem* stamp duty as the reconstruction scheme did not fulfil the requirement of substantiality under a scheme for reconstruction. Clifford's alternative argument before us was that the requirement of substantiality was fulfilled so long as OUE's shareholding in the reconstructed entity, *ie*, Clifford, was maintained at not less than 50%. Clifford urged the court to depart from the decided meaning of "substantially the same persons" in the English cases, on the ground that, in Singapore, there are provisions in the Income Tax Act which have defined "substantially the same" to mean "not less than 50%", and that, in order that the two statutes be "fiscally aligned" and to maintain consistency of meanings of the same expression in revenue legislation, the court should give a similar meaning to the requirement of "substantiality" in s 15(1)(*a*) of the Act. Counsel also argued that, in the context of the current pro-business laws, the courts should construe the requirement of substantiality in s 15(1)(*a*) more favourably to assist companies in synergising the operations of reconstructed companies. We rejected both arguments.

22 With regard to the first argument, it is trite law that the same word may have different meanings in different legislation as the objectives of the different legislation may not be the same. This was made clear in *Ong Chay Tong & Sons (Pte) Ltd v Ong Hoo Eng* [2009] 1 SLR 305 at [67]. In that case, this court declined to apply the definition of "interest" in the Residential Property Act (Cap 274, 1985 Rev Ed) to define the same word in s 115 of the Land Titles Act (Cap 157, 2004 Rev Ed). It also emphasised that the ambit of "interest" in s 115 of the Land Titles Act should not be obtained outside the function and object of the said section (at [68]).

23 In the case of the Income Tax Act provisions, a company is allowed to carry forward its unabsorbed losses for set-off against its income in subsequent years subject to the condition that the shareholders of the company on the last day of the year in which the trade loss was incurred must be "substantially the same" as the shareholders of the company on the first day of the year in which such trade loss is used for set-off against the company's income. This requirement was an anti-tax avoidance measure introduced in the 1970s to prevent loss credits from being freely transferred and abused, and Parliament had in this instance specifically set substantiality at 50%. However, the objective of s 15(1)(*a*) of the Act is quite different. Stamp duty is *prima facie* payable on all instruments which have the effect of passing property from one person to another. Section 15(1)(*a*) is intended to grant relief for such an instrument *only if* there is a scheme for the reconstruction of a company or companies. Having given due regard to the purpose and intent of that particular section, the courts have imposed a high threshold of 90% substantiality in the same

shareholding after the reconstruction before the instrument can qualify for stamp duty relief.

24 With regard to the second argument, Clifford referred to the Second Minister for Finance's speech at the second reading of the Stamp Duties (Amendment) Bill (Bill 31 of 2000) ("the 2000 amendments") as follows (see *Singapore Parliamentary Debates, Official Report* (22 November 2000) vol 72 at col 1212 (Lim Hng Kiang, Second Minister for Finance)):

> The current section 15 of the Stamp Duties Act provides stamp duty relief for corporate restructuring and mergers. Relief from ad valorem duty is given based on the principle that there will be no substantial change in ownership of the transferred assets. As section 15 is a relieving section, several conditions have been set for the concession.
>
> In recognition that companies restructure and merge to obtain greater synergy, achieve cost competitiveness and deliver better products and services to increasingly sophisticated consumers, Dr Richard Hu announced in Budget 2000 that the conditions for section 15 relief will be relaxed so that more companies can enjoy the tax savings.
>
> Dr Hu also announced that relief would be granted to a transfer of assets between associated companies. This relief was previously not available.

25 Clifford contended that the Second Minister for Finance meant that the meaning of the word "substantial" should take into account the synergies of operations and the cost competitiveness that could be achieved from a reconstruction, and therefore the element of substantiality should be any percentage above 50% to facilitate such reconstructions.

26 However, the 2000 amendments were introduced to give effect to the Government's fiscal programme as set out in the 2000 budget speech where the Minister for Finance said (see *Singapore Parliamentary Debates, Official Report* (25 February 2000) vol 71 at cols 1111–1112 (Dr Richard Hu Tsu Tau, Minister for Finance)):

> *Further Stamp Duty Relief for Corporate Restructuring and Merger*
>
> Currently, section 15 of the Stamp Duties Act provides stamp duty relief for corporate restructuring and merger. As section 15 is a relieving section, qualifying conditions have been set for the concession. In recent years, we have seen an increase in the number of companies involved in restructuring or merger to re-align their businesses, so as to improve on cost-efficiency and better deliver products or services to customers. With these developments in mind, I have therefore decided to expand the scope of stamp duty exemption to a wider spectrum of corporate restructurings and mergers. In addition to the existing exemptions, relief will be granted to the transfer of assets between associated companies, the restructuring and merger of listed companies, and companies which intend to list or further list their shares after the exercise.
>
> *Presently, if the transfer involves less than 90% of the company's shares, or if the consideration is made in cash, the exercise would not qualify for the relief. I have decided to lift these two conditions for the transfer of assets between associated companies, defined as one owning 75% or more of another company, or a third company owning at least 75% of both companies*.
>
> Currently, publicly-listed companies and companies which intend to list their shares after the restructuring or merger are not able to meet the condition of a 2-year moratorium on changes in beneficial ownership of the shares. I have decided to lift the 2-year moratorium on the consideration shares held by public shareholders, and also allow companies to float a portion of

their issued share capital up to the minimum listing threshold required by the SGX for its mainboard listing. This threshold is currently 25%.

These changes will take effect shortly when details are announced by [the Inland Revenue Authority of Singapore].

[emphasis added]

The emphasised portion of the above speech is a restatement of the requirement of substantiality under s 15(1)(*a*) of the Act. The legislative intention was to lift the two conditions for the transfer of *assets* between associated companies, defined by r 4 of the Stamp Duties (Relief from Stamp Duty upon Transfer of Assets between Associated Companies) Rules (Cap 312, R 2, 2002 Rev Ed) ("the Asset Transfer Rules") as companies where one company owns 75% or more of the other company's issued share capital. The undertaking of a company may consist of, *inter alia*, assets, such as movable or immovable property, but in law an undertaking is not the assets of the company and *vice versa*. The amended s 15 introduced, via s 15(1)(*b*), a new avenue of relief for transfers of assets between associated companies (as defined), but it neither abrogated the original requirements for a scheme for reconstruction, nor did it alter or redefine the established meaning of "reconstruction". In our view, the requirement of substantiality with respect to the reconstruction of an undertaking (or part of an undertaking) to qualify for stamp duty relief was not affected by the 2000 amendments (see [24] above).

27 We have earlier referred to *Swithland* ([17] *supra*) to show that the Commissioner was entitled to look beyond the Reconstruction Agreement itself to find out what it was really all about and whether the requirement of substantiality was fulfilled. As mentioned earlier, Mr and Mrs Page were the majority shareholders in Estates and Mr Reece was the minority shareholder. The original shareholding proportions were 75%, 15% and 10% respectively. A series of transactions followed. To put things simply, Mr and Mrs Page ended up with 78.95% in Leisure and Mr Reece 21.05%. On these facts, Ferris J took the view that the parties' interest in Leisure, where joint participation was still evident, had "substantially changed from what they had been" (at 459):

Viewed in this way I consider that the transaction was not a reconstruction in the sense in which that word is used in s 55. Like the transaction in *Brooklands Selangor* [([11] *supra*)] it was, in effect, a partition of the assets previously belonging to a single company, in this case Estates. Before the transaction the substantial ownership of Estates was in Mr and Mrs Page and in Mr Reece in the proportions 75%, 15% and 10%. Under the transaction the greater part of Estates' assets were transferred to Newco and Whitbread [became] the only substantial owner of them. Other property, consisting of the assets not sold to Whitbread and all but £2m of the proceeds of sale, was retained by Estates. The substantial ownership of this property was in Mr and Mrs Page in the ratio of 75:15, or in percentage terms 83.3% and 16.7%. Out of the £2m, £100,000 was paid to Mr Reece, so that he owned 100% of this sum. The remaining £1.9m was kept by Leisure and the substantial ownership was as to 78.95% in Mr and Mrs Page (through Investments) and as to 21.05% in Mr Reece. Adapting the language of Pennycuick J in the *Brooklands Selangor* case, the effect of the transaction is that the holders of the shares in each of the four companies are substantially different from the former holders of shares in Estates. The transaction represents the transfer of the greater part of Estates' assets from the holders of the whole of the shares in Estates to Whitbread, which never held shares in Estates. Other significant parts of the assets of Estates were dealt with in such a way that Mr Reece ceased to be interested in those retained by Estates, Mr and Mrs Page ceased to be interested in the £100,000 taken by Mr Reece, and *where Mr and Mrs Page and Mr Reece continued to enjoy a joint participation (that is to say, in the case of Leisure) their proportionate interests were* *substantially changed from what they had been*. [emphasis added]

28 In the present case, when the JVA is read as a contractual prelude under the Reconstruction Agreement, it becomes clear that collectively it was a scheme to transfer OUE's undertaking in the subject properties to Clifford and to enable UOL to immediately become a 33.33% owner of Clifford. This scheme fell far short of the substantiality requirement (in terms of shareholders and shareholdings) necessary for relief under s 15(1)(*a*) of the Act. This was further compounded by the fact that, upon the exercise of either of the call and put options pursuant to cl 18 of the JVA (which is discussed in greater detail at [29]–[36] below), UOL's shareholding in Clifford would be raised to 50%, which eventually actualised when UOL exercised the call option on 30 May 2006, 19 days after the Reconstruction Agreement was signed.

(2) The legal effect of the call and put options under the JVA

29 Clifford contended before us that the Judge was wrong to take into account the legal effect of the call and put options in cl 18 of the JVA, as the exercise of the options was not a "done deal" when the Reconstruction Agreement was concluded and there was no certainty at that point that either party would ultimately exercise its respective option. The court below dealt with this issue by holding, at [9] of the GD, that:

> With the combined call and put options in the JVA, [Clifford] and UOL had therefore agreed as a term of the JVA that [Clifford] was to allot and issue an additional 32,850,000 shares to UOL for a total consideration of $32,850,000 within 12 months. There was in effect no real option available to UOL because [Clifford], through its put option, could compel UOL to take up these additional shares anyway on the same terms. *In my view therefore, the parties to the JVA had agreed that UOL was legally bound to pay $65,700,000 for a total of 65,700,000 new shares of [Clifford], to be executed in two tranches basically. It was only a question of timing, and no longer an option available to UOL whether or not [it] wished to acquire and pay for the balance of 32,850,000 shares at $1 per share*. [emphasis added]

30 We agree that the Judge was, strictly speaking, wrong in law to hold that UOL was "legally bound" to acquire the option shares, as it was theoretically *possible* that the options would not be exercised. That aside, the Judge was correct to take into consideration the option shares in determining whether there was a scheme for reconstruction. Let us explain why.

31 In the case of *Crane Fruehauf* ([9] *supra*), the appellant company ("Crane") entered into an amalgamation agreement with another company ("Boden") to acquire the whole of the latter. The consideration for the acquisition would be satisfied by the allotment of 1,800,000 shares in Crane to Boden's shareholders and £100,000. The agreement also provided that of the 1,800,000 shares, FIL, a company which held one-third of the share capital in Crane, would have the option to purchase 600,000 shares at £1 each. FIL eventually exercised the option. The question before the English Court of Appeal was whether the amalgamation agreement was entitled to relief under s 55 of the Finance Act 1927.

32 Scarman LJ accepted that there had been an "amalgamation" in the general sense as the two companies, *viz*, Crane and Boden, had merged (at 437):

> Although 'amalgamation' is a technical term in the sense that it is frequently used by technicians in the field of company law, it is not a legal term of art; it has no statutory definition. It is frequently used to describe a merging of the undertakings of two or more companies into one undertaking. Such a merger can be achieved in several ways; and the resultant one undertaking

> may become that of one of the companies concerned or of a new company altogether. In the present case the scheme contemplated the amalgamation of the Crane and Boden undertakings into one by the issue to the Boden shareholders of Crane shares in exchange for their Boden shares. On its completion the Boden and Crane separate undertakings were united in the one undertaking of Crane.
>
> This being the intention and effect of the scheme, it cannot lose its character of amalgamation merely because in the events that happened, and as envisaged by the scheme, the Boden shareholders were obliged to sell, and did at once sell, one-third of their new Crane shares to FIL. There still existed only one undertaking comprising the two that had existed before the scheme.

33 However, it is also evident that Scarman LJ was describing "amalgamation" in its non-technical sense as he had earlier opined that even if a scheme of amalgamation existed, relief would nonetheless be denied if the scheme resulted in a substantial alteration of the shareholdings (*ibid*):

> But if a scheme for amalgamation introduces new capital or includes a substantial transfer of shares to a new shareholder, it would appear, on general grounds, to be a scheme outside the purview of the section and not entitled to the relief provided by the section; for then the shareholding does not remain substantially the same, nor does the property remain 'in the old hands'.

34 On the facts of that case, Scarman LJ went on (at 438) to hold that the option must be taken into account for the purposes of s 55 of the Finance Act 1927 as all the parties knew it would be exercised:

> The Boden shareholders were not, therefore, being offered a 'straight swop', to use Templeman J's expressive phrase, but something else – an issue of shares, as to two-thirds unconditionally but as to one-third with a string attached, for the acceptance of which they were to be paid £600,000 cash. They accepted the offer*; the option was exercised, as all knew it would be*, and they received, on the final completion of the scheme, two-thirds of the new issue of shares and £700,000 (£100,000 from Crane, £600,000 from FIL). The fact that, because of the market movement in Crane shares, the offer turned out to be less valuable than an offer of all the new issue unconditionally does not detract from the fact that it was the offer which Crane made and they accepted. The fact that Crane was constrained to make the offer because without the condition FIL could and would have blocked the scheme is also irrelevant; it is merely the reason why the offer was what it was, and not something different. The fact that Crane did not have to find the £600,000 is also irrelevant. Crane proposed a scheme, accepted by the Boden shareholders, under which the Boden shareholders did not part with the new shares until the sum of £600,000 was paid by FIL. The cash did not move from Crane; but the offer which secured the cash did, and was accepted. In my judgment, the totality of the offer made by Crane and accepted by Boden was the consideration moving from Crane in exchange for the Boden shares. Since the total offer included an element other than the issue of shares which was worth more than 10 per cent of the value of the whole, the condition which the section imposes as to the nature of the consideration has not been shown to exist. Duty is therefore payable on the adjudicated instruments.
>
> This conclusion is consistent with the general intendment of the section; for the effect of the scheme was to substitute a new shareholder, FIL, for the old Boden shareholders so far as concerned one-third of the Boden share capital amalgamated into the new undertaking. Not all the property therefore remained 'in the old hands'.

[emphasis added]

35 Accordingly, the test in determining whether an option should be taken into consideration for the purposes of s 15(1)(*a*) of the Act is *the intention of the parties in relation to the option in the scheme for reconstruction*. Such intention may be objectively inferred from the terms of the scheme in the context of the actions of the parties. In *Crane Fruehauf*, for instance, the option was exercised one day after the amalgamation was effected, and Scarman LJ viewed it as an indication that the parties knew that it would be exercised (see [34] above). Similarly, in *Central and District Properties Ltd v Inland Revenue Commissioners* [1966] 1 WLR 1015, the House of Lords took into consideration, for the purposes of s 55 of the Finance Act 1927, a transferable option given to the preference shareholders of the acquired company to subscribe for ordinary shares in the acquiring company at below the market price. Their Lordships computed the difference in the value of the market price of the ordinary shares and the exercise price of the option and found that the value implicit in the option formed part of the consideration for the acquisition. The result was that s 55(1)(*c*) of the Finance Act 1927, *viz*, the requirement that at least 90% of the consideration be satisfied by an issue of shares in the transferee company, was not fulfilled and the scheme was therefore not entitled to relief. It is clear that by issuing (and accepting) an option with a discounted exercise price, the parties must have intended, at the time of its grant, that it would be exercised.

36 In the present case, the JVA provided for a call option as well as a put option, the intention being that if UOL did not exercise the option to subscribe for more shares in Clifford, Clifford would exercise the put option to issue more shares to UOL to give effect to the parties' understanding that they would be equal partners in the enterprise. In other words, it is reasonable to objectively infer from this scheme that the intention of the parties was that UOL would become a 50% shareholder of Clifford eventually, whether through the call option or the put option. It was effectively a done deal. As it turned out, UOL exercised the call option 19 days after the Reconstruction Agreement was signed and became a 50% shareholder of Clifford. These being the facts, it is not unreasonable to infer that this result was exactly what was intended. Therefore, the Judge's conclusion on the effect of the two options is correct in law although he was wrong in stating that UOL was *legally* bound to take up the additional shares in Clifford.

(3) Substantially the same undertaking or "business"

37 In the court below, the Judge accepted the argument of the Commissioner that the business sought to be undertaken by Clifford (which was the redevelopment of the subject properties together with the adjacent land if it were successful in bidding for the land), was not the same as the undertaking transferred to it under the Reconstruction Agreement (which was the operating and letting of the subject properties). He also seemed to have suggested that the transfer of part of OUE's undertaking was not sufficient for the purposes of s 15(1)(*a*) of the Act (see [58] of the GD):

> Neither could I see any reconstruction of OUE as it would still be carrying on its business of owning and letting its commercial properties, namely, 107-M Cavenagh House at Cavenagh Road, Asiawide Industrial Building at Pereira Road and 30 Shaw Road #03-03 and #03-04; and carrying on its hotel operation of the Meritus Mandarin Singapore. The transfer of the properties was a hiving off of assets for redevelopment with a new joint venture partner, UOL, via a formerly dormant company of OUE (*ie*, [Clifford]), and I could not regard this joint venture as a scheme of "reconstruction" of OUE nor [Clifford]. Clearly, commercial men would view the redevelopment business as a new and different business to be undertaken with a different person, when UOL was invited to participate substantially which then changed not only the business profile but also the entire shareholding profile of [Clifford].

38 In our view, if the Judge meant that the transfer of the undertaking of the operation and letting of the subject properties was not a reconstruction of OUE and therefore did not fall under s 15(1)(*a*) of the Act, he would be wrong because the exemption was applicable to the transfer of part of the undertaking by virtue of r 2(2) of the Reconstruction Rules (see *Baytrust Holdings Ltd v Inland Revenue Commissioners* [1971] 1 WLR 1333 at 1353 and the corresponding English legislation which sets out the same position).

39 As for the requirement of carrying on "substantially the same business", we assume it to refer to the undertaking that was transferred, which in this case was *prima facie* the business of operating and letting out the subject properties because those two properties were investment properties of that nature. The JVA also made it clear that the subject properties would be redeveloped, and that Clifford might bid for a piece of adjacent land for integrated development with the subject properties (which it did, but unsuccessfully). In our view, the Judge had taken an excessively narrow and literalist approach in applying the "substantially the same business" test in holding that OUE's undertaking was different from Clifford's undertaking, even if it had included the subsequent development of the land which Clifford had failed to acquire. The entire redevelopment would still be for the purpose of operating and letting out the redeveloped properties, either as an integrated development or as separate developments.

40 In the present case, OUE's businesses at the time of the reconstruction included the development of commercial, hotel and residential properties, or mixed developments, for sale or letting. OUE itself was therefore entitled to redevelop the two properties, with or without the addition of a new property. What OUE could do in the ordinary course of its business, Clifford should be allowed to do likewise. Such an interpretation is consistent with the legislative purpose to allow companies "to re-align their businesses, so as to improve on cost-efficiency and better deliver products or services to customers" (see the 2000 budget speech at [26] above).

Relief from stamp duty under section 15(1)(*b*): Asset transfers between associated companies

41 The 2000 amendments (see [24] above) provided a new relief from *ad valorem* stamp duty with respect to the transfer of assets between associated companies by way of the new s 15(1)(*b*) (see [26] above). Clifford argued before us that the Reconstruction Agreement also qualified for relief under s 15(1)(*b*) of the Act. This point was addressed by the Judge who held that OUE and Clifford had ceased to remain as associated companies (as defined by r 4 of the Asset Transfer Rules) when, as part of the JVA, Clifford issued shares which gave UOL a 33.33% interest in it. This was later raised to 50% upon UOL's exercise of its call options. At [45] of the GD, the Judge said:

> Nevertheless in my view, the fact that r 6(1)(*a*) of the Asset Transfer Rules had provided for a subsequent disallowance of stamp duty relief if either the transferor company or transferee company were to cease to own 75% or more of the shares of the other company (or where the shares in both companies were not owned by a common holding company to the same extent) within a period of two years after the transfer of the asset, indicated clearly to me that a transfer of the said properties belonging to OUE on 11 May 2006 to [Clifford], which was restructured from a 100% subsidiary into one where OUE initially reduced its shareholding to 66.66% on 22 May 2006 some 11 days later, and then further reduced its shareholding to 50% on 30 May 2006 another eight days later, would in any event not have cleared r 6(1)(*a*) read with r 4 of the Asset Transfer Rules were they to be applicable on the basis that there was no reconstruction scheme, which I found was the case here. ... I derived comfort from the fact that my assessment that the instrument was not entitled to relief was also not inconsistent with the application of the Asset Transfer Rules because essentially, one could alternatively view the

instrument as an agreement to transfer assets between associated companies and one could readily treat the transaction as a mere asset transfer between associated companies with no reconstruction scheme in place. OUE transferred its properties to [Clifford], which started life as OUE's fully owned subsidiary but subsequently became a 66.66% and later a 50% associated company of OUE within a matter of days after the asset transfer was completed. A reduction from owning 100% to owning only 50% of [Clifford]'s shares within 19 days after the transfer of the assets from OUE to [Clifford] was way below the retention requirement of a minimum of 75% shareholding for a period of two years after the asset transfer. Since there was no reconstruction, the instrument would in any case be disqualified for relief under r 6(1)(*a*) of the Asset Transfer Rules as the two companies (OUE and [Clifford]) did not remain "associated" (as defined in r 4 of the Asset Transfer Rules) when UOL took up a 33.33% stake and later an even bigger 50% stake in [Clifford], and OUE's 100% stake in [Clifford] at the time of the transfer correspondingly diminished to 50% after 19 days. Therefore, any relief that could have been allowed under s 15(1)(*b*) of the Act for the transfer or conveyance of any beneficial interest in the properties transferred between associated companies (*ie*, OUE and [Clifford]) would invariably have led to a subsequent disallowance of relief under [r] 6(1)(*a*) of the Asset Transfer Rules upon the acquisition of the substantial stakes in [Clifford] by UOL, which caused [Clifford] and OUE to become non-associated companies for the purpose of the Asset Transfer Rules.

42 We agreed with the Judge. As he had pointed out, the fact that Clifford had ceased to be associated with OUE meant that relief, even if granted in the first place, would have been subsequently disallowed. At this point, we would emphasise that r 6(1)(*a*)(i) of the Asset Transfer Rules is premised on "a change in the *percentage of beneficial ownership of the transferor company*" [emphasis added] and not simply "a change in beneficial ownership". The relevant r 6(1)(*a*) reads:

> **6**.—(1) The matters referred to in section 15 (3) (*b*) of the Act are as follows:
>
> (*a*) the transferor company and the transferee company cease to be associated within the meaning of rule 4 within 2 years from the date of the acquisition of the asset by the transferee company by reason of a change *in the percentage* of beneficial ownership of —
>
> (i) the transferor company; or
>
> (ii) a holding company of both the transferor company and the transferee company,
>
> unless such change is in consequence of —
>
> (A) a reconstruction;
>
> (B) an amalgamation;
>
> (C) a liquidation where the conditions specified in paragraph (2) are satisfied; or
>
> (D) a relevant offer of shares of the existing issued share capital of the transferee company or the transferor company;
>
> [emphasis added]

43 In other words, a dilutive issuance of new shares to a third party within the two-year period could potentially trigger the said provision (as opposed to s 15(1)(*a*) of the Act which targets a dilutive issuance if it is part of the purported scheme of reconstruction). In the present case, the

issuance of shares to UOL as part of the reconstruction scheme resulted in relief being denied, correctly, under both ss 15(1)(*a*) and 15(1)(*b*) of the Act.

44 In our view, the fact that, in the present case, Clifford had not at the outset sought stamp duty relief under s 15(1)(*b*) of the Act but only under s 15(1)(*a*) showed that it was fully aware that it could not comply with the requirements for relief under the former section.

Conclusion

45 For the foregoing reasons, we dismissed the appeal with costs.