Clifford Development Pte Ltd v Commissioner of Stamp Duties
[2008] SGHC 168

Case Number : OS 405/2008

Decision Date : 06 October 2008

Tribunal/Court : High Court

Coram : Chan Seng Onn J

Counsel Name(s) : Leung Yew Kwong and Tan Shao Tong (WongPartnership LLP) for the applicant; Liu Hern Kuan and Quek Hui Ling (IRAS) for the respondent

Parties : Clifford Development Pte Ltd — Commissioner of Stamp Duties

Revenue Law – Stamp duties – Exemptions – Instruments liable to ad valorem duty – Whether "reconstruction agreement" exempt from stamp duty – Section 15(1)(a) Stamp Duties Act (Cap 312, 2006 Rev Ed) – Rule 3 Stamp Duties (Relief from Stamp Duty upon Reconstruction or Amalgamation of Companies) Rules (Cap 312, R 3, 2002 Rev Ed)

6 October 2008

Chan Seng Onn J:

Introduction

1 Clifford Development Pte Ltd (the "applicant") submitted to the Commissioner of Stamp Duties (the "respondent") an application for relief from stamp duties pursuant to s 15(1)(a) of the Stamp Duties Act (Cap 312, 2006 Rev Ed)(the "Act") . Section 15(1)(a) provides relief from *ad valorem* stamp duty chargeable on the "Conveyance, Assignment or Transfer on sale of any immovable property or any interest thereof" under Article 3 (a) in the First Schedule to the Act on instruments made for the purposes of or in connection with ---

> "(a) the transfer of the undertaking or shares **in respect of a scheme for the reconstruction** of any company or companies, or the amalgamation of companies;" (emphasis added)

2 The respondent denied the application for stamp duty relief in respect of a reconstruction agreement dated 11 May 2006 ("reconstruction agreement" or "instrument") made between the applicant and Overseas Union Enterprise Limited ("OUE") for the transfer of the undertaking concerning Overseas Union House at No. 50 Collyer Quay (an 8 storey office/carpark and restaurant complex) and the Change Alley Aerial Plaza at No. 60A Collyer Quay (a shopping ramp of 44 shops and a tower building), hereafter collectively referred to as "the properties" representing all of OUE's Central Business District investment properties, from OUE to the applicant. The respondent considered that the transfer was not made for the purposes of or in connection with the scheme of reconstruction of the OUE Group so as to qualify the instrument for exemption from stamp duty under s 15(1)(a) of the Act and the Stamp Duties (Relief from Stamp Duty upon Reconstruction or Amalgamation of Companies) Rules ("Reconstruction Rules").

3 Dissatisfied with the respondent's decision to disallow the applicant's objection, the applicant appealed and required that a case be stated by the respondent for the opinion of the High Court pursuant to s 40(1) of the Act. I heard the matter and decided that the applicant was not entitled to the stamp duty relief claimed. I now give my reasons.

Background and the Chronology of Events

4 The applicant, a private limited company incorporated in Singapore on 3 October 1990, was a dormant company since incorporation with no assets. Its two shares held by Singapore Mandarin International Hotels Pte Ltd were subsequently transferred to OUE, a company listed on the Singapore Exchange. The applicant then became a wholly owned subsidiary directly under OUE.

5 By way of a letter dated 4 January 2006, PricewaterhouseCoopers Services Pte Ltd wrote to the respondent on behalf of OUE stating, *inter alia*, that:

(a) OUE was entering into a scheme of reconstruction to restructure its business operations.

(b) OUE planned to transfer its undertakings comprising the business and the properties to the applicant, its wholly owned subsidiary.

(c) The properties would be transferred based on third party valuation at market value.

(d) At least 90% of the consideration for the acquisition by the applicant would be satisfied by the issue of ordinary shares in the applicant to OUE. (This would accordingly satisfy the requirement in Rule 3(b)(i) of the Reconstruction Rules. (See [24] below))

(e) OUE would undertake that it would not cease to be the beneficial owners of the shares in the applicant issued to it within a period of two years from the date of the authority to increase the share capital of the applicant, other than in consequence of a reconstruction, amalgamation or liquidation.

(f) Correspondingly, the applicant would also undertake that it would not cease to be the beneficial owner of the undertaking and the properties within a period of two years from the date of authority to increase the share capital of the applicant, other than in consequence of a reconstruction, amalgamation or liquidation. (Both (e) and (f) were meant to ensure that subsequent disallowance of relief under Rules 7(a) and 7(b) of the Reconstruction Rules does not apply. (See [24] below))

(g) The OUE's group structure remained the same before and after the transfer of the properties. However, in furtherance of the undertaking so transferred, the applicant would continue the review of redeveloping the properties to renew and enhance the properties as well as to maximise the rental and leasing potential and the overall investment values.

(h) Should the redevelopment option materialise, the applicant might invite a joint venture partner to participate through a fresh share issue and an injection of funds.

6 The objective of items (g) and (h) above was to obtain the necessary financing to redevelop the properties and collaborate with a strategic partner that would contribute the necessary skills and expertise required for the different aspects of the "restructuring project". OUE already had in mind at this stage to invite United Overseas Land Limited ("UOL") to jointly redevelop the properties as OUE believed that UOL could significantly add value to the redevelopment project.

Joint Venture Agreement of 11 March 2006

7 On 11 March 2006, the applicant, OUE and UOL entered into a joint venture agreement ("JVA"). The JVA was to enable OUE and UOL (the "parties") to co-invest in the applicant to undertake the business, amongst other things, of redeveloping the properties. The parties also expected that a property adjacent to Overseas Union House and located at Collyer Quay (the "New Site") would be

released by the Urban Redevelopment Authority ("URA") and that the parties, through the applicant, would bid for the New Site. If the bid was successful, the parties, using the applicant as their corporate vehicle, would jointly redevelop the properties together with the New Site.

8 Under the JVA, the parties agreed, *inter alia*, that:

a. The business of the applicant would be confined to the following unless otherwise agreed:

(1) the acquisition of the New Site and the properties;

(2) the redevelopment of the properties (and together with the New Site, if the bid was successful)(the "Project");

(3) the letting of units in the Project;

(4) 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

(5) any business unanimously agreed by the shareholders.

b. OUE would transfer the undertaking of operating and leasing the properties and the ownership of the properties to the applicant for a consideration of $73,000,000 based on a third party valuation of the undertaking's and the properties' fair market value.

c. The consideration of $73,000,000 was to be satisfied by the allotment and issue to OUE of 65,699,998 shares in the applicant (i.e. accounting for $65,700,000 of the $73,000,000 consideration). The remaining sum of $7,300,000 would be outstanding as a shareholder's loan by OUE to the applicant. Together with the 2 existing shares held, OUE would have a total of 65,700,000 shares of the applicant after the share allotment.

d. UOL would, contemporaneously with the transfer of the properties, apply for and obtain an allotment of 32,850,000 shares of the applicant at $1 per share and pay $32,850,000 to the applicant. UOL would also grant a shareholders loan of $3,650,000 to the applicant.

e. At the same time, the applicant granted a call option to UOL valid for 12 months, which required the applicant to allot and issue to UOL an additional 32,850,000 shares at the aggregate subscription price of $32,850,000. Correspondingly, UOL granted a put option to the applicant valid for 12 months where UOL was required to subscribe for the same number of additional shares of the applicant at the same subscription price as the call option. Upon the payment of the aggregate subscription price for the option shares, UOL was required to grant the applicant a further shareholder's loan of $3,650,000.

f. That generally, in the event of a deadlock (as defined in clause 19.1) occurring, the parties were allowed to bid for shares held by the other party and purchase the shares of the other party, pursuant to the terms set out in clause 19 therein.

9 With the combined call and put options in the JVA, the applicant and UOL had therefore agreed as a term of the JVA that the applicant 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 the applicant, 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 the applicant, 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 they wished to acquire and pay for the balance of 32,850,000 shares at $1 per share.

10 As events later transpired, the transactions were performed exactly in accordance with the agreed terms of the JVA. The call option was exercised on 30 May 2006 just a mere 2 ½ weeks after the reconstruction agreement (see [13] below) was signed. Consequently, UOL obtained another 32,850,000 shares of the applicant. Thereafter, OUE and UOL each became shareholders of 50% of the shares of the applicant. That to my mind was the agreed shareholding structure that the JVA was intended to achieve from the very beginning and even before the reconstruction agreement of 11 May 2006 was signed.

OUE's Purpose for Entering into the JVA

11 According to Mr Teo Cheng Seong ("Teo CS"), the legal manager of OUE, the transfer of the undertaking from OUE to the applicant was:

> "...made in a reconstruction exercise involving OUE and the Applicant. The Applicant would be able to leverage on the project management expertise of UOL, which was to subsequently become a shareholder of the Applicant. UOL's expertise was especially useful in the redevelopment of Overseas Union House into an 18-storey office building and in the conservation of the Change Alley Aerial Plaza."

12 After getting more details from the applicant, the respondent replied on 4 May 2006 turning down the application for stamp duty relief for the proposed reconstruction exercise and decided that *ad valorem* stamp duty had to be paid on the reconstruction agreement and the instrument transferring the properties from OUE to the applicant, its wholly owned subsidiary at the time of the transfer. The respondent's view was that following the proposed reconstruction of the OUE group, shares in the applicant would be allotted to a Joint Venture Partner (a third party) pursuant to the JVA. The allotment of shares would result not only in a divestment of OUE's interest in the properties but would also put an end to the restructuring scheme undertaken.

Reconstruction Agreement of 11 May 2006

13 Pursuant to the JVA and by way of an agreement described as a "reconstruction agreement" and dated 11 May 2006, OUE executed a transfer, transferring the undertaking and the properties to the applicant for a consideration of $73,000,000 consisting of shares in the applicant and the shareholder's loan. Stamp duty of $2,184,600 and $10 was paid (under objection) by the applicant on the "reconstruction agreement" and the transfer instrument respectively (hereafter collectively to be referred to as the "instrument" where appropriate).

14 Soon thereafter on 22 May 2006, UOL, pursuant to its obligations under the JVA, subscribed for and was allotted the requisite number of shares in the applicant and extended the shareholders loan to the applicant. This resulted in UOL having a 33.33% equity stake in the applicant before the exercise by either party of the call and put options.

15 Eight days later on 30 May 2006, UOL exercised its call option under the JVA and obtained an additional 32,850,000 shares in the applicant and provided the additional shareholder's loan as required under the JVA. Following the completion of the allotment of shares under the call option, UOL became a 50% shareholder in the applicant. The share certificates evidencing these two allotments of

a total of 65,700,000 applicant's shares to UOL pursuant to the JVA were issued on and dated 5 June 2006. At this juncture, both UOE and UOL had each extended to the applicant a shareholder's loan of $7,300,000. The JVA also stipulated that UOE and UOL would each be entitled to nominate 3 directors to the board of directors of the applicant. The board would also appoint a Development Committee, which would comprise of 2 members appointed by UOE and 2 members appointed by UOL. From this, it was very clear to me that UOE and UOL were to be equal partners in all respects in their joint venture vehicle, *viz* the applicant.

16 However, on 14 October 2006, OUE acquired all of UOL's shares in the applicant for a consideration of $212,304,567 pursuant to the deadlock mechanism in clause 19 of the JVA. As a result of the deadlock, UOL made a very substantial profit of some $146,604,567 over a very short space of time in this share sale to OUE because of the rapid rise in property prices during this period of five months. The high valuation of the applicant's shares was principally due to the substantial increase in the market price of the properties it now owned since 11 May 2006 when OUE transferred the properties to the applicant. Counsel informed me that the deadlock mechanism was invoked due to some disagreement over certain issues. The transfer of the shares from UOL to OUE was completed on 27 October 2006. Consequently, the applicant became a wholly-owned subsidiary directly under OUE once again.

17 Meanwhile, the public tender launched by URA for the New Site on 29 June 2006 closed on 17 October 2006 with a total of 8 tenders received. The applicant was one of the eight tenderers. On 18 December 2006, the results of the public tender were released. The applicant failed in its bid. Precious Treasure Pte Ltd, a company which is part of the Sino Group based in Hong Kong, won the bid.

Substance of the Whole Transaction between OUE, UOL and the Applicant

18 In essence, OUE and UOL entered into a joint venture agreement where the parties agreed to develop the properties using the applicant as their joint venture corporate vehicle. If the applicant succeeded in bidding for the New Site expected to be released by the authorities for redevelopment, then the applicant would include the New Site for development together with the adjacent property, Overseas Union House. Pursuant to the JVA, OUE transferred the properties to the applicant for a total consideration of $73m, of which $65.7m was essentially payment in kind to acquire 50% of the shares in the applicant and the balance of $7.3m was to be regarded as a shareholder's loan to the applicant. As agreed under the JVA, UOL paid the applicant an aggregate amount of $65.7m in cash and acquired 50% of the shareholding in the applicant. As with OUE, UOL also extended a shareholder's cash loan of $7.3m to the applicant. Subsequently, owing to a deadlock, OUE acquired all of UOL's 50% shareholding in the applicant.

19 The applicant argued that the above events justified a stamp duty exemption for the transfer of the properties by OUE to the applicant as the transfer was "in respect of a scheme for the reconstruction of any company or companies" under section 15(1)(a). At paragraph 23 of Teo CS's affidavit, it was averred that "OUE has through its share holding in the Applicant, retained substantial interests in the Properties and the undertaking, even after the issue of shares in the Applicant to UOL."

20 The respondent disagreed and basically was of the view that the JVA and the events occurring thereafter were pursuant to a joint venture arrangement made between OUE and UOL for the development of the properties and the New Site, when released by the URA and that the acquisition of the properties by the applicant was therefore not a restructuring scheme under s 15(1)(a) of the Act. On 22 June 2007, the respondent wrote to Messrs Wong Partnership, the solicitors acting for the

parties in respect of the transfer of the properties, stating the reasons for the respondent's position as follows:

a. The respondent agreed that the conditions of Rule 3 of the Reconstruction Rules were satisfied;

b. However the conditions must be read in connection with a scheme of reconstruction or amalgamation of companies;

c. A scheme of reconstruction must mean that "substantially the same business shall be carried on and substantially the same person shall carry it on"; and

d. With the allotment of 32,850,000 new shares in the applicant to UOL, the business was no longer substantially carried out by the same person, OUE, as it only held 66.67% shares in the applicant.

21 It did not appear that the respondent was aware as on the date the above letter was written, that UOL had already exercised its option on 30 May 2006 and increased its shareholding in the applicant from 33.33% to 50% and that OUE's shareholding in the applicant was no longer 66.67% but had been reduced to only 50%. If this material information was in fact not conveyed to the respondent prior to 22 June 2007, then why did the applicant not promptly inform the respondent of this material change which substantially increased the shareholding of UOL in the applicant? However, I did not need to deal with this question for the purpose of this decision.

22 On 10 March 2008, the respondent gave his decision pursuant to s 39A(5) of the Act, maintaining the stand adopted in the earlier letter dated 22 June 2007 and stating the additional reason that it was not a restructuring scheme because the reconstruction scheme was terminated shortly after the implementation when UOL completed the acquisition of the shares of the applicant in October 2006.

Case Stated

23 On 24 April 2008, the respondent stated the case as required under s 40(2) and set out the facts (which I would not repeat) and the positions of the applicant and the respondent together with the question for determination as follows:

<u>The Applicant's position</u>

12. The Applicant's position is that the Reconstruction Agreement of 11 May 2006 qualifies for stamp duty relief under Section 15(1)(a) of the Stamp Duties Act and the Rules, as it was made for the purpose of or in connection with a transfer of undertaking in respect of a scheme of reconstruction of OUE and the Applicant.

13. The fact that the Applicant after the transfer, issued shares to UOL does not detract from the position that the transfer of 11 May 2006 is a transfer of undertaking in respect of a scheme of reconstruction of OUE and the Applicant. All the conditions in Section 15(1)(a) of the Stamp Duties Act and the Rules are satisfied for the purpose of the stamp duty relief. None of the situations in the Rules which provide for subsequent disallowance of relief have been encountered.

14. From the commercial point of view, the reconstruction of OUE and the Applicant with the issue of shares in the Applicant to UOL, was to leverage on UOL's experience in project management in the

redevelopment and conservation of the Properties. The scheme of reconstruction has not been terminated with the issue of shares in the Applicant to UOL. OUE has through its shareholding in the Applicant, retained substantial interests in the Properties and the undertaking, even after the issue of shares in the Applicant to UOL.

<u>The Commissioner's Position</u>

12. The Commissioner's position is that:

a. with the allotment of shares in the Applicant to UOL, after the transfer of the undertaking from OUE to the Applicant, there has been a divestment in OUE's interest in the Properties; and

b. in order for there to be a scheme of reconstruction, OUE should remain the substantial shareholder of the Applicant for at least a period of two years after the transfer of the Properties to the Applicant on 11 May 2006. With the allotment of shares in the Applicant to UOL, resulting in a divestment of OUE's interest in the Properties, the Reconstruction Agreement does not qualify for relief under Section 15(1)(a) of the Stamp Duties Act and Rules.

…..

<u>Question for Determination</u>

17. The question for the determination of the High Court is whether the Reconstruction Agreement qualifies for stamp duty relief under Section 15(1)(a) of the Stamp Duties Act and the Rules.

Relevant Provisions

24 For convenience, I would now set out all the relevant provisions in the Act and the Rules. Reference would be made to them from time to time as I deal with the issues in this case.

Stamp Duties Act (Cap 312)

All facts and circumstances to be set out

5. —(1) All the facts and circumstances affecting the liability of any instrument to duty or the amount of the duty with which any instrument is chargeable are to be fully and truly set forth in the instrument.

(2) The Commissioner may require to be furnished with such evidence as he may consider necessary to prove that all such facts and circumstances are truly set forth in it.

Where duty chargeable depends on duty paid on another instrument

11. Where the duty with which an instrument is chargeable, or its exemption from duty, depends in any manner upon the duty actually paid in respect of another instrument, the payment of such last-mentioned duty may, if application is made to the Commissioner for that purpose, and on production of both the instruments, be denoted upon such first-mentioned instrument in such manner as the Minister may by rules prescribe.

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 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; or

...

(3) Where any claim for relief from duty under this section has been allowed and it is subsequently found that —

...

(b) any prescribed matter which the Commissioner was satisfied would not occur in allowing the relief, does occur,

the claim shall be deemed to have been disallowed and an amount equal to the duty remitted shall —

(i) become payable immediately; and

(ii) be recoverable from the transferee company as a debt due to the Government, together with interest thereon at the rate of 6% per annum, from the date on which the duty would have become chargeable if this section had not been enacted.

Commissioner may disregard certain transactions and dispositions

33A. —(1) Where the Commissioner is satisfied that the purpose or effect of any arrangement is, directly or indirectly —

(a) to alter the incidence of any duty which is payable or which would otherwise have been payable by any person;

(b) to relieve any person from any liability to pay duty; or

(c) to reduce or avoid any liability imposed or which would otherwise have been imposed on any person by this Act, the Commissioner may, without prejudice to such validity as it may have in any other respect or for any other purpose, disregard or vary the arrangement and make such adjustments as he considers appropriate, including the amount of duty payable, or the imposition of liability to duty, so as to counteract any reduction in or avoidance of duty payable by that person from or under that arrangement.

(2) In this section, "arrangement" means any scheme, trust, grant, covenant, agreement, disposition, transaction and includes all steps by which it is carried into effect.

(3) This section shall not apply to —

(a) any arrangement made or entered into before 1st September 1999; or

(b) any arrangement carried out for bona fide commercial reasons and had not as one of its main purpose the avoidance or reduction of duty.

Stamp Duties (Relief from Stamp Duty upon Reconstruction or Amalgamation of Companies) Rules ("Reconstruction Rules")

Definitions

2. —(2) In these Rules, any reference to the undertaking of an existing company includes a reference to a part of the undertaking of an existing company.

Conditions for relief from ad valorem stamp duty upon reconstruction or amalgamation of companies

3. The conditions for relief from ad valorem stamp duty in respect of a scheme for the reconstruction of any company or companies or the amalgamation of companies referred to in section 15 (1) of the Act are as follows:

(a) that a company with limited liability (referred to in these Rules as the transferee company) —

(i) is to be registered;

(ii) has been incorporated; or

(iii) has increased its capital,

with a view to the acquisition either of the undertaking, or of not less than 90% of the issued share capital, of any particular existing company; and

(b) that not less than 90% of the consideration for the acquisition (except such part thereof as consists in the transfer to or discharge by the transferee company of liabilities of the existing company) consists of —

(i) where an undertaking is to be acquired, the issue of shares in the transferee company to the existing company or to the shareholders of the existing company; or

(ii) where shares are to be acquired, the issue of shares in the transferee company to the shareholders of the existing company in exchange for the shares held by the shareholders in the existing company.

Subsequent disallowance of relief

7. The matters referred to in section 15 (3) (b) of the Act are as follows:

(a) the existing company or any of its relevant shareholders ceases to be the beneficial owner of the shares in the transferee company issued to it or them as mentioned in rule 3 (*b*) within a period of 2 years from the date of the —

(i) registration of the transferee company;

(ii) incorporation of the transferee company; or

(iii) authority to increase the capital of the transferee company, as the case may be, otherwise than in consequence of any reconstruction, amalgamation or liquidation;

(b) the transferee company ceases to be the beneficial owner of the undertaking or any of the shares acquired in an existing company within a period of 2 years from the date of the —

(i) registration of the transferee company;

(ii) incorporation of the transferee company; or

(iii) authority to increase the capital of the transferee company,

as the case may be, otherwise than in consequence of any reconstruction, amalgamation, liquidation or relevant offer of shares; or

(c) the instrument for the purposes of or in connection with the acquisition was not-

(i) executed within a period of 12 months from the date of the registration of the transferee company, or the date of the resolution for the increase of the nominal share capital of the transferee company, as the case may be; or

(ii) made for the purpose of effecting a conveyance or transfer in pursuance of an agreement which has been filed, or particulars of which have been filed, with the Registrar of Companies within the period of 12 months from the date of the agreement.

Stamp Duties (Relief from Stamp Duty upon Transfer of Assets between Associated Companies) Rules ("Asset Transfer Rules")

Conditions for relief from ad valorem stamp duty upon transfer of assets between associated companies

3. The conditions for relief from ad valorem stamp duty upon the transfer of assets between associated companies referred to in section 15 (1) of the Act are as follows:

(a) the effect of any instrument executed on or after 1st July 2000 is to transfer, convey or assign the beneficial interest in any asset owned by one associated company (referred to in these Rules as the transferor company) to another associated company (referred to in these

Rules as the transferee company);

...

(c) at the time of execution of the instrument, the transferor company and the transferee company have been associated for at least 12 months prior to the transfer, conveyance or assignment referred to in paragraph (a), except where the transferee company had been incorporated specially for the purpose of the acquisition of the asset referred to in paragraph (a);

(d) valuable consideration for the acquisition by the transferee company is paid to the transferor company either in cash or by an issue of shares in the transferee company, at the open market value;

(e) the transfer, conveyance or assignment of the asset is for bona fide commercial reasons;

(f) the transfer, conveyance or assignment by the transferor company to the transferee company is in respect of the entire beneficial interest held by the transferor company in the asset; and

(g) the instrument was not made pursuant to or in connection with an arrangement under which —

(i) the consideration or any part of it for the acquisition of the asset by the transferee company is (directly or indirectly) provided by or received from —

(A) a person other than the transferee company; or

(B) a company (referred to in this rule as the third company) which is not associated to the transferee company within the meaning of rule 4, unless the third company is a financial institution acting in the capacity of a lender of funds to the transferee company; and

(ii) the beneficial interest in the asset was previously (directly or indirectly) transferred, conveyed or assigned to the transferor company by any company which was not associated to the transferor company within the meaning of rule 4 unless —

(A) duty was paid on the acquisition by, or the transfer, conveyance or assignment to, the transferor company;

(B) relief for such duty was allowed; or

(C) such duty was remitted.

Associated company

4. For the purposes of these Rules, a company shall be taken to be associated with another company if —

(a) the company is the beneficial owner (directly or indirectly) of not less than 75% of the issued share capital of the other company, and where the company is an indirect beneficial owner of that other company, the company has more than half of the voting power in respect of that other company; or

(b) the company is a holding company which is the beneficial owner (directly or indirectly) of not less than 75% of the issued share capital of each of the transferor company and the transferee company, and where the holding company is an indirect beneficial owner of that other company, the holding company has more than half of the voting power in respect of that other company.

Subsequent disallowance of relief

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;

(b) the transferee company disposes of the asset that it has acquired within 2 years from the date of acquisition of the asset, unless such disposal is in consequence of —

(i) a reconstruction;

(ii) an amalgamation; or

(iii) a liquidation where the assets of the transferee company are distributed in specie to the immediate holding company of the transferee company, and for the period of 2 years from the date of acquisition by the transferee company —

(A) the immediate holding company retains the assets of the transferee company; and

(B) the immediate holding company remains associated, within the meaning of rule 4, with the transferor company; or

(c) the instrument was not executed within a period of 12 months from the date of the agreement (written or otherwise) for the acquisition of the asset by the transferee company referred to in rule 3 (a).

Submissions of the Parties

25 The applicant submitted that it was trite law that stamp duty was chargeable on instruments and not on transactions. The liability of an instrument to stamp duty arose at the moment when it was executed and depended on the law in force and the circumstances which existed at that time. The character of the instrument ought to be ascertained by reference to its legal effect when it was executed: see *Halsbury's Laws of England* Fourth Edition Reissue Vol. 44(1) para 1010.

26 The applicant pointed out what Diplock LJ had said at the Court of Appeal in *WM. Cory & Son Ltd v Inland Revenue Commissioners* ([1964] 1 WLR 1332 at page 1346:

> 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.

27 The applicant contended that the facts and circumstances to be considered were those as at the date of the execution of the instrument. The liability and character of an instrument should be determined on the basis of the facts at the time of execution of the instrument and should not take into account circumstances subsequent to the execution of the instrument in determining the stamp duty applicable to the instrument. In recognition of that principle, parliament had specifically legislated that where certain events should occur after the execution of the instrument, the stamp duty relief might still be subsequently disallowed. Those events triggering a "subsequent disallowance of the relief" were exhaustively provided in rule 7 of the Reconstruction Rules and subsequent disallowance of relief could only be made where rule 7 of the Reconstruction Rules was satisfied. Such statutory provisions on "subsequent disallowance of the relief" further confirmed the principle that the character and liability of an instrument for stamp duty purposes should be determined at the time of execution of an instrument. Absent such statutory prescriptions, there could be no subsequent disallowance of the relief once an instrument had qualified for relief at the time of its execution. As such, it was improper for the respondent to import further conditions (which were not statutorily provided) to determine whether or not the reconstruction agreement qualified for stamp duty relief.

28 The applicant argued that the court should examine if rule 7 of the Reconstruction Rules applied. On the facts, OUE retained the consideration shares issued by the applicant in consideration for the transfer of the undertaking comprising the properties. There could be no subsequent disallowance of the stamp duty relief. It was not provided in rule 7 that the stamp duty relief under s 15(1)(a) was to be subsequently disallowed upon the applicant allotting shares to UOL. Such an allotment of shares might result in the transferor and transferee companies not remaining as "associated companies". But such an event subsequent to the execution of the reconstruction agreement should not result in the subsequent disallowance of the relief under rule 7.

29 I agreed with the respondent's submission that the above arguments were irrelevant because the respondent's case was that there was never a scheme for the reconstruction of the relevant companies in the first place; the facts showed that the transfer of the properties was made for the purposes of or in connection with a joint venture between UOL and OUE to redevelop the properties.

30 At this juncture, it would be convenient for me to point out that the JVA **preceded** the reconstruction agreement and not the other way around. The JVA was in fact executed three months before the reconstruction agreement. In my view, the JVA was **a relevant pre-existing fact** that

had to be taken into account in construing the liability of the instrument for stamp duty. Not only was the JVA in existence prior to the execution of the instrument in question, the execution of the instrument was also a step that was envisaged by the JVA because it was a term of the JVA that the properties were to be transferred to the applicant for the stated consideration as part of the JVA, and the joint venture scheme between OUE and UOL required them to jointly develop the properties through the applicant as their joint venture vehicle, which formed the whole basis for the required transfer of the properties under the said instrument to the applicant under the JVA. Under the JVA, OUE and UOL were each to be 50% shareholders of the applicant to develop the said properties.

31 Before granting any relief under s 15(1)(a), the respondent was required to determine if the transfer of the undertaking was made in respect of a scheme for reconstruction of a company or companies. To this extent, the respondent was required to enquire into the background circumstances surrounding the instrument. If subsequent events known by the time of the hearing could throw light on what were the intentions of the parties and their reasons at the time the instrument in question was executed, then they would be relevant in my view and could be taken into account to help ascertain those facts existing at the time of the creation of the instrument by way of a retrospective inference.

32 In this regard, the instrument was executed pursuant to the JVA as could be seen in clause 2.1 of the JVA, which envisaged the reconstruction agreement and the subsequent application for relief under section 15(1). Provision was also made in clause 2.1 of the JVA for the consequences in the event the application for relief was not successful. The sequence of events as set out in paras 5-12 of Teo CS's affidavit clearly indicated to me that the reconstruction agreement was part of the process of the joint venture arrangements between UOL and OUE. It was also intended that UOL would exercise its option to acquire eventually 50% of the applicant's shares soon thereafter and therefore beneficially own a 50% interest in the transferred properties for the purpose of realising their full commercial potential through a joint redevelopment of the said properties together with OUE. The events that subsequently took place soon thereafter (*i.e.* the exercise of the call option by UOL) **<u>confirmed</u>** what was in fact the intention behind the combined call and put option clauses in the JVA, that all along UOL was to subscribe for 50% of the shares in the applicant, and therefore indirectly own 50% of the transferred properties for the purpose of UOL's joint redevelopment of the transferred properties together with OUE.

Certain sections in the Act suggest that background facts may be considered

33 In refutation of the applicant's submissions that one should not look beyond the four corners of the instrument to determine the nature of the scheme in question, the respondent submitted that s 5, 11 and 33A in the Act would suggest that it could be done.

34 Section 5 stipulates that all facts and circumstances affecting the liability of any instrument to stamp duty are to be fully and truly set forth in the instrument and the respondent may require the necessary evidence to be furnished as he may consider necessary to prove that all such facts and circumstances are truly set forth in the instrument. Needless to say, this is to enable the respondent to ascertain all the relevant facts and circumstances.

35 Section 11 enables the respondent to take into account duty paid for another instrument where it is appropriate to do so.

36 Section 33A enables the respondent to look into the purpose or effect of any arrangement, and where the arrangement is effected, directly or indirectly to generally avoid duty, the respondent is enabled to make adjustments, which can include the amount of duty payable. An "arrangement" in

section 33A is defined widely to mean "any scheme, trust, grant, covenant, agreement, disposition, transaction and includes all steps by which it is carried into effect."

37 I found these submissions of the respondent to be persuasive that the nature of s 5, 11 and 33A in the Act would suggest that the respondent, in applying out the provisions of the Act, was permitted to look at the wider context, the other transactions or arrangements outside the instrument itself and all the other steps in the scheme in respect of which the instrument was executed, and whether or not these matters might have occurred before or after the date the instrument was executed. Accordingly, the respondent was entitled to look at the relevant background facts and circumstances to determine the effect of the instrument for stamping purposes.

38 However, I must emphasise that the anti-avoidance provision in s 33A was never used in this case to deprive the applicant of relief which it otherwise would have qualified. Here, the instrument simply did not qualify for relief as no reconstruction scheme existed *per se* on the facts.

39 It would be significant to note that the UK stamp duty legislation, upon which the applicant's authority, *WM. Cory & Son Ltd v IRC* [1965] AC 1088 was based, did not have a similar anti-avoidance provision like s 33A which enabled the respondent to take into account arrangements designed to avoid stamp duty.

Reconstruction Rules and the Asset Transfer Rules

40 The applicant further invited me to compare the Reconstruction Rules which applied to s 15(1)(a) situations with its "sister" rules, the Asset Transfer Rules between associated companies which applied to stamp duty relief under s 15(1)(b) situations. Such a comparison, the applicant said, would show up the different conditions for the subsequent disallowance of relief under the two sets of rules very clearly.

41 Rule 6(1)(a) of the Asset Transfer Rules provided for a subsequent disallowance of the stamp duty relief where the transferor company and the transferee company ceased to be "associated" within 2 years of the transfer of the asset. The companies would only remain "associated" within the meaning of rule 4, where one company owned 75% or more of shares of the other company or where the shares in both companies were owned by a common holding company to the same extent.

42 According to the applicant, there was however no similar requirement for the parties to a reconstruction agreement which was entitled to relief under section 15(1)(a) or the Reconstruction Rules to remain "associated" for a minimum 2-year period. The applicant argued that the respondent should not have read such a specific requirement in the Asset Transfer Rules into the Reconstruction Rules for the instant case.

43 The applicant submitted that the 2-year "associated companies" requirement present in the Asset Transfer Rules and conspicuously absent in the Reconstruction Rules showed clearly that the requirement was not to apply in a reconstruction.

44 The above arguments by the applicant in reliance on the comparison of the Reconstruction Rules with the Asset Transfer Rules were considered irrelevant by the respondent because the respondent was not relying on these rules, but on the fact that there was no reconstruction of a company or companies as required by section 15(1). I agreed with the respondent on this point.

45 Nevertheless in my view, the fact that Rule 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 2 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 the applicant, 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 8 days later, would in any event not have cleared Rule 6(1)(a) read with Rule 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. (Detailed reasons for my finding would follow in the later part of this judgment.) 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 the applicant, 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 the applicant's shares within 19 days after the transfer of the assets from OUE to the applicant was way below the retention requirement of a minimum of 75% shareholding for a period of 2 years after the asset transfer. Since there was no reconstruction, the instrument would in any case be disqualified for relief under Rule 6(1)(a) of the Asset Transfer Rules as the two companies (OUE and the applicant) did not remain "associated" (as defined in Rule 4 of the Asset Transfer Rules) when UOL took up a 33.33% stake and later an even bigger 50% stake in the applicant, and OUE's 100% stake in the applicant 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 (*i.e.* OUE and the applicant) would invariably have led to a subsequent disallowance of relief under s 6(1)(a) of the Asset Transfer Rules upon the acquisition of the substantial stakes in the applicant by UOL, which caused the applicant and OUE to become non-associated companies for the purpose of the Asset Transfer Rules.

46 The applicant then tried to argue that there was ultimately no divestment of the shares in the applicant because OUE eventually acquired from UOL all the shares of the applicant on 14 October 2006, and the applicant became once again a wholly owned subsidiary directly of OUE some five months later. Basically, the applicant submitted that UOL could effectively be removed from the equation as though UOL never became a shareholder of the applicant, and the whole matter could therefore be re-looked at in this light which would now constitute purely a reconstruction of the OUE group.

47 I concurred with the respondent's submission that it was artificial for the applicant to argue that there was no detraction from the reconstruction simply because UOL had divested all its shareholdings in the applicant to OUE, and OUE was now the substantial or 100% shareholder of the applicant. I could not ignore the fact that from the outset, OUE and UOL had intended to enter into a JVA to jointly redevelop the properties and the New Site. The subsequent divestment by UOL of shares in the applicant was pursuant to a deadlock mechanism provision in clause 19 of the JVA. Both parties from the start could not have anticipated that such a deadlock would arise or that the mechanism would certainly be activated. If that was anticipated, then it would not have made any commercial sense for OUE and UOL to embark on the share transfers, only to reverse completely the effect of those transfers upon UOL's divestment. The exercise eventually turned out in fact to be a very costly one for OUE as could be seen at [16] above. That OUE subsequently became the sole shareholder in the applicant was a mere happenstance by virtue of an unfortunate deadlock. The transaction undertaken pursuant to the instrument was an important and necessary step in the entire

process of carrying out the scheme in accordance with the terms of the JVA. That was the true reason for the transfer of the properties from OUE to the applicant in the first place.

My Analysis

48 For relief from *ad valorem* stamp duty to be granted under s 15(1)(a) of the Act, it must be shown that (a) a reconstruction scheme exists; (b) the instrument for transfer of the undertaking or shares that has been submitted for relief is in fact **in respect of** the scheme of reconstruction; and (c) the prescribed conditions in Rule 3 of the Reconstruction Rules are fulfilled.

Meaning of "reconstruction"

49 The Act does not define the meaning of "reconstruction" for the purposes of the s 15(1)(a) exemption. Since there is no local case law on how s 15(1) of the Act should be applied, English decisions on the meaning of "reconstruction" will be relevant as our provisions have their origins in the UK's stamp duties legislation. As s 15 of the Act is somewhat similar to (though not exactly in *pari materia* with) the UK provisions, the comments in the cases of *In re South Africa Supply and Cold Storage Company* [1904] 2 Ch 268 ("*Cold Storage*") and *Swithland Investments Ltd & Anor v IRC* [1990] STC 448 ("*Swithland*") are therefore apposite. See also [69] to [72] below.

50 I accepted the applicant's contention that the word 'reconstruction' has a commercial meaning. Buckley J at p 286 in *Cold Storage* ([49] *supra*) held that in a reconstruction, "*substantially the same business shall be carried on and substantially the same persons shall carry it on*." In other words, "*substantially the business and the persons interested must be the same*" for it to be a "reconstruction".

51 Hence the key question to ask is whether or not substantially the same persons are carrying on the same business before and after the whole series of transactions are completed to effect the entire scheme. If the answer is in the affirmative, then that scheme is a "reconstruction" within the meaning of s 15(1)(a) of the Act. In addition to there being a reconstruction, it must it be demonstrated that the prescribed conditions referred to in s 15(1) have been fulfilled. This further requirement for relief in the UK context can be seen in the case of *Swithland* ([49] *supra*) at p 456H- J where Ferris J quoted Scarman LJ in *Crane-Fruehauf v IRC* [1975] STC 51 as follows (at 59):

> Two questions invariably arise when relief is claimed. The first is whether a scheme for reconstruction or amalgamation has been shown to exist. If it has, then the second question is whether in connection with the scheme the conditions imposed by the section also exist. An affirmative answer to each question is needed to establish the case for relief from duty.

52 As s 15 is a provision for relief of stamp duty, the burden falls on the applicant (i.e. the taxpayer) to show that all the conditions to qualify for the relief are satisfied. All the prescribed conditions are to be applied strictly. I shall elaborate why the applicant has not discharged its burden to show that there was in fact a reconstruction of OUE and/or UOL and/or the applicant.

No reconstruction on present facts

53 Looking at the facts in their totality as disclosed by Teo CS's affidavit filed in support of the applicant's case, the relevant transaction or scheme to be examined would be the JVA between OUE and UOL (which I would reiterate was an agreement made **prior** to the instrument or reconstruction agreement transferring the properties pursuant to the terms in the JVA) and not what was briefly

stated in the instrument which failed to describe comprehensively the whole scheme that was set out in the JVA. The JVA disclosed that the undertaking of operating and leasing the properties was to be hived off to the applicant which was to act as a joint venture vehicle for OUE and UOL to redevelop the properties and the New Site when available. Prior to the JVA, OUE was, *inter alia*, operating and leasing the properties. After the transfer from OUE to the applicant, OUE and UOL would become joint venture partners and 50% shareholders of applicant. The applicant was required to redevelop the properties and the New Site pursuant to clause 2.3 of the JVA.

54 Thus, the whole intention of the parties was to jointly own and redevelop the properties and the New Site, rather than to refashion the group structure of OUE and the applicant "*in such a way as to leave the basic character of the object unchanged*": see *Brooklands Selangor Holdings Ltd v IRC* [1970] 2 All ER 76 ("*Brooklands*") where Pennycuick J said at p 86:

> I will first deal with the question whether the transaction amounted to a reconstruction. In ordinary speech the word reconstruction is, I think, used to describe the refashioning of any object in such a way as to leave the basic character of the object unchanged. In relation to companies, the word 'reconstruction' has a fairly precise meaning which corresponds, so far as the subject-matter allows, to its meaning in ordinary speech. It denotes the transfer of the undertaking or part of the undertaking of an existing company to a new company with substantially the same persons as members as were members of the old company.

55 Hence, it seems to me that one of the purposes of s 15(1) of the Act is to "*grant relief from duty where the underlying ownership of the undertaking transferred remains substantially unaltered*" and this is to create a friendly and conducive business environment in Singapore where such schemes of reconstruction or amalgamation of companies are not unduly hampered by tax obstacles: see also Pennycuick J. at p 87E in the case of *Brooklands*.

56 However on the facts, a new business with a new party, UOL, would be carried on pursuant to the JVA. How could this then be the carrying on of the same business by the same persons? Clearly, it was more a case of UOL and OUE fashioning and restructuring the applicant into their joint venture vehicle to own and effect the redevelopment of the properties and the New Site, when available. The whole business character, profile and structure of the applicant in my opinion would be changed substantially pursuant to the joint venture scheme.

57 Putting it another way, the shareholder profile and operating structure of the applicant would be very different after the JVA. It would no longer be only OUE owning 100% of the applicant as it was before the transaction. Now UOL and OUE would jointly own the applicant which would also be made to carry on a quite a different business of redevelopment of properties (*i.e.* in the joint redevelopment of the properties and the New Site as opposed to OUE previously just operating and leasing the properties). Clearly, the applicant would no longer be substantially owned and operated by substantially the same person, OUE, after the full implementation of the scheme. On such facts, I could clearly see a joint venture but I could not discern any scheme that came within the commercial meaning of a "reconstruction" of the applicant, where substantially the same persons were going to carry on the same business before and after the completion of the whole series of transactions to effect the entire scheme.

58 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 (*i.e*. the applicant), and I could not regard this joint venture as a scheme of "reconstruction" of OUE nor the applicant. 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 the applicant. Accordingly, the application for relief on the basis that the instrument was in respect of a reconstruction scheme would fail *in limine* because no reconstruction scheme existed in fact and instead a joint venture scheme was effected. This would be sufficient to dispose of the matter. However, I would proceed to elaborate on the effect and meaning of the words "**<u>in respect of</u>**" in s 15(1) of the Act and the approach that the court should take to determine whether or not the instrument was "in respect of" a scheme of reconstruction.

Transfer must be "in respect of" a reconstruction scheme

59 It is important to note that the relief in s 15(1) only applies to "any instrument made on or after 1st July 2000 for the purposes of or in connection with ----- (a) the transfer of the undertaking or shares **<u>in respect of</u>** a scheme for the reconstruction of any company or companies, or the amalgamation of companies." Thus the transfer of the undertaking under the instrument in question must be "in respect of" a reconstruction or an amalgamation scheme. It bears repeating that there must in fact exist such a scheme or agreed plan for the reconstruction of a company or companies, or for the amalgamation of companies, which is the ultimate purpose behind all the instruments (submitted for the relief from *ad valorem* stamp duty) that are needed to carry out or effect the reconstruction of the company or companies, or the amalgamation of companies *via* the transfer of undertakings or shares as the case may be. These instruments for the transfer of undertakings or shares must therefore be "**<u>in respect of</u>**" (which imports such meanings as "in relation to", "linked to", "in connection with" or "with reference to" *etc*) a scheme or an agreed plan for reconstruction or amalgamation. Hence the instruments must in some way serve to achieve the main and ultimate purpose: reconstruction or amalgamation for relief to be granted.

All relevant facts to be considered

60 It should be noted that the court in *Brooklands* did not just examine the individual instrument concerned to determine if there was a scheme of reconstruction within the meaning of s 55(1) of the Finance Act 1927 in UK. The court examined all the relevant facts in the round to determine if such a scheme of reconstruction existed. This was apparent from p 88E-H of the report as follows:

> Turning to the facts of the present case, **<u>the substance of the scheme</u>** is that the undertaking of BSR is partitioned between PH and the minority shareholders in proportions corresponding to their holdings of the ordinary stock of BSR, the preference stockholders being paid off. That partition, in order to comply with the requirements of company law, was carried out by the transfer of part of the undertaking of BSR to the new company in consideration of stock in the transferee company, ie the taxpayer company, and the issue of that stock directly to the minority shareholders by way of reduction of capital. The effect of that transaction is that the holders of the stock in the taxpayer company are most substantially different from the holders of the stock in BSR. That is to say, they consist of approximately half only in value, though the vast majority in number of the holders of the stock in BSR. So**<u>the transaction represents the transfer of a part of BSR's undertaking from the holders of the whole of the stock in BSR to the holders only of approximately half the stock in BSR</u>**. That, I think, involves **<u>a substantial alteration in the membership of the two companies</u>** within the meaning of the passages which I have quoted from the judgments of Chitty and Buckley JJ. It seems to me that **<u>that transaction is not a reconstruction</u>** and that a transfer made pursuant to that transaction falls neither within the letter nor within the intent of s 55. (Emphasis added)

61 The court considered the 'substance' of the scheme, and the 'effect' of the transaction, and expressed the view that "the transaction represents the transfer of a part of BSR's undertaking from the holders of the whole of the stock in BSR to the holders only of approximately half the stock in BSR." The court did not simply examine the relevant instrument effecting the transfer to determine if there was a scheme of reconstruction but looked at the effect of all the steps in the scheme as a whole to determine if there was a reconstruction.

62 *Swithland* ([49] *supra*) was another case showing that the proper approach to determine whether or not the scheme amounted to a reconstruction was to examine the transactions carried out under the whole scheme rather than to focus separately at the individual instruments submitted for grant of the relief and to treat each instrument as if each existed in isolation. I adopted the respondent's submissions which summarised the facts in *Swithland's* ([49] *supra*) case as follows.

63 In that case, a company, Estates Ltd, operated a licensed premises with three shareholders: P, P's wife and R. The shareholders owned 75%, 15% and 10% respectively of Estates Ltd. They received an offer from a company, Whitbread, to acquire the licensed premises. While the shareholders were in agreement as to the offer, they wished to reinvest the monies in different ways. They incorporated three companies namely Newco, Investments Ltd and Leisure Ltd, and carried out the following transactions:

a. Newco acquired the licensed premises from Estates Ltd and the shares in Newco were then transferred to Whitbread;

b. P and P's wife transferred their shares in Estates Ltd, which previously owned the licensed premises, to Investments Ltd in consideration for shares in Investments Ltd. P and P's wife thus owned 100 per cent of Investments which in turn owned 90 per cent of Estates Ltd;

c. R transferred his interest in Estates Ltd to Leisure Ltd in consideration of shares in Leisure Ltd plus a cash consideration of £100,000;

d. Investments Ltd transferred to Leisure Ltd part of its shareholding in Estates Ltd in consideration of shares in Leisure Ltd;

e. Leisure Ltd transferred to Investments Ltd shares in Estates Ltd in consideration of £2m; and

f. P transferred to Investments Ltd one share in Leisure Ltd in consideration of £1.

64 Steps (a) to (f) above referred to steps (1) to (6) set out at p 455B-H of the report. The taxpayer in the *Swithland* ([49] *supra*) case argued that the transfers in steps (b) and (d) above enjoyed the stamp duty exemption. The taxpayer argued that the reconstruction could be looked at as a broad transaction, or as a narrow transaction and that both the broad transaction and the narrow transaction would be a reconstruction for the purposes of the stamp duty relief. The broad transaction consisted of steps (b) to (f) above, while the narrow transaction was two-fold: the first being step (b) and the second being step (d) above – see p 459B-D of the report.

65 The UK revenue argued that the broad transaction also included step (a) and that both the broad and narrow transactions would not satisfy the UK equivalent of section 15(1)(a) – see p 459D-E.

66 Ferris J reviewed the authorities and held that all the steps should be looked at to determine if

there was a scheme of reconstruction. He said, at p 459E-F of the report:

> 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, as letter F makes clear, 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.

67 It might be said that the "reconstruction" was part of a wider scheme involving the partition of assets previously belonging to a single company and not the scheme itself. Ferris J reasoned thus, at p 459F-J

> Like the transaction in Brooklands Selangor 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 become 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.

68 The approach in *Swithland* ([49] *supra*) was followed in *Fallon v Fellows* [2001] STC 1409 at 1434H-J. Another case where the courts in UK took a holistic approach was *Baytrust Holdings Ltd v IRC* [1971] 3 All ER 76 ("*Baytrust*"). In that case there were two stamp duty appeals. Plowman J described the essence of the scheme at p 87F of the report as follows:

> The scheme was effected in two stages: first, Thos Firth transferred the trade investments in question to a wholly owned subsidiary Nitralloy Ltd (which I shall call 'Nitralloy') in exchange for shares in that company; secondly, Thos Firth transferred its shares in Nitralloy and the surplus cash to a newly-formed investment holding company, Thos Firth & John Brown (Investments) Ltd (which I shall call 'the new company') in exchange for shares in the new company.

69 The taxpayer claimed the equivalent of section 15(1)(a) relief for both the transactions on the basis that the scheme in question was a scheme for the reconstruction of Thos Firth. Plowman J, at pp 92J-93A recognised that the word, 'reconstruction':

> is not a term of art and has no technical meaning in law, and even as a commercial term it bears

no exact meaning (see *Hooper v Western Counties and South Wales Telephone Co Ltd* ((1892) 68 LT 78 at 80), per Chitty J and *Re South African Supply and Cold Storage Co* ([1904] 2 Ch 2268 at 281) per Buckley J).

70 In *Cold Storage* ([49] *supra*) at 281, Buckley J said the following with regard to the word "reconstruction"**:**

> Neither of these words "reconstruction" and "amalgamation" has any definite *legal* meaning. Each is a commercial and not a legal term, and, even as a commercial term, bears no exact definite meaning. In each case one has to decide whether the transaction is such as that, in the meaning of commercial men, it is one which is comprehended in the term "reconstruction" or "amalgamation".

71 As "reconstruction" was a commercial and not a technical term, the court in *Baytrust* went on to consider the position of Thos Firth before and after the scheme was implemented, at p 93B-C as follows:

> If one considers the position of Thos Firth at the end of the day and compares it with the position before the scheme was initiated, what does one find? The objects and the business of Thos Firth were the same; its nominal and issued capital were the same; the ordinary shareholders were the same; their rights as shareholders were the same. All that had happened, in effect, was that certain assets which were not required by Thos Firth for employment in its business had been passed on to its shareholders in the form of shares in the new company. It would not, in my judgment, be an ordinary use of language to say that, in those circumstances, Thos Firth had been reconstructed.

7 2 In the words of Plowman J, it would not be an ordinary use of language for a joint venture in these circumstances to be regarded as a "reconstruction". This should be how a commercial man would view the scheme of events that took place.

73 Similarly in the present case, I would follow the approach adopted by the UK courts. I went beyond the instrument and looked at the totality of the circumstances under which the instrument was created. From this perspective, it was clear that the instrument was a step contemplated by the JVA. See clauses 2.1 and 3.1 of the JVA and compare them with clauses 1.1 and 1.2 in the instrument.

74 I carefully examined the position of OUE and the applicant before and after the scheme was carried out to determine, from a commercial perspective, if the scheme was indeed a scheme for the reconstruction of either OUE or the applicant, and whether or not the business and the persons interested were substantially the same. This would be how a commercial man would view the scheme *i.e.* from a commercial and not a technical, legal perspective. He would see the instrument as one transaction within an entire integral set of transactions forming the whole scheme.

75 I ascertained the effect of all the transactions (which included the "mandatory" exercise of the option by UOL as required under the JVA in the combined call and put option: see [9] above) after they had been carried out and compared it with the situation before any of the transactions had taken place. The purpose of the JVA was to set up the applicant as a joint venture vehicle ready and able to redevelop the properties and to await the release by tender of the New Site by the URA. The totality of the background showed that the transfer of the properties to the applicant in exchange for shares to OUE was not a standalone transaction nor was it meant to be. That "reconstruction agreement" purportedly involving only OUE and its wholly owned subsidiary (the applicant) to effect a

purported "reconstruction" of the OUE group was not the true reason why the instrument was entered into. That was not the objective of OUE, UOL or the applicant. The real reason behind the instrument was to transfer the properties to the applicant so that UOL as the joint venture partner would thereafter have a 50% interest in those transferred properties of OUE and thereafter, UOL could participate beneficially in their redevelopment together with the New Site as part of their joint venture agreed to by both UOE and UOL under their JVA. As a result, the 100% interest of OUE in the properties had been reduced to a 50% interest and that represented a divestment of its 50% interest in those properties via the JVA. Thus the instrument for which relief was sought was an integral and inseparable part of the parties' whole joint venture scheme. The JVA required UOE to transfer the properties to the applicant as a first step towards achieving their joint venture objective, and hence the creation of that instrument to transfer those properties was plainly not meant to be a reconstruction of OUE and/or the applicant (as the instrument might suggest on its own when no attention whatsoever was paid to the background facts and the real reason behind that instrument). That instrument was plainly to enable UOL to eventually own a 50% interest in those transferred properties through a 50% shareholding in the applicant. Hence, an important relevant factor that should not be ignored in the consideration of whether or not the instrument was "**<u>in respect of</u>**" a reconstruction scheme was the resultant effect of the joint venture arrangement by which UOL and OUE had agreed to use the applicant as their joint venture vehicle to jointly own and jointly engage in the redevelopment of the properties and the New Site.

76 In my judgment, the examination of the entire scheme must be comprehensive in order to discern the overall purpose of the plan, which all the various instruments of transfers were meant to execute and fulfil. The examination must therefore be of the scheme as a whole and not of each of the constituent parts or the constituent transfers/transactions or the intermediate steps as though they each existed in isolation and independently of the rest. It was clearly wrong to examine the instrument in question alone and in isolation from the whole arrangement of which the instrument was a part, and then to conclude from there that the transfer of the properties from OUE to the applicant, represented everything there was in the whole scheme and as if it were merely an internal shuffling of assets entirely within the OUE group and no more, thereby constituting a "reconstruction" of the OUE group for which exemption from stamp duty should be given. A myopic examination of each instrument of transfer alone without scrutinising the real purpose behind the transfer in the context of the overall scheme intended by the parties, would represent in my view a failure to examine all the relevant circumstances needed to determine whether or not the instrument was "**<u>in respect of</u>** a scheme for the reconstruction of any company or companies, or the amalgamation of companies" as set out in s 15(1)(a) which was one of the fundamental prescribed conditions to be fulfilled to qualify for relief from *ad valorem* stamp duty.

77 In summary, OUE was the only person interested in the properties and the undertaking before the JVA. But after the JVA, both OUE and UOL were equally interested in the properties and the undertaking. Notwithstanding that OUE retained the consideration shares issued to the OUE by the applicant, the allotment of shares by the applicant to a third party UOL not only resulted in the divestment of the properties but it had also put an end to the "scheme of reconstruction" undertaken within OUE and the applicant. The joint venture scheme in the form that it took was clearly not "within the letter or intent" of s 15.

78 Substantially the reconstructed business was no longer carried on by substantially the same persons. In real terms, it was a divestment of OUE's undertaking and interest in the properties to the applicant that was to be half owned by UOL. 90% of the value of the undertaking and the properties represented the capital injection by OUE into the applicant for 50% of its shares with the other 50% cash injection by UOL into the applicant for the other 50% of the applicant's shares. This in my view was not a reconstruction but a transfer of the undertaking and properties pursuant to a joint venture

agreement that would attract stamp duty under the Act. The intention of the parties was never to reconstruct any one of the companies concerned but rather to jointly own, invest in and develop the properties and the New Site under the terms of the JVA with the applicant as their joint venture corporate vehicle to do so.

79 In OUE's own press release dated 11 March 2006, OUE itself described the arrangement with UOL as a joint venture. When the parties signed the JVA, the JVA was described by all the parties as a joint venture agreement and the intended commercial effect of the JVA was consonant with a joint venture between UOL and OUE. Hence, the commercial parties themselves did not view the whole scheme as a reconstruction but a joint venture which was entirely consistent with the legal effect of the JVA. No reconstruction was ever envisaged by the commercial parties involved in the JVA scheme. The transfer of the properties to the applicant was merely a hiving off of assets which would be jointly owned and redeveloped.

80 For the reasons stated, I accordingly ascertained that the instrument involved was not "**in respect of**" any scheme of reconstruction of a company or companies. Assessing the joint venture scheme as a whole, I found that no exemption from stamp duty was available to the applicant under s 15(1) as the instrument was in respect of a scheme which did not constitute a "reconstruction" as would be understood not as a legal term but as a commercial term by commercial men.

81 In essence, the applicant failed to prove that there was any scheme of reconstruction satisfying the prescribed conditions in the Act and in the Reconstruction Rules. I would stress that an instrument falling within the prescribed conditions in Rule 3 of the Construction Rules *per se* did not automatically mean that there would necessarily be a scheme of reconstruction. A reading of section 15(1) of the Act, Rule 3 of the Reconstruction Rules and the cases above supported the position (indeed, Ferris J in the *Swithland* ([49] *supra*) case at p 456H-J explicitly stated) that there had to be a reconstruction in the general commercial sense (that substantially the business and the persons interested must be the same) **in addition** to the satisfaction of Rule 3 of the Reconstruction Rules before relief from *ad valorem* stamp duty might be granted.

The Applicant's other Arguments

Use of Income Tax Statute to interpret the meaning of "substantially the same persons"

82 The applicant submitted that so long as 50% or more of the persons were the same before and after the transactions, then "substantially the same persons" were involved. In percentage terms, one would intuitively say that 50% or more would be "substantial" according to the applicant.

83 Since neither the Act nor the Reconstruction Rules defined what the phrase "substantially the same persons" meant, the applicant argued that the meaning ought to be deduced from the policy in the provisions in the Income Tax Act. As both the Stamp Duties Act and the Income Tax Act were tax statutes, some consistency in the policy of both statutes in the promotion of the fiscal initiatives should be expected. The applicant relied on s 23 and 37 of the Income Tax Act, which were basically anti-avoidance provisions precluding the taxpayer company from claiming the tax benefit from carrying forward the unabsorbed capital allowances and losses where a substantial change in the shareholdings had occurred.

84 With reference to carrying forward of unabsorbed capital allowances, subsections (4) and (7) of s 23 of the Income Tax Act read as follows:

> (4) No balance shall be added to and be deemed to form part of the corresponding allowance, if

any, to be given to a company under subsection (1) unless the Comptroller is satisfied that the shareholders of the company on the last day of the year in which the allowances arose were substantially the same as the shareholders of the company on the first day of the year of assessment in which such allowances would otherwise be available under this section and such a balance shall not be allowed in any subsequent year of assessment.

...

(7) For the purpose of subsection (4) —

(a) the shareholders of a company at any date shall not be deemed to be substantially the same as the shareholders at any other date unless, on both those dates, not less than 50% of the total number of issued shares of the company are held by or on behalf of the same persons;

85 Similarly, carrying forward of losses where the shareholders were not "substantially the same" would be precluded by subsections (12) and (14) of s 37 of the Income Tax Act. They read as follows:

(12) Notwithstanding subsection (3), the amount of any loss incurred by a company in any trade or business or any sum allowable under subsection (3) (*b*), (*c*), (*d*), (*e*) or (*f*) to a company in respect of any donation shall be disregarded unless the Comptroller is satisfied that the shareholders of the company on the last day of the year in which the loss was incurred or the donation was made, as the case may be, were substantially the same as the shareholders of the company on the first day of the year of assessment in which such loss or donation would otherwise be deductible under subsection (3).

...

(14) For the purposes of subsection (12) —

(a) the shareholders of a company at any date shall not be deemed to be substantially the same as the shareholders at any other date unless, on both those dates, not less than 50% of the total number of issued shares of the company are held by or on behalf of the same persons

86 The applicant contended that one would expect a fiscal alignment of the stamp duty provisions with the income tax provisions. At least, the "qualifying" hurdle for stamp duty relief could not be more onerous than that for the income tax benefit. The applicant submitted that just as income tax benefit for the carrying forward of unabsorbed losses and capital allowances would be allowed where 50% or more of the shareholders remained the same as at the two different dates, the stamp duty relief should similarly apply where 50% or more of the persons were the same before and after the transaction.

87 The applicant further submitted that both the Asset Transfer Rules and the Reconstruction Rules, which made reference to and which provided exceptions for "reconstruction" and "amalgamation" would give an indication of what was contemplated as "substantial".

88 In respect of the Asset Transfer Rules (the "sister" rules of the Reconstruction Rules), rule 6(1) provided for the subsequent disallowance of the relief if the transferor and transferee companies failed to remain "associated" (*i.e.* with a 75% shareholding relationship) for at least 2 years from the

date of acquisition of the asset by the transferee company. An exception was however created where it involved a reconstruction of the companies in rule 6(1)(a)(ii)(A). In other words, after the transfer of assets, the transferor and transferee companies would no longer need to have a common 75% shareholding for a minimum 2-year period should there be a reconstruction. This indicated that in a case of a reconstruction, a threshold lower than 75% common shareholding was contemplated according to the applicant.

89 While the Asset Transfer Rules indicated a "qualifying" level of below 75% common shareholding for a reconstruction, the provisions in the Income Tax Act indicated that 50% would be sufficient to indicate that the persons were substantially the same for the continuance of the tax benefit of carrying forward of unabsorbed losses and capital allowances. The applicant then submitted that there were good policy reasons why 50% should also be adopted for the relief from stamp duty under s 15 of the Act, such that where 50% or more of the persons were the same before and after the restructuring from a predecessor company to a successor company, there would be a "reconstruction".

90 Given the aforesaid purposive favourable treatment of reconstructions, a "qualifying" level of 50% would promote the objectives of the stamp duty relief provisions which were after all to promote reconstruction, synergies, cost-competitiveness and better products. The applicant reasoned that it could not be that after the reconstruction, the transferee company was then ossified into a state of inactivity and it could no longer enlist participation in the undertaking by way of allotment of shares. In commercial life, companies could be reconstructed for a variety of purposes.

91 The applicant submitted that if there were to be a moratorium on the allotment of shares after a "reconstruction" as the respondent appeared to have suggested, then what would be the period of moratorium? The legislation provided no guidance in this regard. The applicant contended persuasively that there could not a moratorium on the allotment of shares after a "reconstruction".

92 In response, the respondent submitted that the "substantially the same persons" requirement was not a statutory requirement but an interpretation that had been adopted by the English courts to determine the meaning of "reconstruction" for stamp duty purposes. However, the applicant sought to use a different statute, the Income Tax Act and a different subsidiary legislation, the Asset Transfer Rules, which provisions were wholly unconnected with the meaning of "substantially the same persons" at English common law, to determine its meaning. The respondent argued that it was not proper to use inapplicable statutes to interpret case law, which in turn interpreted the relevant statute. The relevant statute, rather than case law interpreting the statute, should be interpreted. I accepted the respondent's submission on this point.

Conclusion

93 For all the reasons stated above, I determined that the reconstruction agreement did not qualify for stamp duty relief under s 15(1)(a) of the Act and the Reconstruction Rules. Consequently, I ordered the applicant to pay the costs incurred by the respondent in relation to the appeal.