Neutral Citation Number: [2007] IEHC 182

THE HIGH COURT
REVENUE

2006 No. 868 R.

BETWEEN

THE REVENUE COMMISSIONERS

APPELLANTS

AND
GLENKERRIN HOMES LIMITED

RESPONDENT

Judgment of Miss Justice Laffoy delivered on 22nd May, 2007.

Factual background
1. The factual background to this case stated commences with a contract for sale by tender dated 28th April, 2004 (the Contract), whereby the respondent agreed to purchase from the Eastern Regional Health Authority (ERHA) certain lands, being part of the lands and premises situate at St. Loman's Hospital, Palmerstown, Dublin 20 and being part of the lands registered on Folio 6232 of the Register of Freeholders, County Dublin, at a price of €31,600,000. The deposit payable under the Contract was equivalent to 10% of the purchase price, which amounted to €3,160,000. It was payable in two tranches: €500,000 with the tender; and the balance within five working days of notice of acceptance of the tender. The closing date provided for in the Contract was seven days after the issue of certain consents or approvals of statutory bodies related to ERHA or 23rd June, 2004, whichever should be the later.

2. Completion took place on 24th June, 2004, but it did not take place in the normal way, as was envisaged by the Contract, by payment of the entire purchase money, including release of the deposit, in exchange for an executed transfer, and delivery of possession, of the lands. Instead, ERHA facilitated a completion whereby, instead of being paid the balance of the purchase money on completion, ERHA was given two documents:

> (a) An undertaking dated 24th June, 2004 (the Undertaking) on the letter heading of the respondent and signed by Rory Grehan as director of the respondent, which was in the following terms:
>
> > "In return for you delivering the Deed of Transfer to us, Glenkerrin Homes Limited, we hereby promise and undertake with you to pay to you on the 30th June, 2004 the sum of €31,600,000 (thirty-one million, six hundred thousand euro) and the said amount shall not be deemed due or payable prior to the said date. This undertaking to you is supplemented by the attached guarantee which we have procured from Allied Irish Banks Plc. You might please note that our obligations to you on foot of this undertaking are not assignable to any third party."
>
> (b) A bank guarantee also dated 24th June, 2004 (the Guarantee) under the common seal of Allied Irish Banks Public Limited Company (the Bank). The Guarantee was issued by the Bank in favour of ERHA. It recited the Contract. It also recited that, without prejudice to the terms of the Contract, the respondent had sought a deferral of the balance of the total consideration of €31,600,000 payable under the terms of the Contract amounting to €28,440,000 until 30th June, 2004, which was referred to as "the Payment Date". It further recited that the respondent had agreed to provide the vendor, ERHA, with a bank guarantee as security for that sum and that the Bank had agreed to provide the guarantee thereafter set out. The terms on which the Bank gave the security, as set out in clause 1 of the operative part, were as follows:
>
> > "… in consideration of the premises we Allied Irish Banks Public Limited Company, as primary obligor and not as surety only, hereby unconditionally and irrevocably guarantee the due and punctual payment to [ERHA] of the said sum of €28,440,000 … to be paid on the Payment Date upon receipt of written request and notice from [ERHA] to pay … upon the Payment Date and not later than the Payment Date unless otherwise agreed in writing between [ERHA], the [respondent] and the Bank, and in this respect time shall be of the essence."

3. Clause 6 of the Guarantee provided as follows:

> "This Guarantee shall terminate and cease to have effect on the payment by the Bank to [ERHA] … in accordance with the terms and conditions of this Guarantee or on the payment to [ERHA] of the said sum of €28,440,000 being the balance of the consideration due under the Purchase Agreement (whichever shall be the earlier)."

4. On 24th June, 2004, in exchange for receipt of those two documents, ERHA furnished to the respondent a transfer of the lands in sale duly executed by ERHA (the Transfer). The Transfer was expressed to be made in pursuance of the Contract and –

> "… in consideration of a security to the effect of €31,600,000 (Thirty One Million Six Hundred Thousand Euros) which will be due and payable by the purchaser to the vendor on 30th June, 2004 …"

5. The respondent duly presented the Transfer, which bore the date 24th June, 2004, for stamping. On 10th August, 2004 the appellants issued a notice of assessment to stamp duty under which they assessed the stamp duty due on the Transfer in the amount of €2,844,000, that is to say, *ad valorem* stamp duty at the rate of 9 % on the entire consideration of €31,600,000.

Appeal to Appeal Commissioner
6. The respondent appealed to John O'Callaghan, Appeal Commissioner (the Commissioner) against that assessment. The issue which arose on the appeal turned on the proper construction of s. 40(2) of the Stamp Duties Consolidation Act, 1999 (the Act of 1999), which provides as follows:

> "Where the consideration, or any part of the consideration, for a conveyance on sale consists of any security not being a marketable security, the conveyance is to be charged with *ad valorem* duty in respect of the amount due on the day of the date of the conveyance for principal and interest on that security."

7. Section 40(2) corresponded to s. 55(2) of the Stamp Act, 1891, of which it was a verbatim replication.

8. The Commissioner identified the question which arose before him as being whether the chargeable consideration was limited to €3,160,000 on the following basis:-

(a) that the security given for the sum of €28,440,000 constituted a "non-marketable security" for the purposes of s. 40(2) of the Act of 1999; and

(b) that no amount was due on security on the day of the date of the Transfer within the meaning of s. 40(2) of the Act of 1999.

9. The Commissioner gave his decision on 25th April, 2005 and the transcript of his *ex tempore* decision is set out in the case stated. The Commissioner recorded his determination in the case stated as follows:

> "I came to the conclusion that the security described above constituted such a non-marketable security for the purposes of section 40(2) … and … that there was no amount 'due' on the security on the day of the date of the Deed of Transfer. As a consequence, I came to the conclusion that stamp duty fell to be assessed on the amount of the deposit paid, namely €3,160,000. On that basis, I came to the conclusion that the stamp duty payable on the Deed of Transfer amounted to €284,400."

The issue on the case stated

10. The appellants having expressed dissatisfaction with the Commissioner's determination, they sought a case stated pursuant to s. 941 of the Taxes Consolidation Act, 1997, as applied by s. 21(2) of the Act of 1999. The Commissioner stated the following question for the opinion of this Court:

> "Whether I was correct as a matter of law in my interpretation of section 40(2) … insofar as I concluded that the monies payable pursuant to the said security on 30 June, 2004 were not 'due' within the meaning of s. 40(2) as of the day of the date of the Deed of Transfer dated 24 June, 2004?"

11. For the purposes of the hearing of the case stated in this Court, the appellants accepted that the security constituted by the Undertaking and the Guarantee in combination was a "security not being a marketable security" within the meaning of s. 40(2).

The approach to be adopted to the construction of s. 40(2)

12. The approach to be adopted by a court in construing any taxation measure is well settled and there was no real divergence between the parties on that point.

13. Counsel for the respondent submitted that, insofar as the terms of s. 40(2) are in any way ambiguous in imposing a charge, the respondent is entitled to the benefit of the doubt, on the basis that there is a long line of authority for that proposition, commencing with *Gurr v. Scudds* (1855) 11 Exch. 190. While the factual backdrop against which that case was decided over a century and a half ago is somewhat remote from the factual backdrop to this case stated (the issue there being the admissibility of an unstamped document under which Mr. Gurr agreed to take "all the mannure at four pence each horse, a week, for 45 horses by the year" from Mr. Scudds and, in particular, whether it was exempt from stamp duty as a "contract for the sale of goods"), the principle stated by Pollock C.B. in the passage in his judgment relied on by counsel for the respondent is still apposite. Pollock C.B. stated (at p. 192):

> "If there is any doubt as to the meaning of the Stamp Act, it ought to be construed in favour of the subject, because a tax cannot be imposed without clear and express words for that purpose."

14. Counsel for the respondent also referred the court to the oft-quoted passage from the judgment of Rowlatt J. in *Cape Brandy Syndicate v. Commissioners of Inland Revenue* [1921] 1 K.B. 64 (at p. 71) to the following effect:

> "It is urged that in a taxing Act, clear words are necessary in order to tax the subject. Too wide and fanciful a construction is often sought to be given to that maxim, which does not mean that words are to be unduly restricted against the Crown, or that there is to be any discrimination against the Crown in those Acts. It simply means that in a taxing Act one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used."

15. Counsel for the appellants accepted that that principle has been applied by our courts in construing taxation statutes, citing the following authorities*: Revenue Commissioners v. Doorley* [1933] I.R. 750; *McGrath v. McDermott* [1988] I.R. 258; and *Texaco (Ireland) Limited v. Murphy* [1989] I.R. 496, where McCarthy J. indicated that he was happy to adopt that passage.

Authorities on meaning of "due"

16. As will be clear from what I will say later, in my view, the ordinary and natural meaning of the word "due" in the context in which it is used in s. 40(2) is clear, so that recourse to authorities is not really necessary. Nonetheless, I propose considering the authorities relied on by counsel for the appellants in some depth.

17. The earliest was the decision of the Court of Appeal in Chancery in *Ex parte Kemp* [1874] L.R. 9 Ch. App. 383. There the court was concerned with the construction of s. 15(5) of the Bankruptcy Act, 1869 which enumerated among descriptions of property divisible among the creditors of a bankrupt:

> "All goods and chattels being at the commencement of the bankruptcy in the possession, order or disposition of the bankrupt, being a trader …; provided that things in action, other than debts due to him in the course of his trade or business, shall not be deemed goods and chattels within the meaning of this clause."

18. Having identified the issue for determination as what construction was to be put on the words "debts due to him in the course of trade or business" as used in that provision, Mellish L.J. stated (at p. 387-388):

> "Now, the words 'debts due to him' are certainly words which are capable of a wide or a narrow construction. I think that prima facie, and if there be nothing in the context to give them a different construction, they would include all sums certain which any person is legally liable to pay, whether such sums had become actually payable or not. On the other hand, there can be no doubt that the word 'due' is constantly used in the sense of 'payable', and if it is used in that sense then no debts which had not actually become payable when the act of bankruptcy was committed would be included. Lastly, the expression 'debts due' is sometimes used in bankruptcy proceedings to include all demands which can be proved against a bankrupt's estate, although some of them may not be strictly debts at all."

19. Mellish L.J. then gave illustrations of those various meanings, which were to be found in the Bankruptcy Act itself. He referred to s. 6(6), which provided that it should be an act of bankruptcy if a debtor who had been served with a debtor's summons requiring him to pay a sum due of not less than £50 had neglected to pay that sum, stating that it was obvious that "due" meant "payable" in that provision, because it would be absurd to suppose that a man could be made a bankrupt for not paying a debt which was not yet payable. He also referred to s. 25(6), which provided that the trustee might sell the book debts "due or growing due", stating that the word "due" there seemed to mean payable, because debts due were distinguished from debts growing due. On the other hand, in the case of s. 19, which provided that the bankrupt should give a list of his creditors and debtors, and of the debts due to or from them respectively as the trustee might reasonably require, he observed that it was clear that the word "due" did not mean payable, and that all debts which had been contracted, whether the time for payment had arrived or not, were intended to be included. Similarly, in the case of s. 49, which provided that an order of discharge should release the bankrupt from all other debts provable under the bankruptcy except debts due to the Crown, he was of the view that "debts due to the Crown" meant all provable demands which the Crown had against the bankrupt, whether they had become payable or not, and whether they were in point of law strictly debts or not.

20. When it came to construing the word "due" in s. 15(5), it seems to me that Mellish L.J. took what today would be called a purposive approach. Lest in outlining this aspect of the judgment the impression is given that the appellants relied on it, they did not; they relied only on the second sentence in the passage quoted above. In any event Mellish L.J. recorded that he was construing a recent amendment to bankruptcy law and the general thrust of the modifications effected, noting, however, that the legislature had thought it right not to alter the law which made an assignment of book debts by a trader void against his trustee if notice of the assignment had not been given to the debtors prior to an act of bankruptcy being committed. He continued:

> "Now this being, in my opinion, the principle on which the legislature has proceeded, is there any sound reason for making a distinction between those debts which at the time when an act of bankruptcy is committed have become actually payable and those which have not? I cannot see that there is. Many trades are obliged to give long terms of credit to their debtors. And this being known to their creditors, procures them credit also; and if I were to hold that debts which have been earned, and which are, in what I consider the proper sense of the word, due to the bankrupt, although they have not yet become payable, were taken out of the order and disposition clause, I cannot help thinking that I would defeat the object which the legislature had in view in enacting that the debts due to the bankrupt in due course of his trade or business should still be kept within the clause."

21. Counsel for the appellants also referred the court to two Australian cases.

22. The most recent was a decision of the Supreme Court of New South Wales, acting as the Court of Appeal in the exercise of federal jurisdiction, in *Deputy Commissioner of Taxation (NSW) v. Peacock* (1980) 32 A.L.R. 280. The issue in that case was the validity of two notices served on a bank in which the taxpayer had interest-bearing deposits. The notices were served under s. 218(1) of the Income Tax Assessment Act, 1936, which provided:

> "The Commissioner may at any time…by notice in writing…require –
>
> (a) any person by whom any money is due or accruing or may become due to a taxpayer …
>
> to pay to the Commissioner, either forthwith upon the money becoming due or being held, or at or within a time specified in the notice …
>
> (i) so much of the money as is sufficient to pay the amount due by the taxpayer in respect of any tax and of any fines and costs imposed upon him under the Act …"

23. The court held that the words "due by the taxpayer" in s. 218(1)(i) referred to a liability which has arisen, whether the money be payable presently or at a future date.

24. Counsel for the appellants referred the court to a passage in the judgment of Mahoney J.A. in which there was reference to the earlier Australian case, *Mack v. Commissioners of Stamp Duties* (1920) 18 C.L.R. 373, a decision of the High Court of Australia on an appeal from the Supreme Court of New South Wales, in which Isaacs J. stated as follows (at p. 382):

> "'Due' is sometimes used in the sense of 'payable'; that, however, is where the context requires it. But, as Mellish L.J. said with reference to the phrase 'debts due' in … *Ex parte Kemp*, '*prima facie*, and if there be nothing in the context to give them a different construction they would include all sums certain which any person is legally liable to pay, whether such sums had become actually payable or not.'"

25. In the passage from the *Peacock* case on which counsel for the appellants relied, Mahoney J.A. stated as follows:

> "The plaintiff's argument turns upon the meaning of 'due' in sub-para (i) of s. 218(1). The word 'due' is one the meaning of which includes at least two things: that for which liability has arisen and which is presently payable; and that which, though a liability has arisen, is payable at a future date. In my opinion, the core of its meaning refers to liability rather than the date for discharge of that liability by payment. This I would, with respect, see as the significance of what was said by Isaacs J. in *Mack* … at p. 382. On this basis, a debt is due when liability has arisen and the term will comprehend due debts, whether they be payable presently or at a future date. However, the term is one which will essentially take its meaning from the context in which it is used …"

26. Later in his judgment, Mahoney J.A. distinguished between "due" in para. (a) of sub-s. (1), in relation to which the taxpayer's argument that the word was to be read as meaning "payable" by the taxpayer's debtor was accepted, on the one hand, and "due by the taxpayer" in sub-para. (i), on the other hand. In relation to the latter, Mahoney J.A. stated as follows:

> "As I have said, 'due', in its ordinary meaning, looks to liability rather than to payment: a debt may be 'due' whether it is payable presently or in the future."

27. He went on to say that, while there was a sufficient contextual reason for restricting the meaning of "due" in para. (a), there was no contextual reason for restricting its meaning in sub-para. (i).

28. Mahoney J.A. then went on to consider the purpose of s. 218. Indeed, as counsel for the respondent submitted, in his judgment, Hutley J.A. also adopted a purposive approach. Counsel for the appellants did not, however, rely on those aspects of the judgments.

29. Finally, counsel on each side contended that the decision of the Irish King's Bench Division in *Irish Land Commission v. Massereene* [1904] 2 I.R. 502 supported his assertion as to the meaning of "due" in s. 40(2). The issue in that case was whether s. 90 of the Irish Land Act, 1903 entitled the defendant to variation in respect of the gale of rent due under a perpetuity grant of 1872, which fell due on 1st November, 1903. The passage from the judgment of Gibson J. referred to by both sides is to be found at p. 513 and is in the following terms:

> "The words 'due' and 'accrued due' must be interpreted in like manner according to the reason and context of the statute or document. 'Due' may mean immediately payable (its common signification), or a debt contracted, but payable in *futuro: … Ex parte Kemp* …"

30. Counsel for the respondent submitted that it is clear from that passage that the common meaning of the term "due" is immediately payable. On the other hand, counsel for the appellants submitted that Gibson J. was signifying approval of the judgment of Mellish L.J. in *Ex parte Kemp*, and his opinion that the *prima facie* meaning of the word "due", absent a context which indicated a different construction, was that it covered all sums for which there was legal liability, whether actually payable or not.

31. Whether Gibson J. and Mellish L.J. were *ad idem* on the common meaning of the word "due" is not of significance for present purposes. What is significant, in my view, is that what is to be learned from the passage of the judgment of Gibson J. is that the word "due" may have different meanings in different contexts. That is also the lesson which is to be learned from the judgment of Mellish L.J., in which he illustrates the point by reference to various sections of the statute in issue there in which the word had different meanings. Similarly, it is the lesson which is to be learned from the decision in the *Peacock* case, where the word was found to have different meanings in two juxtaposed, although independent, elements of the statutory provision in issue. In short, for present purposes, the authorities tell us no more than that it is necessary to construe the word "due" by reference to its context.

Construction of s. 40(2)

32. Neither party invited the court to look beyond s. 40(2) in construing that provision. Accordingly, I do not propose to do so save to note that the broader context of the issue which arises here is that under the stamp duty code it is the instrument (in this case the instrument which gave effect to the transaction between EHRA and the respondent), not the transaction itself, which is chargeable with stamp duty and it is chargeable as a conveyance on sale. The narrow context is how the amount of the charge is to be quantified when all or part of the consideration for the conveyance on sale is not money. Sub-section (1) of s. 40 governs the position where all or part of the consideration consists of any stock or marketable security. Sub-section (2) of s. 40 governs the amount of the charge where, as it is accepted is the case here, all or part of the consideration is a non-marketable security. The net question here is what is the proper construction of the phrase "the amount due on the day of the date of the conveyance for principal and interest on that security".

33. The seeming tautologous phrase "the day of the date of the conveyance", the meaning of which was questioned by the Commissioner, was not in issue in this Court. It was accepted that under s. 40(2) the date of the conveyance was the material date. In this case that was 24th June, 2004, which is the date which appears on the Transfer.

34. Both parties agreed that the word "due" must be construed in the context of s. 40(2) as a whole and not in isolation. Where s. 40(2) applies, the charge to stamp duty is quantified by reference to the "amount due … for principal and interest" on the security which has been substituted for money on the material date. In essence, the respondent's case is that the ordinary and natural meaning of the words "amount due" in this context is the amount payable on the material date. The appellants, on the other hand, contend that the words "amount due" extend to all sums for which there is legal liability to make payment, whether the time for payment has actually arisen or not.

35. In my view, the respondent has not illustrated by reference to the context that one must give the word "due" the restricted meaning it has ascribed to it, whereas the appellants have made a convincing argument that their interpretation is the only interpretation which, as a matter of common sense, accords with the context in which the word is used in s. 40(2).

36. To illustrate the contextual significance, counsel for the appellants took as examples the two most common forms of non-marketable security, mortgages and guarantees. Such securities are invariably taken to secure future payments. A mortgage or a guarantee to secure a payment immediately due makes no sense and putting such a mortgage or guarantee in place as part of the consideration for a conveyance on sale makes no sense. Why would the purchaser not just pay the money to the vendor rather than give the vendor security for money immediately payable, counsel rhetorically asked. It makes no commercial sense to proffer a security on foot of which payment is immediately due in lieu of money consideration, it was submitted.

37. The question for the court in construing s. 40(2) is what meaning did the legislature intend to ascribe to the words it used in providing that stamp duty was to be charged "on the amount due … for principal and interest" on the non-marketable security on the material date. In my view, the type of non-marketable security comprehended by the legislature must have been one which secured future payments of principal and interest because that is the only type of security which, as a matter of both commercial sense and common sense, could have been envisaged as a substitute for money in a sale transaction. The concept of a security for money immediately due could, in my view, without exaggeration, be labelled a legal oxymoron. Therefore, in my view, the legislature must have intended that the "amount due" on such security would include all sums, whether for principal or interest, in respect of which there was a legal liability on the material date even though such sums were payable in the future.

38. The Commissioner, having outlined the authorities which had been cited to him, in his *ex tempore* decision went on to say:

> "So, I have to look at the meaning of the phrase 'due on the day of the date of the conveyance'. I think that even without resort to the *Cape Brandy* principle I would be of the view that that would be what amount is payable today. I think that once the qualification of the date comes in it changes the meaning. …
>
> I certainly think that if somebody said to me what debts are due to you, I would give them a list of various amounts receivable today or receivable in the future. If somebody says to me what debts are due to you today, I would take that as meaning what amounts could I call in today. Any amount which is not receivable a month or three months away would not come within my understanding of the meaning of that phrase.
>
> So, that's my primary conclusion."

39. In effect, the Commissioner construed the word "due" as being synonymous with payable. In my view, he took a mistaken view of the law in so doing. He failed to properly take account of the context in which the legislature deployed the word "due", in ascertaining what it intended by the use of that word. The legislature was identifying the sum on which stamp duty would be charged where,

instead of money, all or part of the consideration consisted of a non-marketable security and it expressly equated that sum with the amount due on such security on the material date. The Commissioner ignored that context save that he concluded that the fact that the legislature stipulated the amount due on the material date, as opposed to the amount due simpliciter, had a bearing on the construction of the word "due". Counsel for the appellants submitted that the linking of the "amount due" to a particular date is entirely neutral. I think that is correct. The fact that the amount due is to be ascertained on a specific date is not in any way indicative of the expression "amount due" meaning the amount payable on that date, rather than the amount for which legal liability exists on that date, given that either amount must be readily ascertainable on any date by reference to the security document.

40. The Commissioner recognised that there was a strong argument for the meaning of the word "due" advanced on behalf of the appellants. However, he stated:

> "But in determining whether I should go further than my conclusion regarding the primary meaning of the words as used in the statute, I do have to take the *Cape Brandy* principle into account. I don't think the tax has been imposed in clear terms. I think that copper fastens my conclusions as to the meaning of the section."

41. In my view, the Commissioner has taken a mistaken view of the law in concluding that s. 40(2) is not clear as to the imposition of the charge for stamp duty. There is no lack of clarity or ambiguity in the provision as to the meaning of "amount due", when one properly considers the context in which that expression is used. It is possible to ascertain the meaning the legislature intended from what is clearly stated in the sub-section by having regard to the context in which it is stated. That stamp duty is charged on the amount for which there is liability for principal and interest under the non-marketable security on the material date is the proper construction of the sub-section is determinable by looking at the words used in context without having to resort to any concept of legislative scheme, intendment or purpose.

Application of s. 40(2) on its true construction to the facts

42. The amount due for principal and interest on the security constituted by the Undertaking and the Guarantee on 24th June, 2004 on the proper construction of s. 40(2), that is to say, that "the amount due" means the amount for which there was liability to EHRA on that day, was €28,440,000. Therefore, the Transfer was chargeable with *ad valorem* stamp duty which took into account that amount as part of a consideration for the Transfer.

43. There are a number of inconsistencies in the three documents executed on 24th June, 2004. The operative part of the Transfer stated that the consideration for the transfer was "the security to the effect of €31,600,000 which would be due and payable on 30th June, 2004". We know, however, that 10% of that sum, €3,160,000, was paid by way of deposit and, presumably, was released by ERHA's solicitor to EHRA on the execution of the Transfer, although it is to be observed that there is no receipt clause for that sum in the Transfer. Moreover, the Undertaking was to pay €31,600,000 on 30th June, 2004 and the Undertaking was to be supplemented by the Guarantee. However, the Guarantee related to €28,440,000 payable on 30th June, 2004, being, as the recital in the Guarantee indicated, the balance of the total consideration in respect of which the respondent had sought a deferral. None of those inconsistencies, in my view, bears on the issue which arises on this case stated. However, I do consider it necessary to comment on the statement in the operative part of the Transfer that the consideration would be "due and payable" by the respondent to EHRA on 30th June, 2004 and the corresponding formula included in the Undertaking that the consideration should "not be deemed due or payable" prior to 30th June, 2004. The Transfer is chargeable to stamp duty by reference to what is provided for in s. 40(2) on the basis of the proper construction of that provision. As a matter of fact and law, on the proper construction of s. 40(2), the amount due on 24th June, 2006 to EHRA on the security constituted by the Undertaking in combination with the Guarantee was €28,440,000. That was the position irrespective of the terminology used in the Transfer and in the Undertaking. EHRA executed the Transfer on that day on the basis that on that day both the respondent and the Bank assumed liability to it for that sum and that was the amount due on that day on the security within the meaning of s. 40(2).

Amendment of s. 40(2)

44. The court was apprised that, by virtue of s. 116(1) of the Finance Act, 2005, s. 40(2) was amended in respect of instruments executed on or after 2nd March, 2005. Section 40(2), as amended, now provides:

> "Where the consideration, or any part of the consideration, for a conveyance on sale of any property, consists of any security not being a marketable security, the conveyance shall be charged with *ad valorem* duty as a conveyance on sale of that property for a consideration equal to the value of that property on the date of the execution of the conveyance."

45. As Griffin J. stated in his judgment in *Cronin (Inspector of Taxes v. Cork County Property Company Limited* [1986] I.R. 559, the other judges who sat with him in the Supreme Court, Henchy J. and McCarthy J., concurring, the court cannot construe a statute in the light of amendments that may thereafter have been made to it. He continued (at p. 572):

> "An amendment to a statute can, at best, only be neutral – it may have been made for any one of a variety of reasons. It is however for the courts to say what the true construction of a statute is, and that construction cannot be influenced by what the Oireachtas may subsequently have believed it to be."

46. In arriving at the conclusion I have arrived at on the construction of s. 40(2), I have not been influenced by the amendment, which it is reasonable to infer was a reaction to the Appeal Commissioner's decision.

Answer to the question posed

47. The answer to the question posed in the case stated is that the Commissioner was not correct in his interpretation of s. 40(2).