Harvest Sheen Ltd & Another Applicants

and

The Collector of Stamp Revenue Respondent

(High Court)
(Administrative Law List No 28 of 1997)

Barnett J
19–21 and 30 May 1997

Land law and conveyancing — stamp duty — acquisition of property through shelf company — subsequent ratification by company — whether two separate transactions both chargeable to duty

Administrative and constitutional law — judicial review — Collector of Stamp Revenue — whether s.14(1) of the Stamp Duty Ordinance inconsistent with art.10 of the Hong Kong Bill of Rights Ordinance

[Stamp Duty Ordinance (Cap.117), s.14(1); Hong Kong Bill of Rights Ordinance (Cap.383), s.8 art.10]

A2, Chan Siu Chun, decided to purchase a house and instructed solicitors to acquire a shelf company for the purpose. A trainee solicitor obtained a list of available companies. A2 chose A1's name, Harvest Sheen Ltd. The trainee reserved that name and received confirmation that the company was available and that the company kit could be delivered at any time.

The next day, 5 March 1997, A2 signed a provisional sale and purchase agreement for the purchase of the house. She signed the agreement "Chan Siu Chun for and on behalf of ……" because she was not sure of the spelling of the company's name of A1. She arranged for the solicitors to complete the empty space in the provisional agreement. The trainee who was to deal with both the acquisition of the company and the conveyancing did not fill in the empty space the name of A1. On 13 March, after obtaining the corporate documents, A2 and her husband were appointed directors of A1 and the purchase of the house was ratified. On 19 March, the trainee submitted the original provisional agreement still with the empty space in tact and a certified copy of the same, an IRD questionnaire Form 26 showing A1 (and not A2) as purchaser and a cheque for stamp duty to R, the Collector of Stamp Revenue. The assessor noticed the discrepancy between the provisional agreement and Form 26 and asked the solicitors to rectify the name of the purchaser in Form 26. The trainee simply filled in the empty space the name of A1 in the original provisional agreement but not in the certified copy. The assessor took the view that there were two distinct documents and transactions – a provisional sale and purchase agreement dated 5 March with A2 as purchaser and a subsale agreement dated 19 March with A1 as purchaser – and that stamp duty was payable on each. He did not accept the contention that A2 signed the provisional agreement for and on behalf of A1. He maintained that A2 was neither the director nor the shareholder of A1 as at 5 March 1997 and that, in any event, since stamp duty was a tax on the instruments, A2's intention at the time of execution

of the provisional agreement was irrelevant to the issue. A1 and A2 appealed under s.14 of the Stamp Duty Ordinance. They sought an order of *certiorari* and a declaration that the words "and on payment of the stamp duty in conformity therewith" in s.14(1) of the Ordinance were repealed as being inconsistent with the Hong Kong Bill of Rights Ordinance because they placed an impermissible restraint on freedom of access to the District Court.

Held, quashing the Commissioner's decision requiring A2 to pay duty, that:

(1) Where a statute laid down a comprehensive system of appeal procedure, it would only be in exceptional circumstances, typically an abuse of power, that the courts would entertain an application for judicial review (*Harley Development Inc & Another v CIR* [1996] 2 HKLR 147; [1996] 1 WLR 727 (see [1996] HKLY 25)). Abuse of power did not necessarily mean misconduct on the part of the decision-maker. It could include an excess of zeal or a decision palpably wrong in law. (See p.892E–H.)

(2) Exceptional circumstances existed in the present case such as to justify the court exercising its discretion in the applicants' favour. First, although counsel of perfection might have required the applicants first to try and lodge their appeal with the District Court and make this application only when their appeal had been refused, there was a real danger that the time limit imposed by s.14(1) might be exceeded. There was no power in any court to extend that time limit (*Bangkok Capital Antique Co Ltd v The Collector of Stamp Revenue* [1984] HKC 16). Since A2 was prepared to state on affirmation that she was unable to afford to pay the duty, it was appropriate that the application in respect of the Bill of Rights should be made to the High Court with all speed. Second, it was abundantly clear that R had misdirected himself as a matter of law. (See pp.893I–894B.)

(3) It was an established rule that an act done for another by a person not assuming to act for himself, but for such other person, though without any precedent authority, might become the act of the principal if subsequently ratified by him (*Chitty on Contracts*, 27th edn., s.31-024). On 5 March, A1 was in existence and could at that time have ratified A2's act. A2 entered into a contract for an unnamed principal. There was no doubt whatsoever that A2 intended that the principal should be A1 which subsequently ratified what A2 had done. Therefore, notwithstanding the discrepancies between the documents, there was only one contract and one document chargeable to stamp duty. By virtue of the doctrine of relation back, the agreement to which A1 was a party should have been dated 5 March. (See p.897A–C.)

(4) (*Obiter*) Had it been necessary, the court would have concluded that art.10 of the Bill of Rights Ordinance was engaged in this case and that the words complained of in s.14(1) of the Ordinance were inconsistent with art.10 and therefore repealed (*Golder v UK* (1975) 1 EHRR 525 and *Airey v Ireland* (1979) 2 EHRR 305 followed; *Kwan Kong Co Ltd v Town Planning Board* [1995] 3 HKC 254 (see [1995] HKLY 43) considered). (See p.898I.)

(5) The existing fetter on the right of access to the court under s.14(1) was not proportionate to the end which the legislative scheme sought to achieve. There would be cases where a would-be appellant simply could not pay the duty assessed and was therefore effectively denied access to the court. Neither the Commissioner nor the court had power to ameliorate the requirement that the whole amount of duty be paid. It would not be difficult to introduce provisions (such as those existing in s.22 of the Estate Duty Ordinance) for the giving of security rather than payment of the duty, for the court to defer payment or dispense with security in an appropriate case,

and for a document to be made enforceable pending a legitimate appeal. (See pp.899H–900A.)

Mr Gerard McCoy, QC and Mr Victor Luk for William K.W. Leung & Co for the applicant.
Mr Philip Dykes, QC and Miss P. Wong for A-G's Chambers/respondent.

Cases cited in the judgment:
Airey v Ireland (1979) 2 EHRR 305
Bangkok Capital Antique Co Ltd v The Collector of Stamp Revenue [1984] HKC 16
Golder v UK (1975) 1 EHRR 525
Harley Development Inc & Another v CIR [1996] 2 HKLR 147; [1996] 1 WLR 727
Kwan Kong Co Ltd v Town Planning Board [1995] 3 HKC 254; (1996) 6 HKPLR 237
Limmer Asphalte Paving Co Ltd v CIR (1872) LR 7 Ex 211
Phillips v Eyre (1870) LR VI 1
R v Birmingham City Council, ex p Ferrero Ltd [1993] 1 All ER 530
R v Brentford General Commissioners, ex p Chan & Others [1986] STC 65
R v Inspector of Taxes, ex p Kissane & Another [1986] 2 All ER 37
Smith v Cox [1940] 2 KB 558
Tolstoy v UK (1995) 20 EHRR 442

Barnett J:

Introduction

In March this year, the 1st applicant purchased a house in Hong Lok Yuen, Tai Po. The respondent decided that the agreement by which the 1st applicant acquired the house was chargeable to stamp duty of $338,250. The respondent, however, also decided that the 2nd applicant was an intermediate purchaser or confirmor between the 1st applicant and the vendor. He assessed the agreement by which the 2nd applicant acquired her interest as also chargeable to duty of $338,250. The 2nd applicant was dissatisfied with the decision of the respondent and wished to appeal pursuant to s.14 of the Stamp Duty Ordinance, Cap.117 (the Ordinance). The 1st applicant, while accepting that it had to pay the duty assessed, was concerned that in his assessment the respondent had wrongly dated the agreement by which the 1st applicant acquired the house. To that extent, therefore, the 1st applicant also wished to appeal against the assessment.

Section 14 of the Ordinance reads:

14. Appeal against assessment

(1) Any person who is dissatisfied with the assessment of the Collector under section 13 may, within a period of 1 month from the date on which the assessment is made and on payment of the stamp duty in conformity therewith, appeal against the assessment to the court and may for that purpose require the Collector to state and sign a case setting forth the question upon which his opinion was required and the assessment made by him.

(2) The Collector shall thereupon state and sign a case and deliver the same to the person by whom it is required and the case may, within 7 days thereafter and after service thereof upon the Attorney General, be set down by such person for hearing.

(3) Upon the hearing of the case the court shall determine the question submitted, and, if the instrument in question is in the opinion of the court chargeable with any stamp duty, the court shall assess the stamp duty chargeable thereon.

(4) If the amount of the stamp duty assessed by the court is less than the assessment of the Collector, the excess of stamp duty paid shall be ordered by the court to be repaid together with any excess of penalty paid under section 9 in respect thereof.

(5) If in the opinion of the court the assessment of the Collector is not excessive, the court shall make an order confirming that assessment.

(5A) The court may appoint a member of the Lands Tribunal to sit and assist it in any proceedings or part of any proceedings under this section; but the decision in the appeal shall be the decision of the court alone. (*Added 43 of 1984 s.2*)

(6) In this section "court" means the District Court.

The 2nd applicant did not have the money to pay the stamp duty as required by s.14(1). The applicants therefore applied for and were granted by me leave to apply for judicial review of the respondent's decision. They sought an order of *certiorari* to quash the decision of the Collector of Stamp Revenue dated 25 April 1997 requiring the 2nd applicant to pay stamp duty of $338,250; and a declaration that the words "and on payment of the stamp duty in conformity therewith" in s.14(1) of the Ordinance are repealed as being inconsistent with the Hong Kong Bill of Rights Ordinance (BOR) because they place an impermissible restraint on freedom of access to the District Court. Because of the time limit imposed by s.14(1) there was an expedited hearing of the applicants' motion. At the conclusion of the hearing, I exercised my discretion in favour of the applicants and quashed the decision of the respondent requiring the 2nd applicant to pay duty. I also declared that the correct date of the agreement by which the 1st applicant acquired the house was 5 March 1997. I said I would give reasons for my decision which I now do.

Discretion

It is now well settled that the courts will only entertain an application for judicial review where there is an alternative statutory appeal procedure if exceptional circumstances arise. This was perhaps best expressed by Lord Jauncey of Tullichettle in *Harley Development Inc & Another v CIR* [1996] 1WLR 727 where he said at page 736:

> Their Lordships consider that, where a statute lays down a comprehensive system of appeals procedure against administrative decisions, it will only be in exceptional circumstances, typically an abuse of power, that the courts will entertain an application for judicial review of a decision which has not been appealed.

Abuse of power does not necessarily mean misconduct on the part of the decision-maker. It can include an excess of zeal or a decision palpably wrong in law. Mr Gerard McCoy, QC, who appeared for the applicants said that the respondent's decision was not only perverse and irrational, but plainly wrong in law.

Mr McCoy also referred to *R v Inspector of Taxes, ex p Kissane & Another* [1986] 2 All ER 37. In that case, Nolan J based his decision to grant leave to apply for judicial review at least in part on the absence of any provision in the machinery of appeal for the award of costs. Mr McCoy pointed out that similarly s.14 of the Ordinance makes no provision for costs. In any event, he said, costs on the District Court scale may well be inadequate.

Then, Mr McCoy submitted that as the applicants have to come to the High Court anyway to obtain their declaration in respect of BOR it is sensible to avoid a multiplicity of proceedings by this court dealing with the substantive issue at the same time, particularly when it is relatively brief and straightforward.

There was some substance in all those points. There was no substance whatsoever in two other points made by Mr McCoy. First, he said that the appeal procedure is lengthy, partly because of delays in the respondent's preparation of the case stated, and partly because of delays inherent

in the District Court. During the period while an appeal is pending, an appellant is deprived of the duty which he has had to pay. I observe that if indeed there are such delays then there are adequate ways of dealing with them. The District Court can be asked for an order giving a time limit for the supply of the case stated. The appropriate judicial authority can be asked to deal with delays in the court itself.

Second, Mr McCoy said that there is some doubt about the efficacy of the case stated procedure. For this, he relied upon Stamp Appeal No 26 of 1991 where, in his judgment dated 12 March 1993, the learned district judge appeared uncertain about what he was to do and suggested that judicial review might be the more appropriate avenue to relief. I can only express astonishment over this. The case stated procedure is well established and easily understood. The court is simply required to answer the questions posed by the person stating the case. There is no difficulty about preparing a stated case. Indeed, the admirable affirmation of Mr Thomas Li, a senior assessor of the Stamp Office, filed in these proceedings would, with a little topping and tailing, provide an admirable stated case.

For the respondent, Mr Philip Dykes, QC, pointed out that if the High Court intervenes by way of judicial review, it may be at the expense of policy objectives behind an appeal system. He referred to *R v Birmingham City Council, ex p Ferrero Ltd* [1993] 1 All ER 530 in which the Court of Appeal said that it was necessary for the court to look carefully at the suitability of the statutory appeal in the context of the particular case. The real issue to be determined should be identified, so that it could be seen whether the appeal procedure was suitable to determine that issue. The Court of Appeal thought that the appeal procedure was suitable, the appeal lying as it did to a magistrate's court which was better placed to deal with the issues of fact likely to arise. The court, therefore, set aside the leave which had been granted.

There is of course no doubt that the District Court, to which the appeal should lie in this case, is as well qualified to deal with the issues of fact or law likely to arise as is this court. Further, the District Court may have the benefit of the assistance of a member of the Lands Tribunal which the High Court does not.

Mr Dykes also urged upon me the remarks of Taylor J in *R v Brentford General Commissioners, ex p Chan & Others* [1986] STC 65. At page 73, the judge said:

> It may be tempting to succumb to the approach, well, the case is here now, why not deal with it rather than divert it onto another route which will bring it before another judge in the same building but much later? That would especially be so where the court's initial reaction was to feel that there was substance in the applicant's complaint. But to do so would be contrary to the principles I have earlier stated. It would, in effect, licence applicants to achieve judicial review by simply arriving here and relying on the inconvenience and delay of their being redirected. It would clog the already swelling lists of properly brought cases for judicial review.

Mr Dykes also complained that, although the 2nd applicant has pleaded poverty, she has not given particulars beyond saying that she cannot afford to pay the duty. There is some substance in this. Had this application been made upon that basis alone, I have no doubt I would have made further enquiries as to the 2nd applicant's financial position.

In the event, I decided to exercise my discretion in favour of the applicants for two reasons. First, although counsel of perfection might have required the applicants first to try and lodge their appeal with the District Court and make this application only when their appeal had been refused, there was a real danger that the time limit imposed by s.14(1) might be exceeded. There is no power in any court to extend that time limit: *Bangkok Capital Antique Co Ltd v The Collector of Stamp Revenue* [1984] HKC 16, a decision of the Court of Appeal. Since the 2nd applicant was prepared to state on affirmation that she was unable to afford to pay the duty, it was appropriate

that the application in respect of BOR should be made to this court with all speed. The applicants being properly before this court, there was good sense in dealing with the substance of their complaint on a relatively short and straightforward matter.

Second, although I said the point in issue was relatively short and straightforward, it involved additional hearings on the 2nd and 3rd days. But it became abundantly clear that the respondent had misdirected himself as a matter of law.

I found these to be exceptional circumstances which justified me in exercising my discretion in favour of the applicants and disposing of the motion in their favour.

The decision

Earlier this year, the 2nd applicant and her husband decided to purchase a house. The purchase was to be through a family company. On 4 March, the 2nd applicant instructed her solicitors to acquire a shelf company. The solicitor consulted by the applicant placed responsibility for this exercise in the hands of a trainee. On the same day, the trainee obtained a list of available companies. The 2nd applicant chose the 1st applicant's name. The trainee reserved that name and received confirmation from Pioneer Registration Ltd that the company was available and that the company kit could be delivered at any time.

Next day, 5 March, the 2nd applicant signed a provisional sale and purchase agreement for the house at Hong Lok Yuen for a purchase price of $12.3 million (the agreement). She signed the agreement "Chan Siu Chun for and on behalf of ……" because she was not sure of the spelling of the company's name. She agreed with the estate agent with whom she was dealing that the name would be filled in by the solicitors. The 2nd applicant faxed a copy of the agreement to her solicitors and explained to the partner over the telephone why the 1st applicant's name was omitted. She arranged for the solicitors to complete the form.

At this point, things went wrong. The trainee who was to deal with both the acquisition of the company and the conveyancing did not complete the agreement. Indeed, she took no action until 12 March when she obtained the corporate documents. On 13 March, the necessary formalities were attended to. The 2nd applicant and her husband were appointed directors of the 1st applicant and the purchase of the house was ratified.

On 19 March, the trainee submitted the relevant documents for stamping. Those documents were the original agreement and a certified copy, an Inland Revenue Department questionnaire called form 26 showing the 1st applicant as purchaser, and the cheque for duty of $338,250.

The assessor in the respondent's office who dealt with these documents noted the discrepancy between the agreement and form 26, and asked the solicitors to rectify the name of the purchaser in form 26. The trainee who was still dealing with the matter simply filled in the 1st applicant's name in the original agreement but not in the certified copy. She returned the documents to the respondent's office on 25 March. There, the assessor took the view that there were two distinct documents and transactions not involving the same parties and that duty was payable on each. He advised the solicitors by letter dated 9 April that there were two provisional sale and purchase agreements, each dated 5 March, in one of which the 2nd applicant was purchaser, and in the other the 1st applicant. The solicitors replied the same day explaining that the documents represented the same agreement in which the purchaser had always been "Chan Siu Chun for and on behalf of Harvest Sheen Ltd.". They said the first document had been certified and submitted solely due to inadvertence and without intention to deceive and asked that the first submission be ignored.

The solicitors followed that with a letter on 11 April, in which they gave a more detailed explanation of what had happened. The partner concerned delivered it personally to the assessor and discussed the case with him. There were two further letters of explanation and submission by the solicitors but by letter of 25 April, the respondent confirmed his opinion that there were two different instruments. That letter which constitutes the decision under review needs to be set out at some length:

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Re: (1) Provisional agreement for sale and purchase (provisional agreement) dated 5.3.97 of House 63A, 10th Street, Hong Lok Yuen, Tai Po, NT.
Purchaser: Chan Siu Chun
(2) Agreement for sub-sale and purchase (sub-sale agreement) dated 19.3.97 of House 63A, 10th Street, Hong Lok Yuen, Tai Po, N.T.
Purchaser: Harvest Sheen Limited

I refer to my letter dated 22 April 1997.

I have given the matter much consideration but regret to inform you that I am of the opinion that the above-mentioned two documents are separate and distinct documents in view of the fact that they are not made between the same parties. I am unable to accede to your contention that Chan Siu Chun (CSC) signed the provisional agreement for and on behalf of Harvest Sheen Limited (HS) on 5 March 1997 because CSC is neither the director nor the shareholder of HS as at 5 March 1997. It is clear that CSC should not have any authority to execute the provisional agreement on behalf of HS as at 5 March 1997. In such circumstances, I maintain my view that CSC signed the provisional agreement in her personal capacity and not as a director of HS. The identity of the purchaser in the provisional agreement cannot be rectified by subsequent filling in the name of the company. I consider that such subsequent insertion of the name of the company to the provisional agreement could be construed as operating as a nomination by CSC to HS for the acquisition of the property and a chargeable "transaction" would result …….

Furthermore, as it is a fundamental principle that stamp duty is a tax on the instruments, I am of the view that the intention of CSC at the time of execution of the provisional agreement is irrelevant to this issue.

In view of the above, I am of the opinion that the stamp duty payable for the relevant instruments is as follows:

Provisional agreement for sale and purchase dated 5.4.97 (sic) Purchaser: Chan Siu Chun	$338,250.00
Agreement for sub-sale and purchase dated 19.3.97 Purchaser: Harvest Sheen Limited	$338,250.00

Notices of assessment calling for the above stamp duty will be issued to your clients for settlement separately. If your clients are not satisfied with the assessments, your clients may, under s.14 of Stamp Duty Ordinance, lodge an appeal to the District Court within one month from the date of the assessment and on payment of the stamp duty thereof.

It will be seen that the respondent took the view that there was a provisional sale and purchase agreement dated 5 March (wrongly dated 5 April in the body of the letter) with the 2nd applicant as purchaser, and a sub-sale agreement dated 19 March (the date of resubmission of the documents) with the 1st applicant as purchaser.

The law

It is not in dispute that under the Ordinance the respondent has wide powers to call for information about a document submitted for stamping. These powers are to enable the respondent to ascertain the substance rather than the form of the transaction. In *Limmer Asphalte Paving Co Ltd v Commissioners of Inland Revenue* (1872) LR 7 Ex 211 Martin B delivering the judgment of the court said:

> In order to determine whether any, and if any what, stamp duty is chargeable upon an instrument, the legal rule is that the real and true meaning of the instrument is to be ascertained; that the description of it given in the instrument itself by the parties is immaterial, even though they may have believed that its effect and operation was to create a security mentioned in the Stamp Act, and they so declare. For instance, if a writing were headed by a recital that the parties had agreed to execute the promissory note thereinafter written, yet if in truth the contract set forth was not a promissory note but an agreement of another character, the stamp duty would be not that of a promissory note but of the agreement. The question, therefore, stamp or no stamp, and if a stamp to what amount, is to be determined upon the real and true character and meaning of the writing.

The respondent's interpretation of the correspondence and documents before him and his reasoning are essentially set out in his letter of 25 April. It was somewhat expanded in the affirmation of Mr Li to which I have already referred. The reasoning runs thus. On execution of the agreement by the 2nd applicant on 5 March, the name of the 1st applicant was not explicitly shown as purchaser. The clause "for and on behalf of" did not give any indication that the 1st applicant would be bound by that agreement which was in any event signed by the 2nd applicant in her name only. The deposit paid was by cheque drawn on the 2nd applicant's personal bank account. At that time, the 2nd applicant had no capacity to enter into a contract for and on behalf of the 1st applicant because she was then a stranger to the company. It was not until 13 March that the 2nd applicant became a director and secretary, and a shareholder on 19 March. It was only on 13 March that the 1st applicant, through its directors, resolved that the provisional agreement dated 5 March be approved, ratified and endorsed. That ratification did not have the effect that the 1st applicant would become a party to the original agreement because its name was not shown in the agreement when it was executed. The liability of an instrument to stamp duty depends on the facts and circumstances existing at the date of its execution.

I was in some doubt as to whether a company or any other person could ratify an act done by a stranger. Fortunately, at the hearing on the 3rd day, Mr McCoy was able to place before me authorities directly on point. Thus in *Phillips v Eyre* (1870) LR VI 1 a case arising out of a slave revolt in Jamaica, Willes J delivering the judgment of the court said at page 23:

> If (for instance from the common law) a mere stranger, acting without authority at the time, takes upon him to do an act of trespass in the name and for the benefit of an absent person, such professed agent becomes liable for his unauthorised act, and a right of action is acquired by the person against whom the wrong was committed; and yet the general rule of the common law, borrowed from the civil law, is that the person in whose name the act was done may, if he thinks fit, afterwards ratify and adopt it.

In *Smith v Cox* [1940] 2 KB 558 Humphreys J held that payment to a landlord by a stranger to the tenancy of a sum equivalent to rent outstanding would be good satisfaction of that rent if, *inter alia*, payment was subsequently ratified by the tenant.

Bowstead and Reynolds on Agency (16th edition) has a substantial section on ratification. Article 15 of that section deals with "who may ratify". The comment thereon in dealing with the position of an unnamed principal, the position obtaining in the present case, indicates that much depends upon the intention of the agent. Thus, provided the agent had a particular person in mind, he may later identify that person who may in turn ratify. Where, however, an agent has no principal in mind at the time of his act but simply proposes to dispose of the contract somewhere, there can in principle be no ratification.

The principle is usefully and concisely stated in *Chitty on Contracts* (27th edition) under the sub-heading "ratification" at s.31-024:

> General rule. It is an established rule that an act done for another by a person not assuming to act for himself, but for such other person, though without any precedent authority, may become the act of the principal if subsequently ratified by him ….

On 5 March, the 1st applicant was in existence and could at that time have ratified the 2nd applicant's act. The 2nd applicant entered into a contract for an unnamed principal. There is no doubt whatsoever that the 2nd applicant intended that the principal should be the 1st applicant which subsequently ratified what the 2nd applicant had done. I was therefore in no doubt that, notwithstanding the discrepancies between the documents, there was only one contract and one document chargeable to stamp duty. For those reasons, I quashed the respondent's decision to charge the 2nd applicant. By virtue of the doctrine of relation back, the agreement to which the 1st applicant was a party should have been dated 5 March.

Bill of Rights

What I say on this topic is necessarily *obiter*. I am reluctant to add to the material, itself *obiter*, which already exists on this point. I propose therefore to deal with the issue briefly.

It was Mr McCoy's contention that arts.10 and 22 of BOR are engaged. Article 10 reads:

> **Equality before courts and right to fair and public hearing**
>
> All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (*ordre public*) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgment rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.

Article 22 provides for equality before and equal protection of the law. It prohibits discrimination on the ground, amongst others, of property.

Mr McCoy relied upon *Airey v Ireland* (1979) 2 EHRR 305 in which the European Court of Human Rights dealt with a petition which complained that, because legal aid for civil proceedings was not available, there was a violation of art.6 of the European Convention because right of access to a court was effectively denied. In its judgment, the court said at page 314:

> Mrs Airey cites *Golder v UK* where the court held that this paragraph embodies the right of access to a court for the determination of civil rights and obligations; she maintains that, since the prohibitive cost of litigation prevented her from bringing proceedings before the High Court for the purpose of petitioning for judicial separation, there has been a violation of the above-mentioned provision.

That contention was rejected by the Irish Government which said that the petitioner enjoyed access because she was free to go before the court without the assistance of a lawyer. The court said, however:

> The Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective.

The court gave comfort to the Irish Government by saying that art.6 did not necessarily mean that free legal aid would have to be provided in all cases concerning civil rights and obligations. Everything would depend on the particular circumstances. The court went on to say that:

> In addition, whilst art.6(1) guarantees to litigants an effective right of access to the courts for the determination of their 'civil rights and obligations', it leaves to the State a free choice of the means to be used towards this end. The institution of a legal aid scheme – which Ireland now envisages in family law matters (see para.11 above) – constitutes one of those means but there are others such as, for example, a simplification of procedure. In any event, it is not the court's function to indicate, let alone dictate, which measures should be taken; all that the Convention requires is that an individual should enjoy his effective right of access to the courts in conditions not at variance with art.6 (1).

Article 10 BOR and the decision in *Golder v UK* received an airing in *Kwan Kong Co Ltd v Town Planning Board* [1995] 3 HKC 254. In that case Waung J held *obiter* that art.10 does not confer a right of access to the courts, but only provides equality through procedural guarantees in respect of already pending proceedings. Thus, the obstacles that a prospective litigant may have to overcome before he can launch proceedings do not engage art.10.

Waung J relied upon the dissenting but powerful judgment of Sir Gerald Fitzmaurice in *Golder* and also differences between art.6 of the European Convention and art.10. In *Golder*, the European Court of Human Rights held that the right of access to a court, although not expressly stated in art.6, constituted an element which is inherent in the right protected by art.6. Thus, the right of access could be implied from art.6 and it was inconceivable that art.6 should provide detailed procedural guarantees in civil cases without first protecting the right of access.

Waung J, as I said, rejected that and following a close analysis of art.10 and art.6 of the Convention came to the conclusion that art.10 is limited to pending law suits and the achievement of equality through procedural guarantees. There was an appeal from the judge's decision, reported in (1996) 6 HKPLR 237. It is apparent that the Court of Appeal thought that the judge did not give the generous and purposive approach to construction that is called for by s.2(3) BOR.

For my part, I find it very difficult to believe that somehow art.10 of BOR and art.6 of the European Convention (between which I can see no significant differences) are content with being generous to a litigant who has managed to get before the court, but are not prepared to assist the litigant in getting into court in the first place, no matter what difficulties and obstacles may be placed in his way. I have no doubt that the European Court in *Golder* and *Airey* was following the proper generous and purposive approach to the task before it and reached the correct conclusion. I readily concede that upon a narrow reading of the second sentence of art.10, Waung J's view is justified. I prefer, however, to focus upon the word "entitled". If a litigant is entitled to a fair trial, it must be implicit that the litigant gets to trial in the first place. Waung J's interpretation would be easier to justify if the words "entitled to" were substituted by the word "given".

I would have concluded, therefore, that art.10 is engaged in this case. That being so, I would have had no difficulty in finding that the words complained of in s.14(1) of the Ordinance are inconsistent with art.10 and are repealed. Mr McCoy accepted that the right of appeal given by s.14 does not have to be entirely unfettered. He compared the existing regime with the provision for appeals contained in s.22 of the Estate Duty Ordinance Cap.111. That regime provides for an appeal either on payment of or security for the duty claimed. Provision is made, however, for the Commissioner to defer payment of the duty while the court may allow an appeal to be brought either without payment or payment of so much of the duty as seems reasonable. Mr McCoy suggested that some sort of similar regime might easily be established for the purpose of s.14 of the Ordinance.

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Mr Dykes said that s.14 is part of the mechanism for revenue collection. It can be inferred that in order to protect revenue which has been raised by a legally required assessment, the legislature wished to guard against the possible dissipation of assets by the person liable to pay the duty in case execution was ever necessary as part of recovery. He contended that the limitation imposed by the overall statutory scheme and its objectives was reasonable and proportionate. He also took comfort from the European Court of Human Rights. In *Tolstoy v UK* (1995) 20 EHRR 442, the applicant complained that a requirement that he provide security for costs as a condition of his appeal in a libel action was a violation of his rights under arts.6 and 10 of the Convention. At p.445 the court said:

> 2. Compliance of art. 6(1)
>
> 59. The court reiterates that the right of access to the courts secured by art.6(1) may be subject to limitations in the form of regulation by the State. In this respect the State enjoys a certain margin of appreciation. However, the court must be satisfied, firstly, that the limitations applied do not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired. Secondly, a restriction must pursue a legitimate aim and there must be a reasonable relationship of proportionality between the means employed and the aim sought to be achieved ….
>
> The court's task is not to substitute itself for the competent British authorities in determining the most appropriate policy for regulating access to the Court of Appeal in libel case, nor to assess the facts which led that court to adopt one decision rather than another. The court's role is to review under the Convention the decisions that those authorities have taken in the exercise of their power of appreciation ….
>
> 61. The court considers that the security for costs order clearly pursued a legitimate aim, namely to protect Lord Aldington from being faced with an irrecoverable bill for legal costs if the applicant were unsuccessful in the appeal. This was not disputed. Further, since regard was also had to the lack of prospects of success of the applicant's appeal, the requirement could also, as argued by the government, be said to have been imposed in the interests of a fair administration of justice.
>
> 62. Like the Government and the Commission, the court is unable to share the applicant's view that the security for costs order impaired the very essence of this right of access to court and was disproportionate for the purposes of art.6.

The margin of appreciation there referred to and the decision in *Airey* provide the source of Mr McCoy's concession that the right of access need not be totally unfettered. As I have already said, I cannot accept that the existing fetter falls within that margin of appreciation or, to put it another way, is proportionate to the end which the legislative scheme seeks to achieve. There will be cases where a would-be appellant simply cannot pay the duty assessed and is therefore effectively denied access to the court. Neither the respondent nor the court has power to ameliorate the requirement that the whole amount of duty be paid.

Mr Dykes pointed out that there are differences between the schemes for estate and stamp duties. He pointed out that in relation to estate duty, the assets of the estate are frozen until there has been a grant of probate or administration. The Commissioner will not, therefore, be frustrated when it comes to recovery of the duty. The Commissioner does, however, have power to assist where appropriate. The stamp duty regime, however, is different. Assets can be dissipated, not necessarily unfairly, before the duty is paid if the period is prolonged. The document in question, until stamped, cannot be relied upon in court. Thus, third party rights are affected. These points I accept but, like Mr McCoy, I do not see that it would be difficult to introduce provisions for the

giving of security rather than payment of the duty, for the court to defer payment or dispense with security in an appropriate case, and for a document to be made enforceable pending a legitimate appeal. A

These then are the reasons for the decisions which I made or would have made.

I now order that, in so far as costs have not already been provided for, there be an order *nisi* that the respondent pays the applicants' costs. B