

STAMP DUTY COMMISSIONERS v AFRICAN FARMING EQUIPMENT COMPANY LIMITED (1969) ZR 32 (CA)

COURT 10 OF APPEAL

BLAGDEN, CJ DOYLE JA, EVANS, J

18th February 1969

Flynote and Headnote

[1] Statutes - Interpretation of statutes - Application of ejusdem generis rule.

Section 15 4 (4) of the Interpretation and General Provisions Ordinance precludes the application of the ejusdem generis rule to statutory interpretation unless the word "similar" or some other word of like meaning is included.

[2] Contract - Written agreement - No necessity for signature of both or all 20 the parties.

It is not necessary that an agreement should be signed by both or all the parties for it to be operative against a party who has signed it.

[3] Revenue - Stamp duty - Duty payable on debenture which is the only 25 security for payment of money:

A debenture which is the only security for payment of money is, for stamp duty purposes, classed under Head 8 (1) of the first schedule to the Stamp Duty Ordinance.

[4] Companies - Debenture which is the only security for repayment of 30 money - stamp duty payable:

See [3] above.

Case cited:

(1) Fleetwood - Hesketh v Commissioners of Inland Revenue [1936] 1 KB 351; [1935] All ER 682. 35

Statutes construed:

(1) Interpretation and General Provisions Ordinance (1965 Cap.1), s.4 (4).

(2) Stamp Duty Ordinance (1965) first schedule, Head 8.

Ryan, Senior State Advocate, for the appellant.

Martin, 40 for the respondent.

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Judgment

Doyle JA: The question in this appeal is, what, if any, is the stamp duty chargeable on an instrument drawn in the following terms:

"African Farming Equipment Company Limited whose registered office is situate at Lusaka (hereinafter called "A.F.E.") hereby acknowledges to have received from The Southern Province African 5 Farming Improvement Fund Board, a body corporate established by the African Improvement Funds Ordinance (hereinafter called "S.P.A.F.I.F. ") the sum of One hundred thousand kwacha (K100,000.00) (hereinafter called "the principal sum") by way of loan bearing interest on the principal sum or on so much thereof 10 as may from time to time remain unpaid at the rate of six per centum from the eighteenth day of May One thousand nine hundred and sixty - eight by instalments payable on the thirty first day of December One thousand nine hundred and sixty eight and thereafter annually on the thirty - first day of December 15 every year until the whole of the principal sum has been repaid;

Provided always that so long as the interest on the principal sum shall be paid in the manner aforesaid and so long as the principal sum shall be repaid by five equal instalments of Twenty thousand kwacha (K20,000.00) each commencing on the eighteenth day of 20 May One thousand nine hundred and seventy - eight and ending on the eighteenth day of May One thousand nine hundred and eighty - two and so long as (a) every such payment of interest and instalment of the principal sum is paid within thirty days of the day hereinbefore appointed for the payment thereof and (b) no 25 order is made or resolution passed for the winding - up of A.F.E. and (c) no encumbrancer takes possession or receiver is appointed of the whole or any part of the assets or undertaking of A.F.E. and (d) no distress or execution is levied or enforced upon or sued out against any of the chattels or property of A.F.E. which is 30 not discharged within seven days of being levied and (e) A.F.E. is not for the purposes of section 131 of the Companies Ordinance or any amending or replacing enactment deemed to be unable to pay its debts and (f) A.F.E. shall not give at least six calendar months prior written notice to S.P.A.F.I.F. of its intention to 35 pay off the balance of the principal sum and the interest remaining owing at the expiration of such notice and the period of the notice expires then S.P.A.F.I.F. shall not require payment of the principal sum or any part thereof or of the interest thereon otherwise than by such instalments as aforesaid and A.F.E. shall not 40 be entitled to pay off the principal sum and interest or any part thereof except in the same manner. Any notice hereunder is to be deemed to be sufficiently served (1) if being a notice a A.F.E. it is sent by prepared registered post addressed to A.F.E. or left at its registered office for the time being and (2) if being a notice to 45 S.P.A.F.I.F. it is sent by prepaid registered post addressed to S.P.A.F.I.F. or left at its head office or its principal office in the Southern Province of Zambia for the time being. Any notice sent by post is to be deemed to be served at the expiration of forty -

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eight hours after it is put into the post office.

As Witness the hand of John Peter Rozwadowski the General Manager of A.F.E. duly authorised in this behalf the eighteenth day of May One thousand nine hundred and sixty - eight.

Signed 5 by the said John Peter Rozwadowski in the presence of

P.O. Box 1505,

Lusaka.

Secretary/Typist,"

Both parties are agreed that the instrument is a debenture. Items (1) 10 (2) and (3) of Head 8 of the First Schedule to the Stamp Duty Ordinance relate to debentures and read as follows:

"8.(1) Mortgage, charge debenture or covenant being the only or principal mortgage for the payment of money - for every £100 or part of £100 of the amount 15 secured 0 5 0

(2) Mortgage, charge, debenture or covenant being a collateral or auxiliary, or additional or substituted security (other than an equitable mortgage) or by way of further assurance for the payment of money where the instrument or principal or 20 primary security is duly stamped - for every £100 or any part of the amount secured 0 1 0

(3) Equitable mortgage and debenture not chargeable under item (1) or (2) - for every £100 or part of £100 of the amount 25 secured 0 2 0

[1] The Stamp Duty Commissioners held that the instrument was liable to duty under Head 8 Item (1). On appeal to the High Court it was argued by the appellant that, although it was a debenture, the instrument was not a security for money, but was a mere receipt for 30 money chargeable to stamp duty of one ngwee only. On behalf of the Commissioners it was argued that, as the instrument was a debenture and the only security, the correct item was Head 8 Item (1). The learned acting Judge held that the instrument was a debenture, but was not a security for money. He also was of opinion that under the ejusdem generis 35 rule the word "debenture" in item (1) must be read to be of the same genus as mortgage, charge or covenant and that the item applied to debentures which were formal documents under seal. He held therefore that the instrument was not chargeable under this Head. He further held, however, that item (3) applied to debentures which were not securities 40 for money and that therefore the instrument was chargeable under this item.

Both parties obtained leave to appeal to this Court.

The arguments addressed to us were the same as in the Court below, save that Counsel for the appellant Commissioners drew the court's 45 attention to section 4 (4) of the Interpretation and General Provisions Ordinance which precludes the use of the ejusdem generis rule unless the word "similar" or some other word of like meaning is added.

DOYLE JA

The instrument is hardly a model of clarity. It is, however, in my opinion comparatively easy to elucidate it. It begins by acknowledging the receipt by the respondent company from the Southern Province African Farming Improvement Fund Board of the sum of One hundred thousand kwacha as a loan bearing interest at six per cent which interest is payable by instalments on certain specified dates. A proviso then provides that so long as the interest is paid on the due dates and so long as the principal sum shall be repaid by five equal yearly instalments of K20,000.00 commencing on 18th May, 1978, and so long as certain other specified conditions are satisfied, then the Southern Province African Farming Improvement Fund Board undertakes not to require payment of the interest or principal otherwise than in the manner specified and the appellant company undertakes not to pay off the principal or interest otherwise than in that manner. The instrument then goes on to specify how notices are to be given to the two parties. 15

[2] The instrument was signed only on behalf of the appellant company. It is clear from *Fleetwood - Hesketh v Commissioners of Inland Revenue* [1] that it is not necessary that an agreement should be signed by both parties to it. As Lord Hanworth M.R said at 358 and 359.

"Comment was made that this document is signed by the recipient of the money only and not by the purchaser. To my mind that presents no difficulty, and, indeed, is of slender, if any, importance. What is needed is to have the signature of the person to be charged with the result of the deal, and at any time it will be possible to make good the lack of the father's signature by his adding what is really an unnecessary signature. If it had appeared on the receipt, it could have meant nothing. Just as in the case of a lease the signature of the landlord may alone be required, so, here, it was unnecessary to have more than son's signature, which was the effective signature. Is the document, on that ground, any the less an agreement? It has been suggested that because there was an oral agreement antecedent to this document it might be put in the fire and the parties be no worse off. To my mind that will not do, because I think the parties as a part of their agreement intended that the agreement should be recorded; and by an agreement is meant the record of two minds which have become united for the purpose of the terms contained in the agreement."

Later on pages 366 and 367 Maugham, LJ remarked:

"To my mind it is clear, both on principle and on authority, that an agreement or a memorandum of agreement containing all the terms is certainly within s. 59 of the Act, even though one party only has signed it. It is the commonest thing for one party only to sign an agreement and to hand it over to the other party, being the person who is likely to want to enforce it."

[3] [4] I am satisfied that this instrument sets out the terms of the agreement arrived at by the parties to the loan. Its strange form is due to the fact that it is an agreement masquerading as a mere receipt.

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DOYLE JA

The masquerade is however transparent and did not deceive the Commissioners; nor do I think it should deceive this court. I have no doubt that it is an agreement which binds the appellant company to repay principal and interest. It is therefore a security for money. On the latter 5 point I therefore disagree with the learned acting Judge. I also disagree with the learned acting Judge on his interpretation that item (3) refers to debentures which are not securities. The reference in the item to the amount secured means, in my opinion, the amount secured by the equitable mortgage or debenture. 10

It is also clear that once the word "similar" or some other word of like meaning is not used in the item, it is not possible to pray in aid the ejusdem generis rule as such.

It is, however, obvious that if the word "debenture" is used in its ordinary full sense in items (1) and (2) of Head 8, it is difficult to see the 15 reason for the inclusion of debenture in item (3). Item (1) refers to debentures which are the only or principal or primary security and item (2) refers to all other debentures which are securities - at least where the instrument of principal or primary security is duly stamped.

Items (1), (2) and (3) of Head 8 in their existing form were introduced 20 by the Stamp Duty (Amendment) Act, 1965. Prior to that Act, item (1) referred to mortgages and charges (other than equitable mortgage) being the only or principal security, and item (2) referred to mortgages and charges (other than equitable mortgages) given by way of collateral, or auxiliary or additional charges. These items would include debentures 25 which were mortgages or charges. Item (3) referred, inter alia, to all other debentures which were securities but which were not chargeable as a mortgage or charge. These were three recognisable classes. When the amendment was made in 1965 it substantially followed the wording to be found in the English Stamp Act, 1891, in relation to a "Mortgage, 30 Bond, Debenture and Covenant". In the English Act, however, there is only a reference to two classes of debenture, namely, those now covered by the Zambian items (1) and (2). The English item (3) only refers to an equitable mortgage. It may be that the insertion in the Zambian item (3) is an error brought about by the draftsman per abundante cauleta again 35 providing for three classes of debenture in the replaced legislation. It may, perhaps though that seems unlikely, be that item (3) is intended to cover debentures where the principal or primary security is not duly stamped.

If neither of these be the correct explanation, then the only other 40 way in which to make sense of the inclusion of a third class of debenture security would be to cut down the ordinary meaning of the word "debenture" in items (1) and (2). To what extent can one do so? To restrict debentures in these items to those under seal would be to re-introduce the ejusdem generis rule by the back door. I do not consider that this is 45 justifiable There is, to my mind, no indication as to how one should alter the earlier items to make room for the use of debenture in item (3).

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DOYLE JA

The case has given me considerable difficulty, but I have come to the conclusion that I cannot go outside the ordinary meaning of the words in Head 8 item (1).

This debenture is a security and it is the only security for the money. In my opinion, it falls to be stamped under the provisions of Head 8 item 5 (1). I would allow the appeal of the Commissioners accordingly, and would dismiss the cross - appeal.

Judgment

Blagden CJ: This is an appeal by the Stamp Duty Commissioners (hereinafter called "the Commissioners") and a cross - appeal by the African Farming Equipment Company Limited (hereinafter called "the Company") against a judgment of Scott, Acting Judge, whereby he decided that a certain instrument presented on behalf of the Company to the Commissioners on 28th May, 1968, was liable to duty under the Stamp Duty Ordinance (Cap. 78 of the Laws), as being an instrument falling within the category of instruments set out in item (3) of Head 8 of 15 the First Schedule to the Ordinance, and chargeable to stamp duty accordingly under section 11.

The facts, which are not in dispute, have already been stated in the judgment just delivered on behalf of my brother Doyle. JA

[3] [4] It was contended on behalf of the Company, that the 20 instrument was sufficiently stamped by a 1n stamp as it constituted a mere acknowledgment of money and contained no contractual undertaking to repay. The Commissioners, however, took the view that the instrument was liable to duty as being an instrument falling under item (1) of Head 8 of the First Schedule to the Ordinance. They claim that it was a debenture, 25 and the only or principal or primary security for the sum of K100,000. If they are correct in their interpretation, the instrument would attract stamp duty at the rate of 50n for every K200, making a total of K250 - that is, no less than 25,000 times the figure contended for by the Company. 30

The First Schedule to the Stamp Duty Ordinance as amended by the Stamp Duty Ordinance (Amendment) Act, 1968, sets out the duties applicable to particular instruments which are liable to duty under section 11. It is divided into a number of heads of which Head 8 is entitled "Mortgages, Charges, Debentures, Covenants, and Bills of Sale". 35

It is conceded that the instrument here is a debenture. The first three items of Head 8 deal with debentures and recognise three types namely:

Under item (1): a " . . . debenture . . . being the only or principal or primary security . . . for the payment of money . . ." 40

Under item (2): a " . . . debenture being a collateral or auxiliary, or additional or substituted security . . . by way of further assurance for the payment of money when the instrument of principal or primary security is duly stamped . . ." 45

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BLAGDEN CJ

Under item (3): a " . . . debenture not chargeable under item (1) or item (2)".

The questions for determination are, first, does the instrument here fall for Stamp Duty under one or other of the first three items of Head 8 5 or not; secondly, if it does so fall, then under which item?

I have no hesitation in holding that the instrument does fall under one of these three items. I can see no substance whatever in the argument put forward by Mr Martin on behalf of the Company that this instrument is a mere acknowledgment of the receipt of money. It is true that it does 10 acknowledge the receipt of a loan of K100,000 from the Southern Province African Improvement Fund Board (hereinafter called "the Board"). But it also goes on to provide for the payment of interest on that loan by instalments and for the repayment of the capital, likewise by instalments in considerable detail. It is, admittedly, only signed by one party 15 but that is the party to be charged, namely the Company; and I entertain no doubt that if the Company failed to comply with its terms and conditions it could be successfully sued by the Board upon it.

Under which of the three heads does the instrument fall? I eliminate item (2) because there is nothing on the record to show, nor was it seriously 20 advanced, that this instrument was "a collateral or auxiliary, or additional or substituted security . . . or by way of further assurance for the payment of money". Mr Martin did interpose at one stage of Mr Ryan's argument for the Commissioners, to say that he conceded that the instrument was a debenture, but not that it was the only or principal or primary 25 security. But he did not elaborate on this theme. No other instrument was referred to, and although there may have been, and indeed probably was, some form of earlier oral agreement in regard to this loan, this circumstance would not prevent the instrument which followed from being "the only or principal or primary security" for the payment of the money 30 See *Fleetwood and Hesketh v The Commissioners of Inland Revenue*, 1936, 1 KB 351, per Lord Hanworth, M.R at 358 and 359.

Eliminating item (2) leaves items (1) and (3). Under which does this instrument fall? The meaning of item (1) is plain beyond peradventure. But item (3) constitutes a mystery. What kind of debenture can 35 there be that is a security, but is not a principal or primary security, nor yet a collateral or auxiliary or additional or substituted security, nor by way of further assurance for the payment of money? I am afraid I cannot think of such an oddity, and I suspect that that is because none exists. At any rate, I cannot see, as the learned judge apparently did, that this 40 instrument falls within this mysterious class. In my view it falls fairly and squarely under item (1) and should be chargeable for stamp duty accordingly.

I would allow this appeal, and dismiss the cross - appeal.

Judgment

Evans J: I agree with the judgment of my brother Doyle and 45 would allow this appeal and dismiss the cross - appeal. I, too, have experienced considerable difficulty in this case.

Appeal allowed and cross - appeal dismissed

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