

1978 December 30

[A. LOIZOU, J.]

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

BMS VIOMICHANIAE METALLICON SOLINON LTD.,

Applicants,

v.

THE REPUBLIC OF CYPRUS, THROUGH
THE COMMISSIONER OF STAMP DUTIES AND ANOTHER,

Respondents.

(Case No. 314/77).

Stamp duty—Agreement or memorandum of agreement—Principal instrument—Section 5 of the Stamp Duty Law, 1963 (Law 19/63)—Floating debenture and mortgages—As securities for financial facilities given by Bank—Memorandum of agreement giving details of debenture and mortgages—Right of contracting parties to determine the principal instrument—Section 5(2) of the above Law—Mortgages separate transactions by themselves—They are principal instruments and are chargeable under section 12(e) of the First Schedule to the aforesaid Law. 5

The applicant company applied to Barclays Bank International Ltd., for certain financial facilities and in order to secure to the bank these facilities it offered to execute a floating debenture and to procure the registration of three mortgages. A memorandum of agreement* was then prepared giving details of the financial facilities and of the said debenture and mortgages. 10 15

When respondent 1 was asked to determine the stamp duty chargeable on the said memorandum of agreement and the instruments referred to therein he decided that the debenture was the principal instrument and was chargeable under section 12(c) of the First Schedule to the Stamp Duty Law, 1963 and not ad valorem and the memorandum of agreement was the 20

* See the relevant text of this memorandum at pp. 398-401 *post*.

secondary one and was chargeable under section 5. He further decided that the three mortgages were considered as principal instruments and were, also, chargeable under the said section 12(e).

5 Counsel for the applicant company wrote to the respondent Commissioner disputing the above decision. The Commissioner in reply informed him that he did not dispute the decision of the contracting parties as to the determination of the principal instrument; that section 5(2)* of the Stamp Duty Law, 1963
10 provides that the duty chargeable on the instrument so determined shall be the highest duty which would be chargeable in respect of any of the said instruments employed; and that, although the memorandum of agreement was the principal instrument, the highest duty was collectible, which in this particular case was that attracted by the floating debenture. The
15 Commissioner further stated that he considered the mortgages as independent documents and were chargeable as principal ones.

Hence the present recourse.

20 Counsel for the applicant company contended that the memorandum of agreement was the principal instrument for the purpose of the Stamp Duty Law, 1963 (Law 19/63) and all other instruments referred to therein or annexed thereto by virtue of paragraph 3 thereof were chargeable only with 200
25 mils each as secondary documents in accordance with section 5* of the said Law, because all the documents referred to one single transaction and were necessary to complete same.

Held, dismissing the recourse, that this Court is in agreement with the approach of the respondent Commissioner; that the
30 three mortgages are indeed principal instruments and are chargeable under section 12(e) of the First Schedule to the Law; that they are transactions separate by themselves as each one of them upon completion creates different legal consequences and by different persons than that of the applicant company;
35 that they cannot be said as amounting to several instruments employed for completing one legal transaction; and that, accordingly, the recourse will fail.

Application dismissed.

* Quoted at p. 403 *post*.

Recourse.

Recourse for a declaration that the stamp duty chargeable on a memorandum of agreement and the instruments referred to therein should be calculated on the ad valorem basis on a capital of C£ 400,000.- or alternatively on C£ 450,000, and that each of the other instruments annexed thereto should be chargeable with £0.200 mils each. 5

M. Houry, for the applicants.

A. Evangelou, Counsel of the Republic, for the respondent.

Cur. adv. vult. 10

A. LOIZOU J. read the following judgment. The applicant company by the present recourse claims:-

“(a) A declaration that the stamp duty chargeable on the Memorandum of Agreement between the applicants and Barclays Bank International Ltd., (herein referred to as ‘the Bank’), Paphos Branch, dated 7th November, 1977, (*exhibit 1*) and on the instruments referred to therein should be calculated on the ad valorem basis on a capital sum of C£400,000.- or alternatively on C£450,000.- and that each of the other instruments annexed thereto or referred to therein shall be chargeable with a stamp duty specified for it in the First Schedule to the Stamp Law, *i.e.* 200 mils. 15
20

(b) That the decision of the Commissioner of Stamp Duties stated in his letter to M. M. Houry & Co., Advocates, dated 21.10.1977 (*exhibit B*) is null and void and is made in excess and in abuse of his powers and contrary to the provisions of the Stamp Law 1963 s. 5 (1) and (2)”. 25

The facts of this case appear sufficiently in *exhibit 1* which to the extent that is relevant reads:- 30

“ 1. WHEREAS (1) the Company entered into an agreement with the Bank dated 27th October, 1976, (herein referred to as ‘the said agreement’) in virtue of which the Company obtained from the Bank the financial facilities as therein mentioned and secured the repayment thereof in manner set out in the said agreement and in the floating debenture annexed thereto (herein referred to as ‘the 35

first debenture') and in the mortgage and guarantees referred to in the second recital to the said agreement,

(2) the Company has applied to the Bank that the Bank grant to the Company the following additional financial facilities, that is to say:-

(a) An increase of the fluctuating overdraft referred to in paragraph (a) of the first recital of the said agreement by £110,000 (One hundred and ten thousand pounds) bearing interest at 9% per annum, and,

(b) An increase of the overdraft referred to in paragraph (b) of the first recital of the said agreement by £130,000 (One hundred and thirty thousand pounds) bearing interest at 9% per annum and repayable by six equal half-yearly instalments with all accrued interest from the 31.12.1978, and default in the payment of any one of which will render all unpaid instalments immediately payable with all interest thereon,

(c) By the grant by the Bank to the Company of £160,000 (One hundred and sixty thousand pounds) of documentary credit bearing interest at 9% per annum as herein-after stated.

The term 'documentary credit' as herein employed shall signify credit which the Bank will be requested by the Company to open to the shippers of goods to the Company and the value of which the Bank shall pay upon receipt of the shipping documents in Cyprus, whereupon the Bank shall bring the amount so paid to the debit of the Company's overdraft suspense account and the Company shall thereafter pay to the Bank interest on the amount so debited at the rate of 9% per annum.

Unless and until otherwise agreed, the documentary credit shall be repayable on demand or otherwise on release by the Bank of the goods to the Company as the Bank shall think fit.

(3) And in order to secure to the Bank these additional facilities, the Company offered to the Bank:-

- (a) to execute a second floating debenture (herein referred to as 'the second debenture') in the terms of the annexed draft, charging all its property, movable and immovable whatsoever and wheresoever present and future and its uncalled capital and goodwill, for a capital sum of £400,000 (Four hundred thousand pounds) and a second priority mortgage charging its land factory and machinery installation at Ayia Varvara Paphos denoted by Certificate of Registration No. 4047 dated 2.9.76, for a capital sum of £450,000 (Four hundred and fifty thousand pounds) on the Bank's printed form of mortgage bonds (166 GBF) and on the terms and conditions therein contained. 5
- (b) to procure the registration by the Bishopric of Paphos of a first priority mortgage in the capital sum of £130,000 (One hundred and thirty thousand pounds) on the Bank's printed form (155 GBF/a) charging its property consisting of 339 donums 3 evleks and 2400 sq. ft. of land at Alima Peyia, Paphos. 15
- (c) to procure the registration by the Ayios Neophytos Monastery of a first priority mortgage for a capital sum of £130,000 (One hundred and thirty thousand pounds) charging its field consisting of 61 donums 1 evlek and 1600 sq. ft. with all vines and citrus grown thereon at Sotira Achelia, Paphos district and 433 donums and 3 evleks of fields at Teratsin Ayia Varvara, Paphos district. 20
- (d) to procure the joint and several guarantee for a capital sum of £400,000 (Four hundred thousand pounds) by the Bishopric of Paphos and Ayios Neophytos Monastery on the Bank's printed form (CG/a). 30
- (e) the Company acknowledges that the Bank shall have a first and paramount lien over all shipping documents passed to the Bank under the documentary credit above referred to. 35
- (f) before the facilities hereinbefore recited become available to the Company, the Company undertakes to satisfy the Bank that it has increased its paid up capital to £355,000 (Three hundred and thirty-five thousand

pounds) by the injecting of fresh funds not controlled by the Company.

2. The Bank has accepted the proposal contained in the above recitals (1) (2) and (3).

5 NOW IT IS HEREBY AGREED AND DECLARED
that the Bank shall stand possessed of the second Debenture
as security for all moneys which now are or hereafter may
become due to the Bank for all liabilities which may be
incurred by the Company to the Bank in the manner
10 described in the first and second debenture.

3. The Company hereby declares that save as aforesaid
there is no mortgage or charge on its property or assets
having priority to or ranking *pari passu* with the first and
second Debenture and that the Company will not at any
15 time during the continuance of this security without the
previous knowledge and written consent of the Bank
create any mortgage or charge ranking, or which can by
any means be made to rank, in priority to or *pari passu*
with the first and second Debenture or with the mortgages
20 above mentioned."

Early in October 1977, the applicant Company asked originally
the principal assessor in charge of the Income Tax Office, Paphos
and later by letter dated the 10th October, 1977, respondent
No. 1—The Commissioner of Stamp Duties—to determine the
25 stamp duty chargeable on the aforesaid agreement and the
instruments referred to therein. The respondent Commissioner
replied thereto by letter dated the 21st October, 1977 (*exhibit 3*)
informing them as follows:—

30 “(a) I agree with you that the Debenture is the principal
instrument and is chargeable under section 12(e) of
the First Schedule to the Stamp Duty Law and not ad
valorem and the Memorandum of Agreement is the
secondary one and is chargeable under section 5.

35 (b) The three mortgages are considered as principal
instruments as well and are chargeable under section
12(3) of the Law.”

Before proceeding any further, a correction conceded by

counsel for the Republic should be made to the effect that instead of C£260.- on the mortgage of the Paphos Bishopric and that of Ayios Neophytos Monastery the stamp duty should be C£170.- on each one of them.

Applicants' counsel replied by letter dated the 25th October, 1977, disputing the decision of respondent No. 1 and stated that if the latter insisted on it they would pay the stamp duty demanded under protest. Respondent 1 answered by letter dated the 31st October, 1977 (*exhibit 5*) which reads as follows:—

“ In reply to your letter of the 25th instant, I have to inform you that I do not dispute the decision of the contracting parties as to the determination of the principal instrument. However, section 5(2) of the Stamp Duty Law provides that the duty chargeable on the instrument so determined shall be the highest duty which would be chargeable in respect of any of the said instruments employed. Therefore, although the memorandum of agreement is the principal instrument the highest duty is collectible, which in this particular case is that attracted by the floating debenture.

As far as the mortgages are concerned, I consider them as independent documents and are chargeable as principal ones.”

It is the case for the applicant company that the Memorandum of Agreement (*exhibit 1*), is the principal instrument for the purpose of the Stamp Duty Law, 1963 (Law No. 19/63), and all other instruments referred to therein or annexed thereto by virtue of paragraph 3 of this *exhibit* are chargeable only with 200 mils each as secondary documents in accordance with section 5 of the said Law, as all the documents refer to one single transaction and are necessary to complete same. It may be mentioned here that there are amendments to this Law but they have no bearing on the matter except for the calculation of the duty. The issue before me is one of construction of section 5 thereof. It reads:—

“5. (1) ‘Όσάκις, έν τή περιπτώσει οίασδήποτε συμβάσεως ή μημημονίου συμβάσεως χρησιμοποιώνται πλείονα του ένός έγγραφα διά την περάτωσιν τής δικαιοπραξίας (είτε ταῦτα συντάττονται συγχρόνως, είτε κατά διάφορον χρόνον) μόνον

5 τὸ κύριον ἔγγραφον θὰ ὑπόκειται εἰς τὸ ἐν τῷ Πρώτῳ Παραρτήματι καθοριζόμενον τέλος χαρτοσήμου διὰ τὴν εἰρημένην σύμβασιν ἢ μνημόνιον συμβάσεως, ἕκαστον δὲ τῶν λοιπῶν ἔγγραφων θὰ ὑπόκειται εἰς τέλος χαρτοσήμου διακοσίων μίλις ἀπὸ τοῦ ἐν τῷ εἰρημένῳ Παραρτήματι τυχὸν καθοριζομένου τέλους.

10 (2) Τὰ συμβαλλόμενα μέρη δύνανται νὰ καθορίσωσιν ἀφ' ἑαυτῶν ποῖον τῶν οὕτω χρησιμοποιουμένων ἔγγραφων θὰ θεωρηθῆται, διὰ τοὺς σκοποὺς τοῦ ἑδαφίου (1) ὡς τὸ κύριον ἔγγραφον:

Νοεῖται ὅτι τὸ ἐπὶ τοῦ οὕτω καθορισθέντος ἔγγραφου ἐπιβλητέον τέλος θὰ εἶναι τὸ μέγιστον τέλος εἰς ὃ θὰ ὑπέκειτο οἰουδήποτε τῶν ὡς εἴρηται χρησιμοποιηθέντων ἔγγραφων."

Its unofficial English translation is as follows:—

15 "5. (1) Where in the case of any agreement or memorandum of agreement, several instruments are employed for completing the transaction (whether executed at the same time or at different times) the principal instrument only shall be chargeable with the duty specified in the First Schedule for the agreement or memorandum of agreement aforesaid, and each of the other instruments shall be chargeable with a duty of two hundred mils instead of the duty (if any) specified for it in the Schedule.

25 (2) The parties may determine for themselves which of the instruments so employed shall, for the purpose of subsection (1), be deemed to be the principal instrument:

30 Provided that the duty chargeable on the instrument so determined shall be the highest duty which would be chargeable in respect of any of the said instruments employed."

35 I agree with the approach of the respondent Commissioner. The three mortgages are indeed principal instruments and are chargeable under section 12(e) of the First Schedule to the Law. They are "δικαιοπραξίαι" (transactions) separate by themselves as each one of them upon completion creates different legal consequences and by different persons than that of the applicant company. They cannot be said as amounting to several

instruments employed for completing one legal transaction. Subject therefore to the amendment conceded by counsel for the respondents, the present recourse fails but in the circumstances I make no order as to costs.

Application dismissed. 5
No order as to costs.