JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL No. 35/80

BEFORE: The Hon. President (Ag.)
The Hon. Mr. Justice Carey, J.A.
The Hon. Mr. Justice Wright, J.A. (Ag.)

BETWEEN	-	THE STAMP COMMISSIONER OF JAMAICA	APPELLANT
AND	-	ARPAD RONAI	RESPONDENT

Mr. R.N.A. Henriques, Q.C., for respondent

Mr. H. Hamilton and Mr. Philpotts-Brown for appellant

June 23, 23; May 4, 5
and July 30, 1982

KERR, P. (Ag.):

This is an appeal from a judgment of Marsh, J. delivered on the 29th March, 1980, setting aside a confirmed assessment of transfer tax in the sum of One Thousand One Hundred and Twenty-five Dollars made by the appellant Commissioner against the respondent.

The facts are not in dispute. The respondent was at the material time the registered proprietor of an estate in fee simple known as No. 7 Winchester Road, St. Andrew. On July 8, 1969, he granted an option to purchase the said property to Jamaica Broilers Limited. The consideration for the option was $5,000. The grantees exercised the option on June 15, 1970, and pursuant thereto the property was transferred to the grantees on July 31, 1970, the purchase price being $50,000. The appellant first assessed the transfer tax payable thereon under the Transfer Tax Act (hereinafter referred to as the Act) at $1,250. However, this amount was subsequently reduced on the basis that the $5,000 paid for the option was not taxable as the option was granted before the Act came into effect.

The assessment was confirmed by the Commissioner despite formal objections by the respondent. The Commissioner duly issued his formal notice of decision dated 15th April, 1976. On appeal to Marsh, J. the assessment was set aside with costs to the respondent.

Marsh, J. in his oral judgment after a review of the arguments and the documents tendered held, inter alia, that the case of William Cory and Sons Ltd. v. Inland Revenue Commissioners (1964) 3 All E.R. p. 66, was distinguishable in that that case merely decided on the particular facts that an option was not a contract for sale. He concluded:

> "I have come to the conclusion that the transaction in this case was effected pursuant to a contract made before the 2nd April, 1970 and therefore falls outside the charge to tax having been caught by the provisions of section 46 (4) (a)."

Before us Mr. Hamilton's arguments were along the same lines urged before Marsh, J. He submitted that section 3 of the Transfer Tax Act, 1971, brings into charge all transfer of property made after 1st April, 1970. The option having been granted in 1969 did not fall within the provisions of the Act and was clearly not taxable. However, he maintained that the exercise of the option and the subsequent transfer of the property over which the option was exercised was within the taxable period and was liable to tax since it fell outside the exemptive provisions of section 46 (4)(a) of the Act. Further that under section 11 (1) of the Act the grant of option is by itself a taxable occasion and that section 11 (2) which provides that the grant of the option and the transaction in fulfilment shall be treated as one transaction was concerned with computation of taxes. A clear distinction should be drawn between the option and the contract of transfer of the property over which the option was exercised (sec. 10 (1) of the Act). He cited in support William Cory v. Inland Revenue Commissioners (supra).

Mr. Henriques contended that for the proper interpretation of the relevant provisions regard must be had to the scheme of the Act. When an option is granted there are three steps leading to a complete transfer:

(i) The grant of the option.

(ii) The exercise of the option by the grantee and

(iii) The contract of transfer flowing from the exercise of the option.

The aim of the Act he astutely argued is to impose tax at source so that on the grant of an option transfer tax is payable not only on the value of the option as may be evidenced by the consideration therefor but also upon the value of the property over which it is exercisable. Accordingly, section 11(3) of the Act should be interpreted to the effect that when the option pre-exist the taxable period the subsequent completion of the transfer if effected before the cut-off period in section 46(4)(b) no transfer tax would be payable upon the entire transaction because in the words of section 11(2) they should be treated as one transaction.

Further Cory's case is concerned with interpretation of an English statute which is different in terms to the Transfer Act and is therefore unhelpful to the appellant's cause.

In putting forward these competing contentions the attorneys on both sides were enthusiastic and optimistic but quite properly not dogmatic. The decision must rest upon the interpretation of a statute and neither interpretation as urged could be called far-fetched.

Now in interpreting this Act regard must be had first to the fact that this is a Revenue Act and therefore the normal approach of the court in leaning towards an interpretation favourable to the citizen as is desirable in penal statutes is inapplicable and secondly to the retroactive effect of the Act.

The general retroactivity is to be found in section 3(1) which reads:

> "Subject to and in conformity with the provisions of this Act (which, except as hereinafter specifically provided to the contrary, shall apply in relation to transfers after the 1st April,1970, and prior to the commence- of this Act, as they apply in relation to transfers thereafter), tax shall be charged at the rate of two and one half per centum of the amount or value of

> "such money or money's worth as is, or as may be treated under this Act as being, the consideration for each transfer after the 1st April, 1970, of any property; and tax charged in respect of any such transfer shall be borne by the transferor. "

The categories of property subject to tax are described in section 3(4):

> "(a) land;
>
> (b) a lease of land;
>
> (c) .....
>
> (d) (i) .....
>
> (ii) beneficial interests derived by way of settlement from property in any such class, whether through one or more settlements, and, without prejudice to the generality of any provisions of this Act, reference in any preceding paragraph of this subsection to any class of property includes reference to any class of right or interest created by way of the part disposal of property in any class referred to in that paragraph, and to any class of option as respects any such property transferable upon the exercise thereof. "

Section 11 of the Act deals specifically with options. "Option" is not defined in the Act. Accordingly before essaying to interpret the provisions of section 11, it is seemly prudent to consider the nature of an option.

> "My Lords, 'option' in its widest interpretation means simply choice or freedom of choice. An obligation in a contract can frequently be performed in a large number of ways and the party under obligation can choose any one of the ways that he likes. .... But when a contract itself limits and enumerates the obligations, as when it obliges the shipper to ship wheat or barley or flour, it is quite sensible and natural to talk of his having an option to ship any one of these three commodities. There is, however, a narrower sense in which the word can be used and that is to confer a right of choice specially granted to the holder of the option and to be used solely for his own benefit. It is in this sense, I think, that the word is generally used in the business world. Reardon Smith Line v. Ministry of Agriculture, Fisheries and Food, (1963) 1 All E.R. p. 559 per Lord Devlin. "

> "Canada. - "An option is defined in Paterson v. Houghton (1909), 19 Man. R. 168, 12 W.L.R. 330, as follows: 'An option is defined to be a right acquired by contract to accept or reject a present offer within a limited, or, it may be a reasonable, time in the future'. Yanik v. Conibear & Northern Transportation Co., Ltd. (No. 2), (1945), 1 W.W.R. 33 per Ewing, J.A. at p. 42;"

quoted from Words and Phrases Judicially Defined 2nd Edition Vol. 4 p. 38.

Now section 11 provides:

> "(1) Without prejudice to any provisions of this Part, the grant of any option mentioned in subsection (4) of section 3 is the transfer of property (namely the option) and, in particular, shall be treated as such -
>
> (a) in the case where the grantor binds himself to sell what he does not own and, because the option is abandoned, never has occasion to own;
>
> (b) in the case where the grantor binds himself to purchase what, because the option is abandoned, he does not acquire but subject to the following provisions of this section as to treating the grant of an option as part of a larger transaction.
>
> (2) If an option is exercised the grant of the option and the transaction entered into in fulfilment of the grantor's obligations under the option shall, in accordance with regulations made under section 44, be treated for the purpose of charging tax as a single transaction. "

It is clear that the Act is making the grant of an option by itself a transfer of property as distinct from the property over which the option is exercisable. Such other property by itself would fall under one of the other categories defined in section 3(4). I am fortified in so holding by the lay-out of subsection 3(4). In that regard I note with interest that beside property in section 11(1) there is in parenthesis thus:- "(namely the option)". In so doing "option" and "property" are placed directly in apposition and therefore the manifest intent of the legislature was that the option itself should be regarded as property and a grant the transfer of property. In my view the Act did not intend to change nor has it changed the basic nature of an option. In that regard, I find comfort in the following eloquent exposition of Lord Diplock in William Cory & Sons Ltd. v. Inland Revenue Commissioners (1964),

3 All E.R. p. 75:

> "A contract for the sale of property is of a different juristic character from an option to buy property. The former is a bilateral or synallagmatic contract. It comprises mutual promises whereby each party assumes an obligation towards the other party: the vendor to transfer to the purchaser the property the subject-matter of the sale, the purchaser to accept the transfer from and to pay the price to the vendor. The obligations assumed by each party may be subject to conditions, but not to a condition inconsistent with the existence of a promise such as a condition that the obligation assumed by a party need only be performed if he chooses to perform it. An option to buy property, on the other hand, once validly created either by deed or the giving of consideration by the grantee, is a unilateral or "if" contract, to which the grantee is only a protatic party. The grantor by his agreement to the option assumes a conditional obligation which he promises to perform, to transfer to the grantee the property the subject-matter of the option, the conditions to which his obligation is subject being (i) the grantee's demand for its performance and (ii) payment by the grantee of the agreed price. The grantee by his agreement to the option acquires the right to demand performance of his obligation by the grantor, but he does not thereby assume any obligation to the grantor which he promises to perform. The obligation on his part arises only when he exercises the option by demanding performance by the grantor of his obligation. It is the subsequent demand by the grantee which converts the option for the first time into a bilateral or synallagmatic contract; i.e., a contract for the sale of the property the subject-matter of the option. "

The distinctions drawn here between option and a contract for sale of property are clearly of general applicability. It is because of the very nature of an option that the statute had to declare that a grant of an option per se was a transfer of property.

In my view the other subsections of section 11 seem wisely consistent. By section 11(2) two transactions, the option and the conveyance or transfer are to be considered as one for the purpose of charging tax and for no other purpose. Mr. Henriques' attention was directed to the words in the subsection relating to the regulations. He summarily dismissed their presence by the elementary observation that regulations cannot be used to interpret a substantive act. This casual treatment, however, does not in my view explain its presence. I accept that the proper regard for regulations vis-a-vis their parent statute is as concisely stated:-

> "If the Act is plain, the rule must be interpreted so as to be reconciled with it, or if it cannot be reconciled, the rule must give way to the Act."

Ex p. Davies (1872) L.R. 7 Ch. 526 at p. 529.

However, the inclusion of a reference to regulations in the manner exemplified by subsection 11(2) is clearly purposeful. It is an example of legislation by incorporation. In Britt v. Buckinghamshire County Council (1964), 1 Q.B. at p. 77 - The Court had to consider the Town and Country Planning Act section 83:-

> "In relation to any notice served under this section, the provisions of subsections (3) to (5) of section 23 of this Act, and of section 24 of this Act shall, subject to such exceptions and modifications as may be prescribed by regulations under this Act, apply as those provisions apply in relation to an enforcement notice served under the said section 23. "

In giving the judgment Harman, L.J. said at p. 88:-

> "It is like an amending section of the Act. So that in my judgment that regulation can be referred to because it is embodied in the Act itself and, having a quasi-parliamentary validity, is a good indication of the wishes of the legislature, just as much as if it were enacted in the Act itself."

The advantage of this form of legislation in section 11(2) is that it facilitates changes in the method of computation. This may be effected by regulation without having to proceed by the comparatively protracted formalities of an amending act.

The regulations are therefore relevant not in resolving ambiguities in the Act but of illustrating how the policy of the section as interpreted above is implemented by the regulations.

Regulation 18(1):-

> "In the case of the exercise of an option at which property is transferred by any person, then, for the purposes of charging that person to tax, the grant of the option and the transaction entered into by the grantor in fulfilment of his obligations under the option shall be treated as a single transaction and accordingly -

"(a) if the option binds the grantor to sell, the consideration for granting the option is part of the consideration for the sale;

(b) if the option binds the grantor to purchase, the consideration for acquisition of the option shall be deducted from the consideration for the transfer pursuant to the exercise of the rights under the option:

Provided that where the transferor acquired the option (binding the grantor to purchase) otherwise than directly from the grantor, the deductible consideration for acquisition of the option shall be the consideration for its acquisition by the transferor.

(2) This paragraph shall apply in relation to an option binding the grantor both to sell and to purchase as if it were two separate options with half the consideration attributed to each.

(3) Every reference in the foregoing provisions of his regulation to selling property or purchasing it shall be construed to include a reference to any transfer of property or acquisition thereof by way of its transfer, respectively. "

In my opinion subsection 11(2) has in contemplation the grant of an option which is itself a taxable occasion and the follow-up transaction transferring the property over which it is exercisable as another taxable occasion but for the purposes of computation they should be considered as one. Accordingly, an option outside the taxable period does not become taxable because the contract of transfer pursuant to its exercise occurred in the taxable period; in like manner a contract of transfer occurring within the taxable period does not loose its liability to tax merely because the option to which it relates was granted outside the taxable period. To hold to the contrary would seem as illogical as saying 0 + 5 = 0. I am strengthened in so interpreting by a consideration of section 46 which I shall critically examine in due course.

Before doing so, however, sections 11(3), (4) and (5) ought to be considered:

"(3) The exercise or abandonment of an option by the person for the time being entitled to exercise it is not a disposal of property. "

> "(4) The foregoing provisions of this section shall apply in relation to a forfeited deposit of purchase money or other consideration money for a prospective purchase which is abandoned as they apply in relation to the consideration for an option which binds the grantor to sell and which is not exercised.
>
> (5) Every reference in the foregoing provisions of this section to selling property or purchasing it shall be construed to include a reference to any transfer of property or acquisition thereof by way of its transfer, respectively. "

The purpose of these subsections is intelligible on the basis of the interpretation that the option itself when granted is the "transfer of property" of which section 11(1) speaks.

When an option is granted the grantor is enriched to the amount paid upon the grant. When the option is abandoned the money paid in consideration is still the grantor's but the limitation on his right to dispose of the property is removed and technically there is a reversion. It is to put the matter beyond debate that the section enacts that such should not be treated as a disposal of property attracting a transfer tax. Similarly the mere exercise of the option without the payment of money and transfer of property should not be considered a taxable occasion. It would seem otherwise if the grantee's rights were surrendered for valuable consideration.

Implicit in subsection 11(4) is the recognition that the option itself is taxable on its intrinsic value.

Mr. Henriques described the provisions of section 46 as transitional. I am inclined to the view that in so doing he was not a little influenced by the marginal note to that effect. The marginal note is of extremely limited use in the interpretation of an act and in relation to section 46(4) which is clear and unambiguous it is unhelpful.

Section 46(4):

"No amount of tax shall be charged in respect of -

(a) a conveyance or transfer shown to the satisfaction of the Commissioner to have been effected in pursuance of any contract made before the 2nd April, 1970;

(b) a transfer before the 18th November, 1970, of any settled property as provided by sub-section (4) of section 6, or of any lease or option. "

Section 46(4)(a) concisely states that a conveyance or transfer in pursuance of a contract for sale effected before 2nd April, 1970, is exempt from tax. It is immaterial whether or not the contract of sale was made pursuant to the exercise of an option. In the instant case, the contract of sale and the transfer having been effected after 2nd April, 1970 section 46(4)(a) is inapplicable.

Mr. Henriques at the outset quite frankly and correctly stated he was not relying on this subsection. In this his opinion was contrary to that of Marsh, J. who was clearly in error.

However, as regards 46(4)(b) as set out in his respondent's notice and before this court, he did not accept as correct the learned trial judge's opinion that "option" here was to be given the same meaning as in section 11 and meant an option granted after 1st April, 1970. He contended that option here means an option created before 1st April, 1970 but the legislature prescribed the 17th November, 1970 so as to preclude options remaining outstanding indefinitely. It gave the grantee an opportunity to complete the transactions before the cut-off date.

Without detracting from his pleasing presentation, I am constrained to say that there are glaring areas of weakness in the structure of his argument. In relation to transfers of property in Settled Land and Leases with which the subsection also deals, the date, 1st April, 1970 is irrelevant and incompatible. The section

declares quite clearly that such transfers if effected before November 1970 are exempt from tax. It is inconsistent therefore to relate the date, 1st April, 1970, only to options. Such options as pre-exist 1st April, 1970 in any event, would be outside the taxable period. Equally it is unnecessary to interpret the date, 18th November, 1970, as the cut-off date for the exercise of options and completion of the transfers when by section 11 the exercise of an option is not a disposal of property and section 46(4)(b) makes no mention of contracts of sale which are dealt with in section 46(4)(a). Further his explanation that the subsection provided a sort of transi transitional period to permit the grantee of an option to complete the transfer before 18th November, 1980 ignores the realities.

The Act was given assent on 10th April, 1971 and came into effect by the Minister's proclamation on the 4th August, 1971, many months after the 18th November, 1970. Accordingly November 18,1970 in paragraph 46(4)(b) is an arbitrary date. When the Act came into effect an option either fell within section 46(4)(b) or outside it and so be it. Sections 46(4)(a) and (b) are therefore exceptions to the general retroactivity anticipated in section 3:-

> "Subject to and in conformity with the provisions of this Act (which, except as hereinafter specifically provided to the contrary, shall apply in relation to transfers after the 1st April, 1970, and prior to the commencement of this Act, as they apply in relation to transfers thereafter)...."

As regards section 46(4)(a) the Act granted an exemption in respect of conveyances or transfers effected in pursuance of a contract made before 2nd April, 1970. It is no more than a generous gesture of the legislature in reasonable recognition of a business deal that had virtually closed at the time the Act came into operation.

In giving such interpretations as are set out above I have not overlooked the submissions of respondent's attorney as to the legislative intent to impose a transfer tax payable at the time the option was granted not only on the amount of the consideration

for the option but on the property over which it was exercisable irrespective of whether there was a contract for sale or of how small the intrinsic value of the option or how large the value of the property to which it related. It is that I find the idea so impractical that am moved to say that any implication of such a legislative intent seems unwarranted by the language of the statute. In any event this would not affect the proposition that in general and within the ambit of the Act the grant of an option is a taxable occasion and the contract of sale and/or conveyance pursuant to its exercise is a separate taxable occasion.

Accordingly, I hold that in the instant case the option having been granted prior to November 18, 1970 it is exempt from tax by the provisions of section 46(4)(b) of the Act but that the contract of sale having been effected after April 2, 1970, is subject to transfer tax.

For these reasons I would allow the appeal and set aside the order of the court below with the result that the decision of the Stamp Commissioner and his assessment of $1,125.00 would be revived and affirmed.

CAREY J.A.

This is a short but difficult point of construction under the Transfer Tax Act No. 17 of 1971, section 46 (4) which provides as follows:

> "No amount of tax shall be charged in respect of -
>
> (a) a conveyance or transfer shown to the satisfaction of the Commissioner to have been effected in pursuance of any contract made before the 2nd April, 1970;
>
> (b) a transfer before the 18th November, 1970 of any settled property as provided by subsection (4) of section 6, or of any lease or option.

The matter arises in this way - on the 8th July, 1969 the respondent in this appeal granted an option to purchase premises 7 Winchester Road to Jamaica Broilers Ltd, the consideration therefor being $50,000.00. The option was exercised on 15th June, 1970 and the property was transferred pursuant to the exercise of the option on 31st July, 1970. When the respondent submitted the instrument of transfer to the appellant reflecting the consideration for the transfer as being $50,000.00, transfer tax was assessed at $1,250.00 whereupon the respondent objected to payment of the tax as assessed, and appealed to the Revenue Court on the ground that no tax was payable by virtue of section 46 (4) (b) of the Act. Marsh J. by an order of the court dated 27th March, 1980 allowed the appeal, thus remitting the tax assessed. There is now an appeal from that adjudication by the learned judge of the Revenue Court.

Mr. Hamilton was commendably brief. He submitted that section 3 of the Act brings into charge all transfers of property made after 1st April, 1970 and that section 3 (4) specifies the classes of property which are exigible for tax, and included in that class, are options. The option in the present case, having been granted in 1969 clearly did not fall within the charge for tax. When the option was exercised on 15th June 1970, a contract of transfer, which comes within the provisions of the section, was created. Section 46 (4) does not exempt such a transfer from tax under the Act.

Mr. Henriques contended that it was necessary, in considering the question which fell to be determined to have in mind (a) the mechanics of conveyancing and (b) the scheme of taxation under the Transfer Tax Act and how it relates to the mechanics of conveyancing. In the case of options, the grant of the option, he regarded as stage 1; where the option is exercised and a contract entered into, which concludes the transaction, he regarded as stage 2. In normal conveyancing practise, transfer occurs last and it is upon that occasion that strictly speaking transfer tax should become payable. However, it was plain that the language and scheme of the Act demonstrated that tax was collected at stage 1 i.e. when the option was granted. So that the grant of an option or the making of a contract of transfer alike attract transfer tax, for the Act deems transfer to have taken place at that moment of time. Where an option is exercised and a contract entered into pursuant to the exercise, then these events are treated for purposes of tax as one transaction. The legislation in the light of the retrospectivity of the Act appreciated that some transactions would be incomplete when the Act came into force and accordingly provided a transitional provisions, i.e. section 46 (4). In the case of contracts of transfer, there was an exemption from tax if the transfer was effected before 2nd April, 1970 and as regards options, if the transfer of property pursuant to the exercise of the option, was effected before 18th November, 1970. This option was exercised on 15th June, 1970 and the transfer effected 31st July, 1970 i.e. before 18th November, 1970. Accordingly no tax is payable.

Mr. Henriques submissions are at once attractive and subtle but I fear invalid, as I will endeavour to demonstrate. The Transfer Tax Act No. 7 of 1971 came into operation by ministerial proclamation on 19th July, 1971. It was given retrospective effect (a not unknown feature) of revenue statutes, as appears from the provisions of section 3 (1) of the Act which enacts as follows:

> "Subject to an in conformity with the provisions of this Act (which, except as hereinafter specifically provided to the contrary, shall apply in relation to transfers after the 1st April, 1970, and prior to the commencement of this Act, as they apply in relation to transfers thereafter), tax shall be charged at the rate of two and one half per centum of the amount or value of such money or moneys worth as is, or as may be treated under this Act as being the consideration for each transfer after the 1st April, 1970, of any property; and tax charged in respect of any such transfer shall be borne by the transferor."

Tax is thus imposed on all transfers of property made on or after 1st April, 1970 unless otherwise provided. The contrary provision is section 46 (4) which has been set out in the introductory segment of this judgment. The classes of property which are within the purview of the Act are to be found in section 3 (4):-

> "This section applies to property in any of the following classes -
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> (a) land;
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> (b) a lease of land;
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> (c) securities;
>
> (d) beneficial interests under any settlement of -
>
> (i) property in any class mentioned in paragraphs(a), (b), or (c);
>
> (ii) beneficial interests derived by way of settlement from property in any such class, whether through one or more settlement, and, without prejudice to the generality of any provisions of this Act, reference in any proceeding paragraph of this subsection to any class of property includes reference to any class of right or interest created by way of the part disposal of property in any class referred to in that paragraph, and to any class of option as respects any such property transferrable upon the exercise thereof.

An option is therefore in its own right "property" which is capable of transfer "Transfer" is defined in section 2 (1) as meaning:-

> ".....
> any legal or equitable transfer by way of sale, gift, exchange, grant, assignment, surrender, release, or other disposal, and includes a transfer by or at the order or direction of a court of competent jurisdiction or by way of compulsory acquisition and "transferor", in relation to such a transfer of property means the person from whom the property is so transferred."

It is perfectly true that separate provisions have been enacted in the Act relating to "options", viz, section 11 and "contracts of transfer" section 10 and that section 46 (4) (a) and 46 (4) (b) refer in the former to contracts of transfer and the latter to options, but that obvious fact does not in the slightest alter the plain fact that an option is property in the same sense that land, or lease of land, securities or beneficial interests under a settlement are classes of property. I would invite attention to section 11 which is concerned with options and shows plainly that an option is treated separatly and distinctly from the contract which comes into being when the option is exercised. Section 11 (1) is in the following form:-

> "Without prejudice to any provisions of this Part, the grant of any option mentioned in subsection (4) of section 3 is the transfer of property (namely the option) and, in particular, shall be treated as such-
>
> (a) in the case where the grantor binds himself to sell what he does not own and, because the option is abandoned, never has occasion to own;
>
> (b) in the case where the grantor binds himself to purchase what, because the option is abandoned, he does not acquire, but subject to the following provisions of this section as to treating the grant of an option as part of a larger transaction."

It is a well known rule of interpretation of statutes that every word is to be given its normal grammatical meaning. The rule of law upon the construction of all statutes is to construe them according to the plain literal and grammatical meaning of the words - (per

Alderson B in Attorney General v. Lockwood (1842) 9 M & W 378 at p. 398.) The section states that the grant of an option is the transfer of property, namely, the option. In other words the grant of an option is a transfer of the option which is property. The phrase in parentheses is not without significance. The transfer which is being dealt with is not land or a lease or securities in respect of which the option may have been granted, but the option agreement itself, bereft of its subject matter. The subsequent subsections are concerned with providing guidelines for the operation of the section in its tax gathering endeavours. For example, in order to calculate tax where the option is exercised and a contract is entered into, the grant and contract are to be treated as a single transaction. So this may result, depending on the particular wording of the contract, of the tax already paid on the option grant being deducted from that due under the contract of transfer. But this treatment as a single transaction for the purposes of charging or assessing tax, cannot affect the nature of the option as property deemed to have been transferred at grant which is the taxable occasion. Section 11 (3) is of importance: it provides as follows:

> "The exercise or abandonment of an option by the person for the time being entitled to exercise it is not a disposal of property."

I understand this subsection to mean that the Act does not treat the exercise of an option or the abandonment of an option as a transfer. The occasion of exercise or abandonment is not a taxable one. The first taxable occasion in the case of an option occurs upon the grant of it. The next taxable occasion in the case of an option occurs when a contract of transfer comes into being. So far as the option is concerned, tax in respect thereof would have been payable and nothing remains outstanding. On the making of the contract of transfer albeit in pursuance of the option, it is the transfer of the property i.e. the land, the lease, the securities, which then falls to be considered. Section 10 (1) states as follows:-

> "Where a contract of transfer, being a contract to transfer any property, whether or not in existence or ascertained at the time of the contract, is made, the contract shall be deemed to be the transfer of the property (for the consideration provided for by the contract, without prejudice to any requirement under this Act that consideration for such a transfer be otherwise assessed) for the purposes of this Act."

The making of this contract of transfer is by this section made a taxable occasion under the Act. The argument developed by Mr. Henriques makes it necessary to insert additional words to explain "option" in section 46 (4) (b). For example it would require the insertion of the following words between "transfer" and "option" viz, of the property pursuant to the exercise of the." But, with all respect to that attractive approach, transfers of property other than that class comprising settled property, leases and options are dealt with in section 46 (4) (a).

By adopting the construction being strongly urged on us by learned counsel Mr. Henriques, we would be led not into what is reasonable and sensible but into that which is the precise reverse Section 46 (4) (a) is concerned with transfers arising from contracts made before 2nd April 1970 and 46 (4) (b) relates to transfers of settled property leases and options. But "option" in its peculiar sense of being a particular class of property in my judgment is what is contemplation.

The learned judge was not impressed with the present respondents submissions regarding reliance on section 11. Indeed he held that section 11 did not apply. The importance of section 11 is I think undoubted and is crucial to an understanding of the nature of this statutorily created genus of property as I have endeavoured to show. The basis of his judgment however, was that an option is a contract and therefore "the transaction in this case was effected pursuant to a contract made before the 2nd April, 1970 and therefore falls outside the charge to tax, having been caught by the provisions of section 46 (4) (a)". The relevance of section 11 (1) having been dismissed, this conclusion is not illogical; it was not however supported by either Mr. Henriques or Mr. Hamilton. Indeed the former sought and obtained leave to argue the

the respondent was not liable to tax on the exercise of the option having regard to section 11 and 46 (4) of the Transfer Tax Act. I think as well that the learned judge erred in this regard. Wm. Cory & Son Ltd. v. I.R.C. (1964) 3 All E.R. 66 demonstrates the juristic difference between a contract of sale and an option. At page 75 Lord Diplock said this:

> "A contract for the sale of property is of a different juristic character from an option to buy property. The former is a bilateral or synallagmatic contract. It comprises mutual promises whereby each party assumes an obligation towards the other party: the vendor to transfer to the purchaser the property the subject-matter of the sale, the purchaser to accept the transfer from and to pay the price to the vendor. The obligations assumed by each party may be subject to conditions, but not to a condition inconsistent with the existence of a promise such as a condition that the obligation assumed by a party need only be performed if he choses to perform it. An option to buy property, on the other hand, once validly created either by deed or the giving of consideration by the grantee, is a unilateral or "if" contract, to which the grantee is only a protatic party. The grantor by his agreement to the option assumes a conditional obligation which he promises to perform, to transfer to the grantee the property the subject-matter of the option, the conditions to which his obligation is subject being (i) the grantee's demand for its performance and (ii) payment by the grantee of the agreed price. The grantee by his agreement to the option acquires the right to demand performance of his obligation by the grantor, but he does not thereby assume any obligation to the grantor which he promises to perform. The obligation on his part arises only when he exercises the option by demanding performance by the grantor of his obligation. It is the subsequent demand by the grantee which converts the option for the first time into a bilateral or synallagmatic contract; i.e. a contract for the sale of the property the subject-matter of the option."

Mr. Hamilton relied on this dicta to show that section 46 (4) (b) does not apply to the circumstances of the present case. An option at law is plainly a contract but a special specie of contract. Under the scheme of the Transfer Tax Act, an option is treated as property, capable of transfer like any of the other specie of property mentioned in the Act. The transaction which comes into being upon the exercise of the option is dealt with quite separately and can no longer be regarded as an option. In my view it is correct to say that when the option was exercised on 15th April, 1970 a contract of transfer was made which by the Act is deemed to be the transfer of property. Since the transfer was made after 2nd April, 1970 i.e. the transfer of the property, the consideration for which was $50,000.00 the transaction is exigible for tax. For these reasons I would allow the appeal and restore the assessment of the appellant.

WRIGHT, J.A. (Ag.):

I agree that the appeal should be allowed.

KERR, P. (Ag.):

The appeal is allowed. The judgment of the court below set aside and the assessment of the Stamp Commissioner revived and affirmed. Costs of the appeal to be the appellant's.