**EASTERN CARIBBEAN SUPREME COURT**

**IN THE HIGH COURT OF JUSTICE**

**[CIVIL]**

**SAINT LUCIA**

**CLAIM NO. SLUHCV2020/ 0030**

**BETWEEN:**

**REPUBLIC BANK (EC) LIMITED**

Appellant

**And**

1. **DIRECTOR OF FINANCE AND PLANNING**
2. **ACCOUNTANT GENERAL**

Respondents

**Before:**

The Hon. Mde. Justice Cadie St Rose-Albertini High Court Judge

**Appearances:**

Mr Fyard Hosein SC with Mr Geoffrey DuBoulay, Mrs Sardia Cenac-Prospere and Ms Sasha Bridgemohansingh for the Appellant

Mr David Dorsett with Mrs Brenda Portland-Reynolds, Mr Seryozha Cenac and Mr Kareem Allyene for the Respondents

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2021: January 11, 12
May 31

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*Time for Filing Appeal - Assessment of Ad Valorem Duty - Date of assessment - Methodology and Criteria for Assessment - Stamp Duty Act - Interpretation Act - Banking Act - Part 60 of Civil Procedure Rules 2000*

## JUDGMENT

[1] **ST ROSE-ALBERTINI, J. [Ag]:** This Appeal is filed by Republic Bank (EC) Limited ("the Bank"), challenging the assessment of stamp duty payable on a Banking Business Vesting Order ("BBVO")[1] in which the Bank is the transferee. The BBVO transferred and vested in the Bank all assets, rights, liabilities, and obligations of the banking business of the Saint Lucia branch of The Bank of Nova Scotia ("BNS"). The Bank is aggrieved over the methodology applied in calculating the stamp duty payable on the BBVO.

[2] The Director of Finance and Planning and the Accountant General are the respondents, as officers charged with responsibility for assessment and receipt of payment of stamp duty in accordance with the Stamp Duty Act[2] ("the Act"). In that regard their responsibilities are performed by the Inland Revenue Department ("IRD"), which falls under the umbrella of the Ministry of Finance. The respondents maintain that the assessment is based on a meticulous application of the relevant statutory provisions and is lawful. They further assert that the appeal is filed out of time and should be dismissed with costs.

**The Issues**

[3] The issues for determination are: -

1. Whether the appeal was filed out of time?

2. If the appeal is in time, whether in assessing the stamp duty payable on the BBVO, the respondents erred by applying 2% ad valorem stipulated for Instrument Nos. 35 and 36 in the Schedule of Act, to the ostensible value of the assets conveyed under the BBVO, instead of applying same to the amount or value of the consideration paid for the acquisition?

[1] SI No. 143 of 2019 – See Exhibit IDS 5
[2] Cap 15.11 of the Revised Edition of the Laws of Saint Lucia

**The Grounds of the Appeal**

[4] The Bank is duly incorporated under the Companies Act[3] and engages in banking business in Saint Lucia. The appeal is filed under section 16 of the Act and Part 60 of the Civil Procedure Rules 2000 ("CPR"). Having initiated same by way of a fixed date claim on 23rd January 2020, the Bank subsequently filed an amended fixed date claim form with amended grounds of appeal on 24th April 2020

[5] The Bank asserts that pursuant to a Purchase and Sale Agreement dated 20th September 2019 between BNS and itself ("the PSA"), all of the BNS banking business in Saint Lucia was acquired by the Bank. The BBVO was published in the Official Gazette as a statutory instrument,[4] and was the conveyance by which the BNS banking business vested in the Bank with effect from 31st October 2019.

[6] By letter dated 22nd November 2019, the respondents advised the Bank, among other things, that (i) the applicable stamp duty on the BBVO was based on the value of the individual loans and items of security being transferred; and (ii) such stamp duty is to be paid in accordance with Instrument Nos. 35 and 36 of the Schedule of the Act, in keeping with section 177 of the Banking Act[5]. At the IRD's request, the Bank furnished a copy of the BNS unaudited balance sheet as of 31st October 2019 to substantiate the value of the banking business transferred under the BBVO.

[7] By letter dated 16th January 2020 the respondents conveyed to the Bank that stamp duty on the BBVO was assessed at 2% of the value of the total assets stated in the BNS unaudited balance sheet for the year ended 31st October 2019. The Bank contends that the assessment is unjustified and illegal, and should instead be calculated on the amount of the purchase price paid for the acquisition, as stated in the PSA. Further that the respondents applied the duty to the book value of the assets conveyed, without giving due consideration to the liabilities assumed under the BBVO.

[3] Cap 13.01 of the Revised Edition of the Laws of Saint Lucia
[4] Supra note 1
[5] Cap 12.01 of the Revised Edition of the Laws of Saint Lucia

[8] In the alternative the Bank asserted that the respondents erred in assessing the stamp duty on the book value of the assets transferred without consideration of the liability to stamping and/ or categorization of the instruments transferred in accordance with section 177 of the Banking Act and the Schedule to the Act, including but not limited to Instrument No. 53(6) of the said Schedule. At the hearing the Bank elected to discontinue this ground of appeal.

**The Respondents Answer**

[9] In rebutting, the respondents assert the following:

1. By letter dated 6th June 2019, the Bank requested a provisional assessment of the liability for stamp duty and attached to that letter a draft balance sheet. Subsequently, by letter dated 20th September 2019[6] the Bank wrote to the Prime Minister and Minister of Finance requesting that the calculation of stamp duty be varied to reflect the value of the purchase price actually paid for the acquisition, as opposed to the value of the underlying assets conveyed. This led to the letter of 22nd November 2019 in which the Director of Finance confirmed that stamp duty was payable on the value of the underlying assets and not the purchase price paid.

2. Subsequently by a letter dated 20th December 2019, the Bank (i) accepted Cabinet's decision on the calculation of stamp duties as conveyed in the letter of 22nd November 2019, (ii) agreed that the position was final, and (ii) acknowledged that the payment of stamp duty was then overdue.

3. By letter dated 13th January 2020, the Bank submitted a revised unaudited balance sheet for the purpose of assessing stamp duty. Based on this the respondents adjusted the chargeable amount, having assessed the stamp duty payable as 2% of the value of the assets transferred to the Bank. This led to a revised sum of $31,720,635.30 as the stamp duty payable and was conveyed to the Bank in a letter dated 16th January 2020.

[6] The correct date of this letter is 30th December 2019 – See Exhibit IDS10

4. That the assessment of stamp duty was communicated to the Bank from 22nd November 2019 or at the latest on 20th December 2019 and the appeal ought to have been lodged within 7 days of the date of that assessment, as required by section 16 of the Act. Therefore, the appeal is filed out of time.

5. The BBVO is an instrument of conveyance or transfer on sale, to which section 35 of the Act and Instrument Nos. 35 and 36 of the Schedule are the applicable provisions. These provisions have been applied correctly by calculating stamp duty at 2% of the value of the assets transferred under the BBVO. Further, as the transfer is not by way of assignment, Instrument No. 53(b) does not apply.

6. Section 11 of the Act in conjunction with section 177 of the Banking Act allows the respondents to calculate stamp duty on each of the separate and distinct matters referred to in the BBVO. Thus, the assessment is justified, and the computation conveyed in the letter of 16th January 2020 should be affirmed.

**The Bank's Reply**

[10] In reply the Bank contends that the request for a provisional assessment of stamp duty contained in the letter of 6th June 2019 was submitted by its parent company, Republic Financial Holdings Limited ("RFHL"). This request was not pursued by the Bank. Further, the letter referred to by the respondents as being dated 20th September 2019 was written by RFHL and was in fact dated 30th September 2019.

[11] The Bank denies having agreed that the respondent's method of computation contained in the letter of 22nd November 2019 was final, and what was accepted as final was Cabinet's decision as referenced in that letter, that no waiver of stamp duty would be granted.

[12] The Bank asserts that it also agreed that certain steps be undertaken and thereafter to facilitate agreement on the chargeable value. Thus, an assessment had never been settled or communicated by the respondents and the letters of 22nd November or 20th December 2019 contained nothing which could have constituted an assessment.

[13] The Bank further contends that it was in the letter of 16th January 2020 that the respondents finally communicated the assessment and stated the calculation and amount due for payment This letter was received on 17th January 2020 via email and was the only missive in which the respondents informed the Bank of the completed assessment. Thus, the appeal filed on 23rd January 2020 is within the 7-day period required under the Act.

**The Bank's Evidence**

[14] Pursuant to CPR60.8(2) the Court is allowed to receive evidence on matters of fact at the hearing of the appeal.

[15] Mr. Ian Du Souza, Chartered Accountant and Consultant employed by RFHL testified on behalf of the Bank. He was the Project Manager charged with responsibility for the acquisition of BNS' portfolio in Saint Lucia, as well as other Caribbean countries. He stated that under an Original Purchase and Sale Agreement dated 28th November 2018 between BNS and RFHL, which was amended and restated on 24th September 2019, RFHL agreed to purchase all BNS' banking business operations in several Caribbean countries, at an agreed total price[7]

[16] Around 18th June 2019 the Bank was incorporated by RFHL for the purposes of acquiring the banking business in Saint Lucia, amongst other things. Pursuant to the Amended and Restated Purchase Agreement, BNS and the Bank executed the local PSA on 20th September 2019 to purchase the banking business in Saint Lucia[8]. The purchase price for that sale was stated in Schedule C of the PSA as $18,630,000.00[9]. The parties agreed that the assets and liabilities for the banking business would be transferred at a net value of zero, such that the assets to be acquired minus the liabilities to be assumed by the Bank upon acquisition would be zero. Future income was expected to be generated from the acquisition; therefore it was agreed that the purchase price would be a premium amount paid by the Bank to acquire the banking operations. For accounting purposes that premium

[7] US$123,000,000.00 (See Exhibits IDS2 & 3)
[8] See Exhibit IDS4
[9] US$6,900,000.00

was allocated to "goodwill" in the balance sheet, and is captured in Schedule "C" of the PSA. The sale and transfer of the banking business was implemented by the BBVO, which was issued under section 175 of the Banking Act and took effect on 31st October 2019.

[17] Sometime prior, in April or May 2019 RFHL had made inquiries of its Counsel in Saint Lucia regarding the stamp duty payable on the intended BBVO and was advised that duty was payable unless a full or partial exemption was obtained. RFHL instructed Counsel to write to the IRD to make enquiries regarding a provisional assessment of such liability. This was contained in the letter of 6th June 2019[10] to the IRD. By letter dated 24th June 2019[11] the IRD responded, informing RFHL that until the final instrument was presented it would be premature to make a calculation based on the figures presented and referred to Instrument Nos. 35 to 36 of the Schedule to the Act, as a reliable basis for estimating stamp duty.

[18] By letter dated 9th September 2019[12] RFHL through its Counsel wrote to IRD outlining its position that stamp duty ought to be assessed on the purchase price paid for the acquisition and not on the value of the security instruments transferred and sought clarification on the matter. In conjunction, by letter dated 30th September 2019[13] RFHL wrote to the Prime Minister requesting that the stipulation that stamp duty is payable on the individual loans and items of security being transferred be varied to allow the duty to be paid on the purchase price. The reason given was that the assets and liabilities were being transferred at a net value of zero, therefore stamp duty should be charged on the purchase price, as being representative of the actual value of the business conveyed to the Bank.

[19] By letter dated 22nd November 2019[14] the first respondent wrote to RFHL informing that stamp duty would be charged on the value of the individual loans and items of security being transferred in accordance with the rate stipulated in Instrument Nos. 35 and 36 of the Schedule of the Act. Further, Cabinet determined that a waiver of stamp duty would not

[10] See Exhibit IDS6
[11] See Exhibit IDS8
[12] See Exhibit IDS9
[13] See Exhibit IDS10
[14] See Exhibit IDS11

be granted for the acquisition. Mr. Du Souza says this letter did not provide the actual stamp duty payable, or any guidance on having the assessment made or obtained. Thus, on 2nd December 2019[15] the Bank wrote to the Prime Minister requesting that consideration be given to the calculation of stamp duty on the purchase price paid and not on the value of the assets conveyed.

[20] By letter dated 11th December 2019,[16] the IRD responded to RFHL's letter of 9th September 2019, stating, among other things, that section 177 of the Banking Act recognizes that the BBVO has multiple effects as an instrument that transfers multiple items, rights, and obligations, which may be subject to different duties, in each of the cases imposed on the several instruments. The effect of the BBVO is to allow the parties to have one instrument instead of multiple instruments transferring the various rights and obligations. However, the Act authorizes the imposition of stamp duty on each of the separate items being transferred. Mr. Du Souza stated that this letter did not provide any quantification of the stamp duty payable. On 18th December 2019[17] IRD wrote to RFHL indicating that waiver of stamp duty was refused by Cabinet and was therefore payable on the BBVO. The letter also requested settlement of the liability within 30 days of its date.

[21] By letter dated 20th December 2019[18], the Bank's Managing Director wrote to IRD acknowledging the advice that stamp duty was then due and payable and accepted that the Cabinet's decision refusing the waiver of stamp duty was final. It was also agreed that the Bank would provide IRD with the record of the banking business transferred on 31st October 2019 for calculation of duty and to agree on the chargeable value. The letter also requested an extension of time to 30th January 2020 to finalize payment without the imposition of any penalties. Up to this point, no assessment had been made or provided by IRD and no request had been made of the Bank for information to make the assessment.

[15] See Exhibit IDS12
[16] See Exhibit IDS13
[17] See Exhibit IDS14
[18] See Exhibit IDS15

[22] By letter dated 13th January 2020[19] the Bank furnished IRD with a copy of BNS' unaudited balance sheet reflecting the value of the assets transferred and the liability assumed under the BBVO and requested the assessment of the stamp duty payable on the BBVO. By letter dated 16th January 2020[20] IRD informed the Bank that based on the revised balance sheet presented stamp duty is calculated at 2% of $1,586,031,765.00 (the value of the assets conveyed), which amounts to $31,720,635.30 in stamp duty. This letter was conveyed as an attachment in an email sent to the Bank on 17th January 2020. It was only then that the Bank first received knowledge of the assessment and the stamp duty payable on the BBVO. Being dissatisfied with the assessment the Bank proceeded to file an appeal within the 7-day period permitted under the Act.

**The Respondents' Evidence**

[23] Ms. Olivia Vitė, Comptroller at the IRD testified on behalf of the respondents. She stated that part of her responsibilities included overseeing the assessment and collection of stamp duty on notarial documents and she was familiar with the facts and circumstances of this case. Her account confirms much of the chronology of events set out by Mr. Du Souza and was consistent with the history of the exchanges between the parties over the period June 2019 to January 2020.

[24] She stated that the letter of 6th June 2019 requested a provisional assessment of stamp duty payable on the intended acquisition. The letter enclosed a draft unaudited balance sheet account with a proposed assessment amounting to $21,051,323.00 based on the application of 2% stamp duty on each individual asset that was intended to be transferred. The IRD subsequently confirmed at a meeting with attorneys of RFHL that the ad valorem rate to be applied was 2% on each individual item that was to be transferred, and that a final figure would only be confirmed when the BBVO was executed, and the audited balance sheet presented. This information was also contained in the letter of 24th June 2019 from IRD to the Attorneys for RFHL.

[19] See Exhibit IDS16
[20] See Exhibit IDS17

[25] She subsequently received a copy of the letter of 30th September 2019 from RFHL to the Prime Minister and from her reading, it appeared obvious that the Bank was aware that stamp duty would be assessed at 2% of the value of the underlying assets transferred in the BBVO and not the purchase price stipulated in the PSA. She subsequently received a copy of the letter of 22nd November 2019 from the first respondent to the Bank, which confirmed that stamp duty would be assessed on the value of the assets and not the purchase price. This was followed by the letter of 20th December 2019 in which the Bank accepted that Cabinet's decision on the calculation of stamp duty as communicated in the letter of 22nd November 2019 was final.

[26] In the letter of 13th January 2020, the Bank submitted a revised balance sheet in which the figures changed from that presented in the letter of 6th June 2019. The sum of $1, 586,031,765.00 was presented as the total value of the assets transferred. She proceeded to calculate stamp duty at the rate of 2%, pursuant to section 35 and Instrument Nos. 35 and 36 of the Schedule of the Act and arrived at the sum of $31,720,635.30 as the stamp duty payable on the BBVO. This was communicated to the Bank in the letter of 16th January 2020. She says this exercise did not constitute a re-assessment of stamp duty but simply a calculation of the dutiable amount based on the previously agreed assessment.

[27] She considered the purchase price stated in the PSA as irrelevant in assessing stamp duty as the PSA merely informed the IRD of what was to be contained in the BBVO. After careful consideration of all the relevant instruments referenced in the BBVO, the IRD was guided by sections 175 to 177 of the Banking Act, which states that stamp duty is to be assessed on the value of the business being transferred between the parties. Accordingly, the IRD did not err in its calculation of stamp duty. The duty became payable by 14th October 2019 at the latest, when the BBVO was published.

[28] She referenced a recently concluded transaction, concerning a sale of part of the BNS lending business to a third party, which the IRD treated in like manner. The same assessment regime and methodology was applied to the value of the assets sold and, in that case, IRD received full payment of stamp duty as assessed.

[29] Ms. Vitė stated that the Bank or RFHL had calculated stamp duty in the very same manner as the IRD, in its letter of 6th June 2019 requesting provisional assessment, and the BBVO was published on 14th October 2019 without the payment of stamp duty. In the letter of 20th December 2019, the Bank accepted that the payment of stamp duty was overdue and requested an extension of time to pay and not an extension of time to litigate. She believes these matters confirm that the assessment is correct as the Bank was fully aware of the assessment criteria and methodology by 1st July 2019, 22nd November 2019 and or 20th December 2019. She considered the calculation of stamp duty based on the previously settled criteria was a mere administrative act and not the assessment itself. Thus, the appeal should have been lodged by 21st October 2019 at the latest and is out of time.

[30] It was agreed that the facts were not in dispute, and the parties elected to forego cross examination of the respective witnesses.

[31] As Learned Counsels for the parties made extensive written and oral submissions on the the issues for determination, I have recounted much of their submissions in this judgement, for completeness.

**Issue No. 1: Was the appeal filed out of time?**

[32] The time for filing an appeal against assessment is stipulated in section 16 of the Act. It states: -

> *"16. Appeal from assessment of stamp duty*
>
> *(1) A person dissatisfied with any assessment of stamp duty made by the Accountant General on any instrument liable to stamp duty may **within 7 days of the date of the assessment** by notice in writing **appeal against the assessment to a judge in chambers** and the judge shall have power to hear the appeal in a summary manner and assess the duty if any payable on such instrument.*
>
> *(2) The decision of the judge under the provisions of the preceding subsection is final." [Emphasis added]*

[33] Subsection 36(3) of the Interpretation Act is instructive in calculating time for such purposes. It provides: -

> *"36. Time ……*
>
> *(3) Where in an enactment a period of time is expressed to begin on, or to be reckoned from, a particular day, that day shall not be included in the period."*

[34] To determine whether the appeal is filed out of time, the Court must first ascertain the precise date of the assessment, as the computation of time for filing the appeal commences from the "*date of the assessment*".

**The Bank's Submissions**

[35] The Bank submits that the assessment was conducted by the IRD and is contained in the letter of 16th January 2020, which was received on 17th January 2020, via email, hence the date of the assessment is 16th January 2020. It could not have been 1st July or 22nd November, or 20th December 2019 as suggested by the respondents, as these were merely dates when the Bank was apprised of the methodology which would guide the IRD in calculating stamp duty. The dates of 6th June and 1st July 2019 are untenable because the BBVO was made on 4th October 2019 and rendered effective from 31st October 2019. Under sections 3 and 19 of the Act an instrument attracts duty upon execution and duty is chargeable on instruments and not transactions. Thus until execution is completed no stamp duty attaches[21].

[36] The Bank argued further that even if the IRD's assessment criteria was known on 6th June and 1st July 2019, these factors do not constitute an assessment for the purposes of section 16 of the Act. There are vital elements which the courts have accepted as essential to an assessment of tax which had not been met on these dates. Several authorities were cited including **Burford v Durkin (Inspector of Taxes)**[22] which considered what would be required for an assessment, in circumstances where the statute is silent on the matter.

[21] See also Halsbury's Laws of England 4th edn. Vol 44 (1) at p 584, paragraph 1010
[22] [1991] STC 7 per Nicholls LJ

Nicholls LJ stated that having regard to the nature and functions of an assessment, making an assessment will normally involve: *"(a) a decision to make an assessment for a particular amount; and (b) an appropriate documentary record being made of that decision with the intention that that document shall take effect as an assessment*." In every case quantification of the sum due is considered a vital component.

[37] The Court was referred to **Courts Plc v. The Commissioners of Customs and Excise**[23] where it was held that an assessment must clearly convey to the taxpayer a fixed and definite liability and cannot be a sum that may be subject to change depending on certain conditions. Additionally, the case establishes that: a) the taxpayer must be assessed in a particular sum; b) the assessment itself must be in a document, as a practical matter, to enable notification to be given to the taxpayer; c) it must give rise to an immediate liability to pay the sum assessed and if on a proper reading the notification is of a conditional nature, then the taxpayer has not been given notice of a present liability; and d) the taxpayer must be notified of the assessment as it is only from such notification that he can discern what he is required to do and what assessment has been made. The Bank also relied on the case of **Kothari and ors v Commissioners for HM Revenue and Customs**[24] to underscore that whilst the constituent elements of an assessment may vary according to statute, the calculation of the amount to be paid by the taxpayer is an inextricable element of what any assessment would generally require.

[38] The Bank contends that the none of the matters which transpired prior to 16th January 2020 could have given rise to an assessment for the following reasons: -

1. RFHL's letter of 6th June 2019 requested a provisional assessment.

2. The IRD response on 24th June 2019 informed RFHL that "*a final figure would only be confirmed when the instrument was executed, and the audited balance sheet presented*", and referred RFHL to the relevant provisions of the Act to conduct its own estimate of stamp duty.

23 EWHC 2541 (Ch)

24 [2019] UKFTT 0423 (TC)

3. There were alternative methods for calculation being advanced by the Bank for which it was seeking clarification and was urging IRD to consider applying. In the letter of 9th September 2019, counsel for the Bank advanced the view that stamp duty was payable on the purchase price paid for the acquisition. Another alternative was put forward by the Bank in the letter of 30th September 2019 that stamp duty should be based on the value of the loans and items of security transferred, but nonetheless asked for a variation to reflect the value of the consideration paid.

4. The letter of 22nd November 2019 contained nothing to show that stamp duty in a particular sum was assessed as due and owing and did not notify of any liability to pay a quantified sum. The Bank was simply advised of how to go about making its own calculation of the amount of duty payable.

5. Communication continued and even on 18th December 2019 when the IRD wrote to RFHL indicating that stamp duty was payable and demanded expeditious settlement of this liability, the amount of the liability was not stated in that letter.

6. The Bank's letter of 20th December 2019 is not indicative of an assessment. On the contrary it records the Bank's agreement to certain steps to be taken to arrive at an assessment, to provide records of the banking business transferred, IRD would then calculate duties and the parties would have discussions to agree a value.

7. The business transfer record requested by IRD to facilitate assessment was then supplied in the letter dated 13th January 2020, which letter also stated that the Bank was awaiting the assessment.

8. The only evidence of actual quantification of stamp duty by the respondents is contained in the letter of 16th January 2020, which could not be a revised assessment, as there was no prior assessment.

9. Properly, time would run from the time the Bank was informed of the quantum due as stamp duty and not when it was made aware of the assessment criteria.

**The Respondents' Submissions**

[39] The respondents contend that the criteria for conducting the assessment was conveyed to RFHL or the Bank as early as 1st July 2019 and at the latest by 20th December 2019. In any event, the Bank or its principals were fully aware of the method for calculating stamp duty from their letter of 6th June 2019 or from 1st July 2019 when this was conveyed to their attorneys at a meeting with representatives of the IRD. The appeal should have been filed within 7 days of 20th December 2019 at the latest.

[40] It is the respondents' position that the assessment was made by 22nd November 2019 or 20th December 2019 because:

1. By 6th June 2019, the Bank had itself calculated its provisional liability.

2. The respondents' letter of 24th June 2019 indicated that the stamp duty would not be calculated until the final instrument was presented but provided guidance on the reliable basis for estimating stamp duty.

3. At a meeting held on 1st July 2019 with representatives of IRD and the Bank's attorneys, it was understood that the chargeable amount would only change if the value of the banking business changed.

4. Seized of that understanding, the Bank made attempts to have the assessment and the duty payable in the sum of $21,051,323.00 varied to reflect the chargeable value as the purchase price paid for the banking business and not the value of the assets conveyed. These efforts were contained in the Bank's letters of 30th September 2019 and 16th October 2019, to the Prime Minister.

5. The methodology for calculating stamp duty was affirmed by the IRD's letter of 22nd November 2019 which also demanded payment. Thereafter by letter of 18th December 2019 the respondents' position that the assessment had been completed was conveyed and a demand was made for payment within 30 days of that letter. From this it is logical to assume that an amount must have been communicated, whether directly or indirectly or formally or informally.

6. By letter of 20th December 2019, the Bank acknowledged that payment of stamp duty was overdue and requested an extension of time to finalize payment. This would only have been said if the Bank was also of the view that an assessment had been made. Consequently, by 20th December 2019 the Bank had been effectively assessed for payment of stamp duty under the Act.

7. The respondents' letter of 16th January 2020 merely indicates calculation of a revised amount but not an assessment or re-assessment. The revised amount was calculated based on the previously agreed assessment.

[41] The respondents submitted further that section 3 of the Act declares which instruments are liable to stamp duty and Section 19 says when the liability is to be paid, which is distinct from when the assessment should take place. There is nothing in the Act precluding assessment before execution and although it has been the practice of IRD to await an executed instrument, an assessment could be made on a draft instrument which is subsequently executed, and the duty only becomes payable upon execution. Thus the Bank was aware of the law to be applied to determine the stamp duty payable and the instruments to which it was to be applied. As of 1st July 2019, the Bank had knowledge that the amount of $21,051,323.00 represented what the respondents claimed was the duty payable, and as of 18th December 2019, demand for payment of that liability was made.

[42] The respondents quoted from an article titled **Stamp Duty: Settlements and Conveyances**[25] which states that instruments were in the past stamped before execution, because after execution the commissioner could not consider relevant matters extrinsic to the instrument. This, they say, supports their position that there is nothing in law to invalidate an assessment made prior to execution and that the meeting of 1st July 2019 was capable of being an assessment within the meaning of the Act.

[43] However, in oral submissions the respondents agreed that the assessment could not have taken place before the BBVO took effect and abandon not only the 1st July 2019 date but

[25] *The University of Queensland Law Journal*

also 18th and/or 20th December 2019 stating that the date of assessment was 22nd November 2019 by their letter of that date, to the Bank.

[44] To the legal question of what constitutes an assessment, the respondents submit that the Act does not define this, therefore it must be ascertained from case law and from the IRD's own practice. An assessment is done when the IRD determines the statutory provisions which apply to an instrument and the criteria and methodology to arrive at an arithmetical computation. It does not matter who does the calculation, whether IRD or the taxpayer, provided both parties are ad idem on the amount assessed.

[45] With respect to the case law the respondents assert that in **Burford** where an inspector conducted an assessment and delegated signing of the certificate to another officer, the court found that the assessment was valid as the signing of the certificate was merely a formal step. In the same way the IRD's letter of 16th January 2020 was merely a formal step, which does not in any way invalidate the earlier assessment. Further that **Burford** considered what constituted an assessment under the express provisions of a specific statute and is not of universal application. There, the court found that the provisions of the statute envisaged that an assessment to be contained in a document. In this case the Act does not suggest this, neither does the practice in relation to stamp duty for conveyancing in Saint Lucia. Consequently, the letter of 16th January 2020 was not the assessment but merely an administrative act recording the revised amount.

[46] It was further argued that a written notice to the taxpayer is not a requirement for an assessment under the Act and even in **Burford** where the Court found that an assessment will normally involve a decision on the amount of liability with a documentary record of that decision, the court did not state that the documentary record was to be served on the taxpayer, to be effective. The court also found that once the commissioners had performed the statutory duty of conducting an assessment, that was sufficient to find that an assessment had been made and recording the amount was purely administrative.

[47] The respondents stated that the point in **Courts Plc** was that notification of the assessment was not the assessment itself and their internal practice was important in ascertaining whether an assessment was made. The assessment is a matter for the

respondents and the evidence of Ms. Vite ought to be accepted in that regard as the IRD never issues written letters to taxpayers containing the assessed amount of stamp duty. To accept that a formal notification to the taxpayer is required, is beyond the words of the Act and inconsistent with the conveyancing practice in Saint Lucia. Notice for the purposes of the Act simply means that the taxpayer is aware of the amount the respondents claim to be due. Consequently, by 20th December 2019, the Bank was aware that the amount of $21,051,323.0 was payable and payment was overdue, because the liability to pay became due when the BBVO took effect.

[48] The respondents argued further that in ***Courts Plc***, the court examined the totality of the evidence in arriving at a conclusion on whether an assessment had been made. In the present case the totality of the evidence establishes that the appellant had full notice of the assessment and of the amount of its liability for stamp duty and the respondents never treated the letter of 16th January 2020 as the assessment or a re-assessment. In ***Courts PLC*** it was held that adjustments in the assessed amount do not constitute a new assessment.

[49] In concluding the respondents submit that the pertinent dicta in **Kothari** for the purposes of this case is in the following statement of the court:

> *"We consider that, as Parliament has not seen fit to specify a particular method of making an assessment, we* do *not see that the law requires one.* And *we see no reason why assessments for one tax have to be made in precisely the same way as assessments for another tax* or *even for the same tax. If an assessment is made in the manner which HMRC has determined at that particular time for that particular tax, then the assessment could be valid".*

**The Bank's Reply Submissions**

[50] In reply the Bank argued that the figure of $21,051,323.00 was not put forward by its letter of 6th June as that sum was merely contained in an attached schedule of the book value of the assets to be transferred and was stated as subject to change. It was prior to the BBVO,

and spoke to a future transaction, and did not constitute an assessment. It was never proffered by the respondents as the amount of duty owed at any time and does not accord with the figure eventually calculated and notified by the respondents as stamp duty due. To say that the Bank was aware of this figure as the assessed sum from 1st July 2019 contradict the respondents' own evidence which shows that in all communication prior to 16th January 2020, the respondent only notified the Bank of the assessment criteria and methodology. Even if it could be considered a provisional assessment, such assessment does not constitute a statutory assessment.

[51] The Bank disputed the respondents' contention that the letters revealed their state of mind that the assessment was completed, as the IRD's letter of 18th December 2019 indicated that the liability was overdue, and the Bank accepted in its letter of 20th December 2020 that the liability was in fact overdue. In this regard, the Bank says that the respondents' state of mind as to whether an assessment was made is not dispositive of whether, as a matter of law, an assessment was objectively made, and cited the case of **Aria Technology Limited v The Commissioners for HM Revenue and Customs**[26] to support the view that an assessment in law, does not depend on the state of mind of the assessor.

[52] The central issue in **Aria** concerned circumstances where the legislation was silent on what constitutes an assessment, and whether certain letters taken together did in fact contain an assessment. Singh LJ summarized the legal principles as follows:

> *"44. In my view the following relevant principles can be derived from the authorities: (1) there is no statutory definition of "assessment". It is in general a legal act on the part of the Commissioners constituting their determination of the amount of VAT that is due. (2) There is no particular formality required by either statute or regulations. (3) There is no magic in the use of any particular form, for example one headed "Notice of Assessment". A notification of an assessment can be contained simply in a letter. It can also be contained in more than one document. (4) The question of whether an assessment is made or not made is to*

[26] [2020] EWCA Civ 182

*be determined on an objective analysis. The decision maker's subjective state of mind cannot alter that objective fact.*

*45. … **The test is exclusively an objective one: how would the document or documents said to record an assessment be understood by the reasonable reader?** It is essential to the fair administration of the tax system that a taxpayer should be able to know with certainty whether or not an assessment has been made of an amount of VAT due from him. There would be very considerable uncertainty if the question whether an assessment has been made were to depend on the subjective intentions and beliefs of individual officers of HMRC." [[Emphasis added]*

[53] On examination of the letters, it was observed that a letter from the HMRC dated 6th October 2008 was headed 'Notification of decision to deny input tax' and stated that Aria's right to deduct input tax claimed in respect of certain transactions was denied, which would affect input tax claimed on certain purchase made in the assessment period. It stated that a further letter showing the corrected amount of VAT *now due* is enclosed and advised of the right to appeal within 30 days of the date of the letter. The letter dated 7th October 2008, was headed 'VAT Return for period: 1st May 2006 to 31st July 2006' and stated as Aria had been notified, the commissioners considered that the amounts shown should properly be amended as follows and then showed, in a table, a sum for input tax of £754,545.66 and a sum for net tax due of £313,613.71. The letter noted that reasons were contained in the letter of 6th October 2008 and reminded of the right to appeal.

[54] In these circumstances, Singh LJ held:

*"48. **In my view, the reasonable reader would have understood the letters of 6 and 7 October 2008, read together as they had to be, as recording and notifying a determination by the Commissioners of the amount of VAT assessed as being "due" and, moreover, as being due "now".** On an objective analysis, they did record an "assessment" of the VAT due and were not simply a*

*correction of the figures set out in the VAT return which had been submitted by the Appellant." [Emphasis added]*

[55] Consequently, the Bank submits that whilst it is true that the procedure by which an assessment is made can, in some respects, be determined by the IRD, as for instance the formalities surrounding the recording or communicating of same, it is clear that the test of whether in fact an assessment is made "is exclusively an objective one", and **Aria** establishes that it must involve a calculation of tax by the assessor, which for the purposes of section 16 of the Act would be the Accountant General or someone authorized to act on his or her behalf. Thus, determination of the applicable provisions, criteria or methodology is simply a determination of the bases upon which an assessment rests and is not the assessment itself. This was considered of utmost importance where the time for appeal is very short and runs from the date of an assessment. The taxpayer must know with certainty, the amount that the IRD claims is due, to determine whether an appeal is warranted. As a matter of administrative fairness, the reasons for the assessment should also be given, considering that the actions of the IRD are subject to public law principles.

[56] Concerning whether notice of an assessment is required, the Bank points out that the respondents have stopped short of suggesting that an assessment can be conducted in the absence of notification to the taxpayer of the amount of tax being claimed. Notice for the purposes of the Act means that the taxpayer is aware of the amount that the respondents claim is due. While there may be a distinction between an assessment and notification, in this case both the quantification and notification can be considered as having taken place on 16$^{th}$ January 2020. The Bank took the view that it would be a grave injustice, contrary to the principles of public law, if it could be said that the 7-day period under section 16 of the Act could begin to run in the absence of the taxpayer being notified of an assessment. The principles of natural justice would require that such period could only commence from the time the taxpayer receives notification of the assessment.

## Analysis

[57] As the Act is silent on what constitutes an assessment, the Court must look to case law. The cases demonstrate, contrary to what the respondents suggest, that calculation of a precise, fixed, and unconditional amount of which there is some record is what constitutes an assessment. I note that in each of the cases **Burford**, **Courts Plc** and **Kothari**, a calculation of an amount was made, and this was never in issue. All three cases treat this requirement as trite.

[58] It is less clear the extent to which a written record and notice of the assessment to the taxpayer forms part of the assessment itself. However, fairness would require that notice be given for the reasons stated in **Courts Plc**; that it is only from the notification that a taxpayer can discern what he is required to do and what assessment has been made. More importantly, it is the only way in which a taxpayer can properly access the right of appeal under section 16 of the Act.

[59] In **Burford**, the taxpayer's contention was that an assessment was validly made only if all the acts necessary to constitute an assessment were done by one and the same inspector. The second inspector who had completed the assessments by particularizing the amounts and other relevant data in the assessment book was not the same one who exercised the discretion to make the assessments. The court held that the assessments were validly made by the first inspector, when the second inspector, as agent for the first, carried out the last three ministerial tasks. The critical point being that the assessment was only complete when the discretion was exercised in a particular amount and recorded. Both were necessary to constitute the assessment. The issue was merely whether the process of recording the details could be delegated. That case does not suggest that preparation of the record was any less a part of the assessment as the respondents have alluded and the issue of notification of the taxpayer did not arise.

[60] Similarly, in **Courts Plc**, there was no issue relating to quantification or notification of the taxpayer as both were done. It was held that there was a distinction between the decision to make an assessment, the making of the assessment, and notification of the assessment. The decision to make an assessment was to assess the taxpayer in a

particular sum, this was to be by a person or persons authorized by the commissioners to make the assessment and had to be done to the best of their judgment. It was said that the assessment should be evidenced in writing to enable notification to be given to the taxpayer and in the absence of such notification no liability on the taxpayer arose. The commissioners' practice to make, notify, amend, and withdraw assessments was relevant to how and at what point an assessment was made and how it was recorded.

[61] The court found that an assessment was made when the prescribed form had been completed and signed off. What followed after the form was signed was the processing of the assessment and that was not a part of the assessment itself. Thus, the assessments had been made, and the initial letter sent to the taxpayer gave rise to a debt presently due in the amounts set out on the form and referred to in the letter. It was then open to the commissioners to make assessments which were alternative to each other provided the taxpayer was made aware or understood that one assessment was not additional to the other or that the later assessment was intended to be in substitution for the earlier assessment. In the circumstances later assessments were deemed to be alternative to the initial and earlier assessments, as it was also open to the commissioners to withdraw an assessment once it had been made.

[62] **Courts Plc** establishes that an assessment necessitates calculation of an amount. Whilst the case does say that the commissioner's practice was relevant to how and at what point the assessment is made, it is distinguishable from the present case, as the commissioners had a well-established practice, had quantified the amount due, and the taxpayer had been notified. The court found that the assessment was made when the commissioner had completed the prescribed form and signed it. What followed thereafter in putting the information from the form into the computer system was clerical and not part of the assessment itself but the processing of the assessment. This is not comparable to the present case where the respondents have not stated what the procedure is for making an assessment, save that it is made when the methodology is conveyed, and that taxpayers were never sent letters containing the amount of duty assessed. Additionally, that it is the taxpayer who calculates the amount and submits the payment to the IRD.

[63] In submissions, it was confirmed that this assessment was the first of its kind, for the sale of a banking business under a BBVO. It was not in the form of a standard notarial instrument which usually contains the value or amount of consideration for the transfer. Contrary to what the respondents suggest, this fact demonstrates the necessity to exercise caution in making and notifying the taxpayer of the assessment, and in particular ensuring clarity and specificity. A business as usual, or informal approach would not suffice in such a case. The respondents have not adduced evidence of any procedure or practice for making the assessment, which this Court can consider, except to say that none exists and that in one recent instance of a sale of part of BNS loans portfolio, the taxpayer was the party who calculated the stamp duty payable using the methodology conveyed by the IRD and full payment was remitted, without question.

[64] The court in **Courts Plc** emphasized considering internal practice to determine *"the point is at which, having regard to the procedures laid down by the commissioners, the judgment has been made as to the amount assessed*." There the point was reached when the prescribed form had been completed and signed. Against this backdrop the court in **Courts Plc** held that the adjustment of the amount in that case did not constitute a new assessment. The context here is paramount, as an assessment had been previously made in the sense that the amount of the tax was quantified and the taxpayer had been notified by letter. The assessment was not stated to be conditional, and it was only that enforcement would be delayed pending outcome of an appeal. It is not possible to make a comparable determination in this case where no amount had ever been stated by the IRD as being the duty assessed. It follows then, that the sum stated in letter of 16th January 2020 letter could not be considered an adjustment.

[65] In **Kothari**, the issue was whether assessments had not been validly made or if validly made, were not validly issued, or served. The statute is question contained a provision which required notice of the assessment to be served on the purchaser and stipulated the information required to be included in such notice. The statute did not stipulate a procedure for making the assessment and the court had to consider what constituted making an assessment. It was held that case law was clear that notice of the assessment

is not part of the assessment itself, however the assessment procedure was held to be a combination of the making the assessment and notifying the taxpayer.

[66] The respondents relied on dicta from **Kothari** which must be taken in context. The court noted that the practice at the time of the earlier cases[27] was that assessments were considered made when the inspector signed the certificate and placed it in the assessment book. In the later cases[28] the practice had evolved, assessment books were no longer kept, and the practice was to make an assessment by keying into the computer the amount of the assessment. It was in the context of this modernization/ computerization of making an assessment that the Court stated that if the assessments are made in the manner which the authority had determined at that time for the tax in question, then the assessment could be valid.

[67] The court went on to qualify this statement by saying that making an assessment would logically have mandatory minimum requirements such that the authorized officer must decide to make an assessment and then note the necessary details of the assessment on some form of reasonably permanent record held by the tax authority. The court accepted that an assessment was made for a particular sum and uploading the assessment into the system and placing copies on the taxpayers' paper files was a permanent record. The tax authority was not restricted to any method, but it was a requirement that a decision to assess, and generating a permanent record of the assessment, be satisfied.

[68] **Kothari** is in line with the other authorities cited, despite the dicta extracted by the respondents, which when taken in context provides no support for the contention that there need not be any set procedure, or that whatever the IRD choses to do at any given time, is adequate for an assessment, irrespective of whether it conforms to the minimum requirements gleaned from the cases. **Kothari** also cannot be said to support the contention that notice is not part of an assessment or is not required to be given. Unlike the Act, the statute in that case had a separate requirement for service of the notice of assessment, and whilst it was not considered part of the assessment, it was said to be a

[27] Honig and Burford
[28] Corbally-Stourton and Tutty

vital element of the assessment procedure. Consequently, it cannot be said that where the Act is silent as to assessment and notice that notice is not essential to an assessment or is not required to be given.

[69] The respondents' evidence is that when RFHL requested the provisional assessment by letter of 6th June 2019, it also proposed assessment of stamp duty at 2% of the value of the assets to be transferred and stated $21,051,323.00 as the estimated liability. Two meeting were referenced at which the methodology was conveyed and the IRD confirmed that the rate to be applied was 2% ad valorem on each individual item to be transferred. The IRD does not say that the Bank was made aware of the amount assessed and gives no details of what transpired at these meetings that could amount to an assessment, or that any calculation was made or confirmed.

[70] The IRD also does not say that the calculation was undertaken in the presence of the Bank's representatives or that a calculation previously made was communicated to the Bank or even that the alleged provisional assessment by RFHL was expressly confirmed as being accurate. The evidence is that the IRD communicated at the meeting that a final figure would only be confirmed when the BBVO was executed, and the audited balance sheet presented. This is consistent with the IRD's letter of 24th June 2019 which conveyed that calculation of a figure prior to the presentation of the executed instrument would be premature. The IRD's contention that the Bank was aware of the amount calculated from the meeting of 1st July 2019 is also contrary to the evidence, which all along has been that calculation of the amount is not required for the assessment and that the assessment was made by simply determining and communication the criteria or methodology for arriving at a figure.

[71] Further, the IRD's letter of 24th June 2019, which indicated that calculation of a figure prior to the execution of the instrument would be 'premature', contradicts their assertion that merely stating the criteria/ methodology in June or July could have constituted an assessment. The fact that an amount was eventually calculated, and notice sent to the Bank in the letter of 16th January 2020 underscores that by that time the IRD appreciated that calculation and notification of the liability due to be paid by the Bank were essential

elements of the assessment. Otherwise, that letter could simply have referred the Bank to any of the previous letters which would have already stated the formula for calculating the duty.

[72] At least 4 dates of assessment were put forward by the respondents, which underscores the dilemma associated with the IRD's approach. If they were themselves unable to provide a definitive date of assessment, how was the Bank expected to become aware and to correctly apply the time limit for filing an appeal. Assessment of stamp duty under the Act is the statutory responsibility of the respondents, which is undertaken by the IRD. The authorities clearly say that even where the statute is silent, an assessment comprises i) calculation of an amount, ii) a record of the details of the assessment and iii) notice to the taxpayer. These basic requirements did not crystallize on any of the dates suggested by the respondents.

[73] Additionally, to say that the assessment was on any of several dates, with the effect that a taxpayer could be disqualify from the right of appeal for being out of time in relation to an unknown or conflicted date, is untenable. It is inconceivable that because the known practice has developed in relation to conventional notarial instruments, that the BBVO must be made to fit in the same mold. Indeed, the BBVO was a novel instrument which attracted stamp duty and the parties had a difference of opinion on the methodology for calculating the duty. If the sum assessed was stated in the letter of 22nd November or 18th December 2020 that would have completed the assessment and conveyed to the Bank the sum due. It would have provided the certainty which would have allow the Bank as taxpayer to exercise its right of appeal. I accept this to be a key requirement for the purposes of an appeal.

[74] I am guided by the principles elucidated by Singh LJ in **Aria**, that where the legislation is silent on the matter, the test of whether an assessment is made is an objective one and must involve a calculation of the tax by the assessor. It would be whether from the letters issued by the respondents a reasonable reader would have understood from reading these letters that they recorded and notified the Bank of a determination by the IRD of the amount of stamp duty assessed as being due and moreover, as being due immediately.

[75] The letters issued by the respondents between 24th June 2019 to 18th December 2019 simply could not be said to constitute an assessment. They contained the position of the respondents on the contending methods of computation put forward by the Bank and the IRD's methodology for the computation but no computation or statement of the sum immediately due. The letter from RFHL of 6th June 2019 was prior to the incorporation of the Bank and execution of the BBVO. In response the IRD stated categorically that an assessment was premature and would only be conducted after the BBVO was executed and the audited balance sheet presented.

[76] From September to December 2019, the Bank continued its overtures to vary the method of assessment and to secure a waiver of the payment of stamp duty. The respondents then confirmed Cabinet's refusal to waive stamp duty or to vary the IRD's method of computation. These exchanges culminated in the Bank's presentation of the unaudited balance sheet in the letter of 13th January 2020. Following this the letter of 16th January 2020 containing the calculation and sum to be paid as stamp duty on the BBVO was issued and conveyed to the Bank. It is my considered opinion that taken individually or collectively the earlier letters could not amount to an assessment. The only date on which an assessment was carried out was in the letter of 16th January 2020 and the Bank was notified on the following day.

[77] Section 16 of the Act requires that the appeal be made within 7 days of the date of assessment. Applying the provisions of subsection 36(3) of the Interpretation Act, the date of 16th January 2020 should not be included in calculating the period for filing the appeal. In the circumstances time would run from 17th January 2020 to the close of business on 23rd January 2020. Having filed the appeal on 23rd January 2020 at 12:30 hours, it is correct to say that the appeal was filed within the 7-day period required by law and is not out of time.

**Issue No. 2: In assessing the stamp duty payable on the BBVO, did the respondents err by applying the 2% ad valorem duty stipulated for Instrument Nos. 35 and 36 in the Schedule of Act, to the ostensible value of the assets conveyed under the BBVO, instead of applying same to the amount or value of the monetary consideration paid for the acquisition?**

[78] The law relating to liability for stamp duty is set out in the following provisions of the Act: -

> ***"3. Duties imposed***
>
> *(1) There shall be raised, levied, collected and paid unto Her Majesty for the public use of Saint Lucia upon and in respect of the several instruments specified in the Schedule, the several duties in such Schedule specified, subject to the exemptions contained therein and in any Act in force.*
>
> *(2) Cabinet may by regulations alter the said schedule by increasing or decreasing the amount of any of the duties therein specified or by annulling any of the said duties or by adding any instrument not specified in the said Schedule and imposing duties thereto or in any other manner as they may deem necessary.*
>
> *(3) The provisions of this Act apply to every instrument which may be declared by this or any other Act to be liable to stamp duty."*
>
> ***"35. Meaning of "conveyance on sale****"*
>
> *For the purposes of this Act the expression "**conveyance on sale**" **includes every instrument whereby any property or any estate or interest in any property upon the sale thereof is transferred to or vested in a purchaser** or any other person on his or her behalf or by his or her direction."*

[79] Instrument Nos 35 and 36 of the Schedule to the Act sets the rates of ad valorem duty to be paid by a purchaser at 2% on conveyance or transfer or sale of any movable property, and 2% on conveyance or transfer on sale of any immovable property.

[80] Sections 177 of the Banking Act states: -

> ***"177. Transfers to be subject to stamp duty***

*The transfer of, and vesting in, the transferee financial institution of an undertaking by a Banking Business Vesting Order shall, unless exempted, either generally or in some particular case, by the Banking Business Vesting Order, be subject to the provisions of the Stamp Duty Act as if the Banking Business Vesting Order was, in each of the cases in which the duty is imposed on the several instruments specified in the Schedule to the Act, an instrument between party and party within the contemplation of the Act."*

[81] It is not disputed that the BBVO attracts stamp duty as a conveyance on sale, as defined in section 35 of the Act and that 2% ad valorem applies according to Instrument Nos. 35 and 36 of the Schedule of the Act. However, the parties differ on the chargeable value to which the ad valorem duty should be applied.

[82] The Bank asserts that the rate should be applied to the monetary consideration or purchase price of $18,630,000.00 stipulated in the PSA and paid to BNS for acquisition of its banking operations. The respondents in several letters to the Bank state that the rate should be applied to the value of the underlying assets transferred under the BBVO, and in the IRD's letter to the Bank on 16th January 2020 the sum of $31,720,635.30 was conveyed as the stamp duty due and payable, at 2% ad valorem on the assets valued at $1.586,031,765.00. However, in written and oral submissions the respondents have recanted from this position, and now say that the rate should be applied to the value of the liabilities assumed by the Bank, which inclusive of equity, is also valued at $1.586,031,765.00, plus the purchase price of $18,630,000.00 stated in the PSA.

**The Bank's Submissions**

[83] The Bank main contention is that the taxing basis for the assessment is ambiguous because it is not expressly stated in the Act and must be deduced by applying the rules of statutory interpretation. This requires that the statute be construed as a whole, and unless the contrary appears, the same words must have the same meaning, and different words

should be given different meanings.[29] When read as a whole the language of the Act reveals that ad valorem duty is chargeable on the consideration for the sale and not the value of the property transferred. Any other construction would lead to anomalous or artificial results. In support the Bank relies on extracts from **Halsbury's Laws of England** regarding the presumption against anomalous, illogical, or artificial results.[30]

[84] In this regard, the Bank drew the Court's attention to various sections of the Act to demonstrate that the consideration or purchase price for a sale is the intended taxing basis in relation to Instrument Nos. 35 and 36 of the Schedule of the Act. Notably Instrument No. 39 which relates to a "*conveyance or transfer operating as a voluntary disposition inter vivos"* states that the corresponding duty payable shall be the same duty as a conveyance or transfer on sale, "*with the substitution in each case of the value of the property conveyed or transferred for the amount or value of the consideration for sale*." From this it is implied that the taxing basis for a conveyance on sale is intended to be the *"the amount or value of the consideration for sale".* The Banks interpretation of this provision is that that rate for stamp duty on *gifts inter vivos* is intended to be the same as a conveyance or transfer on sale, which is 2% ad valorem, except that the taxing basis requires that the rate be applied to the "*value of the property conveyed or transferred*" in place of the "*amount or value of the consideration for sale*", the latter being the basis to be used in the case of a conveyance on sale.

[85] The Bank relied on an extract from **Sergeant and Sims on Stamp Duties and Capital Duty[31],** which says where the taxing basis is the amount of the consideration, if the actual completion of a sale transaction is delayed, the purchaser will not be burdened with increases in stamp duty, which may arise if the purchased property increases in value. Each taxing basis entails different ramifications for a taxpayer, and the respondents cannot arbitrarily choose a different taxing basis for each instrument of conveyance, as there must be consistency and certainty on the taxing basis. This was underscored in the House of

[29] Halsbury's Laws of England Vol. 44(1) (reissue) at paragraph 1484
[30] Halsbury's Laws of England Vol. 44(1) (reissue) at paragraphs 1480 and 1482:
[31] 7th edn. p 122

Lords decision in ***WM. Cory*** & ***Son Ltd. v. Inland Revenue Commissioners*** **[1965]**[32] where the court refused to apply a liberal construction, to widen the natural meaning of the stamp duty legislation in question.

[86] The Bank defines the "*amount or value of the consideration for sale*" as the payment, which is made by a purchaser to a seller, in accordance with the meaning ascribed to the term "consideration" as used in contract law, and submits that in ***Central and District Properties v IRC***[33] it was said that "……*the natural meaning of consideration for the acquisition is the quid pro quo provided by or moving from the acquiring company*". Thus, the term "*value of the property conveyed*", speaks to the value of the property which has been transferred by the seller to the purchaser and the term "*value of the consideration for sale*", is an alternative to the "*amount of the consideration for sale*". The latter typically refers to monetary payments, and the former refers to cases in which purchasers do not make payments in money, but in kind, as was the case in ***Re Taylor's Transfer***[34] and ***Cormack's Trustees v IRC***[35]**.** It is the Bank's view that when the Act speaks of consideration for the sale as the chargeable basis for duty on a conveyance on sale and uses the term "*value of the consideration*" that is not the equivalent of the "*value of the property conveyed"*. The former is used simply to cater for the less typical kinds of payments which can arise in practice, to allow them to be monetized according to their value. Thus, it is the type of consideration, as distinct from the value of the property transferred, that ultimately falls to be charged with stamp duty.

[87] A comparison was made between section 35 and section 42 of the Act to illustrate that the "*amount or value of consideration*" is the basis upon which the rate should be applied.

[88] Section 42 provides:

> *"42.* ***Conveyance on any occasion except sale***

[32] 2 W.L.R. 924
[33] [1966] 1 WLR 1015
[34] (1897) 8 QLJ
[35] 1924 SLT 616

*Every instrument whereby any property on any occasion, except a sale, is transferred to or vested in a person, is to be charged with duty as a conveyance or transfer of property*."

[89] The Bank submits that this section demonstrates that a "***sale***" is a critical concept in the categorization of a document for stamp duty purposes. The Act treats a "***conveyance on sale***" in a different manner to other non-sale transactions, and in all cases where it speaks to the taxing basis for a sale, it provides for the consideration for such sale to be taxed. The Bank submits that this is apparent from sections 36 to 41 of the Act which are referenced in the Schedule under Instrument No. 35 and make provision for the calculation of stamp duty in cases where the consideration for the sale is not a one-off monetary payment. In the absence of these specific provisions, uncertainty may arise in the calculation of stamp duty, in these cases, and highly artificial or anomalous results will follow. These sections show plainly that duty is charged on the amount or value of the consideration and not on the value of the property conveyed.

[90] The following examples were cited:

1. Section 36 of the Act provides that (i) where the consideration or any part of the consideration for a conveyance on sale consists of any stock or marketable security, the conveyance is to be charged with ad valorem duty in respect of the value of the stock or security and (2) where the consideration or any part of the consideration for a conveyance on sale consists of any security, not being a marketable security, the conveyance is to be charged with ad valorem duty in respect of the amount due on the date thereof for principal and interest upon the security." This section requires the respondents to value the consideration, which is, the "stock or marketable security" or determine the amount due on a security assigned and assess the duty on that value.

2. Section 37(1) provides for that where the consideration, or any part thereof for a conveyance on sale consists of money payable periodically for a definite period not exceeding 20 years, so that the total amount to be paid can be previously ascertained, the conveyance is to be charged in respect of that consideration with *ad valorem* duty on such

total amount." There the consideration is the total amount of the periodical payments to be paid by the purchaser. Had the Bank agreed to pay BNS the purchase price of $18.6 million by way of periodical payments, the total of the periodical payments would have to be given a present value, which said value would then be used to calculate the stamp duty payable.

3. Similarly section 38 makes stamp duty payable on the consideration moving from the purchaser, where it consists either in whole or in part of the transfer of debts due to the purchaser. What is to be charged is the payment by way of assignment of a debt due to the purchaser to the vendor, such that the vendor becomes the creditor and that is deemed to be the value of the consideration. The respondents would in such a case be required to charge ad valorem duty on the outstanding value of the debt that was transferred by the purchaser.

4. Section 39 deals with the duty payable on conveyance in part consideration of improvements and proceeds on the basis that the conveyance is not chargeable with any duty in respect of such further consideration which comprises of any substantial improvement or addition to the property conveyed, which is undertaken by the purchaser, or of any covenant relating to the subject matter of the conveyance. In such a case the taxing basis for the conveyance on sale, is the consideration in respect of which the sale is made.

5. Section 40 titled "*Direction as to Duty in Certain Cases"* provides that where property contracted to be sold for one consideration for the whole is conveyed to the purchaser in separate parts or parcels by different instruments, the consideration is to be apportioned in such manner as the parties think fit, so that a distinct consideration for each separate part or parcel is set out in the conveyance relating thereto, and such conveyance is to be charged with duty in respect of such distinct consideration. The effect is that where a conveyance involves the transfer of property in parts or parcels by way of different instruments, the duty is to be calculated in each instance upon the "consideration" set out in the conveyance and not on the value of the property contracted to be sold.

[91] The Bank reckons that the foregoing sections (36 to 40) which pertains to conveyances on sale, all provide for 2% *ad valorem duty* to be charged on the consideration for which the sale is made and not the value of the property contracted to be sold. To accept the proposition that Instrument Nos. 35 and 36, which apply to conveyances on sale, authorizes the use of a wholly different taxing basis for the most typical type of conveyance on sale, namely a transfer for a one-off monetary payment, without any explanation for this departure is questionable.

[92] The Bank contends that the framers of the Act carefully prescribed the means for valuing certain types of consideration, to provide certainty on how the ad valorem rate is to be applied and there is nothing in the Act which suggest that monetary consideration was intended to be treated differently from other types of consideration. On the contrary the Act plainly seeks to bring other types of consideration into the realm of an amount or value, so that the *ad valorem* duty can be assessed in similar manner.

[93] The Bank asserts that several anomalies would arise if the value of the property sold was to be ascribed to instruments effecting conveyances on sale which do not fall within sections 36 to 40. By way of examples, the effect would be that where property is conveyed directly by a seller to a sub purchaser, duty would be chargeable on the consideration moving from the sub-purchaser**,** yet where the property is directly conveyed to a purchaser for a fixed sum of money, the purchaser would be liable to stamp duty assessed on the value of the property conveyed to him (section 40(4) and 40(5). Similarly, where property purchased for one consideration for the whole, is conveyed in parts *via* several instruments, the duty would be chargeable with respect to the distinct consideration apportioned for each part, yet where it is conveyed as an undivided whole, it would be charged on the value of the property transferred (section 40(1)). Again, where the consideration for a conveyance on sale consists of periodical payments, stamp duty must be calculated on the total amount of the said periodical payments and not on the value of the property transferred, but where it consists of a one-off payment, it would be charged on the value of the property (section 37(1)). If that was the case, the result would be complicated, arbitrary, and artificial, and indeed could lend itself to manipulation by taxpayers.

[94] The Bank further submits that section 11 (b) of the Act highlights the intended taxing basis with respect of all conveyances on sale, when it states that *"an instrument made for any consideration in respect of which it is chargeable with ad valorem duty, and also for any other valuable consideration or considerations is to be separately and distinctly charged, as if it were a separate instrument in respect of each of the considerations*." This demonstrates that the framers of the Act intended for all instruments for conveyances on sale to be treated consistently, by being made subject to duty on the consideration(s) in respect of which they are made.

[95] In response to the IRD's proposition that section 177 of the Banking Act requires that an undertaking be assessed for stamp duty, rather than the transfer of an undertaking be rendered subject to the provisions of the Act, the Bank argued that the Banking Act does not prescribe "*value of the property conveyed or transferred*", as the taxing basis for a BBVO. This conflicts with the requirements of the Act relating to conveyances on sale. Section 177 merely states that the transfer of an undertaking by way of a BBVO is to be subject to the provisions of the Act. It does not, specify how stamp duty is to be assessed and this is to be resolved by the provisions of the Act, which requires an examination of the nature of the transfers effected by the BBVO to determine into which category or categories of instrument it falls. If the respondents' argument is accepted, it would require that a BBVO be assessed on the value of the property transferred irrespective of the nature of the transfer. It cannot be that one can classify a BBVO as a conveyance on sale, for the purpose of imposing duty and at the same time reject the prescribed taxing basis as being the consideration for the sale. This will only lead to arbitrary and unjust results.

[96] With respect to the respondents' contention that the purchase price stated in the PSA is not relevant for assessment, the Bank makes the point that although instruments and not transactions attract stamp duty, not every instrument that arises during a sale transaction will attract stamp duty. It is only the one which effects the transfer that attracts the tax, as established in ***Oughtred v IRC***[36]**.** Under section 175(3) of the Banking Act, the BBVO is the instrument which ultimately transfers and vests the banking business in the Bank. In

[36] [1960] AC 206

determining the true nature of this instrument and its corresponding liability for stamp duty, the IRD is not necessarily confined to the BBVO as the transferring document. Since the Act imposes the liability on the amount or value of the consideration for the transfer, if this is not clear on the face of the instrument, the respondents will have to look to all the relevant documents and surrounding circumstances to determine the chargeable value.

[97] The facts in **Oughtred**, concerned an oral agreement made between a son (the transferor) and his mother (the transferee) by which the son's reversionary interest in 200,000 shares would be transferred to his mother, in exchange for a transfer by the mother to the son of 72,700 shares which the mother owned absolutely in another company. It was not executed by a direct transfer of the son's reversionary interest to his mother, but by the son authorizing the trustees of the settlement to transfer the 200,000 shares to his mother with the intent that her life interest should be enlarged into an absolute ownership in them. The 200,000 shares were transferred to the mother "*in consideration of 10s*". The court of appeal accepted that this simple transfer was in fact a conveyance on sale, which attracted stamp duty on the consideration or *quid pro quo* given by the mother (her 72,700 shares) for the transfer of her son's reversionary interest. The court looked to the true substance of the transaction effected by the transfer, which was in turn gathered from all relevant surrounding circumstances.

[98] The Bank submits, that **Oughtred** demonstrates that the consideration does not have to be apparent on the face of the instrument but may be gleaned from other relevant documents described as "*interdependent parts of the same transaction*". Thus, contrary to the respondents' contention that the purchase price stated in the PSA is not relevant in assessing the stamp duty payable of the BBVO, it is of central importance to this assessment.

**The Respondent's Submissions**

[99] The respondents submit that the *"value of the undertaking being transferred"* is the respondents' evaluation of the actual value paid or exchanged to effect the transfer. The evaluation is in accordance with the concept of consideration, but the Bank argues from

the perspective of pure *"contractual consideration",* while the respondents argue from the perspective of the "*actual/true consideration*". The latter is what equates to the *"value of the transfer",* on an interpretation of the Act or by applying the very same legal principles contained in the cases cited by the Bank.

[100] The respondents say that the subject matter of section 35 of the Act is the conveyance of property. The words *"on sale"* simply denotes the mechanism by which the property is conveyed, and the reference to stamp duty in the related instruments refer to the subject matter of the property transferred. Thus, the duty is to be applied to the property, in terms of the value of the transfer. The expression "*ad valorem"* is a Latin expression meaning *"to the value"* or *"according to value"* or *"in proportion to its value".* In the context of the Act, this may be rightly taken to mean, *"according to the value "* of the property transferred, as assessed. Section 35 and Instrument Nos. 35 and 36, do not include the expression "2% *of the value of the consideration".* Parliament intended that on a conveyance on sale, duty was to be applied to the value of the property transferred and not the value of the consideration, because consideration is not always monetary in nature. To the duty to the contractual consideration, would yield unsatisfactory results under the Act, when considered in the context of the definition of "*consideration"* in article 917A of the Civil Code[37], which means the cause or reason of entering a contract or of incurring an obligation, and may be either onerous or gratuitous.

[101] The respondents submit that if stamp duty is applied strictly to the value of the contractual consideration, then the need for an assessment would be redundant. It is only because stamp duty is chargeable on the value of the property transferred, that it necessitates an assessment to arrive at the actual value or consideration for the property transferred. Additionally, contractual consideration does not always represent the true value of property transferred and may be manipulated, thus an assessment is required to ascertain whether the contractual consideration stated represents the real value exchanged between the contracting parties.

[37] Cap 4.01 of the Revised Edition of the Laws of saint Lucia

[102] The respondents agree that the Act is to be construed as a whole, and in so doing it reveals that different rates are applied to different instruments. However, it does not follow that because a monetary value is attached to the contractual consideration in one instance, that only the value of contractual consideration must be applied in all other instances. Parliament legislated in all instances but one (conveyance on sale), that value is to be based on the contractual consideration, which suggests that the omitted instance is not a mere oversight, but an intentional omission which must be given effect. Value in that omitted instance is based on some measure other than contractual consideration.

[103] In that regard, the respondents say that reliance on Instrument No. 39 of the Schedule to deduce the chargeable basis for a conveyance on sale offers little assistance as it is self-contained. The only connection which it has with Instruments 35 and 36 is the same ad valorem rate. It is not that voluntary dispositions do not have consideration, **Re Robb's Contract**[38] is authority for the proposition that there can be consideration in respect of a voluntary disposition. In that case the court was required to adjudicate on whether the consideration on a voluntary disposition was adequate for stamp duty purposes and said:

> *"…The sub-section continues: "and (except where marriage is the consideration) the consideration for any conveyance or transfer shall not for this purpose be deemed to be valuable consideration where the commissioners are of opinion that by reason of the inadequacy of the sum paid* as *consideration or other circumstance the conveyance or transfer confers a substantial benefit on the person to whom the property is conveyed or transferred." That contemplates the expression of an opinion by the commissioners to ensure that conveyances for inadequate consideration* do *not slip through the net..."*
>
> *"The object of compelling the submission to the commissioners of every voluntary disposition is, from the revenue point of view, clear. The legislature obviously was anxious that the authorities should have the opportunity of scrutinizing every voluntary disposition or every document purporting to be a voluntary disposition, to see whether or not it was a voluntary disposition, whether the consideration was*

[38] (1941] Ch. 463 at 474

*adequate, and whether or not, under some form of camouflage, the instrument was escaping the burden of the stamp law..."*

[104] Relying on **re Robb's Contract** and **Baker and Another v Inland Revenue Comissioners**[39] the respondents submit that a better interpretation of Instrument No. 39, is that the consideration referred to there is to be assessed on the value of the property conveyed and not on contractual consideration. There is nothing in that interpretation which would yield an anomalous or artificial result if the duty on a conveyance on sale is also assessed on the value of the property transferred.

[105] The respondents further submit that in other jurisdictions, stamp duty on the value of the property conveyed is what is chargeable. In **Chin Choy alias Chong Kim v Collector of Stamp Duties**[40] a taxpayer executed an agreement to purchase a property for $49,000. During the interval between the agreement and the transfer, the value of the property increased substantially to $69,000 and stamp duty was assessed on the market value of the property. The taxpayer appealed and all three courts (including the Privy Council) upheld the assessment on the market value of the property. This assessment was based on an application of s.12A of the UK Stamp Ordinance 1949 which authorized the collector to assess stamp duty either on the value of the consideration or the value of the property, whichever was the higher. The court noted that the enacted was introduced because of the "*common practice of under-valuing the property by showing* a *false consideration ..."* The respondents argue that although the Act does not have a similar provision, it contains no direction on how a conveyance like the BBVPO is to be assessed. Consequently, valuing the true consideration or the actual value of the property transferred are equally valid methods of assessment. Further, the **Chin Choy** case clearly demonstrates that assessing the value of the underlying property is by no means illogical, anomalous, or arbitrary but may well represent the fairest assessment of ad valorem duty on a conveyance on sale. In the circumstances the BBVO must be assessed on the true value of the banking business transferred.

39 [1923] 1 KB 323
40 [1981] STC 564

[106] The respondents also argue that the meaning given to the term 'consideration' under the Act, must be consistent with article 917A of the **Civil Code** and not the treatment given to consideration under the UK Stamp Duty Act, simply because the Act was modelled on the UK Act. In this jurisdiction consideration is not only monetary payment, but also includes all forms of onerous undertakings[41]. Thus, under sections 36 to 39 of the Act consideration is not simply taken to be the face value stated as contractual consideration, but rather the actual value of the consideration in the various circumstances. For example, under section 36 (1) consideration, which consists of the transfer of stock, is taken to be the value of the stock. For periodical payments under section 37, the consideration is the total value of each payment. Likewise, consideration of a debt under section 38, it is the value of the debt. For the consideration in part due to improvements by the purchaser, under section 39, no further duty is charged for such improvement. Thus, the framers of the Act did not specifically state how stamp duty on a simple conveyance on sale was to be assessed because it was generally expected that the contractual consideration paid for the property would ordinarily reflect the market value of the property transferred and would not have contemplated a conveyance on sale by way of a BBVO.

[107] The respondents further say that the case of **Re Taylor's Transfer** cited by the Bank supports their position to assess not only the stated contractual consideration, but also the actual value of the property transferred. There the executors of a will, at the request of all the beneficiaries, executed an instrument purporting to be for the consideration of 10s, by which they transferred 14,775 fully paid-up shares in a gold mining company. It was held that the instrument was a conveyance on sale and that stamp duty was chargeable on the value of shares transferred and not on the 10s consideration or the contractual amount. Further ***Central and District Properties*** cited by the Bank supports the position that the commissioners were correct to include the negotiable option at a price offered to shareholders as part of the consideration, which induced them to part with their shares.

[41] Newman (1977), "The Doctrine of Cause or Consideration in the Civil Law," The Canadian Bar Review, XXX, 662-691.

[108] The respondents rely on paragraphs 1132 of **Halsbury's on Taxation Law (Vol. 99)** which is of similar effect where it says:

> "*The terms of the instrument itself in general decide the question whether any, and if so what, stamp duty is chargeable. The true meaning and effect of the writing, not what the instrument calls itself, decides this question. Accordingly, it has been said that in determining the liability of an instrument to stamp duty, regard should be had to the substance of the transaction rather than to its form. It seems, however, that the substance of a transaction is to be ascertained by reference to the true legal effect of the instrument which implements it…"*

[109] Paragraph 1152 of the text states:

> "Ad valorem *duty on* a *transfer* on sale is *imposed by reference to the amount or value of the consideration for the sale. In order to ascertain the consideration for the sale, regard may be had to all the* circumstances *which exist when the instrument* is *executed, and not merely to the consideration stated in the instrument. Where an agreement* was *entered into for the sale of property to a company for consideration which included the* issue *to the vendor of all the company's authorized capital, and the agreement* was *carried out by a conveyance of the property* expressed *to be in consideration of* a *small cash payment only, duty* was *held to be chargeable* on *the value of the property conveyed which would be reflected in the real value of the* shares, *even though it many times exceeded their nominal value. Where the life tenant of settled* shares *agreed orally with the reversioner to exchange other* shares *owned by her for his reversionary interest in the settled* shares, *and the transaction,* so *far* as *it related to the settled* shares, was *completed by a transfer of those* shares *by the trustees of the settlement to the life tenant for a nominal consideration, the transfer* was *held liable to ad valorem duty on the value of the* shares *received by the reversioner from the life tenant by way of exchange under the agreement."*

[110] The respondents also rely on an article referenced by the Bank, **Stamp Duty: Settlement and Conveyances** to say notwithstanding that "*the liability of any particular document to duty was to be determined upon the face of the document itself*," the author went on to say:

> *"…the High Court unanimously held that extrinsic evidence may be admitted to determine the real nature of the transaction to which the instrument relates and to ascertain the amount of duty payable… The question whether an instrument is duly stamped, or as to what stamp is required, is in general determined by what appears upon the face of it to be its legal operation when first executed so as to be capable of that operation, but the Court is not bound by the apparent tenor of an instrument, and will decide according to the real nature of the transaction, receiving, if necessary, extrinsic evidence..."*

[111] The article further states: "An *important application of this provision occurs upon the sale of a business. If the purchaser agrees to discharge the vendor's business debts, the amount of these debts will be treated as part of the consideration".*

[112] The respondents therefore submit that on examination of the BBVO and the Bank's evidence, it was agreed that the Bank would discharge BNS's liabilities, and this should rightfully be treated as part of the total consideration paid by the Bank to BNS. Thus, the true value of the consideration is not only the one-off cash payment of $18.6 million attributed to the goodwill, but also the undertaking to pay BNS' liabilities for which it acquired BNS' assets in return. On that basis it would be correct to assess the stamp duty on the value of the assets transferred or the liabilities assumed, as either yields the same result. The Act does not require that for every transaction, the IRD must simply identify the stated amount of the contractual consideration and apply the ad valorem rate without more. To say that the Bank acquired a banking business valued at $1.5 billion in liabilities for $18.6 million, and that is truly reflective of what was contractually exchanged, is inaccurate and is not what is contemplated by the Act. Consideration in this case should not be equated merely the purchase price paid for the goodwill.

[113] In concluding the respondents say that since the BBVO does not state the *"consideration"* or the *"value of the conveyance",* the balance sheet is the only means by which the amount or value of the transfer could be assessed. The liabilities transferred represents the consideration for the transfer of the assets and accordingly, the value of the assets is the true value to which stamp duty is to be applied. In any event applying it to the liability figure produces the same outcome and yields no artificial or anomalous result. To apply the stamp duty to the purchase price is what would yield artificial and anomalous result, as it does not remotely resemble what was sold and what was in fact conveyed. The respondents persist that BBVO made no mention of the PSA, and it is not relevant for ascertaining the amount or value of the consideration, moreover as it only represents goodwill. As the Bank has raised it, the result is that the total consideration for the undertaking is now the value of the asset acquired plus the goodwill value. In other words, the Bank has paid $18,630,000.00 to acquire the goodwill and would have acquired the assets by agreeing to assume the liabilities. This is the true commercial reality on which stamp duty is to be applied and is consistent with the findings in **Re Taylor's Transfer, Central and District Properties** and the pronouncement in **Tolley's Stamp Taxes 2019-20/Part Two** that **"**An *instrument made for any consideration which is chargeable to ad valorem duty is separately charged in respect of any other valuable consideration."*[42]

**The Bank's Reply**

[114] The Bank opposed the respondents' new position that the assessment should be calculated on the value of the underlying liabilities plus the consideration in the PSA, as the pleaded case was that the IRD was entitled to assess stamp duty on the value of the assets transferred. The calculation of duty in the IRD's letters was always premised on the value of the assets of the banking business conveyed. Thus, the Bank has been denied the opportunity to respond and lead evidence on that matter, as it was never the respondents' declared position.

[115] To the respondent's contention that the "*actual/true value of the consideration*" is equivalent to the "*value of the transfer*," the Bank submits, although in many commercial

[42] Chapter 67.1

transactions the figures may not give rise to large discrepancies, these are distinct legal concepts which give rise to different tax burdens. If the phrase "amount or value of the consideration" were to be treated as coterminous with the phrase "value of the property transferred", there would be no need to employ different terms.

[116] The Bank maintains that the statutory basis for calculating stamp duty on a sale is the amount or value of the consideration, and the IRD would need explicit statutory authority to use the property value as an alternative basis. Such a provision featured in section 74(5) of the UK Finance Act[43] discussed in **re Robb's Contract and Baker v IRC** which the respondents relied upon as authority to use the value of the property transferred as the basis for assessment. However, in the present case there is no such equivalent in the Act and the simple point to be taken from these two cases, which was reiterated in the Privy Council case of **Lap Shun Textiles Industrial Co. Ltd v Collector of Stamp Revenue**[44] is that a conveyance on sale is chargeable by reference to the consideration for the sale. It can only be chargeable by reference to the value of the property transferred, if is there is a statutory provision that allows the respondents to 'deem' the instrument of sale a "voluntary disposition *inter-vivos*".

[117] In relation to the respondents' argument that as a matter of interpretation duty must be applied to the "property" being transferred, because: (i) neither section 35 nor Instrument Nos. 35 and 36 includes the expression "of the value of the consideration"; (ii) in Saint Lucia "consideration is not always monetary in nature" and (iii) such interpretation would render an assessment redundant; the Bank contends that there must be some basis for assessing duty and it cannot be that the IRD can arbitrarily move between the value of the consideration and the value of the property transferred. If as the respondents say "the value of the transfer as assessed" is the relevant taxing basis, then the assessment basis is open to the discretion of the IRD, and such interpretation would conflict with the canon of certainty to be applied to taxing legislation.

[43] (1909 -1910) Act 1910 UK
[44] [1976] AC p 530

[118] The principle of tax certainty was considered and applied in **Vodafone 2 v Revenue and Customs Commissions**[45] where the court said:

> "110. *I accept that under the principle of legal certainty the person affected by legislation must be able to foresee the manner in which it is to be applied and I would also accept that this must particularly be so where the legislation has financial consequences for him such as flow from the imposition of the requirement to account for VAT. A taxpayer has a legitimate expectation that this principle will be observed. Moreover, a taxpayer is entitled to structure his business so as to limit his liability to tax and take advantage of any loopholes he can find…"*

[119] The Bank maintains that assessments will not be redundant if duty is applied on the contractual consideration, as there will be cases where the IRD will have to assess instruments which are not conveyances on sale, such as voluntary dispositions. Additionally, even in conveyances on sale, there are various payments in kind, or alternatively, instances where the IRD may take the view that the consideration should be other than that contended by the taxpayer. A similar argument was rejected by the Privy Council in **Lap Shun** where the Board said:

> "*First, it does not in the least follow, that if the collector succeeds in the present case, every conveyance or transfer on sale will require an official valuation of the property or an adjudication of the stamp duty. Any stamp authority has to start from the point that valuation of much, if not most, property is a matter of judgment and is only possible within fairly broad limits, and that sound, if not the best, evidence of value is to be found in bona fide, arm's length dealings. It is for this reason, that when section 27(4) authorises the substitution for the agreed consideration of the " real " value, it requires that a substantial benefit for the transferee should be found to exist. In the great majority of cases the normal procedure of presentation for stamping and routine stamping according to the stated consideration will continue to be followed: such cases as the present will*

[45] [2009] 3 CMLR 30

*continue to be exceptional. Thus, their Lordships on this account do not envisage any dislocation of the normal process of stamping*."

[120] The Bank submits that the respondents' argument that "substitution" in Instrument No. 39 means substitution of the "*amount or value of the consideration for sale*" for voluntary dispositions *inter vivos* because a voluntary disposition, like a sale, can be made for valuable consideration, is wholly misconceived. The reason being that conveyances or transfers which operate as voluntary dispositions are dispositions of property made for no consideration and this factor distinguishes them from sales. What **re Robb's Contract** and **Baker v IRC** illustrate, are examples of transactions for sale, which by virtue of the relevant parts of the English Finance Act (which are unenacted in the Act), were brought within the definition of 'conveyances or transfers operating as "voluntary dispositions" and made chargeable by reference to the value of the property. In other words, these English provisions are anti-avoidance clauses targeted at transactions which may be, or appear to be sales, but due to the inadequacy of the consideration involved, are by statute treated as a conveyance operating as a voluntary disposition, which attracts stamp duty on the value of the property conveyed.

[121] The Bank submits that such provisions are irrelevant to the Act because they form no part of it. Instead Instrument No 39 render conveyances and transfers which operate as voluntary dispositions, (involving no sale and no consideration) liable to the same duty but with the substitution of the value of the properties conveyed for the amount or value of the consideration in the case of a sale. There is no equivalent deeming provision in the Act, and such a detailed and carefully crafted provision cannot be "read in" by the Court. The scope of Instrument No. 39, in the absence of the equivalent to section 74(5) of the UK Finance Act, applies *only* to conveyances and transfers operating as voluntary dispositions, which means dispositions made for no consideration. The Bank submits that the important aspect in ***Baker*** is the court's recognition that section 74(1), which is replicated in part in Instrument No. 39, would not on its own, capture dispositions made for valuable consideration and was only apt to capture voluntary dispositions that are not made for consideration.

[122] The Bank further submits that ***Lap Shun*** follows the same reasoning and is of particular interest because there the collector acted as the respondents have done in this case by taxing a genuine conveyance on sale for valuable consideration, as though it were a voluntary disposition chargeable on their assessment of the value of the property transferred. The question on appeal was whether when a sale has been made between parties at arms' length, in good faith, for an agreed consideration, it is open to the collector to charge the conveyance as one operating as a voluntary disposition inter vivos, with stamp duty based on the value of the property. The Bank says the important distinction between the present case and ***Lap Shun*** is that in ***Lap Shun*** it was found that on a proper construction of section 27(4) of the Hong Kong Ordinance, (the equivalent to section 74(5) of the UK Finance Act 1910), the collector was statutorily entitled to do so. Therefore, ***Lap Shun*** lends support to the proposition that in the absence of the specific deeming provision, a conveyance on sale, which carry a taxing basis referable to the consideration in question, cannot be taxed as though it were a voluntary disposition, even where the taxing authorities may hold the view that the value of the consideration does not reflect the true value of the property.

[123] The Bank asserts that **re Robb's** contract is of no appreciable relevance and does not support the respondents' arguments. It did not involve a sale for consideration, but rather a conveyance of land on trust for sale. The question was whether the trust instruments should be presented to the commissioners for adjudication of stamp duty as required by subsection 74 (2). It was held that because of the sweeping nature of section 74, the trust instrument did fall within the meaning of a voluntary disposition.

[124] The Bank submits that by implication Instrument No 39 demonstrates that conveyances on sale are to be assessed on the amount or value of the consideration for the sale. Stamp duty falls to be assessed on the true consideration paid for the transfer of property, if there is no distinction between the consideration paid and the property transferred. In this case, the true and genuine consideration for the transfer was $18.6M. There was no finding by the IRD that this was not the genuine or full consideration paid to BNS. In fact, the IRD always maintained that the proper basis for the assessment was the value of the banking business transferred and were aware of what was paid to BNS.

[125] The Bank continued, that because the BBVO has no stated value or consideration on its face, this does not warrant a solemn exercise in addressing the value of the transfer and/or the value of the actual consideration paid for the transfer". The cases cited which show that one must ascertain the "true" amount of the consideration have refuted any suggestion that because the amount of the consideration for the sale was not written in the BBVO this somehow required the respondents to assess stamp duty on something other than the amount or value of the consideration applicable to a conveyance on sale.

[126] The Bank further contends that **Re Taylor's Transfer** does not support the contention that in the case of a sale one can look to the value of the property for the purpose of imposing stamp duty. The issue in that case turned on what in fact was the chargeable consideration for the transfer of property and emphasized that it is the consideration, which is to be charged and, in this case, it was the value of the shares transferred.

[127] In response to the respondents' application of article 917A of the Civil Code, to expand the meaning of "consideration" in the Act, the Bank says this application is misplaced. The meaning of "consideration" for stamp duty purposes must be informed by the Act itself and it is not that everything which may constitute consideration in one context, will necessarily constitute chargeable consideration for the purposes of the Act. Article 917A is confined to the use of the term consideration when used with respect to contracts. Thus, consideration in the normal sense, and as reflected in article 917A and the Act, is a concept which speaks to what is given by a purchaser in exchange for a transfer of something to him from a seller. There is nothing in article 917A which support a charge being imposed on the value of the property transferred, and any such validation must find provenance in the Act itself.

[128] To the respondents' argument that the IRD is entitled to look at facts and circumstances other than the document to be stamped and the liability in the balance sheet which was assumed by the Bank is to be taxed, the Bank says the argument is premised on the fact that it is indeed the consideration and not the market value of the property transferred that must be assessed. This rests on the principle, that the discharge of a vendor's debts may be treated as part of the true "consideration" and flows from section 38 of the Act which is

modelled from section 57 of the 1891 UK, Stamp Act. It allows the IRD to treat debt as consideration or part thereof in certain circumstances. This section was enacted as an anti-avoidance provision and seeks to capture cases whereby paying off debt charged on property (e.g., a mortgage), the value of the consideration is enhanced, or where instead of paying the vendor directly for the property transferred, the purchaser pays in kind by extinguishing debt that was owed by the vendor, whether to the purchaser himself or third parties. In each case the payment of the debt co-relates to the true amount paid for the property since the payment is in substance a payment in kind, such that the purchaser should pay stamp duty on what he had to pay to the vendor, to acquire the unencumbered property. In those cases, the property intrinsically carried the value of the purchase price plus the amount of debt which encumbered it and was discharged by the purchaser.

[129] In contrast, the liabilities assumed were liabilities that the Bank was put in a position to discharge out of the business assets. BNS parted with liabilities and also with its assets of equal value. It therefore did not sell property subject to "debt" in the sense contemplated by section 38. The Bank acquired assets of value but also acquired debts of equal value. It did not in consideration of $18.6 million find itself enriched with a business worth over $1.5 billion. These liabilities are clearly not the kind that would fall within the meaning of the debts referred to in section 38.

[130] In support, the Bank relied on the case of **Mortimore v Commissioners of Inland Revenue 2 H&C 836**. There, the court was called upon to address the question whether a sale of mortgaged property was chargeable to stamp duty on the mortgage debt. The Court looking to the forerunner to the later section 57 in the 1891 UK Act, said:

> "*…….where property is sold and is conveyed subject to a debt or sum of money to be afterwards paid by the purchaser the same shall be deemed to be purchase money, in respect whereof ad valorem duty is to be paid*".

[131] In that case stamp duty was payable on the mortgage since the moneys to be paid to acquire the property in question, included the debt and this did not change simply because instead of being paid to the vendor it was paid to a third-party mortgagee. This was a

property worth £15,082 5s plus £38,000 (the debt) and in effect this is what the purchaser company agreed to pay to get the vendor to part with it. Directly following the purchase, the reversionary company would have had in hand a property which could be sold for £53,082. The Bank contends that the above scenario is by no means analogous in the context of a banking business being sold where the moneys owed by the business when compared to the moneys due to the business are of the same value. The value of the business would be its aggregate value of assets minus liabilities, or even as in this case represented by the business' future earning potential, termed "the goodwill". It cannot be said that the Bank would have had in hand, immediately upon purchase, a business which it could sell for over $1.5 billion, and thus could fairly be assessed for stamp duty, to the value of this sum.

[132] The Bank submits that section 38 must be interpreted in the context of its scope and purpose which is to avoid the underpayment of stamp duty by extinguishing or paying off a vendor's debts as an inducement for the transfer in question, instead of simply paying the vendor directly in cash for the transfer. A purposive approach was adopted in **Swayne v Commissioners of Inland Revenue [1899] 1 QB 335**, where the Court refused to give an impractical interpretation to the section. That case involved the sale of a lease of two houses for £503. It was accepted that stamp duty was payable in respect of the monetary consideration expressed in the contract. The issue for the court was whether the commissioners were correct in concluding that stamp duty was also chargeable on the yearly rent payable for the houses. The commissioners acted under section 57 of the UK Stamp Act 1891, which said where the property is conveyed subject to the payment of any money, the money is to be deemed part of the consideration in respect of which stamp duty is chargeable. It was held that there was no authority under that section to charge stamp duty on the yearly rents. The court acknowledged that the words of section 57 were very wide but looked to the legislative purpose of the section in dis-applying it to these circumstances, which were plainly outside its intended scope. In this case, if the Bank paid off moneys owed by BNS with the moneys in the possession of BNS or due to it, it would not be left with any estate after discharge of the money debts of BNS.

[133] Thus, the Bank says there is no evidence of any additional chargeable consideration paid by the Bank that could be classified as representative of the true value of the business. There is also no evidence, or finding, that the purchase price stated in the PSA was manipulated or understated. What the Bank acquired was a business which was valued at $18.6 million because that is what the business was worth, after netting off its assets and liabilities. Had the Bank agreed to pay debts owed by BNS as a condition of the sale, which caused BNS to reduce the purchase price to $18.6 million, then different considerations would arise, but this has not occured on the facts.

[134] In relation to the allegation of creative accounting, the Bank submits that to suggest BNS as an unaffiliated third party of equal bargaining strength with the Bank, would in fact have accepted $18.6 million for a business which was valued at $1.5 billion is staggering. BNS did no such thing and, sold a business which was valued at around $18.6 million. On one hand the transaction relieved BNS from debt, but on the other hand, it simultaneously required the assets needed to neutralize that debt. From a practical perspective, BNS was not enriched to the extent of its discharged liabilities, as occurred in **Re Taylor**. There was no large discrepancy between the value of the business transferred and the consideration which was given for it. The Bank acquired both the liabilities and co-extensive assets. BNS was not simply relieved of debt, as consideration for parting with its business assets as it also parted with its assets of an equal value. Moreover, BNS was aware that it was selling its business as a going concern, which carried intrinsic value, and as such the business was valued at $18.6 million and that is what the Bank purchased and paid.

**Analysis**

[135] The controversy here hinges on the chargeable value to which the ad valorem duty applies. The positions put forward for the Court's consideration are:

1. The respondents' proposition as contained in various letter to RFHL and the Bank, that ad valorem duty should be applied to the value of assets transferred to the Bank, or alternatively to the value of the liabilities, both of which are contained in the unaudited balance sheet, plus the purchase price paid for goodwill, as stated in the PSA.

2. The Banks proposition that ad valorem duty should be applied to the contractual consideration or purchase price contained in the PSA, which was paid by the Bank to acquire the BNS banking business as a going concern.

[136] It is notable that the Act does not expressly state the chargeable basis for a conveyance on sale except that in Instrument Nos.35 and 36 it is said that such conveyances will attract duty at the rate of 2% ad valorem, with Instrument No. 35 applicable to conveyance of moveable property (specifically referenced in sections 35 to 41 of the Act) and Instrument No 36 applies to conveyance of immoveable property.

[137] It is commonplace that the Act should be read as a whole and as such, there is merit in the Bank's argument that by implication the taxing basis in relation to a conveyance on sale is the amount or value of the consideration for the sale. This inference can be drawn from the stipulation in Instrument No. 39 which provides the chargeable basis for voluntary dispositions. It says that the ad valorem is "*the same as a conveyance or transfer on sale, with the substitution in each case of* ***the value of the property conveyed*** *or transferred,* ***for the amount or value of the consideration*** *for sale*". This in my view provides a sensible basis for concluding that the chargeable value for a conveyance on sale is ordinarily the *"amount or value of the consideration for the sale"* The examination of sections 36 to 40 of the Act, advanced by Learned Counsel for the Bank, summarized at paragraphs 84 to 94 above, lends support to this outcome.

[138] In its purest form consideration in this jurisdiction is usually a monetary payment by a purchaser to a seller to acquire property, whether moveable or immovable. The typical conveyance on sale attracts duty on the contractual consideration or purchase price paid for the property and this amount is usually stated on the face of the instrument of conveyance, which is normally in the form of a notarial deed. It is accepted that consideration is not always in monetary form, hence the provisions of sections 36 to 41 of the Act prescribe how other form of consideration should be monetized for the purposes of ad valorem duty. It is therefore correct to say that the starting point for assessing duty is the contractual or monetary consideration paid by a purchaser to a seller, and is ordinarily expected to reflect the market value of the property sold.

[139] A difficulty arises with the BBVO which is liable to stamp duty by virtue of section 177 of the Banking Act but does not contain the contractual consideration paid. It is categorized as a conveyance on sale under section 35 of the Act to which Instrument Nos. 35 and 36 relate. The respondents say that the framers of the Act never contemplated a conveyance in the form of a BBVO and because the amount or value of the consideration is not stated anywhere in that instrument, it is necessary to ascertain the true value of the property conveyed to the Bank. The Bank agrees that the respondents are entitled to ascertain the true consideration, but this is a concept which remains distinct from the value of the property transferred. In any event, this exercise will only lead to the PSA as the central agreement which stipulates the consideration paid to BNS, therefore this is not a case where the consideration is unascertainable, even if it does not appear in the BBVO.

[140] The point was aptly illustrated in **Oughtred** that consideration need not be on the face of the instrument of conveyance which attracts duty but will be evident from the documents which form inter-dependent parts of the transaction. There, the court looked to the true substance of a transaction effected as a simple transfer, which in turn was gathered from all the relevant surrounding circumstances. It was held that a taxing authority may look outside the four corners of the instrument if the consideration is unclear from the instrument itself. The BBVO is a unique and novel instrument for the purposes of the Act, in that it is made by the Minister of Finance and transfers the banking business in a manner which does not involve a direct transfer between the Bank and BNS, as occurs in conventional conveyancing. It is however categorized as a conveyance on sale because it is the instrument which vests the banking business in the Bank and by extension implements the PSA executed between the Bank and BNS. In that regard, I accept that the respondents were entitled to examine extrinsic evidence by looking to relevant underlying documents and surrounding circumstances to ascertain the true consideration for the sale. This point was clearly articulated by Learned Counsel for the Bank as stated at paragraphs 96 to 101 above.

[141] The respondents' initial position was that the PSA was not mentioned in the BBVO and is irrelevant to the assessment, moreover as it only represents goodwill which is not the only

chargeable consideration. Thus, the balance sheet is the other means by which the true consideration could be ascertained. I have examined the BBVO and quite contrary to the respondents' suggestion, in clause 2 the term "*agreements*" is defined to include (a) the Purchase and Sale Agreement made on the 27th day of November 2018 as amended by the Amended and Restated Purchase and Sale Agreement made on the 24th day of September. 2019, between the BNS and RFHL, and (b) the Local Purchase Agreement made on the 20th day of September 2019 between the BNS and the Bank (the PSA). Clause 3 of the BBVO states *inter alia* that the banking business of the transferor (BNS) as intended by the "*agreements"* is transferred and vested in the transferee (the Bank). Clause 6 of the PSA states that "*The Purchase Price shall be allocated to the Local Purchased Assets as set forth in Schedule 'C*". This Schedule contains a BNS NAV[46] Statement as of 16th September 2019 which discloses total assets and total liabilities of equal value, and goodwill of $18,630,000.00. The PSA clearly featured as one of the documents referenced in the BBVO and is to be considered an inter-dependent part of the sale. It is also the document which contains the purchase price equated to goodwill, paid to BNS for the acquisition. The BNS updated unaudited balance sheet for the year ended 31st October 2019, (submitted the IRD under cover letter of 13th January 2020) will also form part of the extrinsic evidence to be examined and these two documents are the ones which will inform the chargeable value in relation to the BBVO.

[142] The Court must now consider whether it is the "*contractual consideration*" in the PSA as the Bank asserts, or "*the actual/true consideration"* as the respondents asserts, which should form the chargeable basis for duty. Whichever way it is cast because the BBVO itself does not contain any stated consideration; it is imperative that each of these documents be examined to determine the sum which best represents the chargeable value for this instrument.

**Instrument No. 39**

[143] Instrument No 39 in the Schedule of the Act concerns a conveyance which operates as a voluntary disposition *inter vivos*. It attracts the same duty as a conveyance on sale, with

[46] Net Asset Value

the substitution in each case of the value of the property conveyed, for the amount or value of the consideration for sale. Much was said on the interpretation to be accorded to this stipulation, which the Bank read as referring to gifts only, so that the substitution of "*the value of the property conveyed*" is in keeping with the fact that no monetary or other consideration is paid in this type of conveyance. This led to the Bank's conclusion that once there is a contractual consideration in a conveyance on sale, by implication it is to such consideration that the ad valorem duty applies.

[144] The respondents dispute this interpretation on the assumption that it is wrong to say that voluntary dispositions are gifts only and there are instances where the courts have treated conveyances with consideration to be voluntary dispositions and assessed duty on the value of the property conveyed, rather that the contractual consideration. In that regard the respondents cited **re Robb's Contract** and **Baker v IRC** which both illustrate instances where a conveyance on transfer not made in good faith and for valuable consideration were deemed voluntary dispositions *inter vivos* which are chargeable by reference to the value of the property conveyed. These decisions turned on express provisions in the respective statutes being considered, which were anti-avoidance provisions targeted at transactions which appear to be sales, but due to the inadequacy of the contractual consideration are deemed to be voluntary disposition, which attract stamp duty on the value of the property transferred. It is notable that these rulings were premised on subsection 74(5) of the UK Finance Act 1910, for which there is no equivalent provision in the Act.

[145] The Bank referenced the **Lap Shun** case which considered section 27 (4) of the Hong Kong Stamp Ordinance, which is identical to section 74 (5) of the UK Finance Act 1910, which states:

> *" Any conveyance or transfer (not being a disposition made in favour of a purchaser or incumbrancer or other person in good faith and for valuable consideration) shall for the purposes of this section be deemed to be a conveyance or transfer operating as a voluntary disposition inter vivos, and ... the consideration for any conveyance or transfer shall not for this purpose be deemed*

> *to be valuable consideration where the collector is of opinion that by reason of the inadequacy of the sum paid as consideration or other circumstances the conveyance or transfer confers a substantial benefit on the person to whom the property is conveyed or transferred*."

[146] There the court said*: 'It is reasonably clear what section 27 was intended to achieve. In the first place it charges voluntary conveyances, i.e., conveyances for which no valuable consideration is given, with ad valorem duty based on the value of the property conveyed. In the second place it prevents evasion of this duty by presenting what may in substance be a voluntary disposition as a conveyance for valuable consideration through the insertion of a nominal consideration, or an inadequate consideration."*

[147] The court further said *"…..one kind of case which would be caught by this provision is composed of the following elements: (i) inadequacy of consideration, (ii) the opinion of the collector that by reason of this inadequacy a substantial benefit is, by the conveyance or transfer, conferred on the transferee. Another such case, not directly relevant to the present case, depends upon the existence of " other circumstances " instead of inadequacy of consideration*."

[148] It is settled that such detailed and carefully crafted provisions cannot be read into the Act in the manner that the respondents might be suggesting. In my view, in the absence of such provisions, a conveyance on sale for which there is contractual consideration may not be taxed as if it were a voluntary disposition, and these cases would not be applicable to this jurisdiction or the present case.

[149] In the **Chin Choy** case which the respondents relied on to say that in other jurisdictions stamp duty on the value of the property conveyed is what is chargeable, that case was determined on an application of section 12A of the UK Stamp Ordinance 1949 which authorized the collector to assess stamp duty either on the value of the consideration or the value of the property, whichever was the higher. Again, this outcome was the direct consequence of the application of a specific statutory provision for which there is no equivalent in the Act.

**[150]** Suffice to say, the stipulation in Instrument 39 is unambiguous and means what it says, that it is applicable to voluntary dispositions only, and the taxing basis is the value of the property transferred. It is therefore not applicable in any way to the BBVO.

**The Underlying Assets or Liabilities as the Taxing Basis**

[151] The respondents' position throughout the period of exchanges with the Bank, up to the letter of 16th January 2020 was that duty was chargeable on the value of the assets, because this was the true value of the property conveyed. Subsequently the position shifted to the liabilities assumed, as BNS' debts form part of the property conveyed. The reason being the definition of "*consideration*" under article 917A of the Civil Code includes onerous obligations (liabilities or debts), which attracts stamp duty under section 38 of the Act. Additionally, the respondents say whether the basis is the assets or the liabilities either one will yield the same result as they are equivalent in value. By the close of the respondents' oral submissions the position was converted to a combination of liabilities plus the purchase price paid for goodwill, because the former also formed part of the chargeable consideration for the transfer. According to the respondents the true value of the consideration for the transfer of the BNS banking business to the Bank, is not only the one-off cash payment attributed to the goodwill, but also the Bank's undertaking to pay BNS' liabilities for which it acquired BNS' assets in return.

[152] The respondents' provide further reasons for this approach as follows: (i) the Act does not expressly say that stamp duty is to be assessed on the consideration given for the sale where the instrument is a conveyance on sale, and such omission was deliberate because parliament intended that some measure other than contractual consideration be used in appropriate circumstances; (ii) the use of the word "*ad valorem*" in relation to the duty means "*according to value*" and should rightly be taken to mean the value of the property transferred; and (iii) valuing the true consideration or actual value of the property transferred are valid methods of assessment as the Act contains no provision on how the BBVO should be assessed. Further, the accounting argument advanced by the Bank is objectionable as it is nothing more than *"creative accounting"* which is inconsistent with the taxing regime under the Act. This has caused the Bank to value the consideration as

equivalent to the value of BNS' goodwill rather than the actual commercial value of the enterprise which is sold and should be flatly rejected.

[153] To this the Bank responds that the IRD should not look to the assets or liabilities independently but must consider both in the context of what a banking business is about. The balance sheet shows that the assets transferred comprised cash and cash equivalent, amounts due from other banks, deposits with Eastern Caribbean Central Bank, net loans and advances to customers, cheques and other items in transit net, property plant and equipment, and other assets, which are equivalent in value to the total liabilities transferred. The latter comprises total deposits from customers, taxation payable, amounts due to banks, amounts due to related parties and other liabilities, whilst equity comprised retained earnings. The liability is depositors' monies, and the assets are monies to pay the depositors. Even if the respondent's formula is applied what exist is a zero balance on all sides and what was sold is goodwill which represents the amount paid in cash to BNS. Thus, the value of the business enterprise which was sold cannot be the value of the assets or the liabilities because this leads to an unfairly high assessment of the value of the property transferred. The two streams must be considered together to determine the net value of the undertaking transferred. In the end all that was sold is goodwill or business opportunity, or future earnings on investment, the value of which it is really the opportunity to continue the business.

[154] It is true that whenever monetary consideration is stated in a conveyance on sale, the ad valorem duty is applied to this figure, unless the IRD has reason to believe that the contractual consideration is understated or falsified. There is no such allegation in the present case. The respondents have stated unequivocally that there is no suggestion that the Bank was being fraudulent or had engaged in illegality. I have considered the unaudited balance sheet, which shows the financial position of BNS on 31st October 2019, the effective date of the transfer. What it conveys in the simplest terms is that the assets and liabilities of BNS as a going concern on the date of the transfer were of equivalent value, which is consistent with what a balance is intended to accomplish. In principle the balance sheet represents what BNS would have in hand if all assets were sold, and all

liabilities and obligations paid off on the date of the transfer. Another way of looking at it is what BNS would have had in hand if the banking business was liquidated at the time of the transfer.

[155] I have examined the authorities of **Oughtred, Re Taylor's Transfer** and **Central and District Properties** which the respondents cite in support of their contention that duty is payable on the true consideration which is the value of the property transferred and not the contractual consideration stated in the instrument of conveyance. In **Oughtred** the instrument which effected the transfer contained consideration of *10s*, when in fact the true consideration in exchange for the son's reversionary interest in 200,000 shares was the transfer of 72,700 shares owned by his mother, in another company. The court held that the actual consideration was the 72,700 shares given by the mother in exchange for her son's reversionary interest and the instrument was deemed a conveyance of sale with ad valorem duty payable on the value of the shares which was in fact the true consideration. In **Re Taylor** the executors of a will executed an instrument which transferred 14,775 fully paid-up shares in a gold mining company for *10s*. The court found that the consideration paid for the transfer of the shares was the extinguishing of a debt owed by a sum equal to the value of the shares transferred. It was held that the instrument was not a simple transfer of shares but a conveyance on sale and that ad valorem duty was chargeable on the value of the shares transferred, equal to the value of a debt which was discharged as consideration for the shares transferred.

[156] These cases demonstrate that the courts did not look to any concept other than consideration moving from the purchaser to the vendor, to assess the true value of the transaction. When applied to the present case the Bank has consistently maintained that by agreement the assets and liabilities were transferred at the net book value of zero because the assets were the corresponding property from which the liabilities were to be discharged and they were of equal value. Although BNS was relieved of debt, it simultaneously parted with the assets required to neutralize that debt and was not enriched to the extent of its discharged liabilities, as occurred in **Re Taylor's Transfer**. Additionally, there is no evidence to refute the Bank's assertion that the true and genuine consideration for the transfer was $18.6M paid for the intrinsic value of the business, which

BNS accepted as the consideration for the sale. The evidence is that BNS sold a business for which there was no large discrepancy between what was sold, and the consideration given for it and the Bank acquired both the liabilities and co-extensive assets required to discharge these liabilities. I agree that it is unthinkable that BNS as an unaffiliated party of equal bargaining strength would have accepted $18.6 million for a business which was valued at $1.5 billion.

[157] The Court was required to consider whether the BBVO fell to be considered under section 38 of the Act. It states

> "38. *Duty chargeable on conveyance in consideration of debt, etc.*
>
> *"Where any property is conveyed to any person in consideration, wholly or in part, of any debt due to him or her, or subject either certainly or contingently to the payment or transfer of any money or stock, whether being or constituting a privilege, charge or encumbrance upon the property or not, the debt money or stock is to be deemed the whole or part, as the case may be, of the consideration in respect whereof the conveyance is chargeable with ad valorem duty."*

[158] I agree that the section must be interpreted in the context of its scope and purpose, which is to avoid the underpayment of stamp duty, by reducing the purchase price by the value of the vendor's debt, such that the purchaser will be required to liquidate the vendor's debt to acquire the unencumbered property, instead of simply paying the vendor directly in cash for the transfer. It also contemplates instances where a purchaser utilizes his own debts as part of the consideration for acquisition of the property. The Bank equates section 38 to an anti-avoidance clause which is not applicable to this case and says it did not make a payment to BNS to discharge BNS' liabilities, neither was it using its own debts as part payment for the acquisition. The authorities of **Mortimore** and **Swayne** were cited to highlight the application of the section to a conveyance on sale. In **Mortimore**, the court held that because the monetary consideration for the sale of a property was £5,000 and the property was sold subject to a mortgage to the purchaser of £38,000 to be paid on the happening of a particular event, the true consideration was an aggregate of the £5,000 plus £38,000 pounds amounting to £43,0000 because that amount was what the vendor was entitled to. In **Swayne**, however, the court found that an outstanding and continuous

liability on the sale of a lease of two houses, which was equivalent to an annual debt to pay rent charges, should not be considered by as part of the monetary consideration paid for the property. These cases clearly illustrate that that the circumstances which would trigger the application of section 38 simply do not arise in this case. As I understand the transaction, the Bank has not purchased and paid for liabilities or assets but simply acquired both streams of the banking business which offset each other and paid a cash price for the intrinsic value of the business, which is the goodwill. This scenario is not captured under section 38 or anywhere else in the Act.

[159] I have not found any support in the Act, or the authorities cited, which allows the IRD to extract either the value of the assets or the value of the liabilities as the basis for arriving at the value of the business, which was sold. Even if it is said that onerous obligations form part of consideration under Article 917A of Civil Code, such onerous obligation must be brought within the realm of the Act for taxing purposes. I am not persuaded that the nature of the liabilities which the respondents categorized as onerous obligations fall within the scope of section 38. Additionally, the balance sheet has not revealed any significant excess in assets over liabilities which exceeds the purchase price stated in the PSA or which should be substituted or added to the chargeable value. It is well known that the value of a business is usually derived from its net book value which equates to assets minus liabilities.

[160] There are recognized principles for valuing a banking business for the purposes of a sale. It is an accounting exercise which considers all the relevant conditions and variables, at the time of the sale. It entails more than picking out a column of the balance sheet, to inform the basis of such valuation. The IRD was charged with the responsibility to review the transaction to determine what was the true consideration. The opportunity existed to review all the underlying documents referenced in the BBVO as well as other documents relating to the surrounding circumstances of the sale. The Bank's evidence is that a list of the documents which were uploaded to a virtual data room created for the Eastern Caribbean Central Bank (for assessment and approval of the sale), was provided to the

IRD via email[47] requesting that the IRD indicate which of the documents were required for review. The IRD acknowledged receipt of the email, but no response was received to review the documents. The onus was therefore on the IRD to engage the appropriate valuation process and to place its findings before the Court to substantiate an objective assessment of what it considered to be the true consideration for the business which was sold. In the absence of this, what is left is the Bank's evidence that the transaction was structured to reflect a transfer of the assets and liabilities at a net value of zero and to pay BNS the value of its goodwill as the purchase price for the sale of its banking business.

[161] The IRD referenced a similar transaction in which BNS sold part of its lending portfolio to a third party and stamp duty was calculated in the same way on the value of the assets transferred. The assessment was accepted and paid by the purchaser. Regarding this matter there is no evidence from which the Court can glean whether the two transactions were comparable in nature, scope or structure. Consequently, this information was of no assistance to the Court and no weight was given to it.

[162] Learned Counsel for the Bank made the point that if the Bank paid off moneys owed by the business with the moneys in the possession of the business or due to the business it would not be left with any "***estate discharged from the money debts***" in contrast to the outcome in **Mortimore**. In other words, if A uses $100 of book debt to pay off a liability of $100, A would not be left with something worth $100. It could not be said that the Bank would have had in hand, directly upon purchase, a banking business which it could sell for over $1.5 billion, which could fairly be assessed with ad valorem on the value of this sum, as the banking business sold by BNS was not worth this sum.

[163] Learned Counsel further opined that the scope of section 38 is by no means analogous to the context of a banking business being sold where the moneys owed by the business when compared to the moneys due to the business are of the same value. The intrinsic value of the business is therefore its aggregate value of assets minus liabilities and is

[47] See Exhibit IDS7 of email dated 21st June 2019

potentially the worth of the business over and above this amount, which in this case is represented by the business future earning potential called the "goodwill".

[164] I have found greater merit in the Banks submissions and conclude that the assets or liabilities independent of each other would not be the appropriate chargeable value for the BBVO.

**The Purchase Price as the Taxing Basis**

[165] The respondents say the goodwill is an intangible independent asset for accounting purposes which can stand on its own and is not equivalent to the full consideration for the transfer reflected in the BBVO. Assets, liabilities obligations and rights were all transferred to the bank for which there is no value ascribed. The net assets calculation which is advanced by the Bank is used on the transfer of shares, it does not apply in this case, and it would be wrong to assess stamp duty on this basis.

[166] The Bank on the other hand has consistently maintained that the assets and liabilities were transferred at a net book value of zero and what was paid for the acquisition was the premium placed on the goodwill, which was quantified at $18.6 million, which equates the true consideration which was paid for the banking business as a going concern. Whether it is the purchase price, or the value of the property transferred, the effect is the same, because typically the best reflection of the value of the property transferred in a transaction between unaffiliated parties of equal bargaining power, would in fact be the purchase price paid.

[167] In this case the transfer was structured as a cash payment for the goodwill, in return for transfer of the liabilities with the corresponding assets of equal value. I accept that as a conveyance on sale the starting point would be the value or consideration stated in the PSA. The IRD was entitled to conduct its own inquiry as the consideration was not stated in the BBVO. The monetary consideration for goodwill valued at $18.6 million is stated in Schedule "C" of the PSA, which was reference in the BBVO as an inter-dependent agreement. This value stands as the chargeable consideration unless the respondents can

show that it is unrealistic or that there are other components of chargeable consideration which should be factored into this equation.

[168] Having carefully considered the evidence, authorities, and submissions I am satisfied that the BBVO falls squarely within the definition of section 35 of the Act as a conveyance on sale, for which there was monetary consideration and the purchase price paid is what would attract duty. I accept that whether one assesses the purchase price, or the value of the property transferred, where the assets (book debts) are equal to the liabilities (deposits), it is the value represented by the "goodwill which truly encapsulates the consideration for the sale effected through the BBVO.

[169] There is no evidence that the purchase price was understated or manipulated as part of a tax avoidance scheme. Such matters are to be determined on an evidential basis and the Court is not required to speculate. In the absence of any evidence to refute the value attributed to goodwill as true value of the business, it remains the only objective value of the business conveyed, which can be accepted as being chargeable for stamp duty.

[170] On appeal if the assessment is found to be incorrect the Court is required to assess the duty on such instrument. The BBVO will be assessed using the purchase price stated in the PSA, of $18,630,000.00, as the chargeable value.

**Costs**

[171] Concerning costs, as the parties did not apply to the court to determine the value to be placed on the claim pursuant to CPR65.5 or to set a costs budget for the proceedings under CPR65.11, the appellant is awarded prescribed costs to be calculated in accordance with CPR65.5 (2) (b).

**Conclusion**

[172] By way of disposal, I make the following orders: -

1. The appeal was filed on time and is allowed.

2. The stamp duty payable by the Bank on the BBVO as a conveyance on sale is assessed at 2% ad valorem on the purchase price paid of $18,630,000.00, which amounts to **$372,600.00**.

3. The Bank is awarded prescribed costs to be calculated in accordance with CPR65.5(2)(b).

[173] I wish to thank Learned Counsels on both sides for their extensive written and oral submissions.

**Cadie St Rose-Albertini**
High Court Judge

**By the Court**

**[SEAL]**

**Registrar**