of the £31. For these reasons I am of opinion that the appeal should fail.

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CREAK v. JAMES MOORE & SONS PROPRIETARY LTD.

Appeal allowed. Order appealed from discharged. Appeal from County Court dismissed with costs. Judgment of County Court restored.

Solicitor, for the appellant, *P. J. Ridgway.*

Solicitors, for the respondents, *Gillott & Moir.*

B. L.

Foll *Walker v Commissioner for ACT Revenue* (1994) 28 ATR 1268

Appl *Walker v Commissioner for ACT Revenue* (1994) 35 ALD 194

[HIGH COURT OF AUSTRALIA.]

THE CROWN . . . . . APPELLANT;

AND

THE BULLFINCH PROPRIETARY (W.A.) LIMITED . . . . . } RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF WESTERN AUSTRALIA.

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PERTH, *October* 29.

Griffith C.J., Barton and Higgins JJ.

Stamp duty—Transfer upon sale—Contract for sale of gold mine—Consideration, partly in shares and partly in cash—Value of consideration—Stamp Act 1882 (*W.A.*) (46 *Vict. No.* 6), *ss.* 46, 49.

Where the consideration for the sale of certain gold mining leases was expressed in the agreement of sale to be £400,000, to be paid by the issue of 300,000 shares of £1 each, fully paid up, and £100,000 cash, which in the agreement of sale the vendor agreed to immediately expend in the purchase of 100,000 shares, and the value of the shares had increased between the date of the sale and that of the actual transfer :

Held, that for the purpose of assessing stamp duty under sec. 46 of the *Stamp Act* 1882 (W.A.) in respect of the transfer, the consideration was to be taken to be £400,000.

Decision of the Supreme Court of Western Australia affirmed.

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THE CROWN v. BULLFINCH PROPRIETARY (W.A.) LTD.

APPEAL from the Supreme Court of Western Australia.

The respondent company were the purchasers of certain gold mining leases under a written contract whereby it was stipulated that the consideration for the sale should be £400,000, whereof the sum of £300,000 was to be paid and satisfied by the allotment and issue to the vendors, as they might direct, of 300,000 fully paid-up shares in the capital of the company, which were to be numbered so as to distinguish them from other shares. The balance of the purchase money, £100,000, was to be paid in cash upon the completion of the transfer and registration of the assignment of the leases to the company. The vendors agreed contemporaneously therewith to apply for 100,000 shares in the original capital of the company and to pay for the same on application in full.

Prior to the date of the actual transfer, in which the consideration was expressed to be £400,000, the shares had increased in value, and on presentation for registration the Commissioner of Stamps contended that the amount of duty payable was to be assessed on the then value of the consideration, and demanded an additional sum of £2,512 10s. for duty on the increased value. The respondent company paid this amount under protest, and proceeded by way of petition of right for a refund. The Supreme Court ordered the refund, and from this decision the Crown appealed to the High Court.

Dr. *Stow*, Crown Solicitor for Western Australia, for the appellant. The time that ought to be taken into consideration for the assessing of the duty is the time when the transfer was completed. When the transfer was executed the consideration was shares, and the Crown is entitled to claim on the value of those shares. The definition of stock in sec. 3 of the *Stamp Act* 1882 includes shares. In their agreement the parties draw the distinction between what is a cash consideration and what is a share consideration. There was no actual sale until the date of the transfer; there was merely an agreement to sell. The case of *Commissioner for Stamp Duties* v. *Broken Hill South Extended, Ltd.* (1), quoted by the State

(1) (1911), A.C., 439.

Chief Justice, is not an authority for the proposition that the transfer must be dated back to the date of the agreement. [He also referred to *Stamp Act* 1882, secs. 47, 49; *Alpe on Stamp Duties*, 10th ed., p. 105.]

There is no sale until the conveyance: *Wall* v. *Bright* (1). The real consideration is the shares, not £400,000, the value of the shares; and the question for determination is the date at which they are to be valued. There is no sale until the time of the transfer, or until the time when the purchaser is entitled to call for the transfer.

Northmore K.C. and *Stawell*, for respondents. In the first place, this was a sale for money, £400,000, and the transfer to carry out the sale did not fall within sec. 46 of the *Stamp Act* 1882, so that it never became material to consider the price of the shares either on one date or another. Secondly, if that is not the correct view, and if this transaction is one to which sec. 46 does apply, the Commissioner should have assessed the duty as on 2nd November, and not, as was done, as on 10th December; and, thirdly, if 10th December was the correct date, the Crown was wrong in assuming that the date of sale was a true indication of the value of the vendors' shares, because they were not marketable at that date. It was on the first point that the *Broken Hill Case* (2) was referred to. The sale was completed on 2nd November, and that was the date on which the price should have been reckoned. If this had been a local company, the agreement would have had to be registered here, and it is the agreement that would have been taken as representing the amount of the consideration. The value of the shares should be taken to be the face value: *In re Australasian Timber Company, Ltd.* (3); *Halsbury's Laws of England*, vol. xiii., p. 313. If the actual value is to be taken as at the date of the agreement for sale (2nd November) it is quite clear on the evidence that the Chief Justice was right in saying that the evidence showed that the shares were not worth more than 20s.

(1) 1 Jac. & W., 494.
(2) (1911) A.C., 439.
(3) 16 N.S.W. (W.N.), 86.

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Dr. Stow, in reply. If the respondents say that these shares were not worth a certain value, and it is shown that identical interests were sold at a certain figure, it is for them to show what the diminution was.

GRIFFITH C.J. The question for determination in this case is the amount of stamp duty payable for the transfer of some gold mining leases in Western Australia, in pursuance of an agreement dated 2nd November 1910, by which certain persons, called the vendors, agreed to sell the leases to the Bullfinch Proprietary (W.A.) Ltd. By the agreement it was stipulated that the consideration for the sale should be £400,000, whereof the sum of £300,000 was to be paid and satisfied by the allotment and issue to the vendors, as they might direct, of 300,000 fully paid up shares of £1 in the capital of the company, which were to be numbered so as to distinguish them from other shares. The balance of the purchase money, £100,000, was to be paid in cash upon completion of the transfer and registration of the assignment of the leases to the company. The vendors agreed contemporaneously therewith to apply for 100,000 shares in the original capital of the company and to pay for the same on application in full. By the Western Australian *Stamp Act* 1882 the stamp duty payable upon a "conveyance or transfer upon sale" of any property is *ad valorem* according to the amount or value of the consideration for the sale. The transfer, in this case, expressed as the consideration the sum of £400,000, but the officer to whom it was presented for registration objected that that was not the true consideration, and required the transfer to be stamped with duty as for a consideration exceeding £800,000. There is no doubt that the transfer was a conveyance or transfer upon sale of property within the meaning of the Act.

Sec. 46 provides:—"Where the consideration or any part of the consideration for a conveyance on sale consists of any stock or marketable security, such conveyance is to be charged with *ad valorem* duty in respect of the value of such stock or security." The first question raised is whether the consideration, or any part of it, consists of stock. On the face of the transfer,

as on the face of the agreement—as I construe it—the consideration is expressed to be £400,000, and although the agreement goes on to explain how the £400,000 is to be paid or satisfied, that does not alter the consideration. In the case of *Commissioner for Stamp Duties* v. *Broken Hill South Extended, Ltd.* (1), which was decided last year by the Judicial Committee of the Privy Council, Lord *Macnaghten*, who delivered the opinion of the Board, said (2):—"Probably no difficulty would have occurred to anybody if the agreement between the two companies had been in a form which is not uncommon, namely, in the form of an agreement to the effect that the purchasing company should buy the property and assets of the selling company for so much cash . . . to be satisfied as to so much by the issue of shares fully paid, and as to so much by the issue of shares partly paid up." "That," he said, "is the real contract written large and stated fully and truly."

In that case the cash price was not mentioned, but the consideration was expressed to be the issue of shares of a nominal amount. It would not, perhaps, be right to take that dictum as an absolute decision that in a transaction of this sort the consideration must necessarily be taken to be the sum mentioned, but it is a strong expression of opinion, and, if I may say so, is a common-sense way of looking at the matter. I do not think it necessary, however, to rely upon it as the ground for deciding this case, although if it were necessary I should be disposed to follow it.

Assuming, then, that part of the consideration for this transfer was stock, the duty is to be assessed according to the amount or value of the consideration for the sale. What, then, is the value of the "consideration for a sale?" A sale is always effected by a contract for valuable consideration. The vendor is willing to part with his property for something which he receives in return, which is called the consideration, and which the purchaser is willing to give. In my opinion, the words "consideration for the sale," as used in the Schedule to the *Stamp Act*, mean the consideration fixed by the agreement between the parties, as that for which the vendor is willing to sell to the purchaser. In this case

(1) (1911) A.C., 439 (2) (1911) A.C., 439, at p. 448.

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the real nature of the transaction sufficiently appears upon the face of the agreement itself. I think that the person called upon to pay the tax is entitled, just as much as the Stamp Commissioner, to have recourse to the agreement for the purpose of ascertaining the real consideration, that is, what was agreed to be given by the purchaser and agreed to be accepted by the vendor at the time when the agreement was made. That consideration was undoubtedly £400,000, part of which was represented by £100,000 to be paid in cash, and the remainder by the allotment of shares estimated to be of the value of £300,000. That was the consideration for the agreement to sell, and remains the consideration for the agreement independently of any subsequent rise or fall in the value of the shares. And the value of that consideration is, in my opinion, fixed as of that date. The nominal value of the shares is *primâ facie* their real value. This, then, is the amount upon which duty is to be assessed. The conclusion to which I have come is strongly fortified by the language of sec. 49 of the Act, the first paragraph of which provides that "Where any property has been contracted to be sold for one consideration for the whole, and 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 . . ." What is the consideration meant? Of course, the consideration stated in the contract; that is to say, the single consideration stated in the contract is the basis of the assessment.

The Commissioner of Stamps, however, contends that the value of the consideration is not the value at the date of the agreement of that which was agreed to be given and received, but its value at the date of the actual transfer. For the reasons I have given I do not think that that is the true test. But, even if it were, the Crown cannot succeed, because there was no evidence at all even tending to show that, at the date of the transfer, which was in December 1910, these numbered 300,000 shares were worth more than £1 each.

On all points, therefore, the appeal fails.

BARTON J. I agree with the judgment of my learned brother the Chief Justice, and shall add but little. Clause 3 of the agree-

ment provides that the consideration for the sale shall be the sum of £400,000. The transfer merely repeats this statement, but it does not show, as clause 3 goes on to show, how the sum is made up. That is the entire difference in the statement of the consideration. The appellant says that the transfer does not state the consideration truly. But is it any the less true that the consideration is £400,000, if we read into the transfer the terms of clause 3 of the agreement? The "consideration for the sale" is the price *bonâ fide* agreed on in the bargain, and we find the bargain in the agreement. The company are to give £300,000 of the £400,000 by the allotment of 300,000 shares at par, which both parties estimated as the value at that time. Assuming that a vendor's share was worth as much as a subscribed share, it may be a material fact for some purposes that the value has gone up or down before the execution of the document giving the leases over, called a transfer. But for the present purpose it is not material, because the question is, what was the sum agreed to be given for the mine? The sum was £400,000, made up as described in clause 3. Clause 8 makes it more apparent that the value of the vendors' shares in the company was *bonâ fide* believed not to be greater than £1, for that clause evidently assesses subscribed shares at that value, and it is not pretended that vendors' shares were at any time worth more than subscribed shares. The company stipulated that the vendors should give that price for 100,000 subscribed shares, and they gave it; and the value as then ascertained became the maximum value *bonâ fide* attributed to vendors' shares. Thus the maximum value attributed to 300,000 vendors' shares is £300,000, and that with £100,000 cash is the amount of the "consideration for the sale." Certainly it cannot be said that the agreed consideration amounted to any greater sum.

In my opinion that is enough to dispose of the case. But a short reference may be made to the evidence which was taken in England. It is at the outset clear that the agreed price of 20s. was *primâ facie* the value of each of the 300,000 vendors' shares at the time of transfer. Upon the commission in England the Crown essayed to show that the value was higher, but it failed to do so by the evidence as to the sales of the subscribed or

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marketable shares, because the vendors' shares were subject to a clog by the rules of the Stock Exchange. They were not saleable in the market, and do not appear to have acquired any definite substantial value otherwise. In fact, no sale of any of the latter class of shares at even as high a price as £1 was shown to have taken place at any material time. The *primâ facie* value of 20s. was therefore not affected. When the restriction on their sale in the market was removed, they were at a much lower figure than £1.

For the reasons which I have given I am of opinion that this appeal should be dismissed.

HIGGINS J. In this case I agree that the appeal should be dismissed. I prefer to base my judgment on the simple ground that the consideration for the sale is £400,000, and not, as assumed by the appellant, shares—in whole or in part.

The *Stamp Act Amendment Act* 1905, which is to be read as one with the *Stamp Act* 1882, imposes a tax on every "conveyance or transfer on sale of any property where the amount or value of the consideration for the sale . . . exceeds £25, for every £25 . . . of the amount or value of the consideration 2s. 6d." The consideration for the sale of the mining leases in this case is £400,000 in money, not shares. The agreement for sale, dated the 2nd November 1910, says (clause 3):—"The consideration for the said sale shall be the sum of £400,000." The transfer of the leases (which has been referred to in argument without objection, though not in evidence), expresses the consideration in the same way—"in consideration of £400,000 paid to us for the said leases." There is no evidence that the alleged consideration was fictitious or merely colourable. It is true that as to £300,000, part of the consideration, the vendors were to be paid and satisfied by the allotment and issue of 300,000 fully paid up shares of £1 in the capital of the company; and that as to the balance, £100,000, which was to be paid in cash on completion of the transfer of the leases, the vendors were to apply for 100,000 shares and pay for them on application in full. But these collateral stipulations are quite consistent with the consideration being, in truth and in fact, as expressed, a money price, £400,000.

Shares cannot be issued at a discount; the capital, which they represent, has to be paid for in money or in kind; and in this case, it has to be paid in money—the money which was to come to the vendors for the leases. The consideration for the sale being £400,000 in money, the stamp duty has simply to be calculated on the amount of the money. The case of *Commissioner for Stamp Duties* v. *Broken Hill South Extended, Ltd.* (1), is distinguishable, for there the consideration for the purchase of the assets of the old company was distinctly and directly shares—not money. In this case, however, it seems to be assumed that, as alleged in the defence, the "true consideration" was not expressed in the agreement or in the transfer, and that the true consideration was shares. In this aspect I concur with my learned colleagues that on the true meaning of the Acts, as applied to this case, the consideration has to be found in the actual agreement for sale, and is not to depend on any accidental rise or fall of the shares after the sale; and that the evidence does not establish that the shares were worth more than £1 each on 10th December 1910. The duty is payable on the "conveyance or transfer *on sale*," and is to depend on the "amount of value of the consideration *for the sale*"—not on the value at the time of the transfer. Dr. *Stow* has urged on us with considerable ingenuity the analogy of personal property, saying that there was no "sale" till the property was transferred on 10th December. But we have to deal with real property, which in all cases involves a conveyance or transfer after the actual sale. The sale was complete *as a sale* on the 2nd November 1910; although it was not completed by transfer until 10th December.

Appeal dismissed with costs.

Solicitor, for the appellant, *F. L. Stow*, Crown Solicitor for Western Australia.

Solicitors, for the respondents, *Northmore & Hale.*

N. McG.

(1) (1911) A.C., 439.