

THE HIGH COURT

[2003 No. 558 COS]

**IN THE MATTER OF
FITZ-PACK CARTONS LIMITED (IN LIQUIDATION)**

**AND IN THE MATTER OF
THE COMPANIES ACT, 1963-2006**

Judgment of the Honourable Mr Justice Brian McGovern delivered on the 21st day of February, 2008

Fitz-Pack Cartons Limited (in liquidation), is a private company with limited liability, which was incorporated under the provisions of the Companies Acts on the 13th August, 1986. Hereinafter, in this judgment, it is referred to as "*the company*".

The company was a registered owner of lands in County Mayo including premises and lands comprised in folio 6254F County Mayo, and situated at Ballyhaunis. This application concerns the question of the VAT liability which arose on the company's disposal of the Ballyhaunis property. In the application before the Court, the Liquidator seeks:

(i) Directions as to the proper classification of the company's VAT liability to the Revenue Commissioners, arising on the sale of the company's former premises, and, in particular, directions as to whether such constitute an expense in the Liquidation or whether same fall to be treated as a preferential claim in the Liquidation.

(ii) Directions as to the date on which a liability to Value Added Tax, in respect of the disposal of the company's former premises, accrued, and, in particular, as to whether same accrued as of the date of contract in October 2003, or the date of completion in February 2005.

The Liquidator was given permission to bring these proceedings by order of the High Court made on the 14th January, 2008.

The Facts

1. On the 16th October, 2003, the company entered into a contract for the sale of the Ballyhaunis premises. The sale price was €775,000 plus VAT at the rate of 13.5% (€104,625). A deposit of €67,500 was paid to the company's solicitors to hold as stakeholder.

2. Special Condition Number 3 in the Contract for Sale provides:

"In addition to the purchase price, the purchaser shall pay to the vendor an amount equivalent to the Value Added Tax as shall be eligible in relation to the sale, same to be calculated in accordance with the provisions of the Value Added Tax Act, 1972, and to be paid on completion of the sale, or forthwith, upon receipt by the purchaser of an appropriate invoice (whichever shall be the later)".

3. On the 14th November, 2003, the company was placed in Examinership.

4. On the 21st November, 2003, a VAT 3 return for the period September/October 2003 was signed by the Managing Director of the company and submitted to the Revenue Commissioners. The return showed that the company had VAT on sales amounting to €212,537 and VAT on purchases at €46,751, leaving a net sum payable by way of VAT of €165,786. This VAT liability has never been discharged by, or on behalf of, the company. It is the belief of the liquidator that the VAT return includes the VAT liability of €104,625, payable on the disposal of the Ballyhaunis premises.

5. On the 10th December, 2003, the solicitors for the company sent a VAT invoice in the amount of €104,625 to the solicitors for the purchasers. This VAT invoice is dated the 29th October, 2003. On the 3rd February, 2004, the company was placed in liquidation by the High Court as the Examinership process had not been successful.

6. On the appointment of a Liquidator, the Revenue Commissioners submitted a claim in the liquidation which was in the nature of a preferential claim for the unpaid VAT liability of €165,786 declared in the September/October 2003 VAT 3 returns.

7. On the 5th February, 2005, the sale of the Ballyhaunis premises was completed and, on closing, the solicitors for the purchasers paid the balance of the purchase money and the VAT on the purchase price.

The Issues

8. The issue which this Court has to determine is whether or not the company's liability to VAT on the sale of the said premises, arose (a) on the signing of the Contract for Sale on the 16th October, 2003, or (b) on completion of the sale of the premises on the 5th February, 2005. Depending on the answer to this question, different consequences arise. If the VAT liability accrued on the signing of the contract, then this liability will form part of the preferential debt owed by the company to the Revenue Commissioners. On the other hand, if the VAT liability accrued on completion of the sale, the VAT liability is deemed to be a necessary disbursement in the liquidation and will rank in priority to all preferential claims. The Official Liquidator contends that the liability accrued on the signing of the contract. The Revenue Commissioners contend that it accrued on the completion of the sale and is therefore a necessary disbursement in the liquidation. Order 74 (128) (1) of the Rules of the Superior Courts, 1986, sets out the priorities to be applied in the distribution of the company's assets, after the payment of the Liquidator's fees and expenses properly incurred in preserving, realising or getting in the assets. These priorities arise before preferential claims and non-preferential claims. The third of these priorities is "the necessary disbursement of the Official Liquidator, other than expenses properly incurred in preserving, realising, or getting in the assets herein before provided for".

9. It is clear, therefore, that if the company has insufficient assets to pay all its creditors, that the answer to the questions raised could have a significant bearing on whether or not, and to what extent, the Revenue Commissioners recover the VAT that is owing.

Legislation

10. The relevant legislation on this issue is to be found in both national law and in an EU Directive. Section 4 (2) of the VAT Acts, 1972 to 2006, provides as follows: -

"Subject to paragraphs (c), (d), (e) and (f) of section 3 (1), section 19 (2) and sub-sections (3), (4) and (5), a supply of immovable goods shall be deemed, for the purposes of this Act, to take place if, but only if, a person having an interest in immovable goods to which this section applies, disposes (including by way of surrender or by way of assignment), as regards the whole or any part of those goods, of that interest or of an interest which derives therefrom".

11. The exceptions which are listed in section 4 (2) do not apply to the question in issue in this case. Therefore, in Irish law, supply of immovable goods is deemed to take place when a person with an interest in land disposes of that interest in the land, or disposes of an interest which derives from the interest in the land.

12. Article 5 (1) of the Sixth Council Directive 77/388/EEC of the 17th May, 1977, on the harmonisation of the laws of the Member States relating to turnover taxes, provides that:

“Supply of goods’ shall mean the transfer of the right to dispose of tangible property as owner”.

13. Article 5 (3) of the Sixth Directive provides, inter alia, that: -

“Member States may consider the following to be tangible property:

(a) Certain interests in immovable property . . . ”.

14. There is no dispute between the parties as to what is the legal position if the VAT liability accrued on the date of completion of the sale of the property at Ballyhaunis. In that event, the parties are agreed that the Official Liquidator is the accountable person for VAT purposes and the VAT is payable as a “necessary disbursement” out of the proceeds of sale. This arises by virtue of section 3 (7), section 9 (2A) and section 19 (3) (b) of the VAT Acts, 1972 to 2006.

15. Section 3 (7) provides:

“(i) Where, in the case of any business carried on, or that has ceased to be carried on by a taxable person, goods forming part of the assets of the business, are, under any power exercisable by another person, including a Liquidator and a Receiver, disposed of by the other person in or towards the satisfaction of a debt owed by the taxable person, or in the course of the winding up of a company, they should be deemed to be supplied by the taxable person in the course or furtherance of his business.

(ii) A disposal of goods under this sub-section shall include any disposal which is deemed to be a supply of immovable goods under section 4 (2)”.

16. Section 9 (2A) provides:

“Every person who disposes of goods which, pursuant to section 3 (7), are deemed to be supplied by a taxable person in the course or furtherance of his business, shall, within fourteen days of such disposal, furnish in writing to the Revenue Commissioners, the particulars specified in regulations as being required for the purpose of registering such person for tax”.

17. Section 19 (3) (b) makes provision for the furnishing of VAT returns and the payment of the appropriate tax due in each taxable period.

18. Section 19 (3) (b) (iii) requires a Liquidator who disposes of goods to treat the VAT liability as a “necessary disbursement” out of the proceeds of sale.

Case Law

19. The European Court of Justice has considered the interpretation of Article 5 (1) of the Sixth Directive, in *Staatssecretaris van Financien .v. Shipping and Forwarding Enterprise SAFE BV* (C320/88). The matter came before the Dutch Courts and by way of appeal to the Supreme Court of the Netherlands which referred the following two questions to the European Court of Justice, pursuant to Article 177: -

“1. Must Article 5 (1) of the Sixth Directive be interpreted as meaning that a supply of goods takes place only where legal ownership of the property is transferred?

2. If not, does a supply of goods also take place where the legal owner:

(i) Has entered into an agreement with another party under which any changes in the value of the property, and all profits or outgoings, are for the benefit, or at the expense of that other party;

(ii) Has agreed to transfer legal ownership of the property to the other party at any future time;

(iii) Has agreed to grant the other party an irrevocable power of attorney to carry out transactions necessary to execute that transfer of legal ownership;

(iv) Has, pursuant to that agreement, actually placed the property at the disposal of the other party?”

20. The ECJ answered the questions as follows: -

1. “The first question:

6. It should be noted that Article 5 (1) of the Sixth Directive provides as follows:

‘supply of goods’ shall mean the transfer of the right to dispose of tangible property as owner.

7. It is clear from the wording of this provision that ‘supply of goods’ does not refer to the transfer of ownership in accordance with the procedures prescribed by the applicable national law, but covers any transfer of tangible property by one party which empowers the other party actually to dispose of it as if he were the owner of the property.

8. This view is in accordance with the purpose of the Directive, which is designed inter alia to base the common system of VAT on a uniform definition of taxable transactions. This objective might be jeopardised if the pre-conditions for a supply of goods - which is one of the three taxable transactions - varied from one Member State to another, as do the conditions governing the transfer of ownership under Civil Law.

9. Consequently, the answer to the first question must be that 'supply of goods' in Article 5 (1) of the Sixth Directive, must be interpreted as meaning the transfer of the right to dispose of tangible property, as owner, even if there is no transfer of legal ownership on the property.

The second question:

10. It is clear from the documents before the Court that the National Court sought to establish, in particular, whether the transfer of 'economic ownership', a concept which has been developed in Netherlands tax law, could be deemed to be a supply of goods within the meaning of Article 5 of the Sixth Directive, and it defined the four elements which constituted a transfer of economic ownership in the case before it.

11. By referring in the second question to the four elements thus defined, the National Court is, in reality, asking the Court to apply Article 5 (1) of the Sixth Directive, to the contract at issue in the main proceedings. Under the division of functions provided for by Article 177 of the Treaty, however, it is for the National Court to apply the rules of Community law, as interpreted by the Court, to an individual case. No application is possible without a comprehensive appraisal of the facts of the case.

12. This is illustrated, moreover, by the specific conditions mentioned in the second question, since they refer, on the one hand, to an agreement to transfer ownership under Civil law, which does not necessarily seem to entail the transfer of actual power as indicated by Article 5 (1) of the Sixth Directive, and, on the other, the actual placing of the property at the disposal of the other party, which would normally point towards a finding that actual power has been transferred.

13. The answer to the second question must therefore be that it is for the National Court to determine in each individual case, on the basis of the facts of the case, whether there is a transfer of the right to dispose of the property as owner, within the meaning of Article 5 (1) of the Sixth Directive".

21. Counsel for the Revenue Commissioners argues that the decision of the ECJ means that although a transfer of legal ownership is not necessary for a taxable supply of immovable goods, there must be a transfer of the right to dispose of the immovable goods as owner. It is a matter for the National Courts in each case as to whether or not a particular transaction has the effect of transferring the right to dispose of immovable goods, as owner. It is clear from the *SAFE* case, that the ECJ took the view that an agreement to transfer the legal ownership of immovable goods, would tend to indicate that there had not been a taxable supply. But the actual placing of the immovable goods at the disposal of the purchaser would tend to indicate that supply had taken place.

22. In the context of the case which I am to decide, this means looking at the contract for the sale of the Ballyhaunis premises with a view to ascertaining when the purchaser obtained the right to dispose of the property as owner. The Revenue Commissioners argue that the Contract for Sale entered into by the company, was an agreement to transfer the legal ownership of the property, but that it was not made available to the purchaser prior to the completion date of the 5th February, 2005. Counsel for the Liquidator argues that once the vendor enters into a Contract for Sale, it is a binding agreement with the purchaser, entitling the purchaser to specific performance of the contract, and that accordingly, there is a supply of immovable goods so that for VAT purposes, is in accordance with Article 5 (1) of the Sixth Directive. If the Liquidator is correct in that view, then the VAT falls due in the period September/October 2003, and is payable the following month, and becomes a preferential claim in the liquidation.

23. The *SAFE* decision has been approved in a judgment of the ECJ in February, 2003. This was the case of *Autolease Holland BV v. The Bundesamt Fur Finanzen* (C185/01). In that case, the Court referred to Article 5 (1) of the Sixth Directive, and said: "As the Court found in paragraphs 7 and 8 of *Shipping and Forwarding Enterprise (SAFE)*, it is clear from the wording of that provision that 'supply of goods' does not refer to the transfer of ownership in accordance with the procedures prescribed by the applicable National law, but covers any transfer of tangible property by one party, which empowers the other party actually to dispose of it, as if he were the owner of the property. The purpose of the Sixth Directive might be jeopardised if the pre-conditions for a supply of goods, which is one of the three taxable transactions, varied from one Member State to another, as do the conditions governing the transfer of ownership under Civil law". In July 2005, the ECJ referred again to Article 5 (1) of the Sixth Directive. This was in the case of *British American Tobacco International Limited and Newman Shipping and Agency Company NV v. Belgian State* (435/03). Having indicated that Article 5 (1) of the Sixth Directive provides that the supply of goods shall mean the transfer of the right to dispose of tangible property as owner, the Court went on to say: "It follows from the wording of that provision, that the concept of supply of goods does not refer to the transfer of ownership in accordance with the procedures prescribed by the applicable National law, but covers any transfer of tangible property by one party which empowers the other party actually to dispose of it as if he were its owner. That concept is in accordance with the purpose of the Directive, which is designed *inter alia*, to base the common system of VAT on a uniform definition of taxable transactions (Case C320/88 *Shipping and Forwarding Enterprise SAFE*) [1990] ECR I285, paragraphs 7 and 8)".

24. I have been referred by both parties to the Irish case of *Tempany v. Hynes* [1976] I.R.101. Kenny J. delivered the majority judgment in the Supreme Court, approving the decision of Cranworth L.J. in *Rose v. Watson* [1864] 10H.L.Cas.672, which stated: -

"There can be no doubt, I apprehend, that when a purchaser has paid his purchase-money, though he has got no conveyance, the vendor becomes a trustee for him of the legal estate, and he is, in equity, considered as the owner of the estate. When, instead of paying the whole of his purchase-money, he pays a part of it, it would seem to follow, as a necessary corollary, that, to the extent to which he has paid his purchase-money, to that extent, the vendor is a trustee for him; in other words, he acquires a lien, exactly in the same way as if upon the payment of part of the purchase-money, the vendor has had executed a mortgage to him of the estate to that extent".

25. At page 114, Kenny J. stated:

"A vendor who signs a contract with the purchaser for the sale of land, becomes a trustee in the sense that he is bound to take reasonable care of the property until the sale is completed, but he becomes a trustee of the beneficial interest to the extent only to which the purchase price is paid. He is not a trustee of the beneficial interest, merely because he signs a contract".

26. The decision of the Supreme Court in *Tempany v. Hynes* has been controversial. But it remains the law. The VAT legislation does not state when a disposal takes place. In the circumstances, it seems to me that I must look at the specific nature of the contract in this case, in order to determine whether there was a transfer of the right to dispose of the property, as owner, within the meaning of Article 5 (1) of the Sixth Directive.

27. The Contract for Sale makes reference to the payment of VAT on the purchase price in Special Condition No. 3. This condition reads as follows:

"In addition to the purchase price, the purchaser shall pay to the vendor an amount equivalent to the Value Added Tax as shall be eligible in relation to the sale, same to be calculated in accordance with the provisions of the Value Added Tax Act, 1972, and to be paid on completion of the sale or forthwith upon receipt by the purchaser of an appropriate invoice (whichever shall be the later)".

28. The invoice on the sale was sent to the solicitors for the purchasers of the Ballyhaunis property, on the 29th October, 2003. The company included the VAT arising on the transaction with a bi-monthly VAT return for the period September/October 2003. On the signing of the contract, a deposit of €67,500 was paid to the company's solicitors who held the deposit as stakeholder.

29. The Contract for Sale of the Ballyhaunis premises closed on the 5th September, 2005. There appears to be some confusion as to when the VAT invoice was furnished to the purchasers, because they have informed the Revenue that it was only fairly shortly before the sale closed in February 2005. Wherever the truth lies, it is clear that the completion of the sale was after the furnishing of the invoice, and accordingly, that was the date by which the purchaser was obliged to pay the VAT under the terms of the contract.

30. In *Re Barrett Apartments Limited* and in the matter of the Companies Act, 1963 [1985] 1 I.R.350, the Supreme Court determined that the person who has merely paid a booking deposit, acquired no estate or interest, legal or equitable, in the property. By paying a deposit pursuant to the contract, the purchaser requires an equitable estate or interest in the property, and should, therefore, be allowed to follow that estate or interest by being awarded a lien on it.

31. So what is the position in this case? Undoubtedly, the purchasers of the Ballyhaunis property had an equitable interest to some extent in the property, pending the completion of the sale. But I don't think it could be argued that they had any right to dispose of the property pending the completion of the sale. Even if they have the right to sell on such interest as they had, pending completion, that would not be an interest entitling the purchaser to dispose of the property or transfer ownership in it, until such time as the vendor had been paid.

32. Since I take that view, it follows that the company's VAT liability arises post-liquidation upon completion of the sale, and accordingly the liability is an expense in the liquidation and should be treated as a "necessary disbursement" out of the proceeds of sale. I would, therefore, give the following directions pursuant to the Order of the High Court made on the 14th January, 2008:

(i) The Value Added Tax liability constitutes an expense in the winding up of the company;

(ii) The date on which the liability to Value Added Tax accrued was the date of completion of the sale on the 5th February 2005.