THE HIGH COURT

REVENUE

[2016/RA 2/2012]

IN THE MATTER OF A CASE STATED PURSUANT TO SECTION 941 OF THE TAXES CONSOLIDATION ACT, 1997

BETWEEN

VIEIRA LIMITED

APPELLANT

AND

DERMOT O'DONAGAIN (INSPECTOR OF TAXES)

RESPONDENT

JUDGMENT of Ms. Justice Costello delivered on 8th day of May 2018

Introduction

1. This is an appeal by way of case stated pursuant to s.941 of the Taxes Consolidation Act, 1997 as applied to VAT by s.25 of the Value Added Tax Act, 1972 as amended (hereinafter "VATA") from Her Honour Judge Jacqueline Linnane dated the 21st March, 2017. The case stated seeks the opinion of the High Court on two questions:

> (1) Based on the facts found was I correct in law in determining that the arrangements did not constitute either a letting of immovable goods or a surrender of possession for the purposes of the VATA 1972?
>
> (2) Based on the facts found was I correct in law in concluding that the arrangements constitute an abuse of rights so as to be liable to be set aside in accordance with the principles outlined by the Court of Justice of the EU in its judgment in Case C-255/02 *Halifax plc et al v. Commissioners of Customs & Excise* [2006] ECR I-1609 and so to permit the assessment to stand?

The facts as found by the Circuit Court

2. The appellant is a company incorporated in the State and is registered for VAT with the number 8284762L. The appellant, a building development company, was formed with a view to the development of a very large housing development in Tyrellstown, County Dublin. The company was never in business as a landlord. The aim was to sell the houses.

3. The development at Tyrellstown was the first of its kind in Ireland, with a greater density of housing and involving 35 different house types, considerably greater than normal. It was constructed in a number of phases between 2001 and 2009. In order effectively to market new houses it is generally required to have a similar showhouse available to allow prospective purchasers to view. That was a problem in Tyrellstown due to the number of house types and the prevalence of first time buyers.

4. Mr. McPeake of McPeake Auctioneers was the sole selling agent in respect of the development at Tyrellstown. He was an independent third party charged with the sale of the houses constructed by the appellant. He testified that the vast majority of the sales were to first time buyers and included foreign nationals.

5. In respect of the first phase of the development, which consisted of approximately 70 houses, a showhouse complex of twelve houses was constructed and fitted out. It included about half of the 35 different house types to be developed at Tyrellstown. The houses for sale were in close proximity to the showhouse complex and the houses in the first phase were sold with the assistance of the showhouse complex. There was no licence agreement governing the access of McPeake Auctioneers to the showhouses in this first phase.

6. In respect of the second phase of the development, sales were more difficult. The showhouse complex was no longer representative of the types of houses being sold. This was due both to the number of house designs being used and a change in the relevant building regulations, in particular with respect to disabled access, which necessitated material alterations to the floor plan of the houses. Mr. McPeake stated that this difficulty was greater since a larger than usual proportion of the buyers in Tyrellstown were first time buyers and/or did not have English as their first language. Therefore, misunderstandings as to the nature of the alterations made between the showhouses and the houses to be developed in phase 2 could easily arise. Mr. McPeake said he had particular concerns regarding this issue in the context of misinformation/misrepresentation based on his years of experience and his caution regarding issues of description of the property being sold.

7. Further to advice from its tax advisors, the appellant entered into written licence agreements with McPeake Auctioneers. A letter from the appellant to Mr. McPeake dated the 3rd March, 2003 provided as follows:

> *"I write to confirm your appointment as sole selling agent for those houses in the current phase of Tyrellstown, Dublin 15, listed at the end of this letter, being developed by Vieira Ltd…*
>
> *As discussed, we have decided to enact a new sales process, which has been designed to serve as an incentive to you to close out sales quickly, while reducing the level of management that is required from this company. To that end, you will be given possession of contracted units in advance of their sale in order that you will then be able to exhibit these units to prospective purchasers who may wish to see a constructed house rather than a drawing. We understand this will help avoid any problems surrounding misrepresentation until such time as the new show complex is complete.*
>
> *Accordingly, in respect of each dwelling unit contracted for sale, you will enter into a form of licence, whereby you take possession of each unit. The licence will grant you access for the purposes outlined above and is designed to serve as an incentive for you to complete the sale of the licensed unit, which as stated, will be contracted to a third party. This incentive is created by the licence period being for 2 weeks, after which a fee will be required from you to renew the licence (to continue having access to the said unit for show purposes) and such fee will be set against any commission*

you eventually receive."

8. The appellant executed licence agreements for a total of 198 units of completed/nearly completed residential houses at Tyrellstown to McPeake Auctioneers for the purpose of McPeake Auctioneers' activities as sales agent for the development over a period between 2003 and 2004. At no time were all 198 units licensed together.

9. No licence agreement was ever renewed or extended. There was never any discussion of what the licence fee would be. No licence fee was ever demanded or paid. In fact, McPeake Auctioneers continued to have access to the houses after the expiry of the two week period for the same purposes right up to the completion of the sale of the houses.

10. A set of keys was provided to McPeake Auctioneers who were authorised to permit access to each property to prospective purchasers for the purposes of viewing the property. Mr. McPeake confirmed that McPeake Auctioneers would, on a regular basis, provide keys to those contractors wishing to access the property during the period of the licence agreement to carry out works, including snagging on behalf of the appellant. The appellant's foreman also had keys and had access to the property at any time. Mr. McPeake had no doubt that the foreman would have access to the houses at any period and that he would have keys that would get anybody in.

11. McPeake Auctioneers did not bring furniture, fittings or carpets onto any property. Under the terms of the licence agreement (which will be considered more fully below) McPeake Auctioneers was responsible to keep the premises secure and was required to have relevant public liability insurance cover. Mr. McPeake confirmed that McPeake Auctioneers held general public liability insurance which he believed covered the user of the relevant premises although he had not clarified that with his insurer. Mr. McPeake also confirmed that he did not employ security personnel, but McPeake Auctioneers were liable for ensuring that the doors and windows were fully secured at the end of a viewing. There were disputes with foremen as to whether doors and windows had been left open.

12. Mr. McPeake and his sales team accessed each particular licensed property to show the prospective purchasers of other houses in the development, the layout, design and finish of the particular property. Mr. McPeake testified that the keys would be returned on request to the foreman or to the appellant's solicitors, when the closing was imminent, or directly to the purchaser in some cases.

13. Mr. McPeake testified that the licence agreements would facilitate his efforts to address his concerns regarding the misinformation/misrepresentation and reduce the time spent by his office on sales. In response to a question that there was no need for the licence, Mr. McPeake testified that it was the advisors' way of helping to solve a misrepresentation problem. He did not seek a licence agreement. It was put to him and he dealt with it. In response to a question that the licence agreement did not assist with misrepresentation issues, Mr. McPeake testified that this was incorrect; he described the licence agreement as more pressure on him or a stick with which to beat him. Mr. McPeake said the Tyrellstown development was an unusual development, the licence agreement did not "change his world" but it focused on using specific houses, which were close to ones being sold.

The licence agreement

14. Each licence agreement was in identical terms and was for a period of fourteen days. Licence agreements were only granted once a contract for the sale of the particular house had been concluded. Licence agreements were entered into in respect of each house in the development in respect of which contracts had been concluded for that phase of the development. Each licence agreement was between the appellant as licensor and Mr. Joseph Peake as licensee. The following are the relevant provisions of the license agreement:

> *"A. The licensor is the owner of the property more particularly described in the schedule hereto ("the property") which is part of the Development more particularly described in the schedule hereto.*
>
> *B. The property consists of a site with a new dwellinghouse constructed thereon. The licensor wishes to sell additional property within the Development and has engaged the services of the Licensee as agent for the purpose of identifying a purchaser and negotiating terms of sale of property as quickly as possible and at the best price and upon the most favourable conditions (hereinafter called "the Objective").*
>
> *…*
>
> *D. In order to facilitate the licensee in achieving the Objective, it has been agreed that the Licensor will grant to the Licensee a licence in the terms hereinafter appearing, upon the terms and conditions hereinafter specified."*

15. The licence granted the licensee a licence to enter upon and to use and occupy the property. The right was personal to the licensee. The licensee was prohibited from making any alterations or additions whatsoever to the property without the prior written permission of the licensor.

16. In addition the license provided:

> *"3. The licensee shall hold keys to the property and may enter upon the property as often and at such times and on so many occasions as the licensee may wish and without notice to the licensor, and accompanied by potential purchasers, employees and such others as the licensee may nominate and the licensee shall have possession of the property during the period of this agreement in order to achieve the Objective.*
>
> *4. The licensor shall be entitled at all reasonable times during the day to enter upon the property with colleagues and others.*
>
> *5. The licensee shall be responsible to keep the property secure and shall ensure that no trespassers gain access thereto by reason of the act on (sic) default of the licensee.*
>
> *6. The licensee may bring into the property such furniture, fittings, carpets, curtains and other effects as the licensee may deem desirable in securing the objective.*
>
> *12. The licensee shall ensure that it has at all times public liability insurance covering the legal liability of the licensee and its invitees, employees and agents…arising out of or incidental to the entry of the licensee, its invitees or employees upon the property pursuant to this agreement…*
>
> *13. This Agreement shall be for a period of fourteen days from the date hereof or such longer period as the parties*

hereto may agree provided however that in the event that the Licensee is in default of any of its obligations under this Agreement then the licensor may by notice in writing terminate this Agreement whereupon this agreement shall immediately be at an end and of no further force or effect.

14. It is hereby agreed that notwithstanding the provisions of Clause 13 hereof, this Agreement shall automatically be extinguished and come to an end upon the completion by the licensor of a sale of the Property to a third party purchaser.

15. Upon determination of this Agreement under Clause 13 or Clause 14 hereof the Licensee will forthwith return to the Licensor all keys to the Property, unless otherwise agreed with the Licensor."

Assessment to VAT

17. On the signing of each license agreement the appellant accounted for VAT on the basis that each license agreement was a self supply under s.4(3)(a) and s.3(1)(f) VATA in its relevant VAT returns. It did not account for VAT on the sale of the houses to the consumers. The appellant was assessed to VAT on the sale of the houses to consumers for the period 1st September/October 2003 to 31st August, 2004 in the sum of €1,944,340. The appellant appealed the assessment and the Appeal Commissioner confirmed the assessment on 23rd November, 2011. The appellant appealed against the determination of the Appeal Commissioner to the Circuit Court. The main issue in the appeal was whether the appellant was liable to VAT on the sale by it of new houses to consumers or whether such supplies were excluded from a charge to VAT where VAT was previously accounted for by the appellant by means of a self supply. The appellant advanced its case that the arrangements were self supply for the purposes of VATA on two alternative bases: (1) that the licence agreements were a letting of immovable goods or (2) they constituted a surrender of possession for the purposes of VATA 1972.

The appellant's submissions

18. The appellant maintained that when it entered into the two week licence agreements with Mr. McPeake that gave rise to a self-supply by the appellant upon which it became liable to pay VAT (and it did pay the appropriate VAT of approximately €4.4 million). There are two separate arguments concerning the construction of the relevant tax legislation which the appellant submitted leads to this conclusion. If the appellant is correct that under either construction there is a self-supply, then there is no dispute between the parties that it follows that the subsequent sale of each house would not be subject to VAT.

19. The VAT Act, 1972

The relevant provisions of VATA are sections 3 and 4 of the Act. Section 4 deals with immovable goods. Section 4 (1) applies to immovable goods which have been developed or in respect of which the person supplying them was entitled to a deduction. Prima facie the appellant falls within the charge to VAT as it sells new houses which it has built. Interest for the purposes of s.4 is defined as:

> *"'interest", in relation to immovable goods, means an estate or interest therein which, when it was created was for a period of at least 10 years or, if it was for a period of less than 10 years, its terms contained an option for the person in whose favour the interest was created to extend it to a period of at least 10 years, but does not include a mortgage, and a reference to a disposal of an interest includes a reference to the creation of an interest, and an interval of the type referred to in sub-section (2A) shall be deemed to be an interest for the purposes of this section."*

Section 4 (2) and (3) provide:-

> *"(2) Subject to paragraphs (c), (d), (e)and (f) of section 3(1), section 19(2) and subsections (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.*
>
> *(3)(a) Subject to paragraph (b), where a person having an interest in immovable goods to which this section applies surrenders possession of those goods or any part thereof in such circumstances that the surrender does not constitute supply of the goods for the purposes of subsection (2), the surrender shall be deemed, for the purposes of section 3(1)(f), to be an appropriation of the goods or the part thereof, as the case may be, for a purpose other than the purpose of his business."*

The leasing or letting of immovable property

20. The Sixth Council Directive 77/388/EEC of 17th May, 1977 on the harmonisation of the laws of the member states relating to turnover taxes – common system of value added tax: uniform basis of assessment ("the Sixth Directive") applies to the VAT regime throughout the EU. It applies certain provisions in relation to VAT which the member states are required to transpose into national law. It lays down certain exceptions to VAT throughout the EU in Article 13. Article 13B(b) requires member states to exempt the leasing or letting of immovable property (subject to certain exceptions not relevant to this case) from VAT. Article 13B(b) of the Sixth Directive was transposed into Irish law by para. (iv) of the first schedule VATA.

21. If the licence agreements can be regarded as "*the leasing or letting of immovable property*" within the meaning of that expression as used in the Sixth Directive, then there is a "supply" under s.3(1)(e) of VATA. The effect of s. 3(1)(e) of the Act is that if a taxpayer diverts goods from a taxable business purpose to a non taxable or exempt business purpose, a self-supply arises and the person concerned has to pay the VAT arising on the self-supply. The underlying asset, in this case each individual house, is deemed to be self-supplied by the taxpayer pursuant to the licence agreements and VAT arises on each such supply as being a "supply" within the meaning of s.3(1)(e). In that case there is no charge to VAT on the subsequent sale of the houses.

22. The Court of Justice of EU has considered the meaning of "the leasing or letting of immovable property" for the purposes of Article 13B (b) in a number of cases and has held that the concept falls to be determined exclusively by reference to EU law. This means that the national provision transposing the directive must be interpreted solely by reference to those decisions of the CJEU.

23. The leading decision is *Belgian State v. Temco Europe S.A.* (Case C-284/03) [2005] STC 1451 ("*Temco*"). The court held:

> *"19. In numerous cases, the Court has defined the concept of the letting of immovable property within the meaning of Article 13B(b) of the Sixth Directive as essentially the conferring by a landlord on a tenant, for an agreed period and in return for payment, of the* ***right to occupy property as if that person were the owner and to exclude any other person from enjoyment of such a right ...***
>
> *20. While the Court has stressed the importance of the period of the letting in those judgments, it has done so in order to distinguish a transaction comprising the letting of immovable property, which* ***is usually a relatively passive activity linked simply to the passage of time*** *and not generating any significant added value (see, to that effect, Goed Wonen, paragraph 52), from other activities which are either industrial and commercial in nature, … or have as their subject-matter something which is best understood as the provision of a service rather than simply the making available of*
>
> *property, such as the right to use a golfcourse (Stockholm Lindòpark, paragraphs 24 to 27), the right to use a bridge in consideration of payment of a toll (Commission v Ireland) or the right to install cigarette machines in commercial premises (Sinclair Collis, paragraphs 27 to 30)….*
>
> *22. In any event, it is not essential that that period be fixed at the time the contract is concluded.* ***It is necessary to take into account the reality of the contractual relations*** *(Blasi, paragraph 26). The period of a letting may be shortened or extended by the mutual agreement of the parties during the performance of the contract.*
>
> *23. Furthermore, while a payment to the landlord which is strictly linked to the period of occupation of the property by the tenant appears best to reflect the passive nature of a letting transaction, it is not to be inferred from that that a payment which takes into account other factors has the effect of precluding a 'letting of immovable property' within the meaning of Article 13B(b) of the Sixth Directive, particularly where the other factors taken into account are plainly accessory in light of the part of the payment linked to the passage of time or pay for no service other than the simple making available of the property.*
>
> *24. Lastly, as regards the tenant's right of exclusive occupation of the property, … the* ***landlord may reserve the right regularly to visit the property let. Furthermore, a contract of letting may relate to certain parts of a property which must be used in common with other occupiers****.*
>
> *25 The presence in the contract of such restrictions on the right to occupy the premises let does not prevent that occupation being exclusive as regards all other persons not permitted by law or by the contract to exercise a right over the property which is the subject of the contract of letting….*
>
> ***27 It is also a matter for [the national] court to establish whether the contracts, as performed, have as their essential object the making available, in a passive manner, of premises or parts of buildings in exchange for a payment linked to the passage of time, or whether they give rise to the provision of a service capable of being categorised in a different way.****" (emphasis added)*

24. The opinion of the Advocate General in Temco stated at para. 22:

> *"The leasing of an immovable property is characterised by the transfer of the powers of the owner – with the exception of the power of disposal – and, therefore,* ***the capacity to exclude all others (including the owner) from enjoyment of the property****. Nevertheless, an exclusive tenancy is not synonymous with a sole tenancy, since there is a possibility of joint possession, by means of one or more agreements. The decisive feature is the monopoly enjoyed by the tenants, who are seen by everyone to be in possession of the leased property and are entitled to prohibit anyone else from using it.*
>
> *26… it is for the national court to analyse the content of the contracts and the circumstances in which they are put into effect, in order to determine whether they grant the transferees enjoyment vis-a-vis the world at large and, in particular, vis-à-vis the owner." (emphasis added)*

25. The Advocate General said that it was important to ensure that operations which were substantially the same were not treated differently. This was the basis for the decision in Goed Wonen.

26. The second important decision of the Court of Justice is the case of *Sinclair Collis Limited v. Commissioners of Customs & Excise* (Case c-275/01). In that case the owner of a cigarette vending machine was granted the right to install, operate and maintain the machine on the premises of the site holder for a period of two years in a place nominated by the site holder in return for a percentage of the gross profits of the sales of cigarettes and other tobacco goods on the premises. The court had to consider whether this was capable of amounting to the letting of immovable property within the meaning of Article 13B(b) of the Sixth Directive. The court held that the occupation of an area or space at the commercial premises was under the terms of the agreement merely the means of effecting the supply which was the subject matter of the agreement, namely the guarantee of exercise of the exclusive right to sell cigarettes at the premises by installing and operating automatic vending machines in return for a percentage of the profits. At para. 25 of the judgment the court held:

> *"It is also settled that the fundamental characteristic of a letting of immovable property for the purposes of Article 13B(b) of the Sixth Directive lies in conferring on the person concerned, for an agreed period and for payment, the right to occupy property as if that person were the owner and to exclude any other person from enjoyment of such a right."*

27. Based on the facts in that case it was held that the agreement between the parties did not amount to a letting of immovable property within the meaning of the provisions.

Application of the principles to the licence agreements

28. In my judgment the licensing agreements were merely the means of effecting the sale of houses at the Tyrellstown Development which was the subject matter of the agreement between the appellant and McPeake Auctioneers. The objective identified in each licence agreement was for McPeake Auctioneers to identify a purchaser and negotiate terms of sale of other properties within the development as quickly as possible and to obtain the best price and the most favourable conditions. The individual houses were not made available to the licensee to enjoy in a passive manner in exchange for a payment linked to the passage of time. The occupation by Mr. McPeake of the premises was solely for the purposes of closing the sale of the house and selling other houses within the development, for which the auctioneer would receive a commission. The licensee had no authority to occupy the premises and use it as he sought fit for his own purposes for the duration of the licence agreement, as one would expect where a party was entitled to

enjoy land in a passive manner.

29. The Court of Justice identified payment by the occupier as an essential element of a letting of immovable property for the purposes of the Article. In this case the facts establish that no licence fee was ever calculated or paid even though McPeake Auctioneers continued to occupy some of the houses after the duration of the licence had expired and when a fee ought to have been payable.

30. It was submitted that payment could be equated with benefit to the landlord and that the landlord received a benefit by incentivising McPeake Auctioneers to close the sale of the licensed premises quickly and by reducing the level of management required by the appellant in the sales process, and by facilitating sales of additional property within the development. The Court of Justice has emphasised that the national court must consider all the circumstances surrounding the transaction and to consider whether the contract as **performed** has as its essential object the making available in a passive manner of premises or parts of buildings in exchange for a payment linked to the passage of time.

31. The generation of future sales of further houses in the development cannot be consideration for the licences: that was the service McPeake Auctioneers were engaged to perform when they were appointed sole selling agents for the development. The purpose of the licences was to facilitate those sales, that is the service for which McPeake Auctioneers would be paid commission, the sales were not payment for the licences.

32. Further, the Circuit Court did not find as a fact that there was any such alleged benefit to the appellant. There was no finding of any link between the grant of the licences and any accelerated closing of sales or contracting of new sales. No witness from the appellant identified any such benefit and the furthest Mr. McPeake went was to state that it was incorrect to state that the licence agreement did not deal with the misrepresentation issue and that the agreement "didn't change [his] world".

33. I am quite satisfied on the facts as found by the Circuit Court that, considering all of the surrounding circumstances of these licence agreements as performed, their essential object was not the making available in a passive manner of the 198 houses in exchange for a payment linked to the passage time. Rather, they were clearly associated with the provision of a service; the sale of the houses in the development.

34. In *Temco* the court concluded that a letting of immovable property was required to be a legal transaction whereby the owner of an immovable property assigns the use and enjoyment thereof to another person to the exclusion of all others including the owner for a period of time in exchange for payment of a price. In this case, McPeake Auctioneers were responsible for excluding trespassers from the premises but they were not entitled to exclude all others including the owner from the premises for the duration of the licence. On the contrary, the appellant's foremen and the various sub-contractors engaged in snagging the premises had access to the property at any time and Mr. McPeake said that he had no doubt that the foreman would have access to the houses at any period and that he would have keys that would get anybody in. It is true that in *Temco* the court held that there could be a number of contracts and that the letting may relate to certain parts of a property which maybe used in common with other occupiers, but that is not what occurred in this case. Through its agents, the appellant retained an equal right to occupy the property with the licensee. On the facts of this case, this seems to me to be incompatible with the test established in *Temco* by the Court of Justice.

35. For these reasons, the Circuit Court was correct in law in concluding that the arrangements did not constitute a letting of immovable goods for the purposes of VATA 1972.

Surrender of possession

36. In the alternative the appellant argued that the licence agreements constituted a surrender of possession of each of the properties within the meaning of section 4(3) (a) of VATA and that it is deemed to be an appropriation of goods "for the purposes of s.3(1)(f)" of VATA. If it is, then the licence agreements were subject to VAT as a "self supply" with the consequence that the subsequent sale of the houses in relation to which the licences were granted were no longer subject to VAT.

37. The appellant argued that surrender of possession by way of the licence agreement did not itself simpliciter constitute a supply of goods for the purposes of s.4(2) VATA since the appellant had not disposed of the entire of its interest in those goods or of an interest for a duration of at least ten years. It said that by virtue of s.4(3)(a) VATA that surrender was deemed to be a supply of goods for the purposes of s.3(1)(f) VATA, being deemed to be an appropriation of the goods for a purpose other than the purpose of its business and so to constitute a supply of immovable goods liable to VAT for the purposes of s.3(1) VATA and s.4(2) VATA. It was submitted that neither of the exceptions to s.4(3)(a) VATA contained in sub para. (b) applied. That being so, s.4(3)(a) deemed the surrender of possession as an appropriation of goods for a purpose other than the purposes of its business i.e. a self supply of goods for the purposes of the legislation. By virtue of the provisions of s.3(1)(a) VATA that supply is deemed, for the purposes of the VATA, to have been effected for consideration in the course or furtherance of the appellant's business. Therefore, the appellant was required to account for VAT on a self-supply basis (which it did) and accordingly no further assessment upon the sale of the houses to VAT could be raised and therefore the assessment under appeal should be reduced to nil.

38. This argument depended upon the licence agreements constituting the surrender of possession within the meaning of s.4 of the VATA.

39. The appellant referred to the cases of *Greaves v. Field* [1986] 3 WIR 412 and *Calder Civic Trust Ltd v. Jenkins* (unreported, Court of Appeal of England and Wales, 26th January, 1994) as cases illustrating the indicia of possession of land for the purposes of supporting the proposition that the license agreements involved the surrender of possession by the appellant of each licensed premises.

40. In *Greaves v. Field* the court was concerned with a statutory right under the rent restriction legislation in Trinidad and Tobago. The judicial committee of the Privy Council was concerned with "*the symbols of continued possession"* and occupation further to a tenancy that had previously existed. The issue for consideration was whether there was non user of the previously demised premises within the meaning of the statute. The Privy Council held that the demised premises were used to house goods and as an address for the business of the party claiming the statutory tenancy (who had erected a sign outside the premises). In this context the Privy Council held that these actions amounted to symbols of possession and on that basis concluded that there was no non user within the meaning of the statute. The case did not establish that such actions would be sufficient to establish a surrender of possession of lands and counsel for the appellant did not suggest that this was the case.

41. In *Calder Civic Trust Ltd v. Jenkins* the issue for consideration was whether Mr. Jenkins had ousted the possession of the Civic Trust of a cellar. The Civic Trust had gone into possession of a premises which had a separate cellar accessed by its own door. Mr. Jenkins went into possession of the cellar and attached a lock to the door and kept the key to the lock himself. The case was

concerned with adverse possession and not the voluntary surrender of possession by the owner of land to a third party. It is of limited assistance in construing the meaning of surrender of possession for the purposes of the VATA.

42. Counsel submitted in the light of the slight indicia of occupation that were held to be sufficient to establish possession of premises in *Greaves and Calder Civic Trust* that the appellant in these licence agreements surrendered possession of the premises within the meaning of VATA when it granted the licences. He referred to the right of Mr McPeake to occupy the houses and to exclude persons from the premises (other than the appellant, its foreman and the subcontractors finishing the snagging for the houses) as being a far greater possession of the lands than in either of the two authorities referred to.

43. Counsel for the respondent referred to *Waterford Glass (Group Services) Limited v. Revenue Commissioners* [1990] I.R. 334 where the High Court held that:

> *"The court is entitled to look at the reality of what is being done. Just because the parties put a particular label on a transaction the court is not obliged to accept that label blindly."*

In *Cussens v Brosnan* in the High Court (Unreported, High Court, Charleton J., 11th June, 2008) it was held that there was a "*general principle of interpretation whereby a legal manoeuvre may be identified as to its underlying reality*". The court was urged to consider whether in fact surrender of possession of the houses took place. It was submitted that the form of access or occupation was not a surrender of possession because the appellant, its foreman and the subcontractors were all entitled to and did in fact enter upon the property for the purpose of snagging and finishing the houses. The occupation had to be seen in the light of Mr McPeake's role as the sole selling agent for the development. It was contrived and artificial to say that a two week licence of a house which was the subject of a contract for sale in the process of closing amounted to the surrender of possession of land.

Discussion
21. The concept "surrender of possession" of immovable property involves the owner of immovable property divesting himself to some degree of his rights to possession of the immovable property. The court therefore has to consider the extent to which the appellant's right to enjoy possession of each of the houses on the development was altered by the grant of each licence to Mr. McPeake.

22. The appellant was engaged in developing and selling houses. In each case, the appellant had entered into contracts for the sale of the houses. The licence agreements were only entered into after the contract to sell the house had been concluded and the right of the appellant (and Mr. McPeake) to possession of the house was solely until the sale closed. The appellant continued to enjoy the right at all reasonable times during the day to enter upon the property with colleagues and others. Its foreman had keys to the property and was in a position to let the various contractors access the property at any time as required to complete snagging on behalf of the appellant. The right of the appellant to occupy the property was terminated by the conclusion of the sale. If no licence agreement had been entered into with Mr. McPeake, as the appellant's selling agent, he would nonetheless have been afforded access to the individual house for the purposes of expediting the closing of the sale to the purchaser. In these circumstances, it is very difficult to see what possession was surrendered by the appellant to Mr. McPeake. At its height, there was joint possession of the licensed premises by both the appellant and Mr. McPeake. That cannot amount to surrender of possession by the appellant in favour of Mr McPeake.

21. In my opinion it is artificial and contrived to say that a fourteen day licence amounts to the surrender of possession of premises in circumstances where the licensor, a building company in the business of developing and selling a housing development, had contracted to sell the house to a third party and was in the process of closing the sale and where the licensee is granted the licence for the express purposes of concluding the sale and to show the house to potential purchasers of alternative properties in the development.

22. I do not believe that this is sufficient to establish that the appellant had surrendered possession of the houses to Mr. McPeake for the purposes of s.4(3)(a) of VATA. I therefore conclude that the Circuit Court was correct in law in concluding that the arrangements did not constitute a surrender of possession for the purposes of the VATA 1972.

The Halifax principle
23. In *Halifax Plc, Leeds Permanent Development Services Ltd, County Wide Property Investments Ltd, v. Commissioners of Customs and Excise* (Case C-255/02) [2006] ECR 1 ECRI-01609 ("*Halifax*") the Court of Justice held that the Sixth Directive must be interpreted as precluding any right of a taxable person to deduct import VAT where the transaction from which that right derives constitutes an abuse of practice. It confirmed that the principle that abuse of rights is prohibited applied in the sphere of VAT. The national court must consider whether the impugned transaction involved an accrual of a tax advantage contrary to the purposes of the Sixth Directive and secondly was the essential aim of the impugned transaction the avoidance of tax. The transaction is not abusive if the economic activity carried out may have some explanation other than the mere attainment of tax advantages. It is for the national court to determine, provided that the effectiveness of EU law is not undermined, whether the constituent elements of the abuse of rights exist.

24. In *Cussens v. Brosnan* (Case C-251/16) it was held that the principle of abuse of rights is a principle of general EU law and has direct effect and does not require to be transposed into national law. At para. 44 of the judgment the court held that a principle that abusive practices are prohibited must be interpreted as being capable, regardless of a national measure giving effect to it in the domestic legal order, of being applied directly in order to refuse to exempt from VAT sales of immovable goods. The principles of legal certainty and the protection of legitimate expectations do not preclude the application of the principle.

25. The first requirement of the *Halifax* principle is met in this case. The appellant obtained a tax advantage by avoiding the usual charge to VAT on the sale of the houses as a result of the licence agreements which it regarded as a self supply of goods for the purposes of VATA. The purpose of the relevant provisions of the Sixth Directive and of s.4 VATA is to bring within the charge to tax the "*supply before first occupation of buildings…and the land on which they stand"* (see Sixth Directive Articles 2(1), 4(3), and 13(B)(h)). Thus supplies before first occupation of buildings and the land on which they stand are normally chargeable to VAT. Through the device of the licence agreements, the appellant brought about a situation where no VAT (or an artificially lower amount of VAT) was chargeable. Such a transaction or arrangement is contrary to the purpose of the provisions of the Sixth Directive and the VATA. The Appellant claimed a tax advantage based on the licence agreements which is contrary to the purposes of the Sixth Directive.

26. It is necessary then to consider the second criterion identified by the court in *Halifax*. It is for the national court to determine whether the accrual of a tax advantage is the essential aim of the transaction at issue. This requires the court to determine the substance and real significance of the transaction at issue. The Court of Justice in *Cussens* said that the national court may take account of the "purely artificial nature of those transactions and the links of a legal, economic and/or personal nature between the operators at issue". These aspects were relevant to assessing whether the accrual of a tax advantage was the essential aim of the

transaction notwithstanding the possible existence of other economic objectives.

27. The appellant argued that the licence agreements did not amount to an abuse of rights as there were clearly identified and legitimate business objectives underpinning the licence agreements apart from the tax advantage. These were to maximise the number of new sales and to incentivise the speedy completion of existing contracts for sale. Transactions were not abusive if the economic activity carried out may have some explanation other than the mere attainment of tax advantages and therefore the arrangements in this case did not come within the scope of the *Halifax* principle.

28. The Circuit Court found as a fact that in order to effectively market houses it is generally required to have a similar showhouse available to allow prospective purchasers to view. The vast majority of the sales at the Tyrellstown development were to first time buyers and people whose first language was not English. For the first phase of the development, there was a showhouse complex of twelve houses, including about half of the 35 different house types in Tyrellstown. There was no license agreement governing the access of McPeake Auctioneers to the showhouses in this first phase. The showhouses were no longer available as appropriate examples of the houses to be built in the second phase of the development due to alterations made to the design of the houses to reflect changes in building regulations. Mr. McPeake said he had particular concerns regarding possible misinformation or misrepresentation in relation to sales in the second phase to first time buyers and to persons who did not have English as their first language in these circumstances. The appellant executed licence agreements for each house in the second phase of the development in respect of which a contract for sale was concluded, a total of 198 licences. The evidence was that the licence agreements assisted with Mr. McPeake's misinformation/misrepresentation concerns and reduced the time spent by his staff on sales. He described the licence agreement as more pressure on him or a stick with which to beat him. There was no finding of fact in the Circuit Court that the licence agreement maximised the number of new sales or assisted in the speedy completion of existing contracts for sale.

29. In my judgment the fact that each property sold in the second phase of the development was the subject of a license agreement between the appellant and Mr. McPeake underscores the fact that the licence agreements were not entered into as a means of providing an alternative to specifically built showhouses. The first phase of the development operated with twelve showhouses to illustrate the 35 different type of houses available in the development. It could not plausibly be suggested that 198 showhouses were required. It is of course true that each house was only available for the relatively short period between the date of the contract for sale and the closing of the sale. At any given time relatively few houses were licensed to Mr. McPeake. A review of Schedule C of the case stated reveals that the houses were effectively licensed on a rolling basis in different addresses of the estate. The precondition to the grant of a licence (a concluded contract for sale) necessarily meant that there was no means of ensuring that there was a representative spread of the different types of houses available in the development licensed to Mr. McPeake at any one time such as would normally be available with a scheme of showhouses. Furthermore, all of the houses were licensed which means that the final houses to sell were licensed to Mr McPeake when they could serve no useful function as surrogate showhouses.

30. To my mind, this, combined with the unlimited access enjoyed by the foreman of the appellant and the various subcontractors to each of the licensed premises, the very short duration of the licences and the fact that no rent was even discussed or claimed underscores the purely artificial nature of these transactions. The essential or principal aim of the licence agreements was to obtain a tax advantage. The appellant has not established that there was an additional business objective underpinning the license agreements. Its arguments in that regard are not supported by any finding of fact of the Circuit Court.

31. The appellant relied on the principles of legal certainty and the protection of legitimate expectations in resisting the arguments of the respondent based on the *Halifax* principle. It is clear from the decision in *Cussens* that neither of these principles precludes the application of the principle of abuse of rights. The court was also clear as to the approach to be adopted by national authorities in the circumstances. At para. 48 of *Cussens* the court held:

> *"the principle that abusive practices are prohibited obliges the national authorities, in essence, to apply the relevant VAT legislation to the transactions concerned, while disregarding those of the transactions that constitute an abusive practice."*

The direction is to the national authorities and not just national courts. While the decision postdates the actions of the Revenue Commissioners, they in fact acted precisely as the CJEU has stated that they ought to act in the circumstances where the national authority is satisfied that a claimed tax advantage is based upon a transaction or transactions that breach the *Halifax* principle.

32. I therefore agree with the Circuit Court judge and conclude that the licence agreements are an abusive practice within the meaning of the Halifax principle and the subsequent cases expounding it.

Should there be a reference to the CJEU ?

33. The appellant argued that if the abuse of rights principle did apply to the licence agreements, the principle was enshrined in Irish tax law in section 811 of the Taxes Consolidation Act, 1997. Therefore, the Revenue Commissioners were obliged to apply the relevant national measure which gave effect to the EU principle and they could not, in effect, by pass the express legislative provision and rely on the general principle of EU law instead. It was emphasised that the decision in *Cussen* proceeded on the basis that there was no provision in national law giving effect to the abuse of rights principle and therefore it was not decisive on this issue. The court was invited in the circumstances to make a reference to the Court of Justice on the issue whether recourse could be had to the *Halifax* principle where an anti-avoidance measure existed under national law and whether that law was exhaustive of the anti-avoidance measures which could be relied upon by the national authorities, or whether they could elect not to avail of the national measure but apply the EU principle directly.

34. The court has a discretion whether to make a reference to the Court of Justice under Article 267 of TFEU. It may do so if a ruling by the court is necessary for the national court's determination of the case before it. On the facts of this case, a decision on the point raised is not necessary for me to make my decision on the case stated and therefore I decline to refer the issue raised to the Court of Justice. The issue may well arise in another case where it will be necessary to have a ruling in order to determine the case at issue. It is appropriate that the issue of a reference be reserved to such a case in the future.

Conclusion

35. I therefore answer the case stated as follows:-

(1) Yes

(2) Yes