

THE HIGH COURT

[2015\307 R]

BETWEEN

THE REVENUE COMMISSIONERS

APPELLANT

AND

CANADA LIFE LIMITED

RESPONDENT

JUDGMENT of Mr. Justice Tony O'Connor delivered on the 6th day of July, 2016

Introduction

1. The question for this Court by way of case stated dated 10th December, 2015 from the Appeal Commissioner was whether he was correct in law in determining that the transfer of shares held by the Minister for Finance ("**The Minister**") in Irish Life Group Limited ("**Irish Life**") is exempt from stamp duty by virtue of s. 108(b) of the Stamp Duty Consolidation Act 1999 ("**SDCA**")¹. The transfer was effected by stock transfer form dated 18th July, 2013 for a consideration of €1.3 billion.

2. Section 108 of the SDCA provided that "stamp duty shall not be chargeable on any instrument executed by or on behalf of...the Minister in relation to a function exercised by the Minister which is capable of being delegated to" the National Treasury Management Agency ("**NTMA**") "under s. 5 of the National Treasury Management Agency Act 1990 ("**NTMAA 1990**") [The phrase underlined was the subject of most debate at the hearing on 16th and 17th June 2016 giving rise to this judgment].

Background

3. The Court extrapolates the following from the 24 page case stated and the extensive submissions made as facts which are particularly relevant to its consideration:-

1. Irish Life was owned by Irish Life and Permanent PLC ("**ILP**").
2. ILP but not Irish Life became a "covered institution" pursuant to regulations made by the Minister under the Credit Institutions (Financial Support) Act 2008 ("**CIFSA 2008**"). The CIFSA 2008 was enacted to allow the State to guarantee the liabilities of credit institutions including banks and insurance companies.
3. Under the terms of CIFSA 2008 the Minister was enabled to provide financial support including a loan, a guarantee, an exchange of assets and any other kind of financial accommodation to credit institutions. The power to provide financial support in s. 6(1) of CIFSA 2008 is extremely broad having regard to the definition of "financial support".
4. Section 6(1) to (11) of CIFSA 2008 were added by s. 8(1)(b) of CIFSA 2008 to the first schedule of the NTMAA 1990 as functions of the Minister that may be delegated to the NTMA pursuant to s.5 of the NTMAA 1990.
5. Irish Life and Permanent Group Holdings PLC ("**ILPGH**") came into existence on foot of a scheme of arrangement approved by this Court in January 2010. ILPGH was the holding company and entire owner of ILP.
6. In March 2011, stress tests carried out on ILP detected a requirement for recapitalisation in the sum of €4 billion. This was firstly achieved by the Minister applying for and obtaining a direction order under the Credit Institutions (Stabilisation) Act 2010 ("**CISA 2010**") from this Court on 26 July 2011, pursuant to which he subscribed €2.7 billion by way of capital and other instruments and became the holder of 99.2% of the share capital of ILPGH. A further direction order was made under CISA 2010 on 28 March 2012 requiring ILPGH to sell its shares in Irish Life to the Minister for a consideration of €1.3 billion.

Incidental history

4. The context of the acquisition of Irish Life by the Minister was summarised by Peart J. in *Dowling and Ors. v. The Minister for Finance and Irish Life and Permanent PLC* [2012] IEHC 436. Those proceedings concerned an unsuccessful challenge to the sale of Irish Life to the Minister for €1.3 billion. This arose as part of the measures taken to secure the €85 billion finance facility which was deemed necessary for the State in view of the State's inability to access its own funding on the international markets. In effect, the Minister was obliged to buy Irish Life as part of an overall exercise.

5. O'Malley J. in *Dowling and Ors. v. Minister for Finance and Ors.* [2014] IEHC 418 elaborately set out the history of the various decisions, applications and judgments of this Court and of the Supreme Court in the context of the scheme of arrangement for the holding company of the bank which now trades as Permanent TSB. That judgment does not have any particular impact on the facts to be considered.

Interpretation of s. 108 SDCA

6. The SDCA as a taxation statute must be read in accordance with the decision of the Supreme Court in *O'Flynn Construction Limited v. The Revenue Commissioners* [2011] IESC 47 which requires a court to interpret a tax statute in accordance with ordinary canons and standards of statutory construction, to apply the ordinary and natural meaning of the words used in legislation and "in cases of doubt or ambiguity" to resort to a consideration of the purpose and intention of the legislature, or to adopt "a purposive approach" in the same way as is required by s. 5 of the Interpretation Act 2005.

Burden on taxpayer where relief is claimed

7. Where a claim for relief or exemption is made, the burden of proving entitlement to relief or exemption rests on the taxpayer. In *Revenue Commissioners v. Doorley* [1933] IR 750 at page 766 Kennedy C.J. put it as follows:-

"...If it is clear that a tax is imposed by the Act under consideration, then exemption from that tax must be given

expressly and in clear and unambiguous terms, within the letter of the statute as interpreted with the assistance of the ordinary canons for the interpretation of statutes. This arises from the nature of the subject-matter under consideration and is complementary to what I have already said in its regard. The Court is not, by greater indulgence in delimiting the area of exemptions, to enlarge their operation beyond what the statute, clearly and without doubt and in express terms, excepts for some good reason from the burden of a tax thereby imposed generally on that description of subject matter."

8. The Court must be careful therefore not to enlarge the operation of any exemption "beyond what the statute, clearly and without doubt and in express terms excepts..."

Delegable functions

9. Section 5(1) of the NTMA 1990 provides:-

"The Government may by order delegate to the Agency [NTMA] the functions of the Minister specified in the First Schedule and any other functions of the Minister in relation to the management of the national debt or the borrowing of moneys for the Exchequer that the Minister considers appropriate and are specified in the order."

10. The following powers of the Minister could at the relevant times have been delegated to the NTMA:-

A) "S. 6(1) of CIFSA 2008:-

"As and from the relevant date, and in accordance with this section, the Minister may provide financial support directly or indirectly to any current or former credit institution or current or former subsidiary of a credit institution or from a credit institution which the Minister may specify by order having regard to-

(a) the matters set out in s. 2,

(b) the extent and nature of the obligations (including the degree of control over possible abuse of the financial support) undertaken and which might be undertaken in the future, and

(c) the resources available to him or her for that purpose"

B) Section 6(4) of CIFSA 2008 was correctly identified by the Appeal Commissioner as the key provision and it reads as follows:-

"(4) Financial support may be provided under this section in a form and manner determined by the Minister and on such commercial or other terms and conditions as the Minister thinks fit. Such provision of financial support may be effected by individual agreement, a scheme made by the Minister or otherwise. Without prejudice to the Minister's discretion as to such conditions, all financial support provided shall so far as possible ultimately be recouped from the credit institution or subsidiary to which the support was provided."

Appellant's focus on power to purchase

11. Section 6(9) of CIFSA 2008 which was also delegable to NTMA was focused upon by the appellant and it reads:-

"The Minister may subscribe for, take an allotment of, or purchase shares and other securities in a credit institution or subsidiary to which financial support is provided under this section on such terms as the Minister sees fit."

Non-delegable function:

12. Section 6(13) of CIFSA 2009 which was not added to the first schedule of the NTMA 1990 in order for it to be delegable to the NTMA, was relied upon by both sides in argument. It provides:-

"Money paid by a credit institution or subsidiary to the Minister, or any non-cash consideration received by the Minister from such credit institution or subsidiary, is to be paid into, or disposed of for the benefit of, the exchequer..."

Submissions of the Appellant on S. 6(4).

13. The appellant submitted that the sale of the shares in Irish Life to the respondent did not constitute recoupment of financial support provided to ILP within the meaning of s. 6(4) of CIFSA 2008. The appellant argued that the financial support provided to ILP or ILPGH was in the form of payment of €1.3 billion as consideration for shares in Irish Life and that the €1.3 billion was not recouped from ILPGH but rather from the respondent.

14. The Court summarises the thrust of the other submissions of the appellant in the next six subparagraphs:-

1. The value was received at the time financial support was provided.
2. The sale of shares in Irish Life constituted the realisation by the Minister of the value of the Minister's asset which had been acquired as part of the giving of financial support.
3. The receipt of funds from the respondent is not, according to the plain wording of the relevant subsection, recoupment "from the credit institution or subsidiary to which the support was provided".
4. There was no statutory duty to recoup the financial support provided by way of the sale of shares in Irish Life to a third party such as the respondent.
5. Irish Life was not a "covered institution".
6. Section 6(13) of CIFSA 2008 which was not capable of delegation to NTMA is the statutory provision which requires the Minister to sell the shares for the benefit of the exchequer.

Respondent's submissions on s. 6(4)

15. The respondent explained *inter alia* how the acquisition of shares in Irish Life by the Minister can only be construed as provision of financial support within the meaning of CIFSA 2008. It was submitted that the Minister would not have bought Irish Life if its holding company did not require capital as the Regulator insisted upon.

16. Counsel for the respondent pointed to the Minister's own statement in the Dáil on 18th April, 2012:-

"...it is my intention to use the powers available to me under the CIFSA, 2008 to acquire Irish Life and complete the recapitalisation of PTSB..."

17. Reliance was also placed on the reference in the judgment of Peart J. in *Dowling and Ors. v. Minister for Finance and Ors.* [2012] IEHC 436 at para. 8:-

"Those efforts came to an end on the 25th November 2011 when the highest of 5 bidders withdrew. The Minister did not consider that any of the lower bids was acceptable, and decided that the only way forward at that point was for the Minister himself to purchase Irish Life for €1.3 billion, but with the intention that it will be re-sold at a later date when the time is right. He made a public statement in that regard at the end of November 2011."

Appeal Commissioner

18. The Appeal Commissioner found that the Minister was supporting the entire institution of ILPGH and that the sale of Irish Life to the respondent enabled him to recover the capital invested in supporting the credit institution which originally included Irish Life, being a valuable asset. He expressed the view that it did not matter whether Irish Life was indeed a covered institution and that "the arrangement undoubtedly comes within the terms of s. 6(4)".

The Court's determination

19. No matter what way one looks at the purchase of shares in Irish Life in 2012 which could have been delegated to NTMA, it was a form of financial support to ILPGH and its subsidiaries within the meaning of s. 6(1) of CIFSA 2008. Such support was intended for a short period of time although that is not particularly relevant to the construction of the statutory provisions in issue.

20. The Court rhetorically asks in an effort to identify a clear meaning: if NTMA had been directed to purchase the shares in 2012, what would have happened when the Minister wanted or was required to accept the offer of the respondent to purchase the shares in 2013 for the same price as was paid in 2012? The NTMA in that situation would have had ownership or control but would have been obliged to comply with the directions of the Minister. The appellant's argument that no order had been made to empower the sale of shares by the NTMA is indeed somewhat contrived when one considers the following:-

1. Section 4 of NTMAA 1990 specifies that the principal function of NTMA is to perform delegated functions on behalf of the Minister.
2. If shares were acquired by NTMA on behalf of the Minister there follows inexorably a function to dispose on behalf of and when required by the Minister.
3. Furthermore, s. 4(3) and (4) of the NTMAA 1990 requires NTMA to carry out its functions subject to the supervision of the Minister and in compliance with any ministerial direction.
4. Section 4(2) of the NTMAA 1990 confers on NTMA "*all such powers... as are necessary or expedient for the purposes of its functions.*"
5. Section 5(3)(e) of the NTMAA 1990 provides that any function delegated to NTMA remains concurrently vested in the Minister and remains "capable of being exercisable by the Minister or the NTMA."

"In relation to a function"

21. Counsel for the appellant referred the Court to the prospective effect of the phrase "in relation to a function" in s108(b) SDCA by virtue of the English Court of Appeal's judgment in *London Borough of Lewisham v. Trust Special Administrator appointed to South London Healthcare NHS Trust* [2013] EWCA Civ 1409 and 135 BMLR 78. There, the Court of Appeal was concerned with an appeal from a successful review of a report which recommended changes provided at a hospital that was not under the control of the specific NHS Trust. As with many judgments, particular sentences must be read in context. Sullivan LJ. at para. 14 stated:

"it is common ground that the words "in relation to" are capable of having a broader or narrower meaning depending upon the context in which they are used"

He continued to decide that the extended meaning relied upon by the NHS Trust Administrator was "strained and unnatural" because "in relation to the trust" could not be extended to any other Trust. The Court in this case stated is not adopting a "strained and unnatural" meaning of s108 (b) SDCA, as a logical and clear meaning of same supports the Appeal Commissioner's conclusion.

Summary for Issue 1

22. The NTMA could not have freely dealt with the shares in Irish Life if it had been directed to acquire them in 2012. Any such acquisition of shares by NTMA was a delegable function. All that s. 6(13) of the NTMAA 1990 would permit in this context was to provide for the allocation of proceeds to the exchequer. It would be an extraordinary application of the relevant statutory provisions to find that NTMA could not sell on behalf of the Minister if it had actually acquired the shares. There is no ambiguity and the respondent taxpayer is not enlarging the operation of the statutory provisions which collectively allowed:-

1. NTMA to operate under delegation from the Minister, and
2. The respondent to benefit from the exemption from stamp duty by reason of the ordinary meaning of the relevant statutory provisions.

23. The appellant by way of comparison argued that the specific delegation to NTMA to “vary or sell any investments” made by the Minister under the Scientific And Technical Education (Investment) Fund Act 1997 (“**STEIFA**”) should be taken into account, in light of the express power of sale contained in the first schedule of STEIFA. The appellant submitted that it was not an ordinary meaning of s. 6 CIFSA 2008 to grant NTMA the power to sell state assets when one considers that express power of sale.

24. The Court is not implying a power of sale but is rather giving the natural meaning of the statutory provisions and particularly the effect of s. 6(4) CIFSA 2008.

Issue 2

25. Although the decision of this Court in regard to Issue 1 renders moot the second question posed by the Appeal Commissioner:-

“Whether the sale of the Irish Life shares by the Minister was capable of being delegated to NTMA by reason of his function to manage the national debt within the meaning of s. 5(1) of NTMAA 1990”,

the Court in recognition of the considered views of the Appeal Commissioner and the submissions of the parties gives its view that the Appeal Commissioner was also correct in deciding that the subject stock transfer form did not fall within the “management of the national debt”.

26. Counsel for the respondent submitted that the consequence of the sale did indeed have an effect on the national debt. However, the remove in function and time together with the wording of s. 6(13) of CIFSA 2008 about realising assets for the exchequer as opposed to managing the national debt prompts the Court to agree with the Appeal Commissioner’s finding on this issue. Returning money to the Exchequer does not necessarily mean that the national debt is being managed.

Conclusion

27. The Appeal Commissioner was correct in law in determining that the share transfer form dated 18th July 2013 is exempt from stamp duty by reason of s. 108(b) of SDCA because s. 6(4) of CIFSA 2008 would have allowed NTMA, if necessary, to dispose of the shares. This applies irrespective of whether NTMA had acquired the shares on behalf of the Minister or was requested by the Minister to dispose of shares on his behalf. If the shares had not been acquired by NTMA as in this case, NTMA could have been directed by the Minister to acquire or arrange for the disposal of the shares.

¹ Although irrelevant to the consideration of this issues arising in this judgment, it should be noted that this exemption was repealed and replaced by s. 73 of the Finance Act 2014.