



# THE COURT OF APPEAL

UNAPPROVED  
NO REDACTION NEEDED

Court of Appeal Record No. 2018/271  
Neutral Citation Number [2021] IECA 334

**Whelan J.**  
**Murray J.**  
**Pilkington J.**

**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 Máire Whelan delivered on the 15<sup>th</sup> day of December 2021**

## **Introduction**

1. This is an appeal from the order of the High Court (Costello J.) of 11 May 2018, perfected on 30 May 2018, answering in the affirmative two questions of law posed at the request of the appellant, Vieira Ltd. (“Vieira”), in a consultative case stated by Her Honour Judge Linnane of the Circuit Court on 21 March 2017. The case was stated pursuant to s. 941 of the Taxes Consolidation Act 1997 (hereinafter “TCA”), as applied to VAT by s. 25 of the Value Added Tax Act 1972, as amended (hereinafter “VATA”).

2. The first question submitted for the opinion of the High Court concerned whether a series of licence agreements entered into by Vieira, between March 2003 and August 2004,

in the course of its business constructing a housing development in Tyrellstown, Co. Dublin were effective to create either a letting of immovable goods, or to constitute a surrender of possession of dwelling houses for the purposes of VATA such that each license agreement constituted a “self-supply” pursuant to s. 4(3)(a) and s. 3(1)(f) VATA. If the agreements were so effective, the consequence would be to divert from a “VATable” business purpose to a non-taxable or exempt purpose thereby obviating the necessity for Vieira to account for VAT on the sale of each dwelling house to the end purchaser or consumer.

3. The licence agreements were in each case entered into between Vieira and Mr. Joseph McPeake of McPeake Auctioneers, who had been at all material times the sole estate agent in respect of the sales of units in the said development. Typically a license agreement was only entered into and executed in respect of each property after a binding contract for sale had been concluded by a prospective purchaser and prior to completion of the said sale.

4. Vieira argues that the licence agreements ought to have been accepted by the High Court at face value as having the effect intended by the parties of constituting a letting or, in the alternative, a surrender of possession of each property for the purposes of VAT. Vieira contends that it has duly paid VAT of about €4.4M on the self-supply measured as VAT arising on the site cost and the construction cost of each dwelling house the subject matter of a licence arrangement.

5. In essence the dispute in monetary terms is whether Vieira’s VAT liability was discharged when it paid the said sum of €4.4M or whether VAT is additionally payable on the sale price of each dwelling house. It is the differential between the two that is at issue.

6. In the event that it determined that a self-supply for VAT purposes did arise on foot of the licence agreement under either scenario posited by Vieira, the court had to consider the second question of law posed in the consultative case stated. This was directed to whether the arrangement embodied in the licenses constituted an abuse of rights in light of the

jurisprudence of the Court of Justice of the EU (“CJEU”), including *Halifax plc and ors. v. Commissioners of Customs and Excise (Case C-255/02)* EU:C:2006:121, [2006] E.C.R. I-01609 (hereinafter, *Halifax*) and subsequent cases. This issue involves, in essence and in accordance with the principles identified in those cases, a consideration of substance over form. In particular, a structure may fall foul of the *Halifax* abuse of rights doctrine for lack of economic reality or otherwise. It is contended that the trial judge erred in determining that the transaction effected by Vieira amounted to an abuse of rights within EU Law.

7. Vieira further argues that the *Halifax* doctrine could only apply directly so as to set aside the arrangements derived from the licence agreements if no national procedure existed to address abuse of the provisions in issue. It contends that the *Halifax* doctrine ought not to have been applied when the respondent could have invoked the statutory regime under s. 811 of the TCA and that the failure of the Revenue Commissioners to operate the said procedure cannot be remedied by a subsequent court decision on the basis of “abuse of rights”.

8. Vieira seeks to set aside the order of Costello J. dated 11 May 2018, perfected on 30 May 2018, which in effect held that the licence agreement was neither a lease nor a surrender for the purposes of self-supply under the VAT regime and separately found that the arrangement constituted an abuse of rights under the *Halifax* doctrine. Vieira asserts that the assessment to VAT raised by the Revenue Commissioners on it should be reduced to nil.

**The facts as found by the Circuit Court**

9. The facts as found by the Circuit Court are set out in full in the judgment of Costello J. delivered on 8 May 2018, [2018] IEHC 266.

10. Briefly put, Vieira is a building development company incorporated and registered for VAT in this State. It was formed in order to develop a substantial housing development

in Tyrellstown, Co. Dublin. The company built and sold houses – it was never in business as a landlord.

11. The Tyrellstown development was the first of its kind in Ireland and involved 35 different house types – considerably more than would be normal. The Circuit Court found that in order to effectively market houses, it is generally necessary to have a similar show house available for prospective purchasers to view. This was said to be a problem for the auctioneer charged with selling houses in the development in question due to the variety of house types and the prevalence of first time buyers.

12. All houses in Phase 1 of the development were sold by McPeake Auctioneers with the assistance of a show house complex. However, due to the number of house designs being used and a change in the relevant building regulations, in particular with respect to disabled access, this complex was no longer representative of the unit types on sale in Phase 2 of the development. The Circuit Court found that sales became more difficult because a larger than usual proportion of the buyers in Tyrellstown were first time buyers and/or did not have English as their first language and therefore misunderstandings as to the nature of alterations made between the show houses and the units in sale could easily arise. Thus, it was said, it was necessary to have houses which corresponded with the range of particular properties for sale available for inspection by prospective buyers. The auctioneer, Mr. McPeake, had specific concerns over misinformation and misrepresentation.

**Letter of 3 March 2003**

13. Further to advice from its tax advisors, Vieira entered into written license agreements with Mr. McPeake in connection with house sales in Phase 2. These agreements allowed McPeake Auctioneers to use units built according to more recent designs for the purpose of viewings. Vieira wrote to Mr. McPeake on 3 March 2003, stating:-

“I write to confirm your appointment as sole selling agent for those houses in the current phase of Tyrrelstown, Dublin 15, listed at the end of this letter, being developed by Vieira Limited.

As agreed between us, the commission payable to you in respect of these sales will be 0.7% of the sale price achieved, subject to the conditions below. This letter is to confirm our agreement and hence no further executed agreement will be required between us.

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 also designed to serve as an incentive for you to complete the sale of the licenced 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 said unit for show purposes) and such fee will be set against any commission you eventually receive.”

14. Subsequently, Vieira executed licence agreements with Mr. McPeake for a total of 198 completed/nearly completed residential houses at Tyrrelstown over the period between 14 March 2003 and 4 August 2004. At no time were all 198 units licenced together.

15. In the Circuit Court, it was common case that the licence agreement was in like form for each property and that the facts in respect of one property should determine the VAT treatment of all.

**The licence agreement**

16. Each licence agreement was between Vieira as licensor and Mr. McPeake as licensee. Each recited as follows:-

“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 dwelling house 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.”

The operative part provided as follows:-

“1. Subject to the provisions hereinafter contained the Licensor hereby grants to the Licensee licence to enter upon and to use and occupy the Property subject to the terms and conditions hereinafter appearing.

2. The right hereby granted is personal to the Licensee who shall not be entitled to grant any rights in respect thereof to any third party, whether by the purported assignment of the benefit of this Licence or otherwise.

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 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.

7. The Licensee shall not make any alterations or additions whatsoever to the Property without the prior written permission of the Licensor, save that the Licensee may carry out such works of decoration as he may deem desirable to secure 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 in respect of accidental death, bodily injury or disease, and/or accidental loss and/or

damage to property arising out of or incidental to the entry of the Licensee its invitees or employees upon the Property pursuant to this agreement. Such insurance will be arranged for a minimum amount of EUR2,500,000.00 for any one incident or series of incidents arising out of any one event and the Licensee shall indemnify the Licensor, its successors and assigns against all claims, costs and demands in respect of such accidental death, bodily injury or disease and/or loss and/or damage to property.

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 the termination 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.”

**17.** On the execution of each licence agreement, Vieira accounted for VAT in its relevant VAT returns on the basis that each license agreement was a self-supply under ss. 4(3)(a) and 3(1)(f) VATA. It did not account for VAT on the sale of the houses to the consumers. Vieira did not at any relevant time exercise a formal waiver of exemption pursuant to s. 7 VATA.

**18.** Subsequently, Vieira was assessed to VAT on the sale of the houses to the consumers for the period of 1 September/October 2003 to 31 August 2004 in the sum of €1,944,340. This was appealed by Vieira and subsequently confirmed by the Tax Appeals Commission



on 23 November 2011. Vieira appealed against that determination to the Circuit Court on the basis that the assessment was excessive, contending that it had previously accounted for VAT by means of a self-supply and asserting that the license agreements were either a letting of immovable property or a surrender of possession for the purposes of VATA.

**Circuit Court determination**

**19.** In considering whether the arrangements constituted a “letting of immovable goods” within the meaning of Article 13B of the Sixth Council Directive 77/388/EEC of 17 May 1977 on the Harmonization of the Laws of the Member States relating to turnover taxes - Common system of value added tax: uniform basis of assessment (hereinafter “the Sixth Directive”), the Circuit Court judge referred to paras. 19, 24 and 25 of *Belgian State v. Temco Europe S.A. (Case C-284/03)* EU:C:2004:730, [2004] E.C.R. I-11237. It was noted that it is for the national court to take into account all elements of a transaction and the circumstances in which it takes place in order to establish its characteristics and to assess whether it can be treated as a letting of immovable property within the meaning of Article 13B(b) of the Sixth Directive.

**20.** Having reviewed the evidence, the Circuit Court concluded that “at no stretch of the imagination” could the license agreements be considered a letting of immovable property under EU principles or a surrender of possession:-

“Mr. McPeake did not go into occupation or use any of these properties or enjoy same. He merely accessed with his sales team the properties for the purpose of showing prospective purchasers the layout, *etc*, in respect of other houses in the development to achieve a sale. He was the selling agent, and it is normal for an estate agent to access and to show prospective purchasers a property. That’s what he was employed to do.” (para. 14(m))

21. The Circuit Court judge considered that, even if she was wrong in her determination that the license agreements were neither lettings of immovable property nor a surrender of possession, the principle enunciated in *Halifax (Case C-255/02)* would apply, taking into account the substance of the license agreements. In the court's view, the principal or essential aim in entering the license agreements was tax driven; in particular to obtain a tax advantage by avoiding paying VAT on the sales of the houses.

22. Accordingly, the Circuit Court dismissed the appeal.

### **Consultative case stated**

23. Vieira subsequently requested the Circuit Court to state a case seeking the High Court's opinion on the following questions:

“i. 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?

ii. 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] E.C.R. I-1609 and so to permit the assessment to stand?”

### **High Court judgment**

24. The High Court judgment was delivered on 8 May 2018, [2018] IEHC 266. After outlining the facts as found by the Circuit Court, Costello J. noted Vieira's submission that the license agreements constituted a self-supply by Vieira upon which it became liable to pay VAT. If that was correct, the parties accepted that it would follow that the subsequent sale of each house would not be subject to VAT. Vieira contended that it had paid the appropriate VAT of approximately €4.4M.

***Treatment of “leasing or letting of immovable property” argument***

25. The High Court considered the caselaw of the CJEU on the meaning of “the leasing or letting of immovable property” for the purposes of Article 13B(b) of the Sixth Directive, noting that the concept falls to be determined exclusively by reference to EU law so that the national provision transposing the directive must be interpreted solely by reference to the relevant decisions of the CJEU. She considered the leading decision of *Belgian State v. Temco Europe S.A. (Case C-284/03) (Temco)*, noting that the CJEU had held that the “leasing or letting of immovable property” was defined as essentially the conferring by a landlord on a tenant 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 and is usually a relatively passive activity linked simply to the passage of time.

26. The opinion of the Advocate General in *Temco* was also considered by Costello J., as was the decision in *Stichting ‘Goed Wonen’ v. Staatssecretaris van Financiën (Case C-326/99) EU:C:2001:506, [2001] E.C.R. I-6831*. The court also referred to *Sinclair Collis Ltd. v. Commissioners of Customs and Excise (Case C-275/01) EU:C:2003:341, [2003] E.C.R. I-5965* where the CJEU had held that the occupation of an area of space in commercial premises was, under the terms of the agreement, merely the means of effecting the supply which was the subject matter of the agreement. Costello J. referred in particular to para. 25 of the CJEU’s judgment, wherein it was held that the fundamental characteristic of a letting of immovable property 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. Costello J. noted that, based on the facts in *Sinclair Collis*, it had been held that the agreement between the parties in that case did not amount to a letting of immovable property.

**27.** Applying these principles and jurisprudence to the facts, the court found that the license agreements were merely the means of effecting the sale of houses at the Tyrellstown development which was the subject matter of a prior agreement between Vieira and McPeake Auctioneers. The court found that 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 saw 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.” (para. 28, p. 15)

**28.** The court noted (para. 29) that the CJEU has identified payment by the occupier as an essential element of a letting of immovable property for the purposes of Article 13B(b) of the Sixth Directive. It was observed that in this case no license fee was ever calculated or paid even though McPeake Auctioneers continued to occupy some of the houses after the duration of the license had expired and when a fee ought to have been payable.

**29.** With regard to Vieira’s submission that payment could be equated with benefit to the landlord and that the latter received a benefit by incentivising McPeake Auctioneers to close the sale of the licensed premises quickly, reducing the level of management required by Vieira in the sales process and facilitating sales of additional property within the development, the court referred to the CJEU’s emphasis on the national court’s duty to have regard to 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. Costello J. held that the generation of future sales of further houses in the development could

not be consideration for the licenses since this was the service McPeake Auctioneers were already engaged to perform on being appointed sole selling agents for the development. The High Court found that in light of the fact that the purpose of the licenses was to facilitate sales, *i.e.* the service for which McPeake Auctioneers would already be paid commission, sales of houses were not payment for the licenses.

**30.** Costello J. was satisfied on the facts as found by the Circuit Court that, having considered the surrounding circumstances of the license 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 of time. Rather, the court considered, the licences were clearly associated with the provision of a service.

**31.** The court noted that the CJEU had held in *Temco* that there could be a number of contracts and that the letting may relate to part only of a property which may be used in common with other occupiers but found that had not occurred in this case. Rather, through its agents, Vieira retained an equal right with the licensee to occupy the property. The facts of the case were found to be incompatible with the test established by the CJEU in *Temco*.

**32.** The High Court held that the Circuit Court judge was correct in law in concluding that the licences did not constitute a letting of immovable goods for the purposes of VATA.

***Treatment of “surrender of possession” argument by High Court***

**33.** The court then addressed Vieira’s alternative argument that the license agreements constituted a surrender of possession of each of the properties within the meaning of s. 4(3)(a) of VATA which was deemed to be an appropriation of goods “for the purposes of s. 3(1)(f)” of VATA. If that was the case, the license agreements would be subject to VAT as a self-supply and the subsequent sale of the houses would no longer be subject to VAT.

**34.** Vieira contended that the surrender of possession by way of the license agreements did not *simpliciter* constitute a supply of goods for the purposes of s. 4(2) VATA since Vieira

had not disposed of the entire of its interest in those goods or of an interest for a duration of at least ten years. Vieira argued that by virtue of s. 4(3)(a) VATA, 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 constituted a supply of immovable goods liable to VAT for the purposes of s. 3(1) VATA and s. 4(2) VATA. It was argued by Vieira that neither of the exceptions to s. 4(3)(a) VATA contained in sub-para. (b) applied and thus, s. 4(3)(a) deemed the surrender of possession to be an appropriation of goods for the purposes of the legislation. Vieira submitted that by virtue of s. 3(1)(a) VATA, that supply is deemed to have been effected for consideration in the course or furtherance of Vieira's business. Therefore, Vieira's argument went, Vieira was required to account for VAT on a self-supply basis (which it did) and no further assessment to VAT upon the sale of the houses could be raised so that the assessment under appeal was required to be reduced to nil.

**35.** Costello J. considered that Vieira's contention depended upon the license agreements constituting a surrender of possession within the meaning of s. 4 VATA.

**36.** Vieira relied on *Greaves v. Field* (1986) 35 W.I.R. 412 and *Calder Civic Trust Ltd. v. Jenkins* (Unreported, Court of Appeal of England and Wales, 26 January 1994) as illustrating the *indicia* of possession of land for the purposes of supporting the proposition that the license agreements involved the surrender of possession by Vieira of each licensed premises.

**37.** In light of the evidence, the court was not satisfied that possession was surrendered by Vieira to Mr. McPeake. Costello J. considered that, at its height, there was joint possession of the licensed premises but that could not amount to surrender of possession.

**38.** In the court's opinion, it was artificial and contrived to say that a fourteen day license amounted 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 was granted the license for the express purpose of concluding the sale and showing the house to potential purchasers of alternative properties on the development.

**39.** Costello J. held that Vieira had not established that the arrangements constituted a surrender of possession for the purposes of s. 4(3)(a) VATA and accordingly, the Circuit Court was correct in its conclusion.

***Halifax/abuse of rights doctrine***

**40.** The court then gave consideration to the *Halifax* principle. It was noted that the CJEU in *Halifax* had 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 abusive practice. The CJEU had confirmed that the principle of abuse of rights applied in the sphere of VAT. It was noted that a national court must consider, firstly, whether an impugned transaction involved an accrual of a tax advantage contrary to the purposes of the Sixth Directive and, secondly, whether the essential aim of the impugned transaction was the avoidance of tax. The court stated that a transaction is not abusive if the economic activity carried out may have some explanation other than the mere attainment of tax advantages. It was reiterated that it is for a national court to determine, provided the effectiveness of EU law is not undermined, whether the constituent elements of an abuse of rights exist.

**41.** The High Court noted that in *Cussens and others v. Brosnan (Case C-251/16)* EU:C:2017:881, [2018] S.T.C. 1957 the CJEU had held that the principle of abuse of rights is a principle of general EU law, having direct effect and not being required to be transposed into national law before it could be availed of by the State. It was further noted that the CJEU at para. 44 had observed:-

“...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 affect the application of the principle”

**42.** Costello J. held that the first requirement of the *Halifax* principle was met since Vieira had obtained a tax advantage on the sale of the houses as a result of the license agreements which it regarded as a self-supply of goods for the purposes of VATA by avoiding the usual charge to VAT. The court observed that the purpose of the relevant provisions of the Sixth Directive and of s. 4 VATA was 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 13B(h)) and so such supplies are normally chargeable to VAT. It was found that, through the device of the license agreements, Vieira brought about a situation where no VAT (or an artificially lower amount of VAT) was chargeable and this was a tax advantage contrary to the purpose of the provisions of the Sixth Directive and VATA.

**43.** The court then considered the second *Halifax* criterion; namely, whether the accrual of a tax advantage was the “essential aim” of the transaction at issue. It was noted that the CJEU at para. 60 of *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”. The court considered that these aspects were relevant to assessment of the second *Halifax* criterion notwithstanding the possible existence of other economic objectives.

**44.** In the High Court’s judgment, the fact that each property sold in Phase 2 of the development was the subject of a license agreement between Vieira and Mr. McPeake



underscored that the license agreements were not entered into as a means of providing an alternative to specifically built showhouses. The court considered that, since Phase 1 operated with 12 showhouses to illustrate the 35 different types of houses available in the development, it could not plausibly be suggested that 198 showhouses were required for Phase 2.

**45.** The court held that this, combined with the unlimited access enjoyed at all times by Vieira's foreman and various subcontractors, the very short duration of the licenses, and the fact that no rent was ever discussed or claimed, underscored the purely artificial nature of the transactions. Costello J. determined that the essential or principal aim of the license agreements was to obtain a tax advantage. The court held that Vieira had not established that there was an additional business objective underpinning the license agreements and its contentions in that regard were not supported by any finding of fact by the Circuit Court.

**46.** The court reiterated, as held by the CJEU in *Cussens*, that the principles of legal certainty and the protection of legitimate expectations do not preclude the application of the principle of abuse of rights. It was recalled that the CJEU held at para. 48 of *Cussens* that the abuse of rights principle obliges the national authorities to apply the relevant VAT legislation to the transactions concerned, while disregarding those aspects of the transactions that constitute an abusive practice. The High Court emphasised that this direction was to national authorities and not just national courts. Costello J. held that, although the *Cussens* decision post-dated the actions of the Revenue Commissioners in issue in this case, they in fact acted precisely as the CJEU 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.

47. The High Court was satisfied that the Circuit Court was correct in concluding that the license agreements were an abusive practice within the meaning of the *Halifax* principle and the subsequent jurisprudence.

***Reference request***

48. Finally, the court addressed Vieira's request for a reference to the CJEU. Vieira contended that if the abuse of rights principle did apply to the licence agreements, the principle was enshrined in Irish tax law in s. 811 TCA. Therefore, the argument went, the Revenue Commissioners were obliged to apply the relevant national measure which gave effect to a EU principle and they could not, in effect, bypass that express legislative provision and rely on the general principle of EU law instead. Vieira sought to distinguish the *Cussens* decision on the basis that in the latter case there was no provision in national law giving effect to the abuse of rights principle. In those circumstances, Vieira invited the court to make a reference to the CJEU on the question of whether recourse could be had to the *Halifax* principle where an anti-avoidance measure existed under national law and whether such a domestic provision was exhaustive of the anti-avoidance measures which could be relied upon by the national authorities, or whether the respondent could elect not to avail of the national measure and apply the EU principle of abuse of rights directly.

49. The court noted that it had a discretion whether to make a reference to the CJEU under Article 267 TFEU. On the facts of this case, it was held that a decision on the point raised was not necessary to determine the case stated and therefore, Costello J. declined to make a reference to the CJEU. The court commented:-

“...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.” (para. 34, pp. 27 to 28)

50. The High Court answered both questions of law posed in the affirmative.

### **Notice of appeal**

51. By way of notice of appeal dated 27 June 2018, Vieira contended that the High Court judge erred in law in:

- i. holding that the license agreements did not constitute lettings of relevant properties for VAT purposes and thus did not give rise to a self-supply;
- ii. holding that the license agreements did not constitute a surrender of possession of the relevant properties for the purposes of s. 4(3) VATA and thus did not give rise to a self-supply; and,
- iii. conflating the issue of whether the license agreements constituted lettings or a surrender of possession, with the application of the *Halifax* doctrine, which, further, should have been applied by invoking the special regime set out in s. 811 TCA.

Vieira sought to have the order of the High Court set aside and the assessment to VAT raised by the Revenue Commissioners reduced to nil. In addition, Vieira requested this court to make a reference to the CJEU as to whether the Revenue Commissioners were entitled to raise an assessment to VAT on foot of the *Halifax* principle in circumstances where there was a national measure (s. 811 of the TCA) giving effect to such principle which had not been applied by the Revenue Commissioners.

52. In the respondent's notice, it was observed that there were no grounds of appeal directed by Vieira to the High Court judge's findings in relation to the *Halifax* principle. While it was asserted that there was therefore no appeal in this regard, it was acknowledged that Vieira was requesting a reference to the CJEU in relation to the *Halifax* principle.

### **Scope of this appeal**

53. The appeal is from the decision of the High Court and this court's function is to determine whether the High Court erred in law in determining the case stated.

54. As a preliminary point, the respondent objected to Vieira's reliance on the transcript of the hearing before the Circuit Court. The respondent contends that the hearing before this court is delimited to a consideration of the terms of the case stated of the Circuit Court judge dated 21 March 2017, together with the facts as found and expressed therein. The Circuit Court judge set out her findings of fact which underpin her decision. These findings must be accepted by this court unless there was no evidence at all to support them and that position is clear from the jurisprudence, including *Mitchelstown Co-Op Society v. Comr. for Valuation* [1989] I.R. 210 and *Mara (Inspector of Taxes) v. Hummingbird Ltd.* [1982] I.L.R.M. 421 as well as the more recent decision of the Supreme Court in *McGinley v. Deciding Officer Criminal Assets Bureau* (Unreported, Supreme Court, 30 May 2001). The principle in *Mara (Inspector of Taxes) v. Hummingbird Ltd.* was succinctly set forth by Kenny J. where he observed at p. 426:-

“A case stated consists in part of findings on questions of primary fact...These findings on primary facts should not be set aside by the courts unless there was no evidence whatever to support them. The Commissioner then goes on in the case stated to give his conclusions or inferences from these primary facts. These are mixed questions of fact and law and the courts should approach these in a different way. If they are based on the interpretation of documents, the court should reverse them if they are incorrect for it is in as good a position to determine the meaning of documents as is the commissioner. If the conclusions from the primary facts are ones which no reasonable commissioner could draw, the court should set aside his findings on the ground that he must be assumed to have misdirected himself as to the law or made a mistake in reasoning. Finally, if his conclusions show that he has adopted a wrong view of the law, they should be set aside. If however they are not based on a mistaken view of the law or a wrong interpretation of documents, they should not be

set aside unless the inferences which he made from the primary facts were ones that no reasonable commissioner could draw.”

55. The respondent is correct in its contention that this court is to approach the case, as did the High Court, on the basis that the relevant facts are those found by the Circuit Court judge and as set out in the case stated. In this regard, despite arguments advanced on behalf of Vieira, the court is confined to the findings of fact in, and the documents annexed to, the consultative case stated. In written submissions and in oral argument to the court Vieira sought, impermissibly, to rely on the transcripts of the hearing before the Circuit Court and the evidence adduced at the original hearing. In light of the jurisprudence, this court confines itself to the factual determinations as set forth in the consultative case stated signed by the Circuit Court judge, together with the documents annexed thereto.

#### **Statutory and EU law measures engaged**

56. The Sixth Directive applied to VAT regimes throughout the EU Member States and was repealed on 1 January 2007 but continues to be relevant for the purposes of these proceedings.

57. The Directive lays down certain exceptions to VAT in Article 13. Of particular significance in the context of this case is Article 13B(b) which requires Member States to exempt the leasing or letting of immovable property (subject to specified exceptions) from VAT. Article 13B(b) of the Sixth Directive was transposed into Irish law by virtue of para. (iv) of the First Schedule to VATA, as amended.

58. Article 13 of the Sixth Directive, entitled “Exemptions within the territory of the country” provides:-

#### *“B. Other exemptions*

Without prejudice to other Community provisions, Member States shall exempt the following under conditions which they shall lay down for the purpose of ensuring

the correct and straightforward application of the exemptions and of preventing any possible evasion, avoidance or abuse:

(a) ...

(b) the leasing or letting of immovable property excluding:

1. the provision of accommodation, as defined in the laws of the Member States, in the hotel sector or in sectors with a similar function...
2. the letting of premises and sites for parking vehicles;
3. lettings of permanently installed equipment and machinery;
4. hire of safes.

Member States may apply further exclusions to the scope of this exemption..."

**59.** At the time the license agreements were operative, s. 2 of VATA, as amended, provided:-

“(1) With effect on and from the specified day a tax, to be called value-added tax, shall, subject to this Act and regulations, be charged, levied and paid—

(a) on the supply of goods and services effected within the State for consideration by a taxable person in the course or furtherance of any business carried on by him...”

**60.** Sections 3 and 4 of VATA are of central importance in this appeal.

**61.** At the relevant time, s. 3 of VATA defined “supply” in relation to goods as follows:-

“(1) In this Act ‘supply’, in relation to goods, means—

...

(e) the application (otherwise than by way of disposal to another person) by a person for the purposes of any business carried on by him of the goods,

being goods which were developed, constructed, assembled, manufactured, produced, extracted, purchased, imported or otherwise acquired by him or by another person on his behalf, except where tax chargeable in relation to the application would, if it were charged, be wholly deductible under section 12,

(f) the appropriation of goods by a taxable person for any purpose other than the purpose of his business or the disposal of goods free of charge by a taxable person where—

(i) tax chargeable in relation to those goods—

I. upon their purchase, intra-Community acquisition or importation by the taxable person, or

II. upon their development, construction, assembly, manufacture, production, extraction or application under paragraph (e),

as the case may be, was wholly or partially deductible under section 12, or

(ii) the ownership of those goods was transferred to the taxable person in the course of a transfer of a business or part thereof and that transfer of ownership was deemed not to be a supply of goods in accordance with subsection 5(b)...”

**62.** Section 4 of VATA, as amended, encompasses special provisions in relation to the supply of immovable goods and applies *inter alia* to immovable goods “which have been developed by or on behalf of the person supplying them” *per* s. 4(1)(a)(i).

**63.** Section 4(2) provides:-

“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.”

**64.** Prior to the commencement of the Finance Act 2005, s. 4(3) VATA provided:-

“(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 of any part thereof in such circumstances that the surrender does not constitute a 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 of the part thereof, as the case may be, for a purpose other than the purpose of his business.

(b) This subsection shall not apply to—

- (i) any such surrender of possession made in accordance with an agreement for the leasing or letting of the goods if the person surrendering possession is chargeable to tax in respect of the rent or other payment under the agreement or,
- (ii) a surrender in connection with a transfer which, in accordance with section 3(5), is declared, for the purposes of this Act, not to be a supply.”

**65.** At the relevant time, section 4(3A) was operative and provided:-

“(a) Where a person having an interest in immovable goods to which this section applies surrenders possession of those goods or of any part of them by means of a disposal of that interest or of an interest which derives from that interest, and where



the value of the interest being disposed of is less than its economic value then for the purposes of this Act such disposal –

- (i) shall be deemed not to be a supply of immovable goods for the purposes of subsection (2), but
- (ii) shall be deemed to be a letting of immovable goods to which paragraph (iv) of the First Schedule applies.”

**66.** The First Schedule of VATA identifies exempted activities. It effectively transposed Article 13B(b) of the Sixth Directive and provided, at the relevant time:-

“(iv) letting of immovable goods with the exception of–

- (a) letting of machinery or business installations...
- (b) letting of the kind to which paragraph (ii) of the Third Schedule or paragraph (xiii) of the Sixth Schedule;
- (c) provision of parking accommodation for vehicles...”

### **Submissions of the appellant**

#### ***Lease/surrender***

**67.** Briefly put, Vieira contended that upon entering into each licence agreement with the estate agent, Mr. McPeake, a self-supply by Vieira for the purposes of VATA arose upon which it thereupon became liable to pay VAT which it did discharge. Two alternative characterisations are advanced by Vieira, contending that for VAT purposes each licence agreement is in substance either a lease/letting agreement or, in the alternative, a surrender of possession. Either characterisation, it is argued, leads to the same conclusion; namely, that a self-supply arose by virtue of the licence agreement.

**68.** If Vieira is correct in that contention, irrespective of whether the self-supply in question arose on foot of a lease/letting agreement or on foot of a surrender of possession, it

would necessarily follow from the statutory provisions that the subsequent disposition of the house in each case would not be subject to VAT.

**69.** A central issue, therefore, is whether the licence agreements constituted in each case a “self-supply” which was subject to VAT with a consequence that the subsequent sale and disposition of the houses which took effect on closing the sale with the end purchaser were no longer subject to VAT.

**70.** The respondent contends that even if Vieira can establish on either basis that a self-supply arose, the Revenue Commissioners are nevertheless entitled to have such a result set aside and can raise VAT assessments on the sales of the houses based on the abuse of rights principle as expounded by the CJEU in *Halifax (Case C-255/02)* and other decisions (“the *Halifax* principle”).

***The Halifax principle***

**71.** Vieira submitted that the *Halifax* principle should not be interpreted as a freestanding charter to tax authorities to set aside the legal consequences of an arrangement which produces a tax consequence under domestic tax legislation simply because the tax authorities consider that such a result was not the intention of the legislature in enacting the tax legislation in question. It was contended that such interpretation would ignore the requirement that the national court must find that there has been a “fraud or an abuse of rights” in consequence of the arrangements under challenge and would ignore what the concept of “abuse of rights” means in a tax context where it is well-established that a tax payer is entitled to order his affairs in a way which minimises the incidence of tax upon him and where it is recognised that tax legislation frequently involves legislative provisions which deliberately create situations at variance with commercial reality. Reliance was placed on the opinion of the Advocate General in *Halifax* in that regard.

**72.** It was submitted that the combined effect of the authorities relied upon by the respondent was that the abuse of rights principle could only be successfully invoked by the Revenue Commissioners if they could identify a particular provision of the Sixth Directive sought to be relied upon by Vieira, and where such provision had some particular purpose to which the transaction (the license arrangements) was manifestly contrary.

**73.** Vieira contended that the necessary pre-conditions to establish abuse of rights were not met in this case. Firstly, Vieira asserted that it was relying on specific provisions of Irish VAT legislation and the ordinary principles of Irish statutory interpretation rather than specifically on any interpretation of a provision of the Sixth Directive. Secondly, while it was accepted that the license agreements were structured at least in part with an eye to the tax advantage which would follow from them, it was argued that legitimate trade objectives were being pursued by their creation. Thirdly, Vieira sought to distinguish the instant case from the facts in *Cussens v. Brosnan (Case C-251/16)* on the basis that in this instance the license agreements were between Vieira and a third party, rather than with a company associated with it, and further, unlike in *Cussens*, there was a clear and identified ordinary and legitimate business objective underpinning the licences apart from the tax advantage.

**74.** Vieira asserted that the High Court judge's finding that the essential aim of the license agreements was the accrual of a tax advantage ignored certain factual features, including that there were more than 198 houses in Phase 2 of the development and that licence agreements were not entered into for all of the properties, that there were a maximum of 4 to 5 properties under licence at any given time, and that a new show house complex was completed after the sale of the last licensed properties.

**75.** Vieira submitted that to interpret *Halifax* as a free standing charter to interfere in national tax matters would ignore the point that the *Halifax* principle, as interpreted by the CJEU in *Cussens v. Brosnan*, is concerned with the operation of a much wider EU principle

of abuse of rights in circumstances where there is an absence of a national measure, whether legislative or judicial, giving effect to the *Halifax* principle. It was noted that the existence of s. 811 of the TCA did not arise for argument in *Cussens*.

**76.** Vieira submitted that since the Revenue Commissioners had not sought to invoke s. 811 in this case, they could not now seek to set aside a tax advantage derived from a transaction they considered to be a tax avoidance transaction under the guise of a supposedly free-standing entitlement to do so pursuant to a general principle of EU law. It was contended that this would be contrary to the fundamental principle of subsidiarity in EU law.

**77.** Firstly, Vieira submitted that it is a fundamental constitutional principle that in the absence of applying specific statutory provisions, it is not for the court to refuse to give effect to the consequences of tax legislation even if same are contrary to the result intended by the legislature (*McGrath v. McDermott* [1988] I.R. 258). Secondly, Vieira cited *Marleasing SA v. La Comercial Internacional de Alimentacion SA (Case C-106/89)* [1990] E.C.R. I-4135, EU:C:1990:395 and *Albatros Feeds Ltd. v. Minister for Agriculture* [2006] IESC 52, [2007] 1 I.R. 221 as authority for the principle that the interpretation of national law remains a matter for the national court rather than the CJEU. Thirdly, reliance was placed on *Kofoed v. Skatteministeriet (Case C-321/05)* [2007] E.C.R. I-5795, EU:C:2007:408 as an instance where the CJEU had indicated that legal certainty required the *Halifax* principle to be applied in accordance with a provision of national law and subject to the procedural limitations laid down by that national law. Fourthly, Vieira noted that the CJEU at paras. 90 and 91 in *Halifax* found that the Sixth Directive did not deal with the recovery of VAT and it is therefore for the Member States to lay down the conditions under which the tax authorities may recover VAT after the event, while remaining within the limits imposed by EU law. Vieira cited *Surgicare - Unidades de Saúde SA v. Fazenda Pública (Case C-662/13)*

EU:C:2015:89, where it was held that the mandatory application of a national procedure in the context of abusive practices in VAT matters was not contrary to the VAT directive.

**78.** Vieira submitted that the Revenue Commissioners were precluded from ignoring and bypassing the s. 811 statutory procedure, with its attendant protections for the taxpayer, and from electing instead to rely directly on the *Halifax* principle.

**79.** Vieira requested this court to make a reference to the CJEU if it finds it is appropriate to deal with the *Halifax* principle.

### **Submissions of the respondent**

#### ***Lease/surrender***

**80.** The respondent strongly contested that the agreement between Vieira and Mr. McPeake was capable of characterisation either as a lease or a surrender in light of the CJEU jurisprudence.

#### ***The Halifax principle***

**81.** On the abuse of rights/*Halifax* principle, the respondent referred to the CJEU's decision in *Cussens v. Brosnan (Case C-251/16)* wherein it was held that the abuse of rights principle applies without transposition and that it is sufficient if the accrual of a tax advantage is the essential aim of a transaction, rather than there being a requirement that it be the sole objective before the principle can be applied. The respondent submitted that the essential aim of the license agreements in this case was tax avoidance.

**82.** With regard to the first of the two criteria enunciated by the CJEU in *Halifax*, Revenue submitted that the purpose of the relevant provisions of the Sixth Directive and 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), 5, 6, 13B(h) and 17(2)). The respondent submitted that Vieira deliberately and artificially created the specific circumstances demanded by the self-supply provisions of VATA in order to

trigger their application in the full knowledge that the transactions in question (the licenses) would be followed by the real and intended transaction (the sale of the houses to the consumers) which would then be removed from the VAT net. In those circumstances, it was submitted that the transactions were contrary to the principle of fiscal neutrality and, consequently, contrary to the purpose of the Sixth Directive and VATA.

**83.** Revenue contended that s. 811 would only apply if Revenue was of the opinion that the scheme put in place by the taxpayer works from a technical perspective. In this case, it was submitted that it was not logically open to Revenue to raise a s. 811 notice as it considered that Vieira's arguments as to the existence of a lease or letting and/or surrender of possession to be erroneous and without foundation.

**84.** The respondent referred to the decisions of *Azienda Agro-Zootecnica Franchini sarl and Eolica di Altamura Srl v. Regione Puglia (Case C-2/10)* [2011] E.C.R. I-6561, EU:C:2011:502; *E.R.T. v. D.E.P. (Case C-260/89)* [1991] E.C.R. I-2925, EU:C:1991:254; *Mangold v. Helm (Case C-144/04)* [2005] E.C.R. I-9981, EU:C:2005:709; and, *Küçükdeveci v. Swedex GmbH & Co. (Case C-555/07)* [2010] E.C.R. I-365, EU:C:2010:21, and submitted that they established that a principle of community law is applied to the national law to ascertain if it is compatible with the community law principle.

**85.** Reliance was also placed on *The Commissioners for Her Majesty's Revenue and Customs v. Weald Leasing Ltd. (Case C-103/09)* [2010] E.C.R. I-13589, EU:C:2010:804 where it was held that the principle of prohibiting abusive practices applied to a breach of a national provision where that national provision was adopted on the basis of the Sixth Directive and forms part of the national legislation implementing that Directive.

**86.** Revenue submitted that general principles of EU law can be applied directly without the requirement for implementing measures. The respondent contended that Vieira was in

error to suggest that *Kofoed* was of relevance to the law and facts of the instant case as the *Kofoed* case related specifically to direct effect.

**87.** Revenue further referred to a number of UK authorities which, it was posited, demonstrated that a national authority can apply the prohibition on abusive practices directly in the context of national proceedings concerning VAT, including *WHA Ltd. v. Revenue and Customs Commissioners* [2007] EWCA Civ 728, [2007] S.T.C. 1695; *Paul Newey T/A Ocean Finance v. The Commissioners for Her Majesty's Revenue and Customs (VAT)* [2010] UKFTT 183; *Moorbury v. Revenue and Customs Commissioners* [2010] UKUT 360 (TCC), [2010] S.T.C. 2715; *The Lower Mill Estate Ltd. v. Revenue and Customs Commissioners* [2010] UKUT 463 (TCC), [2011] S.T.C. 636; *Commissioners for Her Majesty's Revenue and Customs v. Pendragon plc* [2012] UKUT 90 (TCC), [2012] S.T.C. 1638; and *Ramsay v. Inland Revenue Commissioners* [1982] A.C. 300.

#### **Consideration of principles – Approach to the issue of “supply” in VAT**

**88.** It is not in contention that *prima facie* Vieira falls within the charge to VAT on the sale of a new house constructed. Vieira contends that the creation of the licences in favour of the estate agent, Mr. McPeake, did not constitute a “disposal” of an interest in each house. Vieira instead relies on s. 4(3)(a) VATA.

**89.** Section 4 VATA deals with liability to VAT in respect of immovable goods such as a new build house in a development. Vieira had an interest in the said properties within the meaning of s. 4, which provides:-

“...‘interest’, in relation to immovable goods, means an estate or interest therein which, when it was created was for a period of at least ten years...and a reference to the disposal of an interest includes a reference to the creation of an interest, and an interval of the type referred to in subsection (2A) shall be deemed to be an interest for the purposes of this section.”

**90.** Counsel for Vieira relied on the decision in *Vieira Ltd. v. The Revenue Commissioners* [2015] IESC 78, between the parties to this appeal, where the concept of “self-supply” was explained by Clarke J. (as he then was) in the Supreme Court thus:-

“...the VAT Act defines self-supply as occurring in a range of circumstances. The broad intent of that aspect of the VAT Act is to cover a situation where goods are owned by a VAT registered person or body for the purposes of their business but where the goods concerned are, as it were, taken out of the business by being supplied to their owner in a private and non-business capacity. Thus, in a relatively straightforward example, a self-supply would occur where a person engaged in the business of selling white goods took a refrigerator, which had been purchased for the purpose of resale as part of the business, for his own use and installed it in his own home. That self-supply would give rise to a transaction on which VAT would need to be charged in accordance with the self-supply provisions of the VAT Act. However, if, on some subsequent occasion and wholly unconnected with the individual’s business, the same refrigerator was sold on to a third party, then no VAT liability would arise on that subsequent transaction in much the same way that no VAT liability would arise in the event that a third party purchaser of the refrigerator who bought it for entirely private purposes might sell it on some subsequent occasion.

2.7 However, while that broad description may indicate, in the most general terms, the thinking behind self-supply...the question of whether a self-supply has or has not occurred in the circumstances of any particular case is entirely dependent on whether the technical requirements of the VAT Act in respect of a particular type of supply have been met. In that context, two further points need to be noted. The first is that, of course, the VAT Act is the means by which Ireland’s European Union obligations



under various VAT directives have been transposed into Irish law. It follows that it is necessary to have regard to those directives in interpreting the VAT Act. Second, it is important to note that, in relation to many aspects of the VAT regime, including rules relating to self-supply, specific provision is made for the sale of immovable property.”

**91.** The case law of the CJEU makes clear that when determining the relevant “supply” in which a taxable entity engages, regard must be had to all the circumstances in which the transaction or series of transactions have taken place. Regard must be had to the totality of the relationship between the actors involved in the transaction under consideration. The CJEU in *Revenue and Customs Commissioners v. Rank Group plc (Joined Cases C-259/10 and C-260/10)* [2011] E.C.R. I-10947, EU:C:2011:719, observed that consideration of economic realities is a fundamental criterion for the application of VAT. Further, it is necessary to recognise the substance and reality of a transaction over form when appropriate. As was observed by the UK Supreme Court in *Revenue and Customs Commissioners v. Aimia Coalition Loyalty UK Ltd.* [2013] UKSC 15, [2013] 2 All E.R. 719 at para. 68:-

“It is also important to bear in mind that decisions about the application of the VAT system are highly dependent upon the factual situations involved. A small modification of the facts can render the legal solution in one case inapplicable to another.”

**92.** What is ultimately at issue in this appeal is how principles enshrined in VATA, as amended; the Sixth Directive, and the relevant CJEU jurisprudence, that are not themselves apparently in doubt, should be applied to the particular facts as found by the Circuit Court judge in her case stated and whether the High Court judge erred in her approach or determination of the issues in the consultative case stated.

**Lease or letting of immovable property**

**93.** In the context of s. 3(1)(e) VATA the first question is whether the arrangement in each case amounts to “the leasing or letting of immovable property” within the meaning of that expression as found in Article 13B(b) of the Sixth Directive.

**94.** It is acknowledged by the parties that the jurisprudence is accurately summarised in the opinion of Advocate General Colomer in *Belgian State v. Temco Europe SA (Case C-284/03)*. Vieira argued that the five distinct *indicia* of a letting/lease identified by Advocate General Colomer, particularly at para. 20 of his opinion, were met by it and are satisfied by the licence. AG Colomer stated that an exemption from VAT will operate where there is:

- (1) a transfer by the owner of an immovable property to another person,
- (2) to the exclusion of all others,
- (3) of the use and enjoyment thereof,
- (4) for an agreed term,
- (5) in exchange for the payment of rent.

***Transfer of immovable property to the exclusion of all others – Factors 1 & 2 of Temco***

**95.** Vieira contends that the license “transfers the properties from Vieira to McPeake Auctioneers” and that the latter took “exclusive possession of the properties against the world”. In addition, it was submitted that it was incorrect for the High Court to hold that a lease requires the ability to have the use and enjoyment of the property to the exclusion of all others, including the owner, in circumstances where it was explicitly acknowledged in *Temco* that the landlord/owner may reserve the right to regularly visit the property let and that a contract may relate to certain parts of a property which must be used in common with other occupiers; namely, in this case, the builders and sub-contractors.

***Passive enjoyment – Factor 3 of Temco***

**96.** It was submitted on Vieira’s behalf that the licences did allow the grantee to have “passive enjoyment” of the relevant properties for a given period of time, not for the purposes of residing in such properties but, rather, for the purposes of carrying on his business of selling houses and using the properties as show houses which, it was said, was sufficient to determine the existence of a lease. Vieira submitted that the fact that the licences were granted to Mr. McPeake for the purposes of identifying purchasers for other properties in the development did not detract from their nature as lettings because the purpose of the arrangement is not a relevant criterion under *Temco*. Vieira submitted that Mr. McPeake’s occupation of the properties for the purposes of showing the houses to prospective purchasers was the manner in which he passively enjoyed the properties.

**97.** The respondent argued that Mr. McPeake had no right to occupation as owner as required by the CJEU’s decision in *Sinclair Collis (Case C-275-01)*. Similar to the CJEU’s finding in *Sinclair Collis*, the respondent argued that the occupation of the licensed properties was merely the means of effecting the subject of the auctioneer’s agency, namely the sale of houses.

**98.** It will be recalled that the key passages in *Sinclair Collis (Case C-275/01)* state:-

“22. It is settled case-law, first of all, that the exemptions provided for by Article 13 of the Sixth Directive have their own independent meaning in Community law and that they must therefore be given a Community definition (see Case C-358/97 *Commission v Ireland* [2000] ECR I-6301, paragraph 51, and Case C-315/00 *Maierhofer* [2003] ECR I-563, paragraph 25).

23. Secondly, the terms used to specify the exemptions provided for by Article 13 of the Sixth Directive are to be interpreted strictly since they constitute exceptions to the general principle that VAT is to be levied on all services supplied for

consideration by a taxable person (see, *inter alia*, *Commission v Ireland*, paragraph 52, and Case C-150/99 *Stockholm Lindöpark* [2001] ECR I-493, paragraph 25).

24. With regard to the exemptions in Article 13B(b) of the Sixth Directive, the provision does not define ‘letting’, nor does it refer to relevant definitions adopted in the legal orders of the Member States (see Case C-326/99 ‘*Goed Wonen*’ [2001] ECR I-6831, paragraph 44).

25. However, 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 (see, to that effect, ‘*Goed Wonen*’, paragraph 55, and Case C-108/99 *Cantor Fitzgerald International* [2001] ECR I-7257, paragraph 21).

26. Moreover, in order to determine the nature of a taxable transaction, regard must be had to all the circumstances in which the transaction in question takes place in order to identify its characteristic features (see Case C-231/94 *Faaborg-Gelting Linien...*”

**99.** The respondent posited that the purpose of the arrangement was to permit McPeake Auctioneers to enter upon the properties with potential purchasers in order to secure sales of other properties. This, the respondent contended, did not constitute a passive enjoyment of property which is the characteristic of a leasing or letting of immovable property.

***Duration of license agreements – Factor 4 of Temco***

**100.** *Temco* and the relevant CJEU jurisprudence indicate that a letting should generally be for an agreed term. Vieira contends that the 14 day term of the license met the *Temco* test.

**101.** The respondent relied on Advocate General Jacob’s opinion in *Svenska Staten (Swedish State) v. Stockholm Lindöpark AB (Case C-150/99)* [2001] E.C.R. I-493,

EU:C:2000:504 and stressed that one of the issues in determining the existence of a letting of immovable property is the duration of the enjoyment of the property.

***Payment of rent – Factor 5 of Temco***

**102.** Vieira submitted that, while the license agreements did not make provision for the payment of rent, the CJEU and the Advocate General made clear in *Temco* that what is required under this rubric is “payment” or a “price”, *i.e.* valuable consideration. Vieira contended that it received valuable consideration from Mr. McPeake in the form of the accelerated closing of sales of houses and the generation of future sales of houses since Mr. McPeake was incentivized to bring about speedy closings of existing contracts, and was able to give an accurate demonstration to purchasers of the type of houses which they would actually get if they signed contracts, thereby minimising (and apparently avoiding) misrepresentation claims by dissatisfied purchasers. It was submitted that this consideration was capable of being valued in money terms and thus satisfied the concept of “payment” or “price” which constitutes rent for the purposes of the definition of a letting of immovable property.

**103.** Vieira referred to the CJEU’s jurisprudence on the concept of consideration within the meaning of Article 11A(1)(a) of the Sixth Directive, including *Bertelsmann AG v. Finanzamt Wiedenbrück (Case C-380/99)* [2001] E.C.R. I-5163, EU:C:2001:372. It was submitted that the CJEU has repeatedly held that:-

“...the consideration for a supply of goods may consist of a supply of services and so constitute the taxable amount within the meaning of that provision, if there is a direct link between the supply of goods and the supply of services and if the value of those services can be expressed in monetary terms.” (p. 16 of Vieira’s written submissions)

Vieira contended that both of these requirements were met in this case as there was a direct link between the licences and the services supplied by McPeake Auctioneers and the value of those services could be expressed in monetary terms.

**104.** Vieira argued that it was unnecessary for the Circuit Court to have made a finding of fact that there was a benefit (or consideration) to Vieira. It contended that the facts are not in dispute and the question is whether those facts constitute consideration for VAT purposes. The respondent noted that there was no evidence of accelerated closings ensuing from the agreements nor any such finding to that effect by the Circuit Court in the case stated. The respondent submitted that, in any event, the alleged benefit was not consideration for the purpose of VAT as it was not capable of being expressed in money. Reliance was placed on paras. 13 and 14 of *Julius Fillibeck Söhne GmbH & Co. KG v. Finanzamt Neustadt (Case C-258/95)* [1997] E.C.R. I-5577, EU:C:1997:491 in that regard. Further, it was submitted that the benefit alleged was not linked to the passive enjoyment of the properties.

#### ***Context of license agreements***

**105.** It is acknowledged by Vieira that account must be taken of all the elements of the transaction and the circumstances in which it takes place by reference to its objective content.

**106.** Vieira submitted that the High Court judge's finding on the essential object of the license agreements was an overly restrictive interpretation which enforced a false dichotomy between the making available of the properties for a payment linked to the passage of time and the service to be performed by Mr. McPeake as the selling agent. It was argued that the license agreements could be viewed as separate agreements which, although connected to the main sales agency agreement, were effected for separate consideration and thus must be characterised as lettings for the purpose of EU VAT law:-

“There is no principle of EU VAT law which would operate to invalidate a supply made by one party simply because that supply is connected to another supply made by the recipient of such supply.” (p. 17 of Vieira’s written submissions)

**107.** The respondent countered that the permission granted to Mr. McPeake must be considered in the context of him having already been appointed as sole selling agent. Reliance was placed on *Waterford Glass (Group Services) Ltd. v. The Revenue Commissioners* [1990] 1 I.R. 334, the decision of Charleton J. in *Cussens v. Brosnan* [2008] IEHC 169, and the need to consider the economic and commercial realities of a transaction, to support the respondent’s contention that the licenses did not amount to a lease or letting of immovable goods. The respondent disputed Vieira’s characterisation of the High Court judge’s construction of “letting” as restrictive and contended that it was in accordance with the caselaw of the CJEU.

***Analysis of context of license agreement***

**108.** In considering the characterisation of the agreement between Vieira and Mr. McPeake I find, *inter alia*, the following factors are of relevance:

- (a) The licence agreement was not negotiated in any meaningful sense by Vieira on the one part and Mr. McPeake/his legal advisors on the other. Rather it was a mechanism recommended by Vieira’s tax advisors and acquiesced in by Mr. McPeake.
- (b) There was no finding by the Circuit Court judge that Mr. McPeake inputted any terms. He simply signed the agreements.
- (c) Mr. McPeake has to be considered by reference to the comparator of a truly independent tenant.
- (c) The rent payable by the estate agent to the licensor was not negotiated at arm’s length: no commercial transaction would be entered into on the basis that,

hypothetically, one party unilaterally controlled the price or where no mechanism or means for ascertainment of the price or rent in the first instance existed.

- (d) The hypothetical ability of the licensor to determine the amount of the licence fee is inconsistent with an arm's length lease or letting agreement having ever come into existence.
- (e) Alternatively, the absence of an identifiable or certain rent was incompatible with a letting being created.
- (f) The rent exigible under the terms of the agreement was in reality either unascertainable, illusory or non-existent.
- (g) The duration of the licence agreement was unduly short and clause 14 operated such that there was no minimum certain term for its operation.
- (h) The right to unilaterally extinguish the agreement on the occurrence of an extraneous event was inconsistent with the existence of any minimum term for the agreement.
- (i) Mr. McPeake had no control over the termination of the agreement.
- (j) The rights reserved to Vieira and their "colleagues and others" far exceeded the right of a lessor to merely visit a let premises.
- (k) The terms (including as to rent) deviated significantly from the provisions to be expected in an arm's length negotiated lease and lacked essential terms characteristic to a lease.

**109.** The license agreement conferred no material rights and imposed no meaningful obligations on the parties thereto above and beyond the subsisting obligations and rights pursuant to the main sales agency services arrangements that were at all material times



operational between the parties. At para. 30, p. 16 of her judgment the trial judge quite correctly recalled that:-

“...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.”

**110.** Costello J. analysed the *Temco* line of authorities, concluding that there can be a letting for VAT purposes even in circumstances where such letting provides for the use of the property in common with other occupiers. On the facts, however, she held that since the landlord retained an equal right to occupy the property with the licensee, there could be no letting for VAT purposes under the *Temco* test. I am satisfied that a clear basis was identified by her for that assessment and her analysis of the authorities was correct.

**111.** Whilst it is true that in *Temco* the CJEU held at para. 24 of the judgment “the landlord may reserve the right regularly to visit the property let”, the rights and entitlements retained in reserve by the licensor in this instance are far greater in extent than a right “regularly to visit the property let”. There is a clear conferral in clause 4 of the operative part of the licence of an entitlement to enter upon the property which is materially different in substance and more expansive in nature than a mere right to visit the property on a regular basis. Visitation is consonant with having parted with possession of the property in the first instance and where possession is held by another. The free and unrestrained right of Vieira to enter during the day with colleagues and others – without any obligation to give prior notice to Mr. McPeake, without any limitation as to frequency or duration of presence, without any limitation as to the numbers of “colleagues and others” or their purposes in entering upon the property – goes beyond any conventional right to visit referred to in the

CJEU jurisprudence such as in the manner contemplated by the court in *Temco* at para. 24 of its judgment. The rights reserved in the agreement were inconsistent with the existence of a letting having come into existence for VAT purposes under the *Temco* test.

**112.** In my view, the cumulative impact of clauses 13 and 14 of the license agreement must be considered when construing its effect. Whilst clause 13 envisages the arrangement being operative “for a period of fourteen days” or “such longer period as the parties hereto may agree” – and the evidence was there was never any such further agreement – clause 14 potentially modifies clause 13 very significantly insofar as it states:-

“...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.”

**113.** Thus, irrespective of the conduct of the licensee, and though he might have complied with each and every obligation specified in the licence agreement, an extraneous event to which Vieira was a direct party as vendor (*i.e.* completion) could occur at any moment or time after the commencement of the arrangement so as to extinguish it automatically. The period of 14 days appears to have represented the outer limit of the intended term of operation of the agreement. Thus, hypothetically, a license might be executed by Mr. McPeake in the morning and later that same day the sale of the property might close resulting in the completion of the sale to “a third party purchaser” and the automatic extinguishment of the term of the agreement in accordance with clause 14. The potential for such a unilateral reduction of the already brief term of 14 days without any remedy or recourse on the part of the licensee results in such a degree of evanescence as to be inconsistent with the existence of an agreed lease or letting in light of CJEU jurisprudence, in particular *Temco*, since the licensee had no certainty as to any minimum duration in its term.

**114.** I am satisfied that no certain rent was chargeable to the licensee, Mr. McPeake, under the terms of the licence agreement. No mechanism existed under the terms of the agreement for ascertaining any rent. Incidentally, rent was nowhere expressly alluded to in the licence agreement itself but rather in a separate letter, a copy of which is annexed to the consultative case stated signed by the Circuit Court judge. The letter stated:-

“This incentive is created by the licence period being for two weeks, after which a fee will be required from you to renew the licence (to continue having access to said unit for show purposes) and such fee will be set against any commission you eventually receive.”

The commission previously agreed and payable under the separate main sales agency agreement to the estate agent, Mr. McPeake, was 0.7% of the sale price achieved. Nowhere, by contrast, is the “renewal fee”, which Vieira seeks to characterise as a rent, quantified or specified nor is there any mechanism set out for the ascertainment of same.

**115.** The “rent” contended for by Vieira therefore did not reflect any economic reality, nor was it enforceable – since it was effectively unascertainable – on the part of Vieira against Mr. McPeake. This conclusion is supported by the fact that no such rent was ever sought from or paid by Mr. McPeake at any time. The absence of either a specified rent or a mechanism within the agreement for the ascertainment of same was fundamentally inconsistent with one of the essential *indicia* of a lease or letting agreement as defined in CJEU jurisprudence. That deficit in the licensing agreement fatally undermined the legal possibility that the agreement could be construed as a lease or letting for VAT purposes.

**116.** Latching on to elements or aspects of the separate obligations assumed by Mr. McPeake as estate agent in the anterior main sales agency agreement between the parties serves only to underscore the fundamental deficiencies in the arrangement and the effective absence of the crucial element of a transfer of the properties in exchange for the payment of

a rent and points strongly to a conclusion that the arrangements were lacking any commercial reality.

***Conclusion on claim that agreement constituted a lease or letting***

**117.** The arguments advanced by Vieira in support of the creation of a lease do not withstand scrutiny. Rent is a payment that must be amenable to calculation and readily ascertainable, either by means of a separate provision or expressly on the face of the document or agreement or otherwise by some identifiable formula or process of calculation.

**118.** The arrangement entered into did not effect the transfer by Vieira of the property to Mr. McPeake in the manner contended. The facts as found by the Circuit Court demonstrate that the intention of the parties as expressed in terms of the arrangement was fundamentally inconsistent with Mr. McPeake taking exclusive possession of the properties.

**119.** The unilateral *ex-post facto* evaluation by the licensor of benefits reported to have accrued from the arrangement does not constitute a “payment” or “price” payable by the licensee to the licensor on foot of the arrangement to satisfy the test in *Temco* and *Sinclair Collis*. The complete absence of an ascertainable rent is, when combined with the other deficits, fatal to Vieira’s contention that the arrangements could ever be construed as lettings for VAT purposes in the context of s. 3(1)(e) VATA, as amended. The fee was, on the evidence, as correctly found by the trial judge, not linked to the premises in question or to the passage of time.

**120.** The inevitable conclusion is, as the High Court correctly held, that the fundamental characteristics of a letting of immovable property for the purposes of Article 13B(b) of the Sixth Directive were absent insofar as the agreement, on its true construction considered in light of all the relevant facts and circumstances, did not confer on Mr. McPeake, for an agreed period and for payment, the right to occupy each house as if he were the owner of same coupled with the right to exclude any other person from enjoyment of that right.

### **Surrender of possession**

**121.** Vieira's alternative contention was that where an agreement such as the license agreement gives possession of the property (however minimal) to another party, this constitutes surrender of possession for the purposes of s. 4(4) VATA. Vieira emphasised that the phrase "surrender of possession" does not derive from EU VAT law but rather VATA, as amended, implementing the relevant VAT Directive. It was contended that s. 4(4) is sufficiently broadly drafted, intentionally so, in order to encompass those disposals which may not formally constitute a sale or lease or other divestment of title to a property in the ordinary sense but which still entail the granting of a level of possession to another party. Vieira submitted, the word "surrender" is broad enough to capture any class of disposal of possessory rights to a property which is not otherwise encompassed by other provisions in the VAT legislation dealing with formal disposals such as a sale or lease.

**122.** Vieira relied on ss. 3(5) and 4(3)(b) VATA which, in combination, exclude the handing over of goods (to include property) as security for a loan from the concept of a surrender constituting a "self-supply". It was submitted that these provisions show that the phrase "surrender of possession" must be given a broad interpretation. However, the position could hardly be otherwise since the equitable right to redeem is intrinsic to a valid mortgage nor do mortgagees conventionally take possession of secured properties save in the context of the realisation of security.

**123.** Vieira contended that the licence agreements were entered into for the specific purpose of formally documenting Mr. McPeake's entitlement to enter into relevant properties for the purposes of using those properties as show houses to facilitate the sale of other properties in the development. It was submitted that, as the licence agreements granted possession rights to Mr. McPeake, there was necessarily a relinquishing (or surrendering) of possessory rights by Vieira in favour of Mr. McPeake, although it was acknowledged that

Vieira did not fully surrender its rights of possession. It was noted that the license agreements conferred rights of possession and obligations on Mr. McPeake in order to facilitate sales of similar houses in the development.

**124.** Vieira contended that the trial judge's analysis as to whether there was a surrender of possession of the properties on foot of the arrangements was based on an incorrect premise. Vieira referred to the High Court judge's finding that, had there been no license agreements, Mr. McPeake as Vieira's selling agent would nonetheless have been afforded access to the houses for the purposes of expediting the closing of sales. It was contended that to say that possession might have been given to Mr. McPeake on a different basis to the one on which possession was in fact given cannot alter the fact that possession was indeed given to him. Further, Vieira argued that it cannot be assumed that possession would have been given on a different basis – as had occurred under the main sales agency agreement.

**125.** It was submitted that the High Court judge provided no explanation for her statement that joint possession cannot amount to a "surrender of possession" for the purposes of VAT:-

"A 'surrender of possession' must necessarily encompass the granting of formal possessory rights to another party which, by necessity, dilutes the possessory rights of the surrendering party. To determine otherwise would introduce a high threshold to the concept of a 'surrender of possession' which is not provided for or included in the relevant VAT legislation." (p. 10 of Vieira's written submissions)

**126.** Vieira took issue also with the judge's finding that, in all the circumstances, it was artificial and contrived to say that a fourteen day licence amounts to the surrender of possession of premises. Vieira contended that the High Court judge failed to determine the relevant threshold which must be met in order for a transaction to give rise to a surrender of possession. It was said that this was an issue which must be determined having regard to objective criteria and the meaning of the statutory provisions and without any consideration

as to whether the arrangements may be “artificial” or “contrived”. Vieira separately contended that the High Court judge had erroneously conflated the application of the *Halifax* principle with her consideration of whether a surrender of possession had taken place. It was submitted that such analysis must be confined to a separate exercise under s. 811 TCA. These arguments will be dealt with hereafter.

***Analysis and conclusions on surrender issue***

**127.** The passages from the High Court judgment relied upon by Vieira represent an aspect only of the judge’s reasoning for her conclusion that the arrangements entered into did not in substance give rise to a surrender of possession. When fairly considered, the judgment also presents a detailed analysis of the *indicia* of possession as developed in the decisions in *Greaves v. Field* and *Calder Civic Trust Ltd. v. Jenkins*. She further considered the Irish jurisprudence, including *Cussens v. Brosnan* and *Waterford Glass (Group Services) Ltd. v. The Revenue Commissioners*, in the latter of which it had been observed at p. 337 that “[t]he court is entitled to look at the reality of what has been done. Just because the parties put a particular label on a transaction the court is not obliged to accept that label blindly.”

**128.** Under clause 3 of the license agreement, the licensee’s possession of the property was limited to “achieve the Objective”, and was thereby confined to activity directed towards the sale of “additional property within the Development”: “identifying a purchaser”; “negotiating terms of sale of property as quickly as possible and at the best price and upon the most favourable conditions”. In other words, Mr. McPeake did not have the general right to take possession of the property at times when he was not actively engaged in the performance or pursuance of the objective specified in the license agreement. Mr. McPeake, the licensee, did not have any sufficient degree of “control” over the property for it to amount to possession consistent with Vieira having surrendered its interest in the property to him. At best, bearing in mind the objective adumbrated in the arrangement, Mr. McPeake was not

entitled to possession in the strict legal sense but only to the use or occupation of the premises in question or to occupy same for the limited purpose of achieving the objective during the 14 day window of time specified in clause 13. This was itself extinguishable at any time without notice in accordance with clause 14 which operated in parallel with his subsisting contractual rights as sole selling agent.

**129.** In my view, no possessory right or interest of Vieira was surrendered or yielded up to Mr. McPeake such as could constitute surrender of possession within the meaning of the VAT legislation. Far from Mr. McPeake enjoying exclusive possession, the licensor retained a broad right under clause 4 of the license agreement to enter the premises at “reasonable times” with “colleagues and others” without any obligation to give prior notice in writing to Mr. McPeake.

**130.** Clause 4, in light of its ambit, is fundamentally inconsistent with the proposition that the underlying agreement gave rise to a surrender by Vieira of its beneficial occupation and possession of the property to the licensee. Thus, the clear language contained in the instrument itself precluded the effecting of a surrender or a deemed surrender, such as would engage s. 4(3) VATA, capable of triggering a deemed appropriation of the goods for a non-business user within the meaning of s. 3(1)(f) VATA.

**131.** In my view, the trial judge also correctly considered it of crucial importance to the substance of the arrangement that in parallel with the licence agreement, Mr. McPeake, by virtue of a prior main sales agency agreement between the parties, was at all material times the sole selling agent for all the units in the development. As such, Mr. McPeake already enjoyed the right to possession of the properties, including the properties the subject matter of these arrangements, consistent with his obligations to sell. Nothing in the license agreements could be said to constitute additional rights or obligations over and above the express or implied duties and rights undertaken under the main sales agency agreement.



**132.** Whereas Vieira contends that the licenses were granted for the purposes of providing Mr. McPeake with additional possession rights “so as to accelerate the sales process in respect of other properties”, prior to entering into the arrangement Mr. McPeake was entirely free to come and go to units as he saw fit and show prospective purchasers around them for the purposes of securing a sale of a unit in accordance with the main sales agency agreement, regardless of whether or not the units were the subject of binding contracts for sale to third parties. Although Mr. McPeake was entitled to hold the keys *per* clause 3 of the license agreements, he already held the keys or had ready access to same as was necessary for the performance of the main sales agency agreement.

**133.** The notion that by entering into the arrangement, a surrender of Vieira’s residual interest in the property was effected for the benefit of Mr. McPeake is illusory and is not supported by the document itself. In particular, clause 13 of the license agreement provided that the arrangement would be of a very short duration of 14 days. This represented but a small portion of the overall period of time during which Mr. McPeake was already the sole selling agent for all units with liberal access to them.

**134.** The contention that Vieira had surrendered possession is likewise inconsistent with the manner in which the arrangement came to a conclusion. In my view it should be reiterated that clause 14 of the arrangement states:-

“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.”

This enabled an automatic retrocession of the arrangement without any act or step being taken on the part of Mr. McPeake. Additionally, though not in any way determinative of the issue, if, on its true construction, the arrangement had given rise to a surrender to Mr. McPeake of an interest in the property one might expect that fact to be disclosed to a

prospective purchaser. Furthermore, prior to completion of the sale, it might reasonably be expected that a purchaser would be informed of the termination of such a surrendered interest in the property, contended to be vested in Mr. McPeake. Conventionally, it would be for a purchaser to decide if clause 14 did validly extinguish a previously surrendered interest or whether they required other evidence such as a waiver or release by Mr. McPeake.

**135.** The profoundly ephemeral nature of the arrangement must also be considered in this context. It was entered into post-contract at a time when a third party had executed a contract for the purchase of the property in question and a completion date was looming. Such transience was not compatible with a surrendered interest being vested in, acquired or held by Mr. McPeake.

**136.** I am satisfied the trial judge was correct in concluding that at its height there was joint possession by both Vieira and Mr. McPeake. It follows that the High Court judge's conclusion that the Circuit Court judge was correct in law in determining that the arrangements did not constitute a surrender of possession, such that s. 4(3) VATA would apply to deem there to be an appropriation of goods for the purposes of s. 3(1)(f) VATA, is correct and no valid basis for disturbing that finding has been demonstrated.

**137.** Scrutiny of the licence agreement itself coupled with a consideration of the operation of the overarching sales agency agreement drains the characterisation of the agreement as a surrender, as contended for by Vieira, of any reality. In my view, the trial judge's reasoning on the issue of surrender is unimpeachable.

**Third ground of appeal**

**138.** The third ground of appeal is directed towards "the application of the abuse of rights doctrine to the question of whether there has been a letting or surrender of possession". In particular it is contended that the High Court judge:

“...erred in law in the application of a *Halifax* abuse of rights analysis to the question of whether the relevant licence agreements gave rise to a letting or a surrender of possession for VAT purposes. Rather, such licenses should have been accepted at face value as having the effect intended by the parties such that they constituted a letting, or in the alternative, a surrender of possession of the relevant properties for VAT purposes.”

**139.** Vieira is critical of the judgment insofar as the judge observed (at para. 21, p. 22), within her discussion of the surrender of possession issue:-

“...it is artificial and contrived to say that a 14 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 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 purpose of concluding the sale and to show the house to potential purchasers of alternative properties in the development.”

**140.** However, this selective quotation from the judgment does not reflect the totality of the consideration given by the trial judge to the issue. The trial judge came to her conclusion as to the artificiality and contrived nature of the arrangement based on a consideration of the totality of the relevant facts and the relevant jurisprudence on the issue of surrender in the first instance and not based on the *Halifax* decision or the abuse of rights jurisprudence. Even if aspects of the judgment might be selectively cited to suggest otherwise, there was ample and compelling evidence before her which she adverted to, and expressly took into account, wholly extraneous to the *Halifax* abuse of rights jurisprudence, which entitled her to reach the conclusions which she did that, on either basis contended, no self-supply was established for VAT purposes.

**141.** As is clear from the jurisprudence, in evaluating a document the judge was not bound to accept at face value its contended effect. She could – and did – have regard to the salient factual matrix in arriving at the conclusions she reached for which there was ample evidence before her based on the findings of fact of the Circuit Court judge and thus, in respect of her conclusions, this court ought not to interfere.

**142.** In so far as Vieira asserts that the trial judge took into account the economic and commercial reality of the subsisting relationship between the parties in her evaluation as to whether on its true construction the arrangement gave rise to either a surrender or lease amounts to a conclusion based on “substance over form”, that is not supported by the evidence. The trial judge did not approach her characterisation of the arrangements in the manner in which Vieira contends but rather applied established CJEU jurisprudence relevant to the issue of surrender and the existence of a lease in arriving at her conclusions. There was ample authority to support her conclusions in respect of the issues of surrender and the existence of a lease.

**143.** The trial judge engaged with the evidence and the facts as found by the Circuit Court judge for the purposes of properly understanding and identifying the underlying substance of the arrangements. Nowhere did the trial judge characterise the arrangement as a sham or a fraud. The arrangements were genuine transactions that fell to be taxed by reference to a realistic view of the actual facts and having due regard to the purpose of the specific legislative measures that were engaged. The trial judge did no more than engage in that process and her conclusions were fact-driven and supported by the clear findings of fact expressed in the terms of the consultative case stated itself. Her focus was primarily on the ascertainment of the true legal nature of the transactions themselves and whether they could be appropriately characterised as either surrenders or leases and is not open to reproach. It is not correct to assert, as Vieira does, that, “such licences should have been accepted at face

value as having the effect intended by the parties”. Such a proposition is incompatible with the relevant obligations of the respondent under both EU and national measures.

**144.** I am not satisfied that Vieira has established that the trial judge incorrectly conflated the application of the abuse of rights doctrine with the consideration of whether there was in fact a lease or surrender of possession. She separately and distinctly evaluated the alternative contentions that the arrangement amounted to either a lease or a surrender. In so far as she subsequently considered same in the context of the abuse of rights doctrine and the *Halifax* doctrine, that approach is not to be faulted.

### **Halifax doctrine – Abuse of rights principle**

#### ***General***

**145.** Clarke J. (as he then was) in the Supreme Court in the decision *Vieira v. The Revenue Commissioners* [2015] IESC 78 alluded, *obiter*, at para. 8.1 to the fact that at that stage the court was “not being asked to consider whether the *Halifax* principles actually require, in all the circumstances of this case, the form of reverse engineering that the ECJ has mandated should occur in circumstances where an abusive practise is established”. That issue does arise in the current proceedings.

**146.** Since the decision in *Gemeente Lausden and Holin Groep BV cs v. Staatssecretaris van Financiën (Joined Cases C-487/01 and C-7/02)* [2004] E.C.R. I-05337, EU:C:2004:263, it is well settled in the jurisprudence of the CJEU that the abuse of rights concept does apply to VAT. When a court is performing a VAT analysis in this context it will not disregard genuine contractual arrangements between parties even if they are connected unless *Halifax* principles apply to re-characterise the transaction.

**147.** *Halifax* has been found to have established a substantive principle of European VAT law. Whereas the rules of evidence which apply are those of the national court, those rules should not themselves breach the principle of effectiveness. The doctrine is directed at

considering the true meaning of the law and whether conditions have in fact and in law been met; it is not focussing on whether a taxpayer has concealed the true facts from the revenue authorities.

**148.** The *Halifax* doctrine reflects the EU approach to tax avoidance. When a structure or arrangement is found to amount to an abusive tax avoidance arrangement it is liable to redefinition under the *Halifax* doctrine.

**149.** It is clear from the jurisprudence that abuse of rights in the *Halifax* context can arise in a number of ways, including, *inter alia*, the adoption of a structure which in and of itself gives rise to an abusive tax advantage or the adoption of a tax efficient structure on terms which are not commercial whereby the said structure gives rise to an abusive tax advantage

**150.** Before Revenue can avail of the abuse of rights principle an interpretative “hook” must be found in the Sixth Directive on which to hang the construction for which it contends. That interpretation must then be read across into the relevant implementing domestic legislation – the VATA 1972.

**151.** As the judgment in *Halifax* makes clear, it involves a two stage test, neither aspect of which necessitates a finding of wrongdoing *per se*. The first stage of the test has two elements:

- (a) does the transaction give rise to a tax advantage; and,
- (b) if so, is the tax advantage contrary to the purpose of the Sixth Directive?

If the answer to 1(a) and 1(b) is yes, then the second stage of the test asks whether it is objectively apparent that the essential aim of the transaction is to obtain a tax advantage.

**152.** Abuse cases do not require an allegation tantamount to fraud notwithstanding the use of the word “abuse”. That the issue is addressed to avoidance and not evasion is clear from para. 86 of the CJEU’s decision in *Halifax* where it referred to the “formal application of the conditions laid down by relevant provisions of the Sixth Directive and of national legislation

transposing it” to the facts of the case and whether the grant of a resulting tax advantage is “contrary to the purpose of those provisions”. Additionally, the second part of the test, which has regard to the “essential aim”, is an objective and not a subjective test. The principles are hereinafter more fully considered.

***Advocate General Maduro***

**153.** An understanding of the ambit of the *Halifax* decision can be obtained from the opinion of Advocate General Maduro, EU:C:2005:200, in the first instance:-

“84. Definition of the scope of this Community law principle, as applicable to the common VAT system, is ultimately a problem of determining the limits applicable to the interpretation of the provisions of the VAT directives that confer certain rights on taxable persons. In this regard, the objective analysis of the prohibition of abuse has to be balanced against the principles of legal certainty and protection of legitimate expectations that also ‘form part of the Community legal order’...and in the light of which the provisions of the Sixth Directive must be interpreted...From those principles it follows that taxpayers must be entitled to know in advance what their tax position will be and, for that purpose, to rely on the plain meaning of the words of the VAT legislation...

85. Furthermore, the court has consistently held, in consonance with the position generally accepted by Member States in the tax domain, that taxpayers may choose to structure their business so as to limit their tax liability...There is no legal obligation to run a business in such a way as to maximise tax revenue for the State. The basic principle is that of the freedom to opt for the least taxed route to conduct business in order to minimise costs...On the other hand, such freedom of choice exists only within the scope of the legal possibilities provided for by the VAT regime. The normative goal of the principle of prohibition of abuse within the VAT system

is precisely that of defining the realm of choices that the common VAT rules have left open to taxable persons. Such a definition must take into account the principles of legal certainty and of the protection of taxpayers' legitimate expectations.

86. By virtue of those principles, the scope of the Community law interpretative principle prohibiting abuse of the VAT rules must be defined in such a way as not to affect legitimate trade. Such potential negative impact is, however, prevented if the prohibition of abuse is construed as meaning that the right claimed by a taxable person is excluded only when the relevant economic activity carried out has no other objective explanation than to create that claim against the tax authorities and recognition of the right would conflict with the purposes and results envisaged by the relevant provisions of the common system of VAT. Economic activity of that kind, even if not unlawful, deserves no protection from the Community law principles of legal certainty and protection of legitimate expectations because its only likely purpose is that of subverting the aims of the legal system itself.

87. I am of the view therefore that the Community law notion of abuse, applicable to the VAT system, operates on the basis of a test comprising two elements. Both elements must be present in order to establish the existence of an abuse of Community law in this area. The first corresponds to the subjective element mentioned by the court in *Emsland*, but it is subjective only in so far as it aims at ascertaining the purpose of the activities in question. That purpose – which must not be confused with the subjective intention of the participants in those activities – is to be objectively determined on the basis of the absence of any other economic justification for the activity than that of creating a tax advantage. Accordingly, this element can be regarded as an *element of autonomy*. In fact, when applying it, the national authorities must determine whether the activity at issue has some



autonomous basis which, if tax considerations are left aside, is capable of endowing it with some economic justification in the circumstances of the case.

88. The second element of the proposed test corresponds to the so-called objective element mentioned in *Emsland*. It is in fact a teleological element whereby the purpose and objectives of the Community rules allegedly being abused are compared with the purpose and results achieved by the activity at issue. This second element is important, not only because it provides the standard upon which the purpose and results of the activity in question are to be assessed. It also provides a safeguard for those instances where the sole purpose of the activity might be to diminish tax liability but where that purpose is actually a result of a choice between different tax regimes that the Community legislature intended to leave open. Therefore, where there is no contradiction between recognition of the claim made by the taxable person and the aims and results pursued by the legal provision invoked, no abuse can be asserted.

89. The prohibition of abuse, as a principle of interpretation, is no longer relevant where the economic activity carried out may have some explanation other than the mere attainment of tax advantages against tax authorities. In such circumstances, to interpret a legal provision as not conferring such an advantage on the basis of an unwritten general principle would grant an excessively broad discretion to tax authorities in deciding which of the purposes of a given transaction ought to be considered predominant. It would introduce a high degree of uncertainty regarding legitimate choices made by economic operators and would affect economic activities which clearly deserve protection, provided that they are, at least to some extent, accounted for by ordinary business aims.

...

91. On the basis of the foregoing analysis I am therefore of the opinion that there is a Community law principle of interpretation prohibiting the abuse of Community provisions, which is also applicable to the Sixth Directive. According to that principle, the provisions of the Sixth Directive must be interpreted as not conferring the rights that might appear to be available by virtue of their literal meaning, when two objective elements are found to be present. First, that the aims and results pursued by the legal provisions formally giving rise to the tax advantage invoked would be frustrated if that right were conferred. Second, that the right invoked derives from economic activities for which there is objectively no other explanation than the creation of the right claimed.” (emphasis in original)

***Halifax – The CJEU’s decision***

**154.** In *Halifax* the CJEU propounded a general anti-avoidance principle based upon the civil law doctrine of “abuse of rights”. It provided:-

“69. The application of Community legislation cannot be extended to cover abusive practices by economic operators, that is to say transactions carried out not in the context of normal commercial operations, but solely for the purpose of wrongfully obtaining advantages provided for by Community law...

70. That principle of prohibiting abusive practices also applies to the sphere of VAT.

...

74. [But] it would appear that, in the sphere of VAT an abusive practice can be found to exist only if, first, the transactions concerned, notwithstanding formal application of the conditions laid down by the relevant provisions of the Sixth Directive and the national legislation transposing it, result in the accrual of a tax advantage the grant of which would be contrary to the purpose of those provisions.

75. Second, it must also be apparent from a number of objective factors that the essential aim of the transactions concerned is to obtain a tax advantage...

76. It is for the national court to verify in accordance with the rules of evidence of national law, provided that the effectiveness of community law is not undermined, whether action constituting such an abuse of practice has taken place in the case before it..."

***Pendragon***

**155.** In this context, the decision of the UK Supreme Court in *Revenue & Customs Commissioners v. Pendragon plc & Ors.* [2015] UKSC 37, [2015] 1 W.L.R. 2838, which the respondent invoked in argument, is instructive. Lord Sumption observed at para. 5:-

“Abuse of law is a concept derived from civil law jurisprudence, which is unknown to English common law but has been adopted by the law of the European Union. In its simplest form, it confines the exercise of legal rights to the purpose for which they exist and precludes their use for a collateral purpose. For present purposes, the expression *détournement de droit* adopted by some French writers is probably a better description of its content. The application of the principle to tax avoidance schemes calls for a difficult balance to be drawn. It is traditional, at any rate in this jurisdiction, to distinguish between avoidance, which involves the lawful arrangement of a taxpayer’s affairs so as to minimise his tax bill, and evasion, which is an unlawful failure to account for tax due, generally by suppressing or falsifying information. Sophisticated avoidance schemes do not so much undermine this distinction as challenge its usefulness. By artificially reclassifying transactions so as to produce a more favourable tax outcome than commercially comparable ‘normal’ transactions, they frustrate the objective of the taxing provision without necessarily falling foul of its language. The result is arbitrarily to depress tax receipts, producing inequity between taxpayers and potentially distorting

competition between firms who are otherwise similarly placed. This gives rise to social costs which are significant and increasingly controversial. On the other hand, legal certainty is an important principle of both English and EU law, particularly when it comes to justifying the financial demands of the state. Artificiality, if it is to be deployed as a workable legal concept, has to be tested against some standard of transactional normality, and the search for such a standard is far from straightforward. Taxpayers faced with a choice between alternative ways of achieving some commercial objective are in principle entitled to select the one with the more tax-efficient statutory outcome. In particular, they are entitled to choose between exempt and taxable transactions in their own financial interest. Like any other tax, VAT is due only in so far as its imposition is authorised by statute. It follows that although the courts may examine the commercial reality of transactions without being unduly hidebound by labels, they do not as a general rule enlarge the scope of a taxing provision by reference to considerations which affect neither the construction of its language nor the characterisation of transactions to which it is said to apply...”

**156.** Lord Sumption considered that, “[t]he main task of any court seeking to apply a principle of abuse of law is to reconcile these competing considerations.” He cited the decision *Emsland-Stärke GmbH v. Hauptzollamt Hamburg-Jonas (Case C-110/99)* [2000] E.C.R. 1-11569, EU:C:2000:695 where the CJEU held at para. 59 that:-

“...A finding that there has been an abuse presupposes an intention on the part of the Community exporter to benefit from an advantage as a result of the application of the Community rules by artificially creating the conditions for obtaining it.”

***First limb of Halifax – Tax advantage***

**157.** A tax advantage generally arises where less net tax is payable under one structure than another. A tax advantage *per se* is not abusive. Vieira correctly points out that it was entitled to elect for a tax efficient structure.

**158.** The creation of a lease or the effecting of a valid surrender of the subject property in an arm's length transaction with a third party is not in and of itself an abusive structure.

**159.** It is not in contention that a tax advantage ensued to Vieira from the licence arrangement. The central issue is whether it is an abusive tax advantage that offends the *Halifax* doctrine contrary to the purpose of the Sixth Directive. Where a taxpayer opts between one legitimate course and another it cannot be said that to choose one over the other results in them necessarily acting "contrary to the purpose of" the legislation.

**160.** The CJEU jurisprudence makes clear that it is generally legitimate for a taxpayer to establish a structure whereby a third party entity enters into a lease in respect of an asset but only where an abusive tax advantage is not thereby generated by leasing on terms which do not correspond to the essential *indicia* of an arm's length transaction and the terms characteristic to such an agreement.

**161.** As was observed in *Halifax* at para. 73 (and subsequently reiterated in *Ministero dell'Economia e delle Finanze v. Part Service Srl (Case C-425/06)* [2008] E.C.R. I-00897, EU:C:2008:108):-

“...it is clear from the case-law that a trader's choice between exempt transactions and taxable transactions may be based on a range of factors, including tax considerations relating to the VAT system...Where the taxable person chooses one of two transactions, the Sixth Directive does not require him to choose the one which involves paying the highest amount of VAT. On the contrary...taxpayers may choose to structure their business so as to limit their tax liability.”

**162.** It is clear from the jurisprudence that certain tax efficient structures adopted by a taxpayer can be abusive. That is self-evident from the facts of the *Halifax* case itself – where the taxpayer created a complex structure, the result of which was that notwithstanding its largely exempt supplies, it could recover a significant proportion of its input tax.

**163.** In *Weald Leasing (Case C-103/09)* the CJEU considered that the establishing of a leasing arrangement is not *per se* abusive but that the terms of the arrangement might make it abusive:-

“38. ...resort to a leasing transaction in respect of an asset does not automatically mean that the amount of VAT on that transaction will be less than would have been paid if the asset had been purchased.

39. That being so, the national court will have to determine, first, whether the contractual terms of the leasing transactions at issue in the main proceedings are contrary to the Sixth Directive and the national legislation transposing it. That would particularly be the case if the rentals were set at levels which were unusually low or did not reflect any economic reality.

...

45. ...The tax advantage accruing from an undertaking's recourse to asset leasing transactions, such as those at issue in the main proceedings, instead of the outright purchase of those assets, does not constitute a tax advantage the grant of which would be contrary to the purpose of the relevant provisions of the Sixth Directive and the national legislation transposing it, provided that the contractual terms of those transactions, particularly those concerned with setting the level of rentals, correspond to arm's length terms and that the involvement of an intermediate third party company in those transactions is not such as to preclude the application of those provisions, a matter which it is for the national court to determine. The fact that the

undertaking does not engage in leasing transactions in the context of its normal commercial operations is irrelevant in this regard.”

**164.** Were Vieira correct in characterising the licence as either a valid lease or surrender for VAT purposes, there is still an outstanding issue; namely, whether such a tax advantage would be contrary to the Directive, and whether the terms on which Vieira transacted with Mr. McPeake, the estate agent, were an abusive practice contrary to the rule in *Halifax*.

**165.** Vieira had a choice, but if it exercised that choice by opting for a structure which in substance gave it a tax advantage contrary to the purposes of the Sixth Directive then, subject to the second limb of the *Halifax* test, its tax liability can be redefined by the respondent.

**166.** The question of artificiality is assessed by reference to the business relationships actually entered into between the parties for the purposes of testing whether they reflected underlying commercial reality and transactional normality. I am satisfied that there was ample evidence before the High Court judge that the license arrangements, viewed against the subsisting relationship between the parties, were highly artificial and even if they could be found to meet the relevant test as a lease or, in the alternative, constituted a surrender, they did not constitute genuine contractual arrangements between the parties. The structure adopted lacked any objective explanation, save achieving a reduction in VAT liability.

**167.** To facilitate the purposes, aims and results thereby envisaged by Vieira would fundamentally conflict with and undermine the relevant provisions of the common system of VAT. As such therefore, even if the agreements were viable as leases or surrenders, the economic activity encompassed by the agreements deserves no protection pursuant to the principles of either legal certainty or legitimate expectation since the evidence points to the inescapable conclusion that they operated and/or had the likely essential object to either subvert or defeat the purpose and objectives of the Sixth Directive and of s. 4 VATA which

brought within the charge to tax the “supply before first occupation of buildings...and the land on which they stand”.

**168.** It is clear from the authorities such as *Weald Leasing (Case C-103/09)* that the CJEU envisages that the national tribunal of fact considers the terms of trading and whether they reflect what might be expected in a commercial situation. If not, then the structure is *prima facie* abusive.

***The second limb of Halifax – The essential or principal aim***

**169.** For the doctrine in *Halifax* to operate there must be not alone (a) an abusive tax advantage but also (b) the essential aim of the transaction must have been to obtain the tax advantage. The CJEU in *Halifax* observed, regarding the second limb:-

“81. As regards the second element, whereby the transactions concerned must essentially seek to obtain a tax advantage, it must be borne in mind that it is the responsibility of the national court to determine the real substance and significance of the transactions concerned. In so doing, it 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 involved in the scheme for reduction of the tax burden...”

**170.** It suffices if the principal or dominant aim of the transaction or transactions is the securing of a tax advantage contrary to the purpose of the legislation and the Directive. That is evident from the language of the CJEU in *Halifax* itself and in particular para. 86 which references “the essential aim” of a transaction. That position was further clarified and confirmed in *Part Service Srl. (Case C-425/06)* where the evidence showed that the mechanism adopted by the taxpayer had an abusive tax advantage but had, in addition, other separate commercial advantages. The CJEU held:-



“45. ...there can be a finding of an abusive practice when the accrual of a tax advantage constitutes the principal aim of the transaction or transactions at issue.”  
(emphasis added)

**171.** Lord Sumption observed in *Pendragon* that:-

“12. ...The potential for abuse consists in the method chosen to achieve the commercial purpose. In *Ministero dell’Economia e delle Finanze v Part Service Srl* (Case C-425/06) [2008] S.T.C. 3132, the consideration payable by the lessee under a leasing transaction was artificially split between two contracts, one with the lessor and the other with an associated company of the lessor.”

Of that decision Lord Sumption noted:-

“This conclusion seems to me to do no more than make explicit something which is implicit in the *Halifax* tests. Identifying the ‘essential aim’ in a case of concurrent fiscal and commercial purposes depends on an objective analysis of the method used to achieve the commercial purpose.”

Relying on the opinion of Advocate General Maduro in *Halifax* from para. 89 *et seq* which was in turn, in terms, approved by the court at para. 75, Lord Sumption noted that:-

“...the taxpayer’s choices must be ‘at least to some extent, accounted for by ordinary business aims.’ The question is therefore whether the commercial objective is enough to explain the particular features of the contractual arrangements which produce the tax advantage.”

**172.** The test for the “essential aim” of an arrangement is objective. The CJEU in *Part Service Srl. (Case C-425/06)* provided some guidance as to the objective factors to be taken into account in this exercise:-

“62. ...the national court...may take account of the purely artificial nature of the transactions and the links of a legal, economic and/or personal nature between the

operators involved (*Halifax and Others*, paragraph 81), those aspects being such as to demonstrate that the accrual of a tax advantage constitutes the principal aim pursued, notwithstanding the possible existence, in addition, of economic objectives arising from, for example, marketing, organisation or guarantee considerations.”

A court can look at the artificiality of an arrangement or any links between the participators in determining whether the arrangement entered into had the characteristics of a normal or commercial transaction or rather was, on balance, contrived. I pause to observe that this is precisely what Costello J. did in answering the issues in the consultative case stated before her as she did.

**173.** In determining how to apply the doctrine of abuse of rights regard can be had to (a) “the essential aim” of the VAT planning, and (b) the meaning of “contrary to the purpose” of the EU VAT provision in question. Relevant authorities confirming that approach include *Part Service Srl (Case C-425/06)* and *Weald Leasing Ltd. (Case C-103/09)*.

**174.** In this context the CJEU jurisprudence suggests that an abusive practice is one that is opposite to the intention of the legislation. The said jurisprudence indicates that it is appropriate for the court to examine the terms of the transaction that achieved the contended outcome when considering whether same were abusive. The need to analyse contractual terms was specifically addressed in *Weald Leasing Ltd. (Case C-103/09)* where the CJEU observed that it was appropriate to consider whether rents were unusually low or otherwise did not reflect economic reality. A separate consideration for the court seised with the determination of the issue as to whether an apparent VAT advantage is contrary to the Directive and an abuse of rights is whether the parties to the transaction dealt on arm’s length terms.

**175.** Considering the issue as to whether the essential aim of a transaction is to obtain a tax advantage, Lord Sumption in *Pendragon* observed:-

“31. ...Since the purpose of a contract is not necessarily the same as its meaning, the evidence which is admissible to prove it cannot be limited to what would be admissible as an aid to construction. It may in an appropriate case include evidence not just of the background knowledge available to the parties, but of the financial position and objective commercial requirements of the party obtaining the tax advantage, the relationship between the participants, the reasonableness of the consideration, the mechanics of the performance, the normal course of the relevant business and potentially other matters.”

***Halifax principle – Analysis of High Court judge’s approach***

**176.** The High Court judge analysed the *Halifax* principle at para. 23, p. 22 *et seq* of the judgement and entered into an evaluation as to whether in all the circumstances in light of her findings on the initial issues an abusive practice was established.

**177.** She embarked on an evaluation of the facts in determining that the first requirement of the *Halifax* principle was met on the evidence (para. 25, p. 23 of the judgment).

**178.** Her methodology involved her thereafter proceeding to consider the second limb of *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’.” (para. 26, pp. 23 to 24)

She noted:-

“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.” (para. 26, p. 24)

**179.** In her application of the *Halifax* doctrine, the trial judge made a distinct determination based on the evidence that there had been an abuse of rights arising from the arrangement under challenge. That determination was entirely open to the judge on the evidence and did not run counter to the principle that a taxpayer is entitled to order his affairs in a way which minimises the incidence of tax. She clearly and correctly determined that the accrual of a tax advantage was the essential aim of the transaction and in doing so correctly applied the principles articulated in *Halifax*.

**180.** At the risk of repetition, the evidence before the High Court demonstrated that the licensee in practice did not pay or discharge any rent nor was same ever capable of calculation or ascertainment. The licences were not negotiated at arm’s length and many terms of same were never adhered to by the parties. The licensee never had exclusive possession as defined in CJEU jurisprudence. All of this is inconsistent with normal commercial practice and ordinary business aims. From an objective perspective the licence arrangements were artificial; on the face of it, superficially appearing to create a state of affairs whereby a “supply” of goods was effected for the benefit of Mr. McPeake within s. 3(1)(e) VATA or, in the alternative construction advanced on behalf of Vieira, operating so as to ostensibly suggest they could be deemed to be an appropriation of the goods to a non-business user by virtue of the surrender of possession of same to Mr. McPeake.

**181.** In reality, as Costello J. correctly held, Mr. McPeake’s subsisting business as the sole estate agent for the development under the main sales agency agreement continued as it had done throughout the sale of houses in Phase 1 of the development with no material discernible alteration in the course of dealing between the parties save that he was required

to sign the licence agreement subsequent to the creation of a contract for sale in each case. I am satisfied accordingly that from an objective perspective there was clear evidence before the High Court judge entitling her to conclude that the principal and essential aim of the arrangement was an abusive tax advantage.

**182.** Contrary to Vieira's arguments, the evidence was consistent with the decision to enter into the licence arrangement being purely tax driven and further was contrary to the purposes of the Sixth Directive. Costello J. did evaluate whether Vieira's commercial objectives explained the particular features of the licence transaction from the vantage point of its characterisation as a lease or a surrender which produced the tax advantage. The trial judge further, having evaluated and identified the essential aims of the transaction, correctly concluded and was driven by the facts to determine that the features which produced the tax advantage had no other rationale than the procurement of the tax advantage in question.

**183.** The agreements were manifestly devised, as the evidence showed, as artificial constructs, not for the primary purpose of facilitating the sale and disposition of units to consumers, but for the dominant purpose of re-characterising the ultimate disposition of the dwelling units to consumers as arising subsequent to a self-supply pursuant to s. 3(1)(e)/3(1)(f) VATA so as to incur no liability in respect of VAT.

**184.** A consideration of the judgment makes clear that the trial judge also considered the purpose of the relevant statutory provisions that were engaged and analysed the transactions as a whole and in their context and proceeded to construe their legal effect in light of that purpose having due regard to relevant CJEU jurisprudence and authorities.

***Conclusions on Halifax and abuse of rights issue***

**185.** The economic substance ostensibly underpinning the licence was that it permitted the estate agent as sole selling agent of houses in Phase 2 of Tyrrelstown development to show prospective purchasers around dwelling houses that had been substantially completed

and were subject to a process of snagging and where closing was anticipated. This was no different from what estate agents did in general and what Mr. McPeake had done in selling the houses in Phase 1 of the development. There was no finding that the agreement led to any alteration or variation in the manner in which the estate agent, Mr. McPeake, carried out his functions as sole selling agent of the houses built in Phase 2 of the development when compared with Phase 1. There was no evidence that could have supported such a finding. It was thus both an unnecessary and an artificial arrangement.

**186.** The special feature of causing the estate agent to sign the licence agreement after a contract for sale of the house was concluded had no business rationale other than achieving a VAT advantage. Thus, the evidence demonstrated that the arrangement was manifestly entered into not for the essential purposes of facilitating the sale and disposition of units in Phase 2 but for the sole or principal purpose of re-characterising the dwelling houses as having been subject to a prior self-supply such as to render them exempt from VAT liability at point of sale to the end consumer.

**187.** I am satisfied that there was ample evidence before the High Court judge that the license arrangements were highly artificial such that, even if they operated in law either as a lease or surrender, in reality they served no business or commercial purpose beyond the aim of impermissibly procuring a VAT advantage. The agreements were not negotiated at arm's length and, notwithstanding their limited nature, in material respects the terms were not adhered to by the parties, such as the obligation to refund the licensor on demand all electricity and telephone accounts (clause 10) in respect of the property attributable to the period of the agreement. No agreement was ever entered into for the extension of any licence (clause 13) in cases where the sale of a unit did not close within the 14 day "initial period" of the agreement.

**188.** On an analysis of the evidence I am satisfied that there was cogent evidence before the High Court judge which entitled her to conclude that the arrangement was designed to secure for Vieira the sale of dwelling units to consumers free from liability to VAT. This was effected through establishing a purported letting/lease agreement, or alternatively, a surrender of possession; diverting the property between contract and completion to an exempt or “non-VATable” business purpose and as such giving ostensible effect to a purported “self-supply”.

**189.** I am satisfied that the findings of the High Court judge were supported by evidence which demonstrated that the arrangement *prima facie* resulted in Vieira achieving a real benefit which is properly to be regarded as a tax advantage whereby it was not liable to pay VAT on the house price by virtue of characterising the licence agreement as a lease or letting agreement triggering self-supply of goods within s. 3(1)(e) VATA or in the alternative a surrender of the interest in the property pursuant to s. 4(1)(a) VATA – resulting in non-payment of VAT which would otherwise be exigible in a sum of over €1.9M. The use by Vieira of this exemption was part of an artificial arrangement seeking to achieve a tax advantage as the High Court correctly concluded.

**190.** The licence, on its true construction, having due regard to the facts as found by the Circuit Court judge as set out in the consultative case stated and as determined by the High Court, operated as an arrangement which is contrary to the purpose of the exempting provisions in the Sixth Directive. Vieira took the tax advantage on an assumption that the scheme it had devised by means of the licence arrangement worked. Even if it had transpired that Vieira was correct in that assumption, the scheme would nevertheless be abusive.

**191.** In my view, because of the fundamental deficiencies in the licensing structure it was not a genuine contractual arrangement. It was inherently abusive and contrary to the Sixth Directive and additionally the terms of the transaction creating the structure were abusive as

they were not those that would exist in arm's length transactions as specified by the CJEU in *Weald Leasing (Case C-103/09)*.

**192.** As regards the *Halifax* test, I am satisfied that Costello J. was correct in her approach that the arrangement entered into with the estate agent, Mr. McPeake, was not consistent with normal commercial practice. The step involved in creating the licence had no commercial rationale other than the achievement of a tax advantage and had manifestly been included for the primary or principal purpose of re-characterising the transaction.

**193.** As stated above, the *Halifax* test requires that the essential aims of the transaction be determined by reference to "objective factors". The subjective intention of the participants in the transaction are to be disregarded. Relevant evidence before the High Court included:

- (a) Mr. McPeake had been sole selling agent for Phase 1 of the development.
- (b) He was also appointed sole selling agent for Phase 2 of the development of approximately 198 dwellings.
- (c) No licence agreement had been entered into in relation to Phase 1 of the housing development.
- (d) The mechanism of entering into written licence agreements in respect of all dwellings in Phase 2 came about based on advice from Vieira's tax advisors.
- (e) The participants in the arrangement were well acquainted with each other and had an established course of dealing in relation to the sales of the units in Phase 1 of the development and a pre-existing concluded agreement for sales of units in Phase 2 via the main sales agency agreement operated between them.
- (f) There was no rent or consideration amenable to ascertainment specified in the arrangement as is normal and characteristic in genuine commercial agreements.
- (g) The carrying out of his functions by the estate agent remained in all material respects identical both before and after entering into the licence agreement.



- (h) The duration of the licence arrangement was fleeting in nature and confined at most to a period of 14 days after the execution of a binding contract for sale by a prospective purchaser of the dwelling unit in question and prior to completion.
- (i) The agreement allowed in clause 14 for its automatic extinguishment without any prior notice to or consent of Mr. McPeake on completion of a sale by Vieira to a purchaser. Thus there was no certain minimum duration of operation.
- (j) No cogent explanation appears to have been forthcoming as to why or how the creation of such a licence over a new build dwelling house was only warranted, necessary or appropriate in circumstances where the dwelling in question was itself the subject of a contract for sale.
- (k) There was no finding of fact that Mr. McPeake, the estate agent, in selling units in Phase 2 of the development did not show prospective purchasers around dwelling houses where no licence existed, which were not the subject of a binding contract for sale with a prospective closing date, or that there was any impediment whatsoever in him doing so in preference to his rights under the main sales agency agreement.
- (l) There was no evidence of any material advantage or benefit being conferred on the estate agent in showing prospective purchasers around a dwelling house in respect of which a licence agreement existed as distinct from a like or similar dwelling house in the same development in respect of which no prospective purchaser had yet entered into or executed a binding contract for sale and hence no licence agreement had been signed by the estate agent and Vieira.
- (m) The letter of 3 March 2003 indicated that the agreement's duration was two weeks "after which a fee will be required from you to renew the licence to continue having access to said unit for show purposes". Yet, as stated above, no such fee was ever identified, "required", sought or charged.

**194.** In the instant case the effect of Vieira's scheme was to enable it to sell newly built dwelling houses to consumers without being subject to VAT.

**195.** I am satisfied that there was ample evidence before the High Court to satisfy it that the licence agreement was a device purporting to give rise to self-supply which, objectively, played no material part in the sale of the houses. The arrangement deviated from transactional normality in the context of Vieira's usual line of business as a vendor of newly built houses. As such it was contrary to the EU policy enshrined in the Sixth Directive and accordingly the first limb of the *Halifax* test was satisfied.

**196.** The "commercial purpose" between the parties was achieved entirely *via* the main sales agency agreement. The licence agreement was commercially otiose. Thus, the second limb of the *Halifax* test was likewise satisfied.

**197.** Accordingly, I am satisfied that the *Halifax* test was satisfied.

### **Section 811 argument**

**198.** It was contended on behalf of Vieira that the procedure pursuant to s. 811 TCA ought to have been activated had the Revenue Commissioners wished to set aside the transaction as not having effected a surrender/created a lease "but this must be a separate exercise". However, Vieira failed to identify any authority for the proposition that the Revenue Commissioners are precluded from taking the course of action that they have taken in this case by invoking the *Halifax* principle and the abuse of rights principle.

**199.** Vieira contends that the *Halifax* principle as interpreted in *Cussens v. Brosnan* (Case C-251/16) is "concerned with the operation of a much wider EU principle about abuse of rights in circumstances where there is an absence of a national measure, whether legislative or judicial, giving effect to the *Halifax* principle." Vieira bases this contention on the fact that it had not been argued in *Cussens* that under Irish law there is a national measure which reflects (and indeed predates) the *Halifax* principle; namely, s. 811 of the Taxes

Consolidation Act 1997, as amended, which provides for the circumstances under which the Revenue Commissioners are entitled to seek to set aside a tax advantage derived from a transaction which they consider to be a tax avoidance one. There was no relevant domestic measure engaged in *Cussens*.

**200.** In *Revenue Commissioners v. O’Flynn Construction Co. Ltd.* [2011] IESC 47, [2013] 3 I.R. 533 O’Donnell J. (as he then was) considered the anti-avoidance provisions contained in the Finance Act 1989 and in giving judgment for the majority of the Supreme Court, stated:-

“[65] ...the essential starting point to the application of s. 86 is a determination that absent its provisions the taxation charge would not apply, or in the case of an exemption, that its benefit would be available to the tax payer, on a literal construction of the language of the relevant statute.

[66] Looked at in this light, s. 86(2) and (3) appear to be directed towards making the difficult distinction between a commercial transaction which has been legitimately structured in such a way as to mitigate the tax view on the one hand, and a purely tax driven transaction designed to give rise to a tax advantage on the other...”

Section 86 of the Finance Act 1989 was the statutory precursor to s. 811 TCA.

**201.** The decisions of the High Court ([2011] IEHC 142) and Supreme Court in *Revenue Commissioners v. Hans Droog* [2016] IESC 55 discuss the limitations inherent in that general anti-avoidance measure including time limits which apply thereunder in respect of certain types of actions by the Revenue Commissioners. It is noteworthy that pursuant to s. 811 a general time limit of four years is applicable in respect of some (though not all) taxes.

**202.** It is useful to recall the characterisation by Clarke C.J. of the response of the CJEU in *Cussens v. Brosnan* to the first question referred to it. At para. 2.2 of his judgment, [2019] IESC 77, he noted that:-

“...the CJEU held...that the principle that abusive practices are prohibited is not a rule established by a directive, but is based on the settled case law of the CJEU, as set out in paras. 68 and 69 of the Court’s judgment in *Halifax*, which states that first, EU law cannot be relied on for abusive or fraudulent ends and second, the application of EU legislation cannot be extended to cover abusive practices by economic operators, that is to say transactions carried out not in the context of normal commercial operations, but solely for the purpose of wrongfully obtaining advantages provided for by EU law.

2.3 The principle that abusive practices are prohibited was held to have the general, comprehensive character which is naturally inherent in general principles of EU law. According to its case law, the CJEU found that the refusal of a right or an advantage on account of abusive or fraudulent acts is simply the consequence of the finding that, in the event of fraud or abuse of rights, the objective conditions required in order to obtain the advantage sought are not in fact met, and accordingly such a refusal does not require a specific legal basis.”

**203.** Significantly, he noted at para. 2.3 that the CJEU had relied on the judgment in *Staatssecretaris van Financiën v. Schoenimport “Italmoda” Mariano Previti vof (Joined Cases C-131/13, C-163/13 and C-164/13)* EU:C:2014:2455 where the CJEU had held that “the principle that abusive practices are prohibited may be relied on against a taxable person to refuse him the right to exemption from VAT, even in the absence of provisions of national law providing for such refusal.” In *Cussens* there was no domestic measure analogous to s. 811 on which the Revenue Commissioners could have relied. In *Cussens* it was argued that

the rule against abusive practices could not apply where there the was an absence of implementing national legislation. Vieira argues the opposite. Neither contention is valid

***Conclusions on s. 811***

**204.** Vieira's interpretation of the CJEU's judgment in *Cussens v. Brosnan* does not withstand scrutiny. The focus of the judgment of the CJEU in *Cussens v. Brosnan* derived from the two questions referred by the Supreme Court to it, namely:-

“(1) Is the principle of abuse of rights, as recognised in the judgment of the court in *Halifax* as being applicable in the sphere of VAT, directly effective against an individual in the absence of a national measure, whether legislative or judicial, giving effect to that principle in circumstances where, as here, the redefining of...the appellants' transactions...would give rise to a liability on the part of the appellants to VAT where such liability, on the proper application of the provisions of national legislation in force at the relevant time to the appellants' transactions did not arise?

(2) If the answer to question (1) is that the principle of abuse of rights is directly effective against an individual, even in the absence of a national measure whether legislative or judicial giving effect to that principle was the principle sufficiently clear and precise to be applied to the appellants' transactions, which were completed before the judgment of the Court in *Halifax* was delivered and in particular having regard to the principles of legal certainty and the protection of the appellants' legitimate expectations?”

**205.** Here Vieira contends that by reason of the fact that the domestic measure in s. 811 TCA is available to the Revenue Commissioners, they are precluded from relying on the *Halifax* doctrine and the abuse of rights principle and are confined to invoking s. 811. Neither the language in the *Halifax* decision itself nor any prior or subsequent decision of the CJEU was identified in support of this proposition. It is logical that the principle that abusive

practices are prohibited may be relied upon by the Revenue authorities against a taxable person to refuse him the right to claim an exemption from VAT whether or not there is a provision in national law providing for such refusal. The absence of such a domestic provision was a key consideration in the CJEU's decisions in *Cussens v. Brosnan* and *Schoenimport* and was found not to give rise to any impediment. The presence of such a domestic measure cannot circumscribe the options available to the Revenue Commissioners who are charged with implementation of the VAT regime at the domestic level. Rather it enlarges the potential options available to it. It was open to Revenue to elect as between relevant measures available to it in the discharge of the State's obligations pursuant to the Sixth Directive.

**206.** The resilience of Revenue's position is further fortified by the judgment of Clarke C.J. in the Supreme Court in *Cussens v. Brosnan* where at para. 2.5 he observed that the CJEU, in answering the Supreme Court's reference:-

“...noted that in its judgment in *Halifax*, the CJEU expressly did not restrict the effects of the interpretation which it gave to the principle that abusive practices are prohibited in the sphere of VAT only to those events which occur in the future.”

**207.** It is further noteworthy in regard to s. 811 that it applies under the scheme of the TCA to tax generally and does not purport to be the transposition or national iteration of any principle of EU law. The operation and application of the abuse of rights principle in all the circumstances of this case accords with the general principle of proportionality and I am satisfied that its operation would not exceed the limits of what is appropriate and necessary in order to attain the objectives legitimately pursued by the legislation in question.

**208.** Further, the decision of *Weald Leasing Ltd. (Case C-103/09)* wholly undermines the contentions being advanced by Vieira in respect of s. 811 where the court rejected a similar objection being advanced by Weald Leasing, stating:-

“Weald Leasing’s argument that the principle of prohibiting abusive practices does not apply to breach of Paragraph 1 in Schedule 6 of the VAT Act 1994 because that provision is purely a question of national law cannot be accepted, because that provision was adopted on the basis of Article 27 of the Sixth Directive and forms part of the national legislation implementing that directive.” (para. 42)

**209.** In the instant case the Revenue Commissioners did not invoke s. 811. There was no persuasive legal basis or authority identified by Vieira to support their contention that they were compelled to do so. As Ms. Clohessy S.C. convincingly argued, from Revenue’s perspective, the scheme encompassed in the arrangements put in place by Vieira did not work from a technical perspective and in its assessment did not give rise to a self-supply; constituting neither a surrender nor the grant of a lease in any instance. The Revenue Commissioners were entitled to conclude that it was not logically open to them to raise a s. 811 notice. The national authority was entitled to elect for the most viable, relevant and appropriate remedy when seeking to enforce national obligations under the Sixth Directive. That conclusion was arrived at by the Revenue Commissioners on a reasonable basis on foot of an assessment of the facts and was supported by the findings of the High Court.

**210.** It is clear that in *Cussens v. Brosnan* the CJEU drew a distinction between a directive which does not have horizontal direct effect and the effect of settled case law, holding that the principle that abusive practices are prohibited, as applied to the domain of VAT by the case law stemming from the judgment in *Halifax*, “displays the general, comprehensive character which is naturally inherent in general principles of EU law.” (para. 31)

**211.** As such, the principle can be relied on against a taxable person to refuse a right to exemption from VAT irrespective of whether a provision of national law exists or does not exist providing for such refusal.

**212.** I am satisfied that the principles enunciated by the CJEU in *Halifax* can be applied as part of the domestic law notwithstanding s. 811. Its availability and operation is not necessarily dependent on either the presence or absence of any potentially relevant national measure.

**213.** As was observed by the court in *Italmoda (Joined Cases C 131/13, C-163/13 and C-164/13)* at para. 57 there is a separate principle of EU law that the rules of EU law themselves cannot be relied on for abusive ends:-

“...in so far as abusive or fraudulent acts cannot form the basis of a right under EU law, the refusal of a benefit under, in this case, the Sixth Directive does not amount to imposing an obligation on the individual concerned under that directive, but is merely the consequence of the finding that the objective conditions required for obtaining the advantage sought, under the Directive as regards that right, have, in fact, not been satisfied.”

**214.** In theory an argument might have been made that the provisions of s. 811 were engaged if on the face of it all of the formalities of the VAT provisions appeared to have been fully complied with by Vieira such that it appeared to Revenue that its claim to the benefit under the VAT regime arising from the licenses was a good claim. It was at all material times the position of the Revenue Commissioners that such was not the case and that the assertion fell at first base by virtue of the absence of key formalities of the VAT provisions being complied with. Hence, the arguments directed towards s. 811 are misconceived. The assessment of Revenue was correctly upheld by the High Court.

**215.** I am satisfied further that the approach adopted does not offend the subsidiarity principle.



## **Conclusion**

**216.** There was ample evidence before the trial judge which she analysed with a high degree of granularity which led her to informed and fact-based evaluative findings that the license agreements constituted neither a lease/letting nor a surrender of possession. This was a valid conclusion that flowed from her evaluation of the relevant jurisprudence and its application to the salient facts as identified by her. Her approach was clearly informed by the CJEU authorities which also reinforce the importance of having regard to the economic and commercial realities as a fundamental criterion for the application of the common system of VAT.

**217.** Even if the license agreements had the effect intended by Vieira and could be construed as leases or in the alternative surrenders, same would have been liable to redefinition under the *Halifax* doctrine, as the trial judge correctly concluded. The trial judge applied the *Halifax* principles to the facts, correctly concluding on the evidence in light of the relevant authorities that the transactions were “purely artificial” in nature. There was, as outlined in detail above, ample evidence before the trial judge on foot of which this inference could correctly be drawn, including the agreements in question, and the congruent anterior subsisting arrangement between the parties for the marketing and sale of properties in the development and the conduct of the parties. The licence agreement, though relevant and important, was but one aspect of the hinterland of material facts engaged with by the judge.

**218.** In all the circumstances, her conclusion that the “principal aim of the licence agreements was to obtain a tax advantage” was a valid conclusion that flowed from her evaluation of the relevant jurisprudence and its application to the salient facts identified by her. There was no additional business objective identified by Vieira underpinning the licence agreements that warranted their re-categorisation as anything other than an arrangement

which conferred an improper advantage on Vieira which was “manifestly contrary” to the objective of EU law.

**219.** It necessarily follows that the assessment to VAT on the sales of the dwelling houses to third party purchasers/consumers was correctly raised – either on the basis that the license agreements constituted neither a letting of immovable property nor a surrender of possession within the meaning of VATA, or, if they did so constitute leases or surrenders, following the application of the *Halifax* doctrine so as to set aside the intended effect of the license agreements for abuse of rights.

### **Reference**

**220.** Vieira requested this court to make a reference to the CJEU if it finds it is appropriate to deal with the *Halifax* principle.

**221.** Revenue argued that the High Court judge was correct to refuse Vieira’s request for a reference to the CJEU on the issue of whether s. 811 TCA is exhaustive of the anti-avoidance measures the Revenue Commissioners could rely on. The respondent maintained that an answer to the question posed by Vieira was not necessary in order for the High Court or this court to determine the instant case.

**222.** The trial judge was correct that she had a discretion whether to make a reference pursuant to Article 267 of the TFEU in all the circumstances. She determined that “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.”

**223.** I am satisfied it was a reasonable and valid determination by the Revenue Commissioners on the facts and on their evaluation of the impugned arrangement that it was on balance not a matter that was optimally or appropriately to be dealt with by the invocation of s. 811. In all the circumstances, the trial judge’s finding that it was not necessary to make the preliminary reference sought to enable her to decide the specific matters at issue which

were confined to the questions raised by the Circuit Court judge in the consultative case stated was reasonable and warranted in all the circumstances. No basis has been made out for directing a preliminary reference by this court in all the circumstances. It is not necessary.

**224.** For the reasons given above, I would dismiss this appeal on all grounds.

**Costs**

**225.** In the circumstances, my provisional view is that the respondent is entitled to its costs of this appeal. If the appellant wishes to contend for an alternative order as to costs, a written submission should be lodged with the Office of the Court of Appeal within 21 days of the date of this judgment identifying the bases for such a contention and the respondent shall likewise file any submission in response within a further like period of time. Thereafter, the court shall consider same.

**226.** Murray and Pilkington JJ. are in agreement with this judgment and the orders proposed.