

THE HIGH COURT

[2023] IEHC 764

[Record No. 2023/2 R]

**IN THE MATTER OF A CASE STATED PURSUANT TO SECTION 949AQ TAXES
CONSOLIDATION ACT 1997**

BETWEEN

SEAN FLAHERTY

APPELLANT

AND

THE REVENUE COMMISSIONERS

RESPONDENT

JUDGMENT of Mr. Justice Nolan delivered the 23rd day of November 2023

Introduction

- 1.** This is an appeal by way of case stated pursuant to s. 949AQ of the Taxes Consolidation Act 1997, as amended, from a determination of the Tax Appeal Commission dated 28 September 2022.
- 2.** The matter relates to an appeal against an assessment to Capital Gains Tax (“GGT”) raised by the Revenue Commissioners on 27 April 2018 for the tax year of 2015. The total CGT due on the assessment amounts to €130,000.
- 3.** The issue, succinctly expressed in the case stated, relates to a disposal of a fishing vessel and its related capacity-tonnage dated, by way of a memorandum of agreement (“agreement”), 21 October 2015. If the memorandum was held to be conditional, the

provisions of s. 542(1)(b) TCA 1997 would deem the date of disposal to be the date on which those conditions were satisfied. If the disposal took place when the conditions were met, then it fell into the tax year of 2016, at which point the appellant could claim the benefits of what is known as entrepreneurial relief pursuant to s. 597AA of the Taxes Consolidation Act 1997 (as inserted by the Finance Act 2015), in which case a 20% rate of CGT would apply in respect of a chargeable gain or chargeable gains on a disposal up to a lifetime limit of €1 million. This relief came in on 1 January 2016. Any sum above €1 million would be subject to the full CGT rate of 33%.

4. It is the case of the appellant that the memorandum contained several conditions and that the last of these conditions was not fulfilled until 11 January 2016 and therefore, that is the correct date of disposal which was in the tax year of 2016.

5. It is the case of the respondent that disposal took place when the agreement was signed on 21 October 2015, in which case the appellant can not get the benefit of the entrepreneurial relief.

Background

6. The appellant carried on the trade of a fisherman. He entered into the agreement for the sale of his fishing vessel and its related capacity-tonnage, a term which refers to the type and amount of fish that a fishing vessel is lawfully allowed to catch, on 21 October 2015.

7. The purchase price was said to be €5 million. It was to be paid in three tranches, namely €65,000 on or before 17 December 2015, €4,930,000 to be paid on or before 19 January 2016 and the last sum of €5,000 to be paid on 10 February 2016. The first payment was to be held on deposit by Maya O'Donnell Solicitors pending completion of the agreement. In fact, the monies were paid somewhat differently but nothing material arises from that.

8. Clause 3 of the agreement entitled "*completion*", says as follows: -

“Completion of this agreement shall take place following:-

- a. receipt by the vendor of the balance purchase monies;*
- b. receipt by the purchaser’s solicitor of the documentation set out in the second schedule hereto;*

and completion shall take place on the day of 2015, subject to the provisions in clause 1.2 hereof.

On completion the vendor shall deliver the vessel to the purchaser at Killybegs.”

9. However, there was no clause 1.2., nor was the date filled in.
10. The second schedule contained a list of documents that were to be furnished. It reads as follows:-
 - (1) Up to date transcript of the register;
 - (2) Certificate of registry;
 - (3) Bill of sale;
 - (4) Discharged marine mortgage;
 - (5) Up to date copies of vendors licences for MSO;
 - (6) Explanation of all acts appearing on searches against the vendor and against the vessel;
 - (7) All other documents in the vendor’s control and possession relating to the vessel;
 - (8) Satisfactory survey;
 - (9) Confirmation of fishing entitlements.
11. It is the case of the appellant that the last requirement, namely *“confirmation of fishing entitlements”* was something which was outside the control of the appellant and

depended upon the licensing authority pursuant to s. 21 of the Merchant's Shipping (Registration of Ships) Act 2014.

12. On that basis, the appellant argues that the contract is conditional. Therefore, the tax liability only arose once the conditions were met, which was 11 January 2016.

The Bill of Sale

13. The Bill of Sale was signed on 21 December 2015 and acknowledged payment in the sum of €5 million paid by the purchaser, in relation to 64 shares in the ship, her boats and appurtenances. The appellant, as the transferor, had acknowledged the transfer had taken place. The appellant also covenanted that the ship was free from encumbrances and that he had the power to transfer. The document was signed under seal.

The Commissioners' Determination

14. On 28 September 2022, the Tax Appeal Commission gave his determination. He went through the submissions made by the appellant and those made by the respondent. He noted the agreement, the bill of sale and various letters from the Department and further correspondence, including a letter from the Department noting that a non-operative licence in respect of the vessel, had been issued to the purchaser. The purchaser was now eligible for an operative licence provided an application was made within a period of three months. A certificate of registry of an Irish fishing boat, issued by the licensing authority for sea-fishing boats in respect of the vessel, and an extract from the transcript of register, issued by the respondent to the purchaser regarding the sale from the appellant to the purchaser, was also furnished together with a copy of a sea fishing boat licence in respect of the vessel, all dated 11 of January 2016.

Material facts found

15. The Commissioner found the following material facts:-

- (1) The appellant entered into a memorandum of agreement for the sale of his vessel and related capacity-tonnage on 21 October 2015;
- (2) The appellant submitted his CGT computation to the respondent which recorded the date of disposal as occurring in the 2016 tax year;
- (3) A dispute had arisen between the appellant and the respondent as to whether the sale occurred in the 2015 or 2016 tax year;
- (4) The vessel and the related capacity-tonnage was required to be disposed of together for the sale to be effective;
- (5) A number of steps were required to be undertaken to ensure that the vessel, licence and fishing rights were transferred to the purchase;
- (6) If those steps were not fulfilled, it was likely that the memorandum entered into between the parties would have become frustrated.

16. Thereafter, the Commissioner summarised the submissions made. He noted that the memorandum which was annexed to his determination was poorly drafted and contained a number of errors, which I have highlighted above.

17. In coming to the kernel of the issue between the parties, he examined the terms of the memorandum and, having regard to the documentation required under schedule 2 of that document, he came to the view that those requirements were procedural rather than conditional in nature and therefore, he did not find that the wording of the memorandum gave rise to any express conditions.

18. He felt that if those documents which were required prior to completion had not been furnished, no disposal for CGT purposes would have taken place since there would have been no date of disposal.

19. He rejected the argument put forward by the appellant, that the sale of the vessel was likened to the sale of property sold “*subject to planning permission*”. In this case, the

agreement did not contain any words such as “*subject to*” or any other similar contingent conditions. He then went through certain case law and the business efficacy test which had been urged upon him in order to interpret whether or not the contract was conditional.

Finally, he came to his determination which I will set out below:-

“51. In the circumstances, and based on a review of the facts and a consideration of the submissions, material and evidence provided by both parties, the Commissioner is satisfied that the respondent was correct in treating the disposal as occurring in the 2015 tax year. Accordingly, the assessments are upheld and the appeal is denied. It is understandable that the appellant might be disappointed with the outcome of this appeal. The appellant was correct to check to see whether his legal rights were correctly applied.”

The Appeal on a Point of Law

20. Following submissions from both parties, the Commissioner furnished this case stated to the High Court to 16 December 2022.

21. He set out the material facts which he found and the outline of arguments made by the parties pursuant to s. 949AQ[ii] TCA 1997.

22. The points which the opinion of this Court are sought are as follows:-

- (1) Did the Commissioner err in his interpretation that the memorandum of agreement did not contain any express or implied conditions regarding the sale?
- (2) Did the Commissioner err at para. 38(5) of his determination in stating that one of the steps required to be taken under the memorandum of agreement was to “*ensure licence and fishing rights were transferred to the purchaser*” rather than “*be surrendered by the vendor and the purchaser given equivalent*

fishing rights”? If so, does this have any impact on the memorandum being conditional in nature?

- (3) Did the Commissioner err in his determination in holding that matters affecting the sale requiring third-party consent did not amount to express or implied conditional terms of the memorandum?
- (4) Did the Commissioner err in determining that, if the procedural steps were not fulfilled, this would have caused the memorandum to become frustrated?
- (5) Did the Commissioner err in determining that the doctrine of business efficacy was not applicable in the instant case?
- (6) Did the Commissioner err in his interpretation that the memorandum entered into between the appellant and the purchaser on 21 October 2015 was not a conditional contract?

The Legal Principles

23. As the submission of the appellant sets out, the role of the court in a case stated has been succinctly set out by Allen J. in *Hughes v. Revenue Commissioners* [2019] IEHC 804.

24. In that case, he set out five principles of law which have been endorsed in the leading cases including *Mara (Inspector of Taxes) v. Hummingbird* [1982] ILRM 421, *O’Culacháin v. McMullan Brothers Ltd* [1995] 2 IR 217 and *Mac Cárthaigh (Inspector of Taxes) v. Cablelink Ltd* [2003] 4 IR 510.

25. In *McMullan Brothers Ltd*, Blaney J. (O’Flaherty and Denham JJ. concurring) distilled from *Hummingbird* and the English authorities five principles of law which were endorsed in *Cablelink Ltd*. These were:-

- “(1) *Findings of primary fact by the judge should not be disturbed unless there is no evidence to support them.*
- (2) *Inferences from primary facts are mixed questions of fact and law.*

- (3) *If the judge's conclusions show that he has adopted a wrong view of the law, they should be set aside.*
- (4) *If his conclusions are not based on a mistaken view of the law, they should not be set aside unless the inferences which he drew were ones which no reasonable judge could draw.*
- (5) *Some evidence will point to one conclusion, other evidence to the opposite: these are essentially matters of degree and the judge's conclusions should not be disturbed (even if the Court does not agree with them, for we are not retrying the case) unless they are such that a reasonable judge could not have arrived at them or they are based on a mistaken view of the law.”*

26. In this case, one can read the Commissioner for circuit judge.

27. In *Revenue Commissioners v. O’Flynn Construction Ltd* [2013] 3 IR 533, O’Donnell J., for the majority of the Supreme Court, undertook a detailed review of the development – or reappraisal – of the law in Ireland, Northern Ireland and England since the Duke of Westminster’s case in 1935. At para. 72, O’Donnell J. said:-

“[72] The suggestion that the principles in McGrath v. McDermott [1988] I.R. 258 preclude a “purposive approach” is also perplexing. In the first place the express words of s. 82 [of the Finance Act, 1989] require the Commissioners to have regard to the “purposes for which it [the relief] was provided”. Furthermore, the decision in McGrath v. McDermott itself expressly contemplates an approach to the interpretation of legislation that has always been understood as purposive. In that decision Finlay C.J. restated at p. 276 the orthodox approach to statutory interpretation at the time when he had adverted to the obligation of the courts in cases of doubt or ambiguity to resort to a “construction of the purpose and intention of the legislature”.

Indeed, if McGrath v. McDermott stands for any principle of statutory interpretation it implicitly rejects the contention that any different and more narrow principle of statutory interpretation applies to taxation matters.”

28. Further, he went on to deal with the provisions of the Interpretation Act 2005 which embodies a purposive approach to the interpretation of statutes (other than criminal legislation) made no concession to a more narrow or literalist interpretation of taxation statutes.

The Relevant Statutory Provisions

29. In this case, the relevant statutory provision is s. 542 TCA 1997 which provides:-

“Time of disposal and acquisition.

(1) (a) *Subject to paragraph (b) and subsection (2), for the purposes of the Capital Gains Tax Acts, where an asset is disposed of and acquired under a contract, the time at which the disposal and acquisition is made shall be the time at which the contract is made (and not, if different, the time at which the asset is conveyed or transferred).*

(b) *Where the contract is conditional (and in particular where it is conditional on the exercise of an option), the time at which the disposal and acquisition is made shall be the time at which the condition is satisfied.*

...

(2) [Relates to the receipt of capital sums from compensation payments etc. and as such is not applicable in this case]”

Findings of Fact

30. It is common case that the Commissioner made primary findings of fact on six issues. These are set out above. It seems to me that these are not controversial in that it is common case that the appellant entered into a memorandum of agreement for the sale of his vessel and related capacity-tonnage on 21 October 2015.

31. Further, it is common case that the appellant submitted his CGT computation to the respondent which recorded the date of the disposal as occurring in the 2016 tax year.

32. Thereafter, it is common case that a dispute has arisen between the appellant and respondent as to whether in fact the sale occurred in the tax year of 2015 or the tax year of 2016.

33. It is common case that the vessel and the related capacity-tonnage were required to be disposed of together for the sale to be effective.

34. Again, it is common case that a number of steps were required to be undertaken to ensure that the vessel, licence and fishing rights were transferred to the purchaser.

35. Finally, whilst it is not entirely common case that if those steps are not fulfilled, it is likely that the agreement would not have concluded.

36. The word "*frustrated*" exercises the appellant. However, whether one uses the word frustrated or not, or concluded some other term to indicate that the contract is lost, the thrust of what the Commissioner has said is clear. If the purchaser did not get a licence and the fishing rights, there would be little point in the sale completing, because the purchaser would not be buying what the vendor had to sell.

The Appellant's Submissions

37. Bearing in mind the questions asked, it seems to me that the kernel of this case relates to whether or not the sale can be said to have been "*conditional*", i.e. conditional upon the obtaining of the documents set out in the schedule. If it can be said that the contract was conditional, then the provisions of s. 542 TCA 1997 (1)(b) would arise, in that the date at

which the disposal and acquisition was made would be deemed to be when the conditions were satisfied. It is the case made by the appellant that date was 11 January 2016, when all the paperwork was concluded, at which point the contract was no longer a conditional contract but was now an enforceable contract. Further, it is the case of the appellant that some of the paperwork such as the confirmation of fishing rights were in the hands of external parties, namely the Fishing Licensing Authority.

38. To that end, the appellant states that the Commissioner erred in law in stating:-

“that completion of the agreement could not have occurred until all of the relevant documentation was furnished by the appellant to the purchaser and the statutory regulations were complied with including approval from the Sea Fishing Authority. Had the agreement not completed for one reason or another, there would have been no disposal for CGT purposes and the date of a disposal would not be an issue.”

39. It is hard to see where the Commissioner erred in law in stating, what seems to be common case, namely a requirement that all the relevant documentation was needed to be furnished by the appellant to the purchaser including the approval from the Sea Fishing Authority before the completion occurred.

40. The appellant says that the word “*conditional*” does not need to be in the contract. To that extent, the appellant relies upon the decision of *O’Connor v. Coady* [2004] IESC 54 and the case of *Hand v. Greaney* [2004] IEHC 391. Both these cases relate to the sale of land. It is the case of the appellant that the contract was not enforceable until the clause, and, in this case, obligation to provide the paperwork, had been complied with, namely 11 January 2016, when the Fishing Authority issued their certificate of capacity.

41. The appellant refers to *Mullane v. Riordan*, [1978] ILRM 73, a case where the contract for the sale of land was made subject to planning permission being obtained and that if the permission was obtained the purchaser might pay a higher price at his own discretion.

Mac William J found that although a contract subject to a condition is unenforceable until the condition is fulfilled, it is, nevertheless, a contract from the beginning.

42. The appellant also says that the Commissioner erred in law in failing to apply the business efficacy test. He submits that it can be clearly inferred from the language of the contract between the parties that the sale of the vessel and the surrender and transfer of the associated fishing rights were part and parcel of the same transaction. He relies on the views of Cregan J. in *Moloney v. Danske Bank* [2014] IEHC 441, where he said that the concept of a condition precedent means that the parties have agreed on the condition precedent. If they have agreed on a condition precedent, then they have reached an agreement.

43. He urges me to answer the questions in the case stated in the affirmative.

The Respondent's Submissions

44. The respondent states that the principal point at issue is what is the appropriate date of disposal for CGT purposes and whether the agreement in question was a conditional contract, such that the provisions of s. 542(1)(b) TCA 1997 apply. I have to say that it seems to me that that is correct. Ms. Healy Reay states that the starting point for determining the date of disposal is the date of the contract and not the date the asset is transferred. Subsection (1)(b) provides an exception where the contract is said to be conditional. That depends upon the true construction of the contract in question.

45. The respondent submits that the appellant entered a binding enforceable contract to sell the fishing vessel on 21 October 2015. It was not an unconditional contract. Under those circumstances, the appellant cannot avail of the entrepreneurial relief under s. 597AA. Further, under the legislation, the date of completion is irrelevant as that date is defined under the statute as being the date of the disposal.

46. In the case of *Parway Estates Ltd v. Commissioners of Inland Revenue* 45 TC 135, a contract for the sale of shares was held to be unconditional even though the transferor was

required to perform various obligations prior to the sale. Further, she submits that a conditional contract is one which is subject to a condition precedent, and not of a condition subsequent. It is the latter that the contract comes into existence but will fall away if the condition subsequent is not fulfilled.

47. Quoting from the Revenue's manual, Part 19-01-15, it says:-

“In the case of a conditional contract the contract is not effective until the condition is satisfied. For Capital Gains Tax purposes, the time of disposal in these circumstances is the date on which the condition is satisfied. For example, in the case of a chargeable asset which is the subject of an option, the date of disposal is the date on which the option is exercised. The option itself is of course disposed of on the date on which it was granted. Similarly, contracts where the disposal and acquisition is subject to obtaining planning permission or loan approval are conditional contracts. The time of disposal is the date the condition is satisfied, e.g. when loan approval is obtained rather than the date the contract is signed and not when the contract is closed.”

48. In this case, the fact that a contract to dispose of an asset is expressed to be subject to performance by the transferee of obligations imposed on him by the contract does not make the contract a conditional contract.

49. A case which the respondent says is similar to this case is *Lyon (Inspector of Taxes) v. Pettigrew* [1985] STC 369. This was a case in which the respondent contracted to sell taxis and associated licences, with the property in the licences passing only on the final instalment payment of the consideration. By law, the taxi and the licence relating to it could not be disposed of independently of each other, so the licences were disposed of at the same time as the vehicles. The whole of the liability under the contract was not made conditional on the payment of the final instalment and, consequently, the contract was not a conditional one.

50. Walton J., following the case of *Eastham v. Leigh* (1971) 46 TC 687, said at p. 381:-
“The words ‘contract is conditional’ have traditionally been used to cover really only two types of case. One is a ‘subject to contract’ contract, where there is clearly no contract at all... and the other is where all the liabilities under the contract are conditional upon a certain event.”
51. Ms. Healy Reay urges me to note the difference between a “conditional contract” and something that is required to be done to allow the conveyance or transfer of the asset the subject of the agreement. In this case, there were no conditions making the contract subject to any specific event. Further, she says that the Commissioner was correct in his conclusions in relation to the business efficacy test.
52. In *Murphy v. O’Toole & Sons Ltd & anor* [2014] IEHC 486, Baker J. said as follows:-
“For a contract to be a conditional contract, it seems to me that such a condition must be express between the parties, and the Court will not imply a financing term, as such a term was not necessary to give business efficacy to this contract which was perfectly capable of being made without such a condition, albeit that performance of the obligation of one party required financing.”
53. This case is said to be authority for the proposition that a contract will not be rendered a conditional contract by reason of an implied term and if a contract is to be classified as conditional one it should contain an express term in relation to the condition which needs to be satisfied.
54. She urges me to answer the question raised in the case stated in the negative.

Decision

55. The Commissioner noted that the contract is not well drafted. I agree with him. It is particularly difficult to understand why the agreement, at clause 3 headed “Completion”, stated that it was subject to the provisions in clause 1.2, when there was no clause 1.2.

Further, the completion date is not inserted, but it was contemplated by the parties that it would take place in 2015, since that is the only date which appears in it.

56. The Commissioner noted the Bill of Sale showed the transfer of the vessel to the purchaser. This was an issue which I raised with counsel during the hearing of the action. The Bill of Sale is a document under seal. It was signed by the appellant. It acknowledged that €5 million had been paid to him by the purchaser and acknowledged receipt of that sum as well as the transfer of 64 shares in the ship and her boats and appurtenances, all dated 21 December 2015. In relation to the argument that the sale of the vessel could be likened to the sale of property “*subject to planning permission*”, I do not accept that one can look at the agreement that way. There are no conditional words used in this agreement. Nowhere does the agreement say that the sale is subject to the obtaining of any of the documents set out in the schedule. It seems to me that the associated documentation and in particular the Bill of Sale, a document under seal, point to the transaction having been concluded. The issue as to when the contract became enforceable may well be a matter for the parties to the contract, but it is not an issue which the Commissioner should take into consideration in interpreting the tax code. In this case the words of the tax provision are clear. The matter of business efficacy is entirely different to the issues which the Commissioner was dealing with.

57. It seems to me that when one looks at the taxation provision, namely Sec 542 TCA 1997, a clear distinction can be seen between a conditional requirement and an act that is required to be done before an asset is conveyed or transferred.

58. What the contract says is that the balance of the purchase price will be paid in exchange for the completion documentation set out in the second schedule. It does not say that the contract is conditional on receiving the completion documentation. If they were never received there would be no contract and therefore there would be no disposal and therefore no CGT liability.

59. It is hard to see where the Commissioner erred in law as the applicant urges, where he stated “*that completion of the agreement could not have occurred until all of the relevant documentation was furnished by the appellant to the purchaser and the statutory regulations were complied with including approval from the Sea Fishing Authority. Had the agreement not completed for one reason or another, there would have been no disposal for CGT purposes and the date of a disposal would not be an issue.*”. As I noted above this seems to me to be common case, namely a requirement that all the relevant documentation was needed to be furnished by the appellant to the purchaser including the approval from the Sea Fishing Authority before the completion occurred. What seems to be an issue is whether the requirement to furnish the documentation was procedural or conditional. I find that the requirement was procedural and related to the conveyance or transfer of the vessel. Therefore, I do not agree that the Commissioner erred in law in his findings in this regard.

60. I am guided by the words of Baker J in *Murphy v. O’Toole & Sons Ltd & anor*, where she said that for a contract to be a conditional contract, such a condition must be expressed between the parties. Court will not imply a financing term or any other term to give business efficacy to a contract which was perfectly capable of being made without such a condition. It seems to me that this case is similar to *Lyon (Inspector of Taxes) v. Pettigrew*. I find it far more persuasive than the case law referred to by the applicant, which seem to me to deal with the sale of land, the enforceability of contracts between a purchaser and vendor and issues of business efficacy which do not arise here.

61. The exemption in Sec 542 (1)(b) makes specific reference to where a contract is conditional. I note that it specifically refers to a contract which is conditional on the exercise of an option. Further the revenue manual is informative on this issue where it states that the option to buy itself is disposed of on the date it is granted. None of that appears in this case.

62. The findings of preliminary fact found by the Commissioner should not be disturbed since there is evidence to support them. I agree with the inferences he found from primary facts which are mixed questions of fact and law. I do not believe he adopted a wrong view of the law and therefore I do not think they should be set aside. I do not believe his conclusions were based upon a mistaken view of the law nor do I believe that the inferences he drew were ones which no reasonable judge could draw. I do not believe that the commissioner's conclusions should be disturbed since I do not believe that a reasonable judge could not have arrived at them or that they are based upon a mistaken view of the law.

63. I therefore will answer the questions raised by the Commissioner as follows:-

1. Did the Commissioner err in his interpretation that the memorandum of agreement did not contain any express or implied conditions regarding the sale? Answer no.

2. Did the Commissioner err in paragraph 38.5 of his determination in stating that one of the steps required to be taken under the memorandum of agreement was to: "ensure licence and fishing rights were transferred to the purchaser" rather than "be surrendered by the vendor and the purchaser given an equivalent fishing rights". Answer yes. The actual procedure was the latter not the former. If so, does this have any impact on the memorandum being conditional in nature? Answer no.

3. Did the Commissioner err in his determination in holding that matters affecting the sale requiring third-party consent did not amount to express or implied conditional terms in the memorandum? Answer no.

4. Did the Commissioner err in determining that if the procedural steps were not fulfilled this would have caused the memorandum to become frustrated? Answer no.

5. Did the Commissioner err in determining that the doctrine of business efficacy was not applicable in the incident circumstances? Answer no.

6. Did Commissioner err in his interpretation that the memorandum entered into between the appellant and the purchaser on the 21 October 2015 was not a conditional contract? Answer no.