Hilary Term
[2021] UKSC 11
On appeal from: [2019] CSIH 7

JUDGMENT

Balhousie Holdings Ltd (Appellant) *v* Commissioners for Her Majesty's Revenue and Customs (Respondent) (Scotland)

before

Lord Hodge, Deputy President
Lord Briggs
Lady Arden
Lord Sales
Lord Carloway

JUDGMENT GIVEN ON

31 March 2021

Heard on 26 and 27 January 2021

Appellant	*Respondent*
Philip Simpson QC Roger Thomas QC (Instructed by Brodies LLP (Edinburgh))	Kieron Beal QC Ross Anderson (Instructed by Office of the Advocate General (Scotland))

LORD BRIGGS: (with whom Lord Hodge, Lord Sales and Lord Carloway agree)

1. This litigation raises what is, when all is said and done, a very short point of construction about the non-technical wording of an apparently simple provision in a taxing statute. Group 5 of Schedule 8 to the Value Added Tax Act 1994 ("VATA") provides for the zero-rating of four classes of supplies made in connection with the construction or conversion of buildings intended to be used for relevant residential or charitable purposes. One of those relevant residential purposes is use as a care home. The first of those zero-rated classes of supply is the "first grant" of a major interest in the building or its site by a person constructing or converting it for use for a relevant purpose. In Scotland, a "major interest" in land means the interest of its owner or the lessee's interest under a lease of not less than 20 years. Other classes include the supply of specified construction services and building materials to a person intending to use the building thereby constructed (or converted) for the relevant purposes.

2. Part 2 of Schedule 10 to VATA provides for what may loosely be described as a form of claw-back of the benefit of zero-rating from the recipient of the zero-rated supply or supplies (called "P" in the legislation) if either of two stated events occurs within ten years from the completion of the building ("the relevant period"). The first is, under paragraph 36(2), if P has, since the beginning of the relevant period, disposed of P's entire interest in the building. The second is, under paragraph 36(3), if there is a change of use of the building from a qualifying to a non-qualifying use. The happening of either of those events triggers what is called a "self-supply" charge to VAT, payable by P.

3. In the present case P is a company within the appellant's VAT group, Balhousie Care Ltd ("BCL"). It acquired a recently constructed care home in Scotland under a zero-rated first grant from the developer, and then financed that acquisition by a sale and leaseback of the building with a finance house. The question which has divided the parties and the courts below is whether the sale and leaseback constituted a disposal by BCL of its entire interest in the care home, so as to trigger a self-supply charge under paragraph 36(2).

4. Perhaps because of the large amount at stake (in excess of £800,000) this short question has become over-complicated by a large number of interesting but ultimately inconclusive arguments, such as whether there was a *scintilla temporis* between the sale and the leaseback, whether they were to be regarded for this VAT purpose as a single composite transaction or as two transactions, whether the VAT

principle of fiscal neutrality applied, and whether the jurisprudence of the CJEU applied to the task of construction. There was also a perfectly proper search for the purpose behind paragraph 36(2) in a context unusually (but perhaps mercifully) free of admissible *travaux préparatoires*.

5. The language of paragraph 36(2) is simplicity itself. A self-supply charge is triggered:

> "… if P has, since the beginning of the relevant period, disposed of P's entire interest in the relevant premises (or part)."

As already explained, P is a person to whom one or more relevant zero-rated supplies relating to a building (or part of a building) have been made: see paragraph 35(1). The relevant period is ten years beginning with the date of completion of the relevant premises. "Relevant premises" means the building (or part of a building) in relation to which a relevant zero-rated supply has been made to P: see paragraph 35(2). "Entire interest" is not defined, but it is clear from paragraph 37(1) that an interest includes a right or licence in the relevant premises. As is common ground, "interest" plainly includes a lease.

6. A reasonably intelligent and well-informed reader of paragraph 36 in its statutory context would be forgiven for thinking it tolerably clear that paragraph 36(2) would trigger a self-supply charge if, but only if, there came a time, during the relevant ten year period, when P no longer had any interest in the relevant premises, including any leasehold interest. If at a particular time P still had a leasehold interest, it could not have disposed of its entire interest. Since the irreducible essence of a sale and leaseback by P is that P ends up at the end of the process (to use a neutral word) with a lease, a sale and leaseback could not trigger a self-supply charge under paragraph 36(2) unless the process was so unwisely structured as to leave a gap in time between the completion of the sale and the taking effect of the leaseback.

7. This is how the matter appeared to the First-tier Tribunal. Having rejected HMRC's case that the particular sale and leaseback in issue created just such a moment in time, known to lawyers as a *scintilla temporis*, (when BCL had sold its ownership interest but had yet to receive its leasehold interest) it held that paragraph 36(2) had not been triggered. There was no time when BCL was neither the owner nor the lessee of the relevant premises. It had not therefore disposed of its entire interest in the care home.

8. HMRC has not thereafter pursued its case that there was such a moment in time. But it has pursued a case, successfully before the Upper Tribunal and the Inner House of the Court of Session, that the sale was, regardless of the leaseback, nonetheless a disposal of BCL's entire interest in the care home. This is principally because, viewed separately, the sale was a disposal of exactly the interest which BCL acquired by the zero-rated first grant from the developer. Once you match those two transactions, it was argued, paragraph 36(2) is triggered, regardless of anything which may happen during the period between them, or at the same time as the second of them.

9. Before becoming immersed in the complexities of the arguments each way, it is instructive to focus for a moment upon two examples of the surprising consequences of the way in which HMRC puts its case. First, take a case in which P first acquires an interest in a relevant care home building by a zero-rated first grant of a 21-year lease. A year later the ownership of the building (ie the real right of property) comes on the market and P buys it, (or in England the freehold reversion), so as to become the outright owner of the building. Five years later it grants an identical 21-year lease of the building to a care home operator but retains the ownership (the real right of property). On HMRC's case, paragraph 36(2) is triggered, because P has disposed precisely of the entirety of the (leasehold) interest which it acquired under the first grant. The continued right of ownership which P had later acquired would be ignored, as would the fact that, from year two until year six, the original lease had merged (by confusion with the property right) and been extinguished.

10. In the second example P, the owner of a disused mill which has been owned by his family for over a hundred years, decides to convert it into a care home and operate it to make a living, and receives numerous zero-rated supplies in connection with its conversion, but no zero-rated first grant of the mill itself. Within ten years after completion of the conversion he either sells the ownership and retains a lease, or leases the care home while retaining the ownership. Since there is no earlier zero-rated first grant with which the later sale or lease can be matched, how can it be decided, on HMRC's case, whether or not paragraph 36(2) is triggered? In this context it is important to note that Part 2 of Schedule 10 (of which paragraphs 36 and 37 are the main operative provisions) applies whenever there has been any kind of zero-rated supply or supplies in connection with the relevant building, not merely a zero-rated first grant of a major interest in it. They include the supply of specified construction or conversion services, and of building materials.

11. These two examples, and many others, suggest that there must be something wrong with any interpretation of the simple language of paragraph 36(2) which leads to a conclusion that P has disposed of P's entire interest in relevant premises when, in reality, P had at all material times an interest in it or *a fortiori*, as in the present case, a major interest in it.

The Facts

12. The appellant Balhousie Holdings Ltd is the representative member of a VAT group that includes BCL. Accordingly, any supplies made to or by BCL are treated as having been made to or by the appellant: section 43 of VATA. The Balhousie group, which includes companies outside the VAT group, owns and operates care homes in Scotland. The group (but not the VAT group) includes Faskally Care Home Ltd ("Faskally").

13. In mid 2011 Faskally acquired land for the construction of a care home, although not intending itself to operate it. It was completed in November 2012 as the Huntly Care Home ("the Home") and BCL then took informal occupation of it and began operating it as a care home, with a view to purchasing it from Faskally. In order to finance that purchase, BCL negotiated a sale and leaseback with Target Healthcare REIT Ltd ("Target"). It was achieved as described in the following paragraphs.

14. By disposition executed on 7 March 2013 ("the Grant"), Faskally conveyed the Home to BCL. The date of entry was 8 March 2013. Faskally was to give BCL vacant possession on that date, albeit that BCL had already been in occupation for some months. (The Grant also conveyed two cottages, which were not the subject of any other transactions at the material time and are not relevant to the present appeal.)

15. By disposition also executed on 7 March 2013 ("the Sale"), BCL conveyed the Home to Target. The date of entry was 8 March 2013. By missives both dated 8 March 2013 (together, "the Missives") between (i) BCL, (ii) the appellant as guarantor of BCL, and (iii) Target, BCL, the appellant and Target agreed that BCL should sell the Home to Target. The Missives also included an obligation that Target would lease the Home (and two other care homes, neither of which is of relevance to the present case) back to BCL for a period of 30 years. The Lease was attached to the Missives and was executed by (i) Target as landlord (signing on 14 March 2013), (ii) BCL as tenant (signing on 7 March 2013), and (iii) the appellant as guarantor of BCL (signing on 7 March 2013).

16. The Missives for the Sale by BCL to Target provided, *inter alia*, that:

a) the Date of Entry was to be 8 March 2013, or such other date as might be agreed (clause 1.1);

b) the Date of Settlement was the date on which settlement was actually effected, whether the Date of Entry or some other date (clause 1.1);

c) the Price for the Home was to be £4,007,561 (clause 1.1);

d) "Subject to the Seller's right of occupation and possession of the Properties conferred by the Lease, the Seller shall give the Purchaser entry to, and actual vacant possession of, the whole of the Properties on the Date of Entry, the giving of such possession being an essential condition of the Missives" (clause 4);

e) on the Date of Entry, Target was to pay the Price for the Home, and, in exchange, BCL was to deliver a disposition conveying the Home to Target, the lease executed by BCL and the appellant, and various other documents (clause 10.1). These provisions were protected by a non-supersession clause (clause 10.3). The terms of the disposition were set out in Schedule Part 4 (as were the terms of the disposition by Faskally to BCL);

f) on the Date of Settlement, Target was to grant a lease of the Home (and the other two properties) to BCL, in agreed terms (the terms were set out in Schedule Part 3). The lease was to apply from that date, whether or not executed by then (clause 11).

17. The Lease provided *inter alia*:

a) the term commenced on 8 March 2013 (clauses 1.1.47, 1.1.48 and 2.1.1);

b) the Lease was for 30 years (clauses 1.1.47 and 2.1.1);

c) the rent was £318,000 pa, subject to upwards review (clauses 1.1.39 and 2.1.1.1);

d) BCL was to use the Home only as a care home and as ancillary residential accommodation and offices (clauses 1.1.4 and 3.16.1).

18. The First-tier Tribunal ("FtT") concluded that, largely because of clause 4 of the Missives, there was no moment in time between the commencement of the Sale

and the taking effect of the Lease when BCL's continued possession of the Home was unsupported by either an ownership or a leasehold interest. This is no longer challenged by HMRC. The Sale and the Lease may therefore be regarded, if separate transactions at all, as simultaneous at least in terms of their effect.

19. The specific VAT consequences of each of the Grant, the Sale and the Lease, viewed separately, have never been controversial. The Grant was a zero-rated supply, being a first grant of a major interest within item 1 of Group 5 in Schedule 8. The Sale and the Lease were each an exempt supply within item 1 of Group 1 in Schedule 9.

20. It is also common ground that the Home was used as a care home at all material times, so that the alternative basis for triggering a self-supply, in paragraph 36(3), was not triggered at any time.

The Zero-Rating Scheme and the Self-Supply Charge, in Detail

21. Zero-rating is not part of the mainstream of VAT. Rather it is a derogation from it, permitted to member states within strict boundaries, which are mainly purposive in nature. Article 110 of the Principal VAT Directive (Council Directive 2006/112/EC) permits zero-rating, subject to other conditions, only if exemption with deductibility of VAT:

> "have been adopted for clearly defined social reasons and for the benefit of the final consumer."

In that formulation the phrase "the final consumer" means the person who acquires goods or services for his personal use, as opposed to an economic activity: see *European Communities Commission v United Kingdom* (Case C-416/85) [1990] 2 QB 130 at 139-140 per Advocate General Darmon at para 14. There is no dispute that zero-rating for the classes of supplies in connection with the construction of (*inter alia*) care homes in items 1 to 4 of Group 5 satisfies those conditions. This is because the provision of care homes for members of the public in need of them is a relevant social purpose, and because the residential occupants of care homes are for this purpose final consumers. The way in which the zero-rating of supplies to builders and owners of care homes actually benefits their occupants is less straightforward, but it may be assumed for present purposes that the reduction in the burden of taxation on those supplies causes a reduction in the cost of the construction and acquisition of care homes which developers and owner-operators pass on to the residential occupants, to some indefinite extent, in reduced prices for occupancy and the caring services provided therein.

22. A particular benefit which zero-rating provides to suppliers of goods or services is that the supply is, by contrast with an exempt supply, still a taxable supply, so that VAT paid on the supplier's inputs may still be recovered. In the present context the immediate beneficiary of the zero-rating of the supply constituted by the Grant was or included Faskally rather than merely BCL, as Mr Kieron Beal QC for HMRC was at pains to emphasise. But it must still be assumed that this benefit percolated down to residential occupants of the Home, by enabling Faskally to provide the Home to BCL at a lower cost, and BCL to provide services to residential occupants with the benefit of a lower cost base. It is not suggested that any aspect of this zero-rating scheme failed to satisfy the social purpose condition in article 110.

23. There was extended debate before this court about the extent to which the jurisprudence of the CJEU was of assistance in resolving the issue about the construction of paragraph 36(2) and its application to the facts. In particular a number of decisions of the CJEU were prayed in aid, on both sides, on the question whether multiple transactions needed to be viewed separately or together for VAT purposes. They included *BLP Group Plc v Customs and Excise Comrs* (Case C-4/94) [1996] 1 WLR 174, *Halifax Plc v Customs and Excise Comrs* (Case C-255/02) [2006] Ch 387, *Centralan Property Ltd v Customs and Excise Comrs* (Case C-63/04) [2006] STC 1542, *Bookit Ltd v Revenue and Customs Comrs* (Case C-607/14); EU:C:2016:355, *National Exhibition Centre Ltd v Revenue and Customs Comrs* (Case C-130/15) [2016] STC 2132, *Ministero dell'Economia e delle Finanze v Part Service Srl* (Case C-425/06) [2008] STC 3132 *and Mydibel SA v État belge* (Case C-201/18) [2019] STC 1342. Whilst *Mydibel* indicates that it may well be appropriate to tax a lease and leaseback financing arrangement as a single transaction (if the national court considers that to be supported by the evidence), these CJEU cases tend to show that the question whether multiple transactions need to be viewed separately or together for VAT purposes in any particular case is heavily context dependent. There is no single answer that applies across the entire field of VAT.

24. The CJEU cases are not particularly instructive for a further reason. As explained above, the zero-rating scheme is a permitted national exemption from VAT under the Principal VAT Directive. If the outcome of this issue could have a bearing on the question whether this part of the zero-rating scheme was compliant with article 110, then it might well be that recourse to the jurisprudence of the CJEU, and even to its rules of construction, might be necessary or appropriate, even though a reference to the Court of Justice is of course no longer available for the resolution of issues of that kind which are not *acte clair*. But neither party made any suggestion that, for example, to allow a care home operator to finance its acquisition of the care home by sale and lease-back rather than secured bank lending without incurring a self-supply charge came anywhere near that possibly elusive boundary. Part 2 of Schedule 10 to the VATA, which includes paragraph 36(2), is just a small part of a

detailed scheme enacted by UK primary legislation, which is compliant with article 110, and which is therefore subject to the usual principles applicable in the UK for the interpretation of statutory material. In short, and cases about taxation merely exemplify a general rule:

> "The ultimate question is whether the relevant statutory provisions, construed purposively, were intended to apply to the transaction, viewed realistically."

Per Ribeiro PJ in *Collector of Stamp Revenue v Arrowtown Assets Ltd* [2003] HKCFA 46, 6 ITLR 454, para 35, approved for general use in *Barclays Mercantile Business Finance Ltd v Mawson* [2005] 1 AC 684, para 36 and *UBS AG v Revenue and Customs Comrs* [2016] 1 WLR 1005, para 66 per Lord Reed. It is nothing to the point that the present case is not about tax avoidance, or that it is about VAT rather than taxes on income or gains. This principle of statutory construction is of general effect, as Lord Drummond Young rightly observed in the Inner House, at para 13.

25. As already noted, Group 5 of Schedule 8 to VATA is a compendious provision, covering a range of supplies of goods and services, in connection with the construction or conversion of buildings for a range of residential, social and charitable purposes. Item 1 is the supply by way of the first grant of a major interest in a building by a person constructing or converting it for a qualifying purpose. Item 2 is the supply of construction services (with certain exceptions) in the course of construction of a qualifying building, but only if the recipient of the supply intends itself to use the building for the qualifying purpose: see Note 12. Item 3 is the supply of services to a housing association related to the conversion of a building for residential use. Item 4 is the supply of building materials to a person to whom the supplier is supplying services within items 2 or 3. The final consumers intended to be benefited include, in addition to residents in care homes, children in children's homes, residential students or pupils, resident members of the armed services, residents in monasteries or nunneries and those ending their days in a hospice. The feature which they all share in common is residence in a relevant building.

26. The issue in the present case is not about the purposes of the zero-rating scheme in Group 5 *per se*, which are both plain and uncontentious, but rather the purpose of one of a particular pair of restrictions or claw-backs upon its effect as tax relief, namely that in paragraph 36(2) of Schedule 10 Part 2 of VATA. In order to interpret this provision purposively, it is necessary to set it in the context of Part 2 generally, so as to illustrate the circumstances in which it applies, and the nature and quantum of the self-supply charge which is imposed when it is triggered. Unfortunately, those contextual provisions are not nearly as clear or simple as paragraph 36(2) itself. The result is that its purpose remains something of a puzzle, even after hearing extended argument.

27. Paragraph 35 sets out the circumstances in which Part 2 applies, in the following terms:

> "(1) This Part of this Schedule applies where one or more relevant zero-rated supplies relating to a building (or part of a building) have been made to a person ('P').
>
> (2) In this Part of this Schedule -
>
> 'relevant zero-rated supply' means a grant or other supply which relates to a building (or part of a building) intended for use solely for -
>
> (a) a relevant residential purpose, or
>
> (b) a relevant charitable purpose,
>
> and which, as a result of Group 5 of Schedule 8, is zero-rated (in whole or in part);
>
> 'relevant premises' means the building (or part of a building) in relation to which a relevant zero-rated supply has been made to P;
>
> 'relevant period', in relation to relevant premises, means ten years beginning with the day on which the relevant premises are completed."

28. Pausing there, the following points are to be noted. First, P is always the recipient of one or more zero-rated supplies, but may well not be the recipient of an item 1 supply: ie the first grant of a major interest in the relevant building. This is because the definition of "relevant zero-rated supply" includes both "a grant or other supply". P may be the developer and intending operator of the building or a housing association, in each case receiving numerous supplies of construction services or building materials. P may already be the long-term owner of land to be developed by the construction of a relevant building. Secondly, the "relevant period" during which a self-supply charge may be incurred runs not from the date of the supply in question, but from the completion of the relevant building. If that is a converted rather than new building that probably means the completion of the conversion. In

either case, even where P is the recipient of an item 1 zero-rated supply, it will be mere coincidence whether P's acquisition of the building coincides with its completion. Thirdly, there is no reason to suppose that, in the ordinary course of events, P will necessarily have control of the use to which the building is put during the whole of the ten years from its completion, when P is at risk of incurring a self-supply charge. Nor will P necessarily have any means of monitoring that ongoing use. After receiving a zero-rated first grant P may let the building to an operator under a lease which does not reserve for P rights to control or monitor its use. In the present case it was mere happenstance that BCL was an operator which remained in control of the Home throughout.

29. This is not to construe paragraph 36(2) by inappropriate reference only to the penumbra at the outer edge of its normal operation. Item 1 zero-rated supplies may involve greater value (although not if the major interest is a lease at a market rent with no premium), but zero-rated supplies under items 2, 3 and 4 are likely to be much more numerous. Many projects for the construction or conversion of relevant buildings may involve no zero-rated first grant under item 1 at all, but will involve the zero-rated supply of construction services or building materials, where the developer also intends to operate the relevant building.

30. It is convenient when looking at context to go next to paragraph 36(1) and then to paragraph 37, which prescribes what is to happen when either paragraph 36(2) or (3) is triggered. Paragraph 36(1) provides as follows:

> "Paragraph 37 applies on each occasion during the relevant period when -
>
> > (a) there is an increase in the proportion of the relevant premises falling within sub-paragraph (2) or (3), and
> >
> > (b) as a result, the proportion of the relevant premises so falling ('R2') exceeds the maximum proportion of those premises so falling at any earlier time in the relevant period ('R1')."

This concept of an increase is designed to deal with a succession of triggering events, where there is a disposal of P's entire interest in, or change of use of, only a physical part of a relevant building, such as a floor or a wing of it. Its effect is to impose a self-supply charge proportionate only to that physical part of the whole.

31. Paragraph 37 provides as follows:

"(1) Where this paragraph applies, P's interest, right or licence in the relevant premises held immediately prior to the time when the increase referred to in paragraph 36(1) occurs is treated for the purposes of this Part of this Schedule as -

(a) supplied to P for the purposes of a business which P carries on, and

(b) supplied by P in the course or furtherance of that business

immediately prior to the time of that increase.

(2) The supply is taken to be a taxable supply which is not zero-rated as a result of Group 5 of Schedule 8.

(3) The value of the supply is taken to be -

(a) in the case of the first deemed supply under this paragraph, the amount obtained by the formula -

R2 x Y x (120-Z)/120, and

(b) in the case of any subsequent deemed supply under this paragraph, the amount obtained by the formula -

(R2-R1) x Y x (120-Z)/120

(4) For the purpose of sub-paragraph (3) -

(a) R1 and R2 have the meaning given by paragraph 36(1)(b),

> (b) Y is the amount that yields an amount of VAT chargeable on it equal to -
>
> > (i) the VAT which would have been chargeable on the relevant zero-rated supply,
> >
> > or
> >
> > (ii) if there was more than one supply, the aggregate amount of the VAT which would have been chargeable on the supplies,
>
> had the relevant premises not been intended for use solely for a relevant residential purpose or a relevant charitable purpose, and
>
> (c) Z is the number of whole months since the day on which the relevant premises were completed."

32. A number of relevant points emerge from this paragraph. First, sub-paragraph (1) expressly contemplates that P may, immediately before the triggering event, only have a licence in the relevant premises. This need not be a proprietary interest at all (per Nourse LJ in *IDC Group Ltd v Clark* [1992] 2 EGLR 184 at 186: "a licence properly so called is a permission to do something on or over land which creates no interest in it"). Nonetheless it is an economic interest. A licence is necessarily an interest of a lesser amount than the minimum necessary to give rise to a zero-rated first grant under item 1 of Group 5, which must be a "major interest" (which, in Scotland, as already noted, is the interest of the owner or the lessee's interest under a lease for a period of not less than 20 years). The focus on the period immediately prior to the triggering event also contemplates that P may have altered its interest in the relevant premises since (if at all) receiving a zero-rated first grant, but before triggering the self-supply charge under paragraph 36(2). Secondly, sub-paragraph (4)(b)(ii) expressly contemplates that the self-supply charge may claw back the benefit of the zero-rating of any number of prior zero-rated supplies to P. Consistently with paragraph 35(2), as already noted, the scheme of Part 2 of Schedule 10 is not therefore limited just to clawing back the benefit of a zero-rated first grant under item 1 of Group 5 (contrary to the main focus of HMRC's argument). It could apply for example to a developer which intends itself to use the building for the qualifying purpose, who receives zero-rated supplies of construction services and building materials, but no zero-rated first grant, but then changes its mind and then changes its use of the building or, without any change of use, disposes

of its entire interest in the building, in each case within ten years of its completion. Thirdly, the last part of the two formulae in effect tapers the self-supply charge from 100% to 0% of the aggregate of the VAT that would have been charged on the relevant zero-rated supplies but for zero-rating, over ten years, to reflect the number of months since the day on which the relevant premises were completed.

33. Armed with that contextual analysis, it is now possible to address directly the purpose and precise meaning of the two triggering events in paragraph 36(2) and (3).

> "(2) The relevant premises fall (or part of the relevant premises falls) within this sub-paragraph if P has, since the beginning of the relevant period, disposed of P's entire interest in the relevant premises (or part).
>
> (3) The relevant premises fall (or a part of the relevant premises falls) within this sub-paragraph if -
>
> > (a) those premises do not (or that part does not) fall within sub-paragraph (2), and
> >
> > (b) those premises are (or that part is) being used for a purpose that is neither a relevant residential purpose nor a relevant charitable purpose."

It is convenient to address the purpose of sub-paragraph (3) first, because it is clear and not in dispute. Taken together with the tapering provision in paragraph 37, it is designed to claw back the benefit of the tax relief consequent upon zero-rating of relevant supplies by reference to the point in time at which, because of a change in the use of the relevant premises (or part of them) from a qualifying to a non-qualifying use, the benefit of the relief can no longer flow through to the intended beneficiaries as consumers. If the beneficiaries get the benefits for half the ten year period (before it is ended by a change of use), then half the tax relief is clawed back. If they get the benefits for nine years, then only one tenth of the tax relief is clawed back.

34. For the achievement of that purpose, which is squarely in harmony with the purpose of the zero-rating scheme as a whole, paragraph 36(3) is unconcerned with the identity of the owner of the relevant premises at the time of the change of use, save only that, if P had already suffered a claw-back under sub-paragraph (2), P is not to be mulcted twice: see paragraph (a) of sub-paragraph (3). And it is equally in

accordance with that purpose that all benefits of zero-rating of supplies are clawed back subject to taper, not just those obtained by a zero-rated first grant under item 1 of Group 5.

35. Turning to sub-paragraph (2), it was submitted for HMRC that its purpose was essentially ancillary to sub-paragraph (3), both by encouraging P to retain a sufficient interest to be able to maintain control of the use to which the relevant premises were put, and to ensure a continued means whereby HMRC could indirectly monitor the ongoing use of the relevant premises, via the trader which had obtained the benefit of the zero-rating, namely P. If that was its purpose, so it was submitted, it lent weight to an interpretation of "entire interest" that applied to a disposal of ownership, with its right of ultimate control, even if there was a simultaneous conferral on P of a lease, not least because the lease could always be terminated.

36. This submission faces insuperable difficulties, even though it was not (perhaps for tactical reasons) challenged root and branch by the appellant. First, the notion that disposal by P of P's entire interest somehow hampers HMRC from monitoring the ongoing use of the relevant premises borders on the fanciful. The qualifying uses falling within Group 5, already described above, or a change from them, could hardly be concealed, even from the most casual observer. Secondly, the question who, as between an owner and a person to whom the premises have been let by the owner, has effective control over the use of the premises depends entirely upon the terms of the lease, and yet paragraph 36(2) entertains no such distinctions. Thirdly, P needs no encouragement from sub-paragraph (2) to maintain control of the use of the premises, since sub-paragraph (3) visits a self-supply charge if the use changes, regardless of whether P has or has not disposed of his interest in the premises, or consented to the change. If P wishes to avoid such a charge under sub-paragraph (3), then P needs to take steps to retain control in any event, either by not disposing of its interest, or by doing so on terms which prohibit change of use without P's consent. Fourthly, sub-paragraph (2) operates regardless of change of use. If P disposes of P's entire interest one year after completion of the building, then P faces a 90% self-supply charge, even if the building remains in a qualifying use for the whole ten years. Finally, sub-paragraph (2) speaks of "entire interest" not, as it could easily have done, of "controlling interest".

37. To the extent that the purpose behind sub-paragraph (2) can be discerned, I consider that it has nothing at all to do with whether P has retained sufficient control to prevent a change of use. Rather it is concerned with avoiding conferring the large tax benefit of zero-rating upon a person who is not prepared to commit to the project of creating and operating a building for a specified socially desirable residential use for a substantial period of time after its completion. This chimes in well with the restriction of zero-rating under items 2 and 4 of Group 5 to those recipients of construction services and building materials who intend themselves to use the

building for a qualifying purpose (and so certify), and the restriction of item 3 to housing associations which, characteristically, are in the business of providing residential social benefits long-term. It achieves that purpose by a tapered claw-back of the tax benefits received (from any kind of zero-rated supply) which decreases over time, and to nil once a ten-year commitment to the project by P has been demonstrated. That demonstration is achieved by P remaining as a stakeholder, ie maintaining some level of interest (in the economic sense) in the relevant premises, some "skin in the game" as it was described during argument. The bar is set very low, by setting the trigger for claw-back at the point when P has disposed of P's entire interest, rather than some lesser proportion of it. Subject possibly to a *de minimis* exception, which has not been argued and does not arise for decision, "entire" means exactly what it says, namely that P no longer has any interest in the premises.

38. It is sometimes said, and HMRC submits, that if the court cannot discern the purpose of a statutory provision, then it must just do the best it can with the words used. If that were to be the position in this case, then "entire" still means exactly what it says. So the identification of a purpose behind paragraph 36(2) is not strictly necessary for that conclusion.

39. But that is by no means the end of HMRC's case. Next it is argued that the VAT context, and in particular the VAT principles of fiscal neutrality and objectivity, together with the transactional nature of the tax, compels an approach to two or more linked transactions that prevents them from being treated, for VAT purposes, as a single transaction. This is undoubtedly so for most VAT related purposes, as Lord Drummond Young's careful and scholarly exegesis of the VAT principles of fiscal neutrality and objectivity in the Inner House amply demonstrates. Even in the present case the Grant, the Sale and the Lease were all separate supplies for VAT purposes, with their own separate VAT consequences. In fact, as is agreed, both the Sale and the Lease were exempt supplies, but they were separate nonetheless, at least for the purpose of an examination of their separate VAT consequences. This was a decisive part of the reasoning of both the Upper Tribunal and the Inner House, and it may have arisen from a perception, based on the parties' submissions, that the outcome of the case turned on a decision whether the Sale and the Lease were or were not to be treated as a single transaction for VAT purposes: see per Lord Drummond Young at paras 36 and 41. Lady Arden shares that perception although, with the benefit of the *Mydibel* case, denied to the court below, she reaches the opposite conclusion as to the outcome.

40. With respect I do not consider that question to have any bearing, let alone a decisive bearing, on the question whether paragraph 36(2) was triggered by the events which have happened. The question whether a series of transactions may be, or may have to be, looked at in the aggregate depends on the context in which the question arises. Applying the text of paragraph 36(2) is not about assessing the VAT

consequences of a particular transaction. The language of sub-paragraph (2) makes this clear. It applies when P "has … disposed" of P's entire interest in the relevant premises. The sub-paragraph does not ask whether a particular transaction amounts to such a disposal. Rather, it demands an enquiry about the existence or otherwise of a state of affairs, namely whether a time came when P (here BCL) no longer had any interest in the relevant premises (here the Home) because it had by then disposed of its entire interest therein. The use of non-technical language and the past tense supports this interpretation. The existence of such a state of affairs then brings into existence a purely notional additional pseudo-transaction, namely a self-supply, not as part of any chain of real transactions but as a peg upon which to hang, and quantify, the claw-back of a tax benefit. Paragraph 37(4) then provides another example of a requirement to aggregate earlier supply transactions, in that case to enable the VAT on the notional self-supply to be calculated.

41. The state of affairs which triggers paragraph 36(2) could come about by a single transaction disposing of the entirety of P's interest, by two or more simultaneous transactions disposing together of the entirety, or by a series of successive transactions following the last of which the entirety had been disposed of. In such cases all relevant transactions may need to be considered, so that the aggregate of their combined effect can be assessed. Thus a series of simultaneous or successive disposals may need to be considered (in relation to the whole of the relevant premises or some physical part of them) to see whether their subject matter adds up to the entirety of P's interest therein. But by the same token where there are successive or simultaneous transactions either way, some disposing of an interest and some acquiring another interest, then they will also have to be examined to discern their aggregate effect, to see whether at any time P's interest had thereby been reduced to zero. None of this involves any departure from rigorous objectivity or from the VAT principle of fiscal neutrality, or the adoption of some rule of construction alien to VAT. It is not as if the disposal by P of P's entire interest in the relevant premises need necessarily be by way of a supply at all. The disposal could be by way of one or more gifts, in particular if P were an individual, or by a mixture of gifts and supplies. All that is required is something akin to a little basic mathematics, and a careful focus on the passage of time.

42. In the present case the Sale and the Lease were two simultaneous transactions, one by way of disposal by BCL and the other by way of acquisition by BCL, in each case of a much more than *de minimis* interest in the whole of the Home. Each was a transfer of a major interest, (although retention of a major interest is not necessary to protect P from paragraph 36(2)), and there was no moment when BCL had neither of them. So paragraph 36(2) was not engaged. Nor would it have mattered if, contrary to the facts, the Sale and the Lease had not been linked transactions, in the sense that one would not have happened without the other, so long as they were simultaneous, as in fact they were. The parties' underlying purposes and intentions are equally irrelevant, although in other VAT contexts, such

as under item 2 of Group 5, read in connection with note (12)(a), they may occasionally be decisive. All that mattered was that, as the FtT found, the two transactions were simultaneous (or in their language "contemporaneous") in their effect, leaving no realistic room for a *scintilla temporis*. There is some indication, both in HMRC's submissions to this court and in Lord Drummond Young's opinion (at para 39) that the notion of a *scintilla temporis* never quite disappeared from their analysis. He speaks of the Sale as being "followed by" the Lease, and of the Lease only taking effect once Target was the heritable proprietor of the Home. But that supposed lack of simultaneity was firmly and rightly rejected by the FtT, and not thereafter pursued on appeal. While it may appear to have some theoretical or technical attraction as a matter of Scottish or even English conveyancing law, it departs from the necessarily realistic view of the facts called for by the true construction and application of the relevant paragraphs: see in a different context *Abbey National Building Society v Cann* [1991] 1 AC 56, 92 per Lord Oliver of Aylmerton:

> "Of course, as a matter of legal theory, a person cannot charge a legal estate that he does not have, so that there is an attractive legal logic in the ratio in *Piskor* …. Nevertheless, I cannot help feeling that it flies in the face of reality. The reality is that, in the vast majority of cases, the acquisition of the legal estate and the charge are not only precisely simultaneous but indissolubly bound together."

In my judgment the same is equally true of the reality of a sale and leaseback, in Scotland as much as in England. This does not violate important principles of property law; it instead just focuses on the aspects of the transactions relevant to the statutory VAT consequences.

43. But HMRC submits that "entire interest" means, and only means, the entirety of the interest that P acquired by an earlier zero-rated first grant, so that if that grant was of "ownership" (under Scots law), and ownership is then disposed of, sub-paragraph (2) is triggered, even if P retains or simultaneously acquires another interest, even a major interest, but one falling short of ownership. Mr Beal sought to make that good by a sustained submission that Part 2 of Schedule 10, or at least paragraph 36(2), was all (and only) about clawing back the undeserved benefits of an earlier zero-rated first grant, but a thorough analysis of sub-paragraph (2) in its context demonstrates that this is not so. Part 2 is about claw-back of the tax benefits of a much wider class of zero-rated supplies than just first grants under item 1 of Group 5, as paragraph 35(2) makes expressly clear, in its definition of "relevant zero-rated supply" as including both a grant or other supply. Paragraph 37(1) makes it expressly clear that a self-supply can be triggered at a time when P only retains a licence in the relevant premises. Since a change of use under paragraph 36(3) can only trigger a self-supply charge if sub-paragraph (2) has not already been engaged,

it must follow that a disposal of ownership may be insufficient on its own to amount to a disposal of P’s entire interest.

44. More fundamentally, this construction contended for by HMRC simply fails to make sense of sub-paragraph (2), whatever rational purpose may be assigned to it, as is illustrated by the two examples at the beginning of this judgment. Why should a self-supply charge be triggered where P, after the receipt of an earlier lease as a zero-rated first grant, later acquires full ownership and then disposes only of a lease? And how on HMRC’s case does paragraph 36(2) work at all when other zero-rated supplies are received by P without ever receiving a zero-rated first grant? Nor is there any rational purpose behind paragraph 36(2) under which it could be triggered by a financing by way of sale and leaseback, but not by way of a loan on security.

45. Reference was made to *Sargaison v Roberts* [1969] 1 WLR 951 and *Robert Gordon’s College v Customs and Excise Comrs* [1996] 1 WLR 201. They reach opposing conclusions, in differing contexts, about the legitimacy of treating separate transactions as a single transaction for tax purposes. Like the decisions of the CJEU mentioned earlier, they disclose no invariable rule about aggregating or not aggregating separate transactions for VAT purposes. Not only do they ante-date the developing EU jurisprudence about this question, as to which the warning of Lord Walker in *College of Estate Management v Customs and Excise Comrs* [2005] 1 WLR 3351, 3362, para 28 is apposite, but they are each context-dependent as well, and neither concerns the provision currently in issue, which had not then been enacted. HMRC also sought to draw a comparison with the capital goods scheme in Part XV of the Value Added Tax Regulations 1995 (SI 1995/2518). Again, this uses different language (“whole or part of his interest in the capital item”), exists for a different purpose, and is therefore of limited value in construing the language in paragraphs 35 to 37 themselves.

46. It follows in my judgment that BCL did not by its sale and leaseback of the Home dispose of its entire interest therein, so that this appeal should be allowed.

LADY ARDEN:

Overview of the issues

47. According to the Opinion of the Inner House of the Court of Session, delivered by Lord Drummond Young, the relevant question on the appeal to them in this case was: what, for VAT purposes, is the relevant transaction? Lord Drummond Young continued: “As we have already indicated, a transactional

approach is central in the application of VAT legislation, and determining the identity of each transaction is a vital part of that analysis" (para 38). The Opinion concluded: "We are accordingly of opinion that the sale and the leaseback are as a matter of substance two entirely different transactions, the second being dependent on the completion of the first. This would be reflected in the Land Register, where two distinct transactions would inevitably be separately recorded. After the grant of the lease, Balhousie Care continued to be entitled to occupy the property, but the right to do so was dependent on the lease, not on their former ownership of the property" (para 40).

48. A key assumption, therefore, made by the Inner House was that paragraphs 35 to 38 of Schedule 10 to the Value Added Tax Act 1994 ("VATA") should be interpreted in accordance with the principles of EU VAT law (see for example, paragraph 31 of the Opinion). Specifically it is assumed that P can be said to have disposed of his entire interest in premises as required by paragraph 36(2) of Schedule 10 to VATA if, applying the principles of VAT law, that is the effect of the relevant transaction under which this disposal is said to have occurred. If that key assumption is correct, those principles included the principle, which I will call "the single supply principle", to be derived from *Card Protection Plan Ltd v Customs and Excise Comrs* (Case C-349/96) [1999] 2 AC 601 and other cases, that normally each supply should be treated as a separate transaction for VAT purposes. It follows that the contrary proposition must also be true, namely that if under the principles of EU VAT law the relevant transactions would be treated as a single transaction then the composite effect of the transactions must be considered and applied for the purposes of paragraph 36(2). In this case, there is no doubt that, when the composite effect of the relevant transactions with Target alone is considered, there was no disposal by P, Balhousie Care Ltd ("BCL"), of its entire interest in the Huntly care home.

49. I need therefore to address two questions: (1) do EU law principles apply in this case? and (2) does the normal single supply principle apply to a sale and leaseback transaction entered into for funding purposes as in this case? If the answer to both questions is in the affirmative, it is the composite effect of the transactions that falls to be considered for the purposes of paragraph 36(2).

50. In my judgment, the Inner House's key assumption was correct. The conditions for zero-rating engage EU law. However, the normal single supply principle does not apply to a sale and leaseback transaction entered into for funding purposes.

My answer to the first question is that the conditions for zero-rating engage the principles of EU law

51. The EU introduced measures to harmonise VAT from 1991. There were several directives, including the Sixth Directive (Directive 77/388/EEC). This contained an important transitional provision in article 28(2) permitting member states to retain reduced rates and zero rates applicable at the 31 December 1975 on certain conditions. One of those conditions in article 28(2) (as amended by Council Directive 92/77/EEC of 19 October 1992) was that the national legislation permitted to be maintained had to be "in accordance with Community law" and satisfy the conditions in the last indent of article 17 of the second VAT Directive (Directive 67/228/EEC). In *Marks & Spencer PLC v Revenue and Customs Comrs* (Case C-309/06) [2008] STC 1408, the Court of Justice of the European Union ("the CJEU") held that the general principles of VAT law applied to exemptions and zero rating:

> "32. The second question asks, in essence, whether a trader has a right, under the general principles of Community law, including the principle of fiscal neutrality, to claim a refund of the VAT which was wrongly levied, when the rate which should have been applied stems from national law.
>
> 33. It must be noted at the outset that the actual wording of article 28(2)(a) of the Sixth Directive, in the version resulting from Directive 92/77, states that the national legislation which may be maintained must be 'in accordance with Community law' and satisfy the conditions stated in the last indent of article 17 of Directive 67/228. Although the addition relating to being 'in accordance with Community law' was made only in 1992, such a requirement, which forms an integral part of the proper functioning and the uniform interpretation of the common system of VAT, applies to the whole of the period of erroneous taxation at issue in the main proceedings. As the court has had occasion to point out, the maintenance of exemptions or of reduced rates of VAT lower than the minimum rate laid down by the Sixth Directive is permissible only in so far as it complies with, inter alia, the principle of fiscal neutrality inherent in that system (see, to that effect, *Gregg v Customs and Excise Comrs* (Case C-216/97) [1999] STC 934; [1999] ECR I-4947, para 19, and *EC Commission v France* (*Republic of Finland intervening*) (Case C-481/98) [2001] STC 919; [2001] ECR I-3369, para 21).

> 34. It thus follows that the principles governing the common system of VAT, including that of fiscal neutrality, apply even to the circumstances provided for in article 28(2) of the Sixth Directive and may, if necessary, be relied on by a taxable person against a national provision, or the application thereof, which fails to have regard to those principles.
>
> 35. As regards, more specifically, the right to a refund, as is apparent from the settled case law of the court, the right to obtain a refund of charges levied in a member state in breach of rules of Community law is the consequence and the complement of the rights conferred directly on individuals by Community law (see in particular, to that effect, *Marks & Spencer* (para 30 and the case law cited)). That principle also applies to charges levied in breach of national legislation permitted under article 28(2) of the Sixth Directive.
>
> 36. The answer to the second question must therefore be that where, under article 28(2) of the Sixth Directive, both before and after the insertion of the amendments made to that provision by Directive 92/77, a member state has maintained in its national legislation an exemption with refund of input tax in respect of certain specified supplies but has misinterpreted its national legislation, with the result that certain supplies which should have benefited from exemption with refund of input tax under its national legislation have been subject to tax at the standard rate, the general principles of Community law, including that of fiscal neutrality, apply so as to give a trader who has made such supplies a right to recover the sums mistakenly charged in respect of them."

52. In addition, section 30(1) of VATA expressly provides that a zero-rated supply shall, in all respects other than the charging of VAT on the supply, be treated as a taxable supply. That in my judgment makes it clear that the principles of EU law which apply to taxable supplies apply equally to zero-rated supplies. Section 30(1) provides:

> "30. Zero-rating.
>
> (1) Where a taxable person supplies goods or services and the supply is zero-rated, then, whether or not VAT would be chargeable on the supply apart from this section -

(a) no VAT shall be charged on the supply; but

(b) it shall in all other respects be treated as a taxable supply; …”

53. Accordingly, in my judgment, the Inner House was correct to proceed on the basis that the principles of EU VAT law applied to the application of paragraphs 35 to 38 of Schedule 10 to VATA.

54. It follows that it is not enough that those provisions would be interpreted under domestic law as having the effect explained by Lord Briggs. Nor do the principles established in *Commission of the European Communities v Ireland* (Case C-415/85); ECLI:EU:C:1988:320 and *Commission of the European Communities v United Kingdom* (Case C-416/85) [1990] 2 QB 130 assist in this case. The Commission there challenged certain zero rates of tax applied (in the latter case) by the United Kingdom on the ground that they went beyond that which was permitted by the transitional provision in article 28(2) of the Sixth Directive and the last indent of article 17 of the Second Directive, which restricted the circumstances in which member states could provide for zero-rating to “clearly defined social reasons”. The European Court of Justice (“the ECJ”) ruled that there should be only a limited review of these reasons at the EU level. It recognised that the identification of such reasons was in principle a matter of political choice for the member states. Further, that choice could be the subject of supervision at the Community level only insofar as the concept had been distorted and led to measures which because of their effects and their true objectives lay outside the scope of article 28 (para 14). The review by EU law was limited in relation to the identification of social reasons because those matters are peculiarly a matter for individual member states. But the ECJ could investigate whether the further condition that the zero-rating was for “the benefit of the final consumer” was satisfied, and whether the zero-rating was proportionate. As is clear from the citation from *Marks & Spencer* in para 51, the CJEU (the successor to the ECJ) has now taken this jurisprudence further by holding that the principles of VAT law apply to zero-rating and exemptions.

My answer to the second question is that, following *Mydibel*, a sale and leaseback for funding purposes is treated for VAT purposes as a single supply

55. The CJEU delivered its judgment in *Mydibel v État belge* (Case C-201/18) [2019] STC 1342 on 27 March 2019, shortly after the Inner House had delivered its Opinion in this matter and so the Inner House was not able to consider this decision. In my judgment, the judgment of the CJEU in this case shows that, in the context of a sale and leaseback for funding purposes, the CJEU will depart from its single supply principle and treat the two otherwise separate transactions together.

56. In *Mydibel* the taxpayer was a producer of potato products and for this purpose it was the owner of certain land and buildings. It had incurred VAT on the construction costs of those buildings, which it had deducted under the terms of a scheme which required adjustments to be made if the property ceased to be used for the purposes of Mydibel's business. The issue, similar to the issue in this case, was whether the benefit which it obtained under a scheme for the deferral of the VAT on capital costs, could be clawed back because it had entered into what the CJEU called a sale and leaseback to raise more money. Mydibel granted the two institutions a 99-year emphyteutic lease conferring a right of possession on the institutions and requiring them to pay a substantial sum each year. They then granted Mydibel the right to use the property for 15 years in return for rent and an option to purchase the lease at the end of that lease. Mydibel resisted a claim for adjustment of the input tax which it had deducted. The transactions were purely financing transactions and had no effect on its use of the land or buildings. The CJEU did not apply the usual single supply principle and held that the economic reality was that the transactions were simply a single transaction to raise money and that accordingly use did not change:

> "36. It is clear that the sale and lease back transactions at issue in the main proceedings are characterised by the combined and simultaneous grant, first, of an emphyteutic right by the taxable person to the two financial institutions at issue in the main proceedings and, second, of a lease of real property by those two institutions to the taxable person.
>
> 37. It must therefore be determined whether, in the context of the main proceedings, the grant of the emphyteutic right and of the leasing of real property must be considered separately or together.
>
> 38. The Court has ruled that there is a single supply where two or more elements or acts supplied by the taxable person to the customer are so closely linked that they form, objectively, a single, indivisible economic supply, which it would be artificial to split (judgment of 21 February 2008, *Ministero dell'Economia e delle Finanze v Part Service Srl* (Case C-425/06) EU:C:2008:108 … para 53 and the case law cited).
>
> 39. It is for the national court to assess if, the contractual structure of the transaction notwithstanding, the evidence put before the court discloses the characteristics of a single transaction (judgment of 21 February 2008, *Part Service* … para 54).

> 40. In the present case, it is stated in the order for reference that the sale and lease back transactions at issue in the main proceedings are purely financial transactions designed to increase Mydibel's liquidity and that the buildings at issue in the main proceedings remained in the possession of Mydibel, which used them in an uninterrupted and permanent manner for the purposes of its taxable transactions.
>
> Those facts appear to indicate that, subject to verification by the referring court, each of those transactions forms a single transaction, since the creation of the emphyteutic right over the buildings at issue in the main proceedings is inseparable from the lease of real property covering those buildings.
>
> 41. It follows that, subject to verification by the referring court, each sale and lease back transaction at issue in the main proceedings constitutes a single transaction. In those circumstances, those transactions cannot be classified as 'supplies of goods' in so far as the rights transferred to the financial institutions at issue in the main proceedings following those transactions, namely the civil law emphyteutic rights reduced by the rights stemming from the leases of real property of which Mydibel is the beneficiary, do not empower them to dispose of the buildings at issue in the main proceedings as if they were their owners."

57. In citing *Part Service*, the CJEU signalled that it drew on its jurisprudence which permits the combining of transactions entered into by more than one supplier (*semble*, not constituting members of the same VAT group). *Mydibel* develops that jurisprudence by reaching the same conclusion, on the basis of economic substance, not where there was more than one supplier but where the parties were on the opposite sides to each other in the relevant transactions. The CJEU extended its jurisprudence on economic substance to these situations for what may have been the first time.

58. HMRC submit that *Mydibel* does not apply in this case. Their first point is that the transaction turned on the right to deduct and not the recovery of VAT under loss of entitlement to zero-rating. I take the view that this is a distinction without a difference because in each case the question was whether the transactions constituted a single supply for VAT purposes.

59. The second ground of suggested distinction is that the transaction in *Mydibel* was one of lease and leaseback, involving the carving out of successive lesser interests, rather than sale and leaseback and that the conditions in paragraph 36 were accordingly not fulfilled. Those conditions require disposal of the entire interest. It is correct that the transaction in *Mydibel* was an emphyteutic transaction which involved the grant by *Mydibel* of a sub interest to the financial institution in return for payment by the financial institution and the grant of an option to acquire the property back in due course. But that is in reality a difference of detail rather than of substance. Different legal systems have different means of facilitating the use of immovable property as security. In the case of an emphyteutic transaction of immovable property, there may be a supply of goods for VAT purposes because article 15(2)(b) of the Principal VAT Directive provides that member states may regard as tangible property "rights in rem giving the holder thereof a right of use over immovable property". That would be sufficient to cover an emphyteutic possessory right. In the present appeal, it is said that a similar analysis would be possible under Scots law, though it may not be possible under English and Welsh law because the Statute of Quia Emptores 1290 (18 Edw 1, c 1) forbade subinfeudation, ie the process of creating new tenancies (see F W Maitland *The Constitutional History of England* ed H A L Fisher, Cambridge University Press (1908), p 24). But I doubt whether it matters whether it was a sale and leaseback or lease and leaseback, as is evident from the fact that on several occasions the CJEU itself refers to the transactions in *Mydibel* as ones of sale and leaseback. The fact remains that there were two transactions going in either direction, and the CJEU held that they should be treated as a single transaction. It is not relevant to this point that under VATA there has to be a disposition of an entire interest, which did not occur under the transaction in *Mydibel*.

60. HMRC make the point that there was no Advocate General's opinion in *Mydibel*, as would have been required if there was a new point of law decided by it. But the CJEU pointed out that the principle was not new although it was a new application of it. *Mydibel* builds on jurisprudence which is present in *Card Protection* itself (see, for example, para 29) about the need to avoid artificially splitting (or bundling) transactions for VAT purposes.

61. HMRC also say that in *Mydibel* the financial institutions could not have parted with ownership since they did not have ownership of the property. They had possessory rights (and there was nothing to suggest that they could not dispose of those rights, subject however to the rights of Mydibel). Likewise, in this case, Target could not dispose of its interest in the Huntly care home free from the lease. Moreover, the covenants in the lease provided that BCL could only use the property as a residential care home and/or nursing home.

62. HMRC further argue that the supply in *Mydibel* was in fact a supply of the principal sum loaned which would be exempt and would have no bearing on the

ongoing use of input construction services by Mydibel in its continuing economic activity, and that that point explains why the CJEU felt that no adjustment to the initial input tax deduction was needed. However, it is quite clear from the judgment that the concern was adjustment of the prior entitlement to deduct. I am not therefore persuaded that there was any relevant difference between *Mydibel* and the present case.

Conclusion

63. I conclude that paragraph 36(2) of Schedule 10 to VATA falls to be interpreted in accordance with the principles of EU VAT law, and that, when that sub-paragraph is so interpreted, the sale and leaseback transactions between BCL and Target fall to be treated as a single transaction which does not involve the disposal by BCL of its entire interest in the Huntly care home. For these reasons, I would allow this appeal.