R (on the application of Federation of Technological Industries and others) v Customs and Excise Commissioners and another

[2004] EWCA Civ 1020

COURT OF APPEAL, CIVIL DIVISION

WARD, JACOB LJJ AND SIR CHARLES MANTELL

6, 7, 30 JULY 2004

Judicial review – Value added tax – Anti-avoidance measures requiring provision of security for VAT due from third party and enabling commissioners to hold certain traders jointly and severally liable for VAT owed by third parties – Vires of United Kingdom to enact legislation – Whether question of compatibility of provisions with EU law should be referred to Court of Justice of the European Communities – Whether Court of Appeal could consider whether inferior court was right to refer - Value Added Tax Act 1994, s 77A, Sch 11, para 4(2) – EC Council Directive 77/388, arts 21(3) and 22(8).

The claimants were traders in mobile telephones and computer processing units and their trade body, the Federation of Technological Industries. In order to counter widespread abuse of the value added tax (VAT) system: (i) s 17 of the Finance Act 2003 amended paras 4(1A) and (2)[a] of Sch 11 to the Value Added Tax Act 1994 so as to allow the commissioners to require a taxable person to provide security for the VAT due from any person by or to whom goods or services were supplied if they thought it necessary for the protection of the revenue; and (ii) s 18 of the 2003 Act introduced s 77A[b] of the 1994 Act which, in certain circumstances, enabled the commissioners to serve a notice on a taxable person rendering him jointly and severally liable for supplies of telephones or computers to him or on any previous or subsequent supplies of those goods. The claimants sought permission, inter alia, to claim declarations that paras 4(1A) and (2) and s 77A were incompatible with Community law and a reference to the Court of Justice of the European Communities to determine that question. The commissioners contended, inter alia, that arts 21(3)[c] or 22(8)[d] of EC Council Directive 77/388 (the Sixth Directive) provided the vires to enact the impugned sections in that the power in art 21(3) allowing member states to hold someone other than the person liable for the payment of the tax to be jointly and severally liable for that tax allowed member states to so provide in all cases. They further contended that the provision in art 22(8) allowing member states to impose such obligations as they deemed necessary for the correct collection of tax and the prevention of evasion authorised both the imposition of joint and several liability under s 77A and the requirements to provide security under para 4. The claimants contended, inter alia, that it was only in the four situations specified in art 21(1)(a), (1)(c), (2)(a) and (2)(b) that art 21(3) conferred on member states the power to provide that someone other

[a] Paragraph 4, so far as material, provides:

> '(1A) If they think it necessary for the protection of the revenue, the Commissioners may require, as a condition of making any VAT credit, the giving of such security for the amount of the payment as appears to them appropriate. ... (2) If they think it necessary for the protection of the revenue, the Commissioners may require a taxable person, as a condition of his supplying or being supplied with goods or services under a taxable supply, to give security, or further security, for the payment of any VAT that is or may become due from—
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> (a) the taxable person, or
> (b) any person by or to whom relevant goods or services are supplied.'

than the person thereunder made liable for payment of the tax should be jointly and severally liable for payment and that art 22(8) did not provide the vires either for the imposition of joint and several liability or for a requirement to provide security for VAT due from someone other than the taxable person. The judge concluded that the claimants had substantial prospects of success on both issues and that the question of construction whether the impugned sections were authorised by arts 21(3) or 22(8) could not be resolved by reference to EU case law and therefore he ordered a reference to the Court of Justice. The commissioners appealed. As a preliminary issue the claimants contended that a higher court could not interfere with a decision of a lower court to refer. The commissioners contended that art 21(3) or alternatively art 22(8) of the Sixth Directive provided the source of the power to make the joint and several provision and art 22(8) provided the source of the power to make the security provision. At the hearing the commissioners conceded that if art 21(3) did not confer the power to make the joint and several

[b] Section 77A, so far as material, provides:

'(1) This section applies to goods of any of the following descriptions—

(a) telephones and any other equipment, including parts and accessories, made or adapted for use in connection with telephones or telecommunication;
(b) computers and any other equipment, including parts, accessories and software, made or adapted for use in connection with computers or computer systems.

(2) Where—

(a) a taxable supply of goods [or services; see below ss 10(a)] to which this section applies has been made to a taxable person, and
(b) at the time of the supply the person knew or had reasonable grounds to suspect that some or all of the VAT payable in respect of that supply, or on any previous or subsequent supply of those goods, would go unpaid,

the Commissioners may serve on him a notice specifying the amount of the VAT so payable that is unpaid, and stating the effect of the notice.
(3) The effect of a notice under this section is that—

(a) the person served with the notice, and
(b) the person liable, apart from this section, for the amount specified in the notice, are jointly and severally liable to the Commissioners for that amount. …

(6) For the purposes of subsection (2) above, a person shall be presumed to have reasonable grounds for suspecting matters to be as mentioned in paragraph (b) of that subsection if the price payable by him for the goods in question—

(a) was less than the lowest price that might reasonably be expected to be payable for them on the open market, or
(b) was less than the price payable on any previous supply of those goods.

(7) The presumption provided for by subsection (6) above is rebuttable on proof that the low price payable for the goods was due to circumstances unconnected with failure to pay VAT.
(8) Subsection (6) above is without prejudice to any other way of establishing reasonable grounds for suspicion. …
(10) For the purposes of this section—(a) "goods" includes services;'

[c] Article 21, so far as material, is set out at [28] and [34], post

[d] Article 22, so far as material, provides in (8): 'Member States may impose other obligations which they deem necessary for the correct collection of the tax and for the prevention of evasion, subject to the requirement of equal treatment for domestic transactions and transactions carried out between Member States by taxable persons and provided that such obligations do not, in trade between Member States, give rise to formalities connected with the crossing of frontiers.'

provision then it could not be acte clair that art 22(8) did so and therefore the court did not consider the art 22(8) point.

Held – (1) Under EU law a decision of an inferior court referring a question to the Court of Justice for a preliminary ruling remained subject to the remedies normally available under national law. The remedy of appeal was a remedy normally available in the courts of England and Wales. Accordingly, a national court of appeal could consider whether a court below was right to refer, and the court did have jurisdiction to review the judge's decision to refer. *Rheinmühlen-Düsseldorf v Einfuhr-und Vorratsstelle für Getreide und Futtermittel* (Case 166/73) [1974] ECR 33 and *Rheinmuhlen-Düsseldorf v Einfuhr-und Vorratsstelle für Getreide und Futtermittel* (Case 146/73) [1974] ECR 139 considered. *Bulmer (HP) Ltd v J Bollinger SA* [1974] 1 Ch 401 and *R v International Stock Exchange of the United Kingdom and the Republic of Ireland Ltd, ex p Else (1982) Ltd* [1993] QB 534 followed.

(2) The correct application of community law in the instant case was not so obvious as to leave no scope for any reasonable doubt. Accordingly, the court could not conclude that it could with complete confident resolve the issue before it and a reference to the Court of Justice would be required. *R v International Stock Exchange of the United Kingdom and the Republic of Ireland Ltd, ex p Else (1982) Ltd* [1993] QB 534 applied.

Notes

For s 77A of, and para 4 of Sch 11 to, the Value Added Tax Act 1994, see De Voil Indirect Tax Service, Division V13.1.

For EC Council Directive 77/388, arts 21(3) and 22(8), see De Voil Indirect Tax Service, Division V15.3.

For the commissioners' power to require security for tax due, see De Voil Indirect Tax Service V5.186.

For judicial review, see De Voil Indirect Tax Service V1.285.

Cases referred to in judgments

Bulmer (HP) Ltd v J Bollinger SA [1974] Ch 401, [1974] 2 All ER 1226, CA.

John Dee Ltd v Customs and Excise Comrs [1995] STC 941, CA.

Milchwerke Heinz Wöhrmann & Sohn KG v EEC Commission (Cases 31/62) [1962] ECR 501, [1963] CMLR 152, ECJ.

R v International Stock Exchange of the United Kingdom and the Republic of Ireland Ltd, ex p Else (1982) Ltd [1993] QB 534, [1993] 1 All ER 420, CA.

Rheinmühlen Düsseldorf v Einfuhr-und Vorratsstelle für Getreide und Futtermittel (Case 166/73) [1974] ECR 33, [1974] 1 CMLR 523, ECJ.

Rheinmuhlen-Düsseldorf v Einfuhr-und Vorratsstelle für Getreide und Futtermittel (Case 146/73) [1974] ECR 139, [1974] 1 CMLR 523, ECJ.

Cases referred to in skeleton arguments

Barings plc (in liq) v Coopers & Lybrand (a firm) [2002] EWCA Civ 1155, [2002] All ER (D) 278 (Jul).

Church of Scientology of California v Customs and Excise Comrs [1979] STC 297, [1979] TR 59; *affd* [1981] STC 65 , [1981] 1 All ER 1035, CA.

CILFIT Srl and Lanificio di Gavardo v Ministry of Health (Case 283/81) [1982] ECR 3415, [1983] 1 CMLR 472, ECJ.

Da Costa en Schaake NV v Nederlandse Belastingadministratie (Case 28/62, 29/62 and 30/62) [1963] ECR 31, [1963] CMLR 224, ECJ.

EC Commission v Belgium (Case 324/82) [1984] ECR 1861, [1985] 1 CMLR 364, ECJ.

EC Commission v French Republic (supported by United Kingdom, intervener) (Case C-43/96) [1998] STC 805, [1998] ECR I-3903, [1998] All ER (EC) 951, ECJ.

Eismann Alto Adige Srl v Ufficio IVA di Bolzano (Case C-217/94) [1996] STC 1374, [1996] ECR I-5287, ECJ.

G v G [1985] 1 WLR 647, [1985] 2 All ER 225, HL.

Gabalfrisa SL v Agencia Estatal de Administración Tributaria (Joined cases C-110/98 to C-147/98) [2002] STC 535, [2000] ECR I-1577, ECJ.

Giloy (Bernd) v Hauptzollamt Frankfurt am Main-Ost (Case C-130/95) [1997] ECR I-4291, ECJ.

Gregory v Turner; R (on the application of Morris) v North Somerset Council [2003] EWCA Civ 183, [2003] 1 WLR 1149, [2003] 2 All ER 1114.

Hadmor Productions Ltd v Hamilton [1983] 1 AC 191, [1982] 1 All ER 1042, HL.

Housing of the Working Classes Act 1890, Re, ex p Stevenson [1892] 1 QB 609, 8 TLR 486, CA.

Irish Creamery Milk Suppliers Association v Ireland (Joined cases 36/80 and 71/80) [1981] ECR 735, [1981] 2 CMLR 455, ECJ.

Lane v Esdaile [1891] AC 210, HL.

R (on the application of Sivasubramaniam) v Wandsworth County Court [2002] EWCA Civ 1738, [2003] 1 WLR 475, [2003] 2 All ER 160.

R (on the application of Teleos) v Customs and Excise Comrs [2004] EWHC 1035 (Admin), [2004] All ER (D) 73 (May).

R v Henn and Darby (Case 34/79) [1980] AC 850, [1979] ECR 3795, [1980] 2 All ER 166, HL.

R v Home Secretary, ex p Chinoy (unreported) (10 April, 1991).

R v Lloyd's of London, ex p Briggs [1993] 1 Lloyd's Rep 176, [1993] COD 66, DC.

R v Medical Appeal Tribunal, ex p Gilmore [1957] 1 QB 574, [1957] 1 All ER 796, CA.

R v Monopolies and Mergers Commission, ex p Argyll Group plc [1986] 1 WLR 763, [1986] 2 All ER 257, CA.

R v Secretary of State for Employment, ex p Seymour-Smith and Perez [1997] 1 WLR 473, [1997] 2 All ER 273, HL.

R v Secretary of State for Trade and Industry, ex p Eastaway [2000] 1 WLR 2222, [2001] 1 All ER 27, HL.

Riniker v University College London [2001] 1 WLR 13, CA.

Schmeink & Cofreth AG & Co KG v Finanzamt Borken (Case C-454/98) [2000] STC 810, [2000] ECR I-6973, ECJ.

Swain v Hillman [2001] 1 All ER 91, CA.

Three Rivers District Council v Bank of England [2001] UKHL 16, [2001] 2 All ER 513.

Appeal

The Commissioners of Customs and Excise and the Attorney General (the defendants) appealed from a decision of Lightman J ([2004] EWHC 254 (Admin), [2004] STC 1008) by which he allowed an application by the Federation of Technological Industries and 53 traders in mobile telephones and computer processing units being members of that trade body (the claimants) for: (i) permission to claim declarations that s 77A of, and paras 4(1A) and (2) of Sch 11 to, the Value Added Tax Act 1994 were contrary to EU law and were incompatible with the Convention for the Protection of Human Rights and Fundamental Freedoms 1950; and (ii) a reference of that question to the Court of Justice of the European Communities. The facts and grounds of appeal are set out in the judgment of Jacob LJ.

Jonathan Peacock QC and *Francis Fitzpatrick* (instructed by the *Solicitor for the Customs and Excise*) for the defendants.

Denis Waelbroeck (of the Brussels Bar), *Andrew Young* and *Amy Berry* (instructed by *Dass Solicitors*, Birmingham) for the claimants.

Cur adv vult

30 July 2004. The following judgments were delivered.

WARD LJ.

[1] I invite Jacob LJ to give the first judgment.

JACOB LJ.

Introduction

[2] This is an application for permission to appeal and, if permission be granted an appeal, from a decision of Lightman J of 18 February 2004 (see [2004] EWHC 254 (Admin), [2004] STC 1008). The appellants are the Commissioners of Customs and Excise and HM Attorney General (collectively, CCE). The respondents are the Federation of Technological Industries and 53 traders in mobile telephones and computer processing units. The Federation is their trade body. I shall call the respondents collectively (the Federation).

[3] By these proceedings the Federation challenges the legitimacy of certain provisions of the Value Added Tax Act 1994 (1994 Act) as amended. The attack before Lightman J was launched on a broad front, alleging both violation of EU law and incompatibility with the ECHR and its first protocol. Six different arguments were raised on the application for permission to proceed with the claim.

[4] Pursuant to an earlier order the application for permission was made on notice to the CCE. So the substantial arguments took place at the permission stage. The Judge rejected five of the six arguments at that point. We do not have to deal with them for there is no attempt to appeal his refusal of permission. As regards the remaining point, the Judge held that permission to proceed with the application for judicial review should be granted. Having regard to the fact that he thought the position under EU law was uncertain he therefore immediately ordered a reference to the Court of Justice of the European Communities (Court of Justice).

[5] In the skeleton arguments before this court there was some misunderstanding as to what the precise procedural position was. Some argument was directed to the question of whether an appeal could lie from a decision to grant permission to proceed with an application for judicial review. But in the end it was agreed that this debate was irrelevant. The CCE are not now seeking to appeal the Judge's grant of permission to proceed; they are seeking to appeal his decision (to refer questions to the Court of Justice) in the proceedings for which he has granted permission to proceed. The fact that he gave his reasons as to why there should be a reference at the permission stage is simply an irrelevance.

[6] There is no doubt that the case raises important questions, legally and financially. So in the ordinary way this Court would (unless that matter is despite its importance very plain) grant permission to appeal. However the Federation raised two preliminary reasons as to why permission should be refused. The first was a particularly meritless time point, based on the fact that although the appropriate documents were filed in time they were filed in the wrong office in this building and it took a little while for this to be sorted out. The Federation suffered no prejudice. Under some pressure from the Court the time objection was dropped.

Jurisdiction of the Court

[7] The second objection was one of law. It was submitted by Maître Waelbroeck for the Federation that this Court had no jurisdiction to decide whether the Judge was right or wrong to refer. He submitted that it was a principle of EU law that a higher court could not interfere with a decision of a lower court to refer under art 234 EC (formerly 177) of the EC Treaty, even where the higher court was of the opinion that a reference was not necessary because the point of European law was clear beyond argument (*acte clair*).

[8] He based his submission on *Rheinmühlen Düsseldorf v Einfuhr-und Vorratsstelle für Getreide und Futtermittel* (Case 166/73) [1974] ECR 33. In para 4 of its judgment the Court said:

> 'It follows from these factors that a rule of national law whereby a court is bound on points of law by the rulings of a superior court cannot deprive the inferior courts of their power to refer to the Court questions of interpretation of Community law involving such rulings.
> It would be otherwise if the questions put by the inferior court were substantially the same as questions already put by the superior court.
> On the other hand the inferior court must be free, if it considers that the ruling on law made by the superior court could lead it to give a judgment contrary to Community law, to refer to the Court questions which concern it.
> If inferior courts were bound without being able to refer matters to the Court, the jurisdiction of the latter to give preliminary rulings and the application of Community law at all levels of the judicial systems of the Member States would be compromised.'

[9] But there was a second *Rheinmühlen* case, (Case 146/73) [1974] ECR 139. Paragraph 3 of the judgment said this:

> 'According to [*Rheinmühlen* 1] a rule of national law whereby a court is bound on points of law by the rulings of a superior court cannot on this ground alone deprive the inferior courts of their power, provided for under Article 177, to refer questions to the Court for a preliminary ruling.
> However, in the case of a court against whose decisions there is a judicial remedy under national law, Article 177 does not preclude a decision of such a court referring a question to this Court for a preliminary ruling from remaining subject to the remedies normally available under national law.'

[10] I read this last paragraph as saying that a national court of appeal can consider whether a court below was right to refer. That is what we are being asked to do here—exercise the remedy of appeal normally available in our courts.

[11] Moreover both these judgments were before our Court of Appeal in *Bulmer (HP) Ltd v J Bollinger SA* [1974] Ch 401 at 420 in the form reported in the CMLR (where they are reported together). Lord Denning MR said:

> 'The European court take the view that the trial judge has a complete discretion to refer or not to refer: see *Rheinmühlen-Dusseldorf (Firma) v Einfuhr und Vorratsstelle für Getreide und Futtermittel* [1974] 1 C.M.L.R. 523—with which they cannot interfere: see *Milchwerke Heinz Wöhrmann & Sohn K.G. v. Commission of the European Economic Community* [1963] C.M.L.R. 152. If a party wishes to challenge the decision of the trial judge in England—to refer or not to refer—he must appeal to the Court of Appeal in England.'

[12] Stephenson LJ (with whom Stamp LJ agreed) said (at 431):

> 'I find it hard to follow the argument that a rule which gives a right of appeal to a party dissatisfied with a judge's exercise of his discretion one way restricts in some manner the judge's power to exercise it. It may facilitate appeals

against one way of exercising it; it does nothing thereby to prevent its exercise either way. The judge is left as free to exercise this discretion as any judicial discretion and this court has its customary freedom to correct its exercise if unjudicial, unjust or wrong.'

[13] So all members of this Court held, having seen both *Rheinmühlen* cases, that an appeal lay to this Court from a judge's decision about a reference, whether that decision was to refer or not refer. Since then, in at least one case, this Court has reversed a decision to refer—see *R v International Stock Exchange of the United Kingdom and the Republic of Ireland Ltd, ex p Else (1982) Ltd* [1993] QB 534. It held that, contrary to the view of the first instance judge, the point at issue was *acte clair.* All concerned assumed that in those circumstances the decision to refer could be reversed.

[14] Maître Waelbroeck and Mr Andrew Young contended that even if we thought the point was *acte clair* the *Rheinmühlen* cases meant that it would nonetheless be open later for to a first instance judge to disagree and to refer, producing a sort of ping-pong between this Court and that of first instance. I understand the fear expressed by the Court of Justice in *Rheinmühlen*, that important questions of EU law might, by virtue of the *acte clair* rule, be kept away from the Court of Justice by a determined national final court of appeal. But this case is miles away from that sort of problem. If the Court of Appeal is of the opinion that a matter is *acte clair,* I doubt very much whether a first instance judge would subsequently take a different view. As Mr Young eventually accepted, the problem has not begun to arise in this case. So I say no more about it.

[15] In the result, as we indicated during the hearing, this Court has jurisdiction to decide whether or not the Judge was right to refer, the time for seeking permission to appeal was extended and permission to appeal was granted.

The problem the impugned provisions are designed to tackle

[16] There is no dispute about the existence of the problem or its details. The Federation do not deny (indeed it could not) that it is a major abuse of the value added tax (VAT) system. It arises from the fact that under the rules for the Single Market introduced in 1993 supplies of goods between registered traders in different member states are free of VAT provided that the seller obtains the VAT registration number of the customer in the other member state and can prove that the goods were removed from the seller's own member state into another member state. Purchases of goods from another member state (acquisitions) into the United Kingdom give rise to an obligation on the purchaser to account in the United Kingdom for 'acquisition' output tax. The purchaser can recover this tax as 'acquisition input tax' on his own VAT return in the United Kingdom.

[17] The simplest form of abuse is what the CCE call 'acquisition fraud'. A business in the United Kingdom acquires goods from an EU supplier VAT free and sells them on into the United Kingdom market directly or indirectly. When it sells these goods to its United Kingdom customers it charges VAT but it fails to account to the CCE for the VAT it collects. Before the CCE catch up with it the trader simply disappears.

[18] This kind of abuse is somewhat limited in that the importer who intends to defraud is actually selling the goods into the United Kingdom market. He has to find real customers or his customers do.

[19] Much more significant is the second type of abuse which the CCE call 'carousel fraud'. Again, there is a United Kingdom importer buying from a supplier in another EU state. Again, he pays no VAT on his purchase. He then sells to a 'customer' in the United Kingdom, charging VAT. That 'customer' sells on to another 'customer', himself charging VAT (output tax) and setting that against the tax he paid to his supplier (input tax). This may go through several

traders (whom CCE call buffers). The last buffer in the chain does not, however sell on to ultimate United Kingdom customers. He sells back into the EU, very often to the original seller. He will have paid input tax on his purchase. This he claims 'back' from CCE. None of this would matter if the original importer, who has charged output tax to the first of the buffers, were around to account to the CCE for that tax. But by now he has disappeared.

[20] So on each circuit of the 'carousel' 17.5% of the value of the goods is extracted from the CCE. The scheme requires high value low physical size goods—a containerful of mobile phones or computer chips is just right for this. A pallet-load arrives at Heathrow, the transactions all take place quickly (perhaps in the same day) and the pallet moves out again.

[21] The CCE estimate (the Federation do not accept) that the annual cost to the United Kingdom in 2002–03 was between £1.65 and £2.64 *billion*. The problem is, whatever the precise figure, vast. It is not confined to the United Kingdom but is EU wide. Mr Peacock QC for the CCE told us that no less than 13 member states had adopted legislation of the sort sought to be impugned in this case. The details of this varied from country to country, but all depended on the power to make it invoked here.

The impugned legislation

[22] This consists of provisions (ss 17 and 18) of the Finance Act 2003 amending the 1994 Act. Section 17 amends para 4 of Sch 11 of the 1994 Act creating what is conveniently called 'the security provision'. Section 18 adds a new section, s 77A, creating the 'joint and several liability' provision.

[23] For brevity I do not set out the detailed wording of these provisions. It is to be found in paras 3 and 4 of Lightman J's judgment. It is sufficient to lift (with gratitude) almost verbatim the uncontroversial summary of how they work provided in Mr Peacock's skeleton argument.

The Security Provision

[24]

> 'i. if they think it necessary for the protection of the revenue, the CCE may require a taxable person, as a condition of his supplying or being supplied with goods or services under a taxable supply, to give security for the payment of any VAT which is, or may become, due from any person to whom "relevant" goods or services are supplied. "Relevant" goods or services means goods or services supplied by or to the taxable person. The security shall be of such amount and shall be given in such manner as the CCE may determine;
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> ii. if an appeal is made against the requirement to give security, then the Tribunal *shall allow* the appeal unless the CCE satisfy the Tribunal that: there has been an evasion of, or an attempt to evade, VAT in relation to goods or services supplied by or to that person; or, it is likely (or without the requirement for security it is likely) that VAT in relation to such goods or services will be evaded;
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> iii. if the CCE do so satisfy the Tribunal, then the Tribunal will consider the requirement to give security in the same manner as they would consider a request for security from a taxable person in respect of that person's current or future VAT debts. The approach which a Tribunal should follow on such an appeal was considered by the Court of Appeal in *John Dee v CCE* [1995] STC 941 at 952-3. The Court held that such an appeal was appellate in nature as opposed to supervisory. The statutory condition which the Tribunal must consider on such an appeal is whether it appeared requisite to the CCE to require security. In considering this, the Tribunal should consider whether the CCE acted in a way in which no reasonable panel of CCE could have acted or whether they had taken into account some irrelevant matter or had

disregarded something to which they should have given weight. The Tribunal may also have to consider whether the CCE have erred in point of law.'

The Joint and Several Provision

[25]

'i. The power to make one person jointly and severally liable with another is exercisable where:

a. a supply to which the section applies has been made to a taxable person; and;
b. the taxable person *knew* or had *reasonable* grounds to suspect that VAT would be unpaid.
If these conditions are satisfied the CCE may serve a notice on the taxpayer specifying the amount of VAT so payable that is unpaid.

ii. there is a rebuttable presumption that the taxable person had such reasonable grounds where it is established that the price payable for the goods was lower than the *reasonable* open market price or less than the price payable on a previous supply of those goods—the burden of showing this on the CCE;
iii. the presumption may be rebutted by adducing evidence as to the circumstances in which the ostensibly "low" price was payable by the taxpayer and by showing that the low price was due to circumstances unconnected with the failure to pay VAT;
iv. once an appeal is lodged, the CCE must satisfy the VAT and Duties Tribunal as to the taxable person's actual knowledge or as to there being reasonable grounds for the taxable person to suspect. The CCE must also, whether they rely on the presumption or not, satisfy the Tribunal that VAT which was payable has not been paid. Only if this is so will the Tribunal go on to consider any other evidence adduced by the taxable person.'

The Source of the Power to make these provisions

[26] CCE claim that EC Council Directive 77/388 (the Sixth Directive) of 17 May 1977 on the harmonisation of the laws of the member states relating to turnover taxes—common system of value added tax: uniform basis of assessment, as last amended by EC Council Directive 2000/65 of 17 October 2000 amending the Sixth Directive as regards the determination of the person liable for payment of value added tax (OJ L269 21.10.2000 p 44), expressly confers the power on member states to enact provisions of the kind impugned. As a fallback position they also would argue that such provisions may be enacted because they are not expressly forbidden by the Directive. Mr Peacock recognises this latter argument faces an arguable difficulty: since the Directive expressly does confer powers to render persons taxable, by implication there is no other power than that contained in it. Because the point is arguable it cannot be said to be *acte clair*. Accordingly, though he reserves the right to run the fallback point in the Court of Justice if necessary, he does not do so before us. Before us the question is whether the Directive so clearly confers a power to create the Security and Joint and Several Provisions that it is *acte clair*—no reference then being necessary.

[27] Before the Judge, and initially before us, Mr Peacock invoked art 21(3) alternatively art 22(8) of the Directive as the source of the power to make the joint and several provision, and art 22(8) as source of the power to make the security provision. As matters developed, however, it became clear that if art 21(3) did not confer the power to make the joint and several provision, then it could not be *acte clair* that art 22(8) did so. Likewise art 22(8) (said to be the source of the power to make the security provision) could not unarguably have sufficient width to justify that provision unless art 21(3) conferred the power to create joint and several

liability. Mr Peacock accepted that if there was no power to create joint and several liability, then it was at least arguable that there was no power to achieve much the same end by making one taxpayer give security for the tax due from others. In short he accepted that if his art 21(3) point was not *acte clair*, then his art 22(8) point could not be either. So we do not have to consider the art 22(8) point.

[28] I therefore turn to set out the whole of art 21 of the Sixth Directive as amended and in force at the time of enactment of the impugned provisions.

'Persons liable for payment for tax

1 Under the internal system, the following shall be liable to pay value added tax—

(a) the taxable person carrying out the taxable supply of goods or of services, except for the cases referred to in (b) and (c).

Where the taxable supply of goods or of services is effected by a taxable person who is not established within the territory of the country, Member States may, under conditions determined by them, lay down that the person liable to pay tax is the person for whom the taxable supply of goods or of services is carried out;

(b) taxable persons to whom services covered by Article 9(2)(e) are supplied or persons who are identified for value added tax purposes within the territory of the country to whom services covered by Article 28b(C), (D), (E) and (F) are supplied, if the services are carried out by a taxable person not established within the territory of the country;

(c) the person who to whom the supply of goods is made when the following conditions are met—

—the taxable operation is a supply of goods made under the conditions laid down in Article 28c(E)(3),

—the person to whom the supply of goods is made is another taxable person or a non-taxable legal person identified for the purposes of value added tax within the territory of the country,

—the invoice issued by the taxable person not established within the territory of the country conforms to Article 22(3).

However, Member States may provide a derogation from this obligation, where the taxable person who is not established within the territory of the country has appointed a tax representative in that country;

(d) any person who mentions the value added tax on an invoice or other document serving as an invoice;

(e) any person effecting a taxable intra-Community acquisition of goods.

2 By way of derogation from the provisions of paragraph 1—

(a) where the person liable to pay tax in accordance with the provisions of paragraph 1 is a taxable person who is not established within the territory of the country, Member States may allow him to appoint a tax representative as the person liable to pay tax. This option shall be subject to conditions and procedures laid down by each Member State;

(b) where the taxable transaction is effected by a taxable person who is not established within the territory of the country and no legal instrument exists, with the country in which that taxable person is established or has his seat, relating to mutual assistance similar in scope to that laid down by Directives 76/308/EEC and 77/799/EEC and by Council Regulation (EEC) No 218/92 of 27 January 1992 on administrative co-operation in the field of indirect taxation (VAT), Member States may take steps to provide that the person liable for payment of the tax shall be a tax representative appointed by the non-established taxable person.

> **3** In the situations referred to in paragraphs 1 and 2, Member States may provide that someone other than the person liable for payment of the tax shall be held jointly and severally liable for payment of the tax.
> **4** On importation, value added tax shall be payable by the person or persons designated or accepted as being liable by the Member State into which the goods are imported.'

[29] The key provision is art 21(3). CCE say it confers on member states the right to make any other plan jointly and severally liable along with any other person mentioned as liable in paras 1 and 2 liable. CCE accept that there are limitations on the power. But these are not as to any kind or class of individual. They are those imposed by general Community law, namely that the exercise of the power must be objectively justifiable, rational, proportionate and legally certain (general principles). So if there were legislation which made A taxable jointly and severally with B for no rational reason it would be invalid: a bookseller in Bath jointly and severally liable with a plumber in Plymouth is the sort of thing, though there could obviously be less extreme examples. Provided the legislation complies with general principles, then A and B can be made jointly and severally liable for A's tax or B's tax or both.

[30] Specifically Mr Peacock submitted that was the case here—the whole and only point of the legislation was to prevent abuse and to remove difficulties in the collection of tax caused by the fact that cross-border imports were involved. He relied upon Lightman J's unappealed finding (para 31) that the legislation is proportionate. Before us, Maître Waelbroeck accepted that if art 21(3) conferred the power to create joint and several liability, then it did so in a manner complying with general principles.

[31] It follows from this that it is common ground that the question before us (*acte clair* or not) turns solely on the meaning of art 21(3). Does it confer a general power to enact laws creating joint and several liability subject only to the general principles, or is the class of person who can be made so liable limited?

CCE's Arguments

[32] Mr Peacock starts with the plain words of the provision. He says art 21(3) plainly and clearly says that someone other than the taxpayer may be made liable provided only that it is in 'one of the situations referred to in paras 1 and 2.' Thus only the situation in para 4 (person liable on importation because designated by member state as being liable) is excluded from the power).

[33] That argument is reinforced by the general words of the 9th recital to the amending EC Council Directive 2000/65:

> '(9) Member States may continue to provide that someone other than the person liable for payment of the tax shall be held jointly and severally liable for payment of the tax.'

[34] Next Mr Peacock says that the literal words are reinforced by the legislative history of the provision. The original, unamended, Sixth Directive in 1977 (EC Council Directive 77/388) had a much shorter art 21. It read:

> '*Article 21*
> Persons liable to pay tax to the authorities
> The following shall be liable to pay value added tax:
> 1. under the internal system:
>
> (a) taxable persons who carry out taxable transactions other than those referred to in Article 9(2) (e) and carried out by a taxable person resident abroad. When the taxable transaction is effected by a taxable person resident abroad Member States may adopt arrangements whereby tax is

payable by someone other than the taxable person residing abroad. Inter alia a tax representative or other person for whom the taxable transaction is carried out may be designated as such other person. The Member States may also provide that someone other than the taxable person shall be held jointly and severally liable for payment of the tax;

(b) persons to whom services covered by Article 9(2) (e) are supplied and carried out by a taxable person resident abroad. However, Member States may require that the supplier of services shall be held jointly and severally liable for payment of the tax;

(c) any person who mentions the value added tax on an invoice or other document serving as invoice;

2. on importation: the person or persons designated or accepted as being liable by the Member States into which the goods are imported.'

[35] So in 1977 the joint and several power was in (a). A more limited joint and several power (because not in respect of 'any person' but only the supplier of services) was in (b). There was no joint and several power in relation to (c).

[36] Article 21 was elaborated and varied by a series of amending Directives, namely:

91/680/EEC
92/111/EEC
95/7/EC
1999/59/EC
2000/65/EC

[37] What matters is that until the last version, whenever an addition or amendment was made (whether by simple insertion of a new kind of case or by amendment of an existing case) the new insertion or provision had, added at its conclusion, a joint and several provision.

[38] This can be illustrated by looking at the amendments made for the coming into force of the Single Market. This was that contained in EC Council Directive 92/111. This provided that:

'Article 21(1)(a) shall be replaced by the following:

(a) the taxable person carrying out the taxable supply of goods or of services, other than one of the suppliers of services referred to in (b).

Where the taxable supply of goods or of services is effected by a taxable person who is not established within the territory of the country, Member States may adopt arrangements whereby tax is payable by another person. Inter alios a tax representative or the person for whom the taxable supply of goods or of services is carried out may be designated as that other person.

However, the tax is payable by the person to whom the supply of goods is made when the following conditions are met:

—the taxable operation is a supply of goods made under the conditions laid down in paragraph 3 of Title E of Article 28c,

—the person to whom the supply of goods is made is another taxable person or a non-taxable legal person identified for the purposes of value-added tax within the territory of the country,

—the invoice issued by the taxable person not established within the territory of the country conforms to Article 22(3).

However, Member States may provide a derogation from this obligation in the case where the taxable person who is not established within the

territory of the country has appointed a tax representative in that country. **Member States may provide that someone other than the taxable person shall be held jointly and severally liable for payment of the tax:**

Article 21(1)(b) shall be replaced by the following:

(b) Persons to whom services covered by Article 9(2)(e) are supplied, or persons, identified for value added tax purposes within the territory of the country, to whom services referred to in Article 28b(C), (D) or (E) are supplied, when the service is carried out by a taxable person established abroad; **however, Member States may require that the supplier of the service shall be held jointly and severally liable for payment of the tax.**'

For convenience I have emboldened the joint and several powers. [A commercial reprint of this version of art 21 before us showed the joint and several provision in art 21(1)(a) further indented. A mini-argument revolved round this, but to no point since the text is not so indented in the Official Journal version.]

[39] It will be seen that both (a) and (b) contain a joint and several provision, (a) quite general but (b) limited to the supplier of the service.

[40] The 1995 and 1999 versions substituted new versions of art 21(1)(b). They are not material to either side's argument. But the 2000 amendment was more drastic. It removed all separate references to the joint and several power from (a) and (b) and inserted the general provision in the new art 21(3). Clearly added is the power to create joint and several liability in respect of class 1(d) (person who mentioned VAT on an invoice). That did not exist before. Equally clearly widened is the power under (b)—no longer limited to the supplier of the service. So recital (9) (saying member states may continue to provide for joint and several liability) does not preclude the Sixth Directive conferring these extra powers.

[41] Mr Peacock submits that what happened was the draftsman was simply picking up the various references to the power to create joint and several liability and lumping them together. He submits that the power was always there, right from the outset in 1977.

[42] Clearly that cannot be quite right—as I have just pointed out there has been a clear enlargement in at least two respects. That enlargement does not in any way alter the thrust of his argument—indeed enlarging the power in the respects I have mentioned reinforces his arguments that the power is to construed quite generally, subject only to the general principles.

[43] Thus according to Mr Peacock the legislative history clearly supports his case that the position is *acte clair*: the power was in the original 1977 version and has been carried through in successive versions, the last version sweeping it up generally in art 21(3).

[44] Mr Peacock finally submits that the *travaux preparatoires* are equally clear on the point. For this purpose he took us to various documents concerning the making of the 2000 amendment—not the *travaux* for the 1977 version itself. He submits that by the time of the making of the 2000 amendment it is clear that all concerned thought the power was and ought to be general.

[45] I therefore turn to examine the *travaux*. The key documents are Commission Proposal [and Explanatory Memorandum] for amendment of the Sixth Directive (COM(1998) 660 final — 98/0312(CNS)) dated 27.11.1998, (the Proposal), and the Opinion of the Economic and Social Committee (ESC) constituted under art 99 of the EC Treaty (OJ C116, 28.4.1999 p 14; 1999/C 116/04) (the Opinion).

[46] Under the general heading 'Determination of the person liable for payment of the tax under the present system' the Proposal says:

> 'According to the principle set out in Article 21 of the Sixth VAT Directive, the trader who carries out taxable transaction in a given country is himself the person liable to pay tax to the authorities.'

It then refers to 'two important exceptions' (triangular transactions and certain supplies of services, eg of lawyers) before restating the principle, and adding that it applies whether or not the person who carries out the transactions is established within the territory of the country concerned.

After describing problems which may arise when the trader is not established in the state of the transaction and the power given to deal with the problems by the appointment of a tax representative, the Proposal says:

> 'Article 21 also permits Member States to provide that someone other than the person liable for payment of the tax is held jointly and severally liable for payment of the tax.'

[47] Mr Peacock points to that. He says it is a free-standing paragraph clearly showing that the Commission thought the power to create joint and several liability was not limited to particular classes of case.

[48] Under the same heading the Proposal goes on to include the following passage:

> 'The general principle that the Commission wished [in a 1994 report to the Council] to see adopted in Member States was that the person liable for payment of the tax should be the taxable person (whether or not he is established) and that there should be as few exceptions (tax representative or person for whom the supply is intended) as possible to this rule.'

[49] The Proposal then comes to the heading 'the Proposed Amendments'. It says, so far as is relevant here:

> '... the present proposal for a Directive supports the idea that there should be only one person liable for payment per type of transaction, irrespective of the Member State in which that transaction was carried out'
>
> 'Member States also still have the option of designating a person other than the person liable for payment of the tax as jointly and severally liable for payment of the tax. The only change is a statement to the effect that this option must not give rise to provisions which create a disadvantage specifically for non-established taxable persons.'

[50] If one goes to the annexed draft Directive (OJ C409 30.12.1998 p 10) one can see what this last sentence is about. The Commission were suggesting a form of art 21(1) which ended with a paragraph reading:

> 'Member States may provide that someone other than the person liable for payment of the tax shall be held jointly and severally liable for payment of the tax, provided this option is applied without discrimination against non-established taxable persons.'

[51] In the event the proposed rider was not adopted and the provision was not included at the end of art 21(1)—it formed a separate art 21(3). This, submitted Mr Peacock, shows it is quite clear that the Commission thought there was a general existing general power to create joint and several liability. Moreover the fact that a qualification to that power was considered at all (albeit not adopted) shows that the general power was specifically under consideration.

[52] I turn to the Opinion of the ESC. Under the Introduction is the following paragraph:

'1.5 Article 21 also permits Member States to provide that someone other than the person liable for payment of the tax is held jointly and severally liable for payment of the tax.'

[53] Under the heading 'The Commission's proposals' is:

'2.1 The present proposal for a Directive supports the idea that there should be only one person liable for payment per type of transaction, irrespective of the Member State in which that transaction is carried out.'
'2.2.1 However, there are exceptions to this general rule: [these are then set out].'
'2.2.2 In addition, Member States would still have the option of designating a person other than the person liable for payment of the tax as jointly and severally liable for payment of the tax. The only change is a statement to the effect that this option must not give rise to provisions which create a disadvantage specifically for non-established taxable persons'

[54] Under the heading 'General comments' is the following:

'3.4 The ESC accepts the proposition that the taxable person who carries out a taxable transaction should logically assume the liability for payment of the tax. It considers that ideally, there should be as few exceptions as possible to this general rule.'

[55] Under 'Specific Comments' is this:

'4.4 The Committee welcomes the fact that Member States will no longer be able to require the appointment of a tax representative, except in limited and clearly-specified circumstances, but notes that they will still have the option to designate a person other than the person liable for payment of the tax as being jointly and severally liable for payment of the tax. The only restriction on the exercise of this option is a statement to the effect that it must not give rise to provisions which create a disadvantage specifically for non-established taxable persons.
4.4.1 The Committee questions the need to retain this option and hopes that Member States will not take advantage of it to negate the effects of this proposed Directive by stipulating that where a trader appoints an agent, whether it be a person or a firm, to act on his behalf in fulfilling his obligations to the VAT authorities that agent shall be jointly and severally liable with the trader for payment of the tax, regardless of whether or not the trader is established in the territory of that Member State'

[56] Finally, under 'Conclusions', the ESC said:

'5.2 It has some concern that these benefits might be impaired or nullified if Member States exercised their option to designate a person other than the person liable for payment of the tax as being jointly and severally liable for payment of the tax in such a way as to make this a general requirement for all traders, both non-established and established, who appointed an agent to act on their behalf in complying with their statutory obligations. The Committee expresses the hope that Member States will not act in this way.'

[57] Mr Peacock submitted that it is as clear as daylight that the Commission and ESC thought the provision which became art 21(3) is perfectly general in import. So the *travaux preparatoire* confirm the literal meaning and the meaning to be derived from the legislative history.

[58] Mr Peacock makes this further, telling, point: what, he asks, is the point of the power to impose joint and several liability? The answer is self-evident—it is to protect the collection of tax due. Articles 21(1) and 21(2) identify the persons

liable. But if there are problems about one of these, then, always subject to the general principles, there is the residual power to impose joint and several liability. And that is exactly what the impugned provisions are for in this case—to prevent abuse and protect tax revenue which is properly due.

The Federation's Arguments

[59] Maître Waelbroeck joins issue with Mr Peacock at every point in his argument. Starting with just the words used in the 2000 Directive, he points out that art 21(3) opens with 'In the situations referred to in paragraphs 1 and 2.' What, he asks, are these for? If there is simply a general power to impose joint and several liability, they are unnecessary. The 'situations' referred to must be something other than all the cases referred to in paras 1 and 2: they are the exceptional situations where someone other than the person who carries out the supply is made the person liable to pay tax, for instance the second paragraph of case (a).

[60] As far as the legislative history is concerned, Maître Waelbroeck disputes that there was ever any general power to created joint and several liability. In the 1977 Directive and in all subsequent versions, the sentences creating the power are tied to and are merely additional to, whatever immediately precedes them. For instance the 1977 para 1(a) has four sentences. The first creates the general rule (persons who carry out taxable transactions). The second and third create an exception (a tax representative system where the person who carries out the service is aboard) and the fourth (the power to provide for joint and several liability) clearly is limited to that exception. What it is saying is that in addition to a tax representative system member states may provide for joint and several liability.

[61] All the subsequent amendments, submits Maître Waelbroeck, conform to this pattern. Other exceptions to the general rule were introduced—and each time the power to create joint and several liability follows on and is tied to the exception.

[62] As regards the *travaux preparatoires*, Maître Waelbroeck submitted they too supported his case. Whilst it is true that there are passages which, read out of context, might be read as saying that the Commission or ESC thought there was a general power, in context those passages all come after reference to the exceptions to the general rule, exceptions whereby some person other than he who carried out the transaction is liable. Implicitly it follows, he said, that, that just as in the 1977 Directive, the power only arises in that context.

[63] Fundamentally Maître Waelbroeck argued that the general principle is that the person who carries out the transaction is the person who is to be liable, that the policy is to have as few exceptions to that as possible, and that a general power to create joint and several liability would blow a hole in the key principle. It is a general principle of construction of Community instruments that exceptions are to be construed narrowly and art 21(3) is in the nature of an exception and should be so construed.

The Judge's View

[64] The Judge thought the Federation was probably right (see [2004] STC 1008 at [20]):

> 'I consider that the construction by Maître Waelbroek has not merely a substantial prospect of success but indeed is likely to succeed. As regards the argument advanced by Mr Peacock, it seems to me to a degree improbable that the draftsman intended to give member states the power to make such a fundamental change in the structure of the VAT legislation. It is more probable that the intention was merely to broaden the limited jurisdiction conferred on member states by that article. I do not find any support for Mr Peacock's proposition in the use of the word "situation" in art 16(1).

Rather that use is consistent with the meaning contended for by Maître Waelbroek. Nor do I find any significance in any change in the ambit of the current article from that of its predecessor. The article is substantially reformulated and there is no reason to believe that any material change in its effect was not intended.'

My Opinion

[65] I do not agree. In my opinion Mr Peacock is right and clearly so. Article 21(3), were it to fall to be considered by the Court of Justice, would be construed as conferring the necessary power to enact the impugned legislation. I will state briefly why.

[66] First, on the literalist approach, I can see no real reason for saying that some cases referred to in art 21(1) and 21(2) are 'situations' and others not. It is true that one can ferret around in the legislation to compare and contrast the use of the words 'situation' and 'case' in various parts of the Directive and Maître Waelbroeck might get some support in that way, though Mr Peacock disputes that and says it is he who gets support.

[67] But that sort of literalist reasoning based on inference from the use of one word or the other in a different part of the legislation is simply not the way the Court of Justice goes about the job of construing EU legislation. It construes purposively and teleologically—moreover in an ambulatory way with the problems of the present and future in mind, not as an historian.

[68] So I think the Court is bound to ask what art 21(3) is for in a 21st century context. Mr Peacock's answer is that it confers a general power to create joint and several liability where that is necessary to prevent abuse of the VAT system. It is not limited to cases where an exception has been created from the general rule, as Maître Waelbroeck proposes.

[69] Maître Waelbroeck could find no answer to that. He accepted that the purpose of the power to create joint and several liability in those cases where someone other than the person carrying out the supply was to deal with problems of difficulty of collection arising from cross-border complications of one sort or another. But he could not suggest any reason why the power should be limited just to those cases. Instead he resorted to the general rule that only one person should be liable and that person should be the person carrying out the supply.

[70] Maître Waelbroeck in effect invites that the Court to construe the legislation so that member states are not given the power to prevent a massive abuse of the system. I just cannot envisage it doing that. The language does not compel it. I cannot imagine any member state supporting the construction (indeed I suspect many will support the United Kingdom's position). Given the widespread nature of such national provisions (as I have said CCE say 13 member states by now—apparently borrowing from an idea originating with the Dutch legislation) the Commission must be aware of what has been done. Yet it has not suggested that any member state in enacting anti-abuse provisions using the art 21(3) power has broken Community law.

[71] At one point I wondered whether there might be a point in that Mr Peacock's argument involved limiting the power by general principles whereas Maître Waelbroeck's did not. But even if the power were more limited as Maître Waelbroeck suggests, the power would still need to be restricted by general principles. So both sides accept these must limit the power. Accordingly this is a purely neutral point.

[72] As regards the Judge's view I think he was clearly mistaken. It ignores purposive construction which lies at the heart of the Court of Justice's approach. He is clearly wrong in saying the article makes no material change—see paras 40–42 and 64 above. He assumes that there is a fundamental change in the

structure of VAT legislation. But a power to prevent abuse, controlled as always by the general principles, is miles away from a fundamental change.

[73] It follows that if it were left to me I would not refer. The logical consequence of my view would be that the application for judicial review should be dismissed. And that is what I would propose but for the combination of three things. First although I have formed a firm view, the other members of the Court are not so sure. Second I am differing from the Judge. And thirdly this is clearly an EU-wide problem and it would be a thoroughly good thing if the Court of Justice declared for the whole EU that Arts 21(3) and 22(8) permit member states to enact laws preventing abuse of the VAT system. Accordingly, although it is not strictly logical, I concur in the proposal that appropriate questions should be referred to the Court of Justice.

[74] As to the form of those questions it is highly desirable that they be sorted out quickly. In the hope of saving time, I would, with some diffidence, propose the following questions:

> '1. Does Article 21(3) of Council Directive 77/388/EEC as amended by Council Directive 300/2065 EC permit Member States to provide that any person may be made jointly and severally liable for payment of tax with any person who is made so liable by Article 21(1) or 21(2), subject only to the general principles of Community law namely that such a measure must be objectively justifiable, rational, proportionate and legally certain?
>
> 2. Does Article 22(8) of the Directive permit Member States to provide that any person may be made so liable or to provide that one person may be required to provide security for tax due from another subject only to the aforesaid general principles?
>
> 3. If the answer to question 1 is no, what limits, other than those imposed by the aforesaid general principles, are there on the power conferred by Article 21(3)?
>
> 4. If the answer to question 2 is no, what limits, other than those imposed by the aforesaid general principles, are there on the power conferred by Article 22(8)?
>
> 5. Are member states precluded by the Directive as amended from providing for joint and several liability of taxpayers or from requiring one taxpayer to provide security for tax due from another in order to prevent abuse of the VAT system and the protection of revenues properly due under that system, if such measures comply with the aforesaid general principles?'

[75] The parties should be free to comment on my proposal or to suggest their own questions. They should do so when this judgment is formally handed down so that the order can be drawn up and transmitted to the Court of Justice before the end of term.

[76] It remains only to comment on the CCE's current position. Mr Peacock frankly told us that the CCE only appealed to this Court rather than going on a reference was for the sake of speed. In the result he has in fact lost time. Given the amount of money at stake (both in the United Kingdom and across the EU) it is highly desirable that the Court of Justice should decide this reference as soon as possible. Meanwhile it is accepted that the CCE can use the impugned provisions. We were told they are only using the security provisions. That is of course a matter for them. On my view they are free also to use the joint and several liability provisions and all threats from the Federation about claims for damages are nothing more than 'sound and fury signifying nothing.'

SIR CHARLES MANTELL.

[77] I gratefully adopt Lord Justice Jacob's comprehensive review of the background to this appeal and the legislative history of the relevant provisions. I

agree with his resolution of the preliminary points for the reasons which he gives. I also agree with his proposed outcome, namely that the reference to the Court of Justice should stand. It would be unnecessary for me to say more but for my Lord, having expressed his views in typically robust fashion, and having referred to my pusillanimous failure to come off the fence.

[78] So I propose, very briefly, to explain my reasons for thinking that the answer is less obvious than it appears to Jacob LJ.

[79] First, looking at art 21 of the Directive in its present form, I have difficulty with the notion that the power conferred by art 21(3) should be wider in its application than that available under art 21(1) and (2). Why, I wonder, to take art 21(1)(a) as an example, should the Directive impose constraints on the power to substitute the recipient of the supply for the supplier as liable to pay the tax when it would be open to add the same person under art 21(3).

[80] Secondly, I am concerned, as was the Judge, to understand what is meant by 'in the situations referred to in paragraphs 1 and 2'. I would hesitate to offer a firm view but it does seem to me that it is at least arguable that the identification of the person liable to pay value added tax as the person carrying out the supply is not aptly described as a 'situation'.

[81] Thirdly, if contrary to the view formed by Jacob LJ but consistent with that expressed by both Mr Peacock QC and Maître Waelbroeck the placement of the power to make persons jointly and severally liable in a separate paragraph was not intended to alter the effect of the original, then again, it seems to me, that adds force to the argument put forward on behalf of the Federation and tentatively accepted by the Judge.

[82] Having expressed my concerns, however, I should make it plain that I well understand the practical advantages of the approach favoured by Jacob LJ.

WARD LJ.

[83] My first impression was that it would be quite ludicrous to suggest that an EC Directive was so lacking in clarity that it could possibly prevent Her Majesty's Government legislating to plug a gap in the law on VAT which was being exploited by dishonest traders to plunder billions of pounds from the Exchequer. My preliminary view was that of course that was a situation which could be brought within paras 1 or 2 of art 21. Thus it is with real misgiving that I conclude we must refer to the Court of Justice. I am now beset with these doubts.

The Literal Construction.

[84] Article 21 gives effect to the general principle, explained by the Commission on 27.11.1998 in its proposal for the Directive to be:

> 'The general principle that the Commission wished to see adopted by the Member States was that the person liable for payment of the tax should be the taxable person (whether or not he is established) and that there should be as few exceptions (tax representative or person for whom the supply is intended) as possible to this rule.'

That suggests, and ordinary principles of construction dictate, that the ambit of the exceptions should be narrowly construed. Paragraph 1(1)(a) gives the general rule—the taxable person is he who carries out the taxable supply—but subject to exceptions for 'the cases' referred to in (b) and (c) and with a further qualification for the non-established supply introduced by the separate paragraph beginning 'where …'. Where the qualification applies, and arguably in that 'situation', Member States may provide otherwise.

[85] Paragraph 1(2) allows for derogation 'where' a tax representative may be appointed and once again the circumstances where those derogations apply can aptly be called 'situations'.

[86] Arguably, therefore, 'situations' is confined to those exceptional circumstances and para 21(3) does not allow the member states *carte blanche* to appoint someone else to be jointly and severally liable in all and any circumstances. If that were the intention, why did not para 21(3) simply provide, 'Except in the case of importation mentioned in paragraph 4, member states may provide [for joint and several liability]'?

The historical survey.

[87] It is common ground that a clear purpose of the 2000 amendment was to simplify the rules but not to make changes to them. Under the previous Directive the circumstances in which joint and several liability could have been imposed were self-contained within sub-paragraphs (a), (b) and (d). Sub-paragraph (c) which applies to the person who mentions VAT on an invoice, stood alone with no power in that case to direct another to be liable. If, however, Mr Peacock is correct, the power is now given in that 'situation', as Mr Peacock construes it to be. I can find no easily discernible justification for or a purpose in this extension. If, on the other hand, Maître Waelbroeck's construction is correct, then no change was made.

Conclusion.

[88] The test I have to apply is set out in *R v International Stock Exchange of the United Kingdom and the Republic of Ireland Ltd, ex p Else (1982) Ltd* [1993] QB 534 where Sir Thomas Bingham MR held (at 545):

> '... [I]f the facts have been found and the Community law issue is critical to the court's final decision, the appropriate course is ordinarily to refer the issue to the Court of Justice unless the national court can with complete confidence resolve the issue itself. In considering whether it can with complete confidence resolve the issue itself the national court must be fully mindful of the differences between national and Community legislation, of the pitfalls which face a national court venturing into what may be an unfamiliar field, of the need for uniform interpretation throughout the Community and of the great advantages enjoyed by the Court of Justice in construing Community instruments. If the national court has any real doubt, it should ordinarily refer.'

[89] With regret I conclude that the correct application of Community law in this case is not so obvious as to leave no scope for any reasonable doubts. I am compelled, therefore, to refer the questions to the Court of Justice. My misgivings are obvious. Were the matter one of domestic law my first impression would prevail. Dishonest trade in these goods must be stamped out. Sections 17 and 18 of the Finance Act 2003 provide ample safeguards for honest traders, though they will be put to inconvenience. Like Jacob LJ, I encourage the Commissioners to apply the impugned law in the expectation of eventual victory in Luxembourg. With so much money at stake I earnestly hope the Court of Justice will be able to expedite the determination of the questions we reluctantly have to send them.

Order accordingly.

Stephen Hetherington Barrister.