

Neutral Citation Number: [2005] EWHC 831 (Ch)

Case No: CH/2004/APP/0496

**IN THE HIGH COURT OF JUSTICE**  
**CHANCERY DIVISION**

Royal Courts of Justice  
Strand, London, WC2A 2LL

**Before :**

**THE HONOURABLE MR. JUSTICE HART**

**Between :**

**ABBEY NATIONAL PLC**

**Appellant**

**- and -**

**-**

**THE COMMISSIONERS OF CUSTOMS  
AND EXCISE**

**Respondents**

**Mr David Goy QC and Ms Claire Simpson** (instructed by **Messrs. Cameron McKenna**) for the Appellant.

**Mr Kenneth Parker QC and Mr Tim Ward** (instructed by **Customs and Excise Solicitors**) for the Respondents.

Hearing dates: 14<sup>th</sup>, 15<sup>th</sup> February 2005

Judgment date: 6 May 2005

## **Justice Hart:**

1. This is an appeal and cross-appeal from the decision (“the Decision”) of the VAT & Duties Tribunal (Dr Nuala Brice and Mrs L M Salisbury) released on 21 June 2004. The background to the case is set out in paragraphs 12-14 of the Decision which read as follows:

“12. For the purposes of its business the Appellant came to own a large number of properties both freehold and leasehold. By the late 1990’s the Appellant owned approximately 1,000 such properties of which about half were freehold and half leasehold. Some of the freeholds were very valuable and some of the leaseholds were virtually worthless tenancies of shop-like premises occupied by the Appellant’s branches. We saw a typical lease dated 23 December 1993 under which a landlord leased to the Appellant certain premises for the term of twenty-five years. The lease contained a covenant by the Appellant with the landlord “not to mortgage charge assign transfer underlet or part with the whole or underlet the whole or part of the demised premises without the consent of the landlord such consent not to be unreasonably withheld.” The lease also contained a provision that if there were any breach of the covenants on the part of the Appellant the landlord could re-enter the demised premises and the term should cease.

13. In early 2000 the Appellant considered a sale and leaseback arrangement under which it would sell most of its property portfolio (freeholds and leaseholds) to a third party who would then lease back to the Appellant such of the premises as the Appellant wished to occupy. The commercial advantages of such an arrangement for the Appellant were: that it released capital which could be invested elsewhere in the business; that it transferred the property risk to a third party; and that it aligned the Appellant’s property liability more closely with its business needs because it permitted the Appellant to vacate leasehold property which was surplus to its needs before the term of the lease expired. It was also intended that, after the transfer of the properties, the new owner would manage the whole portfolio. Negotiations were held with a number of parties and ultimately agreement was reached with Mapeley Columbus Limited (Mapeley).

14. There was no difficulty in the Appellant transferring the freehold properties to Mapeley nor was there any difficulty in the Appellant assigning its long leasehold interests to Mapeley where there was no requirement to obtain the consent of the landlord to such assignment. However, two difficulties arose in respect of those shorter leases where the consent of the landlord to the assignment was required. First, a number of

such consents was required and they would take more time to obtain than was available. Secondly, it was thought to be unlikely that the landlords would consent to assignments to Mapeley which was a new company without a track record of financial strength. In order to overcome these difficulties the concept of a virtual assignment was developed. Under such a virtual assignment the Appellant would transfer all the economic benefits and burdens of the shorter leases to Mapeley and the Appellant would remain in occupation of the premises and would pay a principal fee to Mapeley which was similar to the rent it would have paid if there had been a formal lease back. Most of the shorter leasehold properties were the subject of the virtual assignment.”

2. The issues before the Tribunal related to the correctness of two decisions made by the respondents (“the Commissioners”) dated 7<sup>th</sup> March 2003.
3. The first related to the case where the appellant (“Abbey”) remained in occupation pursuant to the “virtual assignment” mentioned in paragraph 14 of the Decision, and was that the supply by Mapeley to Abbey was not an exempt supply consisting of the leasing or letting of immovable property but a standard rated supply of agency and property management services. The Tribunal held that the Commissioners had been correct in so deciding. Abbey appeals this decision.
4. The second related to those cases where relevant premises were subject to underleases granted by Abbey and where the effect of the agreement between Abbey and Mapeley had been to transfer the economic benefit of those underleases to Mapeley, and was that the rents due to Abbey under those underleases, when paid by the undertenants to Mapeley as provided for by the agreement, were consideration for standard rated supplies of agency and property management services made by Mapeley to Abbey. The Tribunal held that the Commissioners were wrong in so deciding, preferring the argument of Abbey that the rents “accrued” to Mapeley for the purposes of Paragraph 8(1) of Schedule 10 to the Value Added Tax Act 1994 with the result that Mapeley was to be treated as the person who made exempt supplies to the undertenants.
5. It was common ground that in the cases where an actual, as opposed to a “virtual”, assignment had taken place, with a leaseback to Abbey, the rent payable by Abbey was payable in respect of an exempt supply by Mapeley consisting of the leasing or letting of immovable property, and that where sub-leases existed the rent payable thereunder to Mapeley was similarly payable in respect of an exempt supply. The case therefore raises the question whether a different VAT treatment was required in the cases where, as between Abbey and Mapeley, an identical economic effect had been achieved by the mechanism of the so-called “virtual” assignment.
6. The legislation with which I am concerned stems from Article 13B of the Sixth Council Directive (77/388/EC) which provides that Member States shall exempt

“(b) the leasing or letting of immovable property”

That provision is implemented in UK law by the inclusion as Item 1 of Group 1 under Part II of Schedule 9 to the Value Added Taxes Act 1994 of

“[t]he grant of any interest in or right over land or of any licence to occupy land ... other than [a list of exceptions which are not here relevant]”.

It is common ground that the Directive has direct effect, and all the argument before me has in fact focused on its wording rather than that of the statutory provision.

7. Paragraph 8(1) of Schedule 10 to the 1994 Act (which applies by virtue of section 51 with respect to land and buildings) provides:

“8(1) Where the benefit of the consideration for the grant of an interest in, right over or licence to occupy land accrues to a person but that person is not the person making the grant-

“(a) the person to whom the benefit accrues shall for the purposes of this Act be treated as the person making the grant;... .”

There is no provision corresponding to this in the Sixth Directive.

8. The European Court has had to consider the meaning of Article 13B(b) in the following cases: *EC Commission v. United Kingdom* (Case C-359/97) [2000] STC 777 (“*Commission v UK*”); *Maierhofer v. Finanzamt Augsburg-Land* (Case C-315/00) [2003] STC 564 (“*Maierhofer*”); *Stichting ‘Goed Wonen’ v Staatsecretaris* Case C-326/99, [2003] STC 1137 (“*Goed Wonen*”); *Customs and Excise Commissioners v. Mirror Group plc* (Case C-409/98) (“*Mirror Group*”) and *Customs and Excise Commissioners v. Cantor Fitzgerald International* (Case C-108/99) [2001] STC 1453; *Lubbock Fine & Co. v. Customs and Excise Commissioners* (Case C-63/92) [1994] STC 101.
9. The following principles can be derived from these cases.
10. First, the meaning of the expression “leasing or letting of immovable property” cannot be determined by the interpretation given to such an expression by the law of a Member State, but has an independent meaning in Community law: see *Maierhofer* at p.577 paragraphs. 25 and 26; *Commission v UK* at p.805 para.63.
11. Secondly, the expression must be construed strictly since it constitutes an exception to the general principle that VAT is to be levied on all services supplied for a consideration by a taxable person: See *Commission v. UK* supra at p. 805, paragraphs 63 and 67 and *Mirror Group* at paragraph 30.
12. Thirdly, the definition of “leasing or letting of immovable property” may be wider than such a concept under national laws. The availability of the exemption is not, for example, dependent upon whether the right acquired as a result of a supply is a right in property or is a purely personal right as against the person making the supply. This is apparent from the exclusion from the exemption for certain supplies in the hotel sector (see *Commission v UK* supra at p.805 para.66). The UK legislation itself provides exemption for the grant of licences to occupy land, and in Scotland for the grant of personal rights to call for or be granted an interest in land.

13. Fourthly, in order to determine whether a transaction comprises a letting, account must be taken of its “essential features”. In *Maierhofer*, where the question related rather to the question whether the letting of a prefabricated demountable building amounted to the letting of “immovable property”, the court rejected the argument of the UK government that significance had to be attached to the question of whether land as well as buildings were included in the letting so as to avoid the risk of construction or repair work being dressed up to look like an exempt transaction, saying at p.578 para.39

“...[I]t is appropriate to point out that art 13B(b) of the Sixth Directive defines exempt transactions by reference to the nature of the transactions effected. In order to determine whether a transaction comprises a letting or construction or repair work, account must be taken of its essential features (see as regards art 2(1) of the Sixth Directive, *Card Protection Plan Ltd v. Customs and Excise Comrs (Case C-349/96, [1999] 2 AC 601, para 29)* irrespective of the way in which it might be artificially presented.”

14. Fifthly, the “essential features” of leasing or letting should be identified by adopting a functional approach. Applying that approach Advocate General Jacobs in *Goed Wonen*, after referring to Advocate General Darmon’s formulation in *Lubbock Fine* at paragraph 39, ventured the following as a definition:

“84. ‘Leasing or letting of immovable property’ within the meaning of Article 13B(b) includes in my view agreements whereby one party grants the other the right to occupy a defined immovable property as his own and to use or even take profits from that property for an agreed (definite or indefinite) duration in exchange for remuneration linked to that duration”

15. In this connection it should be noted that in *Goed Wonen*, where the question was whether the grant of a usufruct could fall within the exempting provisions, the usufruct in that case gave the right to use the property, including the right to sublet it and retain the rent received. The Commission sought to argue that the rights acquired were different from those acquired on a letting for a number of reasons, one of which was that the usufructuary acquired not merely the right to use the property in question but also the right to enjoy the fruits of it. That argument was not accepted by the court.
16. Paragraphs 16 to 24 of the Decision set out the Tribunal’s findings as to the relevant provisions of the agreement (“the Master Agreement”) whereby Abbey agreed to sell its properties to Mapeley for a consideration of £457.25m and in return Mapeley agreed to grant leases back to Abbey of those premises which it wished to occupy.
17. The salient features of that complex documentation for present purposes consisted in Abbey’s transfer to Mapeley of the following rights:
  - i) the right to have assigned to it the leases concerned on the completion date. If, for any reason, an assignment were not executed on the completion date, Mapeley was entitled to insist on the execution by Abbey of the “Virtual

Assignment”: clause 4. The Virtual Assignment was to take the form of the document specified in Schedule 5. Schedule 2 contained general provisions relating to the sale of the properties, paragraph 4 of which, so far as material provided as follows:

“4. LEASES AND THIRD PARTY LANDLORDS'  
CONSENTS

4.1 Where the Transfer or Assignment of any Transferred Property is not completed on the Completion Date because of the need to obtain the consent of any Third Party Landlord to both the Transfer or Assignment or Lease, then:

(a) Until completion takes place, where legally possible, Abbey National shall hold the benefit of each Sub-Lease in trust for the Purchaser in all respects; and

(b) Abbey National and the Purchaser shall enter into, in respect of Transferred Properties situated in England and Wales, Northern Ireland, the Republic of Ireland, a Virtual Assignment or, in the case of Transferred Properties situated in Scotland, a Scottish Property Agreement. It is agreed that there should only be one Virtual Assignment or Scottish Property Agreement for each owner of such a Transferred Property in each relevant jurisdiction.

4.2 Subject to the provisions of Paragraph 4.3 below, if the terms of any of the Leasehold Properties require the consent of a Third Party Landlord to the Assignment or Transfer and/or to the grant of a Lease in respect of the whole or relevant part of the Leasehold Property:

(a) completion of the Transfer or Assignment of that Leasehold Property shall take place on the later of the Completion Date and the date which is five Business Days after the consent of the relevant Third Party Landlord to the Assignment or Transfer and/or grant of the Lease shall have been obtained in terms reasonably acceptable to Abbey National and the Purchaser;

(b) in any event where the consent of the Third Party Landlord is refused or not obtained in terms reasonably acceptable to Abbey National and the Purchaser such refusal or absence of acceptable consent shall not constitute frustration of this Agreement, nor shall it entitle either of the parties to terminate its obligations under this Agreement and the whole obligations of the parties hereto shall otherwise continue in full force and effect;

(c) in any event where consent of a Third Party Landlord to the Assignment or Transfer and/or grant of the Lease is

required Abbey National confirm that they will not, without the consent of the Purchaser, have any involvement in the application process and undertake not to contact the Third Party Landlord, mortgagee or other person in connection with such application; and

(d) If a Third Party Landlord intimates to the Purchaser or to Abbey National (in any way whether or not by service of a notice pursuant to Section 146 of the Law of Property Act 1925 or Section 14 of the Conveyancing and Law of Property Act 1881 (where relevant)) that it is considering Forfeiture (as defined in the Virtual Assignment) or Irritancy (as defined in the Scottish Property of Agreement) of the lease under which such Leasehold Property is held by reason only of the completion of a Virtual Assignment in relation to such Leasehold Property under the terms of this Agreement, then, at its absolute discretion, Abbey National may:

(i) at its own cost seek to avoid Forfeiture or Irritancy, whether by way of formal application to Court for relief or otherwise; or

(ii) give notice to the Purchaser to withdraw the relevant Leasehold Property from the scope of this Agreement for all purposes, whereupon the Virtual Assignment shall be treated as being void and of no effect immediately upon service by Abbey National of such notice and, to the extent required by law, the Purchaser shall enter into such contractual documentation thereafter as may be required to give effect to such notice.

(e) In the event that Abbey National serves notice pursuant to clause 4.2(d)(ii), the parties shall agree an adjustment to the Original Reference Amount, having regard to the Model, to reflect the absence of the relevant Leasehold Property and, in the event of any dispute between the parties, the matter may be referred by either party for determination by the Change Expert.

4.3 The Purchaser shall act as the agent of Abbey National for the purpose of obtaining the consent of the Third Party Landlords to the Assignment or Transfer and/or grant of the Lease. Subject to the provisions of paragraph 4.4 of this Section (in respect of the timing of applications only), the Purchaser shall use its reasonable endeavours to obtain the consents of the Third Party Landlords to the Assignment or Transfer and/or grant of the Lease. In connection with such applications, Abbey National shall not be required to provide, or procure the provision of any security or rent deposit other than an authorised guarantee agreement or other guarantee

which any Third Party Landlord may require in accordance with the terms of the relevant lease.”

- ii) the economic benefits and burdens of the leases including the right to rents paid by under-tenants: see clause 4 of Schedule 5, set out in paragraph 18 of the Decision but for convenience repeated here:

“4. ECONOMIC BENEFIT

The intention of the Virtual Assignment is to pass to the Purchaser all of the economic benefits and burdens of the Leases and Underleases in respect of the Properties, together with the obligation to manage all dealings with the Landlords and Undertenants as if the Properties had been assigned to the Purchaser but without this Virtual Assignment creating, vesting or granting any legal or equitable estate in the Premises in or to the Purchaser. To this end, any monies from any Undertenants pursuant to any Underleases, together with all proceeds of any disposal of the Leases or for the surrender of any Underleases, shall belong to the Purchaser.”

- iii) the right to deal with the leases as if it were the legal owner. This is the effect of clause 6 of Schedule 5 which provided that:

“6. DEALINGS WITH THE PREMISES

6.1 Until the termination of this Agreement in accordance with clause 7 Abbey National hereby irrevocably appoints the Purchaser to be its agent to act on its behalf and in its name in all dealings connected with the Properties. This will include, but not be limited to:”

There then followed a long list of particularising all imaginable acts which the owner of a lease might wish to do and concluding with “anything else related to the operation of the leases and underleases” and the clause concludes:

“Save where any of such dealings are intended to reflect the provisions of the Master Agreement or the Occupancy Regulations, the Virtual Assignment will permit the Purchaser full discretion in the conduct of negotiations with third parties and in the terms of any such dealings which are agreed with such third parties. ”

- iv) the right to be paid by Abbey “the Principal Fee” in respect of Abbey’s occupation of the premises: see clause 2 of Schedule 5.

- 18. These may be described as the salient features of the ‘virtual’ assignment to Mapeley. The ‘virtual’ equivalent to Mapeley’s leaseback of the premises was achieved by the following provisions:

- i) Clause 8.4 of the Master Agreement which provided that in relation to such premises the appellant:  
“shall occupy [them] pursuant to the Virtual Assignment”;
- ii) Clause 2 of the Virtual Assignment, set out in paragraph 19 of the Decision and for convenience repeated here which provided that:  
“2. OCCUPATION  
  
Abbey National shall be entitled to occupy all or any part of the Premises (subject to the Master Agreement) for the Term, and in consideration of the agreements on the part of the Purchaser contained in this Virtual Assignment, shall pay to the Purchaser the Principal Fee as described in the Particulars, subject to review in accordance with the Occupancy Regulations. Abbey National shall be deemed to have the benefit of the rights set out in Schedule I and shall be deemed to be subject to the rights set out in Schedule II, in the same way as if such rights had been granted or reserved. Abbey National's occupation shall be subject to the matters set out in Schedule III.”
- iii) In cases where Abbey did not wish to occupy a virtually assigned property no such rights of occupation were granted to Abbey by the Virtual Assignment and Mapeley was free to seek undertenants for it: see clauses 8.16 and 8.17 of the Master Agreement and paragraph 23 of the Decision.

The rival arguments on the appeal

- 19. Abbey submitted that the characteristics of a lease predominated in the rights and obligations assumed by the parties, asserting:
  - i) that the effect of clause 8.4 of the Master Agreement coupled with clause 2 of the Virtual Assignment gave Abbey the right to occupy the virtually assigned properties; and that
  - ii) the right of occupation was for an agreed duration in exchange for remuneration (the Principal Fee) linked to that duration.
- 20. Abbey further argued that the “functional” approach, which ensured the equal treatment of taxable persons who in economic terms perform equivalent transactions (see *Maierhofer* paragraph 39 and *Goed Wonen* paragraphs 55-58 and 78-81 of the Advocate-General’s opinion), supported the tax treatment of the ‘virtual’ assignment and ‘virtual’ leaseback as being the same as that accorded to the actual assignment and leaseback.
- 21. Thirdly, Abbey drew attention to the difficulty in identifying for what kind of supply the Principal Fee was payable if it was not a payment for a leasing or letting of immovable property. The Commissioners had argued at one stage that it was consideration for ‘agency and management services’ provided by Mapeley. The Tribunal, noting that the services provided by Mapeley were identical to those

provided in the cases where a legal assignment had taken place, had rejected that contention, holding that it was payable partly to enable Mapeley to discharge Abbey's liability to pay rent to the landlord and only as regards any excess in respect of agency and management services. Abbey submitted that this analysis still produced an irrational distinction between the Principal Fee payable under a 'virtual' as opposed to an actual assignment. Indeed, submitted Abbey, the analysis not only had no rational justification but overlooked the fact that the rent payable by Mapeley could exceed the Principal Fee: in such a case it made no sense to say that the agency and management services had somehow evaporated.

22. For the Commissioners it was submitted that the effect of the virtual assignment was to give neither a legal nor an equitable interest to Mapeley. That was expressly stated in Schedule 5 paragraph 4, which in any event did no more than reflect the general law under which specific performance would not be ordered of the agreement to assign without the landlords' consent: see *Warmington v. Miller* [1973] QB 877 and *Rosen v. Trustees of Camden Charities* [2001] 2 AER 399, CA. Accordingly, Abbey remained legal and equitable lessee rather than by virtue of the agreement with Mapeley. Since Abbey conferred no right to occupy on Mapeley, Mapeley cannot have made a supply of letting of the property back to Abbey.

### Discussion

23. As between those two sets of rival submissions there is one fundamental area of disagreement, namely the extent to which Abbey's right of occupation under the Virtual Assignment can be said to be a right accorded to it by Mapeley and thus a 'letting' by Mapeley for the purposes of the Sixth Directive. That area of disagreement has two aspects. First there is the question whether a 'letting' for the purposes of the Sixth Directive necessarily connotes the grant of a right of occupation or whether it includes also a grant of a right to enjoy the fruits of the property. The second aspect is whether, on the facts of this case, the relevant right has been created. This second aspect has to be considered both in relation to the rights conferred by Abbey on Mapeley in relation to the properties, and in relation to those conferred by Mapeley on Abbey.
24. So far as the first question is concerned, I do not think there can be much doubt that "letting" in the Sixth Directive can include a situation where no right of occupation is in fact granted. Mr Goy QC for Abbey gave the example of a freeholder who has granted a lease of property to a lessee at a rent and who then grants a further lease for a shorter period subject to and with the benefit of the original lease to a third party. The third party will acquire no more than the right to enjoy the rent from the original lessee, but there is no reason to doubt that there will have been a letting to the third party.
25. The second aspect of the question is that which presents the difficulty. So far as the first part of the transaction is concerned (the Virtual Assignment), there is less difficulty in accepting Abbey's submissions than there is in relation to the second (the virtual lease-back). What Mapeley gets under the virtual assignment are all the rights listed at paragraph 17 above, i.e. the right to have assigned to it the leases, the rights to all rents paid by underlessees, the right to payment in respect of Abbey's occupation, and the right to deal with the leases in all respects as if it were the legal owner (subject to Abbey's right of occupation). This bundle of rights, carefully

constructed so as to reflect, so far as legally possible, the effects of a legal assignment, can and in my judgment should be equated with a legal assignment for the purposes of the Sixth Directive. They reproduce the essential features of a letting as identified by the decisions of the ECJ to which I have referred.

26. The reason why it is harder so to analyse the “virtual leaseback” side of the transaction lies in the incontrovertible fact that if one asks, as a matter of national law, by what right Abbey continues in occupation pending the execution of a legal assignment, the only answer which can be given is that the right of occupation is ascribable to Abbey’s rights under the lease: Mapeley never itself having had a right of occupation cannot have conferred one on Abbey. If that is the correct analysis for VAT purposes, the result must follow that the nature of Mapeley’s supply to Abbey will differ according to whether a legal assignment and leaseback has been executed or not, even though the economic pattern of the transaction is identical in both cases and, on a Hohfeldian analysis, the legal relationship between Abbey and Mapeley (although not those between Abbey, Mapeley and the landlords) is practically identical.
27. In my judgment such a consequence is not inevitable, nor is it correct. The relationship to be considered is that between the parties to the relevant supply. For that purpose the relationship of either of those parties to the landlord can be ignored. The answer to the question “for what supply is the Principal Fee paid?” is that it is paid pursuant to an agreement between Mapeley and Abbey under which, as between those parties, Abbey is occupying the property pending the completion of the assignment to Mapeley on which the latter can insist. In my judgment the Tribunal’s conclusion that it was being paid in part in connection with the exempt supply to Abbey by the landlord (to the extent of the rent payable by Mapeley on Abbey’s behalf to the landlord) and as to the balance for agency and management services provided by Mapeley was wrong. The essential nature of Mapeley’s supply to Abbey does not change on execution of the legal assignment by virtue of Mapeley then enjoying, for a scintilla of time, a right of occupation of the premises.
28. I derive some support for that conclusion from the principle of neutrality relied on by Mr Goy. The dangers of being too ready to resort to that principle to the exclusion of others (such as the objective of legal certainty) have recently been elaborated by Lord Walker of Gestingthorpe in his speech in *Lex Services plc v. Customs & Excise Commissioners* [2004] STC 73 at paragraphs 27 to 31. In my judgment this is not a case where application of the principle of neutrality causes an unacceptable degree of damage to the objective of legal certainty: as I have sought to demonstrate the type of transaction which the parties sought to create between themselves was that which the Sixth Directive identifies as a “letting”.
29. Both parties invited me, in the case of doubt, to refer a question to the ECJ. I do not claim to have found my decision on the point an easy one. Nevertheless my hesitation has not been as a result of any doubt on the interpretation of the Sixth Directive but rather as to how the relevant provisions should be applied to a complex of rights and obligations which are very much the creature of the national law. In those circumstances it appears to me from the decision of the ECJ in *Staatssecretaris van Financien v. Shipping and Forwarding Enterprise Safe BV*, Case C-320/88 [1991] STC 627 that a reference would be inappropriate. In that case a Dutch company (A) had contracted to sell immovable property to another (B) but, rather than completing

the transfer, had given B an irrevocable power of attorney to transfer the property. The Hoge Raad asked the ECJ (1) whether a supply of goods only took place where legal ownership was transferred and (2) whether it took place in the circumstances of that case. The ECJ answered the first question in the negative but directed that the second was a matter for the national court.

### The cross-appeal

30. If I am right in the foregoing analysis the cross-appeal falls to be dismissed for the same reasons as the appeal is allowed. If I am wrong, it needs to be separately considered.
31. The point is a short one on the construction of paragraph 8(1) of Schedule 10. Under the terms of Schedule 2 paragraph 4(1)(a) of the Master Agreement it is provided that pending completion:

“... where legally possible, [Abbey] shall hold the benefit of each sub-lease in trust for [Mapeley] in all respects.”
32. What is now paragraph 8 of Schedule 10 to the 1994 Act (and was then paragraph 7 of Schedule 6A to the Value Added Tax Act 1983) was considered by the House of Lords in *Nell Gwynn House Maintenance Fund Trustees v. Customs and Excise Commissioners* [1999] STC 79. The question there was whether the paragraph could be relied on by the Maintenance Trustees in respect of sums paid to them by tenants for providing services to a landlord. The Maintenance Trustees sought to rely on the paragraph in order to have those sums treated as being part of the consideration for the grant of the tenancies. That argument was rejected. Lord Slynn, echoing Slade LJ’s analysis in the Court of Appeal, said at p.93:

“Paragraph 7 of the Schedule is general, but it seems to me that it is really aimed at the situation where the legal title is in one person, so that he can make a grant of an interest in the land, but the beneficial interest is in another person, so he receives any rent or other payment for the grant of the lease ..... I think ... that paragraph 7 is directed to the case where trustees grant an interest in land on behalf of the beneficiary and the benefit of the consideration for the grant accrues to the beneficiary”.
33. In my judgment unless the words “in trust... [etc]” in Schedule 2 paragraph 4(1)(a) can be read down in some way so as not to mean what they say, the Tribunal was entirely correct in the conclusion to which it came. Mr Parker QC submitted that they ought to be read down since it is fundamental to the Sixth Directive that liability to VAT accrues only to the person who has made the supply, relying in particular on Article 2 and the definition of “Taxable person” in Article 4(1). In the present case Abbey was making the supply to the sub-tenants and Mapeley was not. He submitted therefore that paragraph 8 should not be “extended” to subvert the general principle.
34. My difficulty with that argument is that the provisions of paragraph 8(1) appear to me to be clear and unambiguous in their application to the similarly clear and unambiguous declaration of trust in paragraph 4(1)(c) of Schedule 2. I would add that

it seems to me unsurprising that Parliament has made it necessary to make provision for the application of the Sixth Directive in circumstances where the national law is capable of making, and sometimes must make, a distinction between legal and beneficial entitlement to the consideration receivable in respect of a supply. The fact that it has done so does not in my judgment subvert any fundamental principle in the Sixth Directive.

### Conclusion

35. Accordingly I would allow the appeal and dismiss the cross-appeal.