

IN THE HIGH COURT OF JUSTICE

CHANCERY DIVISION

REVENUE LIST

**BESTWAY (HOLDINGS) LIMITED**

**Appellant**

- v -

**DAVID ALEXANDER LUFF (HMIT)**

**Respondent**

**Mr David Goy QC and Miss Aparna Nathan, instructed by Messrs Anthony Oberman & Co, for the Appellant**

**Mr Timothy Brennan, Counsel, instructed by The Solicitor for the Inland Revenue for the Respondent**

Hearing: 2-3 December 1997

Adjourned for submissions in writing received on 30 January 1998 and 11 February 1998

Judgment: 20 February 1998

**THE HONOURABLE MR JUSTICE LIGHTMAN**

**JUDGMENT**

**1. INTRODUCTION** This is an appeal by the taxpayer Bestway (Holdings) Ltd ("Bestway") against a decision in principle of the Special Commissioners ("the Commissioners"). Bestway is the holding company of a group of companies whose trade is the sale of goods by wholesale from various self service cash and carry supermarkets. These are housed in buildings ("the Buildings") which accommodate the supermarkets and the necessary stock for this purpose. Bestway's appeal to the Commissioners (which took some four days of argument and evidence and included a visit to two of the Buildings) were against assessments for corporation tax in respect

of the period from the 1st April 1984 to 30th June 1993. The outstanding issue was the entitlement of Bestway to industrial buildings allowances in relation to the Buildings. Bestway's claim to such allowances was denied in whole or in part by the Respondent, the Inspector of Taxes ("the Inspector"). The agreed question of principle for determination by the Commissioners was:

"Are the whole or any part or parts (and if so what part or parts) of the premises industrial buildings for the purpose of section 7 Capital Allowances Act 1990), [on the ground that they are] occupied by a licensee for the purpose of its trade, or are the premises otherwise disqualified within section 7(3) [on the ground that they are a] showroom"

The Commissioners held that no part of the Buildings was a showroom on the ground that the limited attempts at display of goods at the Buildings were de minimis and that the steel racking on which goods available to customers were placed was not to their best advantage, but to facilitate the speedy disposal of goods to educate purchasers who knew precisely what they wanted to purchase. The Inspector does not challenge that holding. The difficult and important questions raised are whether the Buildings or parts or parts thereof qualify as industrial buildings on the ground that they are in use for the purpose of a trade or a part of a trade which "consists in...the subjecting of goods or materials to any process" or which "consists in the storage of goods or materials". The Commissioners answered the questions in the negative. Bestway appeals against that decision, maintaining that the Commissioners erred in law.

It is common ground that authoritative guidance in the correct approach to be adopted on the appeal is provided in the speech of Lord Lowry in *IRC v. Scottish and Newcastle Breweries Ltd* 55 TC 252. What was at issue in that case was the meaning of the word "plant" in the capital allowance legislation. He said (at p.272 F-H):

"1. It is a question of law what is the meaning to be given to the word 'plant' and it is for the courts to interpret its meaning, having regard to the context in which it occurs. 2. The law does not supply a definition of plant or prescribe a detailed or exhaustive set of rules for application to any particular set of circumstances, and there are cases which, on the facts found, are capable of decision either way. 3. A decision in such a case is a decision on a question of fact and degree and cannot be upset as being erroneous in point of law unless the Commissioners show by some reason they give or statement they make [in their decision] that they have misunderstood or misapplied the law in some relevant particular. 4. The Commissioners err in point of law when they make a finding which there is no evidence to support. 5. The Commissioners may also err by reaching a conclusion which is inconsistent with the facts which they have found.

A gloss may be placed on proposition 1 above to this extent that, whilst the question

whether e.g. a particular article is plant is a question of law, nonetheless if the word "plant" is not a word of art, it must be interpreted according to its ordinary meaning as a person who speaks and understands English and is assumed to have studied the authorities, accurately and not pedantically, would interpret it in its context: see *Cole Brothers v. Phillips* [1982] 1 WLR 1450 at 1453 per Lord Hailsham.

Bestway contends on the appeal that the Commissioners show in the reason they have given that they misunderstood the law; alternatively that the only reasonable conclusion on the facts contradicts the determinations they have arrived at.

The hearing before me commenced on the 2nd December 1997. On the 3rd December, the hearing was adjourned for further submissions after the delivery of judgement by the Court of Appeal in the case of *Girobank v. Clarke* [1998] STC 182 ("*Girobank*"). Judgement was given by the Court of Appeal on the 19th December 1997. To achieve savings in costs Counsel made the further submissions in writing on the 30th January and the 11th February 1998.

**II. FACTS** Bestway owns and claims allowances in respect of the Buildings, which are in Abbey Road Wembley, Croydon, Lewisham and Luton. The Abbey Road Building is the most important, for it houses the head office and is the source of supply of goods to the other three supermarkets. The evidence before the Commissioners was by agreement limited to the conditions and character of the Buildings at Abbey Road and (as representative of Croydon and Lewisham) at Luton. The commissioners visited the premises at Abbey Road and Luton. The Buildings are owned by Bestway which has granted licences to use them to its subsidiary Bestway Cash & Carry Ltd ("*Cash & Carry*"). A very large part of the trading operation is carried on by Cash & carry. But other subsidiaries also carry on trading operations at the Buildings, including Bestway Milling Ltd, Map (UK) Ltd ("*MUL*") and Map Trading Ltd ("*MTL*"). The Buildings are used for the business operations of the Bestway group as wholesale supermarkets. They are not retail shops, for they are not open to the public. The group's customers are mainly retail traders and caterers of various types to whom the group sells groceries, tobacco, confectionery, wines, beers, spirits and household goods. In addition to sales to UK residents, the group also maintains a small but significant export trade, mainly of groceries. Normally customers collect their purchases from the Buildings and arrange their own transport of the goods purchased, but some deliveries are made by Cash & Carry to major customers.

The Building at Abbey Road is a former warehouse of 240,000 square feet, which has since been extended and adapted. 40,000 square feet is used as a bonded warehouse storing imported wines and cigarettes and tobacco. Customs duties on these goods are only paid when they are removed from the warehouse either for sale or for delivery to another branch. The layout and activities at Abby Road underwent a change in 1991. These are detailed in the Commissioners' decision and do not require repetition in the judgement. It is sufficient to say that parts of the Abbey Road Building are accessible to customers and parts are not and that in both parts goods are stacked on very tall steel racking aligned in bays. In areas accessible to customers, in case of food products lower parts of the rack contain stock available to customers, whilst the upper part contain back up stock protected by being encased in clear plastic shrink wrapping: in case of household goods, cigarettes and liquor, steel racks are not used.

and these items are set out for sale in a manner similar to that which one would expect to find in a retail supermarket. An area labelled "Map UK Ltd" was used pre 1991 by MUL for repackaging, sorting and preparing for sale products purchased mainly from China and consisting to a large extent of spices; since 1991 it has been occupied by MUL as a rice mill where large quantities of rice, lentils and pulses are cleaned and polished in impressively large machines. Since 1991 MTL, which deals in similar grocery products to those sold by Cash & Carry but originating from the Bestway Group, has occupied an area. The role of this company is to disguise the source of (and name on) the products, which otherwise competitors might be unwilling to stock.

The Building at Luton is smaller, covering 92,000 square feet. There is no bonded warehouse or rice mill. There is very little shrink wrapping. Otherwise the premises and procedures are similar to those at Abbey Road.

At both stores stock is in the Building on average 6-8 weeks before it is turned-over on sale to customers.

### **III. LEGISLATION**

The allowances claimed in this case are principally in respect of accounting periods prior to 1990 and accordingly fall to be determined on accordance with the provisions of the Capital Allowances Act 1968 ("the 1968 Act"). Section 7 of the 1968 Act (so far as material) provides as follows:

"7(1) Subject to the provisions of this section, in this Chapter 'industrial building or structure' means a building or structure in use- (a) for the purpose of a trade carried on in a mill, factory or other similar premises ... (e) for the purposes of a trade which consists in the manufacture of goods or materials or the subjecting of goods or materials to any process or (f) for the purposes of a trade which consists in the storage- (ii) of goods or materials which are subjected, in the course of a trade, to any process, or (iii) of goods or materials which having been manufactured or produced or subjected, in the course of a trade, to any process having not yet been delivered to any purchaser, or (iv) of goods or materials on their arrival by sea or air in any part of the United Kingdom. (2) The provisions of subsection (1) of this section shall apply in relation to part of a trade or undertaking: Provided that where part only of a trade or undertaking complies with conditions set out in the said provisions, a building or structure shall not, by virtue of this subsection, be an industrial building or structure unless it is in use for that part of that trade or undertaking (2A)..... (3) Notwithstanding anything in the preceding provisions of this section, but subject to the provisions of subsection (4) of this section. 'industrial building or structure' does not include any building or structure in use as, or as part of, a dwelling house, retail shop, showroom, hotel or office or for any purpose ancillary to the purposes of a dwelling house, retail shop, showroom, hotel or

office, (4) Where part of the whole of a building or structure is, and part thereof is not, an industrial building and the capital expenditure which has been incurred on the construction of the second mentioned part is not more than one quarter of the total capital expenditure which has been incurred on the whole building or structure the whole building or structure and every part thereof shall be treated as an industrial building or structure.

Section 87(4) of the 1968 Act provides as follows:

"Any reference in this Part of this Act to any...building shall be construed as a reference to a part of a building... Provided that they where the reference is expressed to be the whole of the building or structure, this subsection shall not apply."

allowances are however also claimed in respect of the period 1991-3 and these are governed by the capital Allowances Act 1990 ("the 1990 Act"). It is common ground that (for all practical purposes in this case) Section 18 of the 1990 Act is in identical terms, and accordingly I need draw no distinction in this judgement between the periods before and after 1990 and the two Acts

#### **IV.STOAGE**

Bestway contend that the Buildings or at least parts of them qualify for capital allowances on the ground that they are used for storage purposes within the meaning of section 7(1)(f).

The Commissioners rejected this contention. The relevant part of their decision reads as follows:

"...we must ask ourselves whether the trade carried on by the Bestway Group involved the storage of goods or materials.

We are inclined to the view that any storage which takes place at Bestway's premises is insufficient to satisfy the provisions of the statute. It is clear from the evidence that Cash & Carry relies on the speedy disposal of its stock. Stock levels are carefully managed to the extent that they are run down towards the end of the accounting year 'in order to improve the appearance of the balance sheet'... In our view goods are not stored at Bestway's premises. The items on the upper shelves of the tall racks which are not immediately available for purchase by the customers and the items held in the general storage areas...are merely back up stock held at a minimum level in order to ensure that an adequate supply is available for purchase by customers.

We find as a fact that storage within the meaning attributed to it by section 70(1)(f) does not take place within Bestway's premises. (1)

we hold to this view even in relation to the contents of the bonded warehouse, where once again we find that there is speedy turnover of stock".

The critical issue is the meaning of the words "a trade which consists in the storage" of the goods and materials specified in Section 7(1)(f) ("the Specified Goods"). The construction of these words, and in particular the word "storage", requires an examination of them in their statutory context. My analysis is as follows:

(1) the statutory context is legislation dating back to the Income Tax Act 1945 designed to encourage industry (and in particular manufacturing, processing, producing, importing and allied trades) by the provision of tax incentives in the form of capital allowances in respect of industrial buildings; see *Vibroplant Ltd v. Holland* (1981) 54 TC 658 at 667 ("*Vibroplant*"). It is to be expected that the allowances will only be available when the use of the building is such as is calculated to advance the statutory object;

(2) Section 7(1) requires as a condition of entitlement to a capital allowance that the building must be used for one of the specified qualifying purposes. Two of these purposes are: (a) for a trade carried on in a mill (which is a place which "processes an article"), a factory (which is a place which "makes an article") or other similar premises: see Section 7(1)(a) and *Vibroplant* at p.668; or (b) a trade which consists in certain specified activities. The activities relevant in his case are; the processing of goods or materials and the storage of goods or materials subjected to a process;

(3) a building may be in use for the purposes of a trade which qualifies it for allowances though it is in use at the same time (and indeed more intensively) for another non-qualifying trade. The use of a building for dual purposes, one qualifying and one not, may qualify the building for allowances so long as the use for the qualifying purpose is not small or insignificant and such that it could not reasonably be brought within the Act: see *Saxone, Lilley & Skinner (Holdings) Limited v. CIR* 44 TC 122 at 140 ("*Saxone*");

(4) a building, in use for a purpose which does not of itself qualify it for allowances under Section 7(1) (e) or (f), may nonetheless qualify if the use is ancillary to a use which does qualify: see *Sarsfield v. Dixons Group plc* [1997] STC 283 at 298. Thus a building may be in use for the purposes of a trade consisting in a "mill, factory or other similar premises" or of a trade carried on of the manufacture or processing of goods or materials, if the building is used for the storage of goods or raw materials to be used in, or of the product of, that trade;

(5) the conditions which Sections 7(1) (e) and (f) require to be complied with are strict: the use is to be of a building (and not a part or parts of a building) and the trade is to consist in (and not merely involve or include) the specified activity. The strictness in respect of both elements is however relaxed by subsequent provisions.

Section 87(4) provides that a part of a building may constitute an industrial building if the statutory conditions are satisfied in respect of that part. Section 7(2) provides that, if part only of the trade carried on satisfies the statutory conditions, a building or part of a building in use for that part of the trade may qualify as an industrial building. I shall later in this judgement have to consider what constitutes a part of a trade;

(6) the extended ambit of sections 7(1) (to which I have referred to in (4) above) and the relaxation's (to which I have referred to in (5) above) are reflected in section 7(4). This subsection is designed to disqualify from entitlement to allowances buildings used for the purposes there specified (which include a showroom or shop). The draftsman recognised that it was necessary to spell out that the disqualification extended to buildings or parts of buildings used for any of these specified purposes or for any purpose ancillary to these purposes;

(7) Section 7(1)(f) in terms strictly limits use which qualifies thereunder for allowances to use for a trade which does not merely involve or include storage, but which consists in storage of the Specified Goods. Storage must be the (and not merely a) constituent of the trade. But Section 7(2) relaxes this restriction and provides that, where storage is not the trade carried on, but is part of the trade carried on, a building or part of a building used for this purpose qualifies for the allowances;

(8) whilst Section 7(4) expressly disqualifies from entitlement to allowances a building or part of a building used for the trade of a retail shop or showroom (and accordingly a retail supermarket) and for storage ancillary to such use, it is common ground that (perhaps because they were not yet thought of in 1945) there is no such disqualification of a building or part of a building used for the trade of a wholesale supermarket or use ancillary to such trade. Accordingly if and so far as a building is in use for the purpose of storage of the Specified Goods and such use is part of the trade of a wholesale supermarket, by virtue of Section 7 (2) the building may attract the allowances; see Copol at pp.585-6.

With this analysis in mind, I turn now to the question of construction raised in this case. The Buildings are plainly used for the trade of a wholesale supermarket which is a use which does not qualify for capital allowances. But if part of that trade consists in the trade of the storage of the Specified Goods in the Buildings or parts of them, Bestway can nonetheless qualify for the allowances claimed. The first issue is accordingly whether what is done at the buildings constitutes "storage" within the meaning of Section 7. Only if this question is answered in the affirmative does the second question arise, namely whether the storage is of the Specified Goods.

Mr Goy for Bestway submits that "storage" is an ordinary English word with the meaning of "keeping in reserve for future use or disposal" and that this meaning should be attributed to the word as it appears in Section 7(1)(f); and if this is done, it covers the use of the areas of the Buildings where any of the Specified Goods are kept, or at any rate any of the Specified Goods other than those immediately available to purchases. Mr Brennan for the Inspector submits that, in the context of this legislation and having regard to the character of the Specified Goods, what is required is a form of warehousing, and not merely the storage which any wholesaler wants for his goods (citing Copol).

I have found this question difficult, but at the end of the day I have concluded that the Commissioners' decisions cannot be challenged and indeed correct. The authorities make clear that there may be "storage" where goods are kept or held for a limited period and indeed for shorter periods than the 6-8 week period during which Bestway's goods are in the Buildings. In *Saxone* the shoes were held to be stored in a warehouse though they remained there for 10-13 weeks or less. In *Crusabridge Investments Ltd v. Casing International Ltd* 54 TC 246 ("*Crusabridge*") a building was held to qualify: (a) under Section 7(1)(f)(ii) because tyres were "stored" though often for no more than 7 days awaiting removal for processing (i.e. remoulding) by remoulders; and (b) under Section 7(1)(f)(iii) because the processed (i.e. remoulded) tyres still owned by the remoulder were stored there pending delivery to a purchaser. But the length of time during which goods are kept or held can only be one, and not the decisive factor or the factor of first importance, in determining whether they are stored: the determining factor must be the purpose for which the goods are kept or held. If goods are delivered for safe keeping to a depository (e.g. a bank providing a safe deposit), so long as the goods remain in the possession of the depository they may be described as "stored"; but this would not be the apt description of goods handed over in the course of his business to a repairer or pawnbroker.

In this case what is critical is the nature of the enterprise intended to be carried on and actually carried on by Bestway at the Buildings and the role played by the stock in that enterprise. For a building is only used for storage if the purpose of keeping goods there is their storage as an end in itself: there is no such use for storage if the goods are kept there for some other purpose: consider *Kay v, Burrows* [1931] AC 454. All the stock in the present case is kept in the Buildings, not for storage, but for sale. No goods are reserved or withheld for future use: they are all likewise available for sale and intended to be sold as soon as the turnover allows. For practical reasons only part of the stock can be made physically available as soon as required to meet demand. In short, as it seems to me, "storage" in Section 7(1)(f) means keeping in storage as purpose and end in itself, and does not extend to such storage as is merely a necessary and transitory incident of the conduct of the business of a wholesale supermarket. The goods enter the Buildings upon their final journey to the customers. The 6-8 weeks of stock at any time in the Buildings may be likened to stock on an extension shelves or on a conveyor belt to the open shelves. Far from being kept in reserve, the stock is in the process or in course of being made available to purchasers at the Buildings.

It is submitted by Bestway that this conclusion is inconsistent with the decision in *Crusabridge*. The decision in *Crusabridge* may be explained on its own facts, namely that there was in that case a finding that the collection and storage of tyres was "an essential part" of the business: see pages 248C-249G. But in any event I do not think that the decision should stand in the way of what is clearly the correct answer in this case.

**V. SUBJECTION TO PROCESS** Bestway contends that the Buildings or part of them have been in use "for the purpose of a trade or part of a trade which consists in the subjection of goods or materials to any process" within the meaning of Section 7(1)(e) of the 1968 Act.

It is common ground that the part of Abbey Road Building used as a rice mill and areas where there are freezer compartments and cold rooms are used for the purpose

of subjecting goods or materials to a process within the meaning of the provision. The live issue relates to areas where one or more of six operations are carried out. These operations which (as listed in the Commissioners' decision) are as follows:

"(a) the checking and sorting of goods; (b) the repackaging of goods on arrival; (c) the labelling of goods; (d) the unpacking of goods; (e) the reading of product codes on goods; [and] ... (g) the repackaging of goods by Map (UK) Ltd".

The relevant part of the Commissioners' decision reads as follows:

"In our judgement the [above] operation... do not amount to the subjection of goods or materials owned by the Bestway Group to a process. The operations are mere preliminaries to Cash & Carry's trade of selling. Furthermore, we do not believe that the various operations described above treat Cash & Carry's goods with the substantial measure of uniformity of treatment or system of treatment required to enable the operations to become a process. Some goods are unpacked, other are not. Some goods are labelled, others are not. Some goods do not have product codes on their arrival, although the majority do.

Having observed some of the operations decided above at both Abbey road and Luton, we have come to the conclusion that these operations do not constitute processes. We find as a fact that the goods and materials of the Bestway Group are not subjected to a process within the meaning of section 70(i)(e)."

On the 17th February 1997, Bestway's accountants wrote a letter to the Commissioners requesting them to clarify one point in their decision. The relevant part of the letter read as follows:

"You will recall the area now occupied by the rice mill was, prior to 1991, used to package spices and repack tins of Chinese groceries.

The spices would arrive in large sacks and via a machine be placed in cellophane packets and boxes. This procedure ceased in 1991 and therefore you did not see this particular machine or process. Mr Choudrey did explain the position under questioning from Mr Goy.

The tins of groceries would arrive in larger quantities and be broken down in to smaller units placed on trays and passed through a shrink wrapping machine and then assembled on pallets. This machine and process is still carried out today although on a very much reduced scale and you did see this machine in action.

Mr Goy has pointed out to us that during the hearing he asked

specifically for a determination to whether the rice mill area pre 1991 qualified for allowances. The decision seems to be silent on this point.

We have asked Mr Williams [who represented the Inspector before the Commissioners] whether he would wish to join us in writing for clarification. After consideration he felt the question had possibly been answered impliedly although not explicitly. He had no objection to us writing for clarification and hence a copy of this letter has been sent to Mr Williams. You will realise that in order for us to agree figures with the Inland Revenue as suggested in the final paragraph of the decision this point needs resolving.

The reason we do not think the point has been covered is that for instance the packeting of the spices does have a measure of uniformity and also would seem not to be preliminary to selling. The same would apply to the repackaging of the tin via the shrink wrapping machine. Hence the reasons for concluding processing does not take place in the rest of the warehouse would not seem to apply to this area.

We would be pleased to receive any clarification you can give."

The operations referred to are those listed above. The last paragraph on page 6 of the decision referred to reads as follows:

"The area to the rear of the premises labelled 'Map('UK') was used by that company for repackaging, sorting and preparing for sale products purchased mainly from china and consisting to a large extend of spices"

The Commissioners were only asked to give a decision in principle, and it is common ground that all I can do is decide whether the decision in principle can stand and, if it cannot stand, give such further guidance as may be of assistance to the commissioners in reconsidering their decision. In the eventuality that I decide that the decision is wrong, it is common ground that I am not in the position myself to decide what (if any) allowances Bestway is entitled to.

The decision whether Bestway is entitled to allowances requires consideration of two distinct questions: (a) whether the use of the Building or parts of the Building for the six specified operations constitutes use for the "part" of Bestway's trade within the meaning of Section 7(2); and (b) if so, whether the use for such part of Bestway's trade consists in the subjection of the Specified Goods to a process. Bestway can only succeed if both questions are answered in the affirmative. The first of these questions was not raised or considered by the Commissioners. It occurred to me after receipt of Counsel's first written submissions on the 30th January 1998, and I accordingly invited Counsel to assist me to decide this question. which they readily did in their

second written submissions received on the 11th February 1998. Since the second of these questions is the only question argued before and decided by the Commissioners, I shall turn to that question first.

(a) Subjection to Process

The question raised is what is sufficient to constitute use of a building (or part of a building) for the purposes of a trade (or part of a trade) consisting in the subjection of goods or materials to a process. The guidance afforded by the authorities, which is limited, is to the following effect:

(1) the phrase "subjection of goods to any process" must be considered as a whole": see Nourse LJ in *Girobank* at p.186; (2) it is not sufficient that " anything is done to goods": see *Kilmarnock Equitable Cooperative Society v, CIR ("Kilmarnock")* (1966) 42 TC 675 at 681 (per Lord Guthrie) and *Vibroplant* at 666 (per Dillon J) and 667F-668H (per Templeman LJ). Thus the mere conveyance of goods is not enough: some form of treatment is necessary: see Lord Guthrie in *Kilmarnock* at p. 681. The treatment may fall short of manufacturing a new article or making any alteration whether in the nature or size of the goods or materials: see *Kilmarnock* per Lord Clyde at p.679 and per Lord Migdale at p.683. It is not necessarily insufficient that what is done is a preliminary to something else being done, and in particular to the trade of selling: Lord Clyde in *Kilmarnock* at p.680. Thus it was held in *Kilmarnock* that it is sufficient that coal is washed, graded and attractively packaged to make it more marketable. But this does not mean that the fact that a particular activity is a preliminary to something else being done may not be relevant to whether that activity constitutes the subjection of goods to a process; (3) subjection to a process means a treatment (or course of operations) involving the application of a method of manufacture or adaptation of goods or materials towards a particular use, purpose or end: pre Lord Cameron at p.685 in *Kilmarnock*; (4) for a trade or part of a trade to consist in the subjection of goods or materials to a process within the meaning of Section 7, it is not sufficient that individual items or defects are treated individually. There is required a substantial measure of uniformity of treatment or system of treatment: see Templeman LJ at p.688 in *Vibroplant*. Thus the servicing and repair of plant or a car is not the subjection to a process because the plant or car is treated individually; (5) the process need not be industrial or complex. In *Buckingham v. Securitas Properties Ltd* 53 TC 540, a building was used by a security company as a security area for the receipt of coins and notes in bulk form, the breaking of bulk, the splitting of the coins and notes into different amounts and the putting of these different amounts into 10,000 different wage packets each week. Slade J. held that the use did not qualify under section 7(1)(e) because the coins and notes did not constitute goods, but he expressed the view obiter that, if the coins and notes could have constituted goods, the exercise undertaken would have constituted the subjection of goods to a process within the meaning of the section; (6) the matter was perhaps taken a little further in *Girobank*. In that case, the issue arose whether a building used as a document and data processing centre constituted a building used for the purpose of trade consisting in the subjection of goods or materials to a process. The Court of Appeal held that the answer was in the negative because the items to which the procedures were applied at the centre were documents carrying information and that these did not constitute "goods or materials". The issue whether the procedures adopted at the centre constituted "the subject of goods or materials to a process"

accordingly did not arise for decision in the Court of Appeal, but was the subject of the expression of a provisional view.

The procedures were summarised in the decision of the Special Commissioner (reported [1966] STC 540 at 548A) as follows:

"The principal procedures at the Wigan centre applied to the documents received there by the machines and the various employees can be summarised as follows: (i) they are read visually, by OCR and magnetically; (ii) they are sorted into convenient batches for the next procedure, including clearing by another bank; (iii) they have rubber bands, paper clips and staples removed from them; (iv) occasionally torn cheques are repaired; (v) they are encoded with magnetically readable print; (vi) they have figures printed onto their face or reverse either for reading in a subsequent procedure or for audit trail purposes; (vii) they are microfilmed; (viii) the information they contain is converted in to information recorded on magnetic disc or magnetic tape; (ix) the information recorded on magnetic disc is transferred to magnetic tape; and (x) the information on the magnetic tapes is sent by telephone link to the mainframe computer Bootle.

None of the procedures at the Wigan centre involve the actual updating of customer accounts. This does not happen until the information is received at Bootle from the telephone link"

The Special Commissioner took the view that these were insufficient to constitute subjection to a process. But Lindsay J. took a different view, stating in his judgement (reported [1996] STC 540 at 563B):

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(1) " I find nothing [in the legislation and the authorities] that limits the broad width of 'any process' to processes only of an 'industrial' character, if by that is meant that something has to be made by the process, or that the operations have to be carried out only or chiefly by machines. Nor is it required of a process that it alters the goods and materials subjected to it in any way but rather it may suffice of a process that it should clean, sort or package the goods or materials fed into it. I hold also that it is no requirement of a process that it should be done with a view to the sale or disposition of the goods or material processed but that 'a process' does connate a substantial measure of uniformity or of treatment or system of treatment, in contrast (although doubtless the line will sometimes be difficult to draw) with individual treatments of the kind given, for example, to cars serviced in a garage or patients in a doctor's surgery."

Nourse LJ, giving a judgement with which the other members of the Court agreed, found it unnecessary to express a concluded view on this question, which he considered difficult, but stated that: "as at present advised, I rather prefer the view of the judge". It is to be noted that part of the exercise undertaken at the centre in that case was the conversion of information contained on the face of documents into information recorded on magnetic disc or magnetic tape. (7)I would add as an inference from all the authorities cited and from a reference to the statutory language in its context, that not every treatment of goods or materials constitutes a subjection to a process. A uniform treatment or system of treatment of some real significance is postulated. This is only to be expected in legislation designed to encourage industry where the word "process" is used in conjunction with the words "manufacture" and "production". A judgement has to be reached whether the treatment is sufficient to meet the statutory criteria and for the statutory purpose to attract the allowances.

I turn to the question whether the decision of the Commissioners is open to challenge. What Bestway did before the Commissioners was to identify six limited operations undertaken by it in the course of its trade of a wholesale supermarket, to characterise these operations as processes and to assert that part of its trade consists in those processes. This assertion was correct. This they did with the Buildings and the activities conducted there. Having received from experienced Counsel guidance as to the Law and the relevant authorities, they reached the considered conclusion that the answer was in the negative.

The questions before me are whether the Commissioners could reach the conclusions of fact which they did and whether those conclusions of fact are in law capable of supporting their decision. I am satisfied that the answer to both questions is in the affirmative. I can find in their reasoning no error of law. Bestway complain of their reference in their reasoning to the activities as "mere preliminaries to Sale" as indicating that they held the erroneous view in law that an activity cannot constitute a "subjection to a process" if it is a preliminary to sale. I do not read this reference as indicating anything of the sort. Indeed I find it difficult to believe that the Commissioners could have fallen into any such error since the passage in Lord Clyde's speech in *Kilmarnock* (a case cited to them), which establishes that this proposition is not correct, must very much have been in their minds. I read the reference to "mere" preliminaries as reflecting their judgement that, fairly and properly viewed, the activities in question were limited, mundane and of no substantial significance and that they could not properly be elevated to the status of processing goods or materials. They decided that as a matter of language (but properly informed by the authorities cited to them) the carrying on of these activities did not amount to the use of the Buildings or part of them for the purpose of the subjection of goods or materials to a process within the meaning of the section. This is a view they were entitled to take. Intuitively this view has much to recommend it. Indeed in my judgement to recognise the activities in the Buildings in this case (as claimed by Bestway) as use of the Buildings for the subjection of goods or materials to a process is totally unreal and to extend the availability of the capital allowances far beyond what the legislature can conceivably have intended.

(b)Part of a Trade

Mr Goy for Bestway submits that, in construing the word "part" regard should be had to the ordinary meaning of the word, and refers to a definition in the Shorter Oxford Dictionary, namely "that which with another or others make up a whole"; that for this purpose a trade can be described as an activity which normally comprises a whole series of actions taken in the course of a trade can be said to be part of a trade represents a part of that trade, reliance is placed on the decision of the European Court in *Schmidt v. Sparkasse Bordesolmen* [1995] ICR 237 ("*Schmidt*"). Under consideration in that case was a Directive safeguard the rights of employees on transfers of undertakings, businesses or parts of businesses. The Court held that the transfer of the function of cleaning one of the banks branches from an employee to an independent firm constituted for the purposes of the legislation there under consideration a transfer of part of the bank's business, though the activity in question was an ancillary activity carried on by a single employee. Reliance is also placed on the *Dillon J. in Vibroplant* (at p.686) which expressed sympathy with the view that the use of the buildings in that case, which was for servicing and repairing the plant which *Vibroplant* wished to hire out, was an essential part of *Vibroplant's* business of plant hire operators and part of their trade.

Mr Brennan for the Inspector emphasises the distinction between "a part of a trade" and "an activity undertaken in the course of a trade". He cites the well known passage in the judgement of *Rowlatt J. in Graham v. Green* [1925] 2 KB 37 at 40:

(1) "a conception of a trade...differs in its nature, in my judgement, from the individual acts which go to build it up, just as a bundle differs from odd sticks. You may say, I think, without an abuse of language, that there is something organic about the whole which does not exist in its separate parts."

Mr Brennan submits that the statutory language is "part of a trade", and not "any activity undertaken in the course of the trade"; and that it is not sufficient for an activity to be a component element in the trade. What is needed is (using the language of *Rowlatt J.*) a bundle of sticks or activities which constitute a significant separate and identifiable "part" of the building user's trade. His submission seeks to reflect the commercial reality that a trade may incorporate more than one separately identifiable "part-trade". Thus for example the trade of a garage proprietor may consist of two parts, a car showroom and a car repair shop. Likewise a trade may consist in making as well as selling surgical products: see *J G Ingram v. Calloghan* [1969] 1 WLR 456. This was recognised in other legislation e.g. section 163(1) of the Taxation of Chargeable Gains Act 1992 (which provides retirement relief from Capital Gains Tax on the disposal of "part of a business") and Regulation 3(1) of the Transfer of Undertakings (Protection of Employment) Regulations 1981 (which makes provisions in the event of "transfer of an undertaking...or part of one").

The choice between these two alternative constructions must depend in a consideration of the language used in Section 7(2) in the context of the legislature as a whole with attention to the statutory purpose of the legislation. On such a consideration I am satisfied that Mr Brennan's construction is correct. The trade of a company or an individual includes all its activities ultimately directed towards making

profits: see *Rolls Royce v. Bamford* (1976) 51 TC 319 at 346 B-C. Its trade may be a composite one. Mr Brennan gave an apt example of the trade of a person carrying on a garage business. The use of a building for the composite trade may not qualify for allowances under Section 7(1): but, if use for one of the two or more component parts does qualify, Section 7(2) extends qualification for allowances to the part or parts of the building used for this qualifying purpose. I think that the primary purpose of Section 7(2), is to make provision in this way for use of a building for a composite trade; and on any basis, to constitute a part of a trade within the meaning of Section 7(2) and to qualify for the allowances, the activities in question must be a significant, separate and identifiable part of the trade carried on. There is no inconsistency between this view and the dictum of Dillon J. in *Vibroplant* or the decision in *Schmidt*. This construction is in my judgement necessary to give effect to the statutory choice of the word "part" and the purpose which the legislation is intended to achieve. It cannot sensibly have been intended that the allowance should be available wherever and to the extent that any activity of the type described in section 7 takes place, and the statutory language is not apposite for this purpose.

I next turn to the question whether the six activities constitute a significant, separate and identifiable part of Bestway's trade carried on at the Buildings and accordingly a part of its trade. I am concerned whether I can or should seek to answer this question since it was a matter for a decision for the commissioners and they have not decided it. The parties however have, far from objecting to my deciding this question, by their written submissions invited me to do so. I am further reassured in answering it by the consideration that, by reasons of my upholding the Commissioners' decision that there was no Specified Goods to a process, my decision on this question does not affect the outcome of this appeal to me. In the circumstances I feel free, and indeed bound, to decide this question and I do so. I decide that the activities in question, aptly described by the Commissioners as "mere preliminaries" to the trade of selling carried out to some (but not all) goods in the course of the trade of wholesaling are not sufficiently significant for this purpose.

## **VI. CONCLUSION**

For the above reasons, I dismiss this appeal.