

# THE HIGH COURT

[No. 2020 87 R]

**BETWEEN**

**YESREB HOLDING LIMITED**

**APPELLANT**

**AND**

**REVENUE COMMISSIONERS**

**RESPONDENT**

## **JUDGMENT of Mr. Justice Tony O'Connor delivered on the of 6<sup>th</sup> May 2021**

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### **Introduction**

1. This appeal by way of case stated concerns two substantive issues:
  - (i) The availability of sub-sale relief from stamp duty pursuant to s. 46 of the Stamp Duty Consolidation Act 1999 (“**SDCA**”) for a particular deed of conveyance;
  - (ii) In the absence of such relief whether the appellant (“**Yesreb**”) is accountable for the entirety of the duty assessed on that deed of conveyance which gives effect to two contracts for the sale of land  
  
with an incidental issue about the advancement of a point relying on the Statute of Frauds which was not addressed at first instance.

### **Background**

2. On 1 July 2005, Mr Dunne entered into a contract to purchase 24 Shrewsbury Road Dublin known as “Walford” for €57.95 million from the executors of an estate (“**the 2005 contract**”).
3. In a manuscript document signed by Mr Dunne and Ms Dunne (née Killilea) dated 23 July 2005 (“**the declaration of trust**”), Mr Dunne confirmed that his entire interest in the 2005 contract was held by him “on foot of our property settlement agreement of 23 March 2005 established to ensure the financial independence of my wife and children for the future

and to secure their independence from my property investments”. The earlier “Property Transfer Agreement” dated 23 March 2005 was in a similar manuscript form and signed by Mr and Ms Dunne.

4. The deed of conveyance dated 29 March 2013 (“**the 2013 deed of conveyance**”) which conveyed the fee simple in Walford to the appellant (“**Yesreb**”), recited that Yesreb paid €14 million to “the beneficial owner” described as Ms Dunne.

5. A related online stamp duty return filed on 26 April 2013 of €270,000 was calculated by reference to the €14 million consideration paid by Yesreb. Under “Vendor details” Matsack Nominees Ltd (“**Matsack**”) and Ms Dunne were only named. The appellant’s solicitors in their reply to a request from the Court for typed copies of documents mentioned at the hearing of this appeal, stated that “This return was not before the Appeal Commissioner and did not form part of the Case Stated.”

6. After inquiries were conducted by the respondent (“**Revenue**”), Yesreb was notified in February 2016 that the stamp duty payable was €1.429 million together with interest of €269,670 which after taking account of the stamp duty already paid of €270,000 left a balance of €1,428,670 then due.

### **The questions**

7. The determination (“**the determination**”) of the unsuccessful appeal from that assessment was dated 23 December 2019 by the Tax Appeals Commissioner (“**the Commissioner**”). The Commissioner by case stated in April 2020, at the request of Yesreb, seeks the opinion of the Court along the following lines, whether upon the facts proved or admitted, the Commissioner was correct in law in her determination that: -

- (i) The conditions necessary to avail of sub-sale relief in accordance with s. 46 of the SDCA, in respect of the deed of conveyance dated 29 March 2013, were not met and that Yesreb was thereby unable to avail of sub-sale relief;

- (ii) Yesreb was the accountable person in respect of the conveyance on sale dated 29 March 2013 in accordance with s. 1 of SDCA;
- (iii) Where sub-sale relief does not apply, the sub-purchaser is liable for stamp duty in respect of the deed of conveyance including the first sale.

**Relevant statutory provisions on stamp duty**

8. The following are relevant in this appeal: -

- (i) Section 1 of SDCA;

“ – (1) In this Act, unless the context otherwise requires –

‘accountable person’ means –

- (a) the person referred to in column (2) of the Table to this definition in respect of the corresponding instruments set out in column (1) of that Table by reference to the appropriate heading in Schedule 1.

....

TABLE

Instrument Heading specified in                      Accountable person

*Schedule 1*

(1)	(2)
CONVEYANCE or TRANSFER on sale of any stocks or marketable securities.	The purchaser or transferee.
CONVEYANCE or TRANSFER on sale of any property other than stocks or marketable securities or	The purchaser or transferee.

a policy of insurance or a policy of life insurance.	....
--	------

(ii) Section 2 of the SDCA provides: -

“ (1) Any instrument which—

(a) is specified in *Schedule 1*, and

(b) is executed in the State or, wherever executed, relates to any property situated in the State or any matter or thing done or to be done in the State, shall be chargeable with stamp duty.

(2) The stamp duties to be charged for the benefit of the Central Fund on the several instruments specified in *Schedule 1* shall be the several duties specified in that Schedule, which duties shall be subject to the exemptions contained in this Act and in any other enactment for the time being in force

(3)....

(4) Where any instrument chargeable with stamp duty is not stamped or is insufficiently stamped-

(a) the accountable person shall be liable, and

(b) where there is more than one such accountable person they shall be liable jointly and severally, for the payment of the stamp duty or, where the instrument is insufficiently stamped, the additional stamp duty and such duty, additional duty and any penalty relating to any such duty shall be deemed to be a debt due by the accountable person to the Minister for the benefit of the Central Fund and shall be paid to the Commissioners ... ”.

The relevant part of SDCA Schedule 1 provides as follows:

“CONVEYANCE or TRANSFER on sale of any property other than stocks or marketable securities or a policy of insurance or a policy of life insurance”.

(iii) Section 7 of SDCA provides: -

“7. Except where express provision to the contrary is made by this or any other Act—

(a) an instrument containing or relating to several distinct matters shall be separately and distinctly charged, as if it were a separate instrument, with duty in respect of each of the matters;

(b) . . . .”.

(iv) Section 45(4) of SDCA provides: -

“(4) Where there are several instruments of conveyance for completing the purchaser's title to property sold, the principal instrument of conveyance only shall be charged with ad valorem duty, and the other instruments shall be respectively charged with such other duty as they may be liable to, but the last-mentioned duty shall not exceed the ad valorem duty payable in respect of the principal instrument”.

(v) Section 46 of SDCA provides: -

“(1) Where—

(a) a person having contracted for the purchase of any property, but not having obtained a conveyance of that property, contracts to sell the same to any other person, and

(b) the property is in consequence conveyed immediately to the sub-purchaser, then the conveyance shall be charged with ad valorem duty in respect of the consideration moving from the sub-purchaser.

2) Where—

(a) a person having contracted for the purchase of any property but not having obtained a conveyance contracts to sell the whole, or any part or parts of that property, to any other person or persons, and

(b) the property is in consequence conveyed by the original seller to different persons in parts or parcels,

then the conveyance of each part or parcel shall be charged with ad valorem duty in respect only of the consideration moving from the sub-purchaser of such part or parcel, without regard to the amount or value of the original consideration.

(3) ....”

**Principles for this case stated**

9. The long-established principles applicable to this type of appeal were set out by Blayney J. in *O’Culacháin v. McMullan Bros. Ltd.* [1995] 2 IR 217 at pp 222-223. There the appellant had contended that the Circuit Court judge had failed to make a finding as to whether canopies (in the context of the appellant’s petrol station) formed part of the setting in which trade was conducted. It was contended that such a finding was required before considering the function of the canopies and whether they constituted “plant” for the purposes of allowing a permissible deduction under the corporation tax code. Ultimately the Supreme Court found that the Circuit Court judge had no obligation to make any special finding as to whether the canopies were part of the premises or setting since a finding that they were part of the premises or setting would not have ruled them out as also being plant. Further the Circuit Court judge’s finding as to the functions fulfilled by the canopies had not been unsupported by the evidence.

10. Blayney J. explained on pp 303-304:

“(1) Findings of primary fact by the Judge should not be disturbed unless there is no evidence to support them.

(2) Inferences from primary facts are mixed questions of fact and law.

(3) If the judge's conclusions show that he has adopted a wrong view of the law, they should be set aside.

(4) If his conclusions are not based on a mistaken view of the law, they should not be set aside unless the inferences which he drew were ones which no reasonable judge could draw.

(5) Some evidence will point to one conclusion, other evidence to the opposite: these are essentially matters of degree and the judge's conclusions should not be disturbed (even if the Court does not agree with them, for we are not retrying the case) unless they are such that a reasonable judge could not have arrived at them or they are based on a mistaken view of the law”.

These principles apply equally to the determination of the Commissioner.

**Jurisdiction of the Court in this case stated**

**11.** It is convenient to clarify now the limited jurisdiction of the Court in this appeal. S 34 of the Finance (Tax Appeal) Act 2015 (“**the 2015 Act**”) which was commenced on 21 March 2016 inserts Pt 40A and more particularly ss. 949AP, 949AQ and 949AR of the Taxes Consolidation Act 1997 (“**TCA**”). S 949 AP provides that the right of appeal consists in granting a party who is dissatisfied with a determination of the Commissioner as being erroneous on a point of law the right to submit a notice in writing to the Commissioner to require that a case be stated and signed for the opinion of the High Court. The option of an appeal to the Circuit Court by way of full hearing was abolished together with the procedure for an appeal by way of case stated therefrom. Save where expressly provided that the decision of the Commissioner is final and conclusive, the appeal by way of case stated



procedure is only available against determinations of the Commissioner in respect of an appealable matter under the relevant statutory provisions relating to tax.

**12.** S 949AQ enumerates the requirements for the case stated in mandatory language. A party may not set out an additional or an alternative point of law in the notice requiring a case stated once the 21-day period for the service of that notice has expired. Collins and O'Reilly in *Civil Proceedings and the State* (3rd edition, 2019) at para 2-48 explain: "In a departure from the former practice, the Appeal Commissioners are responsible for drafting a case stated and may not delegate this task to a party.... The procedure has clearly been designed to reduce the very considerable delays that had been encountered in bringing on cases stated for hearing due to the practice of seeking the parties' agreement to the text of the case stated."

**13.** A party dissatisfied with the contents of a case stated must proceed by way of motion in the High Court rather than by way of judicial review. Further the High Court on its own motion may return the case stated to the Commissioner for amendment.

**14.** I set out S 949AR of TCA in its entirety in order to appreciate the ultimate role of the Court in this appeal:-

**15.** "(1) The High Court shall hear and determine any question of law arising in a case stated and-

- (a) shall reverse, affirm or amend the determination of the Appeal Commissioners
- (b) shall remit the matter to the Appeal Commissioners with its opinion on the matter, or
- (c) may make such other order in relation to the matter as it thinks just, and may make such order as to costs as it thinks fit.

(2) The High Court may send the case stated back to the Appeal Commissioners for amendment, in which case-

- (a) the Appeal Commissioners shall amend the case stated accordingly, and

(b) the High Court shall, thereafter, proceed in one of the ways specified in subsection (1)”

**16.** In summary the Court is not exercising its original jurisdiction and has a limited jurisdiction provided by statute. Therefore, whether the Court may entertain a question which was not addressed before or by the Commissioner is an issue which requires deft handling if new submissions are made which were not made before the Commissioner. In simple terms, additional facts cannot be introduced at the hearing of an appeal. The spectrum of appeals in which a new issue is sought to be argued was described by O’Donnell J in *Lough Swilly Shellfish Growers Co-Operative Society Ltd and anor v Bradley and anor* [2013] IESC 16 at para. 27 as follows:

... At one extreme lie cases such as those where argument of the point would necessarily involve new evidence, and with a consequent effect on the evidence already given (as in *K.D.*) [*K.D. (otherwise C.) v M.C.* [1985] IR 697] for example; or where a party seeks to make an argument which was actually abandoned in the High Court (as in *Movie News*) [*Movie News Limited v Galway County Council* (unreported, Supreme Court 25 July 1997)]; or, for example where a party sought to make an argument which was diametrically opposed to that which had been advanced in the High Court and on the basis of which the High Court case had been argued, and perhaps evidence adduced. In such cases leave would not be granted to argue a new point of appeal. At the other end of the continuum lie cases where a new formulation of argument was made in relation to a point advanced in the High Court, or where new materials were submitted, or perhaps where a new legal argument was sought to be advanced which was closely related to arguments already made in the High Court, or a refinement of them, and which was not in any way dependent upon the evidence adduced. In such cases, while a court might impose terms as to costs, the Court

nevertheless retained the power in appropriate cases to permit the argument to be made”.

17. The above was quoted approvingly by MacMenamin J in *Westlink Toll Bridge Limited v Commissioner of Valuation and Fingal County Council* [2013] IESC 42 before he went on to further address s 39 (5) of the Valuation Act 2001 (which contains similar wording as contained in s 949 AR (1) of the TCA). Then at para 52 of his judgment, MacMenamin J stated: “The jurisdiction of this Court is in turn delimited by s. 39(7) which provides that an appeal shall lie to the Supreme Court from the decision of the High Court. In my view, the Tribunal was not asked to make a decision on the argument sought to be raised by the Commissioner. The case stated did not address the issue. The new matter did not arise “on the case”. Thus, neither the High Court, nor this Court, could embark upon a consideration of that point, whether to reverse, affirm or amend the determination. The point is a simple one of jurisdiction. Neither this Court, nor the High Court would have had jurisdiction to entertain the point as, quite simply, it did not come within the terms of s 39 (5) of the Act of 2001. There had been no “determination” on the issue in the case stated. This Court had no jurisdiction to entertain the point on appeal.”

**Submissions for Yesreb on the substantive points**

18. Yesreb contends that in her analysis of the declaration of trust by Mr Dunne in favour of Ms Dunne, the Commissioner brought an incorrect view of the law to bear. It submits that there is no basis for the Commissioner to impose the following conditions in order to avail of s. 46(1) SDCA: -

- (i) “Identity - the purchaser in the main contract and the vendor under the sub-sale contract must be the same person, not the same name, but the same person;

- (ii) In consequence - the conveyance must have been in consequence of both the original contract and the sub-sale contract and must arise from contracts which are enforceable by means of specific performance;
- (iii) No intervening act – there must be no act other than the signing of the sub-sale contract, between the main contract and the execution of the conveyance”.

**19.** Counsel further submits that s. 46 SDCA does not provide that the transferor must be in any particular capacity, observing in written submissions that:- “The Act is focused on the property being transferred as it is of course the value of that property which is what gives rise to stamp duty”.

**20.** Further, it is contended that the capacity in which Mr Dunne acted after entering into the 2005 contract is not relevant. Mr Dunne had the capacity to enter into the sub-sale contract according to counsel. A conveyance had not been taken as a result of the first contract and the fact that there are a number of parties to the conveyance does not change the requirements of s. 46. The fact that the same property was conveyed is emphasised by Counsel for Yesreb.

**21.** In regard to the declaration of trust, Yesreb contends that a transfer of Mr Dunne’s interest was not needed. Mr Dunne alone could only transfer the title to the property as it remained vested in him (albeit holding the title as trustee for Ms Dunne). Neither Matsack (which was a designated nominee under a subsequent nominee agreement dated 9 October 2006 with Ms Dunne only) nor Ms Dunne were capable of transferring the beneficial title in the property to a buyer.

**22.** Counsel for Yesreb submits that an averment by Mr Dunne in an affidavit for other proceedings cannot affect the legal position because “there had never been a transfer of his contractual entitlements under the 2005 contract to Ms Dunne or Matsack”. This submission seeks to address the contents of an affidavit sworn by Mr Dunne on 12 October 2016 in

proceedings entitled *Christopher Lehane (Official Assignee) v. Gayle Dunne* [2017] IEHC 511, and more particularly para. 47 of the judgment which identified that Mr Dunne held Walford in trust for Ms Dunne “until 9 October 2006 when Matsack, (a nominee company controlled by the partners of Matheson Solicitors), assumed the role of trustee”.

23. Yesreb submits that neither the nominee agreement nor the averment of Mr Dunne in other proceedings establish that there was a transfer of Walford from Mr Dunne before the deed of conveyance. Only Mr Dunne could have obtained an order for specific performance of the 2005 contract and only he could have enforced the 2005 contract. In essence, the Commissioner was wrong according to Yesreb, to focus on capacity or identity because the whole thrust of s. 46(4) of SDCA concerns the transfer of the property.

**Legal submissions for Yesreb on “accountable person”**

24. Counsel submits that it is illogical for Yesreb to be obliged to pay the stamp duty on the combined consideration in the 2005 contract and the agreement for sale in 2013 between Mr Dunne and Yesreb (“**the 2013 contract**”). Counsel cites *Escoigne Properties Ltd. v. Inland Revenue Commissioners* [1958] AC 549 which considered s. 58 of the 1891 Stamp Act (this provision had applied in Ireland until the SDCA). There, a Mr Cohen agreed in 1950 to sell properties to company “A” in exchange for the allotment of shares in company “A”. After Mr Cohen died, a newly incorporated company (the appellant company) agreed without a written contract to purchase the same properties from company “A”. The executors in the estate of Mr Cohen executed five separate instruments at the direction of company “A” to transfer the properties to the appellant company. The House of Lords held that the effect of s 50(1) of Finance Act 1938 meant that the sub-sale relief was not available because the instruments were “...not executed in pursuance of or in connexion (sic) with an arrangement ...”.

25. Counsel for Yesreb focusses on the statement of Lord Somervell of Harrow at p. 563:

“It is common ground that the agreement of 30 June 1950, did not require an ad valorem stamp either when it was signed or when, the consideration being paid, the equitable interest passed under it to the old company. It is also common ground that, if it had been later completed by a conveyance of the legal estate, that conveyance would have been subject to an ad valorem stamp although the conveyance did not itself pass the interest valued. In other words, the conveyance on completion is stampable in respect of the value and transfer of the equitable interest although that has already been transferred and does not require the conveyance to vest it in the purchaser. In the present case the conveyance and other instruments come within s. 58(4). But for that subsection, it might have been suggested or held that double duty was payable, first on the completion of the sale to the purchaser and secondly on the completion of the sale to the sub-purchaser although carried out by the same instrument. Both transfers are covered by the one conveyance and the one stamp. Section 42, in my opinion, relieves an instrument which would otherwise be stampable in respect of the transfer of the equitable interest from one associated company to another. That interest might have already passed under an agreement for sale prior to the instrument of conveyance or transfer. The instrument would be relieved because in such a case, as I have said, the instrument is to be stamped in respect of the value and transfer of the equitable interest, although that has previously passed”.

**26.** On behalf of Yesreb it is submitted that s46 SDCA is designed to ensure that there is not a double charge to stamp duty contending inter alia that: “If Revenue’s logic is correct then what is to prevent a situation arising where the last person in a number of sub-sales is to pay stamp duty in respect of the value of all of those sales? This is illogical and does not arise from a literal reading of the section”.

27. Counsel for Yesreb contends that s7 SDCA only deals with the computation of the charge and the provision needs to be much more specific if stamp duty for the 2005 contract is to be foisted onto Yesreb.

**Agreed existence of a trust**

28. The parties in this appeal do not take issue now with the existence of the trust from 23 July 2005, whereby Mr Dunne held Walford in trust for Ms Dunne, despite the belief expressed by the Commissioner in her determination that insufficient evidence “was adduced in support of the existence of a trust between Mr Dunne and his wife from 1 July 2005”.

**Submissions for Revenue on substantive points**

Burden of proof

29. Counsel for Revenue cites the decision of the Supreme Court in *Bookfinders Ltd v The Revenue Commissioners* [2020] IESC 60 for the repeated view that an applicant for exemption from tax bears the burden of proving that the applicant is entitled to avail of relief such as that provided by s. 46 SDCA. In that case Bookbinders (trading as “Subway”) claimed that the tea and coffee which it supplied should be charged at 0% VAT rather than the 13.5% VAT rate for food and drink. One of the principal questions related to whether “food and drink” in part (xii) of the second schedule to the Value Added Tax Act 1972 should be read conjunctively or disjunctively

Fitch Lovell

30. Revenue also relies on *Fitch Lovell v Inland Revenue Commissioners* [1962] 3 AER 685 for the proposition that the court must look beyond the instrument itself to its nature and intended purpose while being informed by the intention of the legislature to confer a concession for sub-sale relief in order to avoid the imposition of double taxation. Fitch Lovell concerned the sale of shares where shareholders in I.B.S. Ltd who had accepted an offer were invited to complete a form of transfer with the name of the transferee and date of transfer left blank. Fitch Lovell Ltd on closing paid for those shares by issuing shares in Fitch Lovell Ltd

to the transferors. Fitch Lovell Ltd then entered into a sub-sale of those shares to its subsidiary, L and C Ltd which held the balance of the shares in I.B.S. Ltd. Finally, L and C Ltd took the incomplete forms of transfers and merely executed a document stating that it was the transferee. The decision of the Inland Revenue that this document amounted to a conveyance or transfer was upheld by the court.

Three conditions relied upon by the commissioner

**31.** The three conditions of “identity”, “in consequence” and “no intervening act” for availing of the s46 SDCA relief somewhat overlap according to Revenue.

**32.** Revenue suggests that “the necessity for the purchaser and the sub-vendor to be the same person does not arise from the use of the word “same” in ss. 1(a) (which is clearly a reference to the property being the same) but rather arises from the reference to a ‘person’”.

**33.** The first step in approaching matters according to counsel for Revenue is to ascertain whether the capacity and status of Mr Dunne remained the same in the sub-sale. Then one determines who signed and executed the contract in 2013. Crucially according to Revenue, Mr Dunne averred in other proceedings that he had ceased to be a trustee on the appointment of Matsack.

10% deposit in 2005

**34.** Counsel for Revenue also refers to the payment of the 10% deposit by Mr Dunne in 2005 and that his subsequent declaration of trust in favour of Ms Dunne divested him of that 10% beneficial interest.

Nominee agreement appointing Matsack

**35.** Counsel also highlights how Matsack’s entitlement as a matter of law to direct a conveyance of Walford was recognised in correspondence on behalf of the vendors to Mr Dunne in 2005. Moreover, there was clear evidence from correspondence between solicitors that the title deeds to Walford according to Counsel for Revenue “...were at all times held in the power or procurement of Ms Dunne” and under the nominee agreement, Matsack was obliged to hold the title documents. An escrow agreement between Ms Dunne, Yesreb and



Clerkin Lynch solicitors in 2013 provided that Clerkin Lynch held the title deeds “as escrow agent by way of equitable security for the repayment of the 2013 loan from Gayle Killilea to Yesreb Limited”.

**36.** Counsel for Revenue says that all of this leads to the conclusion that Mr Dunne did not have the capacity to perform the 2013 contract as trustee for Ms Dunne after the date of the nominee agreement. Mr Dunne had no title in 2013 and “a person simply cannot contract to sell something over which he/she has no right or title”.

#### Acknowledgement

**37.** It is also submitted for Revenue that Yesreb “ignores the terms of the 2013 conveyance which identifies that Ms Dunne is the beneficial owner of Walford” which is a correct interpretation according to the lawyers who drafted and approved the 2013 conveyance. Those lawyers included Matsack as a party to the 2013 conveyance which is yet another acknowledgment of what transpired.

#### Identity

**38.** Revenue concludes under the heading “Identity” that as and from 9 October 2006 (date of agreement nominating Matsack) Mr Dunne had: -

- (i) No legal interest in Walford because that remained vested in the vendors under the 2005 contract for sale;
  - (ii) No beneficial interest because it resided in Ms Dunne;
- and
- (iii) No bare or nominal trusteeship following the nomination of Matsack.

**39.** If Yesreb is correct in its submissions, Revenue maintains that all that is then required to avail of the s. 46(1) SDCA relief is for any name to be inserted in a subsale contract without any requirement that: -

- (i) That person had the necessary capacity to complete the sale, or,

- (ii) The individual was “the person” who had originally contracted to buy the property.

Counsel contends that the foregoing is an absurdity.

In consequence

**40.** Under the heading “In consequence”, Revenue contends that the property must be conveyed to the sub-purchaser in consequence (pursuant to s. 46(1)(b) SDCA) “of both the original contract and the subcontract”.

No intervening act

**41.** As regards “No intervening act”, Counsel for Revenue accepts (perhaps somewhat surprisingly) that “immediately” in s. 46(1)(b) SDCA does not mean that the transaction must occur within a short period of time. Rather, Revenue submits that it must occur without any intervening act or in the words of the Commissioner that there is a “seamless uninterrupted passage” from the contract to the subcontract. Counsel refers to the subsequent divestment by Mr Dunne of his 10% interest by way of the deposit paid which rendered him unable to enter into a legally enforceable sub-sale contract.

**42.** Ultimately, Revenue contends that the 2013 deed of conveyance completes both the 2005 and 2013 sale agreements.

Revenue on “accountable person”

**43.** Revenue refers to the definition of “accountable person” in s. 1 SDCA which appears in the relevant column as “The purchaser or transferee”. Revenue submits that s. 7(a) SDCA explains how the charge is computed as opposed to addressing the identity of the accountable person.

**44.** The above is a summary of the submissions made. There is little merit in elongating this judgment to mention each and every point addressed by the parties and considered by the Court.

### **Statutory interpretation**

**45.** O'Donnell J. in *Bookbinders Ltd. v. Revenue Commissioners* [2020] IESC 60

(Unreported, 29 September 2020) stated at para. 54 as regards the construction of ambiguous or obscure statutory provisions: -

“... I am satisfied that s. 5 of the Interpretation Act [2005] should not be applied in the interpretation of taxation statutes. However, the rest of the extract from [*McGrath v. McDermott* [1998] IR 258 at 276] is clearly applicable and provides valuable guidance. It means in my view, that it is a mistake to come to a statute – even a taxation statute seeking ambiguity. Rather, the purpose of interpretation is to seek clarity from words which are sometimes necessarily and sometimes avoidably opaque. However, in either case the function of the court is to seek to ascertain their meaning. The general principles of statutory interpretation are tools used to achieve a clear understanding of a statutory provision. It is only if, after that process has been concluded, a court is genuinely in doubt as to the imposition of a liability, that the principle against doubtful penalisation should apply and the texts construed given a strict construction so as to prevent a fresh and unfair imposition of liability by the use of oblique or slack language”.

### **Discussion**

Trustee

**46.** The principal question is whether the Commissioner was correct in her application of the law involving a person with interests in Walford as she found.

**47.** It may be trite to clarify that a person who acts as a trustee for an individual does not act as the trustee for another body simultaneously even though the same person may be the trustee for the other body. In other words, a trustee for person “A” cannot claim relief available to person “B” when acting as trustee for person “A”.

Contests between the parties

**48.** The parties contest each other's positions about the effect of the following matters: -

- (i) The trustee status of Mr Dunne on the passing of the entire purchase money in July 2006 given the deposit paid by Mr Dunne to the solicitors for the vendors in 2005 as stakeholders;
- (ii) The agreement dated 9 October 2006 whereby Matsack agreed to hold the trust fund comprising Walford and €25,000 when transferred;
- (iii) The tendering of Walford for sale by Matsack in October 2011;
- (iv) The averment of Mr Dunne in an affidavit that he held Walford in trust for Ms Dunne until 9 October 2006 when Matsack assumed the role of trustee;
- (v) The exchange of correspondence between solicitors for the various parties identified in the 2013 conveyance;
- (vi) The inclusion of the 2005 vendors of Walford with Mr Dunne as the “original trustee”, Ms Dunne as the “beneficial owner” and Matsack as the “present trustee” with Yesreb as “the sub-purchaser” in the 2013 deed of conveyance;
- (vii) Special condition 3.2 in the 2013 contract between Mr Dunne (“as trustee for Ms Dunne”) as “vendor” and Yesreb as “purchaser” which required Mr Dunne to procure that the deed of assurance be executed by the 2005 vendors for delivery on the closing of the 2013 contract.

#### Trust for Ms Dunne

**49.** Counsel for Yesreb clarified at the hearing before the Commissioner that the deposit was paid to the solicitors for the 2005 vendors as stakeholders. Counsel for Revenue notes that as the 2005 contract predated the Land and Conveyancing Law Reform Act 2009, no interest in Walford passed to Mr Dunne in 2005. I accept that Mr Dunne simply undertook to transfer the interests which he had in the 2005 contract into the name of Ms Dunne “or her nominee when called upon to do so”. Therefore, given the state of the evidence it is true that Mr Dunne’s interest in the 2005 contract following the payment of a balance of the agreed sale price was held in trust for Ms Dunne.

Nominee agreement appointing Matsack

**50.** That brings me to consider whether Mr Dunne's status as a trustee was terminated or assigned. Counsel for Yesreb refers the Court to Recital 2 in the nominee agreement dated 9 October 2006 which states: - "[Matsack] has agreed that it will hold all property [Walford and €25,000] transferred to it by the direction of [Ms Dunne] upon the terms of this nominee agreement". There is no evidence of a direction to Mr Dunne having been given by Ms Dunne according to Counsel for Yesreb in the nominee agreement. Revenue points to the circumstantial evidence which supports the fact that Mr Dunne had ceased to be trustee. That evidence was assessed by the Commissioner. This Court does not find any error of law on the part of the Commissioner in that regard.

Statute of frauds argument

**51.** It is an acknowledged fact that €25,000 was indeed paid to Matsack but that does not overcome the requirement under s VI. of the Statute of Frauds 1695 for "... assignments of any trust or confidence to be in writing, signed by the person granting or assigning the same, ..." according to Yesreb. Counsel for Yesreb contends that only Mr Dunne having created the trust could have assigned the trust which must comply with the Statute of Frauds or otherwise "...be utterly void and of no effect" which are the words in the Statute of Frauds.

Late introduction of argument for appeal

**52.** This Statute of Frauds point was not raised before the Commissioner and was not included in the original written outline submissions filed for the hearing of this appeal. In fact, it was only two days before the hearing of the appeal in this Court commenced, that solicitors for Yesreb notified Revenue that "Our client's counsel may refer to Sections 4 and 6 of the Statute of Frauds and accordingly we enclose copies of the relevant sections" In that way the book of authorities was updated. There was then an exchange of communications that day which lead to Yesreb's solicitors indicating that they would not be giving any additional outline of argument other than stating:-

“The provisions of the statute of frauds supports our argument that there must be an assignment of a trust. No such document exists. It is our submission that the Nominee Agreement does not do so as a matter of law. We are fully entitled to refer the court to the statute of frauds or any other legislation or legal authority on point. For the avoidance of doubt it is not a requirement that the same authorities nor indeed the same arguments are referred to or made in the High Court as before the TAC (indeed Revenue have included the *Keston* case in its written argument which case was not opened in the TAC)... .”

No objection to argument if full or part performance

**53.** Counsel for Revenue at the end of the first day of hearing when asked by the Court about the introduction of the Statute of Frauds issue said that if Yesreb argues that there is nothing in writing and “seek to rely on the Statute of Frauds, I say that there is not only ample evidence of part performance but ample evidence of complete performance”.

Reluctance of this court

**54.** Despite that apparent willingness of Revenue to engage with the ground relying on the Statute of Frauds on behalf of Yesreb, the case law and the statutory provisions cited above behoves me to be circumspect in taking it into consideration. No matter what way the Court approaches what could be categorised ultimately as “a killer point”, it is quite apparent that the Commissioner did not address the facts in the case stated with an eye on whether there was a transfer from Mr Dunne in accordance with the Statute of Frauds. The Court in this appeal cannot embark on an examination of the facts to assess whether complete performance or the doctrine of part performance applies to defeat a Statute of Frauds type plea at this late stage. The Court is not aware at this stage whether one or other of the parties can or will urge the Court to return the case stated for amendment pursuant to s 949AR of the TCA.

**55.** The introduction of new or additional case law at the hearing of an appeal by case stated in order to bolster a substantive point made before the Commissioner is different to

introducing an argument which necessarily involves eliciting facts from the summary given by the Commissioner who had another focus at the time of preparing the summary for the case stated. Likewise, I accept the point made by the solicitors for Yesreb that the Court should not have regard to the online stamp duty return which was not before the Commissioner. In conclusion I decline to take the Statute of Frauds 1695 into account when determining the issues of law raised in the case stated before the Court now.

**Crux of the appeal**

**56.** The crux of this appeal is whether Mr Dunne had any interest to convey in the 2013 deed of conveyance. The Commissioner was “satisfied” that he “... had no interest in the property and had no capacity to enter into a contract for sub-sale in respect of the property. The operation of s 46(1) SDCA does not accommodate the insertion of the name of the purchaser under the original contract into the sub-sale contract in circumstances where that purchaser no longer has capacity as vendor in respect of the sub-sale contract. The joinder of a person in a contract for sub-sale in circumstances where that person’s involvement is unnecessary or gratuitous does not enable a claim for sub-sale relief in accordance with s 46(1) SDCA.”

**57.** The Court does not accept that “a person simply cannot contract to sell something over which he/she has no right or title” which was part of a submission for Revenue. However, a person claiming relief under s 46 SDCA bears the onus of establishing an entitlement to the relief according to the Supreme Court in *Bookbinders Ltd v The Revenue Commissioners* [2020] IESC 60.

**58.** S 46 SDCA does indeed refer to property but it also requires the person who contracted to purchase the property originally and who sells in the sub-sale or sub-sales to have the same identity. An act involving a cessation of interest for that person before the sub-sale is not facilitated by the plain wording of s 46 SDCA.

59. Applying the facts found by the Commissioner having regard to the correspondence between solicitors and to how the various parties through their solicitors conducted themselves, the Court will not gainsay the finding that Mr Dunne no longer had an interest in the 2005 contract.

60. Yesreb has failed to establish that the nominee agreement was not recognised by the relevant parties. In those circumstances the Commissioner did not err in her finding as of 9 October 2006 “that Mr Dunne ceased to hold a bare trusteeship”

61. This conclusion is bolstered by: -

- (i) The averment in the affidavit of Mr Dunne (despite the submission of counsel for Yesreb that a belief averred to on affidavit cannot change the legal position that he still held Walford in trust). It is difficult if not impossible to reconcile this argument for Yesreb with its onus to establish the facts and the law to benefit from the sub-sale relief;
- (ii) The existence of a tender of Walford by Matsack to expire on 24 October 2011 with a sub-sale relief facility condition;
- (iii) The Commissioner’s summary of the reply from the solicitors for the 2005 vendors dated 27 March 2013 approving the draft deed of conveyance to Yesreb.
- (iv) The finding of fact by the Commissioner that Walford was intended to be conveyed at the direction of the beneficial owner through Matsack.

**Conclusion on facts for sub-sale relief**

62. Mr Dunne contracted in 2008 to purchase Walford and did not take a conveyance. Mr Dunne ceased to have any interest in Walford for Ms Dunne as of 9 October 2006. He entered into a contract dated 28 March 2013 (purporting to be a trustee for Ms Dunne) with Yesreb



for the sale of Walford for €14 million. He entered into a deed of conveyance dated 29 March 2013 which: -

- (i) Described him as the “original trustee”;
- (ii) Described Matsack as the “present trustee”, and;
- (iii) At Recital F referred to “the nominee agreement which nominated Matsack to hold Walford on behalf of Gayle Dunne”.
- (iv) In the operative part referred to the direction of Ms Dunne as the beneficial owner (as opposed to Mr Dunne) to the 2005 vendors to convey Walford to Yesreb as sub-purchaser.

**63.** These details lead the Court to find that the Commissioner was not in error in finding that Mr Dunne did not hold an interest in March 2013, whether for Ms Dunne or otherwise, in Walford. It is not necessary to investigate the motivation for including his name in the contract and the deed of conveyance.

**64.** The interweaving analysis by the Commissioner using “identity”, “in consequence” and “no intervening act” is helpful in explaining how a person who may have contracted to purchase a property cannot be considered to be a person who sub sells after losing all legal and equitable interests in the contract and property. Including Mr Dunne as a party to the 2013 conveyance does not rectify the factual situation accepted by him on affidavit and all interested parties that his interest had ceased.

**65.** Further the Court cannot but conclude that Mr Dunne did not enter into an enforceable contract to sell Walford to “any other person”. Therefore, one cannot consider the 2013 conveyance to Yesreb as a purported sub-purchase or to have been in consequence of the 2013 contract. The intervening act of Mr Dunne ceasing to be a trustee as of 9 October 2006 means that the purchaser in 2005 cannot be the same person who agreed to convey to Yesreb.

**66.** I commend the submission of counsel for Revenue that Yesreb’s stance in this appeal would allow anyone without capacity to complete a sale to be inserted in order to avail of the relief. The natural and ordinary meaning of “a person” when interpreting s. 46 means a person who can contract and complete the contracts for the sale of the relevant property.

**67.** Section 46 (1) concerns the conveyance of property which is subject to stamp duty. However, the tax relieving provision uses the word “person” which is not expanded upon by the legislature to accommodate the arrangements entered into by a beneficial owning person such as Ms Dunne. Mr Dunne is a person who held Walford for Ms Dunne until 9 October 2006 and thereafter he had no interest in Walford because Ms Dunne, as a matter of fact and as so found by the Commissioner, purported to offer her interests in Walford for sale by Matsack.

Extent now of sub-sale relief

**68.** In order to appreciate the limits of sub-sale relief as it exists today in 2021, the Court notes that the availability and use of sub-sale relief for “resting on contract” type arrangements, was greatly reduced by the coming into force of s. 31 (a) SDCA (as inserted by s. 78 of the Finance Act 2013) which provides: -

“A charge to stamp duty will arise in respect of a contract or agreement for sale of an estate or interest in land in the State where 25% or more of the consideration has been paid under that contract or agreement”.

**Accountable person**

**69.** The “accountable person” according to s. 1 SDCA is the “purchaser or transferee” in a conveyance. Here Yesreb was conveyed title to Walford pursuant to the 2005 contract and the 2013 contract.

**70.** Section 7 only requires that distinct matters (such as the consideration which passed in 2006 and 2013) “be separately and distinctly charged” as if they were separate instruments.

Accounting for and charging

**71.** There was substantial debate before the Court as to whether Yesreb was the transferee under the 2005 contract so that it became an accountable person. Counsel for Yesreb said “...what I say is that when you have two purchases housed in one conveyance, you have got two purchases in effect, it’s as simple as that. If it were to mean something else, then it would need to be absolutely abundantly clear on the face of either s. 46, s. 1, s. 7 or some other section [of the SDCA] but it’s not”.

**72.** I accept that *Keston & Anor v. Inland Revenue Commissioners* [2004] STC 902 relied upon by Revenue and more particularly the judgment of Lightman J. under “double liability” (paras. 12 – 15) does not identify who is the “accountable person” in an unsuccessful s. 46 type sub-sale conveyance. The judgment supports the view that stamp duty legislation in England, as in Ireland, focuses on the property and the conveyance. In *Keston* the first agreement to sell had provision for the purchaser to require the vendor to transfer the property to any person nominated by the purchaser. The purchaser agreed to sub-sell the property for a small deposit and twenty three future annual instalments ending in 2024. The issue was the “chargeable consideration” and not about “the accountable person”. Nevertheless, a clear mandate is required to impose on a sub-purchaser stamp duty for two separate transactions.

**73.** The operative part of the 2013 deed of conveyance provides that the 2005 vendors “. . . by the direction of [Ms Dunne] hereby grant and convey and [Ms Dunne] as beneficial owner hereby grants and conveys and confirms and [Mr Dunne] and [Matsack] hereby grants conveys and confirms unto [Yesreb] Walford in fee simple”.

**74.** Those words are clear that Yesreb is the transferee under both the 2005 and 2013 contracts. Mr. Dunne may have been the purchaser in 2005 but the instrument (the conveyance) is liable to stamp duty for the transfer of the title. I therefore agree with the Commissioner that neither s. 7 nor s. 45 (4) SDCA apply to render Mr Dunne “the

accountable person” for the stamp duty due on the consideration of €59,950,000. The Court is satisfied that the legislation is sufficiently clear to impose the liability on Yesreb as transferee under the 2005 and 2013 contracts for sale.

**Orders to be made**

**75.** Subject to hearing further from counsel by way of a remote hearing if possible, on a day to be proposed about the contents of the entire order in this case stated, the Court is minded to answer each of the questions in the affirmative. If there is going to be an application for other orders, there should be prior written exchanges with the grounds for seeking alternative or additional orders.

**Post delivery of judgment hearing**

**76.** On 9 June 2021 at the hearing for orders, the Court informed the parties (without objection from either party) that for the sake of clarity the final approved judgment for publication has “from 23 July 2005” in para. 28 and the first sentence of para. 48 in the judgment delivered on 6 May 2021 is shortened. The Court in an *ex tempore* judgment refused the application of the appellant for an order pursuant to s. 949AR of TCA having heard counsel for both parties. The Court finally made an order answering the three questions in the affirmative.

Solicitors for Appellant: Gore and Grimes

Solicitor for Respondent: Revenue Solicitor

Counsel for Appellant: Gráinne Clohessy SC

Counsel for Respondent: Jacqueline O’Brien SC and Rosemary Healy-Rae.