TC01432

Reference no: MAN/2006/0038

Value Added Tax - Whether the original supply agreement for Ford cars had been rescinded by agreement between Ford and the Appellant, in administrative receivership - consequent reversal of the original supply for VAT purposes - remittance of the case by the Court of Appeal for our decision on the rescission issue - Appeal allowed

FIRST-TIER TRIBUNAL

TAX

BRUNEL MOTOR COMPANY LIMITED
(in administrative receivership)

Appellant

-and-

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS

First Respondents

-and-

FORD MOTOR COMPANY LIMITED

Second Respondent

Tribunal: HOWARD M. NOWLAN (Tribunal Judge)
JULIAN STAFFORD

Sitting in public at 45 Bedford Square, London on 16 and 17 June 2011

David Milne Q.C. and Jonathan Bremner, counsel, on behalf of the Appellant
James Puzey, counsel, on behalf of the First Respondents
Francis Fitzpatrick, counsel, on behalf of the Second Respondent

DECISION

Introduction

1. This should have been a very simple case, in that the case had already been the subject of a decision by the VAT and Duties Tribunal (the late Michael Johnson and John Lapthorne) in January 2007, the High Court (Mr. Justice Peter Smith), in January 2008 and the Court of Appeal (The Chancellor of the High Court, Lord Justice Richards and Lady Justice Hallett) in January 2009, and the case was simply remitted to us (following the death of Michael Johnson) to decide whether or not certain original supply agreements had been rescinded by subsequent agreement.

2. We will of course answer the specific question put to us by the Court of Appeal. Indeed the answer to that question is that there was no agreement between Ford Motor Company Limited ("Ford") and the Appellant for the rescission of the original supplies of cars to the Appellant. This conclusion was regrettably not a joint conclusion since the Member, Julian Stafford, considered that there was, on the balance of probabilities, an agreement to rescind the contract. I have considered Julian Stafford's views, and remain very firmly of the view that the termination of the Dealer Agreement, the re-possession of the cars by Ford, and the issue of the credit notes by Ford all resulted from unilateral acts by Ford, such that there was no agreed rescission of the supply agreement. I have accordingly exercised my casting vote in favour of the conclusion that there was no agreed rescission of the supply contract. This means that the Appellant's appeal is allowed. I have naturally given considerable thought to this issue, and the views of Julian Stafford, since we were not in full agreement, and will therefore summarise in due course why I felt it appropriate to adhere to my original view.

3. As perhaps the route that this case has followed indicates, however, the points in dispute were not entirely simple. In order to address matters fully, and to reflect properly the views adopted at the earlier stages, and addressed in argument before us, and in case any of the other points may have any possible significance in relation to other litigation which may yet take place, we will deal with the case slightly more broadly than simply to answer the one issue specifically put to us. This is partly because the issues are so intertwined that it would be yet more confusing to address just the single point, without referring to the other matters.

The facts

4. The Appellant was a main Ford dealer.

5. In periods prior to the ones that we were concerned with, Ford dealership agreements had provided for cars to be supplied to dealers on a "sale or return" basis, which meant that there were supplies for VAT purposes only, roughly speaking when the cars were to be on-sold to customers or used as demonstrators. Following a change to the arrangements, Ford dealership agreements provided for a different supply structure, the one relevant in relation to all supplies in this case, referred to as the "dealer sold" basis. Under this arrangement, whilst the vehicles might physically be in a massive holding pound with the cars allocated to numerous other dealers, the cars were treated as supplied to particular dealers on exiting the factory gates, and the relevant dealers were invoiced at that point. Ford thus accounted for VAT, and the dealers claimed input deductions at that point. Notwithstanding this, the price for the

cars was not payable until some later date (say 180 days after the invoice date), or on the earlier occasion when the dealer called down a car to meet a customer order, or used a car as a demonstrator.

6. The dealership agreement provided for the price for the cars to be accelerated in various other events. One was the appointment of an administrative receiver of the dealer. In such event, the dealership agreement also provided that all outstanding amounts, including the entire balance of the purchase price, became immediately due and payable and that, pursuant to Ford's retention of title clause, Ford could re-take possession of the cars. Clause 12 of the Agreement then provided:

> *"The return of a Vehicle to Ford or to FCE or its agent pursuant to this clause 12 shall be without prejudice to the other rights and remedies of Ford and/or FCE against the Dealer with respect to such Vehicle and its sale and purchase under this Agreement including without limitation the right to the extent applicable to damages for breach of contract and the recovery of the purchase price of the Vehicles if and to the extent that the same is due and payable but unpaid."*

7. By early 2002 there was some friction between Ford and the Appellant. The Appellant was at the time loss-making, and Ford eventually terminated the dealer agreement. By October 2002, Ford and its related finance company, "FCE" (referred to in the paragraph just quoted), decided that they had to put the Appellant into administrative receivership, which they did, by appointing Mr. Bruce Mackay ("Mr. Mackay") of Baker Tilly and two of his partners as administrative receivers on 3 October 2002. On 14 October 2002 Mr. Mackay and the same partners were also appointed as joint receivers by NatWest bank, which was some form of secured creditor of the Appellant.

8. Mr. Mackay gave evidence before us, and was indeed the only person to do so. Mr. Mackay was periodically appointed by Ford and FCE when dealers went into some form of administration. Mr. Mackay had been well acquainted with the procedures when the supplies of cars had been made on the old "sale or return" basis, but this was his first experience of an administrative receivership when cars had been delivered on the "dealer sold" basis.

9. The other point to mention that also pre-dates the commencement of the administrative receivership is that Mr. Mackay was aware of the following. First, in such situations, Ford had a very significant influence on what was going to happen. They intended in this case immediately to exercise their right under the title retention provision to re-take the cars, which they did, possibly on 3 October. They then had two choices. One, their preference, was to re-finance the dealer in the hope that the business would continue in some form. The way in which they sought to achieve this was almost always by re-taking possession of the cars under their title retention clause, and by issuing credit notes to the dealer, releasing the debt owing in respect of the repossessed cars under the old "dealer code". They then closed that old code, opened a "new code" for the same company, and re-supplied the cars under the new dealer code. This would mean invoicing the company under the new code, and accounting for VAT on the new supply. With the benefit then of some slightly changed terms, and greater financial assistance (such as an indemnity against losses, in this case) the hope was that the dealer would be able to re-commence business. Whether the business was then sold to new owners, as was often the case, or possibly sold to Ford itself, would later emerge.

10. The obvious alternative to the preferred procedure just mentioned was that, following the repossession of the cars, Ford might seek to allocate the cars amongst other dealers, who would then be invoiced for the relevant cars. We were told that where this was done, credit notes would again almost invariably be issued to the old dealer that was in administration. We should perhaps clarify that none of these repossessions or re-supplies or new supplies to different dealers involved the cars being moved physically. They were generally in a pound, and would remain there, whether repossessed by Ford, or supplied to a new dealer.

11. On 3 October 2002, the Appellant had a debt to Ford (or FCE – we were told to ignore this distinction, which we very willingly did) for a VAT-inclusive price of approximately £15.8 million. That debt of course became immediately due and payable, and odd as this may seem, the provision of clause 12 quoted in paragraph 6 above appeared to state quite clearly that Ford still maintained a right to the full £15.8 million, notwithstanding that it had re-taken the cars and could dispose of them for full value, as it chose.

12. One of the other important things that we learnt from Mr. Mackay was that, prior to his appointment, he was reasonably clear that Ford's plan for the administrative receivership of the Appellant was that Ford intended to pursue the plan referred to as the preferred plan mentioned in paragraph 9 above. Consistently with this being the Ford objective, we were told that on 28 October, credit notes were issued by Ford to the Appellant cancelling out, or purportedly cancelling out, the debt under the old dealer codes, and then on 29 October the majority of the cars were re-invoiced to the Appellant, which was thus invoiced under the new code for those cars. We were not told how many cars were not re-supplied, and nothing appeared to turn on that. We were also told that whether the cars were to be re-supplied, under new codes, to the old dealer, or sold to various other dealers, it was Ford's near invariable practice to issue the credit notes for the full price.

13. Ford had had discussions with HMRC as to how these procedures would be dealt with for VAT purposes. It appears to have been agreed that:

- on issuing credit notes under the old dealer codes, Ford would recover the VAT that it had accounted for in respect of the original supplies;
- the dealer in administrative receivership would lose its related input deduction, this being recognised in the earlier period or periods when the deduction or deductions had been available;
- Ford would account for VAT on the supply or re-supply of the cars either to new dealers or to the old dealer under new codes where Ford's preferred plan was being pursued; and
- the acquiring dealer would secure an input deduction in respect of those new supplies.

14. In accordance with the expectations just summarised, when Ford proceeded to issue credit notes to the Appellant, and then to invoice the Appellant for the majority of the vehicles under the new code, Ford recovered the VAT paid referred to in the first bullet point in the previous paragraph. The Appellant accepted that it had correspondingly lost its original input deduction, the result being that in the two earlier periods when the cars had originally been supplied, the Appellant switched from being in a very substantial VAT recovery position to having a fairly significant net liability for those periods. It duly paid that liability, and lost its substantial

recovery entitlement. The new supplies mentioned in the last two bullet points had the obvious VAT implications, the material point in relation to the Appellant being that it had lost a "pre-receivership" recoverable, and now had a substantial input deduction in the VAT period that automatically commenced on the appointment of the administrative receivers.

15. Considerable significance attaches to the way in which the administrative receivers dealt with the feature of Ford repossessing the vehicles, pursuant to its title retention right, and then the issue of the credit notes, and the new invoices. Mr. Mackay told us that, because this was his first experience of the repossession of vehicles under the new "dealer sold" basis of supply, he took legal advice to verify that Ford indeed had the right, as it purported to have, to re-take possession of the vehicles under its title retention clause. He was advised that Ford did have this right. He also understood that HMRC had agreed with Ford's expectations that we referred to in the four bullet points in paragraph 13. He then accepted and processed the credit notes and the new invoices.

16. There was a dispute, to which we will refer shortly, as to quite what was meant by the statement that Mr. Mackay "then accepted the credit notes". It was contended by the Appellant, effectively advancing a point that Mr. Mackay may, we surmised, have found rather appealing (for a reason that will soon be clear), that all that was meant was that Mr. Mackay "accepted the legal advice" that the repossession was perfectly lawful, whereupon he just dealt with the credit notes in a fairly routine and mechanical manner. It was contended by HMRC that what was meant was that Mr. Mackay actually accepted the deal in which the original supply was reversed as a contractual matter, and that the issue of the credit notes just evidenced that acceptance.

The origin of the present dispute

17. The present dispute results from the fact that the secured creditor, NatWest, objected to the way in which the changes to the VAT position of the Appellant, referred to in the latter part of paragraph 14 above, prejudiced its security. This was no direct concern of ours but we were told that if the position had remained that the Appellant was entitled to a substantial VAT repayment for periods prior to the administrative receivership, NatWest would have received significantly more in respect of its own charge, which amounts it lost by the reversal of the VAT input deduction for the periods **prior to the receivership**, and the input deduction that obviously resulted from the re-invoicing in the period **after the commencement of the receivership.**

18. As a result of these losses, NatWest sued Mr. Mackay, and as a result of that the Appellant made a voluntary disclosure to HMRC in 2005, claiming that the Ford credit notes were invalid, and that nothing should have reversed the original supplies made to the Appellant in the two relevant periods, prior to the receivership, along with the input deductions resulting from those original supplies.

19. HMRC resisted that claim and refused to refund to the Appellant the amounts that the Appellant had itself earlier refunded to HMRC, at the point when the Appellant considered that the result of the issue of the credit notes was to reverse its input deduction for the two earlier periods, as mentioned in the final two sentences of paragraph 14 above.

20. The Appellant appealed against this refusal to make the relevant refund.

The various different possible VAT analyses

21. Since this case was remitted to us to ascertain simply whether Ford and the Appellant had agreed to rescind the original supplies, it may seem strange for us to seek to summarise at this point the various different possible VAT analyses. We consider that this will in fact be of assistance, however, but we should mention that we were given little guidance in relation to the law, largely because the single issue for us to decide was essentially a contractual issue. Accordingly, and particularly because much of the relevant law has been modified, and Ford may also have changed one of the terms of its dealer agreements which seems to us to have caused all the problems in this case, our following comments should be read with some caution.

The bad debt situation

22. We refer firstly to the point that was discussed during the hearing, but which seems to us to have been largely irrelevant, which is the then treatment back in 2002 of the VAT treatment of bad debts of companies in receivership. As we understood the position, if Ford had not re-taken the vehicles, but had instead simply sued for the purchase price, which was immediately due on the commencement of the receivership, Ford would have been entitled to reverse its original liability for VAT on the supply of the vehicles, if and to the extent that it failed to recover in respect of the debt. Ordinarily the debtor would also have forfeited its input deduction, but as we understood it, a concession would have been available for a company in receivership, and the input deduction would not have been forfeited. Accordingly, there would have been an asymmetry. In the actual events, since Ford never sought to recover any price, and never suffered any form of bad debt, this "bad debt" scenario was totally irrelevant. It is only mentioned because it occasioned an asymmetry, as between supplier and recipient in administration, and the outcome of this Appeal in fact occasions a similar asymmetry.

The resumption of possession by Ford under the title retention clause, and the issue of credit notes

23. Whilst the competing counsel were advancing different arguments, there appeared to us to be three possible analyses in relation to the VAT treatment where Ford had re-taken possession of the cars (as it had done) and the credit notes were issued. We should make it clear that at this point, we are not advancing any new suggestions as to the appropriate VAT analysis. We are simply marshalling the views and conclusions that have been reached in the course of the earlier hearings.

Case 1

24. The most straightforward situation (albeit somewhat odd) appeared to be that if the dealer agreement left the whole price still payable (as it appeared to do), and if there was no rescission, by agreement, of the original supplies, then if Ford just issued credit notes to the Appellant unilaterally, that issue of credit notes would not reverse the original supplies, or the Appellant's pre-receivership input deductions. This would ordinarily affect both Ford and the dealer, with Ford failing to recover the earlier paid VAT, and the dealer remaining entitled to the earlier input deduction. This analysis was one of the two analyses that the Court of Appeal considered to be potentially consistent with the facts already established.

25. It actually followed in this particular case that if the above analysis prevailed, Ford would in fact have retained the recovery of the VAT accounted for in the pre-receivership periods because it had recovered that from HMRC more than three years ago, such that no assessment could now be made to reverse that. Since, by contrast, the Appellant had made a voluntary discovery within the 3-year period, and was still seeking recovery of its input deduction that it claimed to have reversed wrongly, if this analysis prevailed, it would indeed have recovered its input deductions. Accordingly, somewhat by accident, the end result would again have been asymmetrical, and the same as the result, mentioned in paragraph 22 above as regards the "bad debt" situation.

26. We might mention that, with the exception of one suggestion advanced by Mr. Milne (to which we refer in paragraphs 47 and 48 below), it was otherwise common ground that if this Case 1 analysis prevailed as regards the original VAT treatment, it would not prevent the re-supplies, or the supplies by Ford to different dealers where Ford's preferred approach was not pursued, from involving new supplies for VAT purposes, with new input deductions for the dealers. This was obviously beyond any doubt if the supplies were to quite different dealers, but it was also common ground (that one contention by Mr. Milne apart) that the same applied in the case of re-supplies on the new code to the old dealer.

Case 2

27. The second possible result (and this is the point principally relevant in this case) is that if we conclude that Ford and the Appellant agreed to rescind the original supply agreement, such that the original debt for the £15.8 million was reversed (presumably largely because the cars had been repossessed by Ford), and the credit notes were then issued to recognise the legal entitlement to the reversal of that original supply, then the original supply, and its initial VAT results, would have properly been reversed for both parties. The position would in other words have been exactly as expected by Ford and HMRC in the first two bullet points in paragraph 13 above. Critically however, this would only be because the credit notes then reflected and recognised the reversal of the original supplies, which in turn resulted from the agreed rescission of the earlier supplies by the parties. This was the second analysis that the Court of Appeal considered to be potentially consistent with the facts, so far established.

Case 3

28. The third possible situation asks what would the result have been if the terms of the dealer agreement had not contained the "over-kill" and somewhat extraordinary clause 12 provision that we have referred to, namely the one that said that even if Ford re-took possession of the cars, it was still entitled to the entire price, even if the cars had been sold to some new dealer for £15.8 million. The clause might, quite sensibly it seems to us, have said that if the cars were repossessed, then both parties agreed in advance that the result would be that the earlier supplies would be adjusted, such that the price payable by the Appellant would either be eliminated, or at least reduced to the amount of any net loss resulting to Ford from the failure by the Appellant to carry through the agreement as originally intended and contracted. If then credit notes were issued by Ford, eliminating or vastly reducing the debt, this would be in respect of a contractual agreement to eliminate or reduce the debt, and

would be effective to reverse the original VAT treatment of the supplies. The result, thus, in Case 3 would be the same as the result in Case 2.

The "switch" of cars from one dealer to another to enable the acquiring dealer to meet a customer order for a particular car

29. Before summarising the fate of the Appellant's appeal through the various courts, and the contentions of the parties, it is appropriate to mention at this point another provision in the dealer agreement, designed to deal with the position where dealer B had a customer wanting a car with a particular specification, and the Ford computer indicated that precisely that car had been allocated, in the pound, to dealer A on the "dealer sold" basis. In that situation, the dealer agreement with dealer A provided in advance that, simply on Ford giving dealer A notice to effect the switch, the relevant car would be re-acquired by Ford, and the invoice cancelled, whereupon it would be supplied by Ford to dealer B. In accordance with clause 6 of part B of the dealer agreement, this was all pre-agreed in the dealer agreement, and dealer A did not have to agree to, and could not object to it, at the time of the switch.

30. It was common ground between the parties that this mechanism was effective to reverse the earlier supply for VAT purposes, because the credit note that would be issued by Ford to dealer A did reflect a pre-agreed cancellation of the supply under the terms of the dealer agreement, and was not just a unilateral issue of a credit note not matching an agreed adjustment.

31. This result seems to us to confirm the VAT treatment that we suggested in paragraph 27 above for Case 3, quite apart from the fact that both the decision of Mr. Justice Smith ([2008] EWHC 74 (Ch)), and that of the Lord Chancellor in the Court of Appeal ([2009] EWCA Civ 118) proceeded on the same view of the VAT consequences that would have arisen had the agreement contained the more obvious and balanced term, rather than the extraordinary "over-kill" term quoted in paragraph 6 above. In the case of the Lord Chancellor's decision, this emerges quite clearly from paragraph 31 of the Court of Appeal judgment.

The earlier decision before the VAT and Duties Tribunal

32. The decision of the VAT and Duties Tribunal (Case 20107) was actually quite clear.

33. At paragraph 33 of the decision, the late Michael Johnson posed the following question:

> *"33. What if the parties contractually anticipate the possibility of administrative receivership and in that case expressly provide a procedure for rescission in the agreement governing the supplies. That, in our view, must be relevant to determining the scope of the supplies"*.

34. Whilst it is clear that the Tribunal considered that in this event (in other words, our Case 3 scenario), the VAT treatment would be reversed, the decision proceeds to consider whether this contractual position could be extracted from the supply agreement, notwithstanding the "over-kill" clause that provided that the full price was still owing, and was not reversed. Unfortunately the following paragraph 36 contains a slight conflict in that the first sentence assumes that Ford's "over-kill" clause would be overridden as a legal matter by a combination of common sense and

implied terms, whereas the second sentence makes the significantly different assumption that in practice the clause would not have been operated and that "the dealer would be unlikely to face a claim from Ford". The relevant paragraph 36 was as follows:

> *"36. In accordance with ordinary principles of contract, the contracting parties would appreciate, on entering into the Supply Agreement, that where Ford suffered no loss on resale of the vehicles returned, it would not be in a position to sue in respect of the vehicles, save to recover nominal damages. Although not expressly stated in the Supply Agreement, it falls in our view to be implied that, in the circumstances just mentioned, the dealer would be unlikely to face a claim from Ford".*

35. Mr. Johnson then proceeded to say that the issue of the credit notes effectively clarified whether Ford was going to be taking any minor element of the original price "as damages", or whether it would release the whole price on the basis that it had suffered no damage. The credit note would in other words put a cap on the remaining amount of price payable, in this case confirming that no damages were due, and therefore the whole price was cancelled.

36. The decision was then given in paragraph 42, as follows:

> *"42 …… We are of the view that the position that we are considering is one where, in accordance with article 11(C) (1) of the Sixth EC Directive, Ford has properly treated itself as unable, to the extent of the credit notes, to pursue payment for the clause 12 vehicles. The credit notes have been volunteered by Ford; but that is no more than one might objectively have expected* ***from a perusal of the Supply Agreement"*** (our emphasis)

37. This paragraph might have been slightly confusing in its reference to "Ford volunteering the credit notes", but what it plainly meant was that the credit notes were valid because they reflected an entitlement, on the part of the Appellant, to have the original price, and the original supply, reversed on what the Tribunal considered to be a proper interpretation of the Supply Agreement. In other words, the Tribunal decided that the case fell within the Case 3 situation that we have summarised above.

Mr. Justice Smith's decision in the High Court

38. While Mr. Justice Smith appears to have had considerable sympathy for the common sense endeavour of seeking to interpret Ford's "over-kill" provision in clause 12 in a sensible manner, and thus implicitly to decide the appeal on the basis of the Case 3 analysis, he concluded at paragraph 15 that this was untenable. He decided that clause 21, which provided that the dealer agreement contained "the entire agreement .. of the parties, … and [could] only be amended in writing by duly authorised officers of each of the parties" ruled out implied terms that would cut down the effect of clause 12. Thus there could not be a Case 3 type analysis, based on the reversal of the supplies under a term in the agreement. He then turned to consider the rescission approach, in other words our Case 2 approach:

> *"15. Whilst I accept that clause 21 as a matter of construction prevents the implication of an implied term of the type canvassed in argument before me I do not accept that it prevents the parties from agreeing a mutual rescission of the agreement in the circumstances set out in the decision of the Tribunal."*

39. Mr. Justice Smith then proceeded to consider what the parties had actually done, with a view to deciding whether he could conclude that the parties had "agreed on a mutual rescission".

40. At paragraph 43, Mr. Justice Smith recorded that the parties had operated a procedure whereby the following occurred:

> *"(1) The vehicles were returned*
> *(2) Ford issued the credit notes*
> *(3) The Appellant acting by the Administrative Receivers no longer claimed the VAT on the invoices as input tax*
> *(4) The Administrative Receivers paid the VAT to HMRC in full without any such deduction*
> *(5) Ford sold the vehicles to the Administrative Receivers at the same price (including VAT)*
> *(6) That enabled the Administrative Receivers to trade the company out for the benefit of the old creditors of the Appellant.*
> *(7) Both the Appellant and Ford acted as if the Supply Agreement had been rescinded and there were no further obligations arising under it."*

41. Mr. Justice Smith then concluded that although there was "no particular agreement struck on a particular day", the common sense of the situation was that the parties should be treated as having rescinded the Supply Agreement and the original supplies.

42. He then concluded with the following paragraphs:

> *"46. That in my view is what the Tribunal found. It is a finding of fact based on the evidence. I therefore do not see any basis for suggesting that they acted upon the express wording of clause 12* ***alone.***
>
> *47. It follows therefore in my view that the Tribunal decision which is based on their fact-finding cannot be challenged by the appeal. Further in my view had the matter come to me afresh I would have come to precisely the same conclusion.*
>
> *48. Accordingly I dismiss the appeal."*

The Court of Appeal's decision

43. The Lord Chancellor, in giving the decision of the Court of Appeal, initially advanced an argument for trying to found the issue of the credit notes on a different clause of the Agreement (so endeavouring to reach a conclusion on the basis of our Case 3 analysis). He concluded that the argument on the drafting could not be sustained, but both at paragraph 31 and when reluctantly dismissing the approach that he had himself suggested, he certainly confirmed that the VAT result of the Case 3 analysis would have been as we suggested in paragraph 28 above. He thus reluctantly turned to the Case 2 approach of whether it could be said that the parties had mutually agreed to rescind the original contract. In this context, he observed that:

- a more accurate description of the steps summarised by Mr. Justice Smith (recorded at our paragraph 40 above) would have described step 1 as involving "the vehicles having been repossessed by Ford rather than having been returned by Brunel"; but that
- the steps summarised by Mr. Justice Smith were equally consistent with everything having been done as a result of unilateral action on the part of Ford (so occasioning our Case 1 analysis), as they were with the parties having agreed to rescind the original agreement (the Case 2 analysis).

44. He then decided that, because the VAT and Duties Tribunal had never concluded, or reached a finding of fact, that the parties had agreed to rescind the original agreement, Mr. Justice Smith had been wrong to proceed on the basis that such a finding had been made by the Tribunal. He then said that the conduct of the parties was (as just mentioned in the second bullet point in the previous paragraph) consistent with either the Case 1 or the Case 2 analysis, and that the matter should be returned to the First-Tier Tribunal to reach a finding of fact as to whether the parties had indeed reached the agreement to rescind the original supplies, as inferred by Mr. Peter Smith.

45. That is accordingly the conclusion that we must now reach, one way or the other.

The contentions on the part of the Appellant

46. It was contended for the Appellant that:

- no evidence had been adduced that the Appellant, through its administrative receivers, agreed with Ford to the rescission of the dealer agreement or any of the supply agreements under that agreement;
- since the terms of the dealer agreement were so specific, it was curious that the Respondents should be having to base their contentions of such a rescission agreement on such vague, and unspecific arguments;
- it made entire sense that Ford alone had the unilateral right to repossess the cars, pursuant to the exercise of its title retention right;
- testing the issue of whether any alleged contract between Ford and the Appellant provided for the rescission of the original agreement, and the reversal of the supplies (leaving aside the separate provision for the re-supply of the cars), it made no sense to consider whether the Appellant "agreed to the waiver of the price", or to the issue of the credit notes, because once the cars had been unilaterally repossessed, it is perfectly obvious that the Appellant would "take whatever it could get", if Ford volunteered it;
- whilst it was accepted that the Appellant, through its administrative receivers, had to agree positively to Ford's preferred (and virtually "dictated") strategy that the Appellant continue to trade under the new codes, that was a separate matter;
- in contractual terms, the deal in relation to the new supplies made entire sense in that Ford supplied the cars, and the Appellant agreed to pay for them;
- it was wrong to describe the deal as one under which Ford supplied the cars under the new codes, treating that as the consideration for the release of the earlier debt; and that
- the release of the old debt was entirely related to the common sense situation that, following the repossession of the cars, it was implicit in common sense,

business, and general "dealer relation" terms that the price would have to be waived or greatly reduced to a "net damage" point, even if this was not the right interpretation of the Dealer Agreement.

47. We should mention two additional points raised on behalf of the Appellant. One resulted from a general discussion that there had been as to precisely what Ford achieved by the seemingly matched steps of taking the cars back and issuing the credit notes, and then re-supplying virtually all the same cars, and re-invoicing them at the same price. Mr. Milne advanced an argument from this general discussion that the repossession and re-supply could and should just be ignored. All that happened was that while the appointment of the Receivers accelerated the £15.8 million debt, the credit note and re-invoicing exercise just re-deferred the £15.8 million debt. Ford and the Appellant should thus be treated as if the cars held by the Appellant after the relevant exercise were simply those originally supplied, and the exercise in relation to dealer codes, credit notes and re-invoicing should just be regarded as a bit of fairly meaningless internal book-keeping. This approach would then eliminate the VAT treatment of the post-receivership re-supply since on this approach that would not have occurred.

48. We can say immediately that we reject that argument, which is inconsistent with the terms of the Dealer Agreement and the facts.

49. Mr. Milne's other additional point was to the effect that he agreed that if any court had to decide whether the provision that we quoted in paragraph 6 above would withstand scrutiny, he considered that it would not. In other words, when the repossession of the cars meant that the cars had no longer been supplied, it simply could not be possible as a legal matter for the whole gross price still to be payable.

50. We might say now that that point has no bearing on our decision, though once we have also referred to the matching, or rather "opposite" point, advanced on behalf of the Respondents, we will make some reference to this argument below.

The contentions on behalf of both Respondents

51. The contentions on behalf of both Respondents were basically identical, and were as follows:

- the administrative receivers had been conversant with Ford's planning in relation to the Appellant from a point prior to their appointment, and they knew that it was Ford's intention to repossess the cars, issue credit notes, switch the dealer codes and then re-supply the majority of those cars;
- the deal was essentially therefore that the Appellant would be released from its original obligation to pay for the cars, in return for the re-supply of the cars;
- in his Witness Statement, issued for the purposes of the original hearing, Mr. Mackay had said that he had "accepted" the credit notes;
- Mr. Mackay could have rejected them, but he accepted them, which meant that he had agreed to the reduction of the price, which was then just matched by the valid issue of the credit notes; and
- accordingly, the Case 2 analysis was the correct approach.

52. We were also asked by the Respondents to view Mr. Mackay's new evidence with some caution, since he had a marked temptation to present matters so as to

support the Case 1 analysis, in that that would tend to undermine the NatWest negligence claim against the administrative receivers.

53. In relation to the issue of whether, as a legal matter, the apparent continuing liability under Clause 12 on the part of the Appellant to pay the full price for cars that had been repossessed could have been disputed, the Respondents contended that it could not be challenged.

54. In this context, we might say immediately that we are entirely familiar with the law in relation to damages and penalty clauses, and whilst we will add further comments below, we do understand the Respondents' point to the effect that parties can put whatever they want into their agreements, and if the other party accepts those terms, those provisions are then valid.

Further evidence from Mr. Mackay

55. We will rely fairly heavily on the further evidence given by Mr. Mackay in reaching and justifying our decision. Since it makes more sense to deal with these matters in the general context of our decision, we will not refer to the further evidence at this point.

Our decision

56. If there was a contract to rescind the original supply agreements, or to reverse the original supplies, the parties to that contract would have been Ford and the Appellant, acting through its administrative receivers. Accordingly we will look first to the evidence given on that matter on behalf of Ford, and then to that given on behalf of the Appellant.

57. No evidence was given before us on behalf of Ford by any Witness in person, and thus all that we had was the original Witness Statement by Mr. Mark Duncan, issued for the purposes of the first hearing, coupled with a short Supplemental Statement issued on 10 July 2010, also by Mr. Duncan.

58. Neither Witness Statement was being challenged by the Appellant and so Mr. Duncan was not available to be cross-examined or asked to amplify matters by ourselves.

59. Mr. Duncan had now moved and was now employed by HSBC as its VAT manager. At the relevant earlier dates, he had been involved with finance, tax and particularly VAT on behalf of Ford.

60. Mr. Duncan's first Witness Statement gave a helpful summary of the way in which Ford assumed that the "dealer sold" concept would operate both in relation to the issue of credit notes to old dealers in the type of "dealer switch" situation referred to in paragraphs 29 to 31 above, and also in relation to the issue of credit notes, following the repossession of cars where dealers were in some form of administration. More particularly he described the way in which this had all been agreed to work, as expected, by HMRC.

61. We now need to quote paragraphs 10 and 11 of the October 2006 Witness Statement:

> ***"<u>The Agreed VAT treatment</u>***
>
> *10. As a result of the exchange of correspondence, and both my telephone calls (which led to the annotated note referred to above) and the meeting held with HMRC, I can confirm that it was my understanding that the agreed VAT treatment in the cases of a Dealer entering into an administrative receivership would be that in situations where the vehicles were still either at the dealership premises or held in a vehicle holding centre (a Ford and/or third party/dealer owned or operated site for storing vehicles), then providing the Dealer/and or administrative receiver were in agreement, Ford could take the vehicles back into Ford's possession and issue a VAT credit note to cancel the original sale, giving the Dealer full value for the vehicles repossessed. Ford would reduce the company's output tax declaration and re-sell the vehicles to another Dealer (or the administrative receiver under a new Dealer code) accounting for output tax on the new sale. The original Dealer would on receipt of the VAT credit note cancel its indebtedness to FCE (Ford debt assigned to FCE) and reduce its input tax declaration for that VAT accounting period.*
>
> ***<u>The specific VAT treatment in the case of Brunel</u>***
>
> *11. My involvement/understanding of the specific VAT treatment employed by Ford in the matter of Brunel is that Ford followed the normal routines agreed with HMRC and issued credit notes to the dealership for these vehicles that were repossessed and reduced its VAT output declaration accordingly. Further it is my understanding that in the case before the Tribunal the majority of vehicles [were] resold to Brunel in Administration which was acting as the new Dealer.*

62. Mr. Duncan made a short supplemental statement in 2010, essentially to make the point that we now quote, contained in paragraph 7:

> *"7 … by reference to Paragraph 10 of my First Statement, as I state there, my understanding was that the process which occurred when a dealer went into administrative receivership (being the issue of credit notes and the re-supply of the vehicles) was one that required the agreement of the dealer or the administrative receiver (as appropriate). The dealer or administrative receiver had a choice as to whether to accept the credit notes and the re-supply of vehicles."*

63. I believe that Julian Stafford and I are in agreement that we do not find any of the three paragraphs that we have quoted (the only relevant ones) to be of any assistance in relation to the issue of what Ford actually agreed with the Appellant. There is certainly no reference to negotiation or indeed to any contact with the Appellant or the administrative receivers. Since Ford actually contended that there had been an agreed rescission of the earlier supplies, it seems distinctly odd that the only Ford witness gave information principally about what had been agreed with HMRC, and nothing about any contact even or agreement with the dealer.

64. Paragraph 10 of the main Witness Statement contains a crucial proviso that makes the conclusions meaningless, namely the proviso contained in the crucial words "then providing the Dealer/and or administrative receiver were in agreement". That seems to assume the very fact required to sustain the Case 2 analysis. When

paragraph 10 appeared to be referring to the election to take repossession of the cars, and the consequent issue of a credit notes, in all situations, and not just in the situation where that was coupled with a re-supply (when manifestly the dealer would have to agree to repurchase the cars) it seems very odd to suppose that dealer would be expected by Ford to have to agree to anything. Without any doubt, Ford had the **unilateral** right to take repossession of cars in the event that a dealer went into administrative receivership, and the suggestion that repossession would depend on securing the dealer's prior agreement would be ridiculous. Asking then, whether the subsequent issue of credit notes cancelling the price still theoretically payable under the "over-kill" Clause 12, required the dealer's agreement, seemed to be an equally odd question. If a dealer was asked whether it was prepared to agree to the issue of the credit notes, it seems obvious that the dealer would say that having lost the cars, it was a "no-brainer" that it would take any credit note, reflecting the sensible reversal of Ford's "over-kill" provision, and of course it would take whatever Ford volunteered.

65. It seems to me at least to be fairly clear that, except in the situation where the repossession and issue of the credit notes was intertwined with the re-supply, there is no occasion to assume, or even remotely to understand, the extraordinary proposition that the dealer would have to agree to anything in relation to the repossession of the cars or the issue of the credit notes.

66. Neither of us read paragraph 11 of Mr. Duncan's original Statement to indicate that he had any involvement in any negotiation or rescission agreement between Ford and the Appellant, and all that he referred to was Ford's "normal practice" of repossession, followed by the issue of credit notes and the reduction of Ford's earlier VAT output declaration accordingly. There was, in other words, not a word mentioned about the only presently relevant point, namely whether in fact there was a rescission agreement between Ford and the Appellant, in advance of the issue of the credit notes.

67. We find paragraph 7 of the Supplemental Statement to be of no more assistance, albeit that it was obviously written with a view to supporting some point about a new agreement. The critical issue, it seems to us, is that it is obvious that the dealer in administration had to agree specifically to take the cars, and to pay for them under the re-supply transaction. The question is whether some agreement should be assumed to embrace the earlier and, to all appearances, utterly distinct steps of the resumption of possession of the cars, and the then related issue of credit notes. And paragraph 7 appears not to assist us with this question. Equally it appears again that Mr. Duncan was someone who knew what had been agreed with HMRC, and he knew what he hoped and expected the VAT treatment would be following repossessions and the issue of credit notes, but it does not sound for a moment as if Mr. Duncan had any contact whatsoever with the Appellant and its administrative receivers.

68. Accordingly, on the Ford side of this proposition that there was a new rescission agreement, we have absolutely no evidence that there was such an agreement. Of course, there must have been an agreement for the re-supply, being the supply of cars on the part of Ford, and the agreement of the Appellant to pay for them, but that is, or at least very well may be, an entirely separate question.

69. We turn now to the evidence actually given to us in the hearing by Mr. Mackay. Mr. Mackay's evidence during the hearing made the same points repeatedly, as he

was asked questions by counsel, but we believe that the following exchanges between Mr. Puzey, on behalf of HMRC and Mr. Mackay give a very representative picture:

> *"Q. The appointment of yourself and your colleagues as administrative receivers terminated the dealer sold agreement, didn't it?*
>
> *A. That's my understanding in legal terms, yes.*
>
> *Q. Ford are entitled to the return of the cars, provided the retention of title clauses were valid?*
>
> *A. Yes.*
>
> *Q. The advice that you had received was that they were valid?*
>
> *A. Yes.*
>
> *Q. So Ford are entitled to have the cars back.*
>
> *A. Yes.*
>
> *Q. You needed to come to an agreement with Ford in order to pursue your strategy. You have told us that?*
>
> *A. I needed an agreement under which they were agreeing to fund the trade-on strategy, yes.*
>
> *Q. Absolutely. They had the cars and they had the means to enable you to trade on.*
>
> ……
>
> ……
>
> *Q. If the retention of title clauses weren't valid, of course, then you could hold on to the vehicles and you had some vehicles to sell?*
>
> *A. Yes. If it wasn't valid, then in my reckoning, the credit notes weren't valid.*
>
> *Q. But the advice you received was that they were valid, and that's the legal framework within which you were operating?*
>
> *A. Yes.*
>
> *Q. So you needed a source of vehicles. Ford had the vehicles and the funding. Therefore the credit notes that were issued were all part of the agreed arrangements that you had come to, to enable this business to trade on?*
>
> *A. Well, were all part of the agreed arrangements, only in as much as we had an arrangement to trade on, and if their right to raise the credit notes by virtue of the legal ownership was proven to be correct –*

Q. Which it was.

A. – then they seemed to us to be valid credit notes, which needed to be accounted for.

Q. Which it was. Yes. So having received advice that these were valid retention of title clauses, you needed to come to an agreement and you did come to an agreement.

A. Which agreement is that?

Q. The agreement to accept the credit notes and to trade on?

A. Well, the credit notes, to my way of thinking, had just arrived and needed to be dealt with.

Q. Yes, but if you had rejected them –

A. I had no grounds to reject them.

Q. You had no grounds to reject them, no. They had been reflecting the terms that you had agreed, or that had been agreed previously, that the vehicles would go back to the ownership of Ford in the event of Administrative Receivership.

A. Well, I think Ford were just simply implementing their legal rights.

Q. Yes. Yes, but you had a choice whether to accept the credit notes or not. You tell us that in your witness statement?

A. I do, but by that, I mean whether to accept them in terms of them being validly issued, i.e. because they had retained title.

Q. Yes, but the credit notes were linked to the agreement that you needed to enable you to trade on, because if the credit notes were invalid, then you had the vehicles, didn't you?

A. One way or another, I had access to the vehicles, because Ford had agreed to give me access to the vehicles.

Q. Right.

A. Their systems had from 3rd October started the process of moving the vehicles from one dealer code to another.

Q. uh-huh.

A. All I need in terms of -- in my view, in terms of whether or not the credit notes were valid and should be accepted, was legal advice that the retention of title clause in turn was valid.

Q. Once you had that legal advice, you could accept them?

A. I didn't think I had any option."

70. I consider it abundantly clear from those extracts, along with many very similar other statements, that Mr. Mackay said that he considered the repossession of the cars to be something that resulted solely from Ford's absolute liberty to repossess the cars, and he considered the issue of the credit notes to be something that required no agreement on his part. Once he concluded that the retention of title clause was effective, he concluded that the credit notes were valid, and all he had to do with them was process them. The subject matter of the agreement with Ford was the separate issue of the re-supply of most of the cars, the further financial support provided by Ford, and the Appellant's acceptance of its liability to pay for the cars under the new supply, and to perform other obligations.

71. It was suggested to us that Mr. Mackay's evidence might have been influenced by the negligence action hanging over his firm. We now address this.

72. This is perhaps where Julian Stafford and I part company. Julian Stafford was influenced by the fact that it would obviously be enormously in Mr. Mackay's personal interests to undermine the case that there was any contractual agreement to rescind the supply contract. He assumed that if this was achieved, the negligence action hanging over Mr. Mackay's firm would be dropped. Julian Stafford thus considered that there was an unrealistic, and unconvincing, change of tack on the part of Mr. Mackay, involving he considered a slight play on words, when he repeatedly said that any earlier references to his "accepting the credit notes" indicated only that once he had received legal advice that Ford's unilateral right to take re-possession of the cars was valid, he then simply accepted (meaning "took") the credit notes and processed them. Julian Stafford was also influenced by the fact that he processed the credit notes in the knowledge that that would prejudice NatWest. I, on the other hand consider that Mr. Mackay's evidence was not only realistic, but that his summary of events was infinitely the more realistic summary than the alternative contention on the part of both Respondents that the Appellant agreed to a rescission of the earlier contract. I say this for the following reasons:

- It cannot be in doubt that Mr. Mackay sought legal advice that the retention of title clause was valid, and that it would follow, if it were valid, that Ford would have unilaterally re-taken possession of the cars. If Mr. Mackay thought that the rescission of the contract was a matter resulting from an agreement between Ford and the Appellant, why was he seeking confirmation that Ford had the unilateral right, which he believed had been exercised, to re-take the cars?
- I also have considerable sympathy with the claim by Mr. Mackay that when he was advised that the retention of title clause was valid and that Ford had thus exercised a unilateral right to re-take possession of the cars, then the issue of the credit notes was something that he obviously had to accept and process. This seemed to Mr. Mackay to be a "no-brainer", in that their issue reflected reality, and the possibility of "rejecting" the credit notes did not occur to him. I entirely understand that. If the Appellant had lost the cars, something clarified by the legal advice, what was the point or the relevance of rejecting a credit note, and thus in some extraordinary manner trying to re-create the absurd result of Ford's "over-kill" drafting, that might re-render the Appellant liable to pay the price for the cars, even though it had lost them?

- Addressing a different situation that did not arise in this case, if Ford had simply re-taken possession of the cars, and issued credit notes, without there being any prospect of re-supplying the old dealer under new codes, I cannot believe that anyone would suggest that the dealer should pre-agree to either step. This present case, where obviously the Appellant had to agree to the trade-on proposal, obviously means that the Appellant had to agree to something, and the Appellant must have agreed to the re-supply contract. Both Respondents have tried to merge the clear feature of that agreement with the notion that it would follow that Ford and the Appellant agreed to the rescission of the original contract. That cannot be right when it is clear that the repossession of the cars was achieved under Ford's unilateral right, and the credit notes were issued by Ford, in accordance with its invariable practice, just as night follows day.
- The whole notion of there being an agreement between Ford and the Appellant to rescind the original supply contract seems inherently unrealistic, when on any view it was by unilateral action on the part of Ford that the dealer agreement had been terminated (prior to the appointment of the administrators), and by unilateral action on the part of Ford that the title-retention security clause had been operated and the cars re-possessed. There was no suggestion that any of those changes resulted from any agreement of any sort. The suggestion thus, that the only remaining element of the supply agreement, namely the extraordinary liability under clause 12 to pay for cars that had been re-possessed would require some bi-lateral action on the part of both parties to eliminate that liability seems rather odd. Were there such a contract, the consideration given by the administrators in return for the release of the liability would appear to have been rather nebulous, and the common sense reason for assuming that the administrators' concurrence would be required for the release rather thin. In addition, we were expressly told that it was Ford's almost invariable practice to release the liability under Clause 12 in these circumstances.
- I had personally not doubted the integrity of Mr. Mackay's evidence. I understood that there was reason to consider whether Mr. Mackay would have been influenced by the negligence action hanging over his firm to twist the facts somewhat, but I considered that his evidence was honest and cogent.
- I am somewhat influenced in concluding that there was no agreed rescission of the supply agreement (or of the remaining liability to pay the price under Clause 12, depending on how the rescission question is posed) by the fact that Ford, as a joint respondent, failed to produce any evidence whatsoever of any contact between Ford and the Appellant either between 3 and 29 October, or indeed at any time, to give any credence to the proposition that there was some joint agreement to rescind.

73. Whilst Julian Stafford would have reached a different conclusion, my finding of fact is that there was no evidence produced to indicate that either Ford or the Appellant and its administrative receivers agreed to any rescission of the original contract, or anything material in any way to the unilateral right of Ford to repossess the cars, and Ford's consequent, and apparently invariable, practice of issuing the credit notes. And far from any conduct leading to the notion of an implicit agreement by conduct, the conduct of Mr. Mackay (particularly the points stressed in the bullet points in paragraph 72 above) suggest to me the very reverse.

74. I might say that I am somewhat disappointed to reach the above conclusions, because the plain common sense of the situation would rather appear to have been for

the VAT implications of the original supplies all to have been reversed. In our view, had the Ford dealer agreement not contained the somewhat extraordinary "over-kill" clause, these problems would not have arisen. Had it provided that, rather as the agreement dealt with shifts of cars from one dealer to another, both parties agreed from the outset that if the cars were repossessed, then the original supplies would be reversed, and the price initially owed would fall either to nil, or to an amount equal to any net damage claimed by Ford, then the analysis of Case 3 would have prevailed. It was the result of "over-kill", and slightly offensive drafting that prevented this sensible result from being achieved.

75. Having decided that the answer to the Court of Appeal's question is that there was no contractual rescission of the original contract, it is both superfluous and perhaps also inappropriate for us to venture into the area of whether, as a legal matter, both Respondents might have contended that the clause that we quoted at paragraph 6 was obviously in some respect reversed by a sensible implied term, so that the Respondents might have won this Appeal on the alternative basis that the original agreement should be read as providing in advance for agreed reductions of price, following any repossession of the cars. Whilst this analysis, leading to a conclusion on the basis of Case 3, might have been ruled out by the decision of the High Court and the Court of Appeal, we note the odd feature that it was Mr. Milne who was acceding to the proposition that some such implied term would be bound to be assumed by any court, and it was the counsel for both Respondents who were advancing the point that parties could make unreasonable contracts if they wished. Somewhat perversely it seems to us that Mr. Milne's contention, had it been vindicated, would have supported the Case 3 analysis, and therefore the Appeal would have been dismissed. By contrast the Respondents were going out of their way to undermine any possibility of advancing the Case 3 analysis, and of winning the case on that alternative basis.

76. In view of the fact that I have decided the point put to us by the Court of Appeal in favour of the Appellant, and that counsel for both Respondents were adamant in resisting any possible alternative analysis along the lines that Mr. Milne would have seemingly been hard pressed to reject, and since in any event only the one point has been put to us by the Court of Appeal, it is clear that this Appeal is allowed.

Costs

77. In the event that the Appeal was allowed, we had been asked by the Appellant for an award of reasonable costs in their favour, and we were told that Ford had supported HMRC's case on the basis that it would always bear its own costs and not expect to be rendered liable for any other party's costs. We accordingly award the Appellant their reasonable costs in the Appeal before us against the First Respondents.

Right of Appeal

78. This document contains full findings of fact and the reasons for our decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) Tax Chamber Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

HOWARD M. NOWLAN (Tribunal Judge)
Released: 9 September 2011