TC03563

Appeal number: TC/2009/14427

VAT –Transfer of a going concern – Undertaking of assets – Transferee's intentions – Appeal refused

FIRST-TIER TRIBUNAL
TAX CHAMBER

PONTARDAWE INN LIMITED **Appellant**

- and -

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS **Respondents**

TRIBUNAL: JUDGE JULIAN GHOSH, QC
MR CHRISTOPHER JENKINS

Sitting in public at 10 Alfred Place, London on Monday 11th November 2013

Philip Williams of Gerald Thomas & Co for the Appellant

David Yates, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

The Issue

1. The issue in this case is whether a sale of the Ryeford Arms, 12 Ebley Road, Stonehouse, Gloucestershire ("the Property") by the Appellant to an unconnected company, Claden Limited, was a "transfer of a going concern" ("TOGC") for VAT purposes. If so, no VAT is due from the Appellant to the Commissioners for her Majesty's Revenue and Customs ("HMRC"). If not, the sale of the Property itself was an exempt supply for VAT purposes. However the sale of the other assets (see below) was a standard-rated supply and attracted a charge to VAT. Furthermore, in the event of the sale of the Property not being a TOGC, there would be an adjustment under the "Capital Goods Scheme" provisions which would attract a further charge to VAT in the hands of the Appellant. HMRC have raised two assessments on the Appellant to VAT on the basis that the transfer of the Property by the Appellant to Claden Limited was not a TOGC. The Appellant appeals against these assessments.

The Facts

2. There was no Statement of Agreed Facts. There was a draft agreed statement of facts in the bundle of documents which the Appellant provided to us but this was not recorded as having been agreed by HMRC. However both parties produced a summary of what they considered to be the relevant facts in their

respective Skeleton Arguments. Neither party disputed the facts we set out here (although there was disagreement between the parties as to the inferences which were properly drawn from the primary facts and certain correspondence, to which we refer below):

(i) On 19th July 2005, the Appellant acquired the Property for £300,000 + VAT;

(ii) The Appellant traded from that date, from the Property, as a publican;

(iii) On 24th August 2006, the Appellant drew up heads of terms, with a view to selling the Property; the counterparties to these heads of terms were Mr Terry Whittingham and Mr Duncan Smith;

(iv) Prior to the exchange of contracts for the sale of the Property and certain other items, to which we refer below, DR James & Son, the agents for the Appellant, as seller, and Henriques Griffiths, the agents for Messrs Whittingham and Smith, as putative purchasers, corresponded. Some of this correspondence is important as regards the intentions of Messrs Whittingham and Smith as to how they intended to use the Property after they had acquired it. We therefore set out certain extracts from this correspondence here:

(a) On 25th August 2006, Henriques Griffiths wrote to DR James & Son, giving the address for Messrs Whittingham and Smith as "c/o The Sandringham Public House" and requesting that

> "*The contract documents* [should] *provide* [Messrs Whittingham and Smith] *can transfer the benefit of both the lock*

> *out agreement and the contract to a limited company within their ownership.*"

(b) The "lock out agreement" was a reference to a call option granted (for £10,000) by the Appellant to Messrs Whittingham and Smith which precluded the Appellant from negotiating for the sale of the Property with other potential purchasers for a specified period of time.

(c) On 31st August 2006, Henriques Griffiths wrote to DR James & Son asking

> "*Can you … please let us have a contract appropriate to the transfer of a business as a going concern together with full details of the inventory of fixtures and fittings and transferring employees with their contracts of employment.*"

(d) On 6th September 2006, Henriques Griffiths wrote to DR James & Son asking for a "fixtures and fittings list" and observing that their client was

> "*… concerned that the lock out period commenced on 29th August when the lock out agreement is not in an agreed form* [and that Messrs Whittingham and Smith had instructed them] *that the lock out period will commence from the date that the agreement is exchanged between* [the agents for the sellers and the agents for the purchasers]."

(e) On 6th September 2006, DR James & Son wrote to Henriques Griffiths to say that

> "*We are instructed that the 28 days for the lock out agreement commenced on the 29th August …*".

(f) On 7th September 2006 Henriques Griffiths wrote to DR James & Son to say that

> "*… The lock out agreement was exchanged in accordance with Law Society's Formula B* [on that date]."

(g) On 17th October 2006 Henriques Griffiths wrote to DR James & Son asking

> "*… If you would kindly let us have a copy of the Premises Licence so that we can attend to licensing aspects.*"

(h) On 24th October 2006, DR James & Son sent Henriques Griffiths a copy of the Premises Licence for the Ryeford Arms.

(i) On 30th October 2006 DR James & Son wrote to Pontardawe Inn Limited to complain that the draft transfer and assignment for goodwill, received from Henriques Griffiths

> "*… included … a covenant that* [Pontardawe Inn Limited] *will not compete for a period of 3 years at a distance of 3 miles* [and] *this was not included in the contract for sale.*"

The letter asked for instructions whether to delete this clause from the draft assignment.

(j) On 21st December 2006, DR James & Son wrote to Messrs Woolley Bevis Diplock (this was in error, the letter should have been addressed to Henriques Griffiths, as is made clear by a letter from Wolley Bevis Diplock dated 2 January 2007) and confirmed that DR James & Son approved the transfer and assignment but that

> "*the restrictive covenants* [were] … *deleted as this was not included in the Contract.*"

(k) On 21st December 2006 Henriques Griffiths wrote to DR James & Son and communicated that

> "*Our client* [Messrs Whittingham and Smith] *is* [sic] *now wishing to purchase the property in the name of their limited company, Claden Limited … and the transfer will need to be amended accordingly.*"

(l) On 28th December 2006 Henriques Griffiths wrote to DR James & Son, saying that

> "*We also await a copy of the Premises Licence (you have only sent us a summary so far).*"

(m) On 3rd January 2007 DR James & Son wrote to Henriques Griffiths, enclosing a "*list of fixtures fittings and contents …*".

(n) On 28th December 2006 Henriques Griffiths wrote to DR James & Son and said

> "*In order to deal with the aspects of the licensing transfer application we*

must see a copy of the Premises Licence."

(v) The Appellant, on the one hand, and Messrs Whittingham and Smith, on the other, exchanged contracts on 5th October 2006 (we refer to this agreement as "the Contract"; as it happens, the Contract is dated 4th October 2006);

(vi) The sale consideration price in the Contract for sale was £725,000;

(vii) The Contract incorporated certain Special Conditions, which included the following provisions:-

"*16.* *The Seller* [the Appellant] *will sell and the Buyer* [Messrs Whittingham and Smith] *will purchase the Property and the business as a going concern and equipment (together called "the Assets") and the rights of the Seller used in the conduct of the business the* [sic] *for the purchase price which shall be apportioned as follows:-*

Property	*£499,000.00*
Business	*£100,000.00*
Equipment	*£126,000.00*
	£725,000.00

17. *In addition to the purchase price the Buyer shall take and pay for the stock in trade remaining undisposed of on the completion date and glassware at a valuation to be agreed* [the parties were agreed that this valuation amounted to £2,000] *between the Seller and the Buyer …*

18. *Until the completion the Seller will carry on the business as a going concern and will take all proper steps to preserve the business until the*

completion date and shall be treated until the completion date carrying on the business for its own benefit …

26. The parties shall use their best endeavours to obtain the relief available under Article 5 of the Value Added Tax (Special Provisions) Order 1995.

(a) The purchase price is exclusive of Value Added Tax (VAT) which may be payable in respect of the transfer of the Property, the Equipment and/or the goodwill.

(b) It is intention of the parties that the sale and purchase hereunder shall be a sale and purchase as a going concern pursuant to Article 5 of the Value Added Tax (Special Provisions) 1995 [sic] *or any modification or replacement thereof.*

(c) The parties shall use best endeavours to procure that the sale of the business is deemed to be a transfer of a business as a going concern for the purposes of the Vale [sic] *Added Tax Act 1994 section 49 and Schedule 4 paragraph 8(1)(a) or any modification or re-enactment thereof."*;

(viii) As to the terms "Equipment" and "Business" mentioned in Condition 16, Condition 15 of the Special Conditions of the Contract defines the "Equipment" to be the fixtures and fittings, trade equipment and other items specified in Schedule 1 to the

Contract and "Business" to be the goodwill of the Appellant's business conducted in the Property as a publican; there was an assignment by the Appellant, to Claden Limited (which was a company established by Messrs Whittingham and Smith which took title to the Property on completion, rather than Messrs Whittingham and Smith) dated 3rd January 2007, the consideration price being £100,000;

(ix) Condition 25 of the Special Conditions, dealing with the transfer of employees, was struck through;

(x) As we have observed above, on completion of the sale of the Property on 3rd January 2007, the Property was transferred to Claden Limited (incorporated on 15th November 2006), rather than to Messrs Whittingham and Smith. As we noted above, the Appellant's agents had already been informed by the solicitors acting for Messrs Whittingham and Smith (Henriques Griffiths) on 21st December 2006 (that is after the exchange of contracts but prior to completion) that Messrs Whittingham and Smith wished the Property to be transferred to their company, Claden Limited, rather than to themselves;

(xi) On 22nd December 2006, prior to completion of the sale of the Property, Claden Limited submitted a planning application to Stroud District Council to "extend" (using the language in the application for planning permission) the Property into a hotel; planning permission was granted with conditions on 28th February 2007;

(xii) On 3rd January 2007 (that is the date of completion) Cladden Limited obtained a mortgage, registered on 8th January 2007, secured over (1) the Property, (2) the assigned goodwill of the business carried on at the Property, (3) the benefit of all licences held by Cladden Limited in connection with the Property, from Scottish & Newcastle UK Limited (the charge was registered on 10th January 2007); and (4) all goods and moveable fittings. Furthermore, there was a floating charge over the

> "… *whole of* [Cladden Limited's] *undertaking and all its property whatsoever present and future … and all moveable plant and machinery implements utensils building and other equipment now or from time to time placed on or used in or about* [the Property]" (Clause 6 of the particulars of mortgage);

(xiii) However, on 20th August 2007, a second application for planning permission was submitted. This second planning application asked for permission to develop a three-storey, 80 bedroom residential care facility on the site of the Property; this application for planning permission was rejected by Stroud District Council on 11th February 2008;

(xiv) HMRC submitted (at paragraph 11 of HMRC's Skeleton Argument) that the site of the Property is currently marketed as a development site; the Appellant did not quarrel with this.

(xv) Both parties directed us to a VAT audit report, which was made after a VAT visit by HMRC, to the Appellant, which included the observation that:

> "[The Property] *was opted 14/10/05 and VAT was claimed on purchase. Sold for £725,000 to Claden Limited in January 07, without VAT. Pub business was probably sold as a TOGC, but new owner would have had to opt the premises by the time of the transfer for the sale of the premises to have been without VAT. Researched in office.*"

(xvi) On 28th June 2007, HMRC wrote to the Appellant's agents to say:

> "*From our records it would appear that the buyer of* [the Property] *registered* [for VAT] *at the time of the transfer and is using the assets for the same kind of business. On the face of it, the transfer of the business was not a taxable supply.*"

We should say that neither party (in particular the Appellant) relied on the terms of the VAT Visit Report, or of the letter of 28th June 2007 to suggest that this appeal is determined by anything contained in them. Both parties agreed (and in our view were right to do so) that the question of Claden Limited's intentions, having acquired the Property from the Appellant, is a question of evidence as to primary facts and inferences properly drawn from them, rather than inferences drawn from what "probably" seemed to be the case (using the language of the VAT visit report) or what "appeared" to be the case (using the language of the letter dated 28th June 2007). Neither did the Appellant suggest that HMRC were in any sense estopped from resisting the appeal because of anything contained in the VAT visit report, or the letter of 28th June 2007.

(xvii) Cladden Limited's abbreviated accounts for the accounting period ended 31 December 2007 record a figure of £791,023 as "stocks" in the abbreviated balance sheet.

3. No oral evidence was led by either party.

The Law

4. The VAT Directive (206/112/EC), Article 19 provides:

> "*In the event of a transfer, whether for consideration or not or as a contribution to a company, of a totality of assets or part thereof, Member States may consider that no supply of goods has taken place and that the person to whom the goods are transferred is to be treated as the successor to the transferor.*"

5. Article 19 is implemented in the UK by the Value Added Tax (Special Provisions) Order 1995 (SI 1995/1268, "the 1995 Order"), Article 5 which, at the material times, provided:

> "*(1) … They shall be treated as neither a supply of goods nor a supply of services the following supplies by a person of assets of his business –*
>
> *(a) the supply of a person to whom he transfers his business as a going concern where -*
>
> *(i) the assets are to be used by the transferee in carrying on the same kind of business, whether or not as part of any existing business, as*

that carried on by the transferor, and

(ii) in a case where the transferor is a taxable person, the transferee is already, or immediately becomes as a result of the transfer, a taxable person …".

6. Article 5(1)(b) of the 1995 Order is not relevant to this appeal.

7. The Court of Justice of the European Union ("CJEU") set out the test for a TOGC in *Zita Modes v Administration de l'Enregisterment et des Domains* (Case C-497/01) at paragraphs 40-46 of its judgment:

> "*… The concept of a transfer, whether for consideration or not or as a contribution to a company, of a totality of assets or part thereof must be interpreted as meaning that it covers the transfer of a business or an independent part of an undertaking including tangible elements and, as the case may be, intangible elements which, together, constitute an undertaking or part of an undertaking capable of carrying on an independent economic activity, but that it does not cover the simple transfer of assets, such as the sale of a stock of products … Concerning the use which is to be made by the transferee of the totality of assets transferred,* [Article 19 of the VAT Directive] *does not contain any express requirement as to that use … However, it is apparent from the purpose of* [Article 19 of the VAT Directive] *and from the interpretation of the concept of a transfer … of a totality of assets or part thereof … that the transfers referred to in that provision are those in which the transferee intends to operate the business or the part of the undertaking transferred and not simply to immediately liquidate the activity concerned and sell the stock, if any … The transferee must … intend to operate the business or part of the undertaking transferred and*

not simply to immediately liquidate the activity concerned and sell the stock, if any …".

8. The CJEU has also observed that

> "*… The intentions of the purchaser can – or, in certain cases, must – be taken into account in the course of an overall assessment of the circumstances of a transaction, provided that they are supported by objective evidence …*" (*Finanzamt Lüdenscheid v Schriever* (Case C-444/10), paragraph 38 of the judgment of the Court).

9. HMRC Notice 700/9 sets out HMRC's views as to the conditions which must be satisfied for the transfer of a business to constitute a TOGC. The conditions which are relevant to this appeal are set out in the Notice as being:-

> "● *The assets must be sold as part of the transfer of a "business" as a "going concern"*
>
> ● *The assets are to be used by the Purchaser with the intention of carrying on the same kind of "business" as the Seller (but not necessarily identical).*" (paragraph 1.2)

10. Paragraph 2.3.2 specifies that

> "*The test is whether the Purchaser* ***intends*** *(the emphasis is present in the Terms of Notice 700/9) to carry on the business he has bought. This test does not lend itself to a set time-span, because "continuation of a business" can vary between different types of activity.*"

11. Paragraph 2.3.6 provides that

> "***There must be no significant break in the normal trading pattern before or immediately after the transfer***. *The "break in trade" needs to be considered in the context of the type of business concerned, this might vary between different types of trade or activity … A short period of closure that does not significantly destruct the existing trading pattern, for example, for redecoration, will not prevent the business from being transferred as a TOGC.*"

12. We draw the following propositions from the legislative materials and case-law we have referred to above:-

(i) Whether or not there is a TOGC is a question of fact (*Finanzamt Lüdenscheid v Schriever* (Case C-444/10) [2012] STC 633, paragraph 38);

(ii) The factual scrutiny requires an "overall assessment" to be made of the circumstances of the transaction under scrutiny (ibid);

(iii) A TOGC must involve the transfer of assets which "*constitute an undertaking*" (or "*part of an undertaking*") which is "*capable of carrying on an independent economic activity*" and is distinct from a "*simple transfer of assets*" (*Zita Modes*, paragraph 40);

(iv) And the transferee must intend to operate the business (or part of the undertaking) transferred, so that, for example, an intention to liquidate the activity transferred and to sell the stock, if any, on the part of the transferee fails to satisfy this condition (*Zita Modes*, paragraph 44; *Schriever*, paragraph 37);

(v) According to Article 5(1)(a)(i) of the 1995 Order, the transferee must intend, at the time of the transfer of the property under scrutiny, to carry on the same kind of business as the transferor; neither party took any point on Article 5(1)(a)9i). The Appellant did not suggest that Article 5(1)(a)(i) was not compliant with Article 19 of the VAT Directive. HMRC did not suggest that the planning application dated 22nd December 2006 to extend the Property to an hotel infringed Article 5(1)(a)(i). We therefore say no more about this provision.

(vi) The "overall assessment" of the circumstances surrounding a transaction, including the intentions of the transferee, must be supported by "objective evidence" (*Schriever*, paragraph 38);

(vii) Importantly the test is whether the transaction constitutes the transfer of an undertaking which is "capable" of carrying on an independent economic activity, as opposed to one which is "*in fact used*" to carry on such an economic activity (*Zita Mode*s); so HMRC (quite properly) conceded (at paragraph 19 of HMRC's Skeleton Argument) that it was conceptually possible to have a TOGC without a recommencement of a trade, provided there was a *bona fide* intention to do so at the time of the transfer;

(viii) It follows that there is no TOGC, in circumstances where there is, for example, a sale of a business from A to B and a sub-sale of that business from B to C, in circumstances where B does not carry on a

"business", albeit that the "business" carried on by A is carried on by C, after the sub-sale from B to C: *Kwiksave Group Plc v 3EC* [1994] VATTR 457 ("*Kwiksave*"). In those circumstances there is no TOGC on the sale from A to B. Neither is there a TOGC on the sub-sale by B to C.

The Appellant's Submissions

13. Mr Philip Williams, Tax Partner for Gerald Thomas & Company, Chartered Accountants, appeared for the Appellant. We record that we found Mr Williams' submissions to be clear and helpful and we are grateful to him for his submissions.

(i) Transfer of an "undertaking", not merely of "assets"

14. Mr Williams submitted that the Property was transferred by the Appellant to Claden Limited in circumstances where there was also an assignment of goodwill (see above). Mr Williams accepted that no employment contracts had been transferred. However stock had been transferred. Mr Williams also accepted that the item referred to as "the Equipment" in Conditions 15 and 16 of the Special Conditions of the Contract had not been formally transferred by Messrs Whittingham and Smith (who were the purchasers under the contract) to Claden Limited (which took title both to the Property and was assignee of the goodwill). However, Mr Williams asked us to infer that Claden Limited had indeed acquired the right to use the Equipment from the Appellant, so

that, as from 3rd January 2007, Claden Limited was in a position that it was capable (albeit that it did not do so) of commencing a publican's business of the same type as that operated by the Appellant, prior to the sale of the Property. Thus, said Mr Williams, propositions (i), (ii), (iii) (v) and (vii) we set out above were all satisfied. In particular propositions (iii) and (vii), as to whether Claden Limited had acquired a totality of assets comprising an "undertaking" (here a public house business), such that Claden Limited was capable of carrying on a public house business from the Property, were satisfied. If the Equipment had indeed been transferred by the Appellant to Claden Limited, given that the goodwill had been assigned to Claden Limited, that which was transferred by the Appellant to Claden Limited comprised an "undertaking" which was "capable" of being operated as an independent public house business and was not properly viewed as a simple transfer of assets.

15. In relation to the Equipment, Mr Williams also directed us to the abbreviated accounts for Claden Limited for the period ended 31st December 2007. The abbreviated balance sheet shows "stocks" to be standing at £791,023. This demonstrated, said Mr Williams, that the entirety of the value of the Property, goodwill and "Equipment" was represented in this figure for "stocks" (the difference in value being, as we understand it, an appreciation in value of the Property), which, in turn, showed that the Equipment had indeed been transferred to Claden Limited by the Appellant.

(ii) Claden Limited intended to use the Property for a public house business

16. Mr Williams further submitted that it was clear from the terms of the Contract which bound Messrs Whittingham and Smith that the publican business carried on by the Appellant was to be carried on by Messrs Whittingham and Smith (as purchasers under the contract). Indeed they were required to use their "best endeavours" to secure that the transfer of the Property was a TOGC: see the preamble to Condition 26 and sub-paragraph 26(c) of the Contract. We were also invited to infer that Claden Limited had the requisite intention. After all it had been made clear, prior to completion, that title was to be taken by Claden Limited, rather than Messrs Whittingham and Smith. Yet Messrs Whittingham and Smith were still bound by the terms of the contract which required them to secure TOGC status for the transfer of the Property from the Appellant. Thus, said Mr Williams, the inference we should properly draw is that the contractual obligation which obligated Messrs Whittingham and Smith to continue to trade from the Property as publicans, in order to secure TOGC status for the transfer of the Property, reflected an intention on the part of the latter to conduct a public house business from the Property (since otherwise Messrs Whittingham and Smith must be inferred to be seeking to deliberately breach their obligations under the Contract, for which there was no evidence). That intention was properly imputed to Claden Limited since again otherwise, by having the Property transferred to Claden Limited, would be to invite an inference that Messrs Whittingham and Smith, by having Claden Limited take title to the Property, were avoiding their obligations under the Contract to secure TOGC status for the transfer of the Property, for which there was no evidence .

17. Mr Williams submitted that Claden Limited's intention to operate the Property as a public house is also properly inferred from its planning application dated 22nd December 2006 for permission to extend the Property as a hotel. The explanation for the closure of the Property and failure to operate any publican business at all is to be found in the letter of 8th October 2008, in which HMRC had themselves advised the Appellant's agents that Claden Limited's representative had confirmed that the Property was taken over with the intention of trading as a public house, was closed for a period of refurbishment and only subsequently did Claden Limited discover that the costs of refurbishment were prohibitive (which explained the change of mind as to the proposed use of the Property and the second planning permission application which sought to demolish the Property and erect a residential care home). Mr Williams contends that the trade only ceased when that subsequent decision (having found the costs of an extension of the Property to a hotel were prohibitive) was taken. This also, said Mr Williams, explained the absence of the transfer of any employment contracts, since employees would only be required after the refurbishment. Mr Williams also observed that Scottish & Newcastle UK Limited had secured the Property (together with goodwill and the benefit of any licences). This also raised the inference that Claden Limited intended to operate the Property as a public house at the time that it acquired the Property on 3rd January 2007, since it was inherently unlikely that Scottish & Newcastle UK Limited would grant a loan to a non-public house business (indeed Mr Williams observed that it would have, generally speaking, required the presentation of a public house business plan to obtain any loan from

Scottish & Newcastle UK Limited at all, although Mr Williams conceded that there was no evidence as to what had or had not been presented by Messrs Whittingham and Smith, or Claden Limited, to Scottish & Newcastle UK Limited in securing a loan and it was not apparent on the face of the documentation presented to us that there was any conditionality at all as to the use of the premises in order for the loan to be made).

18. Mr Williams also observed that the precise date of the decision to abandon the hotel project and seek to develop the site is irrelevant but must have been after 3rd January 2007 (the date of completion of the sale of the Property by the Appellant to Claden Limited).

HMRCs' submissions

19. Mr David Yates appeared for HMRC. We are also grateful to Mr Yates for his submissions. Mr Yates' submissions made two distinct points. Firstly, there was, he said, no transfer of an "undertaking" by the Appellant which was capable of being operated by Claden Limited as a public house. Thus propositions (iii) (transfer of an undertaking, not merely of assets) and (vii) (transferee must be capable of operating the undertaking as a business) had not been made out by the Appellant. Secondly, there had never been an intention on the part of Messrs Whittingham and Smith (and, by implication, Claden Limited) to operate the Property as a public house. Thus proposition (iv) had not been made out. Either point was, said Mr Yates, sufficient to require us to dismiss the appeal.

(i) Transfer of assets", not an "undertaking"

20. As to whether there had been the transfer of an undertaking, Mr Yates made his case here on two bases. The first basis was that there was no evidence that the "Equipment" had been transferred to Cladden Limited at all. Thus, said Mr Yates, all that Cladden Limited had acquired from the Appellant, on any view, on the basis of the documentation which was presented to us, was title to the Property and an assignment of "goodwill". Mr Yates submitted (and Mr Williams did not quibble with this in the course of his oral submissions) that the Equipment (which we take to be the fixtures and fittings within the Property) was essential to operating the Property as a public house. The Equipment was valued at £126,000, which infers that the Equipment was substantial and important. Title to the Equipment, under the Contract, passed to Messrs Whittingham and Smith. There is no evidence that title (or indeed any right to use the Equipment) passed to Cladden Limited. The purchase price for the Equipment (£126,000) was separately apportioned and thus the subject of a separate transaction to that of the Property. The Appellant had not, said Mr Yates, made any case for suggesting that title to the Equipment passed with title to the Property (say, by reason of being fixtures as a matter of land law). This, quite simply, said Mr Yates, meant that Cladden Limited did not acquire an "undertaking" which was "capable" of constituting an economic activity (a publican business), since that "economic activity" required the "Equipment". Mr Williams' inference that the Equipment must have passed to Cladden Limited from the Appellant was misconceived. There was no documentation to suggest this. That Messrs Whittingham and Smith may,

subsequent to the transfer of title to the Property to Claden Limited (presumably after the proposed refurbishment), have permitted Claden Limited to utilise the Equipment (or even that there was an understanding that the Equipment would be available to use whenever Claden Limited needed it) is irrelevant. For the transfer of the Property from the Appellant to Claden Limited must, to have been a TOGC, have been the transfer of an "undertaking" as opposed to merely "assets". Without the Equipment, the Property (even with the assigned "goodwill") were merely "assets" since there could be no "business" (or "economic activity") without the Equipment. Neither could it be inferred from the abbreviated accounts for the year ended 31st December 2007 that title to the Equipment had passed to Claden Limited by reference to the figure of £791,023 as "stocks" in the abbreviated balance sheet. No evidence had been presented by Mr Williams, said Mr Yates, as to whether this figure indeed did include the value of "the Equipment" (and on what basis, if so, this value of the Equipment had been so included).

21. Mr Yates' second basis for submitting that there was no transfer of an "undertaking" rather than merely "assets" to Claden Limited was by way of an application of ***Kwiksave***. Mr Yates said that even if Messrs Whittingham and Smith had arranged for Claden Limited to use the Equipment, after completion of the sale of the Property on 3rd January 2007, Messrs Whittingham and Smith had never, on any view, carried on the Appellant's public house business from the Property. Thus even if Claden Limited had acquired the Property and goodwill from the Appellant and title (or some other user-right) to the Equipment from Messrs Whittingham and Smith, that was insufficient

for the transfer of the Property and goodwill to be a part of a TOGC, since what passed from the Appellant to Claden Limited was not, without the Equipment, which would have to come from Messrs Whittingham and Smith, an "undertaking" which was being capable of operation as a public house business.

22. Thus, said Mr Yates, proposition (vii), that an undertaking, not merely "assets", be transferred was not satisfied, which meant, in turn, that the sale of the Property and other assets was not a TOGC.

(ii) Claden Limited had no intention of operating the Property as part of a public house business

23. Turning to the question of the intention of Claden Limited to operate the Property as a public house, Mr Yates made separate submissions. Mr Yates submitted that proposition (iv), that there is an intention on the part of the transferee to operate the business previously operated by the transferor, was not made out, as there was no "objective evidence" as to any such intention (proposition (vi)).

24. Mr Yates said that the evidence presented by Mr Williams did not amount to "objective evidence" as to the intention of the transferee (Claden Limited) to operate the Property as a public house. Mr Yates observed that Claden Limited did not seek to operate the pub whilst its application for planning permission for developing a hotel was being considered by Stroud District

Council. There was no transfer of staff (indeed the parties to the Contract had struck through the provisions dealing with the transfer of employees). There was no evidence at all, Mr Yates submitted, that Claden Limited took steps to arrange for suppliers to allow the pub business to continue. Thus it could not be said that there was any objective evidence at all as to Claden Limited's intention to operate the Property as a public house as at 3rd January 2007. Thus proposition (iv) and (vi) were not made out. It followed, according to Mr Yates, that there was no TOGC in this case.

25. Indeed, Mr Yates went further in what was effectively a separate submission on the question of Claden Limited's intentions and submitted that there was never an intention at all on the part of Messrs Whittingham and Smith (and by implication Claden Limited) to operate the Property as a public house at any time. Mr Yates submitted that the alleged closure for refurbishment was illogical pending the outcome of the planning permission application for the hotel (since if the hotel development were to proceed, the refurbishment would be potentially wasted). Mr Yates said that there was no evidence that any actual refurbishment was carried out (or even genuinely intended). It was also, said Mr Yates, unlikely that Claden Limited only decided that the pub business was feasible only after acquiring the business, as one would have thought that this would have been a key business consideration in the first place when deciding to acquire the Property. The inclusion of the value of the Property (on any view, laying aside the question of goodwill and the Equipment) inferred that Claden Limited had intended to develop the Property all along and had no intention ever of running it as a public house. Mr Yates

directed us to certain documentation (with no objection from Mr Williams and the terms of which were not disputed by Mr Williams) which described Mr Whittingham as a property developer and narrated that Mr Whittingham held directorships with other companies whose names suggest their main purpose was one of property development. This raised the inference, said Mr Yates, that Cladden Limited, of which Mr Whittingham was both a shareholder and director, also had a sole property development intention as regards the Property.

26. Thus, said Mr Yates, proposition (iv) had not been satisfied, which was sufficient to entail that the transfer of the Property and other assets was not a TOGC.

Discussion and Conclusion

27. This appeal turns on two questions of fact. Firstly, to determine whether or not the sale of the Property by the Appellant to Cladden Limited was a TOGC, we must ascertain whether what was transferred from the Appellant to Cladden Limited was an "undertaking" which was capable of being operated as a business, as opposed to the transfer of "assets" which was not capable of being so operated (propositions (iii) and (iv): *Zita Modes*, *Schriever*). Secondly (this question only arises if the transfer was indeed that of an "undertaking") we must ascertain whether the transferee (Cladden Limited) had, as at 3rd January 2007, the intention of operating the Property as a public house, which

intention is supported by objective evidence (proposition (vi), (vii): *Schriever; Zita Modes*).

(i) Transfer of the Property: transfer of an "undertaking" or only of an "asset"?

28. We find that the transfer of the Property was that merely of an "asset" (along with the goodwill) and not part of a transfer of an "undertaking". The transfer of the Property was not, therefore, a TOGC.

29. Firstly, we find as a fact that Messrs Whittingham and Smith understood that they were obligated to purchase the Property as "a going concern": see Clause 16 of the Contract, which was clear on its terms. Their agents, Henriques Griffiths made it clear to the Appellant's agents that the transfer was to be one of "a going concern": see the letter of 31st August 2006, which we refer to above. And we acknowledge that the Contract makes specific reference to Article 5 of the 1995 Order (see Clause 18, 26 of the Contract). But we cannot (and do not) infer from the reference, in the Contract, to Article 5 of the 1995 Order, that the parties in fact structured the transfers of the Property, goodwill and the Equipment so as to ensure that there was a TOGC of the Appellant's public house business conducted from the Property. We can only make findings of fact and inferences from the documents put to us which implement the transfer and, where appropriate, the correspondence between the parties, via their agents.

30. We turn to the documents relevant to the transfer of the Property, goodwill and the Equipment. The letter from Henriques Griffiths to DR James & Son, dated 25th August 2006, which intimated that Messrs Whittingham and Smith would be effecting their acquisition via a company, referred to "contract documents". But the letter dated 21st December 2006, which was, of course dealing with the mechanics of the transaction, again intimated that a company would be making an acquisition, not Messrs Whittingham and Smith but referred only to the Property and did not mention the goodwill or the Equipment (or indeed the stocks or glassware). We have observed that the goodwill was assigned to Cladden Limited and not to Messrs Whittingham and Smith. But the very fact that the agents for Messrs Whittingham and Smith went to the trouble of ensuring that the title to the Property went to Cladden Limited and not to Messrs Whittingham and Smith and of assigning the goodwill to Cladden Limited and not to Messrs Whittingham and Smith, notwithstanding the terms of the Contract which was concluded on the basis that the transferees were Messrs Whittingham and Smith, gives rise to the inference that (and we find as a fact that), in the absence of any documentation which suggests otherwise, the Equipment was transferred by the Appellant to Messrs Whittingham and Smith under the Contract and not to Cladden Limited. There is no documentation suggesting that the Appellant transferred the Equipment to Cladden Limited, or any multi-party agreement amongst the Appellant, Messrs Whittingham and Smith and Cladden Limited that the Equipment would be transferred to Cladden Limited as at 3rd January 2007, so as to make the transfer

of the Property part of the transfer of an "undertaking" from the Appellant to Cladden Limited.

31. It is quite clear that the Contract provided for the transfers, by the Appellant to Messrs Whittingham and Smith, of three separate assets, being the Property, the goodwill and the Equipment: see Clause 16 of the Contract. Each asset, as is clear from Clause 16 of the Contract, was separately paid for. And we infer and find as a fact that each asset must have been separately valued for the parties to have arrived at bona fide values for each of the Property, goodwill and the Equipment. And, as is common ground between the parties, since the public house business could not be operated as such without the Equipment (the term "Equipment" was, we should remember, valued at £126,000 and defined in Condition 15 of the Special Conditions to the Contract as the fixtures and fittings and there is no evidence of how the Property, prior to the refurbishment being carried out, was capable of being operated as a public house without any fixtures and fittings), unless the Appellant transferred the Equipment along with the Property and the goodwill to Cladden Limited, what was transferred by the Appellant to Cladden Limited was not "capable" of constituting an "undertaking" which constituted an "economic activity" (a public house business), since it lacked a necessary constituent (the Equipment). This is sufficient to prevent the transfer of the Property (or any of the other assets transferred to Cladden Limited/Messrs Whittingham and Smith) from being part of a TOGC.

32. As we make clear below, we do consider that Messrs Whittingham and Smith intended to use the Property as a public house and the inference we take from that is that Cladden Limited had that intention, at least as at 3rd January 2007, when Cladden Limited acquired the Property. We make it clear as to why we reached that finding of fact below. But that does not infer that the Equipment was transferred by the Appellant to Cladden Limited, in the light of the basis on which we find that the Equipment was not transferred by the Appellant to Cladden Limited. Indeed we cannot even infer that Messrs Whittingham and Smith arranged that Cladden Limited would have access to the Equipment once Cladden Limited had acquired the Property and the goodwill on 3rd January 2007, since whether or not the Equipment would be necessary or appropriate for the public house business run from the Property after Cladden Limited's acquisition on 3rd January 2007 depended on the nature of the refurbishment of the Property, how long the refurbishment took, the outcome of the planning application for the extension of the Property to an hotel and Messrs Whittingham's and Smith's business plan for the nature of the public house business to be run from the Property. We have no evidence as to any of this. It is impossible to infer that there was any agreement as amongst Messrs Whittingham and Smith on the one hand and Cladden Limited on the other as to any use of the Equipment by Cladden Limited, at the time at which Cladden Limited completed its acquisition of the Property on 3rd January 2007. We find as a fact that there was no such agreement.

33. Furthermore, we make no inference (either way) from the reference to "*goods and moveable fittings*", or the reference to "*moveable plant machinery*

implements [etc.]" in Clause 6 of the particulars of mortgage dated 3 January 2007 (registered 8 January 2007), to which we refer above. The reference to "*goods and moveable fittings*" does not infer that the Equipment was transferred by the Appellant to Claden. It merely secures a charge over such moveables as were, in fact and law, transferred to Claden Limited (and for the reasons we set out here, we consider that the Equipment was not so transferred). And Clause 6 refers to such moveables etc. "*placed in or used in or about* [the Property]" and makes no assumptions whatsoever as to whether the Equipment was transferred by the Appellant to either Messrs Whittingham and Smith on the one hand, or to Claden Limited on the other.

34. The entry in Claden Limited's abbreviated accounts of a figure of £791,023 as "stocks" does not raise any inference that the Equipment was transferred by the Appellant to Claden Limited. We find that on the balance of probabilities, this figure in the abbreviated balance sheet includes the value of the Property but we cannot, in the absence of any further evidence as to what was comprised in this "stocks" figure, and in the absence of any evidence as to the nature of the goodwill assigned to Claden Limited or the nature of the Equipment, make any inference or finding of fact that this figure in the abbreviated balance sheet represents the values of these latter items. And in any event, we were not given any explanation as to the basis on which this figure appeared in the abbreviated balance sheet. Neither were we given any analysis of whether, even if this figure is properly taken to be the aggregate value of the Property, goodwill and the Equipment, title to the Equipment is required by Claden Limited before its value can enter its accounts.

35. We therefore repeat our finding of fact that Claden Limited acquired the Property and the goodwill from the Appellant but not the Equipment. As such Claden Limited did not acquire an "undertaking" which was capable of being run as a business, as the Equipment was essential to the operation of the Property as a public house. Thus the transfer of the Property (albeit with the goodwill) was not a TOGC.

36. We also record that no evidence was led as to how the Property was to be staffed by Claden Limited once the refurbishment was complete. No employment contracts were transferred. No evidence was led as to any staff being engaged or other arrangements being made for staff to operate the Property as a public house. We infer (and find as a fact) that there were no such arrangements and thus this is an additional (and sufficient) ground for us to find that the Property was not "capable" of being operated as a public house by Claden Limited as at 3rd January or at any time subsequent to that date (and that there is therefore no TOGC in this case), since it is not possible to operate a public house without staff.

(ii) Intention to run the Property as a public house

37. Our finding of fact that the Equipment was not transferred by the Appellant to Claden Limited and thus prevented Claden Limited from acquiring an "undertaking" from the Appellant is sufficient to dispose of the appeal, as is our finding in relation to the absence of any arrangement to staff the Property. However, we find as a fact that Claden Limited did indeed have an intention

of continuing the public house business from the Property until a change of mind (albeit on some unspecified date) which must have occurred prior to the submission of the second planning permission application dated 20th August 2007, applying to erect a residential care home.

38. As a preliminary point, we reject Mr Yates' submission that there was no intention at all on the part of Claden Limited to run the Property as a public house at any material time, based upon certain documentation he directed us to, which described Mr Whittingham as a property developer, who held directorships with other companies whose names suggest their main purpose was one of property development. This is neither here nor there. As it happens, in the letter of 25th August 2006 to which we refer above, Henriques Griffiths gave Mr Whittingham's address (and indeed that of Mr Smith) as "*C/o The Sandringham Public House*, which suggests that Mr Whittingham had a connection to the public house trade. Also, the fact that the value of the Property was reflected in the figure for "stocks" in Claden Limited's abbreviated balance sheet for the year ended 31st December 2007 is irrelevant, since the change of mind which preceded the second planning permission application was well before the date on which these accounts were prepared, which meant that, by the time the accounts were drawn up, the Property was properly reflected as "stocks" even if Claden Limited had the intention as at 3rd January 2007, to operate the Property as a public house. Neither do we find it unlikely that Claden Limited undertook a refurbishment pending the outcome of the first planning permission application (dated 2nd December 2006) for a hotel. We have no evidence as to whether the refurbishment

would have been sensible and appropriate whether or not this planning permission had been granted (and if the costs had not been sufficiently prohibitive as to require Claden Limited to abandon the proposed extension). It is perfectly possible that the refurbishment was an exercise which Claden Limited was willing to undertake, bearing in mind the risk that this first planning permission would not be granted. Thus the fact of the refurbishment does not militate against a finding that Claden Limited had an intention to operate the Property as a public house at some future date, having acquired the Property on 3rd January 2007.

39. Turning to positive objective evidence as to Claden Limited's intentions as at 3rd January 2007, as we have observed above, Messrs Whittingham and Smith undertook express contractual obligations to ensure that TOGC status was confirmed on the transfer of the Property by the Appellant. These obligations were not altered once it had been made clear to the Appellant's that the transferee, so far as the Property was concerned (and the assignee of the goodwill) was to be Claden Limited, rather than Messrs Whittingham and Smith. No suggestion has been made (by anybody) that these contractual obligations should be taken as being anything other than what they purport to be at face value. Thus the inference arises (and we find as a fact) that Messrs Whittingham and Smith intended to operate the Property as a public house, at some time after the acquisition of the Property from the Appellant, to fulfil their contractual obligations, if nothing else. And the inference also arises (and we find this a fact) that Claden Limited, which was wholly-owned by them, would operate the Property as a public house at some time after 3rd

January, since there is no evidence that Messrs Whittingham and Smith sought to escape their obligations to ensure that the Property was transferred as "a going concern" (see Condition 26 of the Special Conditions to the Contract"). Otherwise the inference arises that Messrs Whittingham and Smith, by taking title to the Property through Cladden Limited, had abandoned their intention to fulfil their obligations under the Contract, for which there is no evidence. Furthermore, the assignment of the goodwill only makes sense if there was an intention on the part of Cladden Limited to operate the Property as a public house at some point (the same is true of the stocks and glassware, valued at £2000). The instrument which assigned the goodwill, dated 3rd January 2007, purported to assign goodwill and also gave Cladden Limited the exclusive right to use the name "*The Ryeford Arms*". So far as the assignment of goodwill is concerned, we have had no evidence as to where this goodwill was located (whether the value of the goodwill was located in the use of the name itself, the physical location of the Property, although this latter element of goodwill could not be intelligibly separated from the Property itself, some sort of customer base, or elsewhere). Be that as it may, the parties ascribed a value of £100,000 and again it was not alleged by HMRC that the goodwill was not so transferred, or that the exclusivity provision was anything other than genuine.

40. Furthermore, there was correspondence between the agents for Messrs Whittingham and Smith, as purchasers and the Appellant's agent, as seller, which reflects an intention on the part of Messrs Whittingham and Smith, as purchasers, that the Property be used as a public house. Firstly, there was an exchange of correspondence where the agents for the Appellant required to

change the terms of the contract to reflect the fact that the Property was being sold as part of a transfer of a going concern (see the letter from Henriques Griffiths dated 31st August 2006). Secondly, there was correspondence as to the assignment of the benefit of licences, in particular a Premises Licence (see the letters from Henriques Griffiths to DR James & Son dated 17th October 2006, DR James and Son's reply dated 24th October 2006 and a further letter from Henriques Griffiths dated 28th December 2006)). The list of fixtures and fittings ("the Equipment") was the subject of letters from Henriques Griffiths to DR James & Son dated 31st August 2006 and a reply from DR James & Son dated 3rd January 2007. None of this correspondence makes any sense unless there was intention on the part of Messrs Whittingham and Smith to operate the Property as a public house at some time. And we have already observed that as Cladden Limited was wholly owned by Messrs Whittingham and Smith , who were had contractual obligations to use best endeavours to operate the Property as a public house, that intention is properly imputed to Cladden Limited. This correspondence amounts to objective evidence (see proposition (vi) that there was an intention on the part of Cladden Limited, as at 3rd January 2007, to operate the Property as a public house at some time. It is not suggested by HMRC that this correspondence was in any sense effected with the objective of creating some sort of pretence that the Property was being transferred with a view to the purchasers, Messrs Whittingham and Smith (and by inference Cladden Limited) as a public house. The requirement for an assignment of licences only makes sense if the Property was to be used a public house at some point.

41. The £126,000 paid for the fixtures and fittings ("the Equipment") by Messrs Whittingham and Smith also only makes sense if the Property was to be used as a public house at some point. There is no evidence that the valuations put on the fixtures and fittings ("the Equipment") was anything other than an arm's length price and we find as a fact that it was such.

42. Our conclusion that Cladden Limited had an intention to operate the Property as part of a public house business as at 3rd January is consistent with our finding of fact that what Cladden Limited acquired from the Appellant was the Property and goodwill but not the Equipment, so that Cladden Limited did not acquire an "undertaking" which was capable of being operated as a public house at some future date (prior to the change of mind evidenced by the second planning application dated 20th August 2007). Cladden Limited intended to operate the Property as part of a public house business as at 3rd January 2007 but would have had to gain access to the Equipment, or to new fixtures and fittings, to fulfil that intention. Exactly the same observations apply to the absence of any staff to operate the Property as at 3rd January 2007.

43. We attach no significance to the first planning application dated 22nd December 2006, since there is no evidence as to how this project affected Cladden Limited's thinking about the use of the Property as a public house between the time when the proposed refurbishment was completed and the start of the hotel project, had it gone ahead. And we also attach no significance to the mortgage obtained from Scottish & Newcastle UK Limited,

registered on 8th January 2007, since there is no evidence as to the terms or conditions on which the relevant advance was obtained.

44. We infer (and find as a fact) that Cladden Limited acquired the Property with a view to operating the Property (after refurbishment) as a public house at some point after 3rd January 2007. We also find as a fact that at some stage prior to the submission of the second planning application on 20th August 2007, Cladden Limited had abandoned this intention, which is self-evident, given the nature of the second planning application to erect a residential care home. We consider that our inference and finding of fact is based on objective evidence, being the Contract and the correspondence we refer to here. This means that Cladden Limited satisfied propositions (iv) and (vi). But despite having an intention to operate the Property as a public house (before the change of intention reflected in the second planning application dates 20th August 2007), Cladden Limited was not capable of operating the Property as a public house as at 3rd January 2007, without the Equipment and without staff. Thus, despite our finding of fact that Cladden Limited did have the intention to operate the Property as at 3rd January 2007, we cannot, for the reasons we give above characterise the transfer of the Property (and other assets) from the Appellant to Cladden Limited as a TOGC.

45. It follows that the assessments raised by HMRC are good. We dismiss the appeal.

JULIAN GHOSH QC
TRIBUNAL JUDGE

RELEASE DATE: 16 April 2014