FIRST DIVISION, INNER HOUSE, COURT OF SESSION

[2018] CSIH 49
XA81/17

Lord President
Lord Drummond Young
Lord Bannatyne

OPINION OF LORD CARLOWAY, the LORD PRESIDENT

in the appeal by

SiBCAS LTD

Appellants

against

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS

Respondents

Appellant: Simpson QC; Anderson Strathern
Respondents: Roxburgh; Office of the Advocate General

13 July 2018

Introduction

[1] This appeal is about whether the appellants' supply of temporary school accommodation to an educational institution is exempt from Value Added Tax as constituting "the grant of [an] interest in or right over land or of [a] licence to occupy land", as interpreted to include "the leasing or letting of immovable property". Unusually, it is the respondents who maintain that the supply is exempt. The issue is of some importance since there requires to be clarity, or at least firm guidance, for commercial enterprises on whether they ought to charge VAT to customers to whom they supply a variety of different types,

shapes and sizes of accommodation modules which are, at least at the time of the initial supply, intended for temporary use.

Statutory Background

[2] The Value Added Tax Act 1994 provides (s 1) that VAT shall be charged "(a) on the supply of goods or services"; "supply" including (s 5) "all forms of supply". The supply requires to be by a taxable (registered) person (s 3) "in the course or furtherance of any business" (s 4). The 1994 Act has its source in the Sixth Directive (EC 77/388) on the harmonisation of ... turnover taxes", which became the Principal Directive (EC 2006/112) on the common system of VAT. The Act's terms require to be construed in a manner compatible with the 2006 Directive. Article 9 of the 2006 Directive refers to a taxable person being someone carrying on "any economic activity"; meaning "any activity of producers, traders or persons supplying services" (see also the Sixth Directive, Art 4). There is, for other purposes, a definition of "a building" in Article 12; being "any structure fixed to or in the ground".

[3] The 1994 Act provides that "the grant of any interest in or right over land or of any licence to occupy land" is exempt from VAT (s 31(1); Sch 9, part II, group 1 (land), item 1(*l*)). This implements Article 135(1)(*l*) of the 2006 Directive, which requires member states to exempt transactions involving "the leasing or letting of immovable property" from the charge (see the Sixth Directive Art 13B(b)). Exceptions to the exemption in this group include the provision of hotel, catering or holiday accommodation, caravan park or camping facilities, and accommodation at a sports ground or other place of entertainment.

Facts found by the First Tier Tribunal

[4] The appellants' business is the manufacture, supply and hire of relocatable, modular prefabricated accommodation units. Single units are manufactured in different sizes, but are generally 3 metres wide and between 6.8 and 9.2 metres long. They are rectangular boxes. The units are transported by lorry to the customers' sites by the appellants. The duration of hire is typically between 1 and 13 months for a single unit; averaging 7 months. Multiple unit hires will range from 4 to 36 months; averaging 20 months.

[5] Part of a secondary school in Stockton-on-Tees, which was operated by the Church of England, had been condemned. Temporary school accommodation was to be supplied by the appellants. The supply was for a minimum of 24 months, although it ultimately lasted for 32 months.

[6] The appellants required to carry out foundation works, since the structure was to be laid on an uneven tarmac playground/tennis court, which was adjacent to the condemned school. The ground conditions were of insufficient strength to cope with the structure's predicted weight. The appellants cut the tarmac and dug three parallel trenches. They filled each trench with compacted stone and placed large steel levelling beams on top of the stone to provide an adequate and level base for the units. The beams were not attached to or embedded in the stone. They simply rested on top of it. The trenches were about 30 metres long and between 300 and 600 millimetres deep. The ground floor units rested on, and were initially clamped to, the beams. The purpose of these friction clamps was not to secure the structure permanently to the ground, since its mass and weight would do that. They were used to stop the first unit moving as the others were positioned next to it and to do the same with other units during the construction phase. The clamps could have been removed on completion of the structure, although there was no need to do so.

[7] The accommodation consisted of three interlinked, two storey blocks, plus four landings and steps, one disabled access ramp to the ground floor and two landings and stairs to the first floor. The base of one staircase was surrounded by tarmac and the others were bolted to metal plates secured to the tarmac. There was no roof framework; simply the flat top of the upper units, which was covered by a sealant membrane. The completed construction contained 19 classrooms with associated staff and other accommodation, including toilets and an internal lift and stairways. It extended to almost 4,000 m^2. It had central heating and air conditioning as well as other utilities, including plumbing and electric and network cabling.

[8] The construction involved 66 units, some of which were combined to create the desired space. The units were clipped or clamped together to create the integrated structure. Decoration and tiling ran across the units. Skirtings were installed between the floors and below the ground floor for cosmetic and safety reasons. Each unit required an articulated lorry to move it onto site, with eight more lorries needed for the carriage of other component parts. The units had all come from another site, where they had also been used as educational accommodation. The overall complex size was the same, although some minor internal modifications were made to meet the school's specific requirements. The units were positioned using a telescopic crane. They took 29 days to assemble (it being impractical to deliver all the units to the site at once).

[9] When the contract came to an end, the services were disconnected, the cabling stripped out and central heating pipes cut. This required far less skill than that used in construction. The rooms were broken back into units. Each unit was removed by crane and lorry. The trenches and stone infill were left on site. The steel beams were taken away. It

took 98 man days (14 men x 7 days) to dismantle and remove the structure. No unit was damaged and all were subsequently rehired to other customers.

The First Tier Tribunal's analysis

[10] The FTT focused on the nature of the completed structure in order to determine whether there had been a lease of immovable property. In that context, it had regard to C-315/00 *Maierhofer* v *Finanzamt Augsburg-Land* [2003] STC 564, C-60/96 *Commission* v *France* [1999] STC 480, *HM Revenue & Customs* v *UK Storage Co (SW)* [2013] STC 361 and *University of Kent* v *Commissioners of Customs & Excise* [2004] BVC 2215. The FTT determined that "immovable" meant "fixed to or in the ground" (*Maierhofer* (*supra*) at para 35). The relevant question was "whether the prefabricated components and therefore the units are fixed to or in the ground and whether they can be easily dismantled or easily moved". Each unit had to be considered in isolation. The friction clamps did not attach or fix the units "and therefore the building" to the beams. The beams which rested on the stone were not an integral part of the building. The foundation trenches and stone remained on site after removal. The external service connections were very limited. Objectively, the attachment was not sufficient to enable the building, or the individual units, to be "firmly fixed to the ground". In any event, it was a straightforward matter to disconnect and remove the units. The appellants did this all over the country on a regular basis with no particular difficulty. The works were therefore not exempt from the VAT charge.

The Upper Tribunal

[11] The UT considered that the question for the FTT had been whether there had been a "grant of any interest in or right over land or of any licence to occupy land". This depended

upon whether there had been a letting of "immovable property" within the meaning of Article 135(*l*) of the 2006 Directive. Article 135(*l*) had to be interpreted in its context and having regard to the underlying purpose of the exemption which it established. The letting of a building may be one of immovable property even if the land on which the building stands is not included in the letting (*Maierhofer* at para 41). In terms of Advocate General Jacobs' first conclusion in *Maierhofer* (at para 43), "'immovable property' ... covers buildings constructed from prefabricated materials … if they are firmly fixed to or in the ground".

[12] Reading both *Maierhofer* and C-532/11 *Leichenich* v *Peffekoven* [2013] STC 846, it was clear that: (1) Article 135(*l*) of the 2006 Directive should be interpreted in a way which was consonant with Article 12(2), whereby a building will be immovable property if it is "fixed to or in the ground"; (2) in neither case did the CJEU exhaustively prescribe the circumstances in which a building ought to be regarded as so fixed. An active connection, such as a physical fastening was not a requirement, as the FTT and the UT in *UK Storage Co (SW)* (*supra*) had held; (3) immovability was to be determined by looking objectively at the characteristics of the building and its relationship with the site; (4) *Maierhofer* did not say that the immovability of a prefabricated building fell to be decided according to whether individual components were fixed to the ground. The issue was whether the building was fixed to or in the ground; and (5) neither *Maierhofer* nor *Leichenich* recommended a sequential approach. The UT in *UK Storage Co (SW)* had erred in adopting that approach. The means by which a building was kept in position and the ease of removal or dismantling were inter-related and both were relevant to whether the building was fixed to or in the ground. They ought to be considered together.

[13] In the UT's view, the relevant question was whether the building was fixed to or in the ground. The FTT had taken an unduly restrictive view of what this had involved. It had

regarded the facts in *Maierhofer* as representing a minimum requirement. It had wrongly adopted the sequential approach. It ought to have looked objectively at the building's relationship with the ground and taken a holistic view, looking cumulatively at all of the links between the building and the ground and whether the building could be easily dismantled and moved. The FTT had erred in looking at each connection separately. The issue was whether the beams and foundations had been integral to the building before dismantling. They plainly were. The FTT's error had been compounded by looking at whether a unit rather than the structure could be easily dismantled and moved. The structure was fixed to or in the ground. It had substantial foundations sunk into the ground. It was held very firmly in position by compressive force. It was connected to services running through the ground. Other parts of the structure, including the stairways, were secured to the ground. "Importantly, the building could not feasibly be moved without being dismantled, and it could not easily be dismantled and moved." The appeal was allowed.

Submissions

Appellant

[14] The appellant maintained that the proper approach was to focus on the FTT's decision, because that tribunal was the primary fact-finder and the maker of judgments based on those primary facts. Unless it had made an error in law in so doing, it was not for the court to interfere (*Procter & Gamble UK* v *Revenue & Customs Commissioners* [2009] STC 1990 at para 7). The court should be slow to interfere with findings of fact (*Advocate General* v *Murray Group Holdings* 2016 SC 201 at para [46]). The FTT had been reversed on the question of whether the beams and stone had constituted part of the building. The FTT had

given acceptable reasons for its conclusions on this point and it had been wrong in law for the UT to alter that. Similarly, the UT had wrongly reversed the FTT on the ease of dismantling and removing.

[15] The reason for the exemption in relation to the lease of immovables was that the construction of a building marked the end of the production process. Letting was normally a passive activity; not adding significant value (C-326/99 *Stichting Goed Wonen* v *Staatssecretaris van Financiën* [2001] ECR I-6856 at para 52). Once the construction process had been completed, value was brought within the scope of VAT on the first grant of a major interest (albeit zero rated). Apart from that, supplies were exempt because, generally, nothing apart from construction added value. In contrast, the appellants' activities in relation to the units were comparatively active. Each hire added value. At the end of each hire the units were taken back and maintenance carried out before the construction of a new structure for subsequent hire. Standing back and looking at the case generally, the appellants were not passive exploiters of immovable property. They manufactured individual units and actively exploited them by using them to create a variety of different structures for different customers. If the appellants' supply were deemed to be exempt, that would cause a serious practical problem in deciding whether a particular structure was exempt. It might depend on the condition of the ground in terms of its strength or level.

[16] *Maierhofer* (*supra*) indicated that the concept of being fixed to or in the ground required some active connection between the structure and the land. The UT erred in adopting a broad interpretation of this phrase to include "firmly placed on the ground". Resting on top of ground was not enough. Using the definition of "building" as an aid, the CJEU had held that there was, for a prefabricated structure to be deemed immovable, a requirement for the components to be fixed to or in the ground in such a way that they (ie

the components) could not either be easily dismantled or easily moved. This was so even if the building was to be removed at the end of the lease and re-used elsewhere. The difference here was that the units would be re-used to form different structures. C-428/02 *Fonden Marselisborg Lystbådehavn* v *Skatteministeriet* [2005] ECR I-1527 was distinguishable. *Leichenich* v *Peffekoven* (*supra*) was consistent with *Maierhofer* (*supra*). It referred (para 26) to the relevance of the objective envisaged by the parties and the function allocated to the structure. The houseboat there was permanent and passively exploited.

[17] *HM Revenue & Customs* v *UK Storage Co (SW)* (*supra*) had been correct in stating (para 26) that a building, which was kept in place merely by its own weight, could not be held to be fixed to or in the ground. The formulation by the CJEU required a causal relationship between the manner of fixing and the ease of dismantling or moving. Any difficulty in dismantling, which was brought about by the connection between components, was to be ignored in assessing whether the supply was of immovable property. The formulation in *Maierhofer* (*supra*) was that, where a structure consisted of prefabricated parts, the question was whether the parts could be easily dismantled or moved. The UT erred in rejecting the sequential approach in *UK Storage Co (SW)* (*supra*). The FTT had been correct to find that the trenches and stone had not formed part of the structure. The services did not connect the structure to the land. It was a straightforward matter to disconnect the units from the ground, hoist them onto a truck and drive them away. The FTT had been correct to find that the trenches and stone had not formed part of the structure. The services did not connect the structure to the land.

[18] The purpose of the legislation was not to distinguish between immovable and moveable. That is what it did. The purpose was to remove passive investment in land and buildings from the scope of VAT. The appellants' business was to manufacture

"Portacabin" style units and to hire them out to a variety of different customers. That involved transport, installation, customisation and removal. The building only existed for the period of hire before disappearing. Having regard to the purpose of the exemption, this was a business which should be fully taxable. Applying the CJEU jurisprudence, there was a taxable supply.

Respondents

[19] The respondents maintained that the UT had been correct to find that the FTT had erred in law in: (1) its application of *Maierhofer (supra)*; (2) its identification of the structure to which the *Maierhofer* test applied; (3) its approach to whether the building was fixed to or in the ground; (4) finding that the units were not attached to the beams; (5) finding that the stone and beams were not an integral part of the structure; and (6) finding that it was a straightforward matter to dismantle and remove the building.

[20] In C-428/02 *Fonden Marselisborg Lystbådehavn* v *Skatteministeriet (supra)*, Advocate General Kokott had said (para 30) that immovable property was "a specific part of the earth's surface, including buildings firmly constructed thereon". In *Maierhofer (supra)* it was noted that there were degrees of movability. Whether a particular structure was movable or immovable depended upon where on the scale it fell. The court held (para 33) that structures fixed to or in the ground must be regarded as immovable. There was no need for them to be inseverably fixed. The letting of a building constructed from prefabricated components, which were fixed to or in the ground in such a way that they could not be either easily dismantled or easily moved, constituted the letting of immovable property, even if the building was to be removed at the end of the lease and reused on another site. The approach in *Maierhofer* was applied in *Leichenich* v *Peffekoven* (*supra*), which

demonstrated that it was necessary to look at the building's link with its site. In *University of Kent* (*supra*) and *UK Storage Co (SW)* (*supra*), the tribunals had been concerned with individual units with no foundations. The FTT had taken a "unit" as shorthand for a prefabricated component in *Maierhofer*. It had ignored the beams and foundation trenches. The FTT had asked the wrong question when considering whether the units, as distinct from the whole structure, were fixed in or to the ground and could be easily dismantled or moved.

[21] Whether the units making up the ground floor were physically attached to the beams was irrelevant. The units could not have been sited on the land without the beams and the foundations. What was important was that the beams were integral parts of the structure before the building was dismantled. The FTT had found that there was a physical connection between the beams and the units. This fixed or attached the units to the beams. The UT was correct to hold that the beams and the foundations were integral parts of the structure. The question, of whether the building was fixed to or in the ground in such a way that it could not be easily dismantled or moved, involved looking objectively at the characteristics of the building and its relationship with the site.

[22] The argument that the exemption was designed to exclude passive exploitation was rejected by the Advocate General in *Maierhofer* ((*supra*) at para 41). The question was whether the building was fixed in or to the ground; looking at what was supplied and whether it could be easily dismantled and moved (*UK Storage Co (SW)* (*supra*) at paras [20], [30]-[31]). The building in *Maierhofer* had involved foundations. There was no requirement for an active connection. Compressive force was sufficient. Little turned on whether or not a sequential approach, such as that in *UK Storage Co (SW)*, was applied. The building was not made of Lego. There were interconnected services. The supply had to be looked at

objectively; the period of the lease was not relevant nor was what happened after the supply.

Decision

The cases

[23] Each of the cases cited is materially different in nature from that under consideration, although each contains relevant *dicta* for analaysis. Approaching the European cases chronologically, C-326/99 *Stichting Goed Wonen* v *Staatssecretaris van Financiën* [2001] ECR I-6831 concerned three newly built housing complexes, which were undoubtedly immovable. The issue was whether a housing association's grant to a foundation, which it had established, of a right to use the complexes for a period of 10 years in circumstances in which the foundation had in turn contracted with the association to manage the individual lets, was exempt from the VAT charge. Put another way (para 39), was the grant of a right to use the housing complexes for a limited period of time itself the lease of immovable property; was it a "supply"? The court noted (para 46) that exemptions from the VAT charge were derogations from the general principle that VAT is to be levied on all supplies or services. They therefore required to be interpreted strictly.

[24] Of more interest, however, is the court's analysis (paras 50 *et seq*) of the *ratio legis* of the exemption. It stated:

> "52. Although the leasing of immovable property is in principle covered by the concept of economic activity ... it is normally a relatively passive activity, not generating any significant added value. Like sales of new buildings following their first supply to a final consumer, which marks the end of the production process, the leasing of immovable property must therefore in principle be exempt from taxation ...
>
> 53. ... The common characteristic of the transactions which [are excluded] from the scope of the exemption is indeed that they involve more active exploitation of

> immovable property, thus justifying supplementary taxation, in addition to that charged on the initial sale of the property".

The purpose of the exemption is essentially to cover the passive act of leasing land and buildings constructed upon it.

[25] C-315/00 *Maierhofer* v *Finanzamt Augsburg-Land* [2003] STC 564 involved (AG's Opinion para 13) "buildings similar to prefabricated houses"; with the walls being made of panels, secured to a concrete base erected on sunk foundations, and a roof framework with tiles. The base was secured by bolts embedded in the foundations. This is a different type of structure from the modular units in this case. The contract involved only the leasing of existing buildings; not their design, transportation, construction and removal. It involved the let, not only of the accommodation, but the land (*ibid* para 12). The only issue was whether the buildings were immovable. The buildings were, in part, built on land which Mr *Maierhofer* had rented from the local authority or on land rented, but not owned, by the tenants.

[26] Advocate General Jacobs was not convinced (para 31) by the argument that the transaction entailed active exploitation of immovable property beyond that levied upon the initial sale. He reasoned (para 41), no doubt correctly, that Mr *Maierhofer* "merely lets the buildings ...; in so doing he does not exploit the property more actively than he would if the letting were of a conventional building which he had constructed". His dismissal of the significance of the possibility of dismantling and re-using the components elsewhere was because "such a sequence of events is ... merely hypothetical, and as such cannot without undermining legal certainty influence the correct classification of a building at a given time as 'immovable property' ...".

[27] The Advocate General's reasoning on why he considered the buildings in *Maierhofer* to be immovable is instructive, even if it was not entirely adopted by the court. The German Government had suggested that the buildings were comparable in type to the "tents, caravans, mobile homes and light-framed leisure dwellings" in Case C-60/96 *Commission* v *France* [1999] STC 480. The Advocate General commented (para 32) that "a true building with walls and foundations will ... only very exceptionally be moved whereas a circus tent's core function is precisely to be movable". He posed the question of whether buildings should be classified as immovable either by looking at objective criteria, such as the quality of attachment to the land, or by subjective criteria, such as the intended duration of the attachment. He excluded the latter as irrelevant because of what he described as the "notoriously fickle criterion" of intention. This reasoning stemmed partly as a consequence of his perception, no doubt soundly based, of the semi-permanence of certain post war "prefabs". An objective criterion, specifically "whether the structure is firmly fixed to or in the ground", was selected. In that context, he continued:

> "42. ... The buildings stand on a concrete base erected on concrete foundations sunk into the ground and are secured by bolts embedded in those foundations. ... they were solidly built in order to last at least five years. It would take a team of eight persons a period of ten days to dismantle them. They may be distinguished from tents, caravans and mobile homes which are both *inherently mobile* and less firmly attached to the ground" (emphasis added).

[28] The CJEU commenced its interpretation by reiterating (paras 27 and 28) the need to "consider its wording as well as the context in which it occurs and the objectives of the rules of which it forms part". In also contrasting the buildings with "caravans, tents, mobile homes and light-framed leisure dwellings" in C-60/96 *Commission* v *France* (*supra*), the court said:

> "32 ... the buildings at issue ... are not mobile; nor can they be easily moved. They are buildings with a concrete base erected on concrete foundations sunk into the ground. They can be dismantled on expiry of the lease for subsequent re-use but by having recourse to eight persons over ten days.
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> 33 Such buildings made of structures fixed to or in the ground must be regarded as immovable property. ... [I]t is significant that the structures cannot be easily dismantled or easily moved but ... [T]here is no need for them to be inseverably fixed to or in the ground. Nor is the term of the lease decisive for the purpose of determining whether the buildings at issue are moveable or immovable property".

[29] The court stressed the utility of adopting the definition of "building", in what is now Article 12 of the 2006 Directive, before continuing:

> "... the letting of a building constructed from prefabricated components fixed to or in the ground in such a way that they cannot be either easily dismantled or easily moved constitutes a letting of immovable property ... even if the building is to be removed at the end of the lease and re-used on another site".

That is entirely understandable in relation to the letting of prefabricated buildings. That is not to say that the same result is achieved in relation to a contract for the construction of temporary accommodation using, not prefabricated walls, ceilings and roofs, but modular units, which are essentially designed to be relatively easily positioned as units, fitted out and even more easily dismantled and removed, and where the contract provides for that removal after a limited period of time.

[30] C-428/02 *Fonden Marselisborg Lystbådehavn* v *Skatteministeriet* [2005] ECR I-1527 was decided shortly after *Maierhofer* (*supra*). It concerned a foundation that owned and operated a marina and let out moorings and storage sites for boats on a short or long term basis. The boat owner acquired a right to use a mooring, which was alongside a jetty, and certain communal facilities. The court observed (at para 28) that what is now Article 135 of the 2006 Directive must be interpreted "having particular regard to the underlying purpose of the exemption". Letting of immovable property meant (para 30) the grant by a landlord of a

right to occupy "his property" in return for a rent for an agreed period. The ground used for the moorings was immovable. The foundation owned it and let it to the boat owner. It was therefore an exempt supply.

[31] More recently, C-532/11 *Leichenich* v *Peffekoven* [2013] STC 846 concerned an agreement to lease a houseboat, landing stage and adjoining area for use as a café-restaurant, and later as a discotheque. The landlord had an agreement with the waterways authority, which allowed him to occupy the relevant river bank and a section of water. The houseboat, whilst immobilised by ropes, chains and anchors, had no system of propulsion and had full utility connections and a postal address. The court noted that *Maierhofer* (*supra*) had determined (para 23) that it was not necessary for a construction to be "indissociably incorporated into the ground in order to be regarded as immovable". It continued:

> "24 By the terms of the leasing contract which is concluded for a duration of five years and which shows no wish of the parties to confer an occasional and temporary character to the use made of the houseboat, the latter is used exclusively for the *permanent* operation of a restaurant-discotheque" (emphasis added).

The court took account (para 25) of not only the physical link of the houseboat with its site but also the nature of the contract which designated it "exclusively and permanently to the operation" of a restaurant-discotheque in determining that it was immovable.

[32] Turning to the Upper Tribunal decisions, *University of Kent* v *Commissioners of Customs & Excise* [2004] BVC 2215 was concerned with 20 "sleep units" hired by the University to accommodate an unexpected number of students who had meantime been placed in hotels because of the University's guarantee of a campus bedroom. The hire lasted for an academic year. The units were to be placed in a car park, which turned out not to be level. A contractor was engaged to place slabs or blocks under the units in order to remedy this problem. Three units could be transported on each lorry. Each weighed about a tonne.

They measured 2700mm (width), 3600mm (length) and 2300mm (height). They had no foundations, but did have four adjustable corner points. They were placed in two rows, back to back, with a service corridor being created between the rows. Timber steps and landings were added to the door of each unit together with various skirtings. A timber member was secured to the tarmac of the car park with bolted connections. A batten was bolted to the sub-frame of the unit and a panel screwed onto it. Concrete traffic control barriers were placed around the units. Electricity, water and drainage connections were established. The units normally contained two beds, but this was reduced to one in order to permit study space. The construction took about 3 weeks. Removal took much less time, with ducting, which had been cut into the car park surface, left on site.

[33] In addressing whether the units were immovable, the UT accepted that the test was "how easily the units could be removed from the site" (para 52). They considered that there was a scale of degrees of movability and immovability. In attempting to follow *Maierhofer* (*supra*), the UT were of the view that the issue was where on this scale the units fell. They did not consider that they were firmly fixed to the ground. It took only about 1½ hours to move a unit after the disconnection of services. The UT held the units to be movable.

[34] *HM Revenue & Customs* v *UK Storage Co (SW)* [2013] STC 361 involved the provision of self-storage facilities to the public. The customer could hire one or more of some 300 storage units; being cladded steel boxes each accessed through a door. The units were assembled on demand and positioned by telescopic crane into gap free rows, placed back to back. The units weighed 600kgs and rested on a concrete surface. They could be dismantled in 2 man-days. The UT, in determining that the provision was not exempt as being the grant of an interest in land, made certain observations on the interpretation of *Maierhofer* (*supra*). The first (para [20]) was that, in order to be immovable property, a structure had to be "fixed

to or in the ground", but not inseverably so. A structure which rested under its own weight could not be regarded as "fixed to or in the ground". Using a sequential approach, the UT said, secondly (para [21]) that, if a structure was fixed to or in the ground, but it could be easily dismantled and removed or easily moved without being dismantled, then it would not be immovable. The fact that it could be re-used on another site was nevertheless "not relevant". The units in question could easily be moved.

Anaylsis

[35] Some time has been taken to set out the facts and circumstances of these cases with a view to determining what test is to be applied to the central question. That question is not simply one of whether the completed structure of the temporary school accommodation was immovable. It is whether, looking at the primary facts found by the FTT, the appellants' supply of the accommodation constituted a grant of an interest in or right over land or any licence to occupy land (Value Added Tax Act 1994, s 31(1), Sch 9, part II (land) I, group 1, item (*l*)); interpreted compatibly with the phrase "the leasing or letting of immovable property" in the Council Directive 2006/112/EC on the common system for VAT (Art 135(1)(*l*)). This is a matter of law; there can only be one correct answer. There is no discretionary element in the judgment.

[36] It is important, in the interests of commercial certainty, that the circumstances in which VAT is chargeable in these or similar circumstances are as clear as is reasonably possible. They should not involve the trader or customer making difficult judgments, which are capable of arriving at different results depending upon, for example, the degree of physical connection between a modular unit or units and a pre-existing or re-constructed ground surface.

[37] In deciding whether a supply is, put shortly, a grant of an interest in land, such as a lease of immovable property, the whole circumstances of the supply, and not just the physical properties of the product, must be looked at in order to understand the substance of the commercial transaction (supply) undertaken. In a case, such as the present, where there are features to the supply beyond the mere leasing of land and/or a building, the purpose of the exemption should be borne firmly in mind, since it is essentially "passive" leases which are intended to be exempt and not transactions with active elements such as those of design, construction, transportation, hire and removal. In all of this, the terms of the contract, including its duration, may be important in understanding the true nature of the supply (*HM Revenue & Customs* v *Robert Gordon University* 2008 SC 419, Lord Penrose, delivering the Opinion of the Court, at para [25]). It is no doubt correct that, in a case which undoubtedly involves the lease of a building, such as *Maierhofer* (*supra*), the duration of the lease is irrelevant. The lease of immovable property remains classified as such, no matter what its term might be. That is not to say that the duration of a contract involving the construction and dismantling of what is not simply intended to be, but actually contracted to be, a temporary structure falls into the same category.

[38] Another factor, although not a determinative one, is whether any interest in the land (ie the undoubted immovable) was conveyed or leased, or already belonged to, the person receiving the supply. In this case, the land was not, nor could it have been, leased by the appellants to the school. At the start of the contract, and at all times thereafter, the property which the appellants supplied, that is to say their units, were movable property. They had no immovable property in Stockton-on-Tees (so far as disclosed) which they could lease, or over which they could grant a right of occupancy. The contract involved the design, transportation and construction of "temporary classroom accommodation" on the school's

own land, payment of rental for the accommodation for a minimum 24 month period and, again perhaps of some significance, the removal of the temporary classroom facilities at the end of the rental period. Part of the construction was the creation of a level surface of adequate strength to support the structure. However, the design of this foundation was not, as in the case of a normal building, intended to cement or bolt (fix) the structure to the land. The design was, on the contrary, such as would not hinder the removal of the structure, unit by unit, or the levelling beams at the end of the period of hire. The supply was of a structure which was always intended to be a temporary one, albeit lasting at least two years, on top of land which was, and remained throughout, the property of the school.

[39] In each of the cases cited, the court or tribunal reached a particular result. In each, that result appears to have been eminently sensible on the particular facts. On the one hand, Mr *Maierhofer's* buildings were, *prima facie*, immovable, even if they might possibly have been dismantled. The berths in the *Marselisborg* marina seemed immovable. Mrs *Leichenich's* permanent floating discotheque was, apparently, immovable. In these cases, the land (and water) and buildings concerned were, using Advocate General's Jacobs' term (*supra*) "inherently immovable" as he applied that only to land. *UK Storage's* boxes and *Kent University*'s pods, on the other hand, appeared to be, again borrowing the Advocate General's phraseology, "inherently movable", given their general nature.

[40] Proceeding on the basis that each case was correctly decided, the search must be to find why that is. Approaching the matter on the basis that all the relevant circumstances relating to the goods or services supplied must be taken into account in determining the true nature of the supply, certain of the *dicta* in the cases (*infra*), which restrict the scope of that inquiry, must fall to be rejected.

[41] The Upper Tribunal was correct to hold that the cases do not prescribe an exhaustive list of circumstances in which a building will be regarded as fixed to or in the ground. Sheer weight of a substantial structure built on rock may render it immovable, even if it has no binding. The UT was also correct to say that the immovability of a building is to be determined by looking at its characteristics and its relationship to the site. However, that will not necessarily answer the question of whether the supply contracted for is truly what is meant by a lease of immovable property. Furthermore, looking at what is normally understood to be the characteristics of a lease or a right to occupy, one objective factor must, as noted above, be the ownership of the land, to which the building attaches, at least where that owner is, as here, the person to whom the respondents maintain, the building is also to be leased. That too may not be determinative, but it may be a good pointer towards acknowledging that what is involved is not a lease; that term normally being understood to involve a landlord who owns or has a head lease over the relevant land and building and who leases them to another who is not that owner or head landlord.

[42] The Upper Tribunal was correct in rejecting the idea, which the FTT adopted, that it was the connection of the individual components to the ground that was important. That may be a factor, but the structure as a whole must be considered. As already observed, the groundworks in this case were never intended to fix the structure to the ground. The purpose of the design was to provide a stable and level surface, but one which enabled the removal of the units without any form of structural disruption. Equally, for similar reasons, the sequential approach in *UK Storage Co (SW)* is not appropriate. The degree of difficulty in dismantling or moving must be looked at alongside the degree of fixation or, perhaps better put, immobility. The services in this case, as with those of the *University of Kent's* pods, were designed to be easily disconnected (eg they were not buried). The connection with the

surface, involving no substantial fastening between beam and ground, or beam and unit (other than the friction clamps), positively enabled easy removal of each unit by crane, even if that process would inevitably take some time dependent on many practical factors; not least transport. The finding of fact, made by the FTT (para 90), that "it was a straightforward matter to disconnect the individual units from the ground and, once the internal wiring, connections etc had been stripped out, the removal of the units was also very straightforward" is important in this context.

[43] It follows that the Upper Tribunal's identification of a number of errors in the FTT's approach is sound. That is, however, only the start of the equation. The next, and determinative issue, is whether, applying a holistic approach, the design, provision and removal of the temporary school accommodation amounted to a lease of immovable property. On this question, which is the correct one rather than the more restricted issue of whether the building was fixed to or in the ground, for all the reasons given above, the FTT reached the correct decision. The structure was one which was "inherently movable". The appeal should therefore be allowed and the FTT's ultimate determination that the supply was not exempt should be re-instated.

FIRST DIVISION, INNER HOUSE, COURT OF SESSION

[2018] CSIH 49
XA81/17

Lord President
Lord Drummond Young
Lord Bannatyne

OPINION OF LORD DRUMMOND YOUNG

in the appeal by

SiBCAS LTD

Appellants

against

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS

Respondents

Appellant: Simpson QC; Anderson Strathern
Respondents: Roxburgh; Office of the Advocate General

13 July 2018

Introduction

[44] The critical question in this case is, as your Lordship in the chair indicates, whether the provision by the taxpayer of goods and services to the Ian Ramsay Church of England School was an exempt supply; if it was it is not subject to VAT. That issue turns on the construction of Part II of Schedule 9 to the Value Added Tax Act 1994, read against the background of article 135(1)(l) of Council Directive 2006/112/EC of 28 November 2006 on the common system of VAT. Part II of Schedule 9 lists the groups of goods and services that are

exempt from the scheme of VAT. Group 1, item 1 of Part II deals with land. It is in the following terms:

> "The grant of any interest in or right over land or of any licence to occupy land, or, in relation to land in Scotland, any personal right to call for or be granted any such interest or right…".

This is subject to a list of exceptions, but none of those is of direct relevance to the present case. Group 1 of Schedule 9 is based on article 135(1)(l) of the 2006 VAT Directive, which is in the following terms:

> "1. Member States shall exempt the following transactions:
>
> …
>
> (l) the leasing or letting of immoveable property".

[45] The exemption for the leasing or letting of immoveable property has been the subject of case law in both the Court of Justice of the European Union and domestic courts and tribunals in the United Kingdom. Before I consider the details of those cases, however, I should note certain general principles that apply to the construction of the EU legislation governing VAT. Two general propositions are relevant to the construction of article 135 of the 2006 VAT Directive and the corresponding United Kingdom legislation. First, the exemptions that are now provided in articles 132 and 135 of the 2006 VAT Directive are imposed by Community law. Consequently they must be given a Community definition. The interpretation of the expression "letting of immoveable property" in article 135 cannot therefore be determined by the interpretation given by the civil law of any member state: Case C-315/00, *Maierhofer* v *Finanzamt Augsburg-Land*, [2003] ECR I-563; [2003] STC 564, at paragraphs 25-26; Case C-532/11, *Leichenich* v *Peffekoven*, ECLI: EU: C: 2012:720; [2013] STC 846, at paragraph 17. Secondly, in construing the exemptions and their scope, a court must take proper account of the context, both legal and factual, in which an exemption may fall to

be applied, and must take proper account of the purpose of the exemption: *Maierhofer* v *Finanzamt Augsburg-Land*, *supra*, at paragraphs 27-28; Case C-428/02, *Fonden Marselisborg Lystbådehavn* v *Skatteministeriet* [2005] ECR I-1527, at paragraph 27; *Leichenich* v *Peffekoven*, *supra*, at paragraph 18. I would observe that these considerations correspond, at a functional level at least, to the principles of statutory construction that are normally applied to domestic United Kingdom legislation.

[46] Two further general statements of principle relating to the structure of the VAT legislation are of fundamental importance in the construction of article 135 of the 2006 VAT Directive. First, the general principle underlying VAT is that all economic activity should be subject to it apart from a limited number of defined exemptions, together with certain categories of transaction that are subject to zero rating; none of the latter categories is relevant to the present case. In the circumstances of the present case, that presumption operates in favour of the taxpayer, which contends that its activities are economic in nature and should therefore be subject to VAT. Secondly, it follows from the last proposition that exemptions from VAT should be restrictively construed.

[47] These two principles are essentially the converse of each other, and are discussed in the judgment of the Court of Justice in Case C-326/99, *Stichting 'Goed Wonen'* v *Staatssecretaris van Financiën*, [2001] ECR I-6856. The facts of that case and the detailed issues that it raised (in particular, whether the exemption from VAT for the leasing or letting of immoveable property applied to a usufructuary right over immoveable property that subsisted for a limited period) are not relevant to the facts of the present case. Nevertheless in its opinion the Court of Justice expressed the general approach that should be taken in the application of the exemption for leasing or letting of property. It indicated (paragraph 46) that what is now article 2 of the 2006 VAT Directive states the general principle of the Directive, namely

that VAT is to be levied on all supplies of goods or services made for consideration by a taxable person. The exemptions provided for in what is now article 135 of the 2006 VAT Directive are accordingly derogations from that general principle stated in article 2, and it is established in the case law that because they are derogations the exemptions, including that for the letting of immoveable property, must be interpreted strictly. (The same point is made in the Court's decision in Case C-428/02, *Fonden Marselisborg Lystbådehavn* v *Skatteministeriet (supra)*, at paragraph 29). It was further noted (paragraphs 47-49) that, according to the preamble of the Directive, the Council had established a common list of exemptions in order to ensure uniformity of collection of taxes in all the member states of the European Union. Thus consistency of approach across different member states is an important background consideration. In the area of rights over property significant differences existed in the national legal systems of member states, and consequently the concept of leasing or letting contained in what is now article 135(1)(l) required a Community meaning, independent of the law of individual member states.

[48] The Court accordingly held (paragraphs 50-54) that it was necessary to analyze the *ratio legis* of the exemption for the leasing or letting of immoveable property, to determine whether the exemption might be extended to the grant of a right of usufruct. On that basis, although the leasing of immoveable property is in principle covered by the concept of economic activity, "it is normally a relatively passive activity, not generating any significant added value". The leasing of immoveable property must therefore in principle be exempt from taxation; an analogy was drawn with new buildings following their first supply to a final consumer, which marks the end of the production process. In effect, this part of the Court's reasoning is that landlords of immoveable property are typically rentiers, in the

economic sense of that word, and do not engage in entrepreneurial activity. It was nevertheless consistent with the general aim of the VAT Directive that:

> "if immoveable property is made available to a taxable person through leasing or letting as a means of contributing to the production of goods or services whose cost is passed on in their price, the property stays within, or returns to, the economic circuit and must be capable of giving rise to taxable transactions. The common characteristic of the transactions which [the VAT Directive] excludes from the scope of the exemption is indeed that they involve more active exploitation of immoveable property, thus justifying supplementary taxation, in addition to that charged on the initial sale of the property" (paragraph 53).

In other words, if a person leasing immoveable property can truly be described as engaging in entrepreneurial activity, as against functioning as a rentier, the justification for exempting leasing transactions from the system of VAT no longer applies.

[49] In the present case it was contended for the taxpayer that its activities in leasing structures made up of prefabricated units were plainly entrepreneurial in nature. A structure was put together from prefabricated units within the taxpayer's stock. It was erected to serve a defined and limited purpose, of an essentially temporary nature. Once that purpose had been fulfilled, the structure was dismantled, and the components were used to create new structures in other places. That did not amount to the passive exploitation of immoveable property. I agree with those general contentions. I would qualify that, however, by stating that the question of whether the activities of the taxpayer are entrepreneurial in nature, or on the other hand are the classic activities of a rentier, cannot be conclusive by itself; the ultimate question that must be determined is whether specific activities of the taxpayer fall within the statutory concept of leasing or letting of immoveable property, or in domestic legislation the grant of an interest in or right over land or a licence to occupy land, including in Scotland personal rights to that effect. That must depend upon the precise analysis of the particular transaction.

Case law on article 135

[50] Article 135 and its predecessor, article 13B(b) of the Sixth VAT Directive, has been considered by the Court of Justice in a number of cases. The most important statements of principle are in my opinion found in two of these, *Maierhofer* v *Finanzamt Augsburg-Land*, *supra*; and *Leichenich* v *Peffekoven*, *supra*. The facts of *Maierhofer* bear some similarity to those in the present case; the taxpayer had constructed single-story and two-story buildings using prefabricated components, which stood on a concrete base erected on concrete foundations sunk into the ground. The walls were secured to foundations by bolts, a factor that functionally does not exist in the present case, where the clamping arrangements were only used to secure units during construction. The buildings could be dismantled at any time by eight persons in ten days and subsequently reused (paragraph 13). The buildings were let to the Free State of Bavaria, with the necessary land, for the temporary accommodation of asylum-seekers. The status of the land on which they were built was not entirely clear (Advocate General, paragraph 12). Some of the land used for the buildings was rented by the taxpayer from the city of Bamberg, while other buildings were situated on land that the Free State of Bavaria had rented from the city of Bayreuth. The taxpayer claimed that the Bayreuth land was made available to him without consideration, but the order for reference from the German court stated that the taxpayer let the accommodation with the necessary land. There was thus some doubt as to whether the taxpayer provided both the buildings and the land to the Free State of Bavaria or merely provided buildings that were erected on the Free State's land. Ultimately, however, this issue does not appear to be relevant in view of the answer given to the second question asked by the German court. On this question, the Court of Justice held (paragraph 41) that for the purpose of determining whether a

letting was of immoveable property within the meaning of what is now article 135 it was irrelevant whether the lessor made available to the lessee both the building and the land on which it was erected or merely the building erected on the lessee's land. The letting of immoveable property might concern solely a building (paragraph 40). This seems to be based on a principle of Community law corresponding to the principle of accession in Scots domestic law, whereby moveable property that is sufficiently attached to immoveable (heritable) property becomes immoveable, or heritable, in nature: compare *Brand's Trs* v *Brand's Trs*, 1876, 3R (HL) 16.

[51] The primary question for the Court of Justice was whether the term "letting of immoveable property" as used in the Sixth VAT Directive covered the provision for consideration of a building constructed from prefabricated components which is to be removed following the termination of the contract and may be reused on another site. The Advocate General gave detailed consideration to the criteria that were relevant to this question: paragraphs 32-42. He noted that the only property that is inherently immoveable is land itself, and that other items attached to land fall within a spectrum of "moveability", ranging from true buildings with walls and foundations to tents and similar items. He then suggested that the question of whether buildings or other literally moveable objects are in legal terms immoveable property may be answered in principle by either objective or subjective criteria; objective criteria relate to "the quality of the attachment of the object under consideration to the land on which it stands", or its "inseverability". Subjective criteria covered matters such as the intended duration of the attachment. Many judgments had assumed that that the letting of conventional buildings or parts of buildings would amount to a letting of immoveable property for the purposes of the VAT Directive, but there was no guidance from the Court on the criteria to be applied in borderline cases. In the

Advocate General's opinion, subjective criteria such as the intended duration of the attachment should not be taken into account. The German domestic legislation (in paragraphs 94 and 95 of the Buergerliches Gesetzbuch, quoted at paragraphs 8 and 9) excluded tangible property attached to the ground only for a temporary purpose from the definition of immoveable property, but the Advocate General considered intention to be a "notoriously fickle" criterion, since subjective criteria raised problems of verification. Reference was made to the prefabricated buildings put up to provide housing after the Second World War as a temporary measure which remained for many years. Consequently (paragraph 38)

> "It is desirable therefore that the criterion for determining whether a building or similar structure constitutes immovable property within the meaning of [article 135] should be objective. In my view the correct criterion is… whether the structure is firmly fixed to or in the ground".

Furthermore, the fact that the structures in question in *Maierhofer* could be removed and re-erected elsewhere did not entail a more active exploitation of property than if a conventional building were constructed and leased (paragraph 41). The buildings under consideration in *Maierhofer* must be regarded as "firmly fixed to or in the ground", as they stood on a concrete base erected on concrete foundations sunk into the ground and were secured by bolts embedded in the foundations.

[52] The Court of Justice did not adopt this part of the Advocate General's analysis in its opinion, although it agreed with the result suggested by him. The Court described the structures in question at paragraph 13, in terms that suggested a degree of permanence. It referred in particular to the fact that the single-story and two-story buildings were "similar to prefabricated houses", and that they stood on a concrete base erected on concrete foundations sunk into the ground. Moreover, the walls were secured to the foundations by

bolts, the roof was covered with tiles and the floors and walls of bathrooms and kitchens were tiled. These factors in themselves suggested that the structures were analogous to commonly found types of permanent or semi-permanent building. In the critical part of its opinion the Court commented that the wording of article 13B(b) of the Sixth Directive (the equivalent of article 135(1)(l) of the 2006 VAT Directive) indicated that the letting of moveable property was intended to be subject to tax, in contrast to the letting of immoveable property which, as a general rule, was to be exempt (paragraph 29). In an earlier decision, Case C-60/96 *Commission* v *France*, [1997] ECR I-3827; [1999] STC 480, the Court had held that caravans, tents, mobile homes and light-framed leisure dwellings were not immoveable property for the purposes of the exemption in article 13B(b), as they were either mobile or could be easily moved (paragraph 31). That distinguished the earlier decision from the structures in *Maierhofer*, which were not mobile and could not be easily moved.

[53] The critical part of the Court's reasoning is found in paragraphs 33 and 35:

> "33 Such buildings made of structures fixed to or in the ground must be regarded as immoveable property. In that connection, it is significant that the structures cannot be easily dismantled or easily moved but… there is no need for them to be inseverably fixed to or in the ground. Nor is the term of the lease decisive for the purpose of determining whether the buildings at issue are moveable or immoveable property.
>
> …
>
> 35 The answer to the first question must therefore be that the letting of a building constructed from prefabricated components fixed to or in the ground in such a way that they cannot be either easily dismantled or easily moved constitutes a letting of immoveable property for the purposes of Article 13B(b) of the Sixth Directive, even if the building is to be removed at the end of the lease and re-used on another site".

In my opinion three aspects of this reasoning are important for present purposes. First, two features are relied on in determining whether the structures were moveable or immoveable property: the fact that they were "fixed to or in the ground" and the fact that they could not

be easily dismantled or moved. Secondly, it is stated that the term of the lease is not "decisive" in determining this question. That is different from the Advocate General's analysis. He regarded the provisions of the lease as irrelevant with regard to the Community definition of immoveable property, but the Court did not go so far as to hold that the lease was not relevant. Thirdly, the Court did not consider the situation where structures made up using prefabricated components are leased for a defined and essentially temporary purpose. It did not need to do so; the structures under consideration in *Maierhofer* were buildings similar to prefabricated houses, let for the purpose of housing asylum seekers, and there is no indication anywhere in the reports of the case to suggest that the letting was for an essentially temporary purpose.

[54] The most recent decision of the Court of Justice on the meaning of the expression "the leasing or letting of immoveable property" in article 135(1)(l) of the VAT Directive is found in *Leichenich* v *Peffekoven*, *supra*. That case involved the letting of the houseboat for use as a restaurant and discotheque; it was thus on its facts clearly very different from both *Maierhofer* and the present case, and for that reason perhaps insufficient attention was paid to the statements of principle in the case in submissions to the Upper Tribunal. The Court noted at paragraph 20 that the situation of the houseboat should be examined not in an isolated manner but taking account of its integration into its site. The houseboat had no system of propulsion and had been immobilized for many years. It was attached to the riverbed by anchors and to the bank by chains and ropes, and those measures could not be removed without effort and considerable cost. It was not necessary for construction to be "indissociably incorporated into the ground" to be regarded as immoveable property (paragraph 23). The Court continued, in a passage that is in my opinion of critical importance in the present case:

> "24 By the terms of the leasing contract which is concluded for a duration of five years and which shows no wish of the parties to confer an occasional and temporary character to the use made of the houseboat, the latter is used exclusively for the permanent operation of a restaurant-discotheque. Moreover, the houseboat has a postal address and telephone line and is connected to the water and electricity mains.
>
> 25 Taking account of the houseboat's link with the elements that constitute its site and of the fact that it is fixed to those elements, which render it, in practice, a part of that space taken as a whole, and taking into account also the contract which allocates the houseboat exclusively and permanently to the operation, on that site, of a restaurant-discotheque, and taking account of the fact that the latter is connected to the various mains, it must be held that the whole constituted by the houseboat and the elements which compose the site where it is moored must be regarded as immoveable property...
>
> 26 The European Commission correctly observes that, having regard to the objective envisaged by the contracting parties and the function allocated by them to the houseboat, it is, for those parties, immaterial, from an economic point of view, whether it is a building incorporated into the ground in a fixed manner, for example by piles, or a simple houseboat such as that at issue in the main proceedings".

[55] Two features of the foregoing analysis seem to me to be important. First, the Court clearly accepts that the terms of the contract governing the placing of the structure on the land are an important factor in determining whether property is immoveable for the purposes of the relevant legislation. Thus in paragraph 24 there is a reference to "the terms of the leasing contract" and to its duration, and to an important inference from those terms: that there was no wish of the parties to confer "an occasional and temporary character" on the use made of the houseboat. In paragraph 25 there is a further reference to the contract, and to the fact that it allocated the houseboat exclusively and permanently to the operation of a restaurant-discotheque. In paragraph 26 there is a reference to the function allocated by the parties to the houseboat; it is obvious that that allocation must have been through the terms of their contract. Consequently it is apparent that the Court rejected the approach taken by the Advocate General in *Maierhofer*, to the effect that "subjective criteria" such as the intended duration of the attachment should not be taken into account. The Advocate

General's approach appears to treat contractual arrangements as "subjective", with the result that they must be rejected; regard should only be had, he thought, to "objective criteria", and in particular the attachment of the structure to the ground: whether it was "firmly fixed to or in the ground".

[56] Secondly, the Court of Justice in *Leichenich* v *Peffekoven* accepted that the temporary or permanent character of the attachment of a structure to the ground may be an important factor in determining whether it is to be regarded as moveable or immoveable. Once again this is contrary to the Advocate General's view in *Maierhofer*, where the intended duration of the attachment is rejected as a criterion. In the opinion of the Court of Justice in the latter case it is stated (at paragraph 33) that the term of the lease is not decisive for the purpose of determining whether the buildings at issue are moveable or immoveable property, but that is not an assertion that it is irrelevant.

[57] At a general level, it appears to me that the Advocate General's analysis in *Maierhofer* is open to significant criticism. He treats the terms of a lease as a "subjective" criterion, and he refers to intention (apparently of the parties to a contract) to be a "notoriously fickle" criterion. Furthermore, he states that "subjective" criteria raised problems of verification. The terms of a lease, however, are normally an objective fact; they will almost invariably be recorded in a document signed by the parties or their representatives. Furthermore, the meaning of those terms will inevitably be determined objectively. Scots law (and for that matter English law) invariably treats the meaning of contractual provisions as a matter to be determined objectively, without regard to the subjective intentions of any one party. While that is a matter of domestic law, and it is clearly not conclusive as to the autonomous meaning given to the expression "the leasing or letting of immoveable property" in article 135 as a matter of Community law, I have great difficulty in understanding how a contract

could be construed on anything other than an objective basis. There are inevitably two (or sometimes more) parties to the contract, and for a proper judicial determination of the meaning of any provision of the contract the subjective view of any one party cannot, logically, be decisive: the only construction that can bind both parties is the objective construction placed by the court on their agreement. That agreement is itself an objective fact. Once this is accepted, the relevant "intention" must be the objective intention of the parties as evidenced by their contract, properly construed. I am accordingly of opinion that as a matter of Community law, when a lease or other contract is construed for the purposes of a provision such as article 135(1)(l), an objective approach must be adopted in determining the intention of the parties.

[58] Intention of this sort may obviously give rise to doubtful cases, but those are resolved by a court, which will apply well-established principles of contractual interpretation, including the principle that intention must be determined objectively. Almost any legal distinction can give rise to doubtful cases, and the mere existence of such cases cannot mean that intention is a "fickle" criterion. Finally, the reference to problems of verification seems remarkable; the terms of the lease will, as I have already noted, normally be contained in a written document, and their meaning is inevitably ascertained on an objective basis. For these reasons, I have no hesitation in adopting the approach taken by the Court of Justice in *Leichenich* v *Peffekoven* in preference to the approach adopted by the Advocate General in *Maierhofer*.

[59] *Leichenich* v *Peffekoven* is the most recent statement by the Court of Justice on the interpretation of the provisions of article 135(1)(l). Although the facts of the case are plainly different from those of the present case (unlike the facts of *Maierhofer*, which present obvious similarities), I am of opinion that it is the principles laid down in *Leichenich* that should be

applied in the present case. In any event, for the reasons that I have stated, I find the approach in that case to be more coherent than that found in the Advocate General's opinion in *Maierhofer*; moreover, I consider that the acceptance in *Leichenich* that the terms of the parties' contract are relevant to the question of whether the structure has been incorporated into the ground in such a way as to become immoveable seems to accord with common sense. The same is true of the acceptance in the latter case of the relevance of the fact that attachment to the ground may be for a merely temporary purpose. In relation to the purpose of the annexation, I note that paragraphs 94 and 95 of the Buergerliches Gesetzbuch expressly have regard to the question of whether attachment to the ground is for a permanent or merely temporary purpose. The same is true of the Scots law of accession, "purpose" being understood in an objective sense: see Gordon, Land Law, paragraphs 5-12 – 5-14. While these are clearly not conclusive so far as the autonomous meaning of Community legislation is concerned, they appear to me to recognize a rather obvious point: that if a structure is attached to the ground for a specific and temporary purpose, that is a relevant consideration in determining whether it is a fixture, or is to be treated as immoveable property.

[60] I should mention one further case, the decision of the Upper Tribunal in *UK Storage Co (SW) Ltd* v *Revenue and Customs Commissioners*, [2013] STC 361. In that case it was held that self-storage units which rested on the ground under their own weight and were not fixed to the ground did not fall within the exemption for the leasing of immoveable property contained in article 135(1)(l) of the VAT Directive. I have no criticism to make of the decision in that case, but I cannot agree with the reasoning of the Upper Tribunal that led to that result. The Upper Tribunal purported to follow *Maierhofer*, but added a gloss on the reasoning of the Court of Justice in two respects, both of which are clearly identified by the

judge of the Upper Tribunal in the present case. First, at paragraph [21], the Upper Tribunal in *UK Storage* adopted what the Upper Tribunal in this case described as a "sequential" approach. They suggested that in applying *Maierhofer* it was necessary to ask two questions: first, were the storage units fixed to or in the ground? and secondly, if so, could the units be (a) easily dismantled and removed or (b) easily moved without being dismantled? The Upper Tribunal in *UK Storage* held that for the storage units to be classified as immoveable property the answer to the first question must be "yes" and the answer to both parts of the second question must be "no". In my opinion such a gloss is not justified by the wording of the legislative provision under consideration in *Maierhofer*, what is now article 135(1)(l) of the VAT Directive, which merely refers to the "leasing or letting of immoveable property". The primary distinction inherent in that definition is that between moveable and immoveable property; that is a fairly straightforward distinction, on an issue that is likely to have parallels in all of the national legal systems, and in my view it should be approached directly without any recourse to elaborate glossing. It is noticeable that in *Maierhofer* itself the Court of Justice approached the issue as a single question. As the judge of the Upper Tribunal points out in the present case, the means by which a building is kept in position on its site, and the ease or difficulty of moving or dismantling and moving it, are interrelated issues, and ought to be considered together.

[61] Secondly, in *UK Storage* at paragraph [26] the Upper Tribunal adopted an unduly restrictive interpretation of the expression "fixed to or in the ground" that is used by the Court in *Maierhofer* at paragraph 35. They held that if units were not fixed to the ground but rested on their own weight and could feasibly be moved, the units were not fixed to or in the ground; an active connection such as a physical fastening was required. The word "fixed", however, as the judge of the Upper Tribunal in this case indicates, has a range of meanings,

including stationary and unchanging or stable in position. A building might be firmly fixed in position through nothing more than downward compressive force, without any fastening. Examples of this would include a dry stone wall, and also certain older buildings that rest on the ground without anything like a modern foundation. Nevertheless, in these cases the wall or building would be treated as immoveable property. I agree with the Upper Tribunal in the present case on this issue; I do not think that "fixed" necessarily requires an active connection. Furthermore, in *UK Storage* the Upper Tribunal followed the views of the Advocate General in *Maierhofer* in holding that the test for fixing to the ground was solely based on "objective characteristics of the units". As I have indicated, I do not agree with that formulation of the test, which is, I think, incompatible with the views expressed by the Court in *Leichenich* v *Peffekoven*.

Approach of the First-tier and Upper Tribunals

[62] In the present case the First-tier Tribunal purported to follow the decision in *Maierhofer*, and held that the primary question was whether the building or units were "fixed to or in the ground". On that issue, the primary argument was, the judge thought, whether the building supplied by the taxpayer should be regarded as a whole or as a series of individual units. She held that the relevant question is whether the prefabricated components and therefore the individual units were fixed to or in the ground and whether those components and units could be easily dismantled or easily moved; it was wrong to consider the structure as a whole. In agreement with the judge of the Upper Tribunal, I am of opinion that that approach is erroneous. It purports to be based on a construction of paragraph 35 of *Maierhofer*, to the effect that when the Court of Justice refers to "the letting of a building constructed from prefabricated components fixed to or in the ground in such a

way that they cannot be either easily dismantled or easily moved", what is referred to is inevitably the individual components rather than the totality. That seems to me to attach undue significance to the use of the plural pronoun (a pronoun that in English at least is used to cover the singular as well as the plural). Furthermore, the approach of the First-tier Tribunal fails to recognize the fact that in *Maierhofer* the Court did not even address the question of whether a building formed from prefabricated components should be considered as a series of individual components or as a unity; the criterion adopted at paragraph 35 was whether the building was fixed to or in the ground in a particular manner.

[63] The First-tier Tribunal went on to consider the application of *Maierhofer* in the event that the correct criterion was the structure as a whole. The judge held that attachment by friction clamps was not sufficient to hold that the building as a whole was fixed to or in the ground, as the clamps were only required for the purpose of assembling the building. The levelling beams resting on compacted stone were held not to be an integral part of the building, and the foundation trenches were held not to be the equivalent of the concrete base on sunken foundations in *Maierhofer*. Nor was the connection to main services sufficient to cause the building to be fixed to or in the ground. Finally, the judge considered the last part of the analysis put forward in *UK Storage*, the ease or otherwise of moving and dismantling. On this matter she held that it was a straightforward matter to disconnect the individual units from the ground and remove them from the site. This part of the reasoning is in my opinion incorrect for the reasons given by the Upper Tribunal; the sequential approach is wrong in itself.

[64] As will be apparent from the foregoing discussion, I am of opinion that the Upper Tribunal was generally correct in its analysis of the present case. I disagree with its approach on one single issue, namely the relevance of the taxpayer's contractual

arrangements with its customer. Apart from that matter, I am in agreement with the Upper Tribunal that a sequential approach should not be used in the construction of article 135(1)(l), and that the expression "fixed to or in the ground" used in *Maierhofer* does not require an "active" connection between the building or structure and the ground. I further agree that *Maierhofer* is not authority for the proposition that the moveable or immoveable character of a building constructed from prefabricated components should be decided by examining whether individual components are fixed to or in the ground; the issue is whether the building as a whole is fixed to or in the ground.

[65] That leaves the single point of disagreement. For the reasons stated at paragraphs [54]-[59] above I am of opinion that the contractual arrangements between the taxpayer and its customer may be important in determining whether there is a leasing or letting of immoveable property. That proposition was in my opinion clearly accepted by the Court in *Leichenich* v *Peffekoven*. The judge of the Upper Tribunal referred to that case in support of his rejection of a sequential approach and as authority for the importance of the ease or otherwise of dismantling and moving a structure. He also referred to the case as supporting the view that the objective facts relevant to whether property is moveable or immoveable may include the period of let in the lease agreement. It does not appear, however, that the arguments put to the judge included the detailed considerations to which I have referred previously. The critical aspect of *Leichenich* v *Peffekoven* is in my opinion the acceptance by the Court of Justice of the importance of the contractual arrangements concluded by the taxpayer. It is those contractual arrangements that I consider to be of decisive importance in the present case. It is on this point alone that I disagree with the reasoning of the Upper Tribunal. I now turn to the application of the relevant legal principles to the facts of the present case.

Application to the present case

[66] The crucial issue in the present case is whether the supply of goods and services by the taxpayer to the Ian Ramsay Church of England School was an exempt supply because it fell within the exemption contained in Group 1, item 1 of Part II of Schedule 9 to the Value Added Tax Act 1994, read against the background of article 135(1)(l) of the VAT Directive, or was an ordinary commercial supply of goods and services falling within the VAT regime. Two general principles favour the inclusion of the taxpayer's commercial activities within the VAT regime: the presumption that all economic activity should fall within the VAT regime unless it is specifically exempted, and the consequent rule that exemptions from the VAT regime should be restrictively construed. A further general consideration is that the activities of the taxpayer are clearly entrepreneurial in nature: they involve the construction and hiring of structures made from prefabricated components which are removed at the end of the period of hire and reused by the taxpayer. The decision of the Court of Justice in Case C-326/99, *Stichting 'Goed Wonen'* v *Staatssecretaris van Financiën*, *supra*, supports the view that the exemption for the leasing or letting of immoveable property is justified on the ground that the activities of a landlord are typically the classic activities of a rentier, not an entrepreneur: see paragraph [47] above. It is, moreover, clear that the exemptions found in article 135 must be given a Community meaning to ensure the uniform application of the system of VAT throughout the European Union: *ibid*. These factors provide support at a general level for the argument that the taxpayer's activities are fully commercial and therefore fall within the VAT regime. In this connection it is perhaps also significant that the exemptions from the VAT regime other than the leasing of land predominantly cover public services; in those cases it can be said that the commercial aspects of the activity are

subordinate to the notion of public service, which justifies the exemption from the VAT regime.

[67] Nevertheless, the foregoing considerations are of a general nature, and I cannot regard them as conclusive. Of greater importance are the two central aspects of the service provided by the taxpayer: first, the nature of the service provided by the taxpayer, and in particular the supply by it of a structure that was attached to some extent to the land and was relatively difficult to remove, and secondly, the definition in the contract between the taxpayer and its customer of the service that was to be provided.

[68] The first of these was treated as decisive by the Upper Tribunal, largely because the second does not appear to have been as fully argued as it was before the Court. On this issue, I find myself in agreement with the analysis by the Upper Tribunal. The structure provided by the taxpayer should in my opinion be considered as a totality, having regard both to the physical nature of the building that was provided and the manner in which that building was attached to the ground. The building was substantial: it was required to provide classroom and laboratory accommodation for the Ian Ramsay School, and was made up of 66 modular units, together with four landings and steps, a disabled ramp to the ground floor, two landings, and stairs to the first floor. It was placed on levelling beams which were themselves located on concrete foundations, and those foundations were constructed in trenches dug into the ground. There was, however, no significant attachment between the structure and the foundations; bolts were provided, but these were designed to prevent movement during construction and not to provide long-term stability. Long-term stability was provided by the downward compressive force of the structure. The building was obviously connected to the standard services, including electricity, gas and water, and normal plumbing connections were also provided. Against that background, I agree with

the Upper Tribunal that the building must be regarded as a single integrated building, both physically and functionally, and that the focus should be on the building as a whole, not the individual components. For this purpose I agree that the levelling beams should be regarded as part of the building, and that the concrete foundations should also be regarded as part of the total structure provided by the taxpayer. The lack of a form of attachment such as the bolts considered in *Maierhofer* is not, I think, of critical importance; the scale of the structure and the compressive force exerted by it are in my opinion sufficient for it to be considered as attached to the ground.

[69] Furthermore, it was clear that the building, considered as a whole, could not be removed without considerable effort. In *Maierhofer* the buildings under consideration could be dismantled at any time by eight persons in ten days. In the present case, it was found by the First-tier Tribunal that dismantling of the building would take a total of 98 man-days, which is slightly longer. It was accepted by both parties that the dismantling process was fairly involved and relatively lengthy. In this respect the case cannot be considered comparable to cases such as *UK Storage*, *supra*, or *University of Kent* v *Customs and Excise Commissioners*, [2004] BVC 2215, where the units were separate from one another and were not integrated into a larger building; in those cases the question of ease of dismantling had to be considered against the time and effort taken to remove a single unit rather than to dismantle the building as a whole. For these reasons, I agree with the Upper Tribunal that this is a case where the relevant structure, the whole building supplied by the taxpayer, could not be removed easily or quickly. Consequently, when the scale of the structure, its degree of attachment to the ground, and the ease with which it could be removed are taken together, if other considerations are left out of account, I am of opinion that the structure could properly be considered to be fixed to or in the ground in such a way that it constituted

immoveable property for the purposes of article 135(1)(l) and the corresponding provision in United Kingdom domestic legislation, Group 1, item 1 of Part II of Schedule 9 to the Value Added Tax Act 1994.

[70] Nevertheless, I am of opinion that one further consideration is of crucial importance in deciding whether the structure constituted immoveable property for the purposes of this legislation. This is the underlying legal relationship that governed the supply by the taxpayer and the relationship between the taxpayer and its customer. That relationship is obviously found in the contract concluded between the taxpayer and its customer. In *Leichenich* v *Peffekoven* it was accepted that the terms of the contract that governs the placing of a structure on land are an important consideration in determining whether that structure is immoveable for the purposes of article 135(1)(l): see paragraph [55] above. It was further accepted that the temporary or permanent character of the attachment of a structure to the ground may be an important factor in determining whether the structure is to be regarded as moveable or immoveable: see paragraph [56] above. Furthermore, it is established by a series of decisions of the Court of Justice that in applying the legislation governing VAT a court must take proper account of the context, both legal and factual, in which an exemption from VAT may apply, and must take proper account of the purpose of the exemption: see paragraph [45] above. In a case such as the present, involving the leasing of property, the legal and factual context obviously includes the terms of the contract under which the property is supplied. Furthermore, the underlying purpose of the exemption is to exclude from VAT transactions that amount to the collection of a rent and thus are not truly "economic" in nature; in giving effect to that purpose a court must take account of that contract and its terms. For all these reasons, the contractual terms must be of fundamental

importance in determining the application of the relevant legislation, both at a domestic and at an EU level, to the present case.

[71] In the statement of agreed facts and the findings in fact of the First-tier Tribunal it is narrated that the Ian Ramsay School required the units provided by the taxpayer to provide temporary classroom and laboratory accommodation because part of their existing permanent building had been condemned. The units hired were accordingly envisaged as a temporary provision, to provide accommodation during the period that it would take to reinstate a permanent building containing the requisite classrooms and laboratories. The structure was originally hired for a period of 24 months, but in the result the period of hire was extended to 32 months. Nevertheless, this emphasizes that the hire was for a limited period of relatively short duration.

[72] Furthermore, it appears that the supply of structures for temporary purposes is a standard aspect of the taxpayer's business. Documentation was available to show the use that had been made of the prefabricated units before and after the supply of the building for the Ian Ramsay School. It was apparent from this that the individual modules and other components are repeatedly reused in a series of structures. These structures may obviously be provided for a wide range of purposes, and the Court was not given a full account of the taxpayer's business. Nevertheless, it is obvious that a major use of such components is the provision of temporary staff and storage accommodation during the performance of a building contract. As with the provision of temporary school accommodation, that is plainly a supply of limited duration. Indeed, it is probably fair to observe that the supply of temporary accommodation is of the essence of the taxpayer's business; as a matter of commercial common sense it is obvious that structures composed of prefabricated

components are unlikely to be satisfactory as long-term accommodation, except perhaps for very limited purposes. If a structure is supplied for a temporary and limited purpose, however, that seems antithetical to the notion that it is "immoveable"; temporary structures are designed to serve a limited purpose and then to be removed. Perhaps more significantly, when structures are provided on that basis, the supply can be seen as contributing added value to economic activity. That is the fundamental rationale for the imposition of the VAT regime: see paragraphs [48] and [49] above. Supply of this nature is quite different at both a conceptual and a practical level from the typical letting of immoveable property, where the landlord draws a rent for allowing the occupation and use of its property, rather than adding value through active participation in economic activity.

[73] Counsel for the taxpayer emphasized the practical difficulty that the taxpayer would have if the present structure were to be regarded as immoveable for the purposes of the VAT legislation. In some cases the structure supplied by the taxpayer to a customer is relatively small and clearly rests on its own weight, without integration into the ground; in such cases the structure would almost certainly be moveable, by analogy with cases such as *UK Storage*. VAT would then be chargeable. At the other extreme, in cases such as the present, there would be a degree of integration into the ground with the result that the structure was exempt from VAT. Drawing a distinction between these categories would frequently be difficult. The difficulty of drawing a distinction is not necessarily a reason for holding that no distinction exists, and in these two extreme cases the degree of integration into the ground is clearly very different. Nevertheless, the fundamental feature of the taxpayer's activities is the provision of temporary structures, and that applies equally to the provision of a single unit resting on its own weight and to the provision of a complex structure such as the present. In both cases the activity can be considered "economic" in

nature, in the sense in which that word is used in the application of VAT; it involves the hiring of units and other components for a limited period to serve limited purposes, and then reusing the units for similar purposes. In my opinion this consideration is decisive; it negates the view that what is supplied by the taxpayer amounts to "immoveable" property for the purposes of article 135(1)(l) or is a "right over land" or a "licence to occupy land" for the purposes of Group 1 of Part II of Schedule 9 to the Value Added Tax Act 1994.

[74] That is sufficient to hold that the present appeal should be allowed. I should observe that I do not regard the ownership of the land on which the structure is erected as decisive; that seems clear from the discussion of the relevance of landownership in *Maierhofer*, at the point when the Court of Justice considered the second question put to it by the German court: see paragraphs 36 *et seq*, and in particular paragraphs 39 and 40. The critical question is whether the structure hired by the taxpayer is to be regarded as forming part of the immoveable property, or is a right over or licence to occupy land, and that must in my opinion be determined by two main factors, the degree to which the structure can be considered integrated into the land and the contractual arrangements under which the structure is supplied. Those two factors may point in different directions, as occurs in the present case. In that event a court or tribunal must consider the supply of the structure as a whole and in context, and decide how the statutory test should apply. When it does so, it is important that the court should have regard to the fundamental purposes of the imposition of VAT on "economic" transactions and the exemption for the "leasing or letting" of immoveable property. In the present case, the contractual arrangements between the taxpayer and its customer demonstrate, especially through their limited and temporary nature, that they are properly considered as a component in economic activity, and thus fall within the fundamental purpose of the VAT regime. That in my opinion takes the present

transaction outside the purpose of the leasing exception. That is sufficient to negate any inference that the structure became immoveable property or involved a right or licence over land.

[75] For the foregoing reasons I agree that the appeal should be allowed.

FIRST DIVISION, INNER HOUSE, COURT OF SESSION

[2018] CSIH 49
XA81/17

Lord President
Lord Drummond Young
Lord Bannatyne

OPINION OF LORD BANNATYNE

in the appeal by

SiBCAS LTD

Appellants

against

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS

Respondents

Appellant: Simpson QC; Anderson Strathern
Respondents: Roxburgh; Office of the Advocate General

13 July 2018

Introduction

[76] I am grateful to your Lordship in the chair for his exposition of the legislation; the facts and circumstances of the case; the analysis of the authorities; and the analysis of the decisions of the First Tier Tribunal and the Upper Tribunal. I am in full agreement with these findings, reasoning and conclusion.

[77] As observed by your Lordship, this case raises an issue of some importance and in these circumstances I would wish to add a few remarks of my own.

Errors in law of the First Tier Tribunal

[78] I consider that the approach of the First Tier Tribunal to the issues before it to be unsound for the reasons set out by your Lordship.

[79] In respect to the errors in law of the First Tier Tribunal, I would wish to make the following further observations.

[80] First, in considering whether a structure is movable or immovable, the first question is to identify the structure. Where, as in the present case, individual units are supplied, which are then functionally or structurally linked together, then it is the structure as a whole which is relevant and not as the First Tier Tribunal concluded the individual units.

[81] In my view, the First Tier Tribunal failed to read paragraph 35 of the judgment of the court in *Maierhofer* v *Finanzamt Augsburg-land* [2003] STC 564 in the context of the preceding paragraphs. On a sound reading of this section of the judgment it is clear that it is the building as a whole which is being considered and not the individual components. It is equally clear on a reading of Advocate General Jacobs' opinion, as a whole, that his advice related to the building as a whole and not as regards the individual units.

[82] Second, a further question in the present case, in respect to identification of the structure, was this: were the foundations and levelling beams part of the structure? The First Tier Tribunal, as a matter of fact, found as follows: the site on which the school was constructed did not, on its own, have adequate load-bearing capacity for a school. Accordingly, the foundations and levelling beams were necessary for the structure as a whole to be erected. In these circumstances, the foundations and levelling beams were integral to the structure and thus formed part of it.

[83] The explanation given by the First Tier Tribunal, for concluding to the contrary, is given at paragraph 81:

> "When the appellant left the site, the foundation trenches and stone remained. The units, steel beams and flitch plates had simply been removed in turn by the appellant and were then taken away and used elsewhere. For the same reasons, I do not find that they can possibly be an integral part of the units."

This reasoning is unsound. The relevant question is: whether the foundations and levelling beams were required while the structure was in position? That question is not answered by noting the foundations remained after the structure was removed and that the levelling beams were removed with the structure. The First Tier Tribunal erred in law in this finding.

[84] Third, the First Tier Tribunal's error of approach regarding whether the foundations and steel beams formed part of the structure fed into its failure to answer correctly this question: what is the proper meaning of the word "fixed" as used by the court in the case of *Maierhofer*? The First Tier Tribunal applied a narrow construction to this word and in essence held that in order for a structure to be fixed to the ground then there required to be an "active connection" such as the bolts which attached the walls to the foundations in *Maierhofer*. I can find no basis for the view reached by the First Tier Tribunal in relation to this issue in any of the case law to which this court was referred. In order to be fixed to the ground, I am persuaded that there is no necessity for any such "active connection".

[85] Fourth, in considering whether the supply involves the leasing or letting of immovable property, I believe a holistic approach must be taken, in which all the circumstances of the supply are considered.

[86] Fifth, I am of the view that as a direct result of taking a holistic approach, the sequential approach suggested in *UK Storage Company (SW) Ltd* v *Revenue and Customs Commissioners* [2013] STC 361 at paragraph 21, namely: asking first whether "the structure" was fixed to or in the ground and, if so, going on to ask whether the structure could be easily moved or dismantled and moved is the wrong approach.

[87] In *Maierhofer*, in his opinion, Advocate General Jacobs, at paragraph 43, advises that the term "immovable property" in Article 13B(b) (of the Sixth Directive):

> "... covers buildings constructed from prefabricated materials such as those in issue in the main proceedings if they are firmly fixed to or in the ground." (emphasis added)

In the judgment of the court in *Maierhofer*, the word "firmly" is not used, rather the court, at paragraph 33, says this:

> "Such buildings made of structures fixed to or in the ground must be regarded as immovable property."

The court then goes on at paragraph 33 to give guidance as to factors which are relevant in considering the question of whether a structure is "fixed to or in the ground". It opines at paragraph 33, as follows:

> "In that connection, it is significant that the structures cannot be easily dismantled or easily moved ...".

Given the above guidance, I agree with the observations of the Upper Tribunal at paragraph 46, that:

> "The means by which a building is kept in position on its site, and the ease or difficulty of moving or dismantling and moving it, are interrelated issues."

The issues of fixity to the ground and the ease of moving or dismantling are not separate questions to be considered one after another. Rather, the issue of the ease or otherwise of moving or dismantling gives content to the phrase "fixed to or in the ground".

The determinative question

[88] Having held that the First Tier Tribunal has erred in law, there is then the question, on a proper approach, did the supply in the present case amount to a lease of immovable property?

[89] I agree with your Lordship in the chair that the above is the correct question, in that it is the relevant wording in the Directive, and not the more restrictive question; was the structure fixed to or in the ground?

[90] As a starting point, it is, I believe, important to understand the purpose or objective of the exemption.

[91] The reason for the exemption I consider is identified by the court in *Stichting Goed Wonen* v *Staatssecretaris van Financiën* [2001] ECR I-6856 at paragraphs 52 and 53, here the court opines as follows:

> "52. Although the leasing of immovable property is in principle covered by the concept of economic activity ... it is normally relatively passive activity, not generating any significant added value. Like sales of new buildings following their first supply to a final consumer, which marks the end of the production process, the leasing of immovable property must therefore in principle be exempt from taxation ...
>
> 53. ... The common characteristic of the transactions which [are excluded] from the scope of the exemption is indeed that they involve more active exploitation of immovable property, thus justifying supplementary taxation, in addition to that charged on the initial sale of the property". (emphasis added)

The importance of the purpose of the exemption in interpreting Article 13B(b) of the Sixth Directive is emphasised by the court in *Belgium* v *Temco Europe SA* [2004] ECR I-11237 at paragraph 18 where it states:

> "That provision (the exemption under Article 13B(b)) must therefore be interpreted in the light of the context in which it is used, and of the objectives and the scheme of the Sixth Directive, having particular regard to the underlying purpose of the exemption ...".

It was the core submission of Mr Simpson that on standing back and looking generally at the appellants; they were not passive exploiters of immovable property. Rather, the position is as he argued: each hire of the units involved added value, as with the hire of any other movable property. The appellants' business model is the repeated hires of individual units

which are intended to be formed into various different structures depending on the terms of the contract. Thus it appears to me that the common characteristic of the transactions which are excluded from the scope of the exemption is present in the supply by the appellants.

[92] I do not think, as argued by Ms Roxburgh, that the observations of Advocate General Jacobs in *Maierhofer,* at paragraph 41, provide an answer to the above submission by Mr Simpson. These remarks must be understood in their context. Advocate General Jacobs considers the position of the German Government that the buildings in issue could be dismantled at the end of each lease and re-erected and that this was active rather than passive exploitation and should not escape VAT. He rejects that argument, however, he does so because on the facts in *Maierhofer* the "sequence of events" suggested by the German Government, namely: the removal and re-erection of the structures was "hypothetical".

[93] Such a sequence of events in the present case is not hypothetical, rather as submitted by Mr Simpson it is the most likely sequence of events. This is I think a critical difference between the present case and *Maierhofer*. In the present case it would seem to me to undermine legal certainty were consideration of the likelihood of what would occur to the units did not form part of the consideration of the issue before the court.

[94] For these reasons, I agree with your Lordship that, in a case such as the present one, where the contract goes beyond mere leasing of a building or land, the purpose or objective of the exemption is one which is of significance in determining the issue before the court.

[95] Other factors which may be of relevance in approaching the issue in a holistic manner, are these.

[96] First, regard can be had to the nature and terms of the contract between the parties (see: *Leichenich* v *Peffekoven and others* [2013] STC 84 at para 24, where: "the term of the leasing contract, which is concluded for a duration of five years, and which shows no wish

of the parties to confer an occasional and temporary character to the use made of the houseboat" was said by the court to be a relevant factor in holding that the houseboat should be regarded as immovable property for the purposes of the exemption.

[97] Further, in *Maierhofer* at paragraph 33, the court considers the relevance of the "term of the lease". The court holds that the "term" is not "decisive" but it does not hold that it is an irrelevant consideration.

[98] I am persuaded that not merely the term of a lease may be a relevant consideration in determining the issue before the court but more generally the whole terms of the contract of supply may be a relevant consideration in determining the issue before the court.

[99] The terms of the contract are an objective criterion in that the court approaches the issue of construction of a contract by seeking to establish the intention of the parties by answering this question: "What is the meaning of what the parties have said? Not, what did the parties mean to say?" (see: Lord Simon of Glaisdale in *Wickman Machine Tools Ltd* v *Schuler AG* [1974] AC 235 at 263).

[100] Accordingly, the terms of the contract of supply are a relevant consideration in understanding the nature of the supply.

[101] I consider that in the present case that it follows from the above that the issue of whether any interest in land was conveyed or leased in terms of the contract between the parties was a relevant one.

[102] The answer to the above question is no, for the reasons set out by your Lordship. The question for the court then becomes, in terms of the contract, what was in fact supplied and the answer to that is as your Lordship states at paragraph [38], namely:

> "The supply was of a structure which was always intended to be a temporary one, albeit lasting at least two years, on top of land which was, and remained throughout, the property of the school."

It is necessary to caveat the relevance of the terms of the contract of supply. The terms of the contract would have to give way to the substance of the transaction, if the terms did not reflect the substance. Advocate General Jacobs emphasises in his opinion in *Maierhofer* at paragraph 49 that:

> "... it is settled case law that it is the inherent nature of the activity in question which governs its tax status and not the form of the arrangement between the parties".

[103] As regards the substance of this transaction a relevant factor is this: is the structure fixed or in the ground? This question is interrelated, as I have already said, to the question: can the structure be easily dismantled/easily moved?

[104] In considering these interrelated questions in the present case, it is noteworthy, as observed by your Lordship, that the design of the structure, as a whole, is an indicator that it is inherently movable. This is a structure which can be detached from its foundations relatively easily (see the finding-in-fact of the First Tier Tribunal at paragraph 91). It can be contrasted with the structure in *Maierhofer*, which is described by the court at paragraph 13, in this way:

> "The building stood on a concrete base erected on concrete foundations sunk into the ground. The walls, which were made of panels, were secured to the foundations by bolts. The roof framework was covered by tiles."

The mode of construction and in particular the nature of the foundations and the attachment of the building built thereon to the foundations, strongly indicates in *Maierhofer* an immovable structure.

[105] In considering whether a structure is easily moved or dismantled, the time and effort required to move or dismantle and move the structure is a relevant consideration. However, it must be borne in mind that the aim in considering such factors is to decide the

extent to which the structure is fixed to or in the ground and therefore where in the spectrum of movable/immovable the supply should be placed.

[106] I can understand how in the *Maierhofer* case, given the nature of the foundations and the attachment of the building to the foundations, the number of man hours was thought to be an important factor in deciding that what was supplied was immovable.

[107] However, the number of man hours in the present case, when viewed in the context of the nature of the construction's connection to the ground is, I believe, a much less significant factor.

[108] The final relevant matter is the connection of the construction to the site in this sense: connections to mains services, such as: telephone; gas; electricity; water; or connections to imported services, such as electricity through an electrical generator or water through, for example a bowser.

[109] Once more, as explained by your Lordship, these services were easily disconnected and had not been installed in such a manner as to indicate the structure was immovable.

[110] It appears to me in the present case both form and substance clearly indicate that this is a supply which is movable. In reaching that conclusion I have found the phraseology of Attorney General Jacobs in *Maierhofer*, namely: a consideration of the inherent nature of the activity to be of significance. On standing back, a consideration of the inherent nature of the supply in the present case clearly indicates the supply of a movable. I consider contrasting the supply in *Maierhofer* and the present case clearly indicates that the supply in the instant case is movable. Thus the supply in *Maierhofer* was not of individual units which were then to be put together to form a single structure as in the present case; the buildings erected in *Maierhofer* were attached to the ground in a much more significant manner than in the present case and in one which suggested strongly that it was not a temporary structure

unlike in the present case and *Maierhofer* was a case where the sequence of events, which applied in the present case, was merely hypothetical.

[111] For all of the foregoing reasons, I agree with the decision of your Lordship that the appeal should be allowed.