AN CHÚIRT UACHTARACH
THE SUPREME COURT

S:AP:IE:2019:000131

Clarke C.J.
O'Donnell J.
MacMenamin J.
Charleton J.
O'Malley J.

Between/

BOOKFINDERS LTD.

Appellant

and

THE REVENUE COMMISSIONERS

Respondent

Judgment of Mr. Justice O'Donnell delivered the 29th day of September, 2020.

I – Introduction

A. Background

1. This appeal arises from a claim submitted to the Revenue Commissioners ("the respondents") by Bookfinders Ltd. ("the appellant") in December 2006. In the claim, the appellant sought a refund for VAT payments made from the period January/February 2004 to November/December 2005 at a composite rate of 9.2%, which Bookfinders claimed should instead have been subjected to 0% VAT.

2. The case turns on the interpretation of two paragraphs in two Schedules to the Value Added Tax Act 1972 ("the 1972 Act"). Having established the general rate of 21% under s. 11(1)(a) of the Act, exceptions are provided for certain goods and services to be charged at 13.5% and at 0%. Under s. 11(1)(b), paras. (iii)-(xx) of the Second Schedule provide for those charged at 0%, while s. 11(1)(d) specifies that the Sixth Schedule details those charged at 13.5%. In effect, Bookfinders alleges that much of its turnover falls under para. (xii) of the Second Schedule and thus should be charged at 0%, and not under para. (iv) of the Sixth Schedule and charged at 13.5% (which, the respondents maintain, is the case). For ease of reference, the key excerpts will be laid out below.

3. Para. (xii) of the Second Schedule reads as follows:-

> "food and drink of a kind used for human consumption, other than the supply thereof specified in paragraph (iv) of the Sixth Schedule, excluding -
>
> (a) beverages chargeable with any duty of excise specifically charged on spirits, beer, wine, cider, perry or Irish wine, and preparations thereof,
>
> (b) other beverages, including water and syrups, concentrates, essences, powders, crystals or other products for the preparation of beverages, but not including
>
> (I) tea and preparations thereof;
>
> (II) cocoa, coffee and chicory and other roasted coffee substitutes, and preparations and extracts thereof,
>
> (III) milk and preparations and extracts thereof, or
>
> (IV) preparations and extracts of meat, yeast, or egg;
>
> […]

(d) (I) chocolates, sweets and similar confectionary (including glacé or crystallised fruits), biscuits, crackers and wafers of all kinds, and all other confectionary and bakery products whether cooked or uncooked, excluding bread,

(II) in this subparagraph 'bread' means food for human consumption manufactured by baking dough composed exclusively of a mixture of cereal flour and any one or more of the ingredients mentioned in the following subclauses in quantities not exceeding the limitation, if any, specified for each ingredient-

(1) yeast or other leavening or aerating agent, salt, malt extract, milk, water, gluten,

(2) fat, sugar and bread improver, subject to the limitation that the weight of any ingredient specified in this subclause shall not exceed 2 per cent of the weight of flour included in the dough,

(3) dried fruit, subject to the limitation that the weight thereof shall not exceed 10 per cent of the weight of the flour included in the dough,

other than food packaged for sale as a unit (not being a unit designated as containing only food specifically for babies) containing two or more slices, segments, sections or other similar pieces, having a crust over substantially the whole of their outside surfaces, being a crust formed in the course of baking, frying or toasting…'

4. Para. (iv) of the Sixth Schedule then reads as follows:-

"the supply of food and drink (other than bread as defined in subparagraph (d), of paragraph (xii) of the Second Schedule) (other than beverages specified in

subparagraph (a) or (b) of paragraph (xii) of the Second Schedule) which is, or includes, food and drink which-

(a) has been heated, enabling it to be consumed at a temperature above the ambient air temperature, or

(b) has been retained heated after cooking, enabling it to be consumed at a temperature above the ambient air temperature, or

(c) is supplied, while still warm after cooking, enabling it to be consumed at a temperature above the ambient air temperature,

and is above the ambient air temperature".

5. Finally, the appellant cites s. 11(1) in support of the exclusion of certain items from one Schedule when specified in another and, in relation to the exclusion of an item specified in one paragraph of a Schedule from any other paragraph of the same Schedule, relies on s. 11(1A)(b), which states that:-

"Goods or services which are specifically excluded from any paragraph of a Schedule shall, unless the contrary intention is expressed, be regarded as excluded from every other paragraph of that Schedule, and shall not be regarded as specified in that Schedule".

6. Bookfinders is a franchisee of the fast food chain, Subway, and is based on the Tuam Road in Galway. As is typical of fast food outlets, between 70-80% of Bookfinders' trade is takeaway.

7. This is in fact the fourth appellate body to hear the case. Having had the claim dismissed by the respondents, Bookfinders appealed to the Appeal Commissioner, who heard the matter on a number of dates from May 2009, until October 18th, 2010. The Appeal Commissioner dismissed the appeal in a determination dated February

21st, 2011, after which Bookfinders appealed to the High Court by way of case stated, pursuant to s. 941 of the Taxes Consolidation Act 1997.

B. The High Court Judgment

8. The case came before Keane J. in the High Court, who gave judgment on October 14th, 2016 ([2016] IEHC 569), dismissing the appeal.

9. The Appeal Commissioner had submitted six questions to the High Court for determination (all of which Keane J. answered in the affirmative):

a. Did hot drinks and sandwiches fall under the Sixth Schedule of the 1972 Act, and were they thus taxable at 13.5%?

b. Should "food and drink" be read disjunctively – and not conjunctively – with regard to the principle of doubtful penalisation?

c. Does the 13.5% rate apply to hot tea and coffee, having found that they were specified by para. (xii) of the Second Schedule?

d. Was the Appeal Commissioner correct in holding that heated sandwiches were not subject to the 0% rate?

e. Did the bread used in the appellant's sandwiches fall outside the statutory definition of bread?

f. Was the Appeal Commissioner correct to hold that the issue of fiscal neutrality did not operate to apply the 0% rate to Bookfinders' sandwiches?

10. In considering the construction of VAT Acts, Keane J. found that the general principle was that all taxable goods and services were to be charged at the standard rate, and that any provisions permitting a lower rate to be charged on the items were exemptions and were consequently to be construed strictly. Exceptions to the exemptions brought the goods or services in question back under the general rate,

and thus were not to be construed strictly, he found. However, Keane J. noted that even a strict interpretation of the provision could not be used to deprive the provision of its intended effect.

11. Bookfinders argued for the application of general principles of interpretation applied to tax statutes generally, and relied on *Gaffney v. Revenue Commissioners* [2013] IEHC 651 ("*Gaffney*") to this end. In *Gaffney*, Dunne J. had relied on *Inspector of Taxes v. Kiernan* [1982] I.L.R.M. 13 ("*Kiernan*"), where the Court had noted three principles in relation to the interpretation of tax statutes: provisions of tax statutes are to be given their plain, ordinary meaning when aimed at members of the public generally; statutes giving rise to penal or taxation liability were to be interpreted strictly; and, where a word is to be given its natural or plain meaning, the judge should rely on their own experience in so construing the word. Consequently, the appellant argued that the VAT Act itself should be construed strictly and its exceptions interpreted broadly, while the respondents sought the converse. The appellant contests this characterisation by the High Court of their arguments in that Court, and instead maintains that they argued that there was no basis for the Second Schedule to be construed any more strictly than the Sixth Schedule.

12. On this issue, Keane J. found for the respondents, holding that he was not satisfied that direct and indirect taxes should not be differentiated due to the application of the principle against doubtful penalisation, and as he, in any event, considered that the principle was inapplicable to the 1972 Act, which had implemented an EU Directive. Accordingly, the principle of conforming interpretation applied. While this did not permit interpretation *contra legem*, the canons of construction were not

to be considered law for this purpose. The Court of Appeal did not find it necessary to express a conclusion on this issue.

13. The appellants, in arguments now no longer in controversy between the parties, argued that the 13.5% rate was only applicable to food and drink consumed on the premises (70-80% of their trade being takeaway) and, further, that characterising the provision of food as a service and not as a good was contrary to Article 5(1) of Council Directive 77/388/EEC ("the Directive"). Keane J. dismissed the first argument as contrary to the natural and ordinary meaning of the words in the Schedule, and the second, finding that whether takeaway food is the supply of goods or that of a service, it falls outside the 0% exemption.

14. Bookfinders then argued that "food and drink" as contained in para. (iv) of the Sixth Schedule was to be read conjunctively (as this was the ordinary meaning of the word "and"), such that only when food was sold with drink was the 13.5% rate to be applied. For this argument, the appellant relied on the replacement of "food or drink" in the 1972 Act with "food and drink" by s. 197 of the Finance Act 1992, which they said showed the legislative intention to read the phrase conjunctively only.

15. In his consideration of this argument, Keane J. relied on *Cronin (Inspector of Taxes) v. Cork and County Properties* [1986] 1 I.R. 559 ("*Cronin*") to the effect that amendments to a statute cannot affect a statute's construction. Having determined that the plain and ordinary meaning of "food and drink" allowed it to be read disjunctively, he found it to fall under the 13.5% rate.

16. Further, the appellant argued that para. (iv) of the Sixth Schedule was only concerned with cooked products and cold products which had subsequently been heated (i.e., that only cold tea and coffee which had been heated fell under the 13.5%

rate, while tea and coffee which was prepared hot came under the 0% rate). The Court similarly rejected this submission.

17. Another issue arose in relation to the respondent's decision to exclude the bread used by the appellant in their sandwiches from being considered as bread under para. (xii) of the Second Schedule, as the sugar content in the bread exceeded the percentage allowed in the Schedule. The Schedule excluded bread from the 0% rate where any of a number of specified ingredients exceeded the allowed percentages. Bookfinders contended that this meant that all of the specified ingredients, if included, would have to have exceeded the allowed percentage in order to fall outside the 0% rate and into the 13.5% rate. Keane J. rejected this argument also, agreeing with the respondent that it was clear that once the allowed percentage was exceeded for any one ingredient, the bread lost the 0% rate.

18. Finally, Bookfinders argued that, by applying different VAT rates to the supply of food based only on temperature, the 1972 Act breaches the EU law principle of fiscal neutrality (that similar products have the same rate applied to them). They also submitted that the 1972 Act breached the principle of legal certainty by making the difference between ambient air temperature and the temperature of the food central to their VAT classification.

19. Keane J. relied on Case C-219/13 *K Oy* [2015] S.T.C. 433 in finding that the principle was engaged in respect of goods or services which the typical customer would consider similar. In the absence of any finding by the Appeal Commissioner to this effect, the Court declined to find that the principle of fiscal neutrality had been breached. Keane J. further found no arbitrariness in the distinction between hot and cold food for VAT purposes, and thus that the principle of legal certainty had not been breached.

20. Having found against the appellant on all grounds, Keane J. dismissed the appeal.

C. Court of Appeal Judgment

21. Bookfinders then appealed to the Court of Appeal, where the case was heard by Kennedy, Baker and McCarthy JJ. Kennedy J. gave judgment on April 3rd, 2019 ([2019] IECA 100), dismissing the appeal.

22. The grounds of appeal had narrowed to three major grounds: the construction of tax statutes (the contention that the trial judge had failed to apply the correct canons in his judgment, and had consequently misinterpreted the provisions in question); the principle of fiscal neutrality; and the principle of legal certainty.

23. In relation to the construction issue, Bookfinders submitted that the High Court had incorrectly applied the stricter interpretation required by the Directive for exceptions to apply a stricter interpretation to the Second Schedule than to the Sixth Schedule, and incorrectly allowed this principle to override the domestic principle of doubtful penalisation. Further, they argued that *Gaffney* and other earlier cases supported the proposition that the principle of doubtful penalisation applies equally to both direct and indirect taxes. For their part, the respondents contended that an interpretation of the plain and ordinary meaning of the provisions in question supported the High Court's interpretation thereof.

24. The Court considered *Revenue Commissioners v. O'Flynn* [2011] IESC 47, [2013] 3 I.R. 533 ("*O'Flynn*"), where the Supreme Court held that there was no special rule for the interpretation of tax statutes as opposed to regular statutes. In that case, relying on *McGrath v. McDermott* [1988] I.R. 258 ("*McGrath*"), the Court held that a purposive interpretation of tax statutes was permissible if a plain and ordinary reading of the provisions gave rise to an ambiguity. Kennedy J. noted that many of

the cases relied on by the appellant in their contention that the 1972 Act should be construed strictly actually adopted an approach analogous to s. 5 of the Interpretation Act 2005 ("the Interpretation Act"). The Court held that a strict interpretation involved precision in the consideration of the ordinary meaning of words so as to prevent any fresh liability accruing. It was not, however, a basis for interpreting tax statutes more narrowly than other statutes.

25. In considering the application of the relevant principles to the provisions in question, Bookfinders maintained that "food and drink" in para. (iv) of the Sixth Schedule should be read conjunctively only, and that the High Court further erred in considering that the legislative history could not inform its interpretation of the provision, as the amendment preceded the tax period in question. However, the Court upheld Keane J. on this point, finding that the appellant's interpretation of the provision ignored the words "or includes" in the paragraph, which the Court held to show that food and drink were included in the paragraph (and thus in the 13.5% rate) by way of a list of which they were two components. Kennedy J. also held that there was no need to consider the legislative history of the provision, as its meaning was clear.

26. Bookfinders further argued that the High Court had found para. (xii) of the Second Schedule to mean cold tea and coffee in drinkable form, which they submitted could not have been the legislative intent, given that cold tea and coffee were uncommon at the time of enactment. The respondent argued that para. (xii) of the Second Schedule referred to the dry forms of tea and coffee. The Court held that para. (xii) of the Second Schedule applied a 0% rate to food and drink except those specified in the Second Schedule and the supply of those in para. (iv) of the Sixth Schedule.

As tea and coffee were expressly excluded in the Second Schedule, they could not then be found to be subject to the 0% rate, the Court found.

27. Dealing with the appellant's contention that all ingredients must exceed the allowed percentages so as to fall outside the definition of bread subject to the 0% rate, the Court found that the use of the word "any" meant that any one of the ingredients, if included, exceeding the allowed percentages took it outside the 0% rate. Additionally, the bread is supplied as part of a heated sandwich, which thus brings it under para. (iv) of the Sixth Schedule (the 13.5% rate).

28. Further, the appellant relied on s. 11(1) of the 1972 Act, the effect of which is that no item specified in any Schedule under the Act could fall under any other Schedule of the Act. They then contended that "specified" meant "under the scope of" rather than "listed in" to argue that the specification of tea and coffee under para. (xii) of the Second Schedule meant that it could not, in any form, fall under para. (iv) of the Sixth Schedule. The Court dismissed this argument also, finding that it was unsupported by any authority, and that it failed to respect the principle that the words of a statute are to be read in the light of the statute as a whole.

29. In relation to the principle of doubtful penalisation, Kennedy J. held that it only became relevant if the provisions were ambiguous, which in this case they were not. Furthermore, the Court applied *Mac Cárthaigh (Inspector of Taxes) v. Cablelink Ltd.* [2003] IESC 67, [2004] 1 I.L.R.M. 359, where the Supreme Court had held that an applicant seeking to show that a lower rate of tax than the standard rate should be applied to them bore an onus to show that this was the case. As the appellant had failed to do so, it could not rely on the principle of doubtful penalisation to avail of the lower rate.

30. Finally, the Court of Appeal upheld the trial judge's findings on the issues of fiscal neutrality and legal certainty, adopting Keane J.'s logic in this regard.

31. The appellants then sought leave to appeal to the Supreme Court. In a determination dated November 14th, 2019 ([2019] IESCDET 268), this Court granted leave to appeal on the grounds of the principles of interpretation to be applied when interpreting tax statutes, particularly when principles of EU law are involved.

D. The Issues

32. The issues still extant in this case can be narrowed down to the correct interpretation of VAT Acts, the impact of the principle of fiscal neutrality, and the application of these principles of interpretation to the provisions in question in this case.

33. Within the question of the correct interpretation of VAT Acts, the order in which the canons of statutory interpretation are to be applied must be considered. It is clear that the plain, ordinary meaning of the provisions must first be considered, but failing that, the parties are in dispute as to whether a purposive approach can be applied, or if the principle of doubtful penalisation should immediately be applied. Further, there is debate over the meaning of the strict interpretation to be applied to tax statutes, and whether it applies equally to general principles as to exceptions.

34. Having dealt with the domestic canons of statutory interpretation, there remains the issue of the principle of fiscal neutrality – namely, what it is, what the test for the principle is, and how the test can be satisfied.

35. Finally, once matters concerning domestic and European principles of interpretation of VAT Acts are considered, they must be applied to the issues in this case. These issues can be summarised as: whether the tea and coffee supplied by Bookfinders falls within para. (xii) of the Second Schedule, as Bookfinders contend, or within

the Sixth Schedule, as the Revenue argue; whether "food and drink" must be read conjunctively; whether the appellant's bread can be said not to be included in para. (xii) of the Second Schedule (and thus in the 0% rate); and whether the principle of fiscal neutrality is breached, or indeed even engaged, in this case.

II – The Interpretation of Taxing Statutes

A. The Parties' Positions

36. The dispute in this case falls to be determined, however, against a backdrop of a wider argument as to the proper approach to the interpretation of taxation statutes. The appellant contends that both the High Court and Court of Appeal in this case, influenced in this respect by the decision of this court in *O'Flynn*, adopted an impermissibly purposive approach (by analogy with the provisions of s. 5 of the Interpretation Act, albeit that it was recognised that the issue in this case predates the coming into force of that Act) and unjustifiably departed from the traditional approach of the courts to the interpretation of taxation statutes exemplified, it was said, by the dissenting judgment of Chief Justice Kennedy in *Revenue Commissioners v. Doorley* [1933] I.R. 750 ("*Doorley*"), and the following passage is quoted in the appellant's submissions:-

> "The duty of the Court as it appears to me, is to reject an *a priori* line of reasoning and to examine the text of the taxing Act in question and to determine whether the tax in question is thereby imposed expressly and in clear and unambiguous terms, on the alleged subject of taxation, for no person or property is to be subjected to taxation unless brought within the letter of the taxing statute, *i.e.*, within the letter of the statute as interpreted with the assistance of the ordinary canons of interpretation applicable to Acts of Parliament so far as

they can be applied without violating the proper character of taxing Acts to which I have referred."

37. The appellant interprets Chief Justice Kennedy's reference to rejecting an *a priori* line of reasoning as meaning that the court should approach the statute "with no foreknowledge", implying, it seems, that the inquiry is limited to the words used in the statute itself. The appellant also relied on the well-known passage in the judgment of this court, *per* Henchy J., in *Kiernan* in the following terms at p. 122:-

> "Secondly if a word or expression is used in the statute creating a penal or taxation liability, and there is looseness or ambiguity attaching to it, the word should be construed strictly so as to prevent a fresh imposition of liability from being created unfairly by the use of oblique or slack language".

38. It is suggested by the appellant that the observations in *O'Flynn* were made without reference to the provisions of Article 1 of Protocol 1 of the European Convention on Human Rights ("the ECHR") which guarantees, *inter alia*, the peaceful enjoyment of possessions and contains a guarantee against the deprivation of such possessions, subject to conditions provided by law which, however, shall not impair the right of the State to enforce such laws as it deems necessary to, among other things, secure the payment of taxes and other contributions or penalties. Indeed, it appears also to have been suggested that a purposive approach (using the phrase in a loose sense) to taxation statutes was inconsistent with the rule of law.

39. This case shows that these broad arguments about the approach to interpretation are perhaps best pursued when not conducted in the abstract, but rather should be addressed by reference to the words of a particular statute and the facts of a particular case. This case also illustrates the fact that there is often a mismatch between the lofty principles that are said to be in conflict and the reality of the

dispute. It is worth emphasising that the starting point of any exercise in statutory interpretation is, and must be, the language of the particular statute rather than any pre-determined theory of statutory interpretation.

B. *O'Flynn* & the Interpretation Act 2005

40. In *O'Flynn*, I delivered a judgment with which Fennelly and Finnegan JJ. agreed. McKechnie J., with whom Macken J. agreed, dissented in part. The case dealt with the very specific anti-avoidance provisions contained in s. 86 of the Finance Act 1989, which provided that, in certain circumstances, the Revenue Commissioners were entitled to look to the substance of a transaction if it was considered to be a transaction entered into solely for taxation purposes. In this regard, it is clear that the provisions of s. 86, although complex in themselves, were intended to reverse the effect of the decision of this court in *McGrath*, which had held that it was not possible to adopt such an approach without statutory authorisation. However, the Appeal Commissioner, in the decision which was the subject matter of appeal in *O'Flynn*, had refused to accept the Revenue Commissioners' interpretation of s. 86, observing, in part, that it was "not open to them to adopt a purposive approach in the light of the decision in *McGrath"*. It seemed clear that, whatever the correct outcome of the application of s. 86 in the context of the *O'Flynn* transaction, that observation was misplaced, since s. 86 was enacted to reverse the effect of the decision in *McGrath*.

41. It would have been sufficient in that case, and might have been preferable, if I had limited myself to that observation, since that case did not raise any more general issue of the correct approach to interpretation. However, I also observed that the decision in *McGrath* "itself expressly contemplates an approach to the

interpretation of legislation that has always been understood as purposive". I also stated that *McGrath* implicitly rejects the contention that any different and more narrow principle of statutory interpretation applies to taxation matters, and that it was acknowledged, at least implicitly, in *McGrath* that the same principles of statutory interpretation apply to tax statutes as to other legislation, and that this same principle was acknowledged explicitly in the provisions of the Interpretation Act "which embodies a purposive approach to the interpretation of statutes other than criminal legislation and made no concession to a more narrow or literalist interpretation of taxation statutes".

42. It is clear that my observations on the issue of statutory interpretation in the *O'Flynn* case were *obiter*. On reflection, they were, I think, unnecessary, incautiously expressed, and made without the benefit of opposing arguments. In particular, I think it was wrong to use the loaded word "purposive" and to further suggest that the Interpretation Act mandated such an approach in respect of taxation legislation. There has been a tendency to set the debate as one between two rather extreme positions: one, a purposive or teleological approach akin to that employed in the field of European law, and in which words and text are of lesser importance than the apparent objective of the legislation; and, at the other extreme, an approach where the only focus of the inquiry, and the question of interpretation, is conducted almost by microscopic analysis of words set upon a transparent slide and stripped of all their context and where, if any ambiguity can be detected, the provision must be given an interpretation favourable to the taxpayer, however unrealistic that interpretation may be.

43. It is open to doubt that s. 5 of the Interpretation Act permits quite the wide-ranging purposive interpretation to give effect to the presumed objective of the drafters or

those who adopted the legislation that is sometimes advocated. Rather, it refers to a construction "that reflects the plain intention of the Oireachtas or parliament concerned, as the case may be, where that intention can be ascertained from the Act as a whole". To that extent, s. 5 is more rooted in the statutory text than the most liberal teleological interpretive approaches. But even so, s. 5(2) undoubtedly distinguishes between general legislation and that which relates to "the imposition of a penal or other sanction", to which the approach in s. 5 does not apply. It appeared noteworthy that the Act did not refer to penal *or revenue* statutes. That is a common phrase in the law generally, and particularly in the context of statutory interpretation. Thus, in *Kiernan*, Henchy J. at p. 122 of the report, stated the then-applicable principle in this way:-

> "[i]f a word or expression is used in a statute creating *a penal or taxation liability*, and there is looseness or ambiguity attaching to it, the word should be construed strictly so as to prevent a fresh imposition of liability from being created unfairly by the use of oblique or slack language." (Emphasis added).

44. Furthermore, while penal statutes and taxation statutes have traditionally been seen as similar, they have nevertheless also been seen as distinct variants. Another area where a different approach is taken in relation to penal and taxation matters from that which applies to other areas of law is in the field of the common law rules against enforcing foreign penal or taxation judgments. Thus, in the celebrated case of *Buchanan v. McVey* [1954] I.R. 89, Kingsmill Moore J. discussed the principle summarised in the 6th edition of A.V. Dicey's *Conflict of Laws* (London: Stevens & Sons, 1949) as follows:-

"English courts will not enforce a right … where the enforcement of such right involves the enforcement of foreign, penal or confiscatory legislation or a foreign revenue law." (Emphasis added).

It is clear that Kingsmill Moore J. considered penal and revenue laws to be closely related – but distinct – categories. Thus, at p. 103, he said that "our Courts will not entertain an action for the enforcement of a penalty… which appears to be the parent of the rule against enforcing foreign revenue claims".

45. It might have appeared, therefore, that the reference in s. 5 to the "imposition of penal or other sanction", without any express reference to revenue or taxation law, implied that a deliberate distinction was being drawn and that revenue legislation did not come within the scope of the exception from s. 5. On reflection, however, I think that such a significant departure from the pre-existing approach, as exemplified by the judgment of Henchy J. in *Kiernan*, should not depend upon implication. Furthermore, as has been pointed out, taxation statutes invariably create offences, and it would be anomalous if the language were to be construed differently depending on the nature of the proceedings.

46. It follows that I should not have suggested that s. 5 of the Interpretation Act 2005 allowed a "purposive interpretation" of taxation statutes. Rather, such statutes must be taken to be within the exception of provisions relating to "the imposition of a penal or other sanction" unless the legislature otherwise provides. I would add, however, that this does not seem to me to be influenced at all by the first Protocol to the ECHR. Nor do I see the issue as involving the rule of law: in those cases where s. 5 of the Interpretation Act applies, the application of the Act is itself the implementation of the rule of law.

C. Relevance of the Purpose of the Act

47. However, that should not be understood to mean that the interpretation of tax statutes cannot have regard to the *purpose* of the provision in particular, or that the manner in which the court must approach a taxation statute is to look solely at the words, with or without the aid of a dictionary, and on the basis of that conclude that, if another meaning is capable of being wrenched from the words taken alone, the provision must be treated as ambiguous, and the taxpayer given the benefit of the more beneficial reading. Such an approach can only greatly enhance the prospects of an interpretation which defeats the statutory objective, which is, generally speaking, the antithesis of statutory interpretation.

48. It is noteworthy from the outset, and even during a period associated with the strictest construction of revenue law, that the courts have recognised that the *purpose* of the provision, if discernible, is a helpful guide towards its interpretation, and indeed that the ordinary tools of statutory interpretation do apply to taxation statutes. Thus, in *Doorley*, Kennedy C.J. in his dissenting judgment, relied upon by the appellants in this case, quoted the passage in the speech of Lord Cairns in *Partington v. Attorney General* (1865) L.R. 4 H.L. 100, 122, to the effect that if Revenue, seeking to recover the tax, could not bring the subject within the letter of the law, then the subject was free, however apparently within the spirit of law the case might otherwise be. However, Kennedy C.J. continued immediately to say that "this dictum does not mean, however, that the ordinary rules applied to the interpretation of statutes are not to be applied to the interpretation of taxing statutes, as has often been pointed out". He quoted the judgment of Lord Russell of Killowen L.C.J. in *Attorney General v. Carlton Bank* [1899] 2 Q.B. 158:-

"In the course of argument reference was made on both sides to supposed special canons of construction applicable to Revenue Acts. For my part, I do not accept that suggestion. I see no reason why special canons of construction should be applied to any Act of Parliament, and I know of no authority for saying that a taxing Act is to be construed differently from any other Act. The duty of the Court is, in my opinion, in all cases the same, whether the Act to be construed relates to taxation or to any other subject, namely to give effect to the intention of the Legislature as the intention is to be gathered from the language employed, having regard to the context in connection with which it is employed."

49. Kennedy C.J. also quoted with approval the judgment of Horridge J. in *Newman Manufacturing Company v. Marrable* [1931] 2 K.B. 297, that the judge was entitled to, and ought to, "look at the object of the section" (emphasis added) when construing the provision. At p. 765, Kennedy C.J. concluded that:-

"[t]he duty of the court, as it appears to me, is to reject an *a priori* line of reasoning and to examine the text of the taxing Act in question and determine whether the tax in question is thereby imposed expressly and in clear and unambiguous terms, on the alleged subject of taxation, for no person or property is to be subjected to taxation unless brought within the letter of the taxing statute, *i.e.*, within the letter of the statute as interpreted with the assistance of the ordinary canons of interpretation applicable to Acts of Parliament so far as they can be applied without violating the proper character of taxing Acts to which I have referred". (Emphasis added).

Indeed, the decision in *Doorley* is itself a good illustration of the sometimes nuanced nature of statutory interpretation and a warning against seeking to reduce that

process to a small number of selected quotations from judgments, taken in the abstract. There, the majority (Fitzgibbon and Murnaghan JJ.) took a literal reading of the statutory language, while Kennedy C.J. adopted an interpretation which required reading the statutory language subject to an implied limitation to Ireland, which he considered was implicit in the structure of the Act.

50. While the appellant interprets the reference in Kennedy C.J.'s judgment to an *a priori* line of reasoning as suggesting that the court should approach the statute with no foreknowledge, it appears that the reference relates to the use of the same phrase on the previous page, in reliance on the judgment of Lord Halsbury L.C. in *Tennant v. Smith* [1892] A.C. 150 at p. 154, and which Kennedy C.J. summarised as providing that:-

> "[t]here is no *a priori* liability in a subject to pay any particular tax, nor any antecedent relationship between the taxpayer and the taxing authority, and, therefore, no reasoning founded upon any supposed relationship with the taxpayer and the taxing authority could be brought to bear upon the construction of the Act".

This does not support the appellant's interpretation of the *dictum* of Kennedy C.J. as precluding a consideration of context and, where discernible, purpose.

51. In this regard, it is worth noting *dicta* on the matter from a number of different cases. In *Kiernan*, Henchy J. at p. 121 said that:-

> "[a] word or expression in a given statute must be given meaning and scope <u>according to its immediate context</u>, <u>in line with the scheme and purpose of the particular statutory pattern as a whole, and to an extent that will truly effectuate the particular legislation or a particular definition therein</u>". (Emphasis added).

In *McGrath*, Finlay C.J. said at p. 276 that:-

> "[t]he function of the courts in interpreting a statute of the Oireachtas is, however, strictly confined to ascertaining the true meaning of each statutory provision, resorting in cases of doubt or ambiguity to a consideration of the purpose and intention of the legislature to be inferred from other provisions of the statute involved, or even of other statutes expressed to be construed with it.". (Emphasis added).

In *Texaco (Ireland) Ltd v Murphy* [1991] 2 I.R. 449, 456, McCarthy J. said that "[w]hilst the Court must, if necessary, seek to identify the intent of the Legislature, the first rule of statutory construction remains that words be given their ordinary literal meaning". (Emphasis added).

52. The task of statutory interpretation in any context is the ascertainment of meaning communicated in the highly formal context of legislation. But some degree of uncertainty or lack of clarity is almost inevitable, and the principles of statutory interpretation are designed to assist in achieving clarity of communication. As long ago as 1964, in C.K. Allen, *Law in the Making*, (Oxford: Oxford University Press, 7th ed., 1964), the 7th edition of a textbook which had spanned the golden age of strict literal interpretation, Professor C.K. Allen observed at p. 349 that:-

> "common experience tells us that it is impossible to devise any combination of words, especially in the form (which all laws must take) of a wide generalisation, which is absolutely proof against doubt and ambiguity. So long as men can express their thoughts only by the highly imperfect instrument of words, an automatic, irrefragable certainty in the prescribed rules of social conduct is not to be attained".

It is not, and never has been, correct to approach a statute as if the words were written on glass, without any context or background, and on the basis that, if on a

superficial reading more than one meaning could be wrenched from those words, it must be determined to be ambiguous, and the more beneficial interpretation afforded to the taxpayer, however unlikely and implausible. The rule of strict construction is best described as a rule against doubtful penalisation. If, after the application of the general principles of statutory interpretation, it is not possible to say clearly that the Act applies to a particular situation, and if a narrower interpretation is possible, then effect must be given to that interpretation. As was observed in *Kiernan*, the words should then be construed "strictly so as to prevent a fresh imposition of liability from being created unfairly by the use of oblique or slack language".

D. Recent Jurisprudence

53. In the relatively recent case of *Dunnes Stores v. The Revenue Commissioners* [2019] IESC 50 (Unreported, Supreme Court, McKechnie J., 4th June, 2019), McKechnie J. (who, it might be observed, was the author of the dissenting judgment in *O'Flynn*) delivered a judgment in relation to the application of difficult to construe provisions of the Tax Acts. I agree fully with what he said there, and which merits an extensive quotation (para. 62):-

> "62. In such circumstances one would have thought and one is entitled to expect, that the imposing measures should be drafted with due precision and in a manner which gives direct and clear effect to the underlying purpose of the legislative scheme. That can scarcely be said in this case. That being so, the various imposing provisions must be looked at critically. If however having carried out this exercise, and notwithstanding the difficulty of interpretation involved, those provisions, when construed and interpreted appropriately, are

still capable of giving rise to the liability sought, then such should be so declared.

63. As has been said time and time again, the focus of all interpretive exercises is to find out what the legislature meant: or as it is put, what is the will of Parliament. If the words used are plain and their meaning self-evident, then save for compelling reasons to be found within the instrument as a whole, the ordinary, basic and natural meaning of those words should prevail. "The words themselves alone do in such cases best declare the intention of the law maker" (*Craies on Statutory Interpretation* (7th Ed.) Sweet &Maxwell, 1971 at pg. 71). In conducting this approach "…it is natural to inquire what is the subject matter with respect to which they are used and the object in view" *Direct United States Cable Company v. Anglo – American Telegraph Company* [1877] 2 App. Cas. 394. Such will inform the meaning of the words, phrases or provisions in question. *McCann Limited v. O'Culachain (Inspector of Taxes)* [1986] 1 I.R. 196, per McCarthy J. at 201. Therefore, even with this approach, context is critical: both immediate and proximate, certainly within the Act as a whole, but in some circumstances perhaps even further than that.

64. Where however the meaning is not clear, but rather is imprecise or ambiguous, further rules of construction come into play. Those rules are numerous both as to their existence, their scope and their application. It can be very difficult to try and identify a common thread which can both coherently and intelligibly explain why, in any given case one particular rule rather than another has been applied, and why in a similar case the opposite has also occurred. Aside from this however, the aim, even when invoking secondary aids

to interpretation, remains exactly the same as that with the more direct approach, which is, insofar as possible, to identify the will and intention of Parliament.

65. When recourse to the literal approach is not sufficient, it is clear that regard to a purposeful interpretation is permissible. There are many aspects to such method of construction: one of which is where two or more meanings are reasonably open, then that which best reflects the object and purpose of the enactment should prevail. It is presumed that such an interpretation is that intended by the lawmaker.

66. Another general proposition is that each word or phrase has and should be given a meaning, as it is presumed that the Oireachtas did not intend to use surplusage or to have words or phrases without meaning. Therefore, every word or phrase, if possible, should be given effect to. (*Cork County Council v. Whillock* [1993] 1 I.R. 231). This however, like many other approaches may have to yield in certain circumstances, where notwithstanding a word or phrase which is unnecessary, the overall meaning is relatively clear-cut. However, it is abundantly clear that a court cannot speculate as to meaning and cannot import words that are not found in the statute, either expressly or by necessary inference. Further, a court cannot legislate: therefore, if on the only interpretation available the provision in question is ineffectual, then subject to the Interpretation Act 2005, that consequence must prevail.

67. I mention the 2005 Act because of what s. 5 states: it reads:-

> "5.—(1) In construing a provision of any Act (other than a provision that relates to the imposition of a penal or other sanction)—
>
> (a) that is obscure or ambiguous, or

(b) that on a literal interpretation would be absurd or would fail to reflect the plain intention of—

(i) in the case of an Act to which paragraph (a) of the definition of "Act" in section 2 (1) relates, the Oireachtas, or

(ii) in the case of an Act to which paragraph (b) of that definition relates, the parliament concerned,

the provision shall be given a construction that reflects the plain intention of the Oireachtas or parliament concerned, as the case maybe, where that intention can be ascertained from the Act as a whole."

Subsection (2) makes similar provision in respect of a statutory instrument, but again excludes from its application any such provision which relates to the imposition of a penal or other sanction.

68. It is alleged on behalf of Dunnes Stores that s. 72 of the 1996 Act and by extension the Regulations enacted to give effect thereto, are of a penal nature or otherwise impose a sanction: accordingly, in their view the section has no application to this case. This is a point I will return to in a moment.

69. Aside from the provisions of s. 5 of the 2005 Act, but in a closely related context, there is the case, cited by both parties of *Inspector of Taxes v. Kiernan* [1981] I.R. 117. It is a case of general importance, where the Court was called upon to determine whether the word "cattle" in s. 78 of the Income Tax Act 1967, could be read as including "pigs". Henchy J. in his judgment made three points of note. The first of these he stated as follows:

"A word or expression in a given statute must be given meaning and scope according to its immediate context, in line with the scheme

> and purpose of the particular statutory pattern as a whole, and to an extent that will truly effectuate the particular legislation or a particular definition therein."

The learned judge went on to discuss when and in what circumstances a word should be given a special meaning, in particular a word or phrase which was directed to a particular trade, industry or business. At pp. 121 and 122 he quoted the words of Lord Esher M.R. in *Unwin v Hanson* [1891] Q.B. 115 at 119, who said :-

> "If the Act is one passed with reference to a particular trade, business or transaction, and words are used which everybody conversant with that trade, business or transaction, knows and understands to have a particular meaning in it, then the words are to be construed as having that particular meaning, though it may differ from the common or ordinary meaning of the words."

The other interpretative rule which Henchy J. also referred to is the presumption against double penalisation or put in a positive way, there is an obligation to strictly construe words in a penal or taxation statute. In this context he said:-

> "Secondly, if a word or expression is used in a statute, creating a penal or taxation liability, and there is looseness or ambiguity attaching to it, the word should be construed strictly so as to prevent a fresh imposition of liability from being created unfairly by the use of oblique or slack language…as used in the statutory provision in question here, the word "cattle" calls for such a strict interpretation."

70. The point first made is of common application: a provision should be construed in context having regard to the purpose and scheme of the Act as a

whole, and in a manner which gives effect to what is intended. The second point does not appear relevant in that although the Regulations refer to "any shop, supermarket, service station or other sales outlet", those even with an intimate knowledge of the business conducted therein, including of course the goods and products on offer would not necessarily, indeed not at all, have an understanding of what a plastic bag is for the purposes of the Regulations. In any event, the phrase is statutorily defined and effect must be given to that. The third is designed to prevent the fresh imposition of a liability where such a burden could only be achieved by an interpretation not reasonably open, by the standard principles of construction above mentioned.

71. Even in the context of a taxation provision however, and notwithstanding the requirement for a strict construction, it has been held that where a literal interpretation, although technically available, would lead to an absurdity in the sense of failing to reflect what otherwise is the true intention of the legislature apparent from the Act as a whole, then such will be rejected. An example is *Kellystown Company v. H. Hogan, Inspector of Taxes*, [1985] I.L.R.M. 200, a case involving potential liability for corporation profit tax: Henchy J. speaking for this Court at p. 202 of the report, said:-

> "The interpretation contended for by *Kellystown*, whilst it may have the merit of literalness, is at variance with the purposive essence of the *proviso*. Furthermore, it would lead to an absurd result, for monies which are clearly corporation profits would escape the tax and, indeed, the tax would never be payable on dividends on shares in any Irish company. I consider the law to be that, where a literal reading gives a result which is plainly contrary to the legislative

intent, and an alternative reading consonant with that legislative intent is reasonably open, it is the latter reading which must prevail."

72. Finally, could I mention the following passage from *McGrath v. McDermott*, [1998] I.R.258, at 276:

> "The function of the courts in interpreting a statute of the Oireachtas is, however, strictly confined to ascertaining the true meaning of each statutory provision, resorting in cases of doubt or ambiguity to a consideration of the purpose and intention of the legislature to be inferred from other provisions of the statute involved, or even of other statutes expressed to be construed with it."

54. It will be noted that, at para. 68, McKechnie J. suggests that he will come back to the question of s. 5 of the Interpretation Act, but in the event, the judgment does not do so. I think it is to be inferred that he would not have considered it appropriate to have recourse to that section in the interpretation of taxation statutes. In any event, for the reasons set out above, I am satisfied that s. 5 of the Interpretation Act should not be applied in the interpretation of taxation statutes. However, the rest of the extract from the judgment is clearly applicable and provides valuable guidance. It means, in my view, that it is a mistake to come to a statute – even a taxation statute – seeking ambiguity. Rather, the purpose of interpretation is to seek clarity from words which are sometimes necessarily, and sometimes avoidably, opaque. However, in either case, the function of the court is to seek to ascertain their meaning. The general principles of statutory interpretation are tools used to achieve a clear understanding of a statutory provision. It is only if, after that process has been concluded, a court is genuinely in doubt as to the imposition of a liability, that the principle against doubtful penalisation should apply and the text construed given

a strict construction so as to prevent a fresh and unfair imposition of liability by the use of oblique or slack language.

55. One final point bears attention in the present context. It is undoubted that the principle against doubtful penalisation applies in the field of criminal law. But the approach to statutory interpretation in that field does not provide support for the highly restricted and artificial approach apparent in the appellant's arguments. In *The People (DPP) v. TN* [2020] IESC 26 (Unreported, Supreme Court, McKechnie J., May 28th, 2020), McKechnie J. reviewed the principles of interpretation at paras. 113-119 of his judgment and, without seeking to in any way dilute the principle of strict construction of penal statutes, sought to place that principle in its proper position in the overall interpretive exercise. At para. 119, he concluded:-

> "Therefore while the principle of strict construction of penal statutes must be borne in mind, its role in the overall interpretive exercise, whilst really important in certain given situations, cannot be seen or relied upon to override all other rules of interpretation. The principle does not mean that whenever two potentially plausible readings of a statute are available, the court must automatically adopt the interpretation which favours the accused: it does not mean that where the defendant can point to any conceivable uncertainly or doubt regarding the meaning of the section, he is entitled to a construction which benefits him. Rather, it means that where ambiguity should remain following the utilisation of the other approaches and principles of interpretation at the Court's disposal, the accused will then be entitled to the benefit of that ambiguity. The task for the Court, however, remains the ascertainment of the intention of the legislature through, in the first instance, the application of the literal approach to statutory interpretation".

56. I would merely add that the principle of strict construction is, like many other principles of statutory interpretation, a principle derived from the presumed intention of the legislature, which is not to be assumed to seek to impose a penalty other than by clear language. That approach should sit comfortably with other presumptions as to legislative behaviour, such as the presumption that legislation is presumed to have some object in view which it is sought to achieve. A literal approach should not descend into an obdurate resistance to the statutory object, disguised as adherence to grammatical precision.

57. The present case is a good illustration of the distinction. The case is not, in my view, a contest between a simple requirement of clarity on the one hand and a broad purposive approach on the other. Instead, the approach of the appellant depends not merely on strict statutory language, but on an artificial interpretation of the words used, to produce an unrealistic reading of the Act. I should add that I do not consider it necessary to consider if the principle of doubtful penalisation applies with the same force – or at all – to indirect taxation. Nor does it appear to me that it is necessary to rely on the principle of conforming interpretation to resolve this case. It is not clear that the interpretation of the Schedules would or could lead to an interpretation at odds with the Directive. For present purposes, I am prepared to approach this case on the basis that the traditional canons of interpretation as set out above apply.

III – Application

A. Tea and Coffee

58. Bookfinders argues that para. (xii) of the Second Schedule contains the only express reference to tea and coffee which they describe as "the tea and coffee saver". It is

argued that the literal meaning of the term contained in para. (xii)(b)(I) and (II) is to maintain tea and coffee within the provisions of the Second Schedule, and thus subject to the 0% rate.

59. Bookfinders also argues that tea and coffee cannot be understood as falling within the general terms of the supply of food and drink in para. (iv) of the Sixth Schedule to the 1972 Act. It is suggested that the Court of Appeal accepted that the Second Schedule's reference to tea and coffee was to the beverage, and thus tea and coffee in their drinkable form. If this was so, then it was suggested that the Revenue interpretation would mean that hot tea and coffee would be captured by the general words of para. (iv) of the Sixth Schedule, but the specific and deliberate reference to tea and coffee contained in the Second Schedule would be confined to cold tea and coffee. Bookfinders argues that since the relevant provision dates from 1985, it is questionable whether this could be the legislative intent "given that cold tea/coffee were not common at that time".

60. It is further argued that the words of the Sixth Schedule are not only general, but also, and in any event, not apt to capture the provision of hot tea and coffee. While tea and coffee are undoubtedly "drinks", they are not commonly described as having been made by "heating" or "cooking". The beverage is not made cold, and then heated above air temperature, or "cooked". In ordinary language, this is not how it is understood that tea or coffee is prepared. This, it is said, reinforces the interpretation of the 1972 Act that all tea and coffee, as a beverage, is captured by the express reference in the Second Schedule, which is not in any way cut down by the terms of the Sixth Schedule.

61. Finally, in this regard, it is argued that, in any event, tea and coffee could not come within even the general words used in the Sixth Schedule, because of the exclusion

from the Sixth Schedule effected by the opening words contained in the parenthesis:- "other than beverages specified in sub paragraphs (a) or (b) of paragraph (xii) of the Second Schedule". Bookfinders argues that "specified" does not mean merely listed or mentioned, but must mean those items identified which are within the scope of the Second Schedule, that is, items which are not excluded from the Second Schedule, but rather are subject to it, and therefore subject to the 0% rate by virtue of inclusion or, more precisely, specification in this sense, within the Schedule.

62. It is not in controversy that the effect of the Second Schedule is that some tea and coffee (at least) is included within the Schedule and is consequently subject to the 0% rate. If so, it is argued that, even if Bookfinders' other arguments as to interpretation are not successful, the tea and coffee served by Bookfinders do not come within the terms of the Sixth Schedule because they are "specified" (in this sense) in para. (xii) of the Second Schedule. In this regard, reliance is also placed upon the question posed by the Appeal Commissioner to the High Court, namely:- "Was I correct in law in holding that the 13.5 per cent rate applied to heated tea and coffee sold in drinkable form having found that their drinks were specified in paragraph (xii) of the Second Schedule". (Emphasis added).

63. These are ingenious arguments which gain some traction from the complicated drafting of the various provisions. However, even though the Act must be read as one, it is permissible and helpful to take account of the fact that it operates within the constraints of European law and, furthermore, that it has been amended on a number of occasions and reached its current form, or at least the form applicable for the purposes of the present proceedings, through a series of amendments and alterations over time as the VAT rate was adjusted, and items moved between

Schedules. Some of the difficult language and structure of the Act, which might raise questions for interpretation if the Act had been drafted as a single coherent whole, are more understandable in this context. Furthermore, while it is certainly the case that the interpretation which the Revenue Commissioners contend should be applied to the sections in this case could have been expressed more clearly and succinctly, that in itself does not mean that the Revenue interpretation must be rejected.

64. In this regard, it is also useful to look at the provisions in a slightly broader context. It seems clear that the objective of the Second Schedule in this regard is to provide that certain staples are to be included at the 0% rate. The object of the Sixth Schedule is, it appears, to apply a reduced rate in certain cases, most obviously, in this context, the supply of hot food and beverages. It is permissible to take into account the consequences of inclusion of an item in each Schedule, and also to have regard to what other items are clearly included in each Schedule in order to gain some understanding of the likely scope and objective of the respective Schedules. One would not, for example, expect luxury goods to be included in the Second Schedule and thus be zero-rated, and any interpretation leading to that conclusion is one that would require close scrutiny before it was accepted.

65. The Second Schedule to the Act is particularly complex. While the end position is either the inclusion or exclusion of certain items, it is perhaps best approached sequentially. At the outset, included in the Second Schedule, and therefore in the 0% rate, is the broad category of "food and drink of a kind used for human consumption". These are general words apt to capture all food and drink, subject only to the qualification that it must be of a kind used for human consumption.

66. From this class of goods, however, there is then subtracted, or excluded, certain specified items, with the consequence that they fall to be rated at the general VAT rate, unless either specifically exempted, or included, in the Schedule containing items to be rated at the intermediate rate. There is no doubt that beverages of a type chargeable with any excise duty are so excluded, (because subpara. (a) says so in terms) and even within the somewhat rarefied and artificial world of taxation, there is an obvious logic to that conclusion. Subparagraph (b) also excludes a category of "other beverages" defined as including "mineral waters, syrups, concentrates, essences, powders, crystals or other products for the preparation of beverages". It follows that the class of beverage thus excluded from the Second Schedule (and, therefore, the 0% rate) is quite broad.

67. However, from that class, there is in turn excluded a further category with the effect that the matters contained within the subparas. (I) – (IV) remain within the Second Schedule and the general category of "food and drink of a kind used for human consumption", and entitled to the 0% rate. The logic of this provision becomes more apparent both from the items included in these subparagraphs (and thus retaining the 0% rate), which are items such as tea, coffee, cocoa, milk and preparations or extracts of meat or eggs, for example, and when compared with the extensive exclusions contained from subparas. (c) – (e) of para. (xii), and which do not get the benefit of the 0% rate. Items excluded by these subparagraphs range from ice cream to chocolate, pastries, potato crisps, popcorn and including roasted nuts. Apart from the fact that a clear distinction is made by the Act, the logic of the distinction appears to attempt to distinguish between food and drink items which can be described as staples, and therefore appropriate for the 0% rate, and those which are more discretionary indulgences.

68. The Second Schedule does not distinguish between the circumstances of the supply of the items under para. (xii) or the temperature at which they are supplied. If, therefore, the Schedule was merely in the terms set out above, and the Act contained no other provision, there would be a strong, and possibly unanswerable, argument that the supply of tea and coffee in whatever form, and in whatever circumstances, is covered by the Second Schedule, and is therefore 0% rated.

69. However, the terms of para. (xii) are qualified at the outset by the words "other than the supply thereof specified in para. (iv) of the Sixth Schedule". It follows that, if the supply of tea and coffee by Bookfinders falls within para. (iv) of the Sixth Schedule, it is excluded from the Second Schedule.

70. The Sixth Schedule is in general terms in that it captures the supply of food and drink (other than bread and beverages as defined) which have been heated, retained heated, or supplied when warm. The defining characteristic, therefore, of the inclusion of the supply of an item in the Sixth Schedule is not the nature of the food and drink, but how it is treated and consumed. It is, at least in colloquial terms, directed towards hot food and drink, and tea and coffee are, at least colloquially, capable of being so described. Bookfinders argues, however, that the Act should not be understood in this way, and accordingly it is necessary to turn to the arguments advanced in this regard.

71. This is not a case in which the specific reference to tea and coffee in the Second Schedule can trump the general words of para. (iv) of the Sixth Schedule, and the consequent exclusion from the Second Schedule of items contained therein, by the introductory words of para. (xii) of that Schedule. The general principle expressed in the Latin maxim *generalia specialibus non derogant* may be helpful in some cases in establishing that a specific provision is not to be treated as overridden by

some general words which, perhaps taken in isolation, might be considered capable of applying to the subject matter. But that principle can have no application here, since it is clear that the Act intends that items which would otherwise be within the Second Schedule will be excluded from it if included in the Sixth Schedule. Furthermore, the terms of Sixth Schedule are clearly intended to apply to items which are referred to specifically in the Second Schedule, if the qualifying conditions (heating, maintenance above ambient temperature, *et cetera*) are satisfied.

72. If it were the case, as Bookfinders suggests, that the Second Schedule only refers to beverages in their liquid and drinkable form, then I would agree that it would be somewhat unusual that the specific reference to tea and coffee in the Second Schedule would capture only cold tea and coffee, and while the much more common hot drinks would fall to be covered only by the general words of para. (iv) of the Sixth Schedule. Even allowing for the complex process of drafting and amendment of the VAT Acts, that would raise questions both of the language and indeed logic. However, I do not accept that the Court of Appeal judgment should be taken as limiting the class of beverage in the Second Schedule to drinkable beverages. It is true that at para. 63 of the judgment, it is stated "[b]everage, for the purposes of the Second Schedule, must, in the normal meaning of the word 'beverage', be in drinkable form". However, the next sentence reads "[s]o, teas and coffees in the Second Schedule are not confined to simply dry goods, such as leaf tea or tea bags or coffee beans" (Emphasis added).

73. It is clear that the Court of Appeal judgment considered that dry goods as specified came within the Second Schedule, and I respectfully agree. The word "beverage", if considered only from the perspective of etymology, might most naturally be

understood as referring to a drink. But in this case, for example, the word would be easily, naturally and readily understood as referring to leaf tea or coffee beans or indeed instant coffee. It would, for example, be unsurprising to see the sign over a supermarket aisle in which tea, coffee and cocoa was being sold use the word "beverages".

74. In any event, it seems clear to me that this understanding of the word "beverage" is that which the interpretation of the Act requires. Subparagraph (b) refers to other beverages including syrups, concentrates, essences, powders, crystals or other products for the preparation of beverages. Such syrups, concentrates, essences, powders, and crystals would not be understood as a drink in the meaning contended for by Bookfinders. That understanding should also apply to the terms tea, cocoa and coffee, particularly since this understanding of beverages establishes the class from which tea, coffee, cocoa, chicory and other beverages are excluded. Like the Court of Appeal, therefore, I consider that the Second Schedule includes leaf tea and ground coffee *et cetera* sold in packet form. If so, there is nothing unnatural about the division between the two Schedules. This interpretation is, moreover, consistent with the logic of the Act in a way that the interpretation advanced by Bookfinders is not. It is entirely understandable that the legislature would wish to zero-rate teas and coffees when sold in a retail setting, but apply the intermediate level in the context of, for example, takeaway foods.

75. Nor am I persuaded by the argument that the terms of the Sixth Schedule do not capture hot tea or coffee because those beverages are not prepared by heating a cold drink, and cannot be said to be supplied while still warm after cooking. This argument is perhaps an example of what statutory interpretation is not. It is not sufficient to observe that, when looked at in isolation, and in reverse, and through

the high-powered lens of litigation focused only on the facts of this case, it would have been possible to use more precise language to make it clear that hot tea and coffee supplied for consumption was captured by the provisions of para. (iv) of the Sixth Schedule. Nor is it sufficient to suggest a contrived interpretation of the words used in isolation, and contend that this creates an ambiguity giving rise to the principle against doubtful penalisation.

76. Here, the provision of para. (iv) of the Sixth Schedule is directed to all food and drink with the exception of those items specified. The statutory phrase does not merely refer to food and drink which has been heated, but rather to such food and drink which is heated to enable it to be consumed at temperatures above ambient temperature. It seems, therefore, that the provision is directed towards what can be colloquially described as the supply of hot food and drink. It is also relevant to this consideration that it is difficult to imagine drinks which would satisfy the interpretation advanced by Bookfinders. To take one commonplace example, "hot" alcoholic drinks would not be covered for two reasons. First, the alcoholic beverages would be excluded as a beverage specified by subpara. (a) of para. (xii) of the Second Schedule, and second, the "hot" drink is not made by heating the alcohol, but by adding hot water in the same way indeed as tea is made and which, on Bookfinders' interpretation, is not captured by the provision either.

77. It is furthermore difficult to conceive of any sensible reason consistent with the policy discernible in the Act for making such a distinction or providing for a class of product which it is hard to conceive of being supplied in practice, while at the same time ignoring the most commonly provided hot drinks such as tea, coffee and cocoa. It is not unusual that ordinary everyday activities which are easily recognisable in life can appear almost comically clumsy and convoluted when

sought to be described in technical or formal language. Consider how the action of kicking a ball might be described in a learned journal seeking to describe precisely the muscular and mechanical movements involved. It is also important to avoid the error of reading the Act backwards through the prism of the particular dispute involved in the proceedings – the Act was not seeking a precise and elegant way to describe the supply of hot tea and/or coffee in an establishment such as that of the appellant. It was attempting a general definition applicable to a wide range of food and drink supplied in certain circumstances. In ordinary language, the general words of para. (iv), while perhaps not precisely expressed, and perhaps clumsy, are nevertheless sufficient to capture the supply of hot tea and coffee.

78. The argument, in reliance on s. 11(1), that tea and coffee are excluded from the Sixth Schedule because they are beverages "specified" in sub para. (b) of para. (xii) of the Second Schedule is complicated but, when analysed, no more persuasive. It depends on attributing a very particular meaning to the word "specified" so that it means anything which is brought within the Second Schedule and subjected to the 0% rate. On this approach, the effect of para. (xii)(b) of the Second Schedule is undoubtedly that tea and coffee (at least that tea and coffee covered by the Second Schedule) is taxable at the 0% rate provided by the Second Schedule.

79. I do not, however, think that "specified" is a term of art having a single meaning throughout the Act. Nor do I think that s. 11(1A)(b) is of particular assistance in this regard. The phrase in the Sixth Schedule does not refer to food and drink "specified" in para. (xii) of the Second Schedule as, for example, para. (ii) of the Sixth Schedule does. Rather, it refers to beverages specified in subparas. (a) or (b) of para. (xii). The meaning to be attributed to "specified" in this provision and, in particular, to the concept of being specified in subpara. (b) can best be understood

by considering what is meant by specified in subpara. (a) since the word must, it would seem, have the same meaning in respect of both subparagraphs. Subparagraph (a) of para. (xii) deals with what might be described broadly as excisable beverages, such as alcoholic drinks. The effect of subpara. (a) is to remove those beverages from the general class of food and drink which is otherwise captured by the Second Schedule, and entitled to the 0% rate. It follows, therefore, that the effect of subpara. (a) is the *exclusion* of certain items of food and drink from the general provisions of para. (xii) of the Second Schedule and what can be said to be "specified" in the subparagraph for the purposes of the introductory phrase of the Sixth Schedule are those items which are excluded from the 0% rate.

80. Turning then to subpara. (b), it seems clear that what is "specified" in subpara. (b) are those "other beverages" which are similarly excluded from the benefit of para. (xii). Those beverages are defined in turn in a way which specifically excludes tea and coffee and the other beverages set out at subparas. (I)-(IV). It cannot be said, however, that tea and coffee are "specified" in subpara. (b). That subparagraph does not make such beverages subject to the Second Schedule and therefore the 0% rate. That result is effected by the general words "food and drink", and the reference to beverages such as tea and coffee in subpara. (b) is merely to prevent them from being excluded from that class by the general words "other beverages". It follows that the beverages "specified" by subparas. (a) and (b) of para. (xii) of the Second Schedule (and thus excluded from para. (iv) of the Sixth Schedule) are excisable beverages and other beverages not including tea, coffee, cocoa, *et cetera*.

81. In the broader context of the approach to statutory interpretation, it is useful to note that, while this conclusion can be reached by a close reading of the words alone, and without foreknowledge, the interpretation is consistent with both the structure

and purpose of the Act, insofar as it can be discerned. Conversely, the interpretation advanced by Bookfinders would seem to make little sense. The effect of the Second Schedule is to provide that a wide range of food and drink, broadly speaking staples, will be subject to the 0% rate. The effect of the exclusion of the large number of products identified in the Second Schedule from the category of food and drink covered by the Second Schedule is that they would remain taxable at the standard rate. The effect of the exclusion in para. (iv) of the Sixth Schedule of beverages specified in subparas. (a) and (b) of para. (xii) is, it appears, to maintain that position, and so avoid the possibility that such products could benefit from the reduced rate provided for by the Sixth Schedule.

82. For these reasons, I would accordingly reject Bookfinders' arguments in this regard, and uphold the decisions of the Appeal Commissioner, High Court, and Court of Appeal respectively.

B. Food and Drink

83. The next argument that Bookfinders advance in this respect is to contend that the phrase "food and drink" in para. (iv) of the Sixth Schedule should be given a conjunctive rather than disjunctive meaning, so that it would only capture a supply of food and drink when supplied together, and not food or drink if supplied separately.

84. It should be said that Bookfinders do not contend that the ordinary meaning of the word "and" means that the phrase must be read conjunctively. They accept that the words can, on occasion, be read disjunctively, and indeed concede that this is how the same phrase "food and drink" should be read in para. (xii) of the Second Schedule because it is followed immediately by a list of individual items. They

argue, however, that in para. (iv) of the Sixth Schedule, it should be given its more common conjunctive meaning, so that it only captures circumstances in which food and drink are supplied together. In this regard, they also point out that the phrase in question was amended by the Finance Act 1992, and that, prior to that amendment, the phrase had read "food or drink". This change, they argue, is indicative of a deliberate legislative intent that the phrase should be read conjunctively.

85. I do agree with Bookfinders that the pre-existing statutory provision may sometimes provide helpful guidance as to the interpretation of a subsequent amending provision, since it can often indicate the state of the law which it is intended to alter and suggest a rationale for the amendment, which may in turn assist in its interpretation. I agree also that the decision in *Cronin*, which considered that subsequent amendments could not be used as a guide to the construction of the prior statutory provision, is not applicable in this case, and is somewhat different. In that case, Griffin J. rejected the argument that the amendment was indicative of a view on the part of the Oireachtas that the original provision bore the interpretation which the taxpayer was asserting. As Griffin J. pointed out, such amendments may be made for a variety of reasons and, in any event, the question was not what view the Oireachtas or, more plausibly, those promoting the amendment, understood the previous provision to mean, but what the Court considered it to mean.

86. In construing a phrase or provision in an Act which is unclear, it is often a misguided detour to seek to interpret an earlier provision, perhaps equally unclear, and draw conclusions as to the unexpressed views of the Oireachtas on the earlier provision, which views (even if held collectively and expressed, which itself is rare) are neither admissible nor, in any event, determinative. However, what is sought to be done here is to refer to the law which applied prior to 1992 with a view to interpreting a

phrase introduced for the first time in that year, for whatever weight that might have, and to that extent I think it is permissible, remembering, however, that the primary task of the Court is to interpret the words of the operative provision.

87. However, I cannot accept Bookfinders' interpretation of the phrase. First, it is, I think, permissible to observe that the construction would make little sense. It is difficult to conceive of any plausible reason why the supply of food with drink should attract the intermediate rate of VAT, and the supply of the same food or the same drink (without the other product) by the same establishment to the same person, would not. "Food and drink" is, moreover, a phrase in common use to describe, for example, establishments where it is possible to buy and consume food or drink or both. The alteration in the statutory language, it might be observed, may have been for no other reason than to avoid the opposite argument to that which is advanced here, namely, that the statute captured only the supply of one or the other, but not both. To that extent, speculation on the reason for the amendment is not particularly helpful.

88. In my view, however, the proper acceptance by Bookfinders that the phrase may be read disjunctively on occasions, if the context so permits, and that it was so used in the same Act at para. (xii) of the Second Schedule – which is closely linked to the terms of para. (iv) of the Sixth Schedule – is a useful approach to interpretation and, in the event, fatal to this argument. It is apparent from other provisions of the Act to which reference is made and where the phrase is found that no added conjunctive significance is to be attributed to the word "and" in the phrase "food and drink". For example, para. (ii) of the Sixth Schedule refers to the "provision of food and drink of the kind specified in para. (xii) of the Second Schedule … in the course of operating any other business in connection with the carrying on of which facilities

are provided for the consumption of the food or drink supplied" (emphasis added), and appears to make it clear that "food and drink" is used in the Act as a generic term to cover the supply of any individual item or items that can come within that broad category.

C. Bread and Sandwiches

89. Bookfinders also argues that the hot filled sandwiches supplied by them do not fall within the provisions of the Fourth Schedule. There are two aspects to this argument. First, it is contended that the bread in such sandwiches is "bread" as defined in para. (xii)(d) of the Second Schedule, and which is therefore expressly excluded from the provisions of para. (iv) of the Sixth Schedule by text inserted in 2005:- "the supply of food and drink other than bread as defined in sub paragraph (d) of paragraph (xii) of the Second Schedule …". Thereafter, it is argued that hot sandwiches, such as a meatball sandwich supplied by Subway, constitute the supply of "food and drink [in this instance bread, if Bookfinders' argument is accepted] which… includes food and drink which… has been heated enabling it to be consumed at a temperature above the ambient air temperature". The "food" of the meatball being, it is said, included in the "food" of the bread.

90. The Second Schedule to the Act contains a complicated definition of an everyday product. The intention of the Act in making such a detailed definition is reasonably clear: it seeks to distinguish between bread as a staple food, which should be 0% rated, and other baked goods made from dough, which are, or approach, confectionery or fancy baked goods. Thus, para. (xii)(d) excludes from the class of food and drink entitled to the 0% rate "… all other confectionery and bakery products whether cooked or uncooked", but from that exclusion in turn, "bread" (as

defined) is excluded, thus leaving bread (as defined) within the class of food covered by the Second Schedule and entitled to the 0% rate.

91. "Bread" is then defined in para. (xii)(d)(II) as follows:-

> "In this sub paragraph **'bread'** means food for human consumption manufactured by baking dough composed exclusively a mixture of cereal flour and any one or more of the ingredients mentioned in the following subclauses in quantities not exceeding the, limitation if any, specified for each ingredient –
>
> (1) yeast or other leavening or aerating agent, salt, malt extract, milk, water, gluten,
>
> (2) fat, sugar and bread improver, subject to the limitation that the weight of any ingredients specified in the sub clause shall not exceed 2 per cent of the weight of flour included in the dough,
>
> (3) dried fruit, subject to the limitation that the weight thereof shall not exceed 10 per cent of the weight of flour included in the dough,
>
> (4) other than food packaged for sale as a unit (not being a unit designated as containing only food specifically for babies) containing two or more slices, segments, sections or other similar pieces, having a crust over substantially the whole of their outside surfaces, being a crust formed in the course of baking, frying or toasting."

92. In this case, there is no dispute that the bread supplied by Subway in its heated sandwiches has a sugar content of 10% of the weight of the flour included in the dough, and thus exceeds the 2% specified in subpara. (II). However, Bookfinders argues that, when read closely, the definition only excludes a baked product which exceeds the limitation contained in the Act for *each* of the ingredients specified and which are used in the baking of the particular bread, and which are identified in

para. (xii). They put their case succinctly in the following way: if the court was to attempt the task of writing the legislation in a way which would achieve the outcome contended for by the Revenue, the court would find itself having to "replace the word 'each' with 'any' in the phrase 'specified for each ingredient'".

93. There is no doubt that, as a matter of precise usage and grammar, the observations of Bookfinders have some force. But the fact that an Act could be expressed more clearly or that, thereby, more precise language could be used does not render it ambiguous, still less give rise to the principle against doubtful penalisation. The function of a court interpreting legislation is not the same as that of a pedantic school teacher correcting a student's English and perhaps inculcating an appreciation of the precise use of language: rather, the Court's function is to understand the provisions enacted by the legislature and give effect to them consistent with the principles of statutory interpretation and, in this case, the principle against doubtful penalisation.

94. The phrase focused on by Bookfinders, "the limitation, if any, specified for each ingredient" must be read in its entire context. I think it is not unfair to observe that the general reader, encountering and perhaps re-reading this complicated section would nevertheless have little difficulty in understanding what was intended to be captured by the definition and, in particular, the limitations applied to ingredients. The subparagraph is concerned with bread being made from dough, which may have a variety of ingredients, and furthermore sets limitations on the ingredients by reference only to the weight of the flour content. The dough must be composed exclusively of flour and "any one or more of the ingredients mentioned… in quantities not exceeding the limitation, if any, specified for each ingredient". When we turn to the ingredients, it is apparent that some ingredients – yeast, salt, malt

extract, milk, water and gluten – have no limitation; and one ingredient – fruit – has a limitation of 10% of flour.

95. Subparagraph (II) applies a 2% limitation by reference to the weight of the flour to a number of ingredients – fat, sugar, and bread improver – and the limitation is expressed as the "weight of *any* ingredient specified… shall not exceed…" (Emphasis added). The punctilious school teacher might point out that the latter phrase could perhaps be expressed more clearly and precisely, while observing, moreover, that, if the section is meant to have the interpretation asserted by Bookfinders, one might expect this paragraph to be expressed rather differently. However, when the entire provision is read together, it is, I think, clear that if one ingredient exceeds the limitation, the resulting product falls outside the definition of "bread" for the purposes of the Act. Again, it is not irrelevant that this interpretation is consistent with common sense and the clear intention of the Act to attempt to limit to a standard bread product the benefits of the 0% rate.

96. Similar considerations apply in relation to the related argument that the supply by Bookfinders of a hot meatball sandwich (to take one example) should not be understood as coming within the "supply of food and drink … which includes food and drink which has been heated enabling it to be consumed" because the phrase "food and drink" is expressed to *exclude* "bread as defined in subparagraph (d) of paragraph (xii) of the Second Schedule". On this argument, the exclusion extends to bread (as so defined) "which…includes food…which has been heated" *et cetera*. This seems a very cumbersome and unnatural description of a hot meatball sandwich. Arguments like this induce some sympathy for the beleaguered draftspersons and for the tortured language to which they sometimes have to resort in order to carry into effect a reasonable statutory policy. It is, I think, doubtful that

this is what the Act meant when it referred to food and drink which is or includes food and drink which has been heated enabling it to be consumed at a temperature above the ambient air temperature.

97. However, it is not necessary to consider if this is indeed what is contemplated by the Act when it refers to the supply of food and drink, including food and drink which has been heated *et cetera*, because the argument depends on the acceptance of the prior contention that the Subway heated sandwich contains "bread" as defined, and therefore can be said to be food for the purposes of the Second Schedule rather than confectionery. Since that argument has been rejected, this subsidiary argument must fail.

D. Fiscal Neutrality

98. Finally, Bookfinders argues that the interpretation which it advances in relation to paras. (ii) and (iv) of the Sixth Schedule is to be preferred because it "ensures conformity with, or at least does the least possible damage to, the principle of fiscal neutrality", which prohibits the treatment of similar goods differently from a VAT perspective, citing joint cases C-259/10 and C-260/10 *Rank v. HMRC* [2012] S.T.C. 23. In particular, Bookfinders argues that the exclusion of their "bread" component from the category of "bread" as defined in the Second Schedule breaches that principle. In the High Court, Keane J. held that Bookfinders lacked any sufficient evidential basis to advance this point. It was necessary to identify two goods which were similar, and in competition in the market place, but which were nevertheless treated differently for VAT purposes. It was argued on this appeal, however, that such evidence was not necessary. The question, Bookfinders argued, was one which

had to be viewed from the standpoint of the average consumer, and the court could make its own assessment in that regard.

99. It may be that, in some clear cases, a court might, without evidence, find that the principle of fiscal neutrality was breached but even in such cases, the court's task would be considerably eased by detailed evidence as to the relevant market, the particular products, and consumer behaviour. Some evidence is a regular aspect of competition cases, and a considerable expertise is available in the field. In this case, I am not persuaded that any court could come to the conclusion contended for in the absence of evidence. There are a number of substantial difficulties involved. When a definition is laid down, particularly by reference to any system of measurement, it is always possible to dispute the marginal cases on either side of the line. In every examination, there must always be a last candidate who passes with the lowest mark among those who passed, and a first candidate who fails with the highest mark among those who fail. The differences between the two candidates may well be marginal. But that, in itself, will not invalidate a distinction being made between them if the distinction has a valid basis, as this clearly has. It is permissible and sensible to limit the zero-rating of baked products to bread, which necessitates a definition of what constitutes bread for that purpose. Here, the situation is more complex again because the product or item which is chargeable to VAT is not the bread component, but rather the heated sandwich in its entirety. Revenue contends that that is the product falling within para. (iv) of the Sixth Schedule. Bookfinders suggests that this should be compared with a hypothetical toasted sandwich sold in another outlet. I cannot accept that this comparison, nor can I accept the contention that the distinction is so self-evident that it should be accepted on the basis of a bare and hypothetical assertion. I do not consider that the principle of fiscal neutrality is

therefore engaged, still less breached, here. The point was, perhaps, only ever a makeweight in the appellant's arguments, and it does not, in the event, add any significant weight to them. I do not consider that it is therefore necessary to seek a reference to the CJEU on this point. Accordingly, I would dismiss the appeal.