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Judgment: approved by the Court for handing down | *Delivered: 29.8.03*

(subject to editorial corrections)

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

BETWEEN:

MALLUSK COLD STORAGE LIMITED

Plaintiff

and

DEPARTMENT OF FINANCE AND PERSONNEL

Defendant

and

BETWEEN:

ANGLO BEEF PROCESSORS LIMITED

Plaintiff

and

DEPARTMENT OF FINANCE AND PERSONNEL

Defendant

COGHLIN J

[1] By agreement of the parties these actions were tried together since they involve a common fundamental legal issue and each case is founded upon a similar factual situation. The plaintiffs were represented by Mr Ashe QC and Mr Michael Keogh while Mr Hanna QC and Mr Paul Maguire appeared on behalf of the defendant. I would wish to acknowledge my gratitude to both sets of counsel not only for their careful preparation of the skeleton arguments and authorities but also for the clarity and economy of their oral submissions.

THE FACTUAL BACKGROUND

Mallusk Cold Storage Limited

[2] This company was set up by four brothers with farming backgrounds in 1985 who leased property upon which they constructed a cold storage

facility that included a blast freezing chamber. Customers bring items of agricultural produce to these premises so that they may be frozen for the purpose of preservation. Slow freezing, particularly of meat, produces large ice crystals which disrupt fibre structure affecting product appearance with loss of juiciness and nutrients when thawed and cooked. The primary objective of blast freezing is to produce smaller ice crystals by reducing the temperature of the product to –12c as quickly as technically feasible and commercially viable. The plaintiff company was set up at a time when there was a substantial demand for blast freezing and cold storage in Northern Ireland generated by the EEC Intervention Freezing Policy for long term storage. Indeed, it would seem that the Intervention Board was probably the largest customer of this plaintiff. The Intervention Board demanded the use of the blast freezing process. The capital to form the plaintiff company was borrowed by the brothers and secured upon their homes and farms with 20% capital assistance coming from the IDB.

[3] Construction of the plaintiff company's plant was completed in September/October of 1986 and during that year the company received a visit from a surveyor employed by the Valuation and Lands Office who inspected the premises for the purpose of raising a rates demand. The premises were first rated in the year commencing 1 April 1987 and to use the words of Mr Pepper, the plaintiffs' manager, the first bill for rates caused "a bit of a shock". Mr Pepper consulted with a firm of experts and sought to appeal the rates assessment upon the ground, inter alia, that the premises were entitled to be distinguished in the valuation list as being "industrial". This appeal was rejected and the plaintiff company, accordingly, paid the rates demanded.

[4] The plaintiff learned of other companies engaged in this business which had also been refused classification as "industrial" and six of these companies decided to cooperate for the purpose of pursuing the matter. A firm of solicitors, together with a firm of experts in valuation, was retained and an opinion sought from senior counsel. Those representing this group of companies met at the solicitor's office in order to consider the opinion obtained from senior counsel. After some discussion a general view was formed that it was not a "worthwhile commercial risk" to pursue the matter further. In the course of giving evidence Mr Pepper said that his impression of counsel's opinion was that it was "negative" in tenor and that it suggested that the companies would face an "up-hill" struggle should they seek a hearing in the Lands Tribunal. The date of the meeting between the company representatives and their solicitor was not precisely established in evidence but, no doubt, it took place fairly shortly after the date of counsel's opinion which was 20 March 1992.

[5] Subsequently a company known as CCS (NI) Limited t/a Granville Cold Storage Company, which also engaged in the blast freezing and cold

storage business, appealed to the Lands Tribunal and on 3 April 1998 the Lands Tribunal gave judgment confirming that premises used for these purposes were entitled to be distinguished as "industrial" in the valuation list and this plaintiff's premises were so distinguished on 27 May 1999. The Department of Finance and Personnel ("the Department") subsequently refunded the rates paid by this plaintiff from 3 April 1998 being the date upon which the Lands Tribunal had given its judgment in the Granville case.

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[6] Since 1 October 1985 the predecessors of this plaintiff have carried on the business of blast freezing and cold storage at 68 Silverwood Road, Lurgan, Craigavon. Each of these companies has traded under the name Ulster Cold Stores and Mr Dickson, the current General Manager, confirmed that the site had been occupied by Anglo Beef Processors Limited since 1 April 1995. Since that date, Anglo Beef Processors have paid rates.

[7] Mr Dickson confirmed that this plaintiff had been included in the group which instructed solicitors to take the advice of senior counsel with regard to a possible challenge to the respondent's refusal to distinguish their premises as industrial. Mr Dickson confirmed that he was not "optimistic" as a result of the opinion received from senior counsel and the discussion which took place with solicitors and he thought that the group should "get more technical advice".

[8] Subsequent to the decision in Granville Cold Stores v The Commissioner of Valuation, acting on behalf of this plaintiff, Mr Dickson lodged an appeal on 15 March 1999. In support of this appeal, Mr Laverick of Barton Brooke and Company wrote to the Valuation and Lands Agency on 4 May 1999 enclosing information showing a breakdown of the blast freezing and storage activities carried out by this plaintiff over the previous three years which purported to confirm that during this period 75% of turnover had been blast frozen … "this being the core of the turnover of the premises."

[9] On 22 September 1999 the respondent acceded to the appeal and distinguished this plaintiff's premises as industrial. Rates were refunded to Anglo Beef Processors Limited backdated from 3 April 1998.

THE RELEVANT STATUTORY FRAMEWORK

[10] In Northern Ireland the relevant statutory provisions are those of the Rates (Northern Ireland) Order 1977 ("the 1977 Order"). Article 6(3)(b) provides that a rate shall be made and levied in accordance with a valuation list and the Commissioner of Valuation for Northern Ireland has a statutory duty to maintain such a list. The list is comprised of "hereditaments" which are or which may become liable to a rate and includes, amongst other details,

the net annual value of the property. Schedule 7 paragraph 1 of the 1977 Order provides that the net annual value of the property is its rateable value.

[11] By virtue of Article 43 of the 1977 Order, where he is so satisfied, the Commissioner or a District Valuer must distinguish a hereditament in the valuation list as being occupied for "industrial purposes". Where such a hereditament is so distinguished in the valuation list its rateable value is nil – see Schedule 7 paragraph 4(2).

[12] Article 13 of the 1977 Order deals with the effect of alterations in the valuation list and sub-paragraph *(1)(b)* provides as follows:

> "13(1)*(b)* Where the alteration is made by way of correction of a clerical error, that valuation list shall have effect, and be deemed always to have had effect, as so corrected."

The definition section of the 1977 Order, Article 2(1), defines `clerical error' as including `an arithmetical error, the transposition of figures, a typographical error or any similar type of error, and also includes any erroneous insertion or omission or any mis-description'.

[13] Article 13(1)*(c)(ii)* provides as follows:

> "13(1)*(c)* Where the alteration –
>
> *(ii)* Consists of the revision in that valuation list of an altered hereditament which has been out of occupation on account of structural alterations or is made by reason of any event which is a material change of circumstances such as is mentioned in paragraph 1*(b)* to *(g)* of Schedule 6, the alteration shall, subject to paragraphs 1(A) and 1(B), be deemed to have had effect on and after the date on which the new or altered hereditament came into occupation or, as the case requires, the date of the happening of the event by reason of which the alteration is made."

[14] If none of the circumstances set out in Article 13(1) apply sub-paragraph *(f)* of Article 13 deems an alteration to have had effect on and after

the date of the financial year in which the application was made for the revision of the valuation list or on and after such later date as is appropriate in the circumstances.

[15] Article 13(4) provides that where the alteration affects the amount levied on account of a rate in respect of any hereditament in accordance with the list the difference, if too much has been paid, shall be repaid or allowed.

[16] Article 15 of the 1977 Order provides for a discretionary scheme to refund overpayments where any amount paid on account of a rate is not otherwise recoverable because, amongst other things, the amount of an entry in the valuation list was excessive. There is a limitation period of six years for recovery under Article 15 and no amount can be recovered if the amount paid was charged on the basis, or in accordance with the practice, generally prevailing when the payment was demanded (Article 15(2)*(b)*).

THE SUBMISSIONS OF THE PARTIES

[17] On behalf of the plaintiffs Mr Ashe QC relied upon the decision of the House of Lords in Kleinwort Benson v Lincoln City Council [1999] 2 AC 349 in which the House, by a majority of three to two, decided that the rule of law precluding recovery of money paid under a mistake of law could no longer be maintained. Mr Ashe QC further argued that the same decision was authority for the proposition that there is no principle of English law that payments made under a settled understanding of the law from which subsequent departure is made by judicial decision could not be recoverable on the ground of mistake of law. He submitted that, as a matter of principle, a claim in restitution could lie against a taxing authority relying upon Woolwich Building Society v IRC [1993] AC 70 and British Steel Plc v Customs & Excise Commissioners [1997] 2 All ER 366.

[18] Mr Ashe QC contended that all of the rates paid by the plaintiffs, since each plaintiff had entered into occupation of the premises used for blast freezing and cold storage, were monies paid under a mistake of law, namely, that such premises were not entitled to be distinguished as industrial in the valuation list. According to Mr Ashe QC, the effect of the decision in Granville Cold Storage Company v The Commissioner of Valuation was to declare the state of the existing law with the result that, in each case, the plaintiff's hereditaments were entitled to be distinguished in the valuation list as industrial with a rateable value of nil.

[19] In response on behalf of the defendant, Mr Hanna QC, while accepting that the decision had abrogated the rule that payments made under a mistake of law could not be recovered in respect of cases described by Lord Goff as "private transactions", maintained that the Kleinwort Benson case had not abrogated the rule in respect of cases concerned with the repayment of taxes

and other similar public charges. Mr Hanna QC emphasised that this was not a case in which taxes or similar charges were recoverable as of right as a result of being exacted ultra vires as in Woolwich Equitable Building Society v IRC [1993] AC 70.

[20] As an alternative, Mr Hanna QC argued that if the decision in Kleinwort Benson applied to cases concerned with the repayment of taxes or similar charges it did so only to a limited extent in that payments of such sums made in accordance with a prevailing practice, or under a settled understanding of the law, should remain irrecoverable under the law of restitution.

[21] Finally, Mr Hanna QC submitted that if, contrary to his other arguments, the abrogation of the rule against recovery of monies paid under a mistake of law did extend to claims for repayment of taxes and similar sums and did so even in circumstances where such sums were paid in accordance with a prevailing practice and settled understanding of the law, essentially, the plaintiffs had not established that there was any mistake of law in these cases. Before the alteration of the valuation lists in respect of the plaintiffs' premises on 27 May and 22 September 1999 the defendant had been obliged by Article 6 of the Rates Order to make and levy a rate each year on the rateable value of the premises in accordance with the valuation list. In turn, as the occupier of the premises, the plaintiffs were lawfully obliged by Article 18 to pay the rates levied by the defendant. According to Mr Hanna QC if the plaintiffs had known the true state of the law at the time when the payments were made, they would still have been obliged to make them and, had they sought legal advice, they would have been so advised. The plaintiff's might have been advised to apply to the District Valuer for revision of the valuation list and, if necessary, to prosecute a further appeal to the Commissioner of Valuation and the Lands Tribunal with a view to securing an alteration of the valuation list. In addition, Mr Hanna QC argued that a person who pays when he is in doubt about the state of the law or who makes a payment in the knowledge that there was ground upon which liability might be contested should be denied recovery. He submitted that, in both situations, it could be said that such a person assumed the risk that he was mistaken – see Lord Browne-Wilkinson in the Kleinwort Benson case at page 363 b-c and Lord Hoffman in the same case, at page 401 g–h.

[22] Specifically in relation to the claim bought by Anglo Beef Processors, Mr Hanna QC submitted that, on the evidence, that firm had not established that the hereditaments which it occupied ought to be distinguished as industrial in accordance with the approach formulated by the Lands Tribunal in the Granville case.

[23] Mr Hanna QC also relied upon the provisions of Article 4 and Article 71 of the Limitation (Northern Ireland) Order 1989 submitting that each of the

plaintiffs could, with reasonable diligence, have discovered the "mistake" when each plaintiff first occupied and used their respective hereditaments for blast freezing or, failing that, well before 17 October 1995 which was the date that marked the commencement of the six year period prior to the initiation of proceedings in these cases.

DOES THE RULE PREVENTING RESTITUTION OF SUMS PAID AS A RESULT OF A MISTAKE OF LAW CONTINUE TO APPLY TO PAYMENTS MADE BY WAY OF TAXES AND/OR RATES?

[24] Mr Hanna QC emphasised that the rate swap agreements with which the House of Lords was concerned in Kleinwort Benson Ltd v Lincoln City Council & Ors [1999] 2 AC 349 ("Kleinwort") were in the nature of private transactions and he drew the attention of the court to the fact that, in the course of giving judgment, Lord Goff had considered it appropriate to draw a distinction between on the one hand payment of taxes and other similar charges and, on the other hand, payments made under ordinary private transactions. In particular, Mr Hanna QC referred to the following passage in the judgment of Lord Goff at p382:

> "Two observations may be made about the present situation (I of course have in mind that this is the subject of proposals for legislative reform contained in the Law Commission's Report, but your Lordships are concerned with the law as it stands at present.) The first observation is that, in our law of restitution, we now find two separate and distinct regimes in respect of the repayment of money paid under a mistake of law. These are:
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> (1) Cases concerned with repayment of taxes and other similar charges which, when exacted ultra vires, are recoverable as of right at common law on the principle in Woolwich, and otherwise are the subject of statutory regimes regulating recovery; and
>
> (2) Other cases, which may broadly be described as concerned with repayment of money paid under private transactions and which are governed by the common law.
>
> The second observation is that, in cases concerned with overpaid taxes, a case can be made in favour of a principle that payments made in accordance with a

> prevailing practice, or indeed under a settled understanding of the law, should be irrecoverable. If such a situation should arise with regard to overpayment of tax, it is possible that a large number of taxpayers may be affected; there is an element of public interest which may militate against repayment of tax paid in such circumstances; and since ex hypothesi all citizens will have been treated alike, exclusion of recovery on public policy grounds may be more readily justifiable."

Mr Hanna QC submitted that Articles 13 and 15 of the Rates (Northern Ireland) Order 1977 ("the 1977 Order") constituted the type of "statutory regime" to which Lord Goff had been referring in the cases included at category (1) of this part of his speech.

[25] While it is not difficult to appreciate the concern of Lord Goff about the large number of cases that might be affected should the abrogation of the rule against recovery for money paid under a mistake of law apply to public impositions such as taxes, rates etc such an exception would not appear to flow logically from the broad general proposition enunciated at page 375 of his speech that "… English law should now recognise that there is a general right to recover money paid under a mistake, whether of fact or law, subject to the defences available in the law of restitution." A large number of tax or ratepayers might be affected in such circumstances but substantial resources are available to the State and, as a matter of principle, it is perhaps difficult to see why the State should benefit from unjust enrichment particularly when the vast majority of tax and ratepayers are unlikely to be substantial businesses or corporations. At page 381 of his speech Lord Goff considered whether their Lordships should develop the law on the lines suggested by the Law Commission as a corollary to the newly developed right of recovery but went on to observe that:

> "But, for my part, I cannot see why judicial development of the law should, in this respect, be placed on the same footing as legislative change. In this connection, it should not be forgotten that legislation which has an impact on previous transactions can be so drafted as to prevent unjust consequences flowing from it. That option is not, of course, open in the case of judicial decisions."

In my opinion this passage suggests that it was the "settled law" defence about which Lord Goff was speaking at this stage of his speech and in my

view neither his speech nor those delivered by any other of their Lordships required an exception to be made specifically for taxes, rates etc.

Ultimately, it seems to me that the issues of social and economic policy which underpin the argument that it would be in the public interest to create an exception for overpayments of tax, rates etc are matters which should be properly considered by Parliament and, if appropriate, incorporated into legislation.

[26] I note that, since the hearing of these action, Park J has given judgment in Deutsche Morgan Grenfell Group v Inland Revenue Commissioners [2003] EWHL 1779 (CL) in the course of which he rejected the argument that Lord Goff was saying in the passage upon which Mr Hanna QC seeks to rely that restitution for money paid under a mistake of law was not available in respect of sums paid by way of taxes. I respectfully agree and adopt the reasoning of Park J.

[27] As a refinement of his argument in relation to this topic Mr Hanna QC submitted that, even if the abrogation of the mistake of law rule does apply to cases concerned with the repayment of taxes, rates etc such sums should not be recoverable in accordance with the law of restitution if made in accordance with a "prevailing practice" or under a "settled understanding" of the law.

[28] In Kleinwort both Lord Browne-Wilkinson and Lord Lloyd emphasised the importance to the commercial and business world of the security of receipts and the closure of transactions together with the ability of businessmen to act in accordance with long established customs and practice. Both Lord Browne-Wilkinson and Lord Lloyd felt that in such circumstances it was unreal to talk of either the payer or the payee acting under a mistake of law. This was recognised by Lord Goff who accepted that the law of restitution must embody specific defences which would protect the stability of closed transactions but who also went on to observe, at page 382:

> "But the proposed `settled understanding of the law' defence is not, overtly, such a defence. It is based on the theory that a payment made on that basis is not made under a mistake at all. Once that reasoning is seen not to be correct, the basis for the proposed defence is, at least in cases such as the present, undermined."

Lord Hoffman considered that whether a subsequent decision changed a settled view of the law or, for that matter, settled what was previously an unsettled view of the law, the enrichment of the recipient was unjust in each case because he received money which he would not have received if the payer had known the law to be what it was subsequently declared to have

been. He acknowledged the argument that the "settled view" theory should be adopted in order to preserve the security of past transactions but expressed the view that to follow such a course would be a legislative act founded purely upon policy and the matter was best left to the legislature. Finally, Lord Hope also accepted that there was some justification for the "settled law" theory on grounds of public policy but he felt that the need for caution shown by the work done by the Scottish Law Commission was entirely justified and did not favour the judicial introduction of such a defence. Ultimately, all five members of their Lordships House were clearly concerned about the impact of their decision upon the finality of commercial transactions and I note that Lord Goff expressly suggested that the Law Commission might be wise, as a matter of urgency, to give consideration to the impact of Section 32(1)(*c*) of the Limitation Act 1980 upon this type of cause of action. However it seems to me that the majority were clearly against the existence of such a defence in respect of private transactions at common law and logically, I do not see why it should apply in respect of sums paid by way of taxes, rates etc, given their reasoning.

[29] In the circumstances, I reject the arguments put forward by Mr Hanna QC under this heading.

WERE THE PAYMENTS MADE AS A CONSEQUENCE OF A MISTAKE OF LAW?

[30] It is important to remember that in Kleinwort the judge at first instance had made orders for the trial of a preliminary issue as to whether the bank's claim that it had made payments under a mistaken belief that they were being made pursuant to a binding contract disclosed a cause of action in mistake and, if so, whether that mistake was one in respect of which the bank could rely on Section 32(1)*(c)* of the Limitation Act 1980. The judge held that in each case he was bound by authority to hold against the banks and the case then proceeded by way of the "leapfrog" procedure directly to the House of Lords. Thus, while the majority of their Lordships held that the plaintiff's claim should succeed if the sums had been paid under a mistake of law the case had to be remitted for trial in order to determine that issue as a matter of fact.

[31] It is interesting to compare the factual background to the Kleinwort appeal with the facts upon which these cases are based and a helpful summary of the former may be found in the judgment of Lord Hope at pages 403/4.

[32] A sophisticated market had developed since interest rate swaps first came into use in about 1981. As it became more complex it was recognised that this market required to be organised and a state of standard terms and conditions was formulated by the British Bankers Association in association with the Foreign Exchange Currency Deposit Brokers Association. Local

authorities were among the participants in the money markets and it was assumed that interest rate swaps could legitimately be entered into with them as an ancillary to their statutory borrowing and lending powers. The Chartered Instituted of Public Finance and Accountancy received advice to this effect in the latter part of 1983. The absence of any legal risk was based on what was understood to be the effect of paragraph 20 of Schedule 13 to the Local Government Act 1972. This assumption continued to be acted upon uncritically until 1987 when the Audit Commission and its officers made statements which for the first time called into question the ability of local authorities to engage in interest rate swap contracts and counsel's advice indicated that, unless they were actual hedging transactions in relation to actual loans that fell within the powers of the relevant local authority, such transactions would not be permitted by the Act of 1972. On 14 July 1988 a press release was issued by the Commission publishing counsel's advice and warning that auditors might challenge items arising from such transactions that were not permitted by the statute. At page 404 of his judgment Lord Hope summarised the situation in the following terms:

> "It appears therefore at the time when the transactions in the present case were entered into there was a general understanding, which was shared by banks and local authorities as regular participants in the money markets, that interest rate swap contracts were within the borrowing and lending powers of local authorities. This understanding appears to have based upon commercial assumptions which developed within the money markets, not as a result of initiatives taken on legal advice by either party in the transactions. When advice was taken by the Chartered Institute it confirmed what was already understood to be the position in the money market. The formulation of standard clauses for use in the basic interest swap contracts – although not designed specifically for use in transactions with local authorities – no doubt added to the general understanding that there was no legal risk. It does not appear that any auditor of local authority accounts expressed doubt on the matter until the issue was first raised in 1987 by the Audit Commission."

[33] By contrast, as I have already recorded earlier in this judgment, Mallusk Cold Storage Ltd engaged a firm of experts to appeal the initial rates assessment in April 1987 upon the ground that the premises were entitled to be distinguished in the valuation list as "industrial", no doubt in the belief

that they had at least and "arguable" case. Mallusk paid the rates demanded subsequent to the rejection of this appeal but, at the same time, joined with the other companies, whose appeals had also been rejected, for the purpose of continuing to press their case. Anglo Beef Processing Ltd were one of the other companies concerned. After consulting with their solicitors and taking senior counsel's advice the general view of this group was that it was not a "worthwhile commercial risk" to pursue the matter further. This meeting appears to have taken place some time during the first half of 1992 and nothing thereafter of relevance appears to have occurred until the appeal of Granville Cold Storage Co against its certificate of net annual value dated 20 October 1994.

[34] These facts also contrast with those in the Deutsche Morgan Grenfell case where there was a relevant UK statutory provision, Section 247 of the Income and Corporation Taxes Act 1988, and in which the case pursued by the Hoechst Group was based upon a number of arguments apart from the challenge based on EC law. In my opinion the contrast is further illustrated by comparing the words of Mr Thomason, quoted by Park J at para 27 of his judgment, with the evidence given by Mr Pepper and Mr Dickson in these proceedings.

[35] While Lord Hope seems to have been the only member of the of their Lordships House who considered in detail the issue of whether or not a mistake of law had occurred, there are observations in some of the other judgments which seem to me to provide assistance in relation to this issue. At page 363, when dealing with the law relating to commercial and property activity Lord Browne-Wilkinson said:

> "If, before payment, the payer had sought advice in some cases he would have been told that the law was dubious: if having received such advice he paid over, he must have taken the risk that the law was otherwise and cannot subsequently recover what it was paid. In other cases, he would have been told that the law was clear and he could safely act on it."

At page 364 Lord Browne-Wilkinson expressed agreement with the test for "settled" law set out in the Law Commission's draft bill and stated that he would have held that the bank would not be entitled to recover on the grounds of mistake of law if at the time of payment the bank were, or if they had sought advice would have been, advised by all lawyers skilled in the field that the swaps agreements were valid.

[36] At page 401 Lord Hoffman said:

> "I should say in conclusion that your Lordships decision leaves open what may be difficult evidential questions over whether a person making a payment has made a mistake or not. There may be cases in which banks which have entered into certain kinds of transactions prefer not to raise the question of whether they involve any legal risk. They may hope that if nothing is said, their counter-parties will honour their obligations and all will be well, whereas any suggestion of a legal risk attaching to the instruments they hold might affect their credit ratings. There is room for a spectrum of states of mind between genuine belief and validity, founding a claim based on mistake, and a clear acceptance of the risk that they are not."

[37] However, it was Lord Hope who developed this issue in greatest detail. Lord Hope thought that the proper starting point was the principle of unjust enrichment and noted that the common law requires the payer to show that the enrichment of the payee was unjust ie that he made the payment under a mistake. Lord Hope did not think that there was any essential difference as between mistakes of fact and mistakes of law in regard to the payer's state of mind and that mistakes of law may be caused by a failure to take advice, omitting to examine the available information, misunderstanding the information which has been obtained failure to predict correctly how the court would determine the issues or even to foresee that there was an issue which required to be resolved by the court. However, he then went on to say, at page 410:

> "Cases where the payer was aware that there was an issue of law which was relevant but, being in doubt as to what the law was, paid without waiting to resolve that doubt may be left to on one side. A state of doubt is different from that of mistake. A person who pays when in doubt takes the risk that he may be wrong – and that is so whether the issue is one of fact or one of law."

Again, when dealing with defences, Lord Hope said, at page 412:

> "The initial requirements already mentioned which the plaintiff must satisfy will do much to sort out those cases which deserve a remedy and those which do not. He must show that he acted under a mistake which caused him to pay a sum

> which the payee was not legally entitled to receive. A payment made in the knowledge that there was a ground to contest liability will be irrecoverable: see Kelly v Solari, 9 MW, 54, 58, per Lord Abinger CB."

[38] Article 6 of the Rates (Northern Ireland) Order 1977 places the defendant under a duty to make rates for each year in accordance with the provisions of the order and Article 18 of the same order places the occupier of the relevant hereditament under a duty to discharge the rates made. The relevant mistake of law in these cases, essentially a mixed question of law and fact, was whether the premises of the plaintiffs ought to have been distinguished as industrial by the Commissioner or District Valuer in accordance with Article 43 and Schedules 2 and 14. By its judgment dated 3 April 1998 the Lands Tribunal recognised that premises occupied for the purposes which the plaintiffs occupied their premises should be so distinguished. While both the plaintiffs in these actions appear to have raised the issue of whether their premises ought to be distinguished as industrial at an early stage after occupation relying both upon representations made on their own behalf and with the assistance of agents, it does not seem to me that either of them would have entertained any real reason to reject the interpretation of the law put forward on behalf of the defendant until senior counsel's opinion was furnished to the group of companies. Up until that time, I have reached the view, on the balance of probabilities, that the plaintiffs were making payments on the basis of a mistake of law bearing in mind that such a mistake may result from the failure to take advice, the omission to examine the available information, misunderstanding the information that has been obtained or failing to identify the relevant issues. However, it seems to me that once senior counsel's opinion had been obtained, despite the fact that it was far from enthusiastic, couching the prospects of success as not "great" and "an uphill struggle", the state of each plaintiff's mind must have moved from that of "mistake" to one of "doubt". It seems to me that after considering their solicitor's advice and taking the benefit of senior counsel's opinion, the agreement by this group of companies reached as a "commercial decision" not to take the risk of further legal proceedings falls within those cases identified by Lord Hope in which the payers were aware that there was an issue of law which was relevant, but doubtful, and in respect of which a decision was taken to make the payments appreciating the risk that the basis upon which they were made might be mistaken.

THE LIMITATION (NORTHERN IRELAND) ORDER 1989

[39] It was common case between the parties that the relevant period of limitation in respect of these proceedings was the 6 year period set out in Article 4 of the Limitation (Northern Ireland) Order 1989 ("the 1989 Order").

Since each action was commenced by writ dated 17 September 2001, prima facie, this provision would exclude liability for payments made prior to 17 September 1995. Each of the plaintiffs sought to avoid such an outcome by relying upon Article 71 of the 1989 Order the relevant portions of which provide that:

> "71-(1)Subject to paragraphs (3) and (5), where in any action for which a time limit is fixed by this Order, either –
>
> *(a)* …
>
> *(b)* …
>
> *(c)* the action is for relief from the consequences of a mistake, the time limit does not begin to run until the plaintiff has discovered the fraud, concealment or mistake (as the case may be) or could with reasonable diligence have discovered it."

[40] The effect of my holding that after the consultation with their solicitors and the consideration of senior counsel's opinion, the members of the group, including both these plaintiffs, were in a state of doubt as to the state of the law rather than labouring under a mistake is that the limitation period began to run from that time. In such circumstances, the relevant six year limitation period would have expired at some time during 1998 and both these actions are statute barred.

[41] If I am wrong about this finding then, alternatively, it seems to me that any mistake from which either plaintiff was suffering at that time could have been discovered by acting with reasonable diligence. While counsel's opinion was not particularly favourable in terms of the prospects of success, he did not advise that the claims were hopeless or that the law was clearly settled. There was no evidence that either plaintiff gave instructions that any of the lines of further enquiry suggested by senior counsel should be pursued or investigated. Mr Dickson himself, in giving evidence on behalf of Anglo Beef Processing Limited, volunteered that, after the consultation, he was of the opinion that more technical advice should be obtained and he agreed that any of the group could have obtained such advice. However, it appears that, in the circumstances, the group simply took a "commercial" decision not to pursue the matter further and to keep making the payments in respect of rates. I note that one of the companies included in this group was a sister company of the company that subsequently successfully appealed to the Lands Tribunal, Granville Cold Storage Company. The certificate of net annual value against which Granville appealed was dated 20 October 1994

which suggests that unlike the members of the group, Granville must have acted within a relatively short time of the consultation and the taking of senior counsel's opinion. The onus is on the plaintiffs to establish measures which they could not reasonably have been expected to take (Paragon Finance v Thakerar [1999] 1 All ER 400: Beggs and Another v Sotnicks [2002] All ER (d) 205).

[42] However, even if these plaintiffs had completed their investigations and decided to institute proceedings, say by the end of 1992, similar to those ultimately taken by the Granville Cold Storage Company it seems to me that any such proceedings would have been contested by the defendant and, using the Granville Cold Storage Company proceedings as an example, it seems on the evidence unlikely that a decision would have been obtained from the Lands Tribunal prior to 1996 or 1997. In such circumstances it seems to me that each plaintiff would have been entitled to rely upon Article 71*(c)* of the 1989 Order.

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[43] During the course of the evidence a significant potential discrepancy emerged between the figures furnished by Anglo Beef Processors Limited ("ABP") agent in support of ABP's claim to be treated on the same basis as Granville Cold Stores and figures compiled by Mr Dickson in respect of the same years. The covering letter of 4 May 1999 represented that 75% of all ABPs product was blast frozen and was the "core of the turnover of the premises". On the other hand, the figures compiled by Mr Dickson appeared to show blast freezing as comprising 20.2%, 20.1% and 6.8% in respect of the years 1996, 1997 and 1998. Mr Dickson sought to explain this apparent discrepancy by stating that the percentage figures provided under cover of the letter of 4 May 1999 were based upon tonnage whereas the handwritten notes which he had made to the accounts related to the company's financial performance. During the course of giving its judgment in the Granville Cold Storage Company case the Lands Tribunal did refer to a case in which turnover by weight of product had been considered, namely, Aberdeen Cold Storage Company Limited v Aberdeen Assessor 1962 RA (Aberdeen). However, the Lands Tribunal expressed reservations about certain aspects of the Aberdeen decision and I note that, ultimately, the Tribunal appears to have accepted that the recognised Scrutton test based on financial turnover was appropriate – see the judgment of Lord Justice Scrutton in Potteries Electric Traction Company Limited v Bailie [1931] 1 KB.

[44] On the basis of this evidence Mr Hanna QC invited me to hold that, on the balance of probabilities, the Lands Tribunal would not have been persuaded that the ABP premises were entitled to be distinguished as "industrial". Upon reflection, I do not think that it would be fair to do so having regard to the way in which and the stage at which this matter arose

during the hearing. It seems to me that further research and argument might help to illuminate the issue. However, the discrepancy revealed in the course of Mr Dickson's cross-examination and the fact the percentages based on the financial turnover figures which he himself added to the companies accounts never appear to have been supplied to the Valuation Agency lead me to the view that it might now be prudent for that body to re-examine the case made by ABP for their premises to be distinguished as industrial.

[45] For the reasons set out above I have reached the conclusion that both these actions are statute barred and, accordingly, in each case there will be judgment for the defendant.