[2018] UKFTT 0509 (TC)

TC06678

Appeal number: TC/2017/02485

CAPITAL GAINS TAX – entrepreneurs relief – voting shares requirement not met – pre-existing arrangement to confer voting rights – maxims of equity "equity looks as done what ought to have been done" – Chapter 3, Part V, Taxation of Chargeable Gains Act 1992 – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

DIENO GEORGE **Appellant**

- and -

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

TRIBUNAL: JUDGE ALEKSANDER

Sitting in public at Taylor House, London EC1 on 23 and 24 July 2018

Michael Firth, counsel, instructed by Ernst & Young LLP, for the Appellant

John Brinsmead-Stockham, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. This is an appeal by Dieno George against a decision on a review set out in HMRC's letter of 24 February 2017. The review related to a closure notice and amendment to Mr George's self-assessment tax return for 2013/14. By a closure notice dated 26 May 2016, HMRC denied Mr George the benefit of entrepreneurs' relief in respect of his disposal of shares in Thornton & Ross Limited ("TRL" or "the company") on 16 August 2013.

2. Mr George was represented by Mr Firth, and HMRC were represented by Mr Brinsmead-Stockham. I heard oral evidence on oath from Mr George and from Jonathan Thornton (in each case, at the request of Mr Brinsmead-Stockham, the evidence was heard in the absence of the other from the hearing room). A bundle of documentary evidence was also submitted.

3. This appeal was allocated to the complex category. Mr George notified the Tribunal (within the relevant time limit) that he wanted to be excluded from any liability to costs pursuant to Rule 10(1)(c)(ii) of the Tribunal's procedure rules.

Law

4. The appeal relates to whether Mr George can claim entrepreneurs' relief ("ER") from capital gains tax on the disposal of his shareholding in TRL on 16 August 2013.

5. The legislative provisions governing ER are set out in Chapter 3, Part V, Taxation of Chargeable Gains Act 1992 ("TCGA"). The key provisions relevant to this appeal are contained within sections 169H, 169I and 169S, which are as follows:

> **169H Introduction**
>
> (1) This Chapter provides for a lower rate of capital gains tax in respect of qualifying business disposals (to be known as "entrepreneurs' relief").
>
> (2) The following are qualifying business disposals—
>
> (a) a material disposal of business assets: see section 169I,
>
> […]
>
> **169I Material disposal of business assets**
>
> (1) There is a material disposal of business assets where—
>
> (a) an individual makes a disposal of business assets (see subsection (2)), and
>
> (b) the disposal of business assets is a material disposal (see subsections (3) to (7)).
>
> (2) For the purposes of this Chapter a disposal of business assets is—

[…]

(c) a disposal of one or more assets consisting of (or of interests in) shares in or securities of a company.

[…]

(5) A disposal within paragraph (c) of subsection (2) is a material disposal if condition A, B, C or D is met.

(6) Condition A is that, throughout the period of 1 year ending with the date of the disposal—

(a) the company is the individual's personal company and is either a trading company or the holding company of a trading group, and

(b) the individual is an officer or employee of the company or (if the company is a member of a trading group) of one or more companies which are members of the trading group.

169S Interpretation of Chapter

[…]

(3) For the purposes of this Chapter "personal company", in relation to an individual, means a company—

(a) at least 5% of the ordinary share capital of which is held by the individual, and

(b) at least 5% of the voting rights in which are exercisable by the individual by virtue of that holding.

[…]

6. The only issue before me relates to paragraph (b) of the definition of "personal company" in s169S(3) TCGA. It is accepted that all the other requirements for ER have been satisfied. In other words, were at least 5% of the voting rights in TRL exercisable by Mr George, by virtue of his shareholding, throughout the period of one year ending with the date on which he disposed of his TRL shareholding?

Background facts

7. At all material times, TRL was engaged in the business of developing, manufacturing and supplying over-the-counter medicines and healthcare products. Mr Thornton was at all material times the chairman of the company's board of directors. The shares in the company were – immediately prior to Mr George joining the company – all owned by members of Mr Thornton's family, or held on trust for beneficiaries who are members of Mr Thornton's family.

8. TRL was performing satisfactorily, but Mr Thornton wanted to improve the profitability of the business and so recruited Mr George. Mr George had a background in marketing in the pharmaceutical and healthcare industries, and was previously a director of SSL International PLC, a substantial manufacturer of healthcare products that was listed on the London Stock Exchange.

9. Mr George was recruited on 8 October 2001, initially as an executive director with responsibilities for TRL's commercial operations. Included in the bundle of

documents was a letter dated 15 November 2001 setting out the terms of Mr George's employment by TRL with effect from 1 December 2001 (the terms of employment from 8 October to 30 November were not provided).

10. Mr George and Mr Thornton worked very closely together, and had a strong relationship of trust. I am satisfied on the basis of the evidence before me that Mr Thornton is a businessman of great integrity, and does not give undertakings or make promises lightly. When he says that he will do something, he feels morally bound to deliver on his promise – irrespective of whether he is legally bound to do so.

11. The evidence of both Mr Thornton and Mr George was that the family shareholders were not actively engaged in the TRL business. They were content to let Mr Thornton and Mr George get on with running the business. Responsibility for liaising with the shareholders fell on Mr Thornton, and his evidence was that they were happy to follow his recommendations. To the extent that shareholder approval was required for anything, this was generally a formality, as there was a relationship of trust within the family. Indeed, Mr Thornton doubted whether the shareholders would read in any detail the documents that he presented to them for signature. In his witness statement, Mr Thornton said that he could not recall a single time in 30 years where events unfolded in a way that he had not planned.

12. Mr George describes these circumstances in the "white space" in his 2013/14 tax return as follows:

> […] my involvement and influence over the company was considerably more than what a 5% voting right might imply. My role with the company was such that all major issues relating to the company including inter alia the corporate strategy, acquisitions, brand, sales and funding were made jointly with the major shareholder (Mr Thornton). The family shareholders had a passive involvement and exercised no control over the company. The family shareholders were content with the arrangement between Mr Thornton and myself (and I have written evidence in support of this).

13. Mr George was very successful in working with Mr Thornton to expand TRL's business. This was reflected in his promotion from 1 March 2002 to become the chief executive of the company, with a commensurate increase in his salary. The updated terms of employment were set out in a letter dated 9 April 2003, but stated to have had effect from 1 January 2002 (and the promotion to chief executive to have had effect from 1 March 2002).

14. In 2005 Mr George was offered the opportunity to acquire shares in TRL. This was the first time in a very considerable period that a non-family member had been offered the opportunity to become a shareholder in TRL. The offer reflected the importance of Mr George to the success of TRL's business.

15. Mr George subscribed £999,996 for 600 C Ordinary Shares in TRL on 11 February 2005, and then £10,000 for 1547 D Ordinary Shares in TRL on 10 October 2008. The C and the D Shares were new classes of shares in the capital of TRL created specifically for Mr George's subscription (the other shareholders held A and B shares).

The precise rights attaching to Mr George's C and D Ordinary Shares are not relevant to this appeal, save that (a) these shares represented 6.9% by nominal value of the company's ordinary share capital; and (b) neither the C nor D Ordinary shares carried any right to vote at general meetings of the company. Mr Thornton said that the C and D Ordinary Shares were created as non-voting shares on the advice of TRL's solicitors and accountants.

16. In 2005 Mr George invested just under one million pounds in TRL, which represented his entire wealth (other than his home). He had a significant shareholding in SSL International PLC that he sold in order to be able to invest into TRL.

17. Mr George was understandably concerned that he could be locked into a small minority shareholding in a family owned company, with no prospect of ever realising value for his investment. However, Mr Thornton assured Mr George that it was his (viz Mr Thornton's) intention to retire by the time he reached 60 (which would be February 2017), and that he intended that TRL would be sold by the time he retired.

18. This assurance was given to Mr George orally in a meeting, and was never recorded in writing. The evidence both of Mr George and of Mr Thornton was that this promise was not (and was never intended to be) legally binding. Their evidence was that the sale of a private company is an inherently uncertain matter (as will be seen), and that therefore there was no expectation on the part of either Mr George or Mr Thornton that this promise was capable of enforcement. It was a promise binding "in honour" only.

19. The state of TRL's share capital immediately after the issue of the C and D Ordinary shares was as follows. The ordinary share capital was divided into four classes – 4100 A Ordinary shares of £1 each, 25,307 B Ordinary shares of £1 each, 600 C Ordinary shares of £1 each, and 1547 D Ordinary shares of £1 each. Holders of the A, C, and D Ordinary shares had no rights to vote at general meetings in respect of their shareholdings. Only holders of B Ordinary shares had any right to vote. There is in the Appendix a table setting out the names of the TRL shareholders and their respective shareholdings immediately after the issue of D Ordinary shares to Mr George on 10 October 2008. There was no subsequent change in the share capital or shareholders until the sale of TRL on 16 August 2013.

20. 3719 of the 4100 A Ordinary shares, and 17,414 of the 25,307 B Ordinary shares were held by trustees on behalf of various family trusts. Of these many trusts, two had trustees who were not members of Mr Thornhill's family. Barclays Wealth Trustees (Isle of Man) Limited held 5089 B Ordinary shares as trustees of JA Thornton's 1997 personal settlement (representing 20.1% of the B Ordinary shares in issue). Richard Michael Ward was co-trustee with Mr Thornton of the Mrs Nancy Whitely discretionary settlement, which held 1850 A Ordinary shares and 1900 B Ordinary shares (representing 45.1% of the A Ordinary shares in issue and 7.5% of the B Ordinary shares in issue, respectively).

21. Article 13 of TRL's articles of association governs the exercise of voting rights where shares are held jointly. In such cases, the signature of any one of the joint holders

is sufficient for the exercise of any of the rights attaching to those shares – unless the company receives express notice from a more senior of the joint holders that she (or he) does not agree, in which case the more senior holder's decision shall prevail (seniority being determined by the order in which the holders are listed in TRL's register of members). In the case of the shares held by Mrs Nancy Whitely discretionary settlement, Mr Thornton is the first listed shareholder in the company's register of members.

22. Mr Thornton and Mr George decided to prepare TRL for sale in 2010/11. Deloitte were engaged to market the company in January 2011 to prospective purchasers, and prepared an information memorandum. Making arrangements for TRL to be sold was a major decision. Mr Thornton described it as “selling the family jewels”. The Thornton family had been significant shareholders in TRL since its incorporation in 1922. Mr Thornton therefore consulted all the other family members (other than Mrs Whitely) to seek their approval to this step - the consultations being both individual and collective. However, Mr Thornton consulted neither Barclays Wealth Trustees (Isle of Man) Ltd, nor Richard Ward, who were trustees of two of the trusts that held shares in TRL. The discussions with family members were informal, as they were undertaken in a family context, and there was a relationship of trust within the family. In particular, nothing was recorded in writing.

23. There were negotiations with a number of prospective purchasers, until eventually, Actavis were selected as the preferred buyer. Negotiations with Actavis were not straightforward. Initially Actavis offered to acquire all of TRL's share capital but Actavis had difficulty in raising sufficient cash to be able to do this. In the end it was proposed that a new company ("Holdco") be incorporated, which would acquire the whole of TRL's share capital (and the share capital of another company, not relevant for the purposes of this appeal) for a mixture of Holdco shares and cash. Actavis would incorporate Holdco and would subscribe cash for Holdco A Ordinary shares of £1.06 each. Following completion of the acquisitions, these would represent 50.1% of Holdco's ordinary shares. The consideration received by the TRL shareholders for the sale of their TRL shares was a mixture of cash and Holdco consideration shares. The shareholders (other than Mr George) would be issued with B Ordinary shares of £1.00 each, and Mr George would be issued with B and C Ordinary shares of £1 each. The B and C Ordinary shares would represent in aggregate 49.9% of Holdco's ordinary shares. In addition, the former TRL shareholders would be issued with non-voting cumulative preference shares. These would be entitled to a fixed 10% coupon, but the coupon would increase by 2.5% each year to a maximum of 20%. In addition, various rights would be granted between Actavis and the former TRL shareholders to allow (in very general terms) Actavis to acquire the balance of the Holdco shares, or for all of the Holdco shares to be sold to a third party.

24. Whilst the preparations for the sale were in progress, Mr George obtained advice from his personal tax advisor on the taxation of the sale, and was advised that he did not qualify for ER, as his shares did not carry any voting rights. Mr George agreed with Actavis and Mr Thornton that the C Ordinary shares to be issued by Holdco would carry voting rights so that they would qualify for ER on any subsequent sale (subject to the other requirements of ER being met). Mr Thornton liaised with his family to obtain

their consent to Mr George's consideration shares having voting rights, and reference to this agreement was made in the s138 TCGA and s701 Income Tax Act 2007 tax clearance application made by TRL's accountants in relation to the proposed sale. Apparently, at around this time TRL's accountants advised Mr Thornton of the risk that a "value shifting" tax charge might fall on the TRL shareholders as a result of Mr George acquiring voting shares.

25. Of course, the enfranchisement would come too late for Mr George to benefit from any ER on the sale of any of his shares to Actavis – as he would not have had the voting rights throughout the year leading up to the sale. However, he might potentially qualify for ER on any subsequent sale of his Holdco shares (either to Actavis or to a third party) if it occurred at least one year later.

26. There are problems with the share capital structure described in the clearance application. There is a very nice point as to whether the preference shares to be issued by Holdco fall within the definition of "ordinary share capital" given their right to an escalating dividend (is an escalating dividend a "dividend at a fixed rate", such as to take it outside the definition of ordinary share capital under s 989 Income Tax Act 2007?). And, even if I assume (without deciding the point) that the preference shares are not "ordinary share capital", because of the difference between the nominal values of the shares to be held by Actavis and the shares to be held by the former TRL shareholders, Mr George would hold only 4.99% of the company's ordinary share capital by nominal value. So he would not have met the 5% ownership requirement in s169S(3). However, Mr George's evidence was that this was probably a rounding error, and would have been noticed and corrected before any share sale contract was signed.

27. In fact the sale to Actavis did not proceed. On 20 February 2012, at a very late stage in the negotiations, Actavis withdrew from the transaction. It subsequently transpired that Actavis was itself the subject of a takeover, which was why its acquisition of TRL could not proceed.

28. Actavis's withdrawal was a major blow, and Mr Thornton and Mr George met on the following day 21 February 2012 to discuss the consequences.

29. There was a wide-ranging discussion between Mr Thornton and Mr George about the future of TRL given that the sale to Actavis had fallen through. Mr George and Mr Thornton reached agreement on a plan of action for the future. This included issues of business strategy, stabilising and retaining the wider management team, potential acquisitions, and generally rebuilding the business (the business's results had slipped back, as neither Mr Thornton nor Mr George had their "eye on the ball" for some time as they were both focussed on the sale).

30. Mr Thornton was worried that Mr George might resign from TRL. Mr George and Mr Thornton had spent the last two years working together towards a sale, and Mr Thornton did not know what was going through Mr George's mind. In order to pre-empt any risk that Mr George might leave, he undertook to Mr George to put TRL up for sale within the next two years. In return, he sought (and obtained) a commitment from Mr George to "steady the ship" and to stay with the company until it was sold. He also

undertook that Mr George's shares would qualify for ER by giving them voting rights. However Mr Thornton was concerned that if Mr George's shares were enfranchised, a "value shift" might arise which would be taxable in the hands of the TRL shareholders (presumably under s29 TCGA) – and Mr George confirmed that he would bear any such cost (the risk of value shifting had been raised previously by the company's accountants in the course of discussions about enfranchising Mr George's shares in the context of the Actavis transaction).

31. There were no minutes or any other record of the matters discussed and agreed upon at the meeting of 21 February 2012. Mr Thornton said when giving evidence that it would not be appropriate to come out of that meeting with a piece of paper - not in the context of an agreement between two people who worked closely together.

32. Subsequent to the 21 February 2012 meeting, Mr George and Mr Thornton continued to work together to manage TRL and implement the agreement they had reached. In particular, Mr Thornton started the processes necessary to enfranchise Mr George's shares. This process did not proceed particularly quickly – the evidence was that TRL was engaged in major litigation in New York that took up a lot of Mr Thornton and Mr George's time, as did the Eurozone crisis and the need to recruit senior staff. In addition, there were holidays. Mr Thornton's evidence was that the enfranchisement was not simple and took time to implement. Mr Thornton was particularly concerned about the "value shifting" risk and wanted to work through the issue in detail with the company's professional advisors. Although Mr George had agreed to bear the cost of any tax falling on the other shareholders, Mr Thornton wanted to quantify the risk, as he was concerned that Mr George should not be exposed to a disproportionate liability. Mr George's evidence was that he could see that progress was being made towards enfranchising his shares, and although the progress was slow, he was content to see that progress was being made.

33. Eventually the corporate documentation to enfranchise Mr George's shares was prepared. Mr Thornton discussed this with his family over the Christmas holidays. A written special resolution and class consents to enfranchise Mr George's shares were circulated to shareholders on 3 January 2013 and were signed on 4 January by Mr George (in respect of the class consents only), on 10 January by all the other shareholders (with the exception of Mr Ward), and on 15 January 2013 by Mr Ward. As Mr Ward was the "junior" joint holder, his signature was unnecessary to the special resolution (the more senior shareholder having already signed), so the special resolution took effect on 10 January 2013.

34. The effect of the special resolution was to confer on the holders of the B, C, and D Ordinary shares on a poll one vote for every such share that they held. The holders of A Ordinary shares continued not to be entitled to vote their shares.

35. A deed of indemnity was executed on 4 January 2013. The deed of indemnity was between Mr George on the one hand, and Mr Thornton (for himself and as trustee for the other shareholders and for TRL) on the other. It starts with a recital that it was proposed that the TRL articles of association be amended to confer voting rights on the

holders of the C and D Ordinary shares. Under the terms of the deed, Mr George covenants:

> … to pay to each Member or to the company on demand an amount equal to any Tax Liability falling on that Member or (as the case may be) on the Company …

36. "Tax Liability" is defined as meaning:

> (i) any liability to capital gains tax or to inheritance tax falling on the Members (or any of them) by reason of the Event being deemed to be a disposal or part disposal for capital gains tax purposes by any Member of his or her interest in any shares in the capital of the Company or by reason of the Event constituting a transfer of value by any Member for inheritance tax purposes and/or (ii) any liability for PAYE contributions falling on the Company by reason of the Event being deemed to be earnings or to confer a benefit-in-kind for income tax purposes on any employee or director of the Company.

37. "Event" is defined as meaning:

> … the modification of the Articles of Association of the Company so as to confer voting rights on the "C" ordinary shares and the "D" shares of £1 each in its capital by the passing of a Written Special Resolution in the form circulated to the shareholders of the Company for agreement pursuant to Sections 283 and 288 of the Companies Act 2006 on […] January 2013

No date has been inserted in the square brackets at the end of the definition of "Event" – but it is clearly intended to refer to the written special resolution circulated on 3 January 2013, and I so find.

38. "Members" is defined as all the shareholders of TRL (other than Mr George); "Company" is defined to mean TRL; and "PAYE" is defined to include national insurance contributions.

39. The deed of indemnity also includes provisions addressing the conduct of claims, and for payments to be made to Mr George if TRL should receive a corresponding tax relief. Mr George is also required to "gross up" any payment to take account of any tax liability suffered by a Member on the payment itself, presumably arising under the principles set out in the *Zim Properties v Proctor* 58 TC 371 decision (see also HMRC's extra-statutory concession D33) (neither *Zim Properties* nor ESC D33 were cited to me).

40. Meanwhile, in late 2012, Mr Thornton received an unsolicited approach from Stada UK Holdings Limited ("Stada") to acquire TRL. Stada offered to acquire the whole of the issued share capital of TRL for a cash payment. The share sale and purchase agreement was signed and completed on 16 August 2013. Because Mr George's shares were only enfranchised on 10 January 2013, Mr Thornton was concerned that Mr George would not qualify for ER in respect of his shareholding if those shares were sold in August – and Mr Thornton offered to seek to defer the sale so

that Mr George's shares could qualify for ER. However, Mr George was mindful of the failure of the Actavis sale, and did not want to defer the Stada transaction with the risk that it too might fail – so the sale proceeded and completed on 16 August 2013.

Eligibility for entrepreneurs' relief

41. On the face of the bare facts, it would appear that Mr George does not qualify for ER in respect of the disposal of his TRL shares to Stada. Although he held at least 5% of the ordinary share capital of TRL for at least one year prior to the disposal, those shares were non-voting, and only carried voting rights from 10 January 2013 – which is less than one year prior to the disposal.

42. However, Mr Firth has come up with an ingenious and clever (but ultimately – as will be seen – hopeless) argument as to why Mr George is entitled to claim ER.

43. The argument goes like this. On 21 February 2012, Mr Thornton (on behalf of himself and all the other shareholders in TRL) agreed to do whatever was necessary to enfranchise Mr George's shareholding – so that it qualified for ER. This agreement was legally binding and specifically enforceable. One of the maxims of equity is that "equity looks on that as done which ought to be done", and equity treats a specifically enforceable contract to do a thing as if it were already done. Mr Firth argues that Mr George's C and D Ordinary shares are therefore treated (as a matter of equity – which forms part of the general laws of England and Wales) for all purposes as if they had voting rights with effect from 21 February 2012. So it follows that the requirements of s169S TCGA are satisfied.

44. In this decision I refer to the maxim "equity looks on that as done which ought to be done" as the "equitable maxim".

45. This line of argument needs to be unpacked into each its constituent elements. Every one of these elements needs to be satisfied for Mr Firth to make good his case. If even one element falls, so does Mr Firth's whole case:

(1) Was a legally binding contract concluded between Mr George and Mr Thornton (acting for all the shareholders) on 21 February 2012? This element has a number of sub-elements which are discussed below.

(2) Assuming there is a legally binding contract, would a court of equity make an order for specific performance to enforce the contract?

(3) Does the equitable maxim that "equity looks on that as done which ought to be done" apply in the circumstances of this case?

(4) Can the statutory requirements in s169S TCGA be met by the application of the equitable maxim?

Was a legally binding contract concluded on 21 February 2012 between Mr George and all the other shareholders?

46. In 1976 in *Horrocks v Forray* [1976] 1 WLR 230 (CA) (not cited to me) Megaw LJ said:

> Now in order to establish a contract, whether it be express or implied by law, there has to be shown a meeting of the minds of the parties, with a definition of the contractual terms reasonably clearly made out and with an intention to affect the legal relationship, that is that the agreement that is made is one which is properly to be regarded as being enforceable by the court if one or the other fails to comply with it; and it still remains a part of the law of this country, though many people think that it is time that it was changed to some other criterion, that there must be consideration moving in order to establish a contract.

47. For persons to be bound by a contract every one of the following elements must exist:

(1) The parties must have reached an agreement;

(2) The terms of the agreement must be sufficiently certain (an agreement will not give rise to a binding contract if it is too vague or obviously incomplete);

(3) The agreement must be made with the intention of creating legal relations; and

(4) The agreement must either be made by a deed or supported by "consideration".

Did the parties reach an agreement?

48. Mr Brinsmead-Stockham submits that the evidence that such an agreement was reached is weak. The only evidence is the oral evidence of Mr Thornton and Mr George, and it is uncorroborated in any way. He notes that there is no reference to such an agreement in any correspondence or emails. The recital in the deed of indemnity makes no reference to the deed giving effect to any prior agreement. There is no reference to Mr George's undertaking to pay any tax incurred by the shareholders in a "to whom it may concern" letter from Mr Thornton dated 25 September 2016 (which was sent to HMRC by Mr George's tax advisors), nor in the minutes of a meeting on 2 February 2017 that Mr George had with HMRC. Mr Brinsmead-Stockham notes that the first reference to the existence of any indemnity was in the witness statements of Mr Thornton and Mr George dated 6 November 2017 and 3 November 2017 respectively.

49. In addition, there is no reference to the agreement (in particular as regards enfranchising the C and D Ordinary shares) in TRL's annual financial reports for the years ended 31 March 2012 and 2013 (save that in the latter case, it does state in one of the notes to the balance sheet that the C and D Ordinary shares carried voting rights since 9 January 2013).

50. Mr Brinsmead-Stockham also notes that it was the habit of Mr Thornton to ensure that important agreements were properly documented - and that TRL had legal advisors

(both in Huddersfield and in Manchester) who were able to prepare such agreements for it. Mr Brinsmead-Stockham referred in particular to Mr George's employment agreements, and to the deed of indemnity.

51. Mr Thornton explains the absence of any reference to Mr George's undertaking to pay the shareholders' tax from his letter of 25 September 2016 because he wrote that letter himself, and at that time did not appreciate its importance and therefore the need to refer to it.

52. As regards the absence of any formal documentation relating to the agreement, Mr Thornton said that it was not his habit to document these kinds of arrangement - it was not the way he operated - indeed, there are no notes of any of the many meetings he had with Mr George. He only had formal agreements prepared in cases either where there was some legal requirement for an agreement to be documented (as is the case for employment agreements), or where he was acting on behalf of other parties, and a formal agreement was needed to protect them (as was the case for the deed of indemnity). But otherwise, he was content not to rely on documents.

53. The absence of any reference to the agreement from TRL's annual financial statements was explained both by Mr George and by Mr Thornton as being because these were prepared by the company's finance director, who may not have been aware of it.

54. Mr Brinsmead-Stockham cross-examined both Mr Thornton and Mr George as to whether Mr George had expressed any intention to leave TRL. He noted that Mr George had made a considerable financial investment in TRL shares, which would have appreciated significantly in value – and if he left voluntarily, then under the terms of the company's articles of association, he would only be entitled to receive his original investment for his shares, and that this would be a significant financial disincentive to resigning. Mr Thornton's response was that there was every risk that Mr George might leave, and he wanted to pre-empt that possibility by proposing the agreement that they concluded. Mr George said that he fortunately did not have to consider leaving, given Mr Thornton's proposal – but that he would certainly have considered resigning otherwise. The fact that he had a considerable investment in TRL was irrelevant to that decision – as it was a small minority stake in the company, it had little value if TRL was not sold.

55. Having considered all of the evidence, I am in no doubt that Mr George and Mr Thornton reached a "meeting of minds" on 21 February 2012, notwithstanding the absence of any corroborating evidence. The oral evidence is compelling, and I am satisfied that both Mr Thornton and Mr George are honest and reliable witnesses.

56. Actavis had withdrawn the previous day from negotiations to sell the company. I can understand that the negotiations with Actavis might well have been time consuming and difficult, and that their withdrawal placed the company with an uncertain future. It was absolutely necessary for Mr Thornton to ensure that Mr George remained with the business for the foreseeable future, in order to "steady the ship" and then prepare the company for another sale attempt.

57. At their meeting on 21 February, Mr Thornton and Mr George had a considerable number of matters to discuss - of which the retention of Mr George and the enfranchisement of his shares was only one out of many topics. This was a meeting between the chairman of the company's board and the chief executive - two senior directors. Most of what they discussed would relate to operational matters. And whilst I may find it surprising that there was no record of their discussions (or at least of "actions points" arising out of those discussions), the evidence is that this is the way they had always operated, as two individuals who had always worked closely together and had considerable trust in each other. I accept the evidence of both Mr Thornton and Mr George that it was not their habit to document these kinds of agreement reached between business colleagues who worked together closely and had a strong and trusting relationship. In this context, the absence of any corroborating document becomes understandable.

58. I therefore find that there was such a meeting of minds, and the terms of the agreement that they reached were that:

(1) TRL would be put up for sale within the next two years;

(2) Mr George would stay with the company until it was sold;

(3) Mr George's shares would become eligible for ER by giving them voting rights; and

(4) Mr George would pay costs incurred by the shareholders in the event that they were taxed in consequence of any "value shifting" arising on the enfranchisement of his shares.

59. Although I am satisfied that Mr Thornton and Mr George reached an agreement, I am not satisfied that in reaching this agreement Mr Thornton acted as agent for the other shareholders. I find that the agreement was between Mr George and Mr Thornton (acting personally), and not between Mr George and all the other shareholders. Any undertaking by Mr Thornton to enfranchise Mr George's shares could only have been an undertaking to use his reasonable endeavours to obtain the consent of the other shareholders.

60. The point here is that a special resolution of the TRL shareholders would be required to amend its articles of association to enfranchise any of Mr George's shares. In addition, class consents would be required. The special resolution would require a 75% majority of those attending and voting at a general meeting of the company, or a written resolution signed by those holding 75% of the voting shares. Mr Thornton did not, on his own, control sufficient of the TRL shares to be able to procure the passage of a special resolution. In order for there to be an agreement on which Mr George could rely to get his voting rights, the agreement would need to be not just with Mr Thornton – but also with other shareholders holding sufficient numbers of shares to be able to pass a special resolution and any necessary class consents.

61. The evidence that Mr Thornton had been given authority to act for the other shareholders is, at best, extremely weak.

62. Mr Firth referred to the fact that the other shareholders left Mr Thornton to get on with running the company, and it was therefore implicit that he had their authority to act on their behalf. But the other shareholders were just that – shareholders – and not directors. The nature of a company under English law is that day-to-day management is delegated to the directors. The issues described by Mr George in the white space in his tax return as being decided without reference to the shareholders (corporate strategy, acquisitions, brand, sales and funding) are properly decisions for the directors and not the shareholders (and the reference in the white space to the decisions being made with Mr Thornton would be in his capacity as a director). Shareholders' rights to interfere in the actual management of a company are very limited; if they are dissatisfied with the way in which the company is managed, their principal remedy is to vote to change the directors. I therefore place no weight on this point.

63. Mr Firth also referred to the tax clearance application for the Actavis sale as evidence that all the shareholders had previously given consent to the enfranchisement of Mr George's shares – this, he submits, demonstrates that Mr Thornton had authority to enter into an agreement with Mr George on their behalf to enfranchise his shares. Mr Thornton, when giving evidence, also said that the family had previously agreed to Mr George being given voting rights.

64. However, that agreement was in a very different context and related to a different entity. The proposal was that a new Holdco be incorporated, which would acquire both TRL and another company - and Holdco would be 50.1% owned and controlled by Actavis. Further, all of the ordinary shares to be issued by Holdco would carry voting rights - which would include the B Ordinary shares issued as consideration in exchange for the (non-voting) A Ordinary shares in TRL, as well as the C Ordinary shares to be issued to Mr George. In my view, an agreement by members of Mr Thornton's family that Mr George's consideration shares confer voting rights in circumstances where the family does not control the company (Holdco), is very different from a proposal that Mr George's shares in TRL are enfranchised in circumstances where the family continue to have control. Whilst I do not doubt that the family might well agree to a recommendation made by Mr Thornton that Mr George's shares be enfranchised - if such a recommendation were to be made - that is very different to Mr Thornton having been given the authority by his family to make such an agreement on their behalf. I do not consider that consent by family members to Mr George's consideration shares in Holdco having voting rights can be translated into an agreement that Mr George's shares in TRL should be enfranchised. I therefore find that Mr Thornton did not have the authority of the other shareholders to agree on their behalf with Mr George to enfranchise the C and D Ordinary shares.

65. Further, as can be seen from the table in the Appendix, a substantial number of the TRL shares were held by trusts. Unless the instrument governing the trust expressly states otherwise, trustees can only act with unanimity (see *Luke v South Kensington Hotel Co* (1879) 11 ChD 121 (CA) and *Snell's Equity* (33rd edition (2015)) at 28-002, neither cited to me – although the requirement for unanimity was raised by me during the course of submissions). There was no suggestion by either of the parties (let alone any evidence) that the instruments governing these trusts provided for decisions by their respective trustees to be made by majority voting. Two of the trusts have non-family

trustees. Mrs Nancy Whitely's discretionary settlement (holding 1850 A Ordinary shares and 1900 B Ordinary shares) has as its trustees Mr Thornton and Richard Ward (I assume from the address given for him that he is, or was, a solicitor at Baxter Caulfield, one of the firms of solicitors regularly instructed by TRL). The trustees of JA Thornton's 1997 personal settlement (holding 5098 B Ordinary shares) are Barclays Wealth Trustees (Isle of Man) Limited. It will be recalled that only the B shares have voting rights, and so the total number of votes that can be cast by these trustees would be 6998. This represents 27.6% of the total number of votes (25,307) that can be cast on a poll at a general meeting of TRL. As a special resolution is required to amend TRL's articles of association to enfranchise Mr George's shares, these trustees would have the power to block the passage of such a special resolution (which requires a 75% majority of those voting).

66. Mr Firth says that this analysis is incorrect, as the first named holder of the shares held subject to Mrs Nancy Whitely's discretionary settlement is Mr Thornton - and in the event of any disagreement between the holders about the exercise of any vote, it is the first named holder who prevails. Thus, in the case of Mrs Nancy Whitely's discretionary settlement, only the agreement of Mr Thornton to the enfranchisement was required. On this basis, Mr Firth submits, only the shares held by Barclays Wealth Trustees (Isle of Man) Limited are taken out of the calculation. As their shares represent only 20.1% of the total number of votes, they could not block a special resolution.

67. But Mr Firth's submission is predicated on Mr Thornton being able to overrule Mr Ward in the event of a disagreement between them. But, as trustees can only act with unanimity, the agreement of Mr Ward would needed to have been obtained in order for Mr Thornton to have authority to reach any agreement on behalf of the trustees of Mrs Nancy Whitely's discretionary settlement, and there is no evidence that his agreement had been sought or obtained. Interestingly *Luke v South Kensington Hotel Co* concerned an agreement signed on behalf of a trust by only two out of its three trustees – the Court of Appeal refused to give effect to the agreement on the grounds that the agreement did not bind the trust as the consent of the third trustee had not been obtained. So Mr Thornton could not enter into an agreement on behalf of Mrs Nancy Whitely's discretionary settlement without the consent of Mr Ward. And although Mr Thornton may well have been able to vote the shares held by Mrs Nancy Whitely's discretionary settlement without the consent of Mr Ward, that would have given rise to a breach of trust - with all the consequences that follow.

68. Mr Brinsmead-Stockham also noted the fact that the written special resolution (and class consents) that were actually passed by the shareholders included a statement in the rubric that they were free to withhold their signature and agreement from the resolution. I place little weight on the inclusion of this provision in the rubric, as it clearly forms part of the draftsman's standard form "boilerplate", as do the other provisions in the rubric.

69. I therefore find that any agreement made with Mr George by Mr Thornton was made on only on his own behalf, and not on behalf of the other shareholders in TRL.

Were the terms of the agreement certain?

70. An agreement will not give rise to a legally enforceable contract if its terms are:

> so vague or uncertain that no definite meaning can be given to it without adding further terms. (*Chitty on Contracts*, 32nd edition (2015)) at 2-147, cited with approval in *Kunicki v Hayward* [2016] EWHC 3199 (Ch) at [152])

71. Mr Firth says that the terms of the 21 February agreement (as set out in paragraph [58]) are self-evidently certain. Mr Thornton agreed (i) to put TRL up for sale within two years, and (ii) enfranchise Mr George's shares, and in return Mr George agreed (a) to stay with TRL until a sale, and (b) to indemnify the shareholders for any tax consequences arising from the enfranchisement.

72. Mr Brinsmead-Stockham says that the terms are insufficiently certain in several respects. First, how many shares were to be enfranchised - all of Mr George's C and D Ordinary shares, or only sufficient so that his total voting rights reached 5%? I note that it would only be necessary to enfranchise Mr George's 1547 D Ordinary shares to give him a 5% voting entitlement, and that it would not be necessary to enfranchise the 600 C Ordinary shares.

73. In his evidence, Mr Thornton said that he had given consideration to "switching on" the voting rights attaching to Mr George's shares, and he discussed "switching on" these rights with Mr George in the meeting on 21 February 2012. Mr George's evidence was similar and consistent. However, in both cases their evidence was that Mr George's shares would be enfranchised so that he became entitled to ER (subject to meeting the other requirements of the relief). Mr Thornton said that they did not discuss an exact number of shares to be enfranchised, nor the mechanics for achieving this - but that the 5% requirement was discussed and agreed.

74. When Mr George was asked during cross-examination whether there was any discussion about the number of shares to be enfranchised, or how it was going to be effected, he answered that Mr Thornton

> [...] just said he was going to do it and that was enough for me. I had every reason to believe that it was just an issue of advisors telling [Mr Thornton] how to do it. I still don't know why it is complicated.

75. Neither mentioned in their evidence whether all of Mr George's shares would have their voting rights "switched on", or just the voting rights attaching to the D Ordinary shares.

76. Whilst I find that there was an agreement that Mr George would have his shares enfranchised, I find that the agreement did not address whether all of his shares would be enfranchised, or just his D Ordinary shares. I therefore find that there was uncertainty as to the number and class(es) of the shares held by Mr George that were to be enfranchised.

77. Secondly, Mr Brinsmead-Stockham refers to the indemnity, and submits that the terms of the indemnity were never agreed - instead the agreement on the part of Mr

George (to pay the shareholders for any tax that they might have) amounted to an agreement that Mr George would indemnify the shareholders on terms to be agreed.

78. Finally, Mr Brinsmead-Stockham submits that the time for performing the agreement (in particular the time within which the shares should be enfranchised) was not specified. Mr Firth says that the agreement was that the shares should be enfranchised immediately - if a person promises to do something, then the ordinary interpretation is that performance is immediate, unless there is an express term to the contrary. Mr Brinsmead-Stockham referred me to *Chitty* at 21-021, which states that where a contract is silent as to the timing of performance, then the law implies a reasonable time for performance, having regard to all the circumstances.

79. In reaching any conclusion relating to the certainty of the terms of the agreement, I must bear in mind that too strict an application of the requirement of certainty could result in the striking down of agreements intended by the parties to have binding force: see *Chitty* at 2-148 which quotes Lord Wright's speech in *Hillas & Co Ltd v Arcos Ltd* (1932) 147 LT 503 (HL) where he said:

> Businessmen often record the most important agreements in crude and summary fashion; modes of expression sufficient and clear to them in the course of their business may appear to those unfamiliar with the business far from complete or precise. It is accordingly the duty of the court to construe such documents fairly and broadly, without being too astute or subtle in finding defects; but on the contrary, the court should seek to apply the old maxim of English law, *verba ita sunt intelligenda ut res magis valeat quam pereat*. That maxim, however, does not mean that the court is to make a contract for the parties, or to go outside the words they have used, except insofar as they are appropriate implications of law.

80. The difficult question is whether a court would imply terms into the agreement reached between the parties to give it sufficient certainty so as to be enforceable, or whether that would amount to going outside the words they have used so as to make a contract for the parties.

81. I have no difficulty in implying into the agreement a term that a reasonable time be allowed for its performance. This would meet the "officious bystander" test, and is certainly consistent with the subsequent actions of Mr George and Mr Thornton. Mr George was aware that Mr Thornton was proceeding (at a deliberate pace) with the enfranchisement. Both were also engaged in running the business, and in particular in dealing with major litigation in New York. Holidays also intervened. All of this is consistent with there being a reasonable time implied into the agreement - and I so find.

82. However, I have difficulty in implying other terms into the agreement. Whether both the C and D Ordinary shares should be enfranchised, or just the D Ordinary shares, would not meet the officious bystander test. Which shares should be enfranchised is not something that would be obvious to a bystander. This is a key term to the agreement, and I find that the uncertainty in identifying the shares to be enfranchised must be fatal to any legal enforceability.

83. I discuss below (in relation to "consideration") whether the agreement reached in relation to the indemnity was an agreement, or just an "agreement to agree". An "agreement to agree" is self-evidently uncertain as to its terms such that it is not enforceable. For the reasons expressed below, I find that the agreement reached relating to the indemnity was an "agreement to agree", and accordingly there was no certainty as to the terms on which Mr George was to provide an indemnity.

84. I therefore find that there was uncertainty both as to (a) which of the class or classes of shares held by Mr George were to be enfranchised, and (b) the terms of the indemnity to be given by Mr George. Accordingly, I find that the terms of the agreement were not sufficiently certain as to be legally enforceable.

Was there an intention to create legal relations?

85. Mr Firth says that in discussions between business people, there is a strong presumption that agreements reached between them are intended to be legally enforceable (this contrasts with agreements reached in a social or domestic context where there is no such presumption). *Chitty* at 2-168 says:

> In the case of ordinary commercial transactions it is not normally necessary to prove that the parties to an express agreement in fact intended to create legal relations. The onus of proving that there was no such intention "is on the party who asserts that no legal effect is intended and the onus is a heavy one". In deciding whether the onus has been discharged, the courts will be influenced by the importance of the agreement to the parties, and by the fact that one of them has acted in reliance on it.

86. The quotation in the citation from *Chitty* is from the decision of the High Court in *Edwards v Skyways Ltd* [1964] 1 WLR 349 (QBD) to which I was referred by Mr Firth, and in particular to the judgement of Megaw J at 355 (cited with approval in *Esso Petroleum Co Ltd v CEC* [1976] 1 WLR 1 at 6):

> In the present case the subject matter of the agreement is business relations, not social or domestic matters [...] I accept the propositions [...] that in a case of this nature the onus is on the party who asserts that no legal effect was intended, and the onus is a heavy one.

87. Mr Firth submits that the agreement reached between Mr George and Mr Thornton was plainly reached in a business context, and there is no basis for displacing the presumption that the agreement was intended to be legally binding.

88. Mr Brinsmead-Stockham submits that in the circumstances of this case, HMRC are not subject to a heavy burden to demonstrate that there was no intention to create legal relations. That burden only exists in the context of "ordinary commercial contracts", and the agreement in this case was not such a contract given that:

(1) it related to the internal operations of a private family company;

(2) Mr Thornton and Mr George had a long standing and close working relationship based on trust;

(3) the agreement was aimed solely at achieving a tax result, namely enabling Mr George to claim ER, and was not therefore "commercial";

(4) the informal nature of the circumstances in which the agreement was made;

(5) the vagueness of the terms of the agreement; and

(6) the absence of any record of the terms of the agreement.

89. Mr Firth's answer to points (1), (2), and (3) are that these are irrelevant to the question. The fact that the agreement related to a private family-owned company does not mean that there is no business context. The fact that Mr George (an outsider) had tied-up substantially all his wealth in a small minority holding was extremely important to him and was a good reason for the agreement to be enforceable at law. Also irrelevant is the fact that Mr George and Mr Thornton had a relationship based on trust, as many commercial relationships are long-standing and involve trust. Mr Firth answers points (4) and (6) similarly - and point (5) has already been discussed in the context of whether the agreement is sufficiently certain.

90. I was referred by Mr Brinsmead-Stockham to the decision of the High Court in *Orion Insurance Co plc v Sphere Drake Insurance plc* [1990] 1 Ll Rep 465, where the court held that an agreement reached between the parties was not intended to be legally binding. It is worth noting that the factual background in the *Orion* case was extraordinarily complex. The evidence of a Mr Sage, who had been Orion's General Manager at the relevant time, that the agreement was not intended to be legally binding, played a significant part in Orion's victory. But whether Mr Sage had perjured himself became an issue in subsequent litigation, although ultimately Langley J in *Sphere Drake Insurance Plc & Anor v Orion Insurance Company Plc* [1999] EWHC 286 (Comm) decided that he had not committed perjury and had given evidence that he honestly believed to be true. Suffice it to say, I am inclined to treat the Orion case with some caution. But it does provide an example of circumstances where a commercial agreement was found not to be intended to give rise to legally binding obligations on the parties.

91. The question in issue here is whether Mr Thornton and Mr George intended that their agreement should be legally binding.

92. Both were cross-examined on the point by Mr Brinsmead-Stockham. Mr Thornton refused to be drawn on whether their agreement was intended to be legally binding. He refused to describe the agreement reached with Mr George as a "contract". Instead, he described it as "an agreement between two senior people who had things to agree". When asked if a breach of that agreement would give rise to a liability to pay damages, Mr Thornton replied that he "didn't think of the agreement being a legal agreement requiring signing" and that "a case would have to be brought and decided" and that he would not "second guess" the result.

93. Mr George said "yes" when asked during cross-examination whether he understood that the agreement he reached with Mr Thornton to be a legally binding oral contract. But when then asked if he would sue Mr Thornton if his shares were not enfranchised, his response was more equivocal. He said that he would have "absolutely

gone and got legal advice" and have "gone through the paperwork". Mr George said that he "would have had to take stock".

94. Mr Firth submits that even though neither Mr Thornton nor Mr George had thought on 21 February, in terms, that they intended to create a legal relationship, this is because ordinary business people do not think in such legalistic terms - which is why there is a strong presumption that agreements made in a commercial context are intended to be legally binding.

95. Having weighed all the evidence, I have reached the conclusion, and find, that Mr Thornton and Mr George did not intend their agreement to be legally binding.

96. My reasons are as follows. First, the agreement was reached during the course of a wide-ranging discussion about the future of TRL. Many issues were discussed, and agreement reached on how to take the business forward given the abandonment of the sale. There has been no suggestion that the agreements reached between Mr Thornton and Mr George about business strategy, stabilising and retaining the wider management team, potential acquisitions, and generally rebuilding the business were intended to be legally binding. Indeed, it would be unusual if agreements about the internal management of a business reached during the course of discussions between directors created a legally enforceable contract. The agreements reached about voting rights, sale of the company and the indemnity were reached during the course of this wide-ranging discussion, and were not segregated or distinguished in any way from the other matters discussed and agreements that were reached.

97. Secondly, I agree with Mr Firth that there is no reason why the context of a family-owned private company should be less "commercial" than any other company. But the point here is not that the company in question is a private family company, rather that the agreement was reached in the course of a discussion between directors about the internal management and future strategy of their company - and such agreements are generally not intended to create legally enforceable contracts, irrespective of whether the company is private, listed, family-owned, or institutionally-owned.

98. Thirdly, the oral evidence of both parties tends to support the absence of any intention to create a legally binding relationship. Mr Thornton deliberately ducked the issue when questioned by Mr Brinsmead-Stockham. Although Mr George gave an initial answer of "yes" to the question, his subsequent answers (when questioned in more detail) were equivocal. Having to seek legal advice, and having to "go through the paperwork" as to whether he might be able to sue for breach, suggests to me that Mr George was uncertain as to whether he had created a legally binding agreement. I am not persuaded by Mr Firth's submission that Mr Thornton and Mr George intended to create a legally binding agreement, even though they may not have thought that they had done so.

99. Fourthly, the conduct of Mr Thornton subsequent to 21 February is consistent with the agreement not being legally binding. Mr Thornton said that he was concerned about the risk that Mr George would assume under the indemnity, and wanted to have

the company's professional advisors "work through" the issues. The minutes of Mr George's meeting with HMRC on 2 February 2017 confirm this; they say "[Mr Thornton] also realised that there could be an impact on the other shareholders so he needed to work around this, and he needed to understand the tax consequences etc. too." I recognise that Mr Thornton did not attend this meeting (or even review these minutes), so the statements in these minutes as regards Mr Thornton's intentions need to be treated with some caution. But the description in the minutes is consistent with Mr Thornton's oral evidence, and the minutes must reflect Mr George's understanding of why there was an 11-month delay. In any event, Mr Thornton's actions are inconsistent with him believing that he had entered into a legally binding agreement. Rather, they suggest that Mr Thornton wanted to obtain professional advice before finally committing Mr George and the other parties to an agreement that Mr George might not be able to afford to keep.

100. Finally, Mr George regarded the agreement relating to voting rights as of far less importance than the undertaking originally given by Mr Thornton that the company would be sold by the time he retired, which would be no later than 2017. During cross-examination, Mr George was asked about why there was no record of the agreement reached on 21 February 2012. Mr George replied by comparing the 21 February agreement with the earlier agreement under which he agreed to invest nearly £1m in the company, and Mr Thornton gave an undertaking to put the company up for sale by the time he retired in 2017. Mr George said that he had not asked for that agreement to be put in writing - and he regarded that agreement (which has been acknowledged by all parties as not being legally binding) as “more important than voting rights”. If Mr George was content to rely on an agreement binding in honour only in relation to his investment in TRL (and a subsequent sale), it would follow that he would probably also be prepared to rely on such a non-binding agreement in relation to voting rights - a matter he regarded as much less important.

101. I therefore find that there was no intention that the agreement made between Mr Thornton and Mr George on 21 February 2012 was intended to give rise to a legally binding contract.

Was the agreement supported by consideration?

102. Mr Brinsmead-Stockham identifies two promises made by Mr George as consideration for Mr Thornton’s promise to enfranchise the shares. These are that:

(1) Mr George would stay with the company until it was sold; and

(2) Mr George would pay costs incurred by the shareholders in the event that they were taxed in consequence of any "value shifting" arising on the enfranchisement of his shares.

103. Mr Brinsmead-Stockham submits that neither of these promises is capable of constituting consideration for Mr Thornton’s promise to enfranchise Mr George’s shares.

104. As regards Mr George's agreement to stay with TRL, Mr Brinsmead-Stockham submits that there was in fact no change in the terms of Mr George's employment contract with TRL. Indeed, in a letter dated 9 February 2016 to HMRC from Mr George's tax advisor, it is stated that "there has been no change in [Mr George's] employment contract". Thus, says Mr Brinsmead-Stockham, Mr George's promise was simply to continue to perform his existing contractual duties of employment - and such an agreement cannot constitute consideration, as to which see *Stilk v Myrick* (1809) 170 ER 1168 (KB).

105. Mr Firth's response is that the promise made by Mr George to continue to work for the company was made to Mr Thornton (for himself and as agent for the other shareholders), and not to TRL. As the promise was made to the shareholders, and not the company, Mr George was entering into a new obligation, which would constitute valid consideration, and *Stilk v Myrick* is irrelevant.

106. Given the broad range of the discussions on 21 February, it is difficult to untangle whether the agreement Mr George reached with Mr Thornton was in Mr Thornton's capacity as a director (and chairman) of TRL, in his capacity as a shareholder, or in his capacity as agent for the other shareholders. But on balance I find that Mr George's promise to continue to work for the company was made to Mr Thornton in his capacity as a shareholder, as well as to Mr Thornton in his capacity as a director - and therefore as agent for TRL. To the extent that it was made to Mr Thornton in his capacity as a shareholder, it is a new obligation, and capable of constituting consideration.

107. I do not find (for the reasons given at paragraphs [64] to [68] above) that Mr Thornton was acting as agent for the other shareholders.

108. Mr Brinsmead-Stockham submits that Mr George's promise to provide an indemnity to the other shareholders amounts to an "agreement to agree". Such an agreement is incapable of amounting to a binding contractual obligation (due to lack of certainty) (see *Walford v Miles* [1992] 2 AC 128 (HL), *per* Lord Ackner at 138C-D). It therefore cannot constitute good consideration. Mr Brinsmead-Stockham submits that this is demonstrated by the fact that Mr George subsequently entered into a formal deed of indemnity dated 4 January 2013, which sets out the detailed terms of the indemnity at some length.

109. Mr Firth responds by saying that Mr George's oral evidence was clear that he agreed to indemnify the shareholders for any tax cost arising from the enfranchisement of his shares - and the fact that this agreement was subsequently the subject of a deed does not turn the earlier agreement into an "agreement to agree".

110. I find that the agreement reached on 21 February 2012 in relation to the indemnity was an "agreement to agree" for the following reasons.

111. First, the terms of the deed of indemnity as eventually executed go well beyond a simple deed confirming a prior agreement to indemnify the other shareholders for any tax cost they might incur as a result of enfranchising Mr George's shares. The deed includes extensive provisions relating to the conduct of any claims made by HMRC,

grossing-up provisions in respect of withholding taxes, and a grossing-up provision for any liability that might arise in consequence of the doctrine set out in the *Zim Properties* decision. These go well beyond any terms that could be implied.

112. Second, the scope of the indemnity is wider than just capital gains tax arising in consequence of any "value shifting". The indemnity also extends to inheritance tax falling on the shareholders. In addition, the deed includes an indemnity in favour of TRL for any PAYE or national insurance contributions that might arise (presumably under Part 7, Income Tax (Earnings and Pensions) Act 2003). Whilst (at a stretch) I can understand that inheritance tax falling on the other shareholders might fall within the scope of Mr George's statement that he would meet the shareholders' tax costs, the statement could not be interpreted to extend to PAYE and NICs.

113. Third, the indemnity is expressed to relate to taxes arising "by reason of the Event" (namely the passing of the written special resolution to amend TRL's articles of association to confer voting rights on Mr George's shares that was circulated on 3 January 2013). However, if Mr Firth is correct in his argument that voting rights were conferred on Mr George's shares with effect from 21 February 2012 by virtue of the operation of the equitable maxim, then any tax liability would arise at that point, and not on the subsequent passage of the special resolution. In any event, on general tax principles, if there had been an antecedent agreement between Mr George and the other shareholders to enfranchise his shares, then the time of the disposal (for CGT) and disposition (for IHT) would have been at the time that agreement was concluded - not at the time the subsequent ministerial acts to give effect to that agreement were completed. All of this suggests that not only was there only an "agreement to agree" in relation to the indemnity, but that the whole arrangement was an "agreement to agree", intended only to take effect once formal documentation had been prepared and executed. In this context, I note that there is no reference in the recital to the deed of indemnity to the deed giving effect to an antecedent agreement (which is what I would have normally expected to see in such a case).

114. Fourth, the actions of Mr Thornton in the period after 21 February are consistent with the agreement reached being an "agreement to agree". Mr Thornton said in the course of giving evidence that he was concerned about the potential exposure of Mr George under the indemnity, and needed to work through the issues (and this is corroborated by the minutes of Mr George's meeting with HMRC on 2 February 2017). This is not consistent with the actions of someone who considers that they have entered into a binding agreement - they are consistent with someone who considers that they have agreed to something "in principle" with the details remaining to be resolved, in other words, an "agreement to agree".

115. I therefore find that Mr George's promise to indemnify the other shareholders for any tax costs incurred as a result of the enfranchisement of his shares amounted to an "agreement to agree", and did not constitute good consideration.

Conclusions

116. For the reasons given above, I find that an agreement was reached on 21 February 2012 between Mr George and Mr Thornton, but I find that was not a legally binding contract capable of enforcement. It was a "goodwill" agreement, binding in honour only.

117. Even if I am wrong, and it was legally enforceable, it was an agreement solely with Mr Thornton, and not with the other shareholders. It was therefore incapable of giving Mr George an enforceable entitlement to have the articles of association of TRL amended to enfranchise his shares.

118. As I find that there was no legally binding agreement, it follows that Mr George's appeal must fail, and I therefore dismiss it.

119. However, in case I am wrong, and as the points were fully argued before me, I go on to consider the other points in the case made by Mr Firth.

Is the agreement capable of enforcement by specific performance?

120. The analysis assumes that I was wrong in finding that the agreement of 21 February is not a legally binding contract.

121. It goes without saying that this Tribunal has no powers to enforce any contract, let alone make an order for specific performance. However, for the purposes of this appeal, I have to decide whether a court of equity would made an order for specific performance if there were a breach.

122. I agree with Mr Firth that the starting point is that an agreement for the purchase of shares in an unlisted company is specifically enforceable (see for example *Odessa Tramways v Mendel* (1878) 8 ChD 235, and *Grant v Lapid Developments Ltd* [1996] BCC 410).

123. *Snell's Equity* at 17-010 says:

> The court will not specifically enforce contracts for the sale of Government stock or shares freely available in the market, but it will order specific performance of an agreement for the sale and purchase of stock or shares which cannot readily be bought in the market. So, too, specific performance has been ordered of a contract for the sale of an annuity, and for the sale of debts proved in a bankruptcy, for as the dividends were uncertain, the damages recoverable at law might not accurately represent their value.

124. Mr Firth goes on to submit that the same must logically be true for an agreement relating to the acquisition of voting rights in an unlisted company, as there is no rational basis for distinguishing the situation, as such voting rights cannot be readily purchased in the market. It must follow that a court would order specific performance of the 21 February agreement.

125. Mr Brinsmead-Stockham submits that a court of equity would not award specific performance of the 21 February agreement for five reasons:

(1) damages would be an adequate remedy;

(2) impossibility;

(3) lack of mutuality;

(4) uncertainty of obligations; and

(5) delay/acquiescence.

126. I deal with each of these reasons in turn.

Damages would be an adequate remedy

127. A court will not make an order for specific performance if damages would provide an adequate remedy for the claimant (see *Co-operative Insurance Society Ltd v Argyll Stores (Holdings) Ltd* [1998] AC 1).

128. Mr Brinsmead-Stockham submits that this is a clear case where damages would be an adequate remedy for Mr George. The only reason why he wanted the voting rights was so that his shares would qualify for ER on a sale. The loss Mr George suffers would be the amount of additional tax that he would have to pay as a consequence of not being entitled to claim ER. Mr Brinsmead-Stockham submits that accordingly money would be an adequate remedy to compensate Mr George for any breach.

129. Mr Brinsmead-Stockham referred me to the decision of the High Court in *Midtown Ltd v City of London Real Property Co Ltd* [2005] EWHC 33 (Ch) where a landlord was denied an injunction to protect a right to light because

> it was interested in the property only from a money-making point of view.

130. Mr Brinsmead-Stockham submits that just because it may be difficult to quantify damages, that does not mean that damages are inadequate (see *Fothergill v Rowland* (1873-4) LR 17 Eq 132 and *Snell* at 17-007). In any event, says Mr Brinsmead-Stockham, damages in this case would be easy to quantify, as it would be 18% of the increase in value in Mr George's shareholding, up to a maximum of £1.8m (the calculation is based on the reduction in the rate of CGT when ER is taken into account, and the £10m lifetime limit on gains qualifying for ER).

131. Mr Firth's response is that damages would not be an adequate remedy for Mr George in the circumstances of this appeal. The *Midtown* case was not concerned with a contract relating to shares in an unlisted company, and the reasons why an order for specific performance was refused were much broader than the mere fact that the claimant's interest in the property was from a "money making point of view". Moreover, the fact that the ultimate intention is to make a profit does not exclude specific performance as a remedy, otherwise many contracts relating to land or unlisted shares would not be enforceable by specific performance as profit is often an underlying motive behind the agreement. Mr Firth referred me to *North Eastern Properties Ltd v*

Coleman [2010] EWCA Civ 277 as an example where an order for specific performance was granted in circumstances where the land was wanted for sale or on-letting rather than own use.

132. Mr Firth also submits that it would be impossible (and not merely difficult) to quantify Mr George's loss in the event of a breach unless and until all of the following are known: (a) the sale price, (b) the ER lifetime limit, (c) the relevant "ordinary rate" of CGT, and (d) the ER rate of CGT (the last three are changed from time to time).

133. On this question, I agree with Mr Firth and find that damages would not be an adequate remedy for Mr George. Whilst the ultimate damage that he suffers is financial, that is no reason of itself to exclude specific performance as a remedy. The point is that damages would be impossible to compute until after such time as he sells his shares for the reasons given by Mr Firth.

Impossibility

134. This can be dealt with quickly. Mr Brinsmead-Stockham's submission is that Mr Thornton did not control sufficient voting rights to be able to pass a special resolution of TRL's shareholders on his own. On the basis that only Mr Thornton (and none of the other shareholders) were parties to the 21 February agreement, a court would not compel Mr Thornton to pass a special resolution, as that was something that he was not lawfully competent to do (see *Warmington v Miller* [1973 1 QB 877 *per* Stamp LJ at 886G-H).

135. The answer to this submission is that (subject to the wrinkle discussed below) when considering the availability of specific performance, I have to assume that my finding in relation to the agreement was wrong – and that indeed Mr Thornton did have the authority of the other shareholders to enter into an agreement on their behalf.

136. The wrinkle relates to the shares held by JA Thornton's 1997 personal settlement and by Mrs Nancy Whitely's discretionary settlement. Even if Mr Thornton had authority to enter into the 21 February agreement on behalf of the other shareholders, there is a separate question as to whether he had the authority of the trustees to contract on behalf of these two trusts. If the trustees of Mrs Nancy Whitely's discretionary settlement were not parties to the agreement, they could block the passage of a special resolution. In such circumstances, there must be some doubt as to whether a court of equity would order specific performance on the part of the other parties to the 21 February agreement.

137. I therefore find (assuming that my findings in relation to the existence of an agreement are wrong, and subject to the wrinkle discussed above), that a court of equity would not refuse to make an order for specific performance on the grounds of impossibility.

Lack of mutuality

138. The principle of mutuality is that a court of equity will not order specific performance against one party, if it would not have done so in respect of the claimant's own contractual obligations. A court

> will not compel a defendant to perform his obligations specifically if it cannot at the same time ensure that any unperformed obligations of the plaintiff will be specifically performed, unless, perhaps, damages would be an adequate remedy to the defendant for any default on the plaintiff's part (*Price v Strange* [1978] 1 Ch 337 *per* Buckley J at 367-8)

139. Mr Brinsmead-Stockham submits that as Mr George's obligations include an undertaking to continue to work for TRL until it was sold, a court would not order this obligation (a contract for personal service) to be specifically performed. I was referred to the case of *Ogden v Fossick* (1862) 45 ER 1249 as an example of a court refusing to make an award of specific performance: the case concerned a lease of a wharf granted in consideration of the plaintiff agreeing to be employed by the defendants, an order for specific performance in relation to the lease was dismissed on appeal because the plaintiff's employment agreement could not be the subject of an order for specific performance.

140. Mr Firth's response is that the defence is discretionary, and is waived if the defendant accepts the claimant's commencement of performance. I was referred to the judgement of Goff LJ in *Price v Strange* at 358 where he said that the defence of mutuality could be waived. As Mr George commenced performance of his side of the agreement (continuing to work for TRL), Mr Firth submits that the defence of mutuality was waived.

141. I agree with Mr Firth's submissions, to the extent that the defence of mutuality applies to any claim for specific performance, I find that it was waived. I therefore find (assuming that my findings in relation to the existence of an agreement are wrong), that a court of equity would not refuse to make an order for specific performance on the grounds of lack of mutuality.

Uncertainty of obligations

142. As with "impossibility", this too can be dealt with quickly.

143. Mr Brinsmead-Stockham's submission is that the terms of the 21 February agreement are too uncertain to be capable of specific performance (see *Snell* at 17-022 and also *Co-operative Insurance Society Ltd v Argyll Stores (Holdings) Ltd per* Lord Hoffman at 13H-14E). In a sense, this is the flip side of the question of whether there was sufficient certainty for there to be a legally binding contract in the first place. But this analysis in relation to specific performance proceeds on the basis that my findings in relation to the agreement were wrong – and therefore, by implication, the terms of the agreement were sufficiently certain to be enforceable. In such circumstances, the terms would also be sufficiently certain to be capable of specific performance.

144. I therefore find (assuming that my findings in relation to the existence of an agreement are wrong), that a court of equity would not refuse to make an order for specific performance on the grounds of uncertainty.

Delay and acquiescence

145. This is, in essence, a question of whether the application of the equitable doctrine of *laches* would operate as a bar to a court ordering specific performance.

146. Mr Brinsmead-Stockham notes that there was a delay of 11 months between the date of the agreement (21 February) and the date on which voting rights were conferred on Mr George's shares. Whilst Mr Brinsmead-Stockham acknowledges that this delay would not, of itself, have prevented a court from making an order for specific performance, it would be a factor that the court would have taken into account. Given the other reasons listed above, a court would have reached a decision not to make an order for specific performance.

147. I regard this submission as misconceived. The question I need to consider is whether (hypothetically) specific performance would have been ordered if there had been a breach immediately after the agreement had been concluded. Whether a court would make an order for specific performance in (say) January 2013, if the special resolution had not been approved by that time, is irrelevant.

148. Even if *laches* were in issue, given that there would have been an implied term that the voting rights had to be granted within a reasonable time, and given the intervention of the Eurozone crisis, the company's litigation in New York, the need to corral the shareholders to sign the resolutions, and holidays, I do not think that 11 months is an unreasonable period for performance.

149. I therefore find (assuming that my findings in relation to the existence of an agreement are wrong), that a court of equity would not refuse to make an order for specific performance on the grounds of delay or acquiescence (*laches*).

Conclusion

150. I therefore find (assuming that my findings in relation to the existence of an agreement are wrong), that a court of equity would have made an order for specific performance of the agreement on the part of the shareholders if they had been in breach.

Does the equitable maxim that "equity looks on that as done which ought to be done" apply in the circumstances of this case?

151. In the light of my finding, that a court of equity would have made an order for specific performance (assuming that my findings in relation to the existence of an agreement are wrong), I now turn to consider the impact of the equitable maxim.

152. Mr Firth submits that English law treats as done that which ought to be done under a specifically enforceable agreement. In support of this proposition, I was

referred by Mr Firth to the cases of *Walsh v Lonsdale* (1882) 21 ChD 9 (in which the court held that a tenant holding under an agreement for lease holds under the same terms as if a lease had been granted), *Oughtred v IRC* [1960] AC 206 (where an equitable interest in a reversionary interest in shares was held to have been created by an agreement over that interest), and *Neville v Wilson* [1997] Ch 144 (where the court held that a specifically enforceable agreement to assign an interest in property creates an equitable interest in favour of the assignee).

153. Mr Firth submits that "the thing" that is treated as having been done is so treated for all purposes – including for tax purposes. On this he referred me to the decision of this Tribunal in *HSP Financial Planning v HMRC* [2011] UKFTT 106 (TC) where the Tribunal decided that persons selling goodwill to a company in exchange for shares became "participators" in the company at the time of making the contract (at [22]):

> [counsel for HMRC] said that on making the Sale Agreement the partners were entitled to specific performance because they were ready, willing and able to perform their obligations. Their entitlement to acquire the shares was simultaneous to the acquisition by the Appellant of the goodwill.

154. In *Lobler v HMRC* [2015] UKUT 152 (TCC) the Upper Tribunal said at [48]:

> It has never been suggested that before the effect of the availability of specific performance can be taken into account by the FTT, the appellant must go to court and actually obtain the remedy of specific performance. On the contrary, the cases show this is not the case: see *Oughtred v IRC* [1960] AC 206, *Jerome v Kelly* [2004] UKHL 25, *BMBF (No 24) Limited v IRC* [2002] STC 1450 and *HSP Financial Planning v HMRC* [2011] UKFTT 106 (TC). A tribunal such as the FTT must however take into account all the factors that a Court would in deciding whether specific performance would be available, such as whether damages would be inadequate, whether specific performance would require constant supervision, whether the appellant is ready, willing and able to perform, hardship and so on.

155. *Lobler* is a difficult case, and hard cases can sometimes give rise to bad law. There is no dispute that paragraph [48] quoted above is relevant to this appeal. However, other aspects of the decision are more challenging. It is a case relating to rectification where a taxpayer had made the wrong sort of withdrawals from life insurance policies (giving rise to a large tax liability), but if he had made the right kind of withdrawals, he would have incurred a much smaller liability. There are some nice points about the effect of the equitable maxim where rectification is sought – but as *Lobler* is a case about rectification, and not specific performance, I consider that it is not binding upon me in any event.

156. Mr Firth submits that the equitable maxim applies in the circumstances of this case such that Mr George could exercise voting rights over his shares with effect from 21 February 2012.

157. Mr Brinsmead-Stockham submits that there are limits to the application of the equitable maxim. Equity binds the conscience of the promisor in respect of assets

owned by the promisor. He submits that the maxim applies to give the claimant equitable rights (in some form) in property which is (i) owned by the other party; and (ii) the subject of the contract – the paradigm example being the implied trust over land which arises between buyer and seller in the period between exchange and completion. However, in this case, submits Mr Brinsmead-Stockham, Mr Firth seeks to extend the maxim in an entirely novel way – by treating Mr George as having acquired voting rights in the shares he already owns. This is fundamentally different from the circumstances in any of the cited cases, which relate to the acquisition of equitable rights in property owned by the other party.

158. Mr Firth's response is that the authorities give effect to the maxim in the case of an asset that is created and vested in the claimant by virtue of the specifically enforceable agreement (such as the case of an agreement for lease in *Walsh*). To which Mr Brinsmead-Stockham's reply is that although the lease might not have existed, the freehold did – and equity bound the freeholder's conscience in relation to the rights he had granted out of the freehold.

159. The speech of Lord Jenkins in *Oughtred* at 240 indicates the limits of the maxim:

> In truth the title secured by a purchaser by means of an actual transfer is different in kind from, and may well be far superior to, the special form of proprietary interest which equity confers on a purchaser in anticipation of such transfer.
>
> This difference is of particular importance in the case of property such as shares in a limited company. Under the contract the purchaser is no doubt entitled in equity as between himself and the vendor to the beneficial interest in the shares, and (subject to due payment of the purchase consideration) to call for a transfer of them from the vendor as trustee for him. But it is only on the execution of the actual transfer that he becomes entitled to be registered as a member, to attend and vote at meetings, to effect transfers on the register, or to receive dividends otherwise than through the vendor as his trustee.

160. The difficulty that Mr Firth faces is how would a court of equity give effect to the maxim in relation to Mr George's voting rights? In the case of – for example – the sale of land or unlisted shares, equity binds the conscience of the seller by impressing an implied trust over the shares in favour of the buyer. The seller henceforth holds the shares as trustee for the buyer. As indicated in Lord Jenkins' speech in *Oughtred*, that implied trust operates as between the buyer and seller – but does not have effect against the whole world, and does not confer on the buyer a right to vote those shares. In the event that the seller disposed of those shares for value to a *bona fide* third party purchaser without notice, that third party would acquire good title to the shares – notwithstanding the original buyer's equitable interest in those shares, and the operation of the equitable maxim. Any implied trust would then subsist over the sale proceeds and not over the shares.

161. The point here is that voting rights are conferred by the articles of association of TRL. Equity acts *in personam*, and there is nothing equity can do to bind the conscience of the shareholders (not being the parties to the 21 February agreement) which would

have the effect of conferring voting rights on shares they do not own – namely, Mr George's shares.

162. In *HR Trustees Ltd v Wembley plc* [2011] EWHC 2974 (Ch), Vos J (as he then was) said at [59]:

> Equitable maxims should not be taken too far. Their application should […] be strictly confined to the areas in which they can be seen to have been previously applied […] and maxims should only be applied within the parameters of what are clearly understood boundaries.

163. Accordingly, I find that the core of Mr Firth's argument in this appeal is fundamentally incorrect. Even if Mr George was a party to a specifically enforceable contract providing for his shares to be enfranchised, I find that the equitable maxim would not operate so as to confer (in equity) those voting rights with effect from the date of the agreement.

164. It therefore follows that Mr George's appeal must be dismissed on this ground as well.

Can the statutory requirements in s169S TCGA be met by the application of the equitable maxim?

165. As this point was fully argued before me, I will now go on to consider it.

166. Mr Brinsmead-Stockham submits that even if Mr Firth's analysis of the position is correct, Mr George's appeal should still be denied as he does not meet the requirements of s169S(3)(b) TCGA. This sets out the definition of a "personal company" and requires that "at least 5% of the voting rights [in that company] are exercisable by the individual **by virtue of that holding**" (emphasis added).

167. For Mr George to qualify for ER, section 169S(3)(b) requires that he was able to exercise at least 5% of the voting rights in TRL "by virtue of" his holding of ordinary share capital throughout the period of one year ending with the date of disposal.

168. Mr Brinsmead-Stockham submits that this requirement is not satisfied, as he was only able to exercise voting rights in TRL once the special resolution was carried in January 2013 (less than one year before the sale to Stada). Even if Mr Firth's analysis is correct, it would only give Mr George voting rights "by virtue of" being a party to a specifically enforceable agreement with the other shareholders – and this would not satisfy the requirements of s169S(3)(b).

169. Mr Firth submits that Mr George's case is not that he is to be treated as having "floating votes", but rather that the effect of the 21 February agreement is to give him voting shares – the fact that the reason the shares are voting is because of a specifically enforceable contract (rather than because of the company's articles of association) is irrelevant – the source of the voting rights may be different, but the effect is the same.

170. I referred the parties during the hearing to the decision of the House of Lords in *National Westminster Bank plc v IRC* (1994) 67 TC 1, which concerned the availability of business expansion scheme ("BES") relief in relation to shares that were allotted (but not issued) by 16 March 1993. That date was Budget Day, when the Chancellor of the Exchequer announced anti-avoidance legislation, to have effect from 16 March, which would counteract BES relief on certain shares issued on or after 16 March. The relevant legislation was included in the Finance Act 1993. The House of Lords held that although the shares had been allotted, they had not been issued, and so the BES relief was not available. The distinction between allotment and issue is that in the former case, the company has agreed to issue the shares, but the investor is not entered into the register of members as a shareholder. The shares are only issued once the investor is recorded in the register of members as a shareholder in the company. Whilst the *National Westminster Bank* case is not exactly on all fours with the circumstances of this case, it does illustrate that language in tax statutes needs to be construed carefully and precisely.

171. Applying s169S(3)(b) to the facts in this case, I find that even if Mr George was entitled to exercise voting rights (because of the application of the equitable maxim), it would not mean that those rights were exercisable by virtue of his holding of his shares. It follows that TRL would not be Mr George's personal company, and he is therefore not entitled to claim ER.

Conclusions

172. For the reasons given above, I dismiss this appeal.

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

NICHOLAS ALEKSANDER
TRIBUNAL JUDGE

RELEASE DATE: 23 August 2018

Amended pursuant to rule 37 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 on 8 October 2018

Cases cited in skeletons but not mentioned in the decision:
Harnett v Yielding (1805) 2 Sch & Lef 549
The Lindsay Petroleum Co v Hurd (1874) LR 5 PC 221
Zakhem International Construction Ltd v Nippon Kokan KK [1987] Ll Rep 596
Williams v Roffey Bros & Nicholls (Contractors) Ltd [1991] 1 QB 1
Bottrill v Harling [2015] EWCA Civ 564

APPENDIX

Shareholder(s)	A Ord	B Ord	C Ord	D Ord
Hilary Jane Thornton	381	1106		
Anne Rebecca Campbell		3086		
Dieno George			600	1547
Nancy Whitely		100		
Jonathan Henry Thornton		3599		
Margaret Betty Thornton		2		
Jonathan Henry Thornton, James Alexander Thornton, and Hilary Jane Thornton as trustees of the HJ Thornton No 1 Discretionary Settlement	372			
Jonathan Henry Thornton, James Alexander Thornton, and Hilary Jane Thornton as trustees of the HJ Thornton No2 Discretionary Settlement	372			
Hilary Jane Thornton and Jonathan Henry Thornton as trustees of the Margaret Betty Thornton 17 Dec 2002 discretionary settlement		483		
James Alexander Thornton and Anne Rebecca Campbell as trustees of the Margaret Betty Thornton 6 Dec 2002 discretionary settlement		1291		
Jonathan Henry Thornton and Anne Rebecca Campbell as trustees of the Margaret Betty Thornton 5 Dec 2002 discretionary settlement		2177		
Jonathan Henry Thornton and James Alexander Thornton as trustees of the Ralph Thornton Esq and Mrs Margaret Betty Thornton 4 Dec 2002 discretionary settlement		4965		

Anne Rebecca Campbell, James Alexander Thornton and Andrew Neville Campbell as trustees of the AR Campbell No 1 discretionary settlement	63			
Anne Rebecca Campbell, James Alexander Thornton and Andrew Neville Campbell as trustees of the AR Campbell No 2 discretionary settlement	63			
Anne Rebecca Campbell, James Alexander Thornton and Andrew Neville Campbell as trustees of the AR Campbell No 3 discretionary settlement	63			
Anne Rebecca Campbell, James Alexander Thornton and Andrew Neville Campbell as trustees of the AR Campbell No 4 discretionary settlement	63			
Anne Rebecca Campbell, James Alexander Thornton and Andrew Neville Campbell as trustees of the AR Campbell No 5 discretionary settlement	63			
Anne Rebecca Campbell, James Alexander Thornton and Andrew Neville Campbell as trustees of the AR Campbell No 6 discretionary settlement	63			
Anne Rebecca Campbell, James Alexander Thornton and Andrew Neville Campbell as trustees of the AR Campbell No 7 discretionary settlement	63			
Anne Rebecca Campbell, James Alexander Thornton and Andrew Neville Campbell as trustees of the AR Campbell No 8 discretionary settlement	63			
Anne Rebecca Campbell, James Alexander Thornton and Andrew Neville Campbell as trustees of the AR Campbell No 9 discretionary settlement	63			

Anne Rebecca Campbell, James Alexander Thornton and Andrew Neville Campbell as trustees of the AR Campbell No 10 discretionary settlement	62			
Anne Rebecca Campbell, James Alexander Thornton and Andrew Neville Campbell as trustees of the AR Campbell No 11 discretionary settlement	62			
Anne Rebecca Campbell, James Alexander Thornton and Andrew Neville Campbell as trustees of the AR Campbell No 12 discretionary settlement	62			
Anne Rebecca Campbell, James Alexander Thornton and Andrew Neville Campbell as trustees of the AR Campbell No 13 discretionary settlement	62			
Anne Rebecca Campbell, James Alexander Thornton and Andrew Neville Campbell as trustees of the AR Campbell No 14 discretionary settlement	62			
Anne Rebecca Campbell, James Alexander Thornton and Andrew Neville Campbell as trustees of the AR Campbell No 15 discretionary settlement	62			
Anne Rebecca Campbell, James Alexander Thornton and Andrew Neville Campbell as trustees of the AR Campbell No 16 discretionary settlement	62			
Anne Rebecca Campbell, James Alexander Thornton and Andrew Neville Campbell as trustees of the AR Campbell No 17 discretionary settlement	62			
Anne Rebecca Campbell, James Alexander Thornton and Andrew Neville Campbell as trustees of the AR Campbell No 18 discretionary settlement	62			

Jonathan Henry Thornton and James Alexander Thornton as trustees of the JH Thornton No 1 discretionary settlement		60		
Jonathan Henry Thornton and James Alexander Thornton as trustees of the JH Thornton No 2 discretionary settlement		60		
Jonathan Henry Thornton and James Alexander Thornton as trustees of the JH Thornton No 3 discretionary settlement		60		
Jonathan Henry Thornton and James Alexander Thornton as trustees of the JH Thornton No 4 discretionary settlement		60		
Jonathan Henry Thornton and James Alexander Thornton as trustees of the JH Thornton No 5 discretionary settlement		60		
Jonathan Henry Thornton and James Alexander Thornton as trustees of the JH Thornton No 6 discretionary settlement		60		
Jonathan Henry Thornton and James Alexander Thornton as trustees of the JH Thornton No 7 discretionary settlement		60		
Jonathan Henry Thornton and James Alexander Thornton as trustees of the JH Thornton No 8 discretionary settlement		60		
Jonathan Henry Thornton and James Alexander Thornton as trustees of the JH Thornton No 9 discretionary settlement		60		
Jonathan Henry Thornton and James Alexander Thornton as trustees of the JH Thornton No 10 discretionary settlement		60		
Jonathan Henry Thornton and James Alexander Thornton as trustees of the JH Thornton No 11 discretionary settlement		60		
Jonathan Henry Thornton and James Alexander Thornton as trustees of the JH Thornton No 12 discretionary settlement		60		

Jonathan Henry Thornton and James Alexander Thornton as trustees of the JH Thornton No 13 discretionary settlement		60		
Jonathan Henry Thornton and James Alexander Thornton as trustees of the JH Thornton No 14 discretionary settlement		60		
Jonathan Henry Thornton and James Alexander Thornton as trustees of the JH Thornton No 15 discretionary settlement		60		
Jonathan Henry Thornton and James Alexander Thornton as trustees of the JH Thornton No 16 discretionary settlement		60		
Jonathan Henry Thornton and James Alexander Thornton as trustees of the JH Thornton No 17 discretionary settlement		60		
Jonathan Henry Thornton and James Alexander Thornton as trustees of the JH Thornton No 18 discretionary settlement		60		
Jonathan Henry Thornton and James Alexander Thornton as trustees of the JH Thornton No 19 discretionary settlement		60		
Jonathan Henry Thornton and James Alexander Thornton as trustees of the JH Thornton No 20 discretionary settlement		60		
Jonathan Henry Thornton and James Alexander Thornton as trustees of the JH Thornton No 21 discretionary settlement		60		
Jonathan Henry Thornton and James Alexander Thornton as trustees of the JH Thornton No 22 discretionary settlement		60		
Jonathan Henry Thornton and James Alexander Thornton as trustees of the JH Thornton No 23 discretionary settlement		60		
Jonathan Henry Thornton and James Alexander Thornton as trustees of the JH Thornton No 24 discretionary settlement		60		

Jonathan Henry Thornton and James Alexander Thornton as trustees of the JH Thornton No 25 discretionary settlement		60		
Jonathan Henry Thornton and Richard Michael Ward as trustees of the Mrs Nancy Whitely discretionary settlement	1850	1900		
Barclays Wealth Trustees (Isle of Man) Ltd as trustee of JA Thornton's 1997 personal settlement		5098		
Total	**4100**	**25,307**	**600**	**1547**