Neutral Citation: [2023] UKFTT 00089 (TC)

Case Number: TC08717

FIRST-TIER TRIBUNAL
TAX CHAMBER

By remote video

Appeal reference: TC/2019/06568
TC/2019/06569

INHERITANCE TAX - tax planning arrangement involving transfer of reversionary interest – whether excluded property – no – whether a transfer of value – yes – appeal REFUSED

Heard on: 16, 19 – 21 December 2022
Judgment date: 30 January 2023

Before

TRIBUNAL JUDGE AMANDA BROWN KC

Between

(1) THE EXECUTORS OF THE ESTATE OF PETER JOHN LININGTON
(2) THE TRUSTEES OF THE KENT TRUST

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Mrs Bridget Pearce, the Appellant

For the Respondents: James Henderson and Thomas James of counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs

DECISION

INTRODUCTION

1. This appeal is bought pursuant to s224 Inheritance Tax Act 1984 (**IHTA**) (all statutory references are to the IHTA unless otherwise stated) and concerns the validity of two Notices of Determination (**NoDs**) issued by HM Revenue & Customs (**HMRC**) under s221. The first was issued to Mrs B Pearce (**BP**), Mr D Linington and Mr J Linington in their capacity as executors (**Executors**) of the estate of the late Mr Peter Linington (**PL**) on 11 June 2019. The second was issued to BP and Mr P Sutton (**PS**) as Trustees (**KTrustees**) of the Kent Trust (**KTrust**) on 19 July 2019. Both NoDs concern the same tax and only one will be enforced. The Executors and KTrustees are referred to collectively as the Appellants (**Appellants**).

2. The NoDs were issued on the basis that HMRC have concluded that certain inheritance tax (**IHT**) planning arrangements (**Arrangements**) entered by PL constituted a transfer of value meeting the description in s3(1) and that following his death, gave rise to a charge to IHT. The tax considered to be due from the Executors was calculated at £399,992 and the amount due, if paid by the KTrust, is £269,002 (I note that these figures have been a somewhat moveable feast with the amounts stated in the NoDs, view of the matter letters and ultimately the statements of case each being different).

3. The Arrangements involved the assignment of the reversionary interest of the reversionary beneficiary (**Reversionary Interest** and **Reversionary Beneficiary** respectively) in the Marshall Trust (**MTrust**), a 150-year Isle of Man (**IoM**) trust, to PL who was then granted an option to become the income beneficiary (**Income Beneficiary**) of the MTrust. Prior to the exercise of the option PL transferred his Reversionary Interest to the KTrustees. The Arrangements were put in place in 2010.

4. Had the Arrangements been implemented post 24 June 2012 it is clear, and agreed, that the transfer to the KTrust would have been a transfer of value by virtue of the enactment of section 74A - C Finance Act 2012.

5. The Appellants contend that the Reversionary Interest in the MTrust was property which was excluded from the charge to IHT by virtue of s3(2) on the basis that PL had acquired the interest for no consideration and MTrust was property situated outside the UK which had been settled by a settlor domiciled outside the UK at the time of settlement (thereby meeting the relevant definitions s6 and s48(1)(a)). They also contend that even if the Reversionary Interest was not property so excluded, there was no transfer of value when it was transferred to the KTrust on the basis that the effect of the Arrangements was that there was no diminution on the value of PL's estate, the Arrangements representing an arm's length transaction pursuant to which PL exchanged £1,000,000 cash for an interest in property of the same value.

6. HMRC accept that the MTrust was settled by a non-UK domiciled settlor and was property held outside the UK with the consequence that the property held within the settlement, at the relevant time £1,000,000 cash in an IoM branch of Barclays Bank, was excluded property. However, they contend that the Reversionary Interest held by PL following his nomination as the Reversionary Beneficiary was not excluded property as he acquired that Reversionary Interest for consideration. They further contend that the transfer to the KTrust represented a transfer of value. HMRC assert that the diminution in value of the estate arising from the transfer of the Reversionary Interest is £1,168,725 if the tax arising as a consequence of the transfer is paid by the executors and £999,980 if the tax is paid by the KTrustees.

7. In this appeal I must determine:

   (1) Whether PL acquired the Reversionary Interest in the MTrust for consideration in money or money's worth (**the Excluded Property Issue**)

(2) If the Reversionary Interest was not excluded property, whether the transfer of it to the KTrust was a transfer of value and if so, its value or the basis on which that value is to be determined (**the Transfer of Value Issue**)

8. The Arrangements in this appeal are broadly the same as those in the decision of this Tribunal in the appeal of *Michael Lawton Salinger and Janice Lawton Kirby v HMRC* [2016] UKFTT 677 (TC) (***Salinger***). That matter was heard by Judge Redston and Ms Bridge. That Tribunal determined that the reversionary interest held by Mr Salinger and transferred to a family trust (the equivalent of the KTrust) was not excluded property but that there had been no transfer of value by Mr Salinger when he transferred the reversionary interest to the family trust.

9. For the reasons set out below I find that the reversionary interest was not excluded property and that there was a transfer of value when PL assigned the reversionary interest to the KTrust. The Appellant's appeal therefore fails. I recognise that the decision reached is inconsistent with that of the Tribunal in *Salinger*. This is for the reasons stated in the judgment below, but in summary, is because I consider, based on the evidence available to me that the open market value of each of the Reversionary Interest and the interest of the Income Beneficiary (**Income Interest**) when valued individually was nil because no third party would have purchased either interest on the open market individually. PL did not purchase them independently, he purchased them pursuant to the Arrangements which he believed escaped a charge to IHT. When taken together the option to purchase the Income Interest (**Option Interest)** together with the Reversionary Interest had an open market value equivalent to the assets in the MTrust. The effect of separating the Option Interest and the Reversionary Interest was to diminish the value of PL's estate and thereby met the s3 definition of a transfer of value and gives rise to a charge to IHT pursuant to s1.

10. The parties agreed that, following the Tribunal's decision in this case (and subject to any onward appeals) they would seek to agree between themselves whether any further IHT should be borne by PL's estate or by the KTrust, and the arithmetical computation of any such amounts. If the parties were unable to agree, they would revert to the Tribunal.

THE LAW

11. The legal provisions are contained within the IHTA, as amended. So far as relevant to this decision, they are set out in the Appendix. All references to statutory provisions in this decision are to the IHTA, unless otherwise stated. However, in outline:

(1) IHT is charged on the value transferred by a "chargeable transfer" (s1).

(2) A "chargeable transfer" is a transfer of value made by an individual other than an exempt transfer (s2(1)).

(3) A "transfer of value" is "a disposition made by a person…as a result of which the value of his estate immediately after the disposition is less than it would be but for the disposition". The value transferred by the transfer is "the amount by which the value of his estate is less" as a result of the transfer (s3(1)).

(4) In deciding whether there is a transfer of value within s3(1), no account is taken of excluded property which ceases to form part of a person's estate as a result of a disposition (s3(2)).

(5) IHT is charged on death as if the deceased had made a transfer of value immediately before he died; the value transferred is taken to be equal to the value of his estate at that time (s4).

(6) A person's estate consists of all the property to which he is beneficially entitled (s5(1)) but does not include an interest in possession acquired after 21 March 2006 (s5(1)(a)). Furthermore, a person's estate immediately before death does not include excluded property (s5(1)(b)).

(7) "property" is defined to include "rights and interests of any description but does not include a settlement power (s272). A settlement power is defined to mean any power over or exercisable (whether directly or indirectly) in relation to settled property or a settlement (s272 and s47A).

(8) Transfers of value do not include dispositions made by way of arm's length transactions which are not intended to confer gratuitous benefit on any person (s10).

(9) Both of the following are excluded property:

(a) a reversionary interest in an offshore trust, unless it was acquired for consideration in money or money's worth (s48(1)); and

(b) settled property (other than a reversionary interest) if the property is outside the UK and the settlor was non-domiciled (s48(3)).

(10) The value of property shall be determined as the price which the property might reasonably be expected to fetch if sold on the open market at the time at which it is to be valued (s160).

12. With effect from 20 June 2012 s74A-C were introduced by s210 Finance Act 2012. The explanatory note on its introduction explains:

> "section 210 amends the inheritance act (IHT) settled property provisions. Where a UK-domiciled individual acquires an interest in a settled property, which as a result of certain arrangements gives rise to a reduction in the value of that individual's estate, a charge to IHT will arise. In addition if the settled property was formerly excluded property it will cease to have that status.
>
> The charge will largely replicate the tax treatment that a UK-domiciled individual would have incurred if the assets within the offshore trust, which are in some cases 'excluded property' and which would otherwise be ignored for IHT purposes, had instead been transferred to a UK trust."

THE EVIDENCE

13. I was provided with a bundle of documents consisting of 1532 pages which included: correspondence between the parties; witness statements and exhibits from Mr David Pearce and BP; an Expert Report from Brian Watson (**BW**) and the documents pursuant to which the Arrangements were put into effect, together with correspondence regarding the Arrangements between PL and his advisors.

14. The burden of proof rests with the Appellant to show, on the balance of probabilities, that there was no transfer of value when the Reversionary Interest was transferred to the KTrust.

The Arrangement documentation

15. The Arrangement documentation comprised:

(1) Trust deed for the MTrust dated 8 April 2008

(2) Deed of nomination of PL as reversionary beneficiary dated 12 February 2010

(3) Deed of appointment dated 22 February 2010

(4) Deed reducing time to revoke the nomination dated 23 February 2010 timed at 17:55

(5) Warranty deed dated 23 February 2010 timed at 17:55

(6) Option Deed dated 23 February 2010 timed at 17:55

(7) Trust deed for the KTrust dated 23 February 2010 timed at 18:25

(8) Assignment of the reversionary interest in the MTrust to the KTrust dated 23 February 2010 and timed at 18:43

(9) Assignment of the interest to income under the MTrust to PL by way of exercise of the option

(10) Nomination of Mr Sutton as Protector of the MTrust dated 5 March 2010

Marshall Trust Deed

16. On 8 April 2008 Marshall Limited (**Marshall)** settled the MTrust. The trustee (**MTrustee**) was Crossman Trust Company Ltd (**Crossman**), and the amount settled was £10. MTrust was governed by IoM law (the parties however agreed that there was no relevant difference between IoM law and the laws of England).

17. The beneficiaries of the MTrust were the Income Beneficiary and the Reversionary Beneficiary (clause 1.1(xi)). The MTrust deed provided that:

(1) the Income Beneficiary was Marshall and/or any other persons who should be the assignee(s) of the whole or part of Marshall's right to income (clause 1.1(iii)); and

(2) the Reversionary Beneficiary was Brachlach Limited (**Brachlach**) (clause 1.1(x)).

18. Marshall, Crossman and Brachlach Limited were all IoM resident and incorporated companies. They were not domiciled in the UK.

19. The MTrust deed gave the MTrustee the power:

(1) to nominate another person as the Reversionary Beneficiary instead of Brachlach (clause 1.1(x)(a)(i));

(2) to revoke that nomination within 42 days, unless extended by deed before the expiry of the 42-day period (clause 1.1(x)(a)(ii)); and

(3) to extinguish or restrict any of its own powers (clause 6).

20. Clause 4.1 provided that the MTrustee "shall hold the [MTrust] property upon trust: (i) to accumulate and capitalise so much of the income thereof as the [MTrustee] think fit; and (ii) to pay the balance thereof not so accumulated and capitalised to the Income Beneficiary".

21. Pursuant to clause 4.2 MTrustee was to hold the capital and income "upon trust for the Reversionary Beneficiary".

22. The MTrustee also had the power to pay all or any of the capital to the Income Beneficiary at its absolute discretion (clause 4.3(i)) (it is therefore to be noted that the Income Interest may include a distribution of capital or income).

23. The Trust Period was 150 years; at the expiry of that period, the MTrustee was to hold the capital and income on trust for the Reversionary Beneficiary (clauses 1.1(iv) and 4.2).

24. Clause 4.4 provided that Marshall (as Settlor) could designate other persons to be the Income Beneficiary. It stated that "This power shall not be capable of being exercised more than once in respect of any part of the said interest and any exercise of this power shall be void notwithstanding that it is made for consideration …"

25. Clause 12 provides for the appointment of "the Protector". 12.1 provides for Marshall to appoint a Protector by notice in writing given to the MTrustee at any time prior to any

assignment of its right to income under clause 4.1. After the assignment of Marshall's rights as Income Beneficiary the Protector was to be appointed by notice given to the MTrustee by the receiver/liquidator/administrator of Marshall, the trustees themselves or a Protector in office. No beneficiary could be appointed as Protector (clause 12.6). The Protector had the power to exercise or refrain from exercising its powers notwithstanding that they were directly or indirectly interested in the matter in question.

26. The MTrustee could be removed by the Protector on the Protector giving notice to that effect (clause 9.2). Replacement or additional trustees could be appointed by the Protector (clause 10.1 and 10.2).

27. On 28 April 2008 Marshall settled an additional £1,500,000 into the MTrust.

Nomination deed

28. On 12 February 2010 PL was nominated as the Reversionary Beneficiary of the MTrust by way of a deed of nomination in place of Brachlach. Under clause 1.1(x)(a)(ii) of the trust deed the MTrustee could revoke PL's nomination within 42 days, subject to the power to shorten such period.

Deed of appointment

29. On 22 February 2010 through Mr Laidlow PL offered to pay £1,080,000 for a two thirds interest in the MTrust on the condition that Marshall would procure a reduction in the trust to £1m. That offer was rejected and following negotiation the price was agreed at £1,083,750 with the required purchase mechanism for the Income Interest being stated to be "one of conditional option arrangement with a strike price of £100".

30. The deed of appointment notes in the recitals that clause 4.3(1) of the MTrust deed gives the MTrustee the power at their absolute discretion to pay all or any part of the capital of the fund to the Income Beneficiary. It further recites that the MTrustee had decided to appoint and transfer irrevocably to Marshall the sum of £500,000.

31. Following such appointment the remaining property in the MTrust was the £1,000,000 required by PL.

Deed reducing time

32. At 17:55 on 23 February 2010 the MTrustee exercised the power to reduce the revocation period with immediate effect i.e. 17:55. The recitals to the deed simply recognise the deed of nomination and the power to reduce time. Accordingly, in that instant PL was irrevocably the Reversionary Beneficiary.

Option deed

33. Marshall granted PL the Option Interest pursuant to which he was entitled to acquire the Income Interest as provided in clause 4.1 of the MTrust deed on the condition that simultaneously with the granting of the Option Interest PL would pay Marshall £1,083,750 in consideration for the grant of the option and subject to the condition precedent that the MTrustee "shall not have exercised their power pursuant to clause 1.1(x)(a)(ii) of the MTrust deed to revoke PL's nomination as Reversionary Beneficiary.

34. The option was exercisable for a period of 21 years on the payment of £100. The option was assignable by PL provided that the assignee furnished the MTrustee with such due diligence information and documentation as the MTrustee required.

Warranty deed

35. At 17:55 on 23 February 2010 the MTrustee gave certain warranties. The recitals acknowledge that "on or around 23 February 2010 at 17:55 Marshall granted PL the option to acquire Marshall's interest as the Income Beneficiary".

36. The warranties relevant to this appeal were:

(1) no settlor of the settlement was UK domiciled at the time of settlement

(2) there was £1,000,000 in cash on deposit in the name of Crossman

(3) Marshall had, since incorporation, been managed and controlled in IoM

(4) Marshall had not appointed a protector.

Kent trust deed

37. The KTrust was settled at 18:25 on 23 February 2010 by BP. BP and PS were appointed as the KTrustees. This trust was subject to the laws of England and Wales. The beneficiaries of the trust were PL, his children and remoter issue living or born in the trust period (80 years), the spouses of PL, his children or remoter issue and any person nominated under clause 5.1 (which provided for the KTrustees to nominate persons or classes of persons as beneficiaries). The amount settled at that time was £20.

38. The deed provided for the KTrustees to accept additional money, investment or property transferred to them by the settlor or any other party (clause 8).

39. Clause 9 provided that:

> "The [KTrustees] shall hold the capital and income of the [KTrust] upon the trust and in favour or for the benefit of all or one or more of the Beneficiaries exclusive of the other or others of them in such shares or proportions if more than one Beneficiary and with and subject to such powers and provisions for maintenance education of other benefit or for the administrative powers and discretionary or protective powers or trusts as the [KTrustees] shall .. in their absolute discretion appoint."

40. In the absence of appointment under clause 9 there was a power of appointment or accumulation of income and application of capital (clause 10). The powers under clauses 9 and 10 could be satisfied by payment to the beneficiaries or into another trust (clause 12).

Deed of assignment to KTrust

41. At 18:30 on 23 February 2010 in consideration of £20 PL assigned his Reversionary Interest under the MTrust to the KTrust.

Exercise of the option

42. Minutes of Marshall record that at 18:50 on 23 February 2010 the directors received an email exercising the option which had been granted earlier in the day. Having received that email the board resolved to execute the deed of assignment designating PL as the Income Beneficiary pursuant to clause 4.4 of the MTrust. The deed was executed at 19:25.

Appointment of protector

43. On 5 March 2010 Marshall nominated PS as Protector of the MTrust. The MTrustee accepted that nomination and PS was duly appointed.

Other documents

44. By reference to the death certificate it can be established that PL died on 22 September 2010, his death was registered on 30 September 2010. Probate in England was granted on 24 June 2011 and in IoM on 2 March 2012.

45. Under PL's will the Executors were appointed. The will provided for certain specific gifts, and for the residuary estate to be held under a discretionary will trust the trustees for which were James Linington and PS. The beneficiaries of the will trust were BP, DL and his wife, PL's grandchildren and remoter issue, the issue of DL's wife and any other persons nominated in the trust period (2 years).

46. On 21 September 2012, the Executors released the Income Interest from PL's estate into the will trust. On the same day, the trustees of the will trust appointed and assigned the interest as Income Beneficiary to BP and DL in shares of 75% and 25% respectively.

47. By deed dated 16 October 2014 £25,000 was appointed from the capital in the MTrust to BP.

48. By deeds of appointment dated 1 August 2016 a further £217,370.57 cash and the "investment combined portfolio with Towry Limited" was transferred to BP and £239,124.86 cash was appointed to DL. The deeds narrated that this appointment was made:

> "Having considered the interests of, and benefit to, the Beneficiaries of the Trust as a whole"

49. With this deed of appointment there were no assets in the MTrust which was therefore wound up.

Advice correspondence

50. BP held an enduring power of attorney on behalf of PL, she was responsible, in that capacity, for his financial affairs.

51. It appears that BP was corresponding with PS of Haines Watts (accountants) and through them with Philip Laidlow of Laytons (solicitors) in the period leading up to the beginning of February 2010.

52. The earliest email available to me is that dated 5 February 2010 from Mr Laidlow to PS. That email outlines at a very high level the form that the Arrangements would take emphasising the security that a prospective purchaser of the trust interests would have as to the legitimacy of the Arrangements also referencing the ability to appoint a protector, indicating that either Mr Laidlow or PS could be appointed as protector and, as necessary, replace the trustees. The email clearly sought to provide reassurance that buying the trust, albeit a discretionary trust, was not losing access to the equivalent sum held in the trust.

53. On 10 February 2010 PL wrote a "to whom it may concern letter" which read:

> "As part of my estate planning I wish to rearrange some of my assets into a more Inheritance Tax friendly form. To this end I have hired Haines Watts to investigate the opportunities for me to purchase an interest in a pre-existing Excluded Property Trust. The nature of this type of arrangement has been explained to me.
>
> In the event of a suitable trust being identified I would like my daughter Bridget to help me with any necessary documentation as she currently manages and records my various investments and is the holder of an Enduring Power of Attorney dated 21 November 2005. She can therefore sign on my behalf if necessary."

54. Pursuant to that letter PS wrote to Mr Laidlow instructing him to source an interest in a relevant excluded property trust and to obtain the necessary warranties and indemnities regarding the status of the investment as excluded property. The instruction acknowledged that the sellers of the interest would expect a premium over the net asset value of the trust as an

introducer's fee. It also identified that cleared funds for the transaction would be available by 25 February 2010.

55. By letter dated 11 February 2010 Mr Laidlow confirmed his instructions and the basis of his engagement. The fee to be paid to him was 1.25% of the "value of the trust" bought. Mr Laidlow was engaged "to advise [PL] on inheritance tax planning and specifically the possibility of reducing [his] inheritance tax exposure through the purchase of an interest in an excluded property trust." His role was to involve all tax advice, the sourcing of an appropriate trust, due diligence on any trust found and all legal work involved in the acquisition of the trust. I note here that all references are to the trust and not to individual or specific interests in the trust.

56. Pursuant to that instruction Mr Laidlow contacted Crossman and thereby identified the MTrust as a suitable excluded property trust.

57. On 23 February 2010 Dougherty Quinn (**DQ**) (Solicitors in the IoM) provided a legal opinion which, having reviewed the MTrust deed, the constitutional documentation and minutes of the MTrustee, confirmed that the MTrust had been validly settled under IoM law. By second letter of the same date DQ confirmed the sum of £1,083,750 as the consideration for the granting of the Option Interest. They acknowledged that the funds were to be held in their client account to PL's order until the option agreement was executed by PL and Marshall and that it would not be released until after midnight on 23 February 2010. Release of the funds was subject to the condition that PL's nomination as the Reversionary Beneficiary had not been revoked. As is apparent, and given the nature of the Arrangements, the payment is identified as payable in respect of the granting of the option but conditional on the Reversionary Interest becoming irrevocable.

58. By email dated 25 February 2010 Crossman wrote to Mr Laidlow asking if PL had any suggestions for the trustees to consider regarding the investment of funds. Mr Laidlow forwarded the email to PS under the cover of an email which stated:

> "Please take this up directly with … [Crossman]. Crossman does not give investment advice. They usually appreciate a steer from the main beneficiary's adviser. In dealing with [Crossman] please respect the integrity of the trust i.e. it is the trustees you will advise."

59. Mr Laidlow provided ex post facto advice on the transaction on 22 March 2010. He advised that as MTrust had been settled by a non-UK domiciled company it met the IHTA definition of excluded property. The letter notes:

> "You have bought the [MTrust] and acquired its excluded property status. You cannot buy a trust as such in the same way that a company can be bought. You can acquire the interests of the beneficiaries in the trust. Before you purchased the interest of the income beneficiary the trust had two beneficiaries. [Marshall] had the income interest in [MTrust] and [Brachlach] had the reversionary interest in the [MTrust]. The income beneficiary's interest carries almost the entire economic interest of the trust. You have bought that interest from [Marshall]. The reversionary interest, which only becomes relevant after the termination of [Marshall's] interest, currently scheduled for 150 years hence has next to no value and it has been acquired at no cost and transferred to the [KTrust]".
>
> …
>
> You have acquired [Marshall's] interest as income beneficiary of [MTrust] and have effectively become the "owner" of, as main beneficiary, an excluded property trust.

…

> You will be familiar with the ten-year anniversary charge to inheritance tax on most trusts. This charge does not apply to the [MTrust] as it is an excluded property trust. There will therefore be nothing to report on ten yearly anniversaries. The same applies to any withdrawals from the trust. No inheritance exit charges will apply precisely because the trust is excluded and therefore there will be no reporting. The above said, I should stress that the planning you have undertaken does not, in any way depend upon secrecy I am simply commenting that there is nothing at all to disclose which is very convenient."

60. By that same letter, Laytons described the Trustee Protector as:

> "The trustee of the [MTrust] at the point of purchase of your interest in the [MTrust] was and still is [Crossman]. Should you, in the future, wish to change the trustee then in the first instance that should be broached through a request to [Crossman] to retire in favour of a nominated new trustee or trustees. In the highly unlikely event of Crossman declining to retire, the protector has the power to hire and fire trustees.
>
> You had the ability as part of the purchase process to nominate a protector of the [MTrust]. You have nominated Peter James Sutton as protector of the [MTrust]."

61. It is to be noted that a distinction is drawn between the Income and Reversionary Interests but in the context of "buying the [MTrust]".

62. From that letter it is also plain that Crossman had implemented arrangements of the type proposed to PL widely and for the same purpose. It references what is described as a "gaping error" in the legislation which permitted IHT planning through the acquisition of pre-existing excluded property trusts (provided they were not interest in possession trusts).

63. In correspondence between PS and Crossman (into which BP was copied and apparently contributed) Crossman was advised that PL was a cautious man and would be uncomfortable with the funds being held other than in a "straight forward savings type account". The correspondence also indicates that one of the beneficiaries was likely to want "his share" of any trust interest liquidated and paid over to him in the event of PL's death, and thus that the MTrust property would be best kept in a liquid form. The email exchanges confirm that BP "appreciated that ultimately [investment] was a trustee decision" and invited Crossman to recommend a suitable account. Crossman indicated that they were not licensed to provide investment advice but ultimately, on 20 April 2010, some (but not all) of the funds were moved to a Nationwide deposit account which would give a better rate of interest than Barclays.

64. The Executors received advice from PS after PL's death that the MTrust did not need to be reported for IHT purposes on the basis that it was excluded property. This reflected advice given by Laytons in the 22 March 2010 letter.

65. In correspondence which followed PL's death the MTrustee contacted BP with a view to obtaining instruction on the management of the MTrust property and in particular whether to continue to hold it in a deposit account with instant access at Nationwide. In particular whether to move it to a fixed deposit account with higher interest rates. On behalf of the executors BP gave certain instructions as to the investment of the MTrust funds, accordingly, initially the Executors and subsequently BP and DL were able to determine how and where the funds were held.

66. Ultimately, investments were made of BP's share of the Income Interest through Towry, an investment advisor.

67. Haines Watts confirmed by letter dated 22 July 2016 that there was no IHT charge arising on the distributions which were then proposed and ultimately made on 1 August 2016. However, BP and DL gave an indemnity to the MTrustee for any IHT that may arise from the closing of the MTrust.

BP's evidence

68. BP provided a very thorough and detailed witness statement and gave sworn oral testimony. BP was an open and reliable witness.

69. Much of BP's witness statement was devoted to a recitation of her interactions with HMRC and the difficulties she experienced in those interactions. As I informed her at the hearing this Tribunal's jurisdiction is limited by statute. The Tribunal does not have judicial review powers and cannot consider complaints made regarding HMRC's conduct. On that basis I was not able to consider and do not comment on the travails narrated by BP.

70. BP explained that her father, PL, was a cautious and conscientious man. He had been a farmer. He suffered from Parkinson's disease and towards the end of his life looked to manage his affairs so as to limit the IHT payable on his estate at death. To that end he sought advice from PS, a man he trusted and had used as his accountant for many years.

71. PS, working with and through Mr Laidlow at Laytons, identified an opportunity which they advised would be IHT efficient but provided PL with the reassurance he needed that should he need the funds in order to pay for his care such funds would be available to him.

72. BP explained that at all times her father, and the Executors and trustees of the will trust and the KTrust had only sought to act on advice received from professional advisors and in accordance with the law as they understood it.

73. I address below the *Salinger* case. BP was particularly concerned that in that case the Tribunal had determined that there should be no charge to IHT on the basis that there was no transfer of value. She was aware having communicated directly with Mr Salinger, though HMRC could not comment due to taxpayer confidentiality, that HMRC had appealed to the Upper Tribunal and that Mr Salinger had withdrawn from the appeal due to concerns about costs. BP considered it both unfair and unreasonable that HMRC were not prepared to stand by the Tribunal's decision and accept that the Arrangements worked and that through s74A - C the loophole giving rise to a beneficial tax treatment had been closed.

74. BP, by her witness statement, and in cross-examination accepted that the steps in the Arrangements were meticulously scripted and that each step was taken in the certainty that the next step would follow. She recollected being at the Haines Watts office on 23 February 2010 in the late afternoon and early evening to execute the steps. She was clear that, to the letter, she followed the advice she was given, physically handing over first £20 by way of settlement of the KTrust and £20 in respect of the assignment of the Reversionary Interest in the MTrust. She was present with PS and Mr Laidlow was on the phone. She recollected, though with less certainty, that representatives of Marshall and Crossman were also on a conference call.

75. BP fairly accepted that the Arrangements were entered for the purpose of achieving IHT savings which might otherwise have been due on the distribution of PL's estate to his family (particularly to herself and her brother, DL). It was PL's intention that she and her brother and other family members benefit from his estate to the maximum extent possible. She understood that the individual steps in the Arrangements preserved the status of the MTrust and all the individual interests in it (i.e. the Income and Reversionary Interests) as excluded property and that they were carried out with the object of implementing the planning. She accepted that if at any point PL had determined not to proceed with the Arrangements, Marshall would have revoked the nomination of PL as Reversionary Beneficiary.

76. BP's understanding of the Arrangements and the terms of the implementing documentation was very thorough. She readily accepted and understood that the Income Interest Beneficiary was to be paid such income as the MTrustee did not accumulate (in their absolute discretion) and for there to be payments of capital only at the absolute discretion of the MTrustee. She accepted that there was no sense in which PL owned the MTrust assets or had a right to receive any payments from it at all.

77. However, BP considered that, on the basis of the advice received, considerable comfort was derived from the MTrust provisions concerning the Protector. She understood that the facility under the MTrust deed providing for the appointment of a Protector ensured that the wishes of the Income Beneficiary would be adhered to. Before the Arrangements had been implemented it had been agreed that PS would be appointed to that role and, on 5 March 2010 he was duly so appointed. If PL had considered the MTrustee to have been unreasonably refusing to make an appointment of the MTrust property in his favour he could have requested PS to appoint additional MTrustee or remove Crossman and appoint alternative trustees in their place. It was therefore her view that there was no circumstance in which PL, or any Income Beneficiary, would be vulnerable to having their wishes not met as to the use or appointment of MTrust assets. The Protector was, in her view, critical to the Arrangements both for her father and for any subsequent Income Beneficiary, including ultimately herself.

78. Advice was taken at the time the Arrangements were implemented as to how they should be recorded when PL died for IHT purposes. That advice was clear that PL's interest as Income Beneficiary would pass into his residuary estate and thereby subject to the discretionary will trust but that nothing would need to be reported on the IHT400 form. Further advice was taken following PL's death by the executors which confirmed that there was nothing to report either by way of transfer of value or under the relevant property regime. The advice received confirmed that the MTrust was excluded property. BP confirmed that she had followed that advice, having sought for it to be, to the best of her knowledge, definitively confirmed to her, anxious to ensure that at all times her dealings with HMRC were accurate.

79. BP explained that in 2015 HMRC's view had been sought as to whether the MTrust was excluded property and HMRC had so confirmed by their correspondence of 8 September 2015. On the basis of that confirmation she, and those advising her, considered that there was no IHT charge in connection with any aspect of the Arrangements.

80. In 2016 BP and DL approached the MTrustee with a view to the funds held in the Trust being paid out in full and winding up the Trust. The MTrustee appointed 75% of the value in the Trust (represented by cash and the investment portfolio then held with Towry) to BP and 25% (in cash) to DL. On the basis of the advice received at that time BP understood that there was no IHT consequence of the distribution so made.

81. BP was clear that there was "never any dispute from the [MTrustee] regarding paying out the full amount of the Trust" to DL and herself when, as Income Beneficiaries they had requested payment of the capital and accumulated income.

82. It was only in 2017, and following the *Salinger* case, that HMRC began to question the IHT consequences of the Arrangements. BP was very shocked to receive the correspondence having considered that the matter had been openly disclosed and confirmation received by way of the letter of 8 September 2015.

83. BP's evidence extensively, and with great detail, narrates the correspondence which followed with HMRC and her view as to the unfairness suffered in consequence of what she perceived to be a change of position by HMRC and the belated attack on the Arrangements, particularly in the face of the Tribunal's decision in *Salinger* which had concluded that there was no IHT charge arising on the transfer of the interest of the reversionary beneficiary in that

case. BP was of the view that given that the relevant notices of determination had been issued in *Salinger* on 11 February 2015 and were therefore matters of which HMRC were quite plainly aware when they were engaged in correspondence regarding the Arrangements in 2015, it was wrong that HMRC should so belatedly be entitled to challenge the Arrangements.

84. I do not set out that evidence as it is ultimately not relevant to the issue I have to determine. However, I note that as I interpret HMRC's letter of 8 September 2015 I do not consider that there has been a change in position though I fully appreciate why BP considers that there has.

85. By letter dated 30 March 2015 sent on behalf of the MTrustee HMRC were asked to confirm the status of the property in the MTrust and whether the provisions of section 74A – C applied. By their letter dated 8 September 2015 HMRC confirmed that the MTrust was excluded property by virtue of s48(3)(a). I interpret that as providing the narrow confirmation sought as to the status of the MTrust property itself and not as to either the status of the property represented by the Reversionary Interest (which in the case of the KTrust was plainly not excluded property as it was a residuary interest for which the KTrust had paid £20) or the Income Interest. In this appeal I must determine whether the Reversionary Interest when in the hands of PL was excluded property and if not, when he disposed of it there was a transfer of value consequent upon the transfer.

Expert evidence

86. Mr Brian Watson (**BW**) was appointed by the parties as a joint expert consistent with the provisions of Part 35 Civil Procedure Rules.

87. BW was initially approached by HMRC to act as their witness in this matter, having previously been appointed by them in respect of a number of previous cases in particular with a view to giving evidence to the Upper Tribunal in *Salinger*.

88. The Appellants endeavoured to find an expert witness of their own. BP explained that they had contacted a number of organisations with a view to appointment but once the nature of the expert evidence sought was fully explained none of the organisations felt in a position to adequately provide the evidence. Ultimately the Appellants alighted on the possibility of appointing BW who initially indicated that he would be conflicted by such appointment. The parties thereby resolved to appoint BW as a joint expert.

89. BW is a fellow of the Institute and Faculty of Actuaries and is the owner of H. E. Foster and Cranfield, a valuer and auctioneer of life and reversionary interests in trusts. He advises clients in connection with the valuation and sale of such interests. His expert opinion was based on his experience of providing such valuations and advice and the associated market of such interests. He was unaware of any alternative market for the sale of interests in trusts and confirmed that Foster and Cranfield had never offered for sale any of the interests he was asked to express an opinion on.

90. By way of the witness statement prepared by BP, the Appellant's skeleton argument and in submissions certain challenges were made on behalf of the Appellant as to the extent to which BW was capable of giving expert evidence in light of the limitations of his experience. I made clear at the hearing that as BW had been jointly appointed it was inappropriate for the Appellant to challenge the relevance of BW's experience. The challenges as to the extent to which such evidence assisted me in resolving the issues was something I was able to consider, I set out the challenges in the Appellant's submission section of the Transfer of Value Issue and my response to them in the discussion section relating to that issue.

91. BW produced an initial report and two supplemental reports. He gave oral testimony answering questions from me and from both parties.

92. He was instructed to value the following interests:

(1) The Reversionary Interest immediately after nomination of PL whilst Marshall retained the Income Interest, and the power of revocation was active.

(2) PL's Option Interest taken in isolation (i.e. ignoring that at that point PL had been nominated as the Reversionary Beneficiary).

(3) Marshall's interest as the Income Beneficiary following nomination of PL as the Reversionary Beneficiary.

(4) The Reversionary Interest and the Option Interest when held by PL but taken in isolation.

(5) The Reversionary Interest and the Option Interest when held by PL but taken together.

(6) The Option Interest immediately after assignment of the Reversionary Interest to the KTrust.

(7) The Income Interest after exercise of the option.

(8) KTrust's interest as Reversionary Beneficiary.

(9) PL's interest under the KTrust following the transfer to the KTrust of the Reversionary Interest before exercise of the option.

93. I set out below the opinions expressed on the particular scenarios on which BW was asked to express an opinion; however, he confirmed that his answers were all underpinned by his experience and opinion that purchasers of interests under trusts determine price by refer to the application of a discounted value for the aspects of uncertainty inherent in the interest being sold. In this context he was clear that purchasers of trust interests need some certainty for an interest to have a marketable value.

94. As such a life interest or interest in possession provides the certainty that income will be paid by the trustees in question to the life tenant. The associated uncertainty arises from the potential life span of the life tenant, the nature of the assets and income return on them. Similarly for the remainderman interest there will ultimately be no impediment to the realisation of the asset only as to the timing and potentially as to its value at that time. However, under a discretionary trust there is no certainty that the discretionary beneficiary will ever have a legal entitlement to the capital or income assets and, as such, there will be no market for the interest.

95. BW confirmed that investors looking to purchase trust interests would have access to the relevant trust deed and such other documentary material as would be necessary and relevant in order for them to assess the value of the interest.

96. BW was aware of what is known as the *Saunders v Vautier* principle by reference to which it was determined that where the interests of a life tenant/income beneficiary and the reversionary beneficiary are vested in the same entity (natural or legal person), that entity has a right to call for the trust to be wound up and thereby became absolutely entitled to the fund assets. The interests do not automatically merge (in the sense that the interests of a tenant and a landlord merge if held by the same entity) but there is a right for the beneficiaries to call for them to do so.

97. BW noted that the Income Interest under the MTrust was for the payment of such income as the MTrustee did not accumulate and for the appointment of such capital as the MTrustee, in their absolute discretion considered appropriate. He also noted that the Reversionary Interest did not crystalise until the year 2158 and only insofar as the MTrustee had not appointed capital

and/or any accumulated income in favour of the Income Beneficiary. In BW's view these features of the MTrust were critical to establishing the price a willing but prudent purchaser would pay a willing vendor for the interests he was required to value.

98. BW provided his view as to the value of each of the interests identified at [92] above as follows (summarised from his written report and oral testimony). When determining the valuation he did not have regard to HMRC's open market value guidance but based his opinion on his own knowledge of the market of which he was aware for trust interests:

Scenario	Value	Reason
(1) Reversionary Interest after nomination	nil	Interest subject to revocation and, in any event arises only in 148 years; also subject to the MTrustee having paid away any or all of the income and/or capital
(2) PL's interest under the option to purchase Income Interest taken in isolation	nil	Whilst option gave certainty as to acquiring the Income Interest, no certainty of entitlement to payment of any sums of income or capital all subject to the absolute discretion of the MTrustee
(3) Marshall's interest as Income Beneficiary after nomination of PL as Reversionary Beneficiary	nil	Marshall had no certainty of entitlement to payment of any sums of income or capital all subject to the absolute discretion of the MTrustee
(4) PL's interest as Reversionary Beneficiary without reference to the option	nil	Whilst the Reversionary Interest is no longer subject to revocation the event by reference to which entitlement arises is 148 years away and subject to the MTrustee having paid away any or all of the income and/or capital
(5) PL's interest as Reversionary Beneficiary together with the Option Interest	Discounted value of £1m	As PL has the right to exercise the option and become the Income Beneficiary and, at the same time, the Reversionary Interest, he has the ability to bring about the situation which would enable him to exercise a *Saunders v Vautier* right and call for the trust property and wind up the Trust. PL could assign the option and the Reversionary Interest together, there being no restriction on assignment of either interest. A willing and prudent purchaser would discount the rights taken together only by reference to the time and costs associated with affecting the right. BW was unable to comment on how long it would take to wind up a trust in these circumstances.
(6) The Option Interest after transfer of the Reversionary Interest	nil	As for (2)
(7) PL's interest as Income Beneficiary	nil	PL has had no certainty of entitlement to payment of any sums of income or capital all subject to the absolute discretion of the MTrustee. The value is

after exercise of the option		not enhanced by virtue of the fact that the Reversionary Interest is with an associated family trust. Investors would not buy based on a hope that the Reversionary Interest might also be up for sale. Only if they are essentially sold together/on the market at the same time. Were that the case the combined value would be of the order of £1,000,000 as in (5) above. BW could not comment on how that value might be split between the two interests; it would not matter to the purchaser.
(8) KTrust's Reversionary Interest	Nil	As for (4) KTrust does not have a revocable interest but the event by reference to which entitlement arises is 148 years away and subject to the MTrustee having paid away any or all of the income and/or capital.
(9) PL's interest in the KTrust (before exercise of the option)	nil	PL's interest under the KTrust is subject to the discretion of the KTrustees, it is uninfluenced by his right to call for the Income Interest as he had no right to call for the trust property.

99. In addition BW was asked to address the following more general questions (again summarised and dealing with questions put in writing and in oral testimony):

(1) The basis on which Mr Laidlow had advised PL that the Income Beneficiary carried the entire economic interest in the MTrust.

Answer: BW did not feel able to answer the question as he did not understand the meaning of economic interest in context.

(2) Did the fact that the MTrustee had appointed £500,000 to Marshall represent reasonable evidence that the MTrustee would exercise their discretion in favour of the Income Beneficiary in future.

Answer: BW did not consider it affected his assessment of the value to be attributed to the interests considered in the table at [98] above as the purchasers in the open market would not be satisfied that even reasonably expected conduct was sufficiently certain to justify paying for the interest.

(3) Whether it was reasonable to compare the market for life interests with the Income Interest.

Answer: Yes on the basis that the valuation of a life interest reflected the certainty the market for investors required, absent such certainty (as a consequence of a discretion to accumulate and as to payment of capital) it was reasonable to conclude that no value would be ascribed to a discretionary interest.

(4) How a fair and reasonable basis on which to divide trust property should have been determined in the context of BP "buying out" DL (assuming his Income Interest was 25%).

Answer: when undertaking a fair and reasonable assessment of the valuations of interests in trust property all the conditions of the trust will be considered so as to determine and distribute value between a life tenant/interest in possession and the residual beneficiaries.

Following the assignment by the Executors of the Income Interest in divided shares to BP and DL, BW was unable to value the shares as anything other than nil as, whether together or split, the Income Interest remained only at the discretion of the MTrustee. There was therefore no value to be assigned to the 25% share.

(5) The value the Income Interest to PL.

Answer: the market value of the interest was nil as per scenario (7) in the table at [98] above. The value to PL would depend on his own view as to what payments might be made to him in that capacity, however, such valuation was purely subjective and not objective as required for an open market valuation. It might also be driven by his view that the Income Interest was part of the Arrangements and thereby delivering IHT mitigation.

(6) Would the answer to (4) be different on an assumption that the MTrustee would "always act in accordance with the expressed wishes of the [Income Beneficiaries]".

Answer: on that assumption and on the basis that the assets in the MTrust were valued at £1,000,000 a fair and reasonable valuation of DL's 25% share would be dependent on the source of BP's funds with which the share would be acquired and whether she was content to assume that her investment in the MTrust was as safe and accessible as the source from which she had taken the funds to purchase the share. This was on the basis that the assumption removes the uncertainty associated with the discretion of the MTrustee has been removed. It is that discretion which affects the value of the Income Interest on the open market.

(7) On the basis of the same assumption that the MTrustee would "always act in accordance with the expressed wishes of the [Income Beneficiaries] what value would be ascribed to PL's interest as Income Beneficiary in the circumstances (a) that PL wanted £1,000,000 one month after buying the interest of the Income Beneficiary; and (b) wanted £100,000 per annum for 10 years.

Answer: in each case but predicated on the basis that the MTrustee would act in accordance with his wishes (thereby removing the uncertainty which otherwise affects the market value) and that the interest in the MTrust was as safe and accessible as any other deposit the interest would have been valued at £1,000,000. In such a circumstance, and on this assumption, there would be certainty of payment and it is that certainty which will be valued on the open market.

(8) What did BW understand of the restriction in clause 4.4 of the MTrust deed which provides "the Settlor may by deed … executed within the Trust Period designate any one or more persons to be holders of the interest [of the Income Beneficiary]… This power shall not be capable of being exercised more than once in respect of any part of the said interest …". And did it influence the value of the interest of the Income Beneficiary.

Answer: there can only be one assignment of the interest of the Income Beneficiary, at least only one by the Settlor. To the extent that it affected the ability of the assignees from the Settlor to make further assignments it was an additional impediment which would make the interest unattractive to a purchaser/investor but as the interest was already considered to be of no value, in the end, it had no influence on valuation.

(10) Whether BW was aware of a market for interests sold for a tax planning purpose and what value is given to the opportunity.

Answer: BW was not aware of such a market and was unable to comment on whether there was such a market.

100. In oral testimony BW was questioned as to whether the role of the Protector would have given the prudent purchaser sufficient comfort as to constitute the certainty he considered was required by the market in order to value any of the interests independently at greater than nil. He was clear that he did not consider it made a difference as any payments of capital or income remained at the absolute discretion of the MTrustee who were required to act subject to their fiduciary duties which were owed to both the Income and Reversionary Beneficiaries. A protector, even one favourable to the Income Beneficiary, would not, in BW's view, ensure that the exercise of the MTrustee discretion in their favour was sufficiently watertight to give the Income Interest alone value in the open market.

FINDINGS OF FACT

101. On the basis of the evidence above I find the following facts:

(1) PL was a cautious and conscientious man.

(2) The Arrangements were undertaken for the purposes of effecting a disposition of property to PL's family without attracting a charge to IHT.

(3) PL had been assured that in making the disposition in this way he could be confident that to the extent that he needed access to the funds they would be paid out to him.

(4) The steps in the arrangements were carried out strictly in adherence to the timetable set by the advisors so as to take advantage of what was considered to be a "gaping hole" in the legislation.

(5) Marshall, Brachlach and Crossman were all domiciled outside the UK and the funds were all, at all material times, held outside the UK.

(6) At no point were the Income or Reversionary Interests held by the same natural or legal person; however, having both the Option Interest and the Reversionary Interest gave PL de facto the ability to call for the trust to be wound up.

(7) The Appellants and PL held the belief that holding both interests "within the family" gave them the security they needed that the family retained control over the funds.

(8) At all material times the funds in the MTrust were £1,000,000 held in cash.

(9) PL paid £1,083,750 in order to benefit from the Arrangements and to achieve what he understood to be the tax efficient outcome he sought. At no point did he, or those acting on his behalf, consider or value the interests of the Income Beneficiary or the Reversionary Beneficiary independently of one another.

(10) On 23 February 2010 there was an intention that PS be appointed as protector, but he was not in fact appointed until 5 March 2010.

(11) The MTrustee did consult with the Income Beneficiary as to how the funds were to be invested whilst also making clear that investment decisions were in their discretion.

(12) When requested to do so the MTrustee made payments to the Income Beneficiaries in accordance with their wishes.

(13) The Arrangements were not declared on the IHT return on the basis of advice taken and on the understanding that HMRC accepted that all interests arising from the Arrangements were excluded property.

(14) BW was the only identified expert able to assist the Tribunal as to the market for trust interests.

(15) There is evidence, derived from the correspondence, and from *Salinger* that Crossman and Laytons advised not only PL concerning arrangements similar to the Arrangements and that the price payable for such arrangements involved the payment of a premium of 1.25% of the fund value. There was therefore a market for tax planning arrangements including the Arrangements. However, the price paid was for all steps in the arrangements and not for any identifiable step.

SALINGER

102. As indicated the *Salinger* case concerned arrangements essentially identical to the present Arrangements using a trust for which Crossmans were the trustees and Mr Laidlow was the legal advisor.

103. The trust interests purchased by Mr Salinger had, on a previous occasion, been the subject of an aborted sale to Mr Jones. Mr Jones had been nominated as the reversionary beneficiary subject to a 42-day revocation period. He did not proceed to acquire the option to purchase with the consequence that the nomination was duly revoked. Mr Salinger was subsequently nominated as the reversionary beneficiary. His purchase of the option did not proceed as swiftly as PL's; it appears this was because of negotiations as to the price he was prepared to pay, the period of the domicile warranty, and a requirement that an opinion be obtained from tax counsel as to the efficacy of the arrangements. The revocation period was therefore extended on two occasions such that the period of revocation was ultimately 98 days.

104. As with PL the amount held in the trust exceeded the value that Mr Salinger wanted to acquire and Crossman, as trustees of the excluded property trust, made an appointment of the excess back to the settlor.

105. Mr Salinger was formally advised that prior to the purchase of the interest of the income beneficiary he would be required to assign his interest as the reversionary beneficiary. Mr Salinger established a family trust.

106. In an email of advice from Mr Laidlow, Mr Salinger was advised:

> "The overall picture is as follows. There are two interests in the …Trust. The main interest carries 99.9% of the economic value of the trust and is to be bought by Mr Salinger. The secondary interest is the reversionary interest which is relatively worthless. Mr Salinger is currently nominated as the reversionary beneficiary. Up to Thursday that appointment can be revoked. If he does not buy the main interest it will certainly be revoked. Mr Salinger cannot own both beneficiary interests at once otherwise the trust will come automatically to an end (Saunders v Vautier). On Thursday Mr Salinger will sign the option deed which will allow him subsequently to exercise the option (at a strike price of £100) to acquire the main beneficiary interest. The £890,000 will be paid on Thursday to the selling beneficiary, … From Thursday therefore Mr Salinger will have the certainty of acquiring the main beneficiary interest. In the event of his death prior to exercising the option (which period would only be a matter of 2 or 3 days) I confirm that his PRs [personal representatives] could exercise the option. Therefore there is no risk of losing the £890,000 and acquiring nothing in return…
>
> After Mr Salinger has signed the option deed on Thursday he will get rid of his interest as reversionary beneficiary. He will do so by assigning it to the [family trust].
>
> …

> The idea of assigning the reversionary interest to the [family trust] is so that the interest is held within the Salinger camp but is no longer held personally by Mr Salinger. The deed of assignment will subsequently be executed, a day or two following the 24th. … Please do not date it. The assignment is to be in consideration of £20…I appreciate that the passage of the £20 backwards and forwards may seem like a pantomime, but the procedure ought to be followed please.
>
> Once the assignment has taken place, Mr Salinger can safely exercise the option as at that point he will have disposed of the reversionary interest and there will be no danger of him holding both interests at once. Mr Salinger should please sign the option exercise notice, but it should not be dated. …" (see paragraph 42 of the judgment)

107. On 24 September 2009 Mr Salinger followed precisely the series of steps taken by PL.

108. With regard to the Excluded Property Issue, at paragraphs 68 – 76, the Tribunal determined:

(1) It was appropriate to apply the approach directed in *Collector of Stamp Revenue v Arrowtown Assets Ltd* [2003] HKCFA 46 and *UBS AG v HMRC; Deutsche Bank v HMRC* [2016] UKSC 13 to determine whether "the relevant statutory provisions, construed purposively, were intended to apply to the transaction, viewed realistically".

(2) In essence therefore, the Tribunal had to determine whether when Mr Salinger was nominated as the reversionary beneficiary he had acquired the interest in consideration in money or money's worth (meeting the requirements of s48(1)).

(3) The Tribunal focused on whether, on the facts viewed realistically, Mr Salinger had "acquired" (interpreted constructively) the interest as reversionary beneficiary.

(4) The Tribunal concluded that as the nomination was subject to the right of revocation and thereby an empty shell giving rise to no real or practical entitlement the interest of the reversionary beneficiary had not been acquired until the right of revocation was itself revoked. As that occurred at the same time, and as part of a series of pre-ordained transactions including the granting of the option and the payment of £890,000 it was right to conclude the reversionary interest had been acquired in consideration for money or money's worth.

(5) The reversionary beneficiary was not therefore excluded property within the meaning of s48(1).

109. On the Transfer of Value Issue, at paragraphs 93 – 106, the Tribunal considered:

(1) The timing of the steps undertaken meant that Mr Salinger had transferred the reversionary interest to the family trust an hour before he acquired the income interest and therefore "he was never in a position to ask the Trustee to collapse the Trust and pay out the Trust Fund".

(2) The reversionary interest was of negligible value because it only entitled the holder to the income and capital remaining in the trust at the end of the 150-year trust period.

(3) However, income interest had real value to Mr Salinger as there was only one income beneficiary and there was no evidence that the trustees would act unreasonably should he call for income or capital from the trust and alternatively, the interest could have been assigned to a third party as it had been assigned to him for a price which could (on open market value principles) easily be determined as the only asset in the fund was cash.

(4) Accordingly, there had been no transfer of value, Mr Salinger had exchanged £820,000 in cash for an equivalent interest in the same sum as the income beneficiary.

EXCLUDED PROPERTY ISSUE

110. By virtue of s3(2) there will be no transfer of value (chargeable to IHT under s2(1)) where excluded property ceases to form part of a person's estate as a result of a disposition. The composite definition of "property" by reference to the definition of "settlement power" as set out in s272 is that it "includes all rights and interests of any description but does not include any power over, or exercisable (directly or indirectly) in relation to settled property or a settlement". So far as relevant in this appeal settled property is excluded property where it is situated outside the UK and the settlor is domiciled outside the UK at the time that the settlement was made. A reversionary interest (by virtue of s47 a future interest under a settlement) is excluded property unless it has been acquired for consideration in money or money's worth or one to which the settlor is beneficially entitled (s48(1)(a) and (b)).

111. HMRC accept that the funds within the MTrust are excluded property as at all relevant times the settled funds were held outside the UK (IoM being outside the UK for these purposes) having been settled by a non-UK domiciled settlor.

112. Marshall was never beneficially entitled to the Reversionary Interest with the consequence that the exception to excluded property under s48(1)(b) did not apply.

113. I have to determine whether the Reversionary Interest in the hands of PL was one which he had acquired for consideration in money or money's worth.

114. Though also relevant to the Transfer of Value Issue and more specifically whether the conclusion of the Tribunal in *Salinger* can be right, I am also asked to determine whether the Income Interest is capable of representing excluded property. It is relevant to do so in this section.

Submissions

115. I am grateful for the submissions made by both parties. I note the diligence with which Mrs Pearce had prepared for this appeal and her depth of understanding, as a lay person, of some very complex trust law and tax issues. I would also like to thank Mr Henderson and Mr James who recognised that Mrs Pearce was a litigant in person ensuring that matters which were contrary to their case were appropriately drawn to my attention.

116. What appears in paragraphs [117] – [121] and [133] – [175] below is necessarily a summary of the detailed arguments put both in writing and orally. I can assure both parties that I have carefully considered all arguments made in respect of the two relevant issues I have to determine and considered all the case law to which I was referred even where not referenced directly below.

Appellants submissions

117. The Appellants contended that PL was nominated as the Reversionary Beneficiary on 12 February 2010 for no consideration and, as such, the Reversionary Interest meets the definition of excluded property as provided in s48(1)(a).

118. As of 12 February 2010 PL had made no offer to purchase the Income Interest from Marshall. Consistently with the advice provided at the time, and in accordance with BW's evidence, the Reversionary Interest had no value on its own and did not justify the payment of money or money's worth for it. None was paid.

119. This was on the basis that it was clear that the MTrustee would pay out the full amount of the fund on any request by the Income Beneficiary and would otherwise act on behalf of and in accordance with the wishes of the Income Beneficiary, as evidenced by the enquiries made

as to the nature of investments to be made. In essence PL, as Income Beneficiary, would become the "owner" of the fund and the only and real value was in respect of that interest, all the consideration paid was in return for that valuable interest.

120. BP's only submission in respect of the Income Interest as excluded property was that there was no provision the equivalent to s48(1)(a) and on the basis that it represented the principal economic interest in the underlying MTrust property it was excluded property.

HMRC's submissions

121. HMRC submitted that I should adopt and apply the analysis of the *Salinger* Tribunal and accept that PL had acquired the Reversionary Interest for consideration in money or money's worth and as such it was excluded from the definition of excluded property.

122. I was invited to take a realistic view of the facts and to purposively construe the statutory provisions, in particular the phrase "acquired … for consideration" on the basis of the same principles advanced successfully in *Salinger*.

Discussion

123. I note that before the nomination of PL as Reversionary Beneficiary on 12 February 2010 PL had written the "to whom it may concern" letter confirming instruction of Haines Watts to investigate opportunities to purchase an interest in a pre-existing excluded property trust. Mr Laidlow had been engaged to source a trust and carry out due diligence on it on the understanding that the seller of such property would be likely to expect a premium over the "net asset value" of the trust with Mr Laidlow being expected to secure a discount against the usually expected premium of 10%, presumably on the basis that Mr Laidlow had the necessary experience and relationships to do so. The email from Haines Watts to Laytons indicated that cleared funds would be available by 25 February 2010. Pursuant to that engagement enquiries were immediately made to secure an interest in a relevant trust to secure the desired IHT planning outcome. It is in that context that the nomination of PL as Reversionary Beneficiary must be viewed.

124. On 12 February 2010 PL was nominated as the Reversionary Beneficiary subject to Marshall's power to revoke that nomination at any time within 42 days, Marshall having power to extend or shorten the revocation period.

125. In *Salinger* Judge Redston considered that the word "acquired", construed purposively, means that the acquirer must have at least some of the rights attributable to an owner, i.e. the right to dispose, transfer, mortgage or lend the interest (see paragraph 70). I agree.

126. She went on to conclude that at the point of nomination and subject to the revocation power Mr Salinger was in possession of an empty shell with no rights and powers and that it was only when the deed of revocation (pursuant to which the right as Reversionary Beneficiary was crystalised) that Mr Salinger could be said to have acquired the interest (see paragraph 71). Again I agree.

127. PL therefore acquired his interest as Reversionary Beneficiary on 23 February 2010 at 17:55, conterminously with the acquisition of it, he paid £1,083,750 for the full package of rights and interests under the Arrangements which included the granting of the option.

128. Applying the analysis of the Supreme Court in *Tower MCashback LLP 1 v HMRC* [2011] UKSC 19, Judge Redston considered it unnecessary to determine what proportion of the consideration paid might have been attributed to Reversionary Interest simply that it was plain that there was a package of interests and that the payment made, and thereby represented the consideration, for the package. Again I agree. Quite plainly PL would not have paid £1,083,750 for the Income Interest alone however much he believed that the MTrustee would

act in his favour, or that he could use the influence of PS as protector to influence their decision. His objective was to preserve access to the funds if needed but to divest himself of them in favour of his children and other family members in a tax efficient way. That required the whole package of rights, including the irrevocable right to the interest as Reversionary Beneficiary. And it is that for which he paid a monetary sum.

129. As regards the status of the Income Interest, I am not satisfied it is excluded property.

130. I agree with HMRC that it is property. It meets the definition of property under s272 because it is an interest "of any description". It is an interest distinct from the underlying property because the interest to be paid income or capital (pursuant to clause 4.1) is subject to the absolute discretion of the MTrustee. Whilst clause 12 provides for the appointment of a protector (who, pursuant to clause 10 may appoint replacement or additional trustees) the protector acts in the interest of the beneficiaries (i.e. both the Income and Reversionary Beneficiaries) and thereby cannot assure the Income Beneficiary of payment of either capital or income. The Income Interest is a discretionary interest in the MTrust property.

131. To be excluded property the Income Interest itself would need to be property situated outside the UK, PL's interest in respect of underlying funds situated outside the UK is a discrete interest personal to him in the UK and not therefore property outside the UK. In any event, PL would also need to be domiciled outside the UK (s6(1)), and he his not.

132. There is no other statutory basis for concluding that the Income Interest was excluded property and, by default therefore it was not excluded.

TRANSFER OF VALUE ISSUE

Parties' submissions

Appellant's submissions

133. The Appellant contends that there was no transfer of value meeting the description of s3(1). Significant reliance was, justifiably, placed on the conclusion of the Tribunal in *Salinger* on the basis that the Arrangements were materially the same as those considered in *Salinger*.

134. The Appellant's submissions are primarily predicated on a firm belief and understanding (based on the advice they were given) that there was no diminution in the value of PL's estate when the Reversionary Interest was transferred to the KTrust. This was on the basis that, pursuant to the option and its exercise, he retained the benefit to the full value of the MTrust through the Income Interest, at least in part as a consequence of the protections offered by the role of the protector and the fact that the Reversionary Interest remained in the family.

135. By reference to *Salinger* the Appellant contended that all the evidence supported a conclusion that the MTrustee would act in the best interests of the Income Beneficiary unless it was wholly unreasonable to do so. By way of example discussed during the hearing were the Income Beneficiary to have made a request for funds which was out of character and for an unwise purpose the MTrustee would have legitimately refused the payment in the wider interests of both the Income and Reversionary Beneficiaries, but that situation would have been rare and an example of acting in accordance with their fiduciary duties.

136. In light of HMRC's guidance and the case law referenced in that guidance, it was contended that when considering the open market value of the Income Interest it was necessary to assume a willing vendor and a prudent purchaser who would make reasonable enquiries and would not rush into a transaction.

137. As regards the market itself the Appellant contended that I should be concerned to identify all possible markets in which willing vendors and prudent purchasers might be bought together and not simply those of a public auction as to so ran the risk that potential interested

purchasers may be excluded and to do so was contrary to the judgment of Dankwerts J in *Holt v Inland Revenue Commissioners* [1953] 1 W.L.R 1488 (***Holt***) who stated (by reference to *Inland Revenue Commissioners v Clay* [1914] 3 K.B. 466 (***Clay***) that an open market "does not mean that a sale by auction … is to be assumed, but simply that a market is to be assumed from which no buyer is excluded" (see also *Inland Revenue Commissioners v Crossman* [1937] A.C. 26). An open market is simply one in which "the whole world is to be assumed to be free to bid" (see *Walton Inland Revenue Commissioners* [1999] STC 68). Or as Reid LJ put it in *Buccleuch v Inland Revenue Commissioners* [1967] A.C. 506 (***Buccleuch***) "the place where buyers of that kind of property congregate".

138. The Appellant relied on the judgment of Lord Reid in *Lynall v Inland Revenue Commissioners* [1972] A.C. 680 to assert that the critical requirement of the open market was to allow for economic forces to determine price by reference to the highest price that someone is willing to offer, where competition has been invited, so as to enable a variety of persons to consider what offer they would be prepared to make.

139. It was contended that reference only to the market offered by Foster and Cranfield was simply not the right market to consider, or at least not wide enough. The market for the interests arising under the Arrangements was, the Appellant contended, that conducted through private banks and advisors who were able to put together interests such as those arising under the Arrangements, and which had an enhanced value given their beneficial tax consequences. BP relied on the fact that rather than discounting or considering the value of the interest he purchased to be nil, PL was prepared to pay a £83,750 premium. The existence of other parties with the same interest as PL (and indeed Mr Salinger) should, in the Appellant's view, be considered when determining the value of the interest held by PL after the transfer of the Reversionary Interest.

140. The Appellant accepted that there was no direct evidence of that market but considered that there was sufficient evidence from the correspondence and the *Salinger* case, coupled with the accepted and acknowledged fact that there are a number of other cases under enquiry and subject to appeal for similar arrangements.

141. By reference to the case law the Appellant contended that a prudent purchaser would be someone who would make full inquiries and have access to accounts and other information which would be likely to be available to him (see *Findlay's Trustees v Inland Revenue Commissioners* (1938) 2 A.T.C 437 (***Findlay***) and *Holt*)

142. A prudent purchaser would, so the Appellant says, have:

(1) studied the MTrust deed and be legally advised on it;

(2) identified that the MTrustee had previously appointed £500,000 to Marshall as the original Income Beneficiary;

(3) been aware that appointments had also been made by the trustees in similar situations to the income beneficiary in the *Salinger* case;

(4) known that the MTrustee had readily and willingly appointed a trusted advisor to the Linington family as the protector;

(5) known that if the MTrustee were not amenable to the wishes of the Income Beneficiary that the protector could replace them;

(6) been unconcerned about the terms of clause 4.4 which limited only the Settlor to a single designation of a further Income Beneficiary (or beneficiaries).

143. By reference to the evidence it was contended that:

(1) The MTrustee acted only on the instruction and in accordance with the wishes of the Income Beneficiary in respect of the nature of investments made, PL had wanted to be confident that he had immediate access to the entire fund, conscious that such access reduced the return available by way of interest. By contrast when BP and DL had become Income Beneficiaries different investment instructions had been given and adopted by the MTrustee.

(2) The power for the protector to remove the MTrustee was significant and facilitated that the wishes of the Income Beneficiary were met. This ensured that the value of the Income Interest could be equated with the value of the fund to which the Income Beneficiary had effective access, albeit strictly subject to the absolute discretion of the MTrustee.

(3) As was clear, with the benefit of hindsight, the MTrustee had paid out the full amount of capital and accumulated income on request by the Income Beneficiaries.

144. It was also contended that the investment made by PL was not intended to confer a gratuitous benefit, it was simply an exchange of a cash asset for the Income Interest, which was to be assimilated to, and equivalent of retaining, the cash but with the benefit that it was outside the charge to IHT on PL's death.

145. In the Appellant's submission it was entirely unrealistic to conclude that PL had been prepared to pay in excess of £1,000,000 to be granted two worthless interests. What was acquired was a valuable interest in the MTrust which HMRC had accepted was excluded property. They invited me to apply the same "realistic view of the facts" to both the Excluded Property Issue and the Transfer of Value Issue.

146. With regard to HMRC's submission (see paragraphs [148] – [175] below) that *Salinger* would give rise to an astonishing (and presumably unintended) consequence that were the Income Interest to have value, such value must have remained part of PL's estate when he died and thereby subject to IHT (although not forming the basis of the conclusions in the NoDs) the Appellant contended that if that were the consequence that was the consequence and for resolution at a different time and in a different case. BP did, however, fairly acknowledge that to tax discretionary interests under a trust would appear to carry significant wider consequences than for only the Arrangements.

147. Finally, the Appellant also contends that the legislative change made by the Finance Act 2012 must be at least indicative that prior to that date the Arrangements had their intended effect and there was no transfer of value. The 2012 amendment expressly provides for a deemed transfer of value which, the Appellant contends, would have been unnecessary if there were a transfer of value on the assignment of the Reversionary Interest.

HMRC's submissions

148. HMRC contend that the Tribunal in *Salinger* was wrong to conclude that there was no transfer of value. They invite me to reappraise the position in this appeal by reference to the evidence available to me, in particular the evidence of BW as to the open market value of each of the Income and Reversionary Interests and contrast that with the open market value of the Option Interest together with the Reversionary Interest (**Combined Interest**). They submit that BW's evidence provides me with materially significant evidence that was not available to the Tribunal in *Salinger*.

149. HMRC focus on s160 and invite me to value the various interests and combinations of those interests immediately before and after the transfer of the Reversionary Interest. Each such interest is to be determined by reference to "the price which the property might reasonably be expected to fetch if sold in the open market at that time".

150. HMRC did not significantly challenge the Appellant's submissions on how I should approach determining the open market value of the various interests (perhaps not unsurprisingly given that the submissions were firmly rooted in HMRC's own guidance). However, in a number of specific regards they contended that the lens through which the test was put by the Appellant was wrong.

151. The principal focus of HMRC's submission on the open market value centred on the correct identification of the interest to be valued. In the present case there were three such interests: Income, Reversionary and Combined (as to which see paragraphs [157] to [165] below). Once the relevant interest has been identified HMRC contend that it is then necessary to value it by reference to a market for it and not as part of a package of arrangements for which there may be an entirely different market.

152. HMRC invited me to consider and apply the approach adopted by the FTT in *Nader v HMRC* [2018] UKFTT 294 (decided after *Salinger* and not referencing it) (***Nader***). That case concerned a different IHT planning scheme involving the purchase of an income interest in an offshore trust. One of the issues to be determined was the open market value of the relevant interest when acquired and whether the purchase represented a transfer of value. As in the case of *Salinger* the taxpayer in that case provided no direct, independent or objective evidence of valuation. However, in *Nader* HMRC tendered BW as their witness who gave evidence by reference to the same experience as was offered in this appeal. In his evidence in that case BW noted that the relevant trust in that case conferred very wide powers and discretions to the trustees. There, as here, he considered that a reasonable person in the market would not buy the kind of income interest relevant in the appeal because of the discretionary powers under the deed. The taxpayers had argued, as here, that it was expected that the trustees would exercise their powers in the interests of the family and so as to ensure that the benefit of the trust assets would be distributed as intended despite there being no formal obligations requiring them to do so. HMRC contended that there was an illuminating read across for the approach that I should take which clearly supported a conclusion in the present appeal that the correct approach is not to consider the price payable for tax planning arrangements but to consider the market value of the relevant interests so as to determine if there was a transfer of value diminishing the value of the estate.

153. By reference to *Nader*, *HMRC v Bower* [2008] EWHC 3105 (Ch) (***Bower***) and *Walton* [1996] STC 68 (***Walton***)) HMRC contended that when identifying a market for the hypothetical sale real potential purchasers must be identified and not invented. They relied on *Bower* in particular in which the High Court had stated:

> "If in the real world an asset is worthless, the statutory hypothesis does not make it valuable. It is not, in my judgment, lip service to the hypothesis, as [counsel for the taxpayer] argued in those circumstances to ascribe a nominal value to an asset. On the contrary, it is a necessary consequence of a finding of fact that an asset is not commercially, as opposed to legally, saleable coupled with the assumption that a sale must be assumed to have taken place."

154. The Tribunal in *Nader* applying that binding conclusion on the law itself determined that the income interest in that case was considered to be "bespoke" created for the purposes of the IHT scheme and not attractive to anyone other than buyers of the scheme (as opposed to the interest in question considered on its own).

155. Further, and by reference to *Nader* as supported by *David Merril Watkins and Clive Jonathan Harvey (executors of Kathleen May Watkins decd) v HMRC* [2011] UKFTT 745, HMRC contended that the Tribunal should take care to avoid the temptation to speculate as to the existence of a market where there was no evidence of the factual existence of such an open market for the hypothesised sale.

156. HMRC considered that paragraph 203 in *Netley v HMRC* [2017] UKFTT 442 provided a sensible summary of the correct approach to determination of the appropriate valuation principles (which largely reflected the submissions of BP in this regard):

> "(1) The sale is hypothetical. It is assumed that the relevant property is sold on the relevant day (*Buccleuch* …).
>
> (2) The hypothetical vendor is anonymous and a willing vendor, in other words prepared to sell provided a fair price is obtained (*Clay* …).
>
> (3) It is assumed that the relevant property has been exposed for sale with such marketing as would have been reasonable (*Buccleuch …*).
>
> (4) All potential purchasers have an equal opportunity to make an offer (*Lynall …*).
>
> (5) The hypothetical purchaser is a reasonably prudent purchaser who has informed himself as to all relevant facts such as the history of the business, its present position and its future prospects (*Findlay …)*."

157. By reference to these principles HMRC contended that my task was to consider all the evidence available to me and determine whether there was any evidence of a market for the Reversionary Interest or the Option/Income Interest which would ascribe value to them and also to consider the market for the Combined Interest. Unless there was a market which would value the Option/Income Interest at £1m on its own after the sale of the Reversionary Interest I need look no further. Only were there evidence of a market which would ascribe a value to the Option/Income Interest independently from the Reversionary Interest would I need to evaluate within a range where the open market value falls.

158. HMRC described 17:55 as a "magic moment". In that moment PL had irrevocably been appointed as the Reversionary Beneficiary and, as holder of the Option Interest, as a matter of law and fact, he held all the cards. The right to exercise the option was absolute, and on payment of the £100 option fee he would have had the right to control the MTrustee or to commit them to particular dealings with the trust property and, as such to call for the trust to be bought to an end and direct the MTrustee to trust property. It is by reference to this Combined Interest that PL had the right to the full value in the MTrust.

159. Before that moment and after 18:43, when he disposed of his interest as the Reversionary Beneficiary, PL did not have any combination of rights which gave him access to the call for the property or otherwise compel the MTrustee to pay any or all of the trust property to him. He was simply a discretionary beneficiary with a hope (however assured that hope might have been) that the MTrustee would apply the capital and/or income in accordance with his wishes.

160. On the evidence HMRC contend that there is only one conclusion open to me, namely that the Combined Interest was valued at approximately £1m but the Option/Income Interest on its own had no value such that there was a transfer of value of all but £1m.

161. They contend that the Combined Interest had commercial value because it was an interest which provided a potential and informed purchaser with sufficient certainty of accessing the MTrust property by exercising the option and then as holder of both the Income and Reversionary Interests calling for the MTrust property. By reference to the evidence of BW it was only such certainty that the market would pay. He had estimated that the market would discount the £1m held as cash by reference to the time and costs associated with bringing the trust to an end.

162. There was no such certainty associated with the Income Interest. This was because pursuant to clause 4.1 the MTrustee has a power to accumulate or pay out income and pursuant to clause 4.3(i) a power to appoint capital in favour of the Income Beneficiary but no obligation

to exercise it, the powers being at the absolute discretion of the MTrustee. This is to be contrasted with an interest in possession/life interest in favour of a single beneficiary who has an entitlement capable of being valued and sold on the open market. HMRC recognised that the Income Beneficiary was entitled to request appointment of capital or income and that the MTrustee, acting in accordance with their fiduciary duties, would be required to at least consider the request (and not ignore it). However, they contended that there is no requirement on a trustee to act reasonably only that they do not act in breach of their fiduciary duties and thereby not capriciously or in bad faith. Similar arguments were made in respect of the Protector who could not be a beneficiary and had the freedom to exercise or refrain from exercising their powers pursuant to clause 12.12.

163. HMRC acknowledged that acting reasonably the MTrustee may have been prepared to pay out by reference to the wishes of the Income Beneficiary and may have been replaced by the Protector (but not the beneficiaries) if they refused. However, they point to the evidence of BW to demonstrate that none of those features would give a prospective purchaser the assurance/guarantee of entitlement which would justify a positive value being placed on the Income Interest because no one could compel the MTrustee to exercise their discretion in a particular way. Accordingly, there was no commercial value to be attributed to the potential reasonableness of the MTrustee.

164. It was contended that the value of the Income Interest was further restricted by clause 4.4 which, they submitted, precluded further assignment of the Income Interest as the open market valuation of it would be required to take account of the fact that the terms of that clause precluded a further designation of an Income Beneficiary.

165. As regards the Reversionary Interest HMRC contended that there was even greater uncertainty and hence a nil valuation as clause 4.2 provided only for capital and accumulated income in the MTrust at the end of the 150-year trust period to be held for the Reversionary Beneficiary.

166. HMRC contended that no account should be taken of the fact that PL was prepared, on the face of the documentation, to pay £1,083,750 for the Option Interest plus £100 for the Income Interest, or that Mr Salinger and others might have been prepared to do the same. HMRC submitted that PL, Mr Salinger, Mr Jones and others were in the market for a package of rights giving rise to what they considered the beneficial tax consequences of the Arrangements.

167. Even were that not the case they were "special purchasers" and did not represent "prudent purchasers" as required for valuation purposes (this despite that PL was a cautious or otherwise prudent individual).

168. A "special purchaser", in HMRC's submission is someone willing to pay a higher price for the asset because of special circumstances. In this regard I was referred to *Inland Revenue Commissioners v Gray* [1994] STC 360 (***Gray***). In Gray the Court of Appeal considered relevant but not determinative "the fact that one person had a particular reason for paying a higher price than others". The relevance of those purchasers prepared to pay a higher price was, in HMRC's submission and by reference to the Court of Appeal judgment in *Walton v Inland Revenue Commissioners* [1996] STC 68 (***Walton***), limited to determining the market response to them i.e. the existence of a special purchaser capable of influencing the price the market will pay will have an effect on the open market value but not otherwise.

169. HMRC did not even consider PL as a special purchaser in the market for any of the Option, Income or Reversionary Interests as he had no interest in acquiring any of them individually only as part of the Arrangements. Rather the price PL was prepared to pay for the Option Interest was driven by the Arrangements themselves which had been designed to

achieve the beneficial tax outcome asserted by its proponents. In HMRC's submission PL paid £1,083,750 ascribed to the Option Interest plus £100 to exercise the option because he was advised that by doing so, and contingent upon the acquisition and transfer of the Reversionary Interest he would acquire an interest in excluded property thereby effecting a distribution of £1m to his family outside the charge to IHT. Essentially for precisely the same reasons as it was to be concluded, in law and in fact, that part of the consideration paid was attributable to the purchase of the Reversionary Interest, it could not be said that the whole of the £1,083,750 was attributable to the Option Interest.

170. As regards s10 and whether the transfer of the Reversionary Interest represented a disposition not intended to confer a gratuitous benefit HMRC again drew my attention to the analysis in *Nader*. In *Nader* it had been determined that given that the question of whether there was a disposition conferring a gratuitous benefit was determined by reference to the relevant "series of transactions and any associated operations" it was necessary to look at the context of, in that case, the full scope of the tax planning arrangements. In the present appeal, whilst the payment of £20 for the Reversionary Interest by KTrust to PL reflected a fair payment for the value of that interest, the Arrangements had to be viewed as a whole. By reference to the Arrangements taken as a whole HMRC contended that PL was plainly seeking to pass up to £1m of cash assets to his children and the other beneficiaries of his estate. His intent was to do so in an IHT efficient manner, as evidenced by the "to whom it may concern" letter and the statement and oral testimony of BP.

171. HMRC also addressed whether the Combined Interest amounted to a "settlement power" which was thereby excluded from the definition of "property" in s272 and thus outside any potential charge to IHT. In this regard HMRC raised the question whether that, as defined by s47A, a settlement power is "any power over, or exercisable (whether directly or indirectly) in relation to settled property" and might encompass a *Saunders v Vautier* right to bring a trust to an end where the rights of an income and reversionary beneficiary are held by the same person. However, in the present case the Arrangements had been deliberately designed so that the Income Interest and the Reversionary Interest were never be held by the same person. As such the settlement power which may be implicit within a *Saunders v Vautier* right/entitlement was not a feature of the Arrangements. The Option Interest and the Reversionary Interest were not to be equated to a *Saunders v Vautier* right and were not therefore capable of representing a settlement power excluded from the definition of "property". That conclusion did not, however, in HMRC's submission, preclude a conclusion that the Combined Interest was valued (as BW had done) at of the order of £1m such that the disposition of one of the elements of the Combined Interests had the effect of diminishing the value of the remaining interest to nil and thereby representing a transfer of value.

172. Finally, but not as a free-standing basis on which the appeal should be rejected, HMRC contend that in the event that the Tribunal in *Salinger* was correct there would be a very significant, apparently unintended, consequence with potentially far-reaching consequences. Whilst HMRC gave the Appellants in this case an assurance that those consequences would not be applied should I reach the same conclusion in this appeal as was reached by the Tribunal in that appeal, they contended that the potential and necessary consequences were so significant that the conclusion reached must be called into question.

173. HMRC contend that the effect of the Tribunal's judgment in *Salinger* is apparently to ascribe value to a discretionary interest arising under a trust, at least in the case where there is a single beneficiary during the trust period and a reversionary beneficiary at the end of it.

174. Discretionary interests are subject to IHT under the relevant property regime (pursuant to which the trust itself is subject to a charge to tax on the 10th anniversary and when capital

leaves the trust) but the potential beneficiaries are not considered to have a right to the trust property and, as such, their discretionary interest cannot form part of the beneficiary's estate and no charge to IHT arises for that beneficiary in respect of it. If the Tribunal in *Salinger* were right, HMRC contend, there is at least a significant risk that property held in a discretionary trust could be subject to IHT under both the relevant property regime and as a transfer of value in the estate of a potential beneficiary.

175. Therefore, and by reference to both *Salinger* and the present case, if the Tribunal were correct that the Income Interest were to be the full capital value of the trust fund such an interest would be property meeting the s272 definition, and thereby forming part of the estate on death and, at that point, subject to a charge to IHT on the value of the capital then in the trust fund.

Discussion

176. On this issue I am faced with the clear and coherently articulated judgment in *Salinger* which concluded that the Option/Income Interest acquired by Mr Salinger in virtually identical circumstances did not represent a transfer of value because, in essence, Mr Salinger had paid a commensurate price for the interest in question.

177. With the assistance of submissions from HMRC, and by reference to a number of my own decisions on the issue I have considered the application of the principle of comity. In summary, the principle requires that whilst courts of competent jurisdiction are not bound by the legal conclusions of one another's judgments, such conclusions will be highly persuasive and should be followed unless the second court is convinced that they are wrong. There was some debate as to the meaning of "convinced" (established by the Upper Tribunal to be the same as "satisfied" – see *Gilchrist v The Commissioners for Her Majesty's Revenue and Customs* [2014] UKUT 0169 (TCC)), and whether the second court (or Tribunal) must consider them to be "plainly" or "clearly" wrong (as determined in *HMRC v Abdul Noor* [2013] UKUT 071 (TCC)).

178. However, and whilst the Appellant considered that the judgment in *Salinger* was correct, the Appellant agreed with HMRC that I should simply reach my own decision on the law and by reference to the facts of this appeal and, if my conclusion was contrary to that of the Tribunal in *Salinger* I should determine this appeal by reference to my own conclusions without considering whether I was "convinced" or "satisfied" that *Salinger* was wrong.

179. I express no view on whether, in the light of the evidence available to it, the Tribunal in *Salinger* was wrong, but I have reached a different conclusion by reference to the evidence and legal arguments as they were presented to me.

180. Dealing with the ancillary issues first:

> (1) As set out in paragraph [0] above I consider that PL had the clear and stated intention of effecting a gratuitous disposition to his family of £1m. He effected that disposition through the Arrangements which he believed maximised the value to his beneficiaries by escaping a charge to IHT. In accordance with s10 it is the series of transactions and any associated operations which I must consider when determining whether a gratuitous disposition was effected. By reference to the Arrangements taken together and PL's stated intent (as per the "to whom it may concern" letter) it cannot be said (as per s10) that the disposition was one which did not confer a gratuitous benefit or put more simply there was a gratuitous disposition, and it cannot thereby be excluded from a charge to IHT by virtue of s10. This conclusion is entirely consistent with the conclusion reached in *Nader*.
>
> (2) I do not consider that the Combined Interest represented a settlement power within the definition of s272:

(a) Inherent within the Combined Interest were two interests: the Option Interest and the Reversionary Interest. They were structured specifically to avoid a concern that if the Income Interest and the Reversionary Interest were in the same hands there would have been a de facto merger of trust interests bringing the MTrust to an end.

(b) In my view that concern was, in any event, misplaced. By reference to *Saunders v Vautier*, and the available respected commentary on it, the holding of both interests by a single beneficiary does not bring the Trust to an end it simply provides that at the behest of the single beneficiary it can be called for. The beneficiary is equally entitled to maintain the separated interests.

(c) Under the Arrangements in the period from 17:55 to 18:43 whilst the Option gave PL the right to call for the Income Interest and thereby, upon exercise of the option, the right to call for the MTrust property the construct of the Arrangements and the strict order in which the steps were to be undertaken had the effect of precluding a conclusion that at any point the *Saunders v Vautier* right of appointment over the property in the MTrust was established and, as such, was neither a direct or indirect power in relation to the MTrust property. The power of appointment in respect of the MTrust property remained throughout in the discretion of the MTrustee.

181. As such I am required to determine whether the open market value of PL's estate immediately prior to the transfer of the Reversionary Interest was diminished by the transfer of the Reversionary Interest.

182. At 17:54, so far as relevant, PL's estate consisted of £1,000,000 in cash held to his account by DQ and a revocable Reversionary Interest in the MTrust. At this point given the revocable nature of the Reversionary Interest the open market value of his estate at that time was plainly £1,000,000 and neither of the parties argued to the contrary.

183. By 17:55 PL had become the irrevocable owner of the Reversionary Interest and the £1,000,000 held to his account by DQ had, consistently with the condition precedent set out in clause 1.1.2 of the Option deed, been paid to Marshall who, in return, had granted the Option Interest. PL was therefore entitled to the Combined Interest. I have to determine the open market value of that combined interest.

184. By reference to the evidence of BW, HMRC contend the value of the Combined Interest is of the order of £1,000,000 on the basis that at this point, upon payment of the £100 option fee, PL would have had the right to call for the appointment of the property of the MTrust (i.e. £1,000,000 held in cash). On the basis of BW's experience, the uncertainty inherent within the discretionary features of each of the Option/Income and Reversionary Interests was eliminated because the holder had a clear and certain route to accessing the property. In BW's experience it is this certainty that an investor will value. The contractual ability to secure certainty is enough to ensure that the Combined Interest would be valued in a hypothetical market.

185. BW's conclusions were, in essence, supported by BP's evidence to the effect that PL needed to feel secure that, on behalf of the family and his successors, there was no risk that the MTrust property was not held for them collectively. To this end, the Reversionary Interest had to have become irrevocable, and PL wanted and needed to be assured that should he need to he could access to the funds. PL was provided with the necessary reassurance that the Arrangements as a whole protected him and, on that basis he paid over £1,083,750. It was the Arrangements taken together that provided him with the confidence that he was not losing his money and in the belief that the Arrangements delivered the IHT savings he anticipated.

186. I consider that the hypothetical prudent purchasers of the Combined Interest were investors of the type who would use the Foster and Cranfield auction and those who reasonably considered that the Arrangements gave rise to an IHT saving. The former group would discount the value to allow for access to the property or to secure investment of the MTrust assets. The latter group were, on the evidence, prepared to pay a premium for the potential/advised tax saving. This latter group may be considered to be special purchasers who were prepared to pay a higher price than the former for a special reason (to obtain a tax advantage). However, I take the view that given that the special reason was not one which would affect the wider market the open market value is a discounted value.

187. This conclusion is also one which is in the Appellant's favour as it diminishes (albeit only marginally) the value ascribed and is consistent with the NoDs.

188. The parties opposing submissions on the effect of clause 4.4 of the MTrust deed had the potential to affect the discount which might be applied to the £1m when reaching an open market value of the Combined Interest. As set out above HMRC say that clause 4.4. precluded a second designation of the Income Beneficiary. The Appellants say 4.4 applied only to Marshall.

189. BW's evidence was that HMRC's interpretation made little difference to a valuation of the Option/Income Interest independently because the value was already nil. However, he did not address the impact of HMRC's submission on the open market value of the Combined Interest. That could have left a potential hole in the evidence as to what an investor would have paid for the Combined Interest. However, on the construction of clause 4.4 I agree with the Appellants. That clause is an effective impediment on Marshall as settlor from purporting to make a further designation of the Income Beneficiary but places no such restriction on further designation by a subsequent Income Beneficiary. As a consequence I consider that the clause would have no effect on the valuation of the Combined Interest.

190. At 18:43 PL assigned his Reversionary Interest leaving himself with the Option Interest. That interest gave him the absolute right, on payment of £100, to the Income Interest i.e. an interest to have income or capital appointed at the absolute discretion of the MTrustee. 42 minutes later PL became the Income Beneficiary with the Income Interest.

191. BW's evidence was that a third-party investor would pay nothing for the Option or Income Interest taken alone because the nature of each of the interests gave the potential purchaser no certainty of becoming entitled to the underlying property. He confirmed that the possibility of accessing the Reversionary Interest would not alter the valuation though, for the reasons he valued the Combined Interest if both interests were sold as a package on the market together they would be valued as for the Combined Interest.

192. BP's evidence was that each of the interests had been priced in the Arrangements and that such valuation was a reasonable reflection of the open market. She gave evidence and submitted on behalf of the Appellants that individuals, such as her father, were prepared to pay the full value and a premium for the Option Interest based on the assurances given.

193. The problem with that evidence and submission is that it proves the contrary point i.e. that the price paid was for the Arrangements as a whole and not for the Option Interest alone. It is on the basis of that obvious conclusion that both the Tribunal in *Salinger* and I have concluded that the sum payable for the Arrangements as a whole represented consideration for all the interests including the Reversionary Interest (at the point at which it became irrevocable).

194. PL was not a special purchaser for an Option Interest capable of influencing the open market price he was a prudent purchaser of the Arrangements as a whole including all the

features built in to make it an attractive proposition for the disposition of a gratuitous benefit in a hoped-for tax efficient way.

195. Whilst I have determined that there is evidence for a market for the Arrangements (see paragraph [0]) there is no evidence that a prudent purchaser of either the Option Interest or the Income Interest would have been prepared to pay for it and, by reference to *Bower*, it is not for me to invent such a purchaser. The only evidence before me is that the Option Interest and/or the Income Interest taken alone was commercially unsaleable. As such it had no value with the consequence that the transfer of the Reversionary Interest (although itself also commercially unsaleable and valued at nil – despite the payment of £20) diminished PL's estate by the value of the Combined Interest.

196. That conclusion is entirely consistent with the reasoning and outcome in *Nader* in which it was considered that it was apparent (when construing s160 purposively) that Parliament "intended the open market value of property to be the true and objective economic value of the property in question to be ascertained regardless of the particular circumstances or aspirations of the actual parties concerns, and, indeed, disregarding any manipulation of the value of the asset." (see paragraph 144). The Tribunal concluded that the deceased in that case had been prepared to pay £1m not for the income interest but for the IHT planning scheme and the ability to shelter the £1m.

197. As regards HMRC's submission that *Salinger* produces a very odd result which has the potential to strike at the heart of the basis on which IHT is charged on discretionary interests. It certainly appears to be that the natural consequence of the judgment must be that if Mr Salinger did not effect a transfer of value associated with the arrangements he entered the income interest he held at death must have represented property for the purposes of s272 at his death and which would have then been assessable to IHT at that point. That was not something directly relevant to the determination required by the Tribunal in that case and was not apparently put and thereby addressed by the Tribunal. It does not arise on the basis of my conclusion and accordingly I do not need to determine whether it is or is not a consequence.

198. Finally, with respect to the 2012 legislative amendment, quite plainly it introduced a specific charge to IHT where arrangements are entered meeting the terms of ss74A – C. That does not however mean that the present arrangements escaped a charge to IHT. For the reasons set out above, and by reference to the conclusions below, I consider that there was a transfer of value assessable to IHT under the pre 2012 legislative changes.

DISPOSITION

199. For the above reasons I conclude:

(1) PL acquired the Reversionary Interest in the MTrust for consideration in money or money's worth and as such the Reversionary Interest was not excluded property.

(2) The transfer of the Reversionary Interest to the KTrust was a transfer of value. The value so transferred is determined by reference to the difference between the open market value of the Combined Interest and the Option Interest. The open market value of the Combined Interest is to be estimated by reference to £1,000,000 discounted by reference to a reasonable period in which the purchaser could have exercised the option and called for the MTrust property. Given that the option was exercisable immediately (as evidenced by facts of this case) and that the MTrust property was held in cash and could thereby have been liquidated almost immediately it appears to me that very little discount would be appropriate. The value of the Option Interest at the point at which the Reversionary Interest was transferred was nil. Accordingly, the transfer value in the NoD is likely to be generous and should be upheld.

(3) For all the reasons set out above, the appeal is dismissed on the basis that, as mentioned above (see paragraph [10] above), this is a decision in principle. The parties may apply to the tribunal for the tribunal to determine the amount of the resulting Inheritance tax if the parties fail to reach agreement.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

200. 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.

AMANDA BROWN KC
TRIBUNAL JUDGE

Release date: 30th JANUARY 2023

APPENDIX

Inheritance Taxes Act 1984[1]

1 Capital Transfer Tax

Capital transfer tax[2] shall be charged on the value transferred by a chargeable transfer.

2 Chargeable transfers and exempt transfers

(1) A chargeable transfer is a transfer of value which is made by an individual but is not (by virtue of Part II of this Act or any other enactment) an exempt transfer…

3 Transfers of value

(1) Subject to the following provisions of this Part of this Act, a transfer of value is a disposition made by a person (the transferor) as a result of which the value of his estate immediately after the disposition is less than it would be but for the disposition; and the amount by which it is less is the value transferred by the transfer.

(2) For the purposes of subsection (1) above no account shall be taken of the value of excluded property which ceases to form part of a person's estate as a result of a disposition…

(3) Where the value of a person's estate is diminished, and the value–

(a) of another person's estate, or

(b) of any settled property, other than settled property treated by section 49(1) below as property to which a person is beneficially entitled,

is increased by the first-mentioned person's omission to exercise a right, he shall be treated for the purposes of this section as having made a disposition at the time (or latest time) when he could have exercised the right, unless it is shown that the omission was not deliberate.

3A Potentially exempt transfers

(1A) Any reference in this Act to a potentially exempt transfer is…a reference to a transfer of value–

(a) which is made by an individual on or after 22nd March 2006,

(b) which, apart from this section, would be a chargeable transfer (or to the extent to which, apart from this section, it would be such a transfer), and

(c) to the extent that it constitutes–

(i) a gift to another individual

(ii) a gift into a disabled trust, or

(iii) a gift into a bereaved minor's trust on the coming to an end of an immediate post-death interest…

(4) A potentially exempt transfer which is made seven years or more before the death of the transferor is an exempt transfer and any other potentially exempt transfer is a chargeable transfer.

(5) During the period beginning on the date of a potentially exempt transfer and ending immediately before–

(a) the seventh anniversary of that date, or

(b) if it is earlier, the death of the transferor,

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[1] The provisions here set out are from the version of IHTA which was in force in 2009-10

[2] The reference in this section to CTT must be read as a reference to IHT in respect of a liability to tax arising on or after 25 July 1986, see FA 1986 s 100(1), (2)

it shall be assumed for the purposes of this Act that the transfer will prove to be an exempt transfer.

4 Transfers on death

(1) On the death of any person tax shall be charged as if, immediately before his death, he had made a transfer of value and the value transferred by it had been equal to the value of his estate immediately before his death…

5 Meaning of estate

(1) For the purposes of this Act a person's estate is the aggregate of all the property to which he is beneficially entitled, except that–

(a) the estate of a person–

(i) does not include an interest in possession in settled property to which section 71A or 71D below applies, and

(ii) does not include an interest in possession that falls within subsection (1A) below unless it falls within subsection (1B) below, and

(b) the estate of a person immediately before his death does not include excluded property….

(1A) An interest in possession falls within this subsection if–

(a) it is an interest in possession in settled property,

(b) the settled property is not property to which section 71A or 71D below applies,

(c) the person is beneficially entitled to the interest in possession,

(d) the person became beneficially entitled to the interest in possession on or after 22nd March 2006, and

(e) the interest in possession is–

(i) not an immediate post-death interest,

(ii) not a disabled person's interest, and

(iii) not a transitional serial interest.

(1B) An interest in possession falls within this subsection if the person–

(a) was domiciled in the United Kingdom on becoming beneficially entitled to it, and

(b) became beneficially entitled to it by virtue of a disposition which was prevented from being a transfer of value by section 10 below.

(2) A person who has a general power which enables him…to dispose of any property other than settled property, or to charge money on any property other than settled property, shall be treated as beneficially entitled to the property or money; and for this purpose "general power" means a power or authority enabling the person by whom it is exercisable to appoint or dispose of property as he thinks fit.

6 Excluded property

(1) Property situated outside the United Kingdom is excluded property if the person beneficially entitled to it is an individual domiciled outside the United Kingdom.

10 Dispositions not intended to confer gratuitous benefit

(1) A disposition is not a transfer of value if it is shown that it was not intended, and was not made in a transaction intended, to confer any gratuitous benefit on any person and either–

(a) that it was made in a transaction at arm's length between persons not connected with each other, or

(b) that it was such as might be expected to be made in a transaction at arm's length between persons not connected with each other…

(3) In this section–

"disposition" includes anything treated as a disposition by virtue of section 3(3) above;

"transaction" includes a series of transactions and any associated operations.

47 Reversionary interest

In this Act "reversionary interest" means a future interest under a settlement, whether it is vested or contingent (including an interest expectant on the termination of an interest in possession which, by virtue of section 50 below, is treated as subsisting in part of any property).

48 Excluded property

(1) A reversionary interest is excluded property unless–

(a) it has at any time been acquired (whether by the person entitled to it or by a person previously entitled to it) for a consideration in money or money's worth, or

(b) it is one to which either the settlor or his spouse or civil partner is or has been beneficially entitled…

(3) Where property comprised in a settlement is situated outside the United Kingdom–

(a) the property (but not a reversionary interest in the property) is excluded property unless the settlor was domiciled in the United Kingdom at the time the settlement was made, and

(b) section 6(1) above applies to a reversionary interest in the property but does not otherwise apply in relation to the property; but this subsection is subject to subsection (3B) below…

(3B) Property is not excluded property by virtue of subsection (3)…above if–

(a) a person is, or has been, beneficially entitled to an interest in possession in the property at any time,

(b) the person is, or was, at that time an individual domiciled in the United Kingdom, and

(c) the entitlement arose directly or indirectly as a result of a disposition made on or after 5th December 2005 for a consideration in money or money's worth.

(3C) For the purposes of subsection (3B) above–

(a) it is immaterial whether the consideration was given by the person or by anyone else, and

(b) the cases in which an entitlement arose indirectly as a result of a disposition include any case where the entitlement arose under a will or the law relating to intestacy

47A Settlement power

In this Act "settlement power" means any power over, or exercisable (whether directly or indirectly) in relation to, settled property or a settlement.

49 Treatment of interests in possession

(1) A person beneficially entitled to an interest in possession in settled property shall be treated for the purposes of this Act as beneficially entitled to the property in which the interest subsists.

(1A) Where the interest in possession mentioned in subsection (1) above is one to which the person becomes beneficially entitled on or after 22nd March 2006, subsection (1) above applies in relation to that interest only if, and for so long as, it is–

(a) an immediate post-death interest,

(b) a disabled person's interest, or

(c) a transitional serial interest...

160 Market value

Except as otherwise provided by this Act, the value at any time of any property shall for the purposes of this Act be the price which the property might reasonably be expected to fetch if sold in the open market at that time; but that price shall not be assumed to be reduced on the ground that the whole property is to be placed on the market at one and the same time.

272 General interpretation

…

"excluded property" shall be construed in accordance with sections 6 and 48 above

…

"property" includes rights and interests of any description and does not include a settlement power

…

"Settlement power" has the meaning given by section 47A above.