Neutral Citation: [2024] UKFTT 00214 (TC)

Case Number: TC09101

FIRST-TIER TRIBUNAL
TAX CHAMBER

Taylor House, London

Appeal reference: TC/2021/11218

CAPITAL GAINS TAX – claim to entrepreneurs' relief for goodwill on transfer from individual to close company post 3 December 2014 – application of section 28 Taxation of Chargeable Gains Act 1992 – whether contract for disposal is deemed to have been made earlier than 3 December 2014 – on the evidence no – appeal dismissed

Heard on: 14 and 15 November 2023
Judgment date: 11 March 2024

Before

TRIBUNAL JUDGE AMANDA BROWN KC
JULIAN SIMS

Between

FRANCES DELANEY

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Roaul Downey, barrister but appearing as partner of Ms Delaney

For the Respondents: Charles Asuelimen litigator of HM Revenue and Customs' Solicitor's Office

DECISION

INTRODUCTION

1. This appeal concerns a claim to Entrepreneurs' Relief (**ER**) made by Frances Delaney (**Appellant**) in her tax return for the tax year ended 5 April 2016 in respect of the disposal of her business operating two nursery schools to a close company Miss Delaney's Nursery Schools Limited (**MDNSL**).

2. Prior to 3 December 2014 a taxpayer who disposed of a business, including goodwill, to a limited company to which they were connected was entitled to claim ER thereby reducing the rate at which capital gains tax is paid from 28% to 10%. ER was denied on any such disposal occurring after 3 December 2014 by virtue of section 169L Taxation of Chargeable Gains Act 1992 (**TCGA**).

3. By virtue of section 28 TCGA the time at which a disposal is treated as made is the date on which the contract giving rise to the disposal was made. In this appeal, as particularised below, the Appellant contends that there was a contract for disposal prior to 3 December 2014. Absent a written agreement between the Appellant and MDNSL, and by reference to the evidence available, HM Revenue and Customs (**HMRC**) have determined that there was no effective contract for disposal prior to the time of actual disposal which was effective from 1 September 2015. Accordingly, HMRC refused the Appellant's claim to ER. Their refusal of ER is the relevant conclusion as specified in the closure notice issued pursuant to section 28A Taxes Management Act 1970 on 29 March 2021; that conclusion justifies the amendment to the Appellant's capital gains tax calculation increasing tax payable by her in the sum £196,902.

4. On the evidence and legal arguments presented to us we consider that the Appellant has failed to show that there was a contract for disposal prior to 3 December 2014 and we dismiss the appeal.

BURDEN OF PROOF

5. In this appeal it is for the Appellant to show, on the balance of probability, that there was an enforceable contract for the transfer of the business by the Appellant to MDNSL prior to 3 December 2014.

EVIDENCE AND FACTS

6. We were provided with a hearing bundle consisting of 442 pages and a supplementary bundle of 62 pages. We note that some documents were provided in a redacted or incomplete form. This was on the basis that the Appellant was prepared, so it was said, to apply a limited waiver of legal advice privilege. We were not provided with any advice provided to the Appellant by either her solicitors (Hunters) or accountants (Menzies) regarding the incorporation of MDNSL or the disposal. In our view the Appellant's case may have been assisted had she been prepared to disclose such advice as was received.

7. We had the benefit of witness statements from the Appellant and Mr Downey who both gave oral evidence and were cross examined.

8. We found the Appellant to be a truthful witness. Her witness statement had, in our view, clearly been drafted for her and in parts amounted to impermissible submission which she was then ill equipped to address in cross examination. Through her oral evidence she demonstrated that she was passionate about, and devoted to, her vocation in the provision of nursery school education. However, matters of business are not her focus, she stated, and it was apparent from her evidence, that she relied entirely on the advice of others and undertook such actions as they directed. It was plain that she had very little personal involvement in, or intellectual engagement with, the legal steps involved in the incorporation of MDNSL or the disposal of

her business to MDNSL. In cross examination she often struggled to understand even the most basic of questions put to her regarding the incorporation of MDNSL and the disposal of the business. That was so even when the questions were reframed and simplified. In our view she was focused on ensuring continuity of education for the children and a significant change of premises which occurred at the same time as the disposal.

9. We found Mr Downey's evidence rather self-serving but not untruthful.

10. It is unfortunate that we did not have the benefit of evidence from Menzies, in particular Mr Dick Watson who had been an advisor to the Appellant for many years.

11. From the evidence we find the following facts:

(1) The Appellant established her first nursery school in 1996. At that time it operated from premises at St James' Norlands Church (**St James'**) under the terms of a personal licence granted to the Appellant.

(2) In 2001 the Appellant opened a second school known as "Miss Delany's Too" which operated from premises at St Clements Notting Dale Church (**St Clements**) also under a personal licence.

(3) The licences at both premises were renewed periodically.

(4) In the period to 2011 the business gained reputation and grew.

(5) In or about 2011 the Appellant was advised by Dick Watson at Menzies (her personal advisor for many years) that she should consider transferring her business to a limited company so as to protect her from personal liability arising from the business and with a view ultimately to selling the business in due course. We have no further details as to the advice provided. Ms Delaney had little understanding of the basis on which incorporation protected her.

(6) In 2012 the Appellant began renewal negotiations with the church diocese for both properties as the licences were due to expire in August 2014. As part of those negotiations the possibility of a transfer of the business to a limited company was discussed with the church's representatives with a view to aligning the then potential transfer with the granting of continued occupation for the nursery business. Given occupation of the premises was under personal licence, transfer of the business into an incorporated company would have precluded continued occupation under renewed licences and required the granting of a lease.

(7) Limited correspondence on the negotiations was provided to us though we were provided with a letter dated 19 October 2012 from Hunters (the Appellant's solicitors). This letter stated:

> "Please find enclosed with this letter our client engagement letter in relation to your instructions to act for you in relation to the issues concerning <u>your occupation</u> of the two Church premises … Stephen Morrall will send you a separate engagement letter as and when he becomes involved in advising on the transfer of the business to the proposed newly incorporated company."

(8) We find that this letter indicates a general intention to incorporate and transfer the business but lacks any specificity so as to evidence even an intention to contract at that stage.

(9) We were then provided with a letter dated 19 October 2013 from the Appellant to the church pursuant to which the church was informed:

> "… I am looking to operate both Miss Delaney's and Miss Delaney's Too under a corporate structure in the future and it is for this reason that I am looking to put the leases in the name of the company rather than hold them personally at present …" (emphasis added)

(10) We consider that this letter demonstrates the true position in October 2013. The Appellant wished to negotiate for the continued occupation of St James' and St Clements on the basis that the occupier post the expiry of the then current personal licences on 31 August 2014 would be the limited company. However, on 19 October 2013 she was "looking to operate [the nurseries] under a corporate structure in the future". We find that this is evidence that there was no definite intention as to whether or when a transfer might take place, we infer that the Appellant's advisors were keeping the options open as to the vehicle through which the business was operation as the premises from which the business operated was inherently critical – unless the church was prepared to grant a lease any incorporated entity would have no place from which to operate the business.

(11) Excerpts of a letter dated 23 October 2013 from Hunters were disclosed. We do not know its author. The letter sets out the scope of work to be undertaken by Hunters as follows:

> "The work we will carry out is as follows:
>
> (a) I will incorporate two companies as set out in my email to you of 1st October 2013. At the time of writing, I am waiting for you to confirm the initial names you wish to use for the companies. The first company will be the vehicle for your two existing schools; the second company will be for the new school you plan to establish at the OLV.
>
> (b) Prepare a short Business Sale Agreement for the transfer of the existing schools to company No 1. …
>
> (c) Review the current terms and conditions that you provide to parents and advise on:
>
> (i) A contract of employment for yourself.
>
> (ii) Standard contracts of employment for your staff …
>
> (iii) A licence agreement to use the "Miss Delaney" name."

(12) Despite Hunters being instructed to do so no business sale agreement was ever drafted. The explanation given was that as there was no risk of disagreement between the vendor (the Appellant) and the purchaser (MDNSL) as to the terms of the transfer it was unnecessary to incur the costs associated with preparation of the agreement. 0

(13) We can accept that saving costs may well have been a reason not to proceed with the preparation of the business sale agreement. And whilst as vendor and sole director and shareholder of the purchasing company a "disagreement" as to terms was unlikely we consider the proposition that it justified no agreement to be naïve. A limited company offers protection to the owners which is absent in an unincorporated entity with the consequence that a limited company has a far wider group of stakeholders than an unincorporated business including customers, the landlord of leased property, lenders, employees etc. It is the company (and thereby the wider stakeholders of that company) whose interests would have been protected by a business sale agreement. It was apparent that the Appellant was unaware of the true and real ramifications and responsibilities in what she referred to as incorporation of her business and her responsibilities as a director.

(14) We were also informed and find that Hunters never ultimately: (a) incorporated the second company, (b) drafted an employment contract for the Appellant, (c) drafted

standard employment terms or (d) drafted a licence agreement for use of the "Miss Delaney" name as envisaged in the letter of 23 October 2013. We were informed an accept that the trademark "Miss Delaney's" was registered in the Appellant's name on 7 March 2014 but was never formally licenced.

(15) We find that the engagement letter (being between Hunters and the Appellant in her capacity as a private individual) cannot represent evidence of an intention by both the Appellant and MDNSL to contract for the sale and purchase of the goodwill and any other assets of the business. At best it was a statement of intent of what may or may not have been delivered by Hunters to the Appellant in due course.

(16) In her witness statement the Appellant stated: "as far as I was concerned, the agreement to transfer the business to [MDNSL] was implicit in my decision to proceed to incorporate the business". When cross examined on this statement the Appellant became very confused and upset. She was unable to answer the questions put to her as to the basis on which the statement was founded. On the evidence we find that the Appellant gave no thought at the time to the connection or otherwise between the incorporation of MDNSL (as opposed to "the business" which is never incorporated per se) and the transfer of the business whether by formal written contract or otherwise. We further find that it is not possible, on the evidence, to find that MDNSL was incorporate with the sole intention of being the recipient of a transfer of the business. We struggle to find evidence of any particular intention of Ms Delaney either in her capacity as the Appellant or director of MDNSL, she was merely doing what was suggested to her. The intention of those advising her cannot be assimilated as her intention.

(17) In any event and whatever the reason, there is no written contract between the Appellant and MDNSL.

(18) The Appellant stated that she "did not go through the charade of verbally making an offer on behalf of myself and verbally accepting it on behalf of [MDNSL]". We find that there was no oral contract between the Appellant and MDNSL in 2013 or at all.

(19) On 21 November 2013 MDNSL was incorporated. The Appellant was the sole director and shareholder.

(20) We were told that the decision to incorporate was taken because as at that date the Appellant understood that the church was willing to grant a lease in respect of the St James' premises and incorporation was synonymous with an intention to transfer the business which would be operated from the premises to which a lease had been granted. We have some difficulty with this evidence as the Appellant's evidence was also that in November 2013 the church had indicated that they were not willing to grant a lease in respect of the St Clement's premises. The granting of a lease only for St James' would have precluded the possibility of operating both schools under the common ownership of the incorporated entity (given a presumed inability to grant a sublicence from a personal licence). We find that incorporation may have facilitated the granting of a lease for St James's and, had the Appellant been able to also reach agreement for a similar arrangement for St Clement's, the incorporated entity could have been the recipient of a transfer of the business but the asserted synonymity is not made out on the evidence. Incorporation was, in our view a necessary step which the Appellant was advised to take in a process leading to "incorporation of the business".

(21) That conclusion is supported by the actions taken by the Appellant arising from the difficult negotiating position of the church. In November 2013 she began to investigate alternative premises for the operation of a combined business. Premises were found and negotiations began for a lease of the new premises. We were informed and accept that

in principal terms were agreed in December 2013, but the landlord withdrew in January 2014 (we were not provided copies of the in principal agreement).

(22) By this time it was also apparent that the church was not willing to grant a lease for St James's and, at most, would only consider extending the terms of the Appellant's personal licence. In the circumstances, the Appellant, continued negotiations to renew the personal licences. Absent alternative accommodation, securing occupation of the premises at St James' and St Clements beyond August 2014 was an imperative for the Appellant as the contractual commitment for places for the academic year commencing 1 September 2014 were entered up to 18 months in advance of that date. The Appellant agreed an extension of the personal licences to 31 August 2014 as an interim measure.

(23) We find that this is continuing evidence that the Appellant wanted to effect a business transfer to a limited company and maintained an intention to do so when and if the circumstances provided. However, as of January 2014 the business could not have been transferred to and operated by an incorporated entity as there were no premises from which that business could be operated available to MDNSL.

(24) In March 2014 the landlord of the alternative property sought to reopen engagement regarding occupation of the property by the nursery schools. The alternative property offered what appeared to be more suitable premises for the school, enabled the two schools to come together and operate together and also facilitated the potential for the business to be transferred. However, as the building was in residential use, use for the provision of nursery education required the Appellant/MDSNL to obtain planning permission for change of use and, when and if granted, the property then needed to be inspected and registered with OFSTEAD. We understand that negotiations regarding the property continued throughout the summer of 2014.

(25) We were informed that on 30 June 2014 MDNSL employed a head teacher for the schools, with a deferred start date of 5 January 2015. We were told that the recitals to the contract of employment (which we were not provided with) referenced "Miss Delaney's" the registered trademark for the operation of the proposed combined school. We were told that the recitals also indicated that MDNSL owned and operated the schools. As we did not have sight of the contract we cannot make findings as to its terms. However, we note that any use of the trademark by MDNSL is strictly contrary to its registration as there was no licence granted for its use to MDNSL and that it is admitted that as of 30 June 2014 MDNSL did not own or operate the business.

(26) Terms of an underlease with MDNSL as tenant were agreed an on 9 September 2014; the Appellant was also a counterparty acting as guarantor for MDNSL. The lease provided that MDNSL would apply for "Planning Consent" (whilst the nomenclature used indicates that Planning Consent is a defined term it is not so defined) and that if such Planning Consent was not granted then MDNSL was entitled to give one month's notice of termination of the lease. The consequence of this clause was that MDNSL did not become obligated under the terms of the lease save for a period of months at the start unless there was at least planning certainty that the premises could be used as a nursery school.

(27) We find that the extended personal licences and the break clause in the lease enabled the Appellant to keep all her options open for the running of the business until she had certainty that she could transfer the business to company who would then be able to operate it. It cannot therefore be said that there was a definite intention to transfer the business from any date (or indeed at all) by virtue of the lease for the new property being signed.

(28) Planning consent was granted on 11 December 2014. At that point we find that MDNSL could have been reasonably confident that once the necessary works had been undertaken on the property it would be in a position to acquire and operate the business. Whilst obtaining OFSTED registration was essential both form MDNSL and the property we accept that Ms Delaney did not consider there to be a realistic risk that registration would be refused. Her evidence, which we accept, was that the registrations would be likely to be successful because of her experience and personal registration.

(29) Following receipt of the planning consent, MDNSL began to make the changes necessary in order to run a nursery school from the property. The Appellant, presumably in her capacity as director of the company, determined not to make the application for OFSTED registration as a new provider of nursery school education until completion of the building works. The Appellant stated, and we accept, that the decision to do so was for convenience and facilitated both the entity and property registrations being made and considered at the same time. MDNSL and the property were both duly registered in July 2015.

(30) The head teacher spent the period from January to September 2015 overseeing the works to the new property and the preparation and submission of the OFSTED applications. In her statement the Appellant stated: "I did not formally second [the head] from the Company to the business but this is in effect what happened". Unless we have misunderstood the evidence as to the role undertaken by the head we do not consider there would have been any need to second her as she was acting for MDNSL putting it in a place to receive and then run a nursery school business. If in fact the head teacher taught in the two schools at St James' and St Clements then a secondment would have been required.

(31) We understand that the head teacher was paid by way of the Appellant's payroll and not by MDNSL and this is borne out by the accounts. Use of the Appellant's payroll without formal agreement between MDNSL and the Appellant is, in our view, indicative of a fluid and close association between the Appellant and MDNSL and a failure to maintain the necessary procedural boundaries which would have been maintained between third parties – the relationship was "familial".

(32) However, and in any event, we consider that the employment of the head teacher by MDNSL is evidence of a general intention that the business would be transferred in due course (as indeed it was) but not evidence supporting a conclusion that there was a contract to transfer the business at that time.

(33) We were told that none of the agreements with parents were novated by the Appellant to MDNSL. Education continued to be provided to the children and parents paid MDNSL, but the formal contracting was not remediated though, we understand, that any new contracts post 1 September 2015 are with MDNSL.

(34) The Appellant's business was valued on three separate occasions:

(a) Around November 2012 at £649,500 (based on the Appellant's accounts to 31 August 2011;

(b) On 8 January 2015 at £1,146,000 (by reference to the accounts/draft accounts for the periods to 31 August 2013 and 2014 and the forecast results for the period to 31 August 2015; and

(c) At £1,105,000 on 12 February 2016 by reference to final accounts for the three years ended 31 August 2013, 2014, and 2015.

(35) It was the latter of these valuations which was used as the valuation of the disposal when made.

(36) Accounts were prepared for MDNSL for the period 21 November 2013 to 31 August 2014. These accounts show the company as a dormant company with assets of £60,000 cash and a loan of £59,900 from the Appellant. There was no contingent asset or liability associated with a purported right to buy and obligation to pay for the business. From this it can be inferred that there was certainly no transfer of the beneficial interest in the business and no liability (even a contingent liability) to pay for the business when transferred at some point in the future. The accounts are consistent with there being no contract for purchase when those accounts were drawn up and signed by Ms Delaney as director of the company and representing a true and fair view of the company's financial position at those dates.

(37) MDNSL's accounts to 31 August 2015 state that the company commenced trading on 1 September 2015. Further loans are recorded as made by the Appellant (together with a smaller bank loan). The lease is recorded as are administrative expenses but no employment costs. We find these accounts are consistent with there being a contract for purchase of the business on 31 August 2015.

(38) The accounts to 31 August 2016 record an operating profit of £23,815. Assets are identified valued at £994,500 (acquisition price for the business of £1,105,000 amortised at 10% per annum).

(39) The Appellant's tax return for the tax year ended 5 April 2014 made no mention of the agreement now said to have been reached to sell the business to MDNSL. We find this unremarkable given that the actual disposal was made on 31 August 2015 (see further paragraphs 36 to 39 below)

(40) On 28 January 2017 the Appellant submitted her income tax return for the year ended 5 April 2016 together with the capital gains tax pages. In box 33 the Appellant declared a chargeable gain of £1,105,000 and in box 38 she stated:

> "On 1 September 2015 I transferred my business into a company and obtained a valuation of the internally generated Goodwill of £1,105,000 … Entrepreneurs' Relief has been claimed in respect to the Goodwill on the basis that there was an unconditional obligation to incorporate entered into prior to 3 December 2014.

(41) Pursuant to the claim to ER the Appellant declared capital gains tax of £109,390 (i.e. 10% of the gain exceeding the annual exempt amount).

(42) In correspondence dated 1 November 2018 Menzies stated that the disposal was incorrectly reported in the 2015/16 tax year and should have been reported for 2013/14 and that the error was Menzies. In evidence Mr Downey stated that the letter had effectively been written without authority and was wrong. Mr Downey stated that the disposal had been correctly reported as taking place in the 2015/16 tax year but that the date on which it was treated as made was 21 November 2013 such that the provisions of the gain was subject to ER. The accuracy of these statements is a matter of law which we address below (see paragraphs 36 to 39 below). However, and for present purposes, we find that the disposal was correctly reported as taking place on 1 September 2015.

(43) In cross examination the Appellant confirmed that she was of the view that had a third party sought to buy the business prior to 31 August 2015 she would not have been prepared to sell it but that she did not understand that she would have been precluded from doing so. This evidence ran somewhat contrary to the evidence given as to the

reasons for incorporation (which included the ability to sell the business on further at some point). However, taking the evidence together we find that in the period 2013 – 2015 Ms Delaney was not yet ready to retire from the business and transfer it to a third party she did not want to sell it but could have done so.

THE LAW

12. The relevant charge to tax arising in this appeal is as provided for under Taxation of Chargeable Gains Act 1992 (**TCGA**) as amended by Finance Act 2015 (**FA15**). The relevant provisions are set out in an annex to this judgment.

13. Under that legislation, as amended, the chargeable gain on a material disposal of a business asset is charged to tax at a lower rate (in the present case 10% as opposed to 28%) provided it is not a disposal of goodwill by an individual to a close company (i.e. one in respect of which, as here, the counterparty is connected) made on or after 3 December 2014.

14. Pursuant to section 28 TCGA the time at which a disposal is deemed to be made is the time at which the contract effecting the disposal is made. If that contract is conditional the date of disposal is deemed to be the date on which the contract becomes unconditional.

THE ISSUE

15. The parties agree that there is a charge to capital gains tax arising under section 1 TCGA in respect of the disposal of the business carried on by the Appellant prior to 1 September 2015. They agree that the disposal was made by way of a contract but not a written or even an contract but rather a contract inferred by conduct.

16. The parties also agree that the Appellant is entitled to claim ER if the business transfer was by way of a disposal which was made pursuant to an unconditional contract made prior to 3 December 2014. They further agree that if the disposal is one which was made pursuant to a contract made after 3 December 2014 then ER is not available. In this latter regard it is accepted by the Appellant that the formalities for the closure notice have been met and the quantum of the amendment to the Appellant's self-assessment is correct.

17. Accordingly, the only issue for us to determine is when the contract effecting the contract was made.

PARTIES SUBMISSIONS

Appellant's submissions

18. The Appellant contends that the date of the contract (which HMRC accept was made) has to be implied from the conduct of the parties and in so doing the Appellant contends that the contract was made no later than 9 September 2014 (and thereby before 3 December 2014). However, her primary case is that the contract was made on 21 November 2013 when MDNSL was incorporated.

19. It is submitted that there was course of conduct by the Appellant by reference to the incorporation of MDNSL (as necessary together with the employment of a head teacher and the entering of lease obligations) which clearly demonstrates an agreement to effect the disposal to an incorporated entity. Solicitors were instructed to incorporate the company and to draft a business sale agreement. The fact that no agreement was drafted does not, the Appellant contends, diminish the effect of the conduct evidencing the making of the relevant contract at the point at which MDNSL was created.

20. Conduct subsequent to incorporation, by way of the employment contact with the head teacher and the signing of the lease for the new property are all said to corroborate that the contract had been made for the disposal and acquisition of the business at incorporation of MDNSL with the date of disposal occurring on a subsequent date (ultimately 31 August 2015).

21. In so contending the Appellant relies on *Chitty on Contracts* inviting us to take an "objective" rather that "subjective" view of the existence of the agreement such that we should take as our starting point "the manifestation of mutual assent" between the Appellant and MDNSL regarding the disposal determined as a "matter of inference from conduct".

22. On the basis that the Appellant acted in her personal capacity as vendor and as sole director and shareholder of MDSNL it was contended that the simple act of incorporating the company with the sole intention to effect the disposal such that MDNSL then operate the business was enough to manifest mutual assent of agreement to make the disposal.

23. By her skeleton argument it was contended that the effect of section 28 TCGA is merely to fix the relevant date and time of a disposal where, as a matter of fact and law, a disposal is made. The provision does not, the Appellant contends, alter the date on which the disposal is effected in a commercial law context such that reference to the terms of the Appellant's tax return and the date on which it is stated that the disposal was made (in a commercial sense) cannot fix the date of the deemed disposal for capital gains tax purposes.

24. The Appellant challenge HMRC's failure to advance evidence as to a positive case for the date on which the contract for disposal (as distinct from the disposal itself) was made. The Appellant submits that there is no evidence at all that the Appellant and MDNSL waited until 31 August 2015 to agree that the business would be transferred it was simply the date on which the business was transferred. The Appellant denies that the need to (1) find property which MDNSL could occupy, (2) obtain planning consent and (3) obtain OFSTEAD registration preclude a conclusion that there was a contract to transfer at the point of incorporation neither were they conditions precedent for the creation of the contract to transfer.

HMRC's submissions

25. By reference to HMRC's letter of 29 January 2021 HMRC's closure notice concludes that ER is not available to the Appellant on the basis that there was no unconditional contract for the disposal made prior to 3 December 2013. It notes that an intention or plan to do something at a future time or the taking of preliminary steps does not constitute a legally binding contract. It is stated that all steps taken by either the Appellant or MDNSL were simply preparatory to the contract finally made on 31 August 2015. The commitment to the lease, the engagement of the head teacher and other steps taken were not, in HMRC's view, sufficient to establish a binding commitment to acquire the business which could not, in any event, be operated until after both the property and MDNSL had been OFSTED registered. HMRC also relied on the basis on which the Appellant had filed her 2013/14 and 2014/15 tax returns to substantiate their conclusion that the contract date could not have been prior to 3 December 2014.

26. By their original and amended statement of case HMRC contend that if the Appellant's position as to the effective date contract were correct the Appellant should have returned the gain in her 2013/14 tax return and not on the 2015/16 return. The fact that she did not was indicative, so they contended, that the relevant contract date was not prior to 3 December 2014. The statements of case contend that there is no evidence that MDNSL commenced trading prior to 3 December 2014 and reference evidence that trading would have been impossible given the lack of OFSTED registration by that date.

27. The statements of case then proceed to contend that there is insufficient evidence from which it can be inferred that there was a contract to dispose before the relevant date and/or that any such contract must have been conditional on, at least, OFSTED registration and a right to occupy premises from which it could operate the business. HMRC reference the absence of an agreed price prior to 3 December 2014. Without the necessary elements to constitute a contract HMRC contended that there could be no unconditional agreement that the Appellant would

sell and MDNSL would buy the business in whole or in part. HMRC accepted that the incorporation of MDNSL was necessary but not sufficient to evidence a contractual agreement so as to fix the date of disposal as at the date of incorporation.

28. By their skeleton argument HMRC invited us to focus on the contemporary documents, in particular the tax returns, to conclude that there was no binding agreement in the form of a contract made prior to 3 December 2014. We were referred to what is known as the *Gestmin* principal of caution when considering the oral evidence given in this appeal where that evidence was not corroborated by contemporaneous documents. We were invited to draw an adverse inference from the Appellant's failure to waive privilege in advice received which, if disclosed, could have provided additional evidence in determining this appeal.

29. We were reminded that it is the Appellant that bears the burden of proof and that HMRC need not evidence any positive case as to the date on which a contract was made for disposal.

30. We were invited by HMRC to determine the terms of the disposal contract so as to apply section 28 TCGA. In particular we were asked to infer that any contract made was always and ultimately conditional upon having secured OFSTED registration.

31. HMRC refer to the Supreme Court judgment in *Marks and Spencer Plc v BNP Paribas Security Services Trust Company (Jersey) Limited and another* [2015] UKSC 72 (***Marks***) as to the basis on which contract terms can and should be implied into a contract to submit that there is no evidence that the Appellant had made a contract to dispose of the business by 3 December 2014 as there is no presumed intention as to the date of the contract ultimately disposing of the business on 31 August 2015.

32. Regarding the evidence HMRC contend "to qualify for [ER] [the Appellant] must have disposed of the goodwill before 3 December 2014" and submit that the evidence does not support such a disposal date. They refer to the income and corporation tax return and company accounts which all, they say, demonstrate that the disposal date was 31 August 2015. They further point to the fact that the price agreed for the disposal was one which was not determined until 12 February 2016 of the business on 31 August 2015.

33. HMRC contended that had there been an unconditional contract for disposal made prior to 31 August 2015 MDSNL would effectively have been the equitable owner of the business and the Appellant would only have been able to continue to trade with the permission of MDNSL. Further, the accounts of both the Appellant and MDNSL would have reflected their respective rights and obligations under the contract. They contend that there was nothing to prevent the Appellant from selling the business to a third party willing to offer more than the sum at which the business was valued and that there would have been no right of recourse for MDNSL had she done so. As a consequence HMRC contend there was no binding obligation to transfer the business until it was actually transferred.

34. HMRC also reference the expectation that a third party would never have entered an unconditional contract to purchase or sell without the certainty that the recipient was in a position to take and operate the business i.e. have premises and the appropriate registrations.

35. When considering the evidence available HMRC contended that the Appellant and MDNSL were taking steps with a view to transferring the business to MDNSL. Each step was important but until each had been taken there was no binding agreement to dispose.

PRELIMINARY POINT

36. In our view HMRC's legal position as to the effect of section 28 TCGA was not clearly stated. Their pleadings and skeleton argument seemed to assimilate the disposal with the contract.

37. However, and by reference to the judgment in *Jerome v Kelly* [2004] UKHL 25 (***Jerome***), it is apparent that the statutory fiction provided for in section 28 TCGA fixes only the date on which the disposal is deemed to have occurred by reference to any pre-existing contract for the purposes of tax assessment.

38. We consider that HMRC were wrong to submit that the Appellant must evidence that the disposal itself was made prior to 3 December 2014 or certainly in the bold way in which it was submitted. In order to succeed in this appeal the Appellant was required to evidence that there was an unconditional contract to dispose prior to that date which section 28 TCGA then deems to have been the date of disposal.

39. We also consider that HMRC were wrong to rely as heavily as they did on the basis on which the tax returns were submitted by the Appellant for the tax years ended 5 April 2014 and 2015. We agree with the Appellant that until there was an actual disposal in a commercial sense there was no disposal which could have been assessed to tax. Once the disposal was effected the deemed date of the disposal then fell to be determined. Accordingly, were the Appellant correct that there was an unconditional contract for disposal made prior to 3 December 2014 there was no disposal assessable to tax for that year until the actual disposal was made. That conclusion is the necessary consequence of the judgment in *Jerome*[1] and *Underwood v HMRC* [2008] EWCA Civ 1423[2]. Accordingly, the Appellant's tax returns for the years ended 5 April 2013 and 2014 would not have been incorrect at the date on which they were rendered.

DISCUSSION

40. This is a case which is essentially determined on the facts we have found.

41. The sole issue before us is whether there was an unconditional contract for the disposal of the company prior to 3 December 2014. On the facts there was not.

42. The Appellant urged us to imply or infer a term into the contract for disposal (a contract which the parties rightly agreed must have been made at some point because there was an actual disposal) fixing the date on which the contract was made as 21 November 2013 (by reference to the incorporation of MDNSL) or, in the alternative, on 30 June 2014 (when the employment contract for the head teacher was entered) or in the further alternative 9 September 2014 (when the lease for the new property was granted).

43. We have carefully considered the extracts from *Chitty on Contract* and the Supreme Court Judgment in *Marks* regarding the circumstances in which terms are to be implied into a contract. However, we have not found them to be of assistance. Whilst it is apparent that terms representing the "presumed intention" of the parties are to be implied into the contract to ensure that the contract which governs their relationship reflects that intention here we do not need to determine the nature, extent or terms of the relationship. We are called to determine the date on which there was an unconditionally contract for the disposal of the business (most specifically the goodwill) of the nursery schools Miss Delaney's and Miss Delaney's Too.

[1] In *Jerome* the taxpayer and others entered an unconditional contract for the disposal of land. Prior to effecting the contract various parcels of land were transferred to a Bermudan company subject to the contract. The final disposal was thereby made by the Bermudan company. The House of Lords applied what is now section 28 TCGA to fix the date of the disposal by reference to the contract but the parties to the actual disposal we unaffected by the statutory fiction such that there was no charge to tax the disposition having actually been made by a non-resident company.

[2] In *Underwood* the Court of Appeal confirmed that absent a transfer in the beneficial interest in land pursuant to a contract for its disposal at a future date there was no actual disposal. Section 28 TCGA did not deem there to be a disposal where none was in fact made. It merely fixed the date of an actual disposal by reference to the contract for such disposal.

There is, in our view, no need to imply a term fixing the date the contract was made (given that it is accepted that the contract was so made). As set out in *BP Refinery (Westernport) Pty Ltd v President, Councillors and Ratepayers of Shire of Hastings* (1977) 52 ALJR 20 recorded in paragraphs 18 and 21 of *Marks* there is no need to imply such a term. The contract for disposal is effective without the implication of the date on which the contract itself was made. As identified in paragraph 22 of *Marks* "the process of implying terms into a contract [is] part of the exercise of the construction, or interpretation, of the contract." We do not need to interpret the contract we must simply identify when it came into existence.

44. As submitted by the Appellant, *Chitty on Contracts* 1-034 confirms that "agreement" is an essential ingredient for a contract not formed by deed. Whether there is an agreement is to be determined objectively and may be a matter to be inferred from the conduct of the parties. 1-035 confirms that the parties must also possess an intention to create legal relationships i.e. in this case for the goodwill to be sold and purchased for an agreed consideration.

45. In *Roger Dyer and Jean Dyer v HMRC* [2016] UKUT 0381 (TCC) (***Dyer***) the Upper Tribunal (**UT**) considered various authorities on the circumstances in which a contract otherwise than in writing can be determined to have come into existence. The authorities (relevant quotations of which are set out by the UT in paragraphs 25 – 28) confirm that for a contract to come into existence the parties to it must have reached agreement as to the terms on which they propose to transact. The three "essential characteristics of a contract are recorded by the UT in paragraph 33 as:

> "… an intention to enter into a legally binding relationship; mutuality of obligation; and certainty…"

46. In *Dyer* the First-tier Tribunal had found, on the evidence, that the relationships were familial and not contractual. Mr and Mrs Dyer and their daughter acted in a certain way, but their conduct was not sufficient to establish a contract between their daughter and the family company and there was nothing which was enforceable between them. The UT also considered that the conduct between the parties lacked the necessary certainty required for a contract – the parties had not agreed their respective rights and obligations. In the context of a contract of employment a description of the role, hours to be worked, place of work, remuneration etc. would, in the UT's view, have been necessary to provide the certainty to establish a contract. Finally, the UT considered that there was no evidenced mutuality of obligations.

47. In the present case we are faced with the same individual representing themselves and the MDNSL in the asserted contractual negotiations. In oral evidence Ms Delaney admitted that she was focussed on running the schools and ensuring continuing education provision. She was advised to "incorporate her business" but appreciated little of what such an exercise entailed. There is no question that Ms Delaney planned to follow the steps she was instructed and advised to follow but it is highly questionable whether there was an agreement as to when and ultimately if the disposal would take place until all the steps were complete some time after July 2015 when OFSTED registration for MDNSL and the new property were obtained. Similarly for the creation of legal relations.

48. However, and in our view, most critically, there was insufficient certainty as to the terms of the purported agreement prior to 3 December 2014. On 3 December 2014 MDNSL had been incorporated, it had entered into a lease agreement (with break clause) and employed a head teacher. However, we consider that these are all steps it took preparatory to any contract to acquire the goodwill of the Appellant's business. It was putting itself in a position to acquire the business but as at 3 December 2014 it was not in a position to be certain that it could take any proposed transfer as it awaited planning consent for the property to be used as a nursery, it required OFSTED registration but most significantly there was, at that point, no agreed

mechanism by reference to which the consideration payable for the transfer would be determined and thereby there was a lack of certainty that MDNSL would acquire and at what price (or how such price would be determined).

49. On the evidence and by reference to the facts we have found we consider that the Appellant has failed to meet the burden of proof on it to establish that any contract was made between the Appellant and MDNSL for the disposal of the goodwill in the Appellant's business prior to 3 December 2014.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

50. 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: 11th MARH 2024

ANNEX

Taxation of Chargeable Gains Act 1992

Part 1 Capital gains tax and corporation tax on chargeable gains
Chapter 1 Capital Gains tax: -

Section 1: Charge to capital gains tax

(1) "Capital gains tax is charged for a tax year on chargeable gains accruing in the year to a
person on the disposal of assets."

Part II General Provisions relating to computation of gains and acquisition and disposals of assets

Chapter II Assets and disposals of assets

General provisions

Section 21: Assets and disposals

(1) All forms of property shall be assets for the purposes of this Act, whether situated in the United Kingdom or not, including-

(a) options, debts and incorporeal property generally, and
(b) any currency ither than sterling, and
(c) any form of property created by the person disposing of it, or otherwise coming to be owned without being acquired."

Section 28: Time of disposal and acquisition where asset disposed of under contract

(1) "Subject to section 22(2), and subsection (2) below, where an asset is disposed of and acquired under a contract the time at which the disposal and acquisition is made is the time the contract is made (and not, if different, the time at which the asset is conveyed or transferred).

(2) If the contract is conditional (and in particular if it is conditional on the exercise of an option) the time at which the disposal and acquisition is made is the time when the condition is satisfied".

Part V Transfer of business assets, business asset disposal relief and investors' relief

Chapter 3 business asset disposal relief

Section 169 H: Introduction

(1) This Chapter provides for a lower rate of capital gains tax in respect of qualifying business disposals (to be known as 'business asset disposal relief')

(2) The following are qualifying business disposals –

(a) a material disposal of business assets: see section 169I…

(3) But in the case of certain qualifying business disposals, business asset disposal relief is given only in respect of disposals or relevant business assets comprised in the qualifying business disposal: see sections 169L and sections 169LA…

Section 169I: Material disposal of business assets

(1) There is a material disposal of a business assets where –

(a) an individual makes a disposal of business assets (see subsection (2)) and

(b) the disposal of business assets is a material disposal (see subsections (3) to (7))

(2) For the purposes of this Chapter a disposal of business assets is –

(a) a disposal of the whole of part of a business…

(3) A disposal within paragraph (a) of subsection (2) is a material disposal if the business is owned by the individual throughout the period of 2 years ending with the date of the disposal…"

Section169L Relevant business assets

(1) If a qualifying business disposal is one which does not consist of the disposal of (or interest in) shares in or securities of a company, business asset disposal relief is given only in respect of the disposal of relevant business assets comprised in the qualifying business disposal.

(2) In this chapter 'relevant business assets' means assets (including, subject to section 169LA, goodwill) which are, or are interests in, assets to which subsection (3) applies, other than excluded assets (see subsection (4) below).

(3) This subsection applies to assets which –

(a) In the case of a material disposal of business assets, are assets used for the purposes of a business carried on by the individual or a partnership of which the individual is a member,…

(4) The following are excluded assets –

(a) shares and securities, and

(b) assets, other than shares or securities, which are held as investments."

Section 169LA Relevant business assets: goodwill transferred to close company

(1) Subject to subsection (1A), subsection (4) applies if –

(a) as part of a qualifying business disposal, a person (P) disposes of goodwill directly or indirectly to a close company (C), and

(b) immediately after the disposal, P meets any of the personal company conditions in the case of C or any company which is a member of a group of companies of which C is a member.

(1ZA) For the purposes of subsection (1)(b) –

(a) The reference to the personal company conditions is a reference to any of the conditions in 169S(3)(a), (b), (c) (i) or (ii), and

(b) P is taken to have all the rights and interests of any relevant connected person.

Section 169S – Interpretation of Chapter

(1) For the purpose of this Chapter 'a business' means anything which –

(a) is a trade, profession or vocation, and

(b) is conducted on a commercial basis and with a view to the realisation of profits.

(2) References in this Chapter to a disposal of an interest in shares in a company include a disposal of an interest in shares treated as made by virtue of section 122.

(3) For the purposes of this Chapter a company is a 'personal company' in relation to an individual if –

(a) the individual holds at least 5% of the ordinary share capital of the company,
(b) by virtue of that holding, at least 5% of the voting rights in the company are exercisable by the individual, and
(c) either or both of the following conditions are met –

(i) by virtue of that holding, the individual is beneficially entitled to at least 5% of the profits available for distribution to equity holders and, on a winding up, would be beneficially entitled to at least 5% of assets so available, or
(ii) in the event of a disposal of the whole of the ordinary share capital of the company, the individual would be beneficially entitled to at least 5% of the proceeds…"

Finance Act 2015

"42 Entrepreneurs' relief: exclusion of goodwill in certain circumstances

(1) Chapter 3 of Part 5 of TCGA 1992 ('entrepreneurs' relief) is amended as follows:

(2) In section 169H (introduction), in subsection (3) for 'Section 169L' substitute 'sections 169L and 169LA'.

(3) In section 169L (relevant business assets), in subsection (2), after 'including' insert 'subject to section 169LA'.

(4) After that section insert –

169LA Relevant business assets: goodwill transferred to related party etc.

(1) Subsection (4) applies if –

(a) as part of a qualifying business disposal, a person ('P') disposes of goodwill directly or indirectly to a close company ('C')
(b) at the time of the disposal, P is a related party in relation to C, and
(c) P is not a retiring partner.

(2) P is a related party in relation to C for the purposes of this section if P is a related party in relation to C for the purposes of Part 8 of CTA 2009 (intangible fixed assets) (see Chapter 12 of that Part (related parties) and in particular, section 835 (5) of that Act)…

(3) …

(4) For the purposes of this Chapter, the goodwill is not one of the relevant business assets comprised in the qualifying business disposal.

(5) …

(6) If a person –

(a) disposes of goodwill as part of a qualifying business disposal, and

(b) is party to relevant avoidance arrangements, subsection (4) applies (if it would not otherwise do so).

(7) …

(8) In this section –

'arrangements' includes any agreement, understanding, scheme, transaction or series of transactions (whether or not legally enforceable);…

(5) The amendments made by this section have effect in relation to qualifying business disposals made on or after 3 December 2014."