[2018] UKFTT 0082 (TC)

TC06340

Appeal number: TC/2015/06512

CAPITAL GAINS TAX – purchase of shares by the Appellant, followed by conversion of those shares into different class and subsequent repurchase for lesser amount – Appellant's claim to have suffered allowable loss – Section 16A TCGA 1992 – whether one of the main purposes of the arrangements entered into by the Appellant was to secure a tax advantage – yes – Section 17 TCGA 1992 – whether there had been an acquisition or disposal by the Appellant otherwise than at arm's length – yes – application of market value – Section 29 TCGA 1992 – whether the Appellant had control of a company – yes – whether that control had been exercised so that value passed out of the Appellant's shares – yes – could additional consideration have been achieved – yes – application of market value – appeal dismissed

LEGAL PROFESSIONAL PRIVILEGE – whether the Appellant relied on privileged material – yes – whether that amounted to waiver – yes – consequence of failing to disclose that material – inferences to be drawn

"WITHOUT PREJUDICE" COMMUNICATIONS – whether a document had been sent without prejudice – yes – whether it could be adduced – no

FIRST-TIER TRIBUNAL
TAX CHAMBER

CONEGATE LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE JANE BAILEY
MR NIGEL COLLARD

Sitting in public at the Royal Courts of Justice, London on 2 and 3 November 2016

Mr Setu Kamal of counsel, instructed by Messrs DLA Piper, solicitors, for the Appellant
Mr Daniel Saoul of counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. The Appellant's appeal is against the Respondents' decision, dated 2 October 2015, to refuse the Appellant's claim to have incurred a capital loss of £2m as a consequence of a disposal of shares in May 2010. A further disposal, of a smaller number of shares but on a similar basis, took place in August 2010.

2. The Respondents formally refused the Appellant's claim on the basis that the application of Section 17 of the Taxation of Chargeable Gains Act 1992 ("TCGA 1992") to the transactions resulted in the Appellant not suffering a loss as a result of the disposal, and therefore no allowable loss could be claimed. In previous correspondence and before us, the Respondents also relied, in the alternative, on Sections 16A and/or 29 of TCGA 1992. The Appellant maintained that an allowable loss of £2m for capital gains tax purposes had been incurred as a result of the May 2010 transactions, and so it was entitled to claim relief.

3. On 2 October 2015 the Respondents issued a decision, accompanied by a closure notice amending the Appellant's tax return, and an assessment to corporation tax to recover the sum the Respondents maintained was not due to the Appellant. On 27 October 2015, the Appellant appealed to the Respondents and, on 28 October 2015, the Appellant referred that appeal to this Tribunal.

The onus and standard of proof

4. In an appeal against an assessment the Appellant bears the onus of proof; the standard of proof is the civil standard, the balance of probabilities.

Preliminary issues

5. At the beginning of the hearing the parties drew our attention to three issues which had arisen in addition to the substantive dispute. These were:

   a) Whether privilege had been waived in respect of advice given to the Appellant which would otherwise be privileged from disclosure, and the consequences if there had been a waiver of that privilege,

   b) Whether a letter sent by the Respondents was sent "Without Prejudice", and whether it could be adduced in evidence, and

   c) The Appellant's wish to reserve the right to bring judicial review proceedings in respect of certain contents of the Respondents' manual.

6. We understood the last of these to be simply, as stated, the Appellant reserving its position. As the possibility of the Appellant bringing proceedings in the Administrative Court is clearly a matter outside the Tribunal's jurisdiction, we make no further comment upon it.

The first preliminary issue - legal professional privilege

7. The Respondents' skeleton argument drew attention to their submission that, through statements made in a witness statement, the Appellant had waived privilege in respect of a class of material which would otherwise be subject to legal professional privilege (on the basis that the documents concerned communications between a client and a legal advisor for the purpose of seeking legal advice). The Appellant did not agree that privilege had been waived in respect of this material. It appeared that there had been substantial discussion between the parties in relation to disclosure of that material in the period immediately prior to the hearing.

8. We had anticipated that the Respondents would make an application for disclosure of that class of documents. However, on the first day of the hearing it transpired that the Respondents' took the view that if they made such an application then there would not be sufficient time remaining in the present listing for the substantive hearing to proceed without the substantial risk of the appeal being part-heard. Therefore the Respondents' position was that they would not make an application for disclosure but would instead submit that privilege had been waived and that the Tribunal should draw an adverse inference from the absence of the relevant documents.

9. The Appellant's view at the beginning of the hearing (and we note below the Appellant's later submissions on this point) was that there had been no waiver of privilege, and that no adverse inference should be drawn in any event. The Appellant apparently took the same view as the Respondents of the risk of the hearing being part heard, and so joined with the Respondents in submitting that there should be no preliminary hearing of the issue of whether privilege had been waived.

10. We acceded to the joint request of the parties that the issue of whether there was a waiver of privilege and, if so, the consequences of that waiver, should be considered by us after the hearing as part of our determination of the substantive dispute. We consider this issue below when setting out our approach to the evidence.

The second preliminary issue - Without Prejudice communications

11. While we were not required to consider an application for disclosure at the beginning of the hearing, it was necessary for us to express an opinion as to whether a letter should be excluded from our bundles on the basis that it had been sent Without Prejudice. The parties were agreed that we should approach this question without seeing the letter in question but after having heard a description of the document.

12. The document in question was a response sent from the Respondents to the Appellant. The original letter from the Appellant had been marked "without prejudice" and contained settlement proposals. The Respondents' response to that letter – the document in dispute – was not marked "without prejudice" but, in responding to the Appellant's offer, the Respondents stated: "on a strictly WP basis ….". We were told that the Respondents then went on to concede part of their case at that stage and to invite the Appellant to concede other arguments.

13. Mr Kamal argued that, although, at that date, an enquiry was underway and the letter was sent as part of that enquiry, it was not clear that there was a dispute. If there was no dispute between the parties at the time it was sent then it followed that the letter in question could not have been sent on a Without Prejudice basis.

14. Mr Saoul noted that this point of difference between the parties had arisen only on 31 October 2016, and that ten days prior to the hearing it had been common ground that the letter was sent on a Without Prejudice basis. Mr Saoul drew our attention to an email of 18 October 2016 where the Appellant's solicitors had stated that certain documents, including the letter in question, "are without prejudice and add nothing to the case". Mr Saoul identified the policy behind the exclusion of Without Prejudice correspondence as encouraging settlement, and took us to *Cutts v Head* [1984] 1 Ch 290. It was plain that this policy applied equally to pre-action correspondence where the parties knew that if there was no agreement then the matter would be litigated; this was why the Appellant's original letter had been marked "Without Prejudice". Mr Saoul argued that the dispute between the parties here went back as far as 2012.

15. The Respondents also referred us to *Rochester Resources Limited v Lebedev* [2014] EWHC 2185 (Comm) and *Sampson v John Boddy Timber Limited* (Court of Appeal, 11 May 1995, Official Transcripts 1990-1997). It was submitted that the letter in question here was also inadmissible as simply not being relevant, as each of the parties was either right or wrong on the substantive points made, and concessions made in correspondence had no bearing.

16. In reply, Mr Kamal argued that there was no dispute between the parties at the time that the Appellant's letter was sent, and that the Respondents' reply was the beginning of the dispute. Mr Kamal could not explain why the Appellant's letter had been marked "Without Prejudice" but submitted that did not mean that there was a dispute between the parties at the time. Mr Kamal also noted that the letter in question was sent prior to the letter of 2 October 2015 which contained the formal decision appealed against in these proceedings.

Our conclusions on this issue

17. We adjourned briefly to consider this issue. When we reconvened we informed the parties of our conclusion that, on the description the parties had provided of the document, the Respondents' letter was sent on a Without Prejudice basis. We took the view that there was an issue between the parties by March 2015. The Appellant's letter was marked "Without Prejudice", and we considered that that letter would not have been marked in that way if there had not been the thought in the sender's mind, at that time, that the issue between the parties might lead to litigation. A response to a Without Prejudice communication is also Without Prejudice. Therefore we concluded that the letter in dispute was sent on a Without Prejudice basis and would not be admitted.

The substantive dispute and remaining first preliminary issue

18. Having disposed of the second of the preliminary issues during the course of the hearing, we turn our attention to the outstanding first preliminary issue and the

substantive dispute between the parties, namely whether the Appellant was entitled to claim a loss.

19. As the preliminary issue may affect our approach to the evidence, and thus the facts we find, we consider first whether the Appellant did waive privilege. If we conclude that there was a waiver we will consider what effect this has, before then setting out our approach to the evidence before us and our findings in respect of that evidence. We will then consider the parties' arguments in respect of the substantive dispute.

First preliminary issue - has there been a waiver of privilege?

20. We bear in mind that the dispute between the parties concerns the effect of the transactions entered into by the Appellant, and that part of that dispute (the arguments concerning Section 16A TCGA 1992) focusses upon the Appellant's main purposes in entering into those transactions.

21. We understand (from Mr Kamal's skeleton argument) that certain transaction documents, including emails to Mr Sullivan from the Appellant's solicitors, had voluntarily been disclosed to the Respondents. (Although Mr Kamal then submitted that privilege could not be waived in respect of part of the documentation only, we do not understand him to be arguing that the Appellant had waived privilege as a result of that voluntary disclosure.) However, certain emails sent between Mr Sullivan and the Appellant's solicitors in the period 5-10 May 2010 had not been disclosed.

22. In his witness statement Mr Sullivan stated:

> 8.1 I am aware that HMRC have queried why I (via Conegate and Roldvale) went about contributing funds to WHH in this manner. The categorical answer is that I wished to obtain a shareholding in the football club and inject further funding into the football club to improve its long-term financial viability, but I did not want to bail out CBH financially. There was a grave risk that if I invested in WHH simply by acquiring CBH's existing interest, only CBH would benefit financially. I had no intention of that risk happening
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> 8.2 Further, I did not wish for Conegate or Roldvale inadvertently to incur what may be termed as a "dry charge" to capital gains tax, as this would have reduced the funds available to Conegate and Roldvale to invest into WHH. Initially in May 2010, I had wished to assign to WHH for nil or nominal consideration my option to acquire further shares in WHH having an aggregate exercise price of £4 million (i.e. £20,000 per share). My intention was that WHH could then exercise the option and buyback the relevant shares for £4 million and issue new shares (in the same number as those shares just bought-back) at an aggregate subscription price of £8 million (i.e. £40,000 per share). This would have net[ted] WHH £4 million, i.e. the £8 million new share subscription less the £4 million buy-back price, thereby achieving the aim of injecting further funds into WHH.
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> 8.3 Messrs [MS and PT] were both corporate lawyers who had the principal conduct of the matter for me. They advised me of a risk that my proposal could

have inadvertently triggered a chargeable gain. In essence, the risk was that the proposed share issue at £40,000 per share could be taken as evidence that the DS Entities' option over WHH had meaningful value, given that the option exercise price was £20,000 per share. So, if the option was assigned for nil or nominal consideration in circumstances where the disposal proceeds for chargeable gains purposes were deemed to be equal to market value, the DS entities could have effectively suffered a charge in respect of an amount they never received; that is, a "dry" tax charge. Such a dry charge would have been an unjust boon to HMRC at the expense of WHH's funding. And on any objective analysis, such a charge would be wholly unnecessary in the scheme of re-financing WHH as described above.

8.4 I then considered whether the DS Entities could simply waive their option over 200 WHH shares, thereby permitting WHH to buy-back 200 shares directly from CBH for £4 million and fund that buy-back out of the proceeds of a fresh issue of shares for £8 million. However, [MS] advised me that this was prohibited under the Companies Act, as the premium element on the buy-back of CBH shares needed to be funded out of distributable reserves, which WHH did not have. In light of this company law restriction, the only feasible alternative was for WHH to buy-back shares at a nominal consideration (£1). This was the reason on 24 May 2010 for the variation of rights attaching to certain of Conegate's and GGIL's ordinary shares in WHH (and re-naming as a separate class of deferred shares) and subsequent buy-back of those shares for £1. It also facilitated the further injection of funds by way of share subscription into WHH on that date, and enabled shares to be held in WHH in the commercially agreed proportions set out [above].

23. Mr Sullivan's references to the advice received from MS and PT have resulted in the Respondents' submission that the privilege which would ordinarily attach to communications between a legal advisor and a client for the purpose of obtaining legal advice had been waived by the Appellant in respect of the advice it received (through Mr Sullivan) from its legal advisors. The Respondents submitted that there were clear references to, and reliance upon, the legal advice received in relation to the transactions, that this reliance was to advance the Appellant's case, and that this was sufficient to constitute the Appellant's waiver of privilege over certain documents which had been withheld, notwithstanding the lack of reference to a specific document or documents in Mr Sullivan's witness statement.

24. The Appellant strongly denied that privilege had been waived, submitting that there had been no reliance upon the contents of the legal advice to advance the Appellant's case and thus no deployment. Mr Kamal submitted that, far from the Appellant seeking to deploy material which would otherwise be privileged, it was in fact the Respondents who wished to rely upon the documents in question.

Our conclusion on this issue

25. Our starting point is the dictum of Mustill J. (as he then was) in *Nea Karteria Maritime Co Ltd v Atlantic & Great Lakes Steamship Corpn (No. 2)* [1981] Comm LR 138 (at 139):

> … where a person is deploying in court material which would otherwise be privileged, the opposite party and the court must have the opportunity of satisfying themselves that what the party has chosen to release from privilege represents the whole of the material relevant to the issue in question. To allow an individual item to be plucked out of context would be to risk injustice through its real weight or meaning being misunderstood.

26. The parties referred us to a number of authorities concerning what would constitute deployment or reliance. The Respondents referred us to the following helpful passage in *Mid-East Sales Ltd v United Engineering & Trading C. Ltd and another* [2014] EWHC 892 (Comm), in which Hollander on Documentary Evidence was summarised, noting the distinction between references to the fact that legal advice had been given and reliance upon the content of that advice. At paragraph 15 of his judgment, Males J. stated:

> …The overriding principle is one of fairness, that if the content of legal advice is deployed or relied upon in order to advance a party's case, then fairness may require that disclosure of that advice be made available so that the court can properly assess that assertion.

27. After setting out the relevant statements, Males J. continued (at paragraphs 18 and 20):

> It seems to me that those two statements, taken together, do cross the line from reference to deployment. They make a case that the second defendant was acting on legal advice in responding to the claim form in the way that it did. That can only be relevant because the second defendant seeks to rely on that as a factor going to the exercise of the court's discretion. I can see no other reason why the reference to acting on legal advice should have been included in the witness statement. Now that the second defendant has invited the court to exercise its discretion on the basis that it was acting on legal advice, it may be highly relevant to know what that advice was. …
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> In my judgment, therefore, there has been a waiver of privilege in those two written communications and fairness does require that the claimants and the court should have the opportunity to see those communications so that the evidence about them can be fairly assessed. …

28. We also found the comments of Elias J. in *Brennan and others v. Sunderland City Council and others* [2009] ICR 479, helpful in ascertaining whether there has been waiver. At paragraph 67, the then President of the Employment Appeal Tribunal stated:

> However, in our view, the answer to the question whether waiver has occurred or not depends upon considering together both what has been disclosed and the circumstances in which disclosure has occurred. As to the latter, the authorities

in England strongly support the view that a degree of reliance is required before waiver arises, but there may be issues as to the extent of the reliance. Ultimately, there is the single composite question of whether, having regard to these considerations, fairness requires that the full advice be made available. A court might, for example, find it difficult to say what side of the contents/effect line a particular disclosure falls, but the answer to whether there has been waiver may be easier to discern if the focus is on the question whether fairness requires full disclosure.

29. Therefore, we approach the question of whether there has been sufficient reliance to constitute waiver as a composite question of achieving fairness between the parties. Mr Sullivan has clearly referred to the fact of legal advice but he has not referred to specific documents. Was there reliance on the advice to the extent that fairness requires the documents containing the legal advice be disclosed?

30. We take the view that, when Mr Sullivan was referring to the advice the Appellant received, he was referring to that advice in order to make the case that it was because of that advice that the Appellant had taken the steps it took (rather than taking other steps to achieve its objective of injecting funds into the football club) – Mr Sullivan described the steps taken as "the only feasible alternative". It seems to us that was sufficient reliance or deployment to constitute waiver, and that in the circumstances it would be unfair for the Appellant to assert that the legal advice it received led directly to the particular steps taken, without the Respondents having the opportunity to examine documents containing that advice in order to ascertain the position for themselves.

31. We conclude that the balance of fairness is in favour of the Respondents, that there was deployment, and as a result privilege has been waived by the Appellant in respect of the legal advice it received in respect of the options available when identifying the manner in which funds could be injected into the football club.

What is the consequence of privilege having been waived?

32. Having concluded that privilege was waived, we consider the effect of that waiver by the Appellant.

33. The Respondents submitted that, at a minimum, the Tribunal was entitled to draw adverse inferences from the Appellant's refusal to disclose the relevant documents or to provide further information about them. In their skeleton argument the Respondents had also argued that, if privilege had been waived, then they (and the Tribunal) were permitted to question the Appellant's witness about the advice which had been given. Above we set out the parties' common stance at the beginning of the hearing that the question of whether privilege had been waived should not be determined as a preliminary issue. This position meant that the Respondents did not press this second point before us.

34. The Appellant submitted that no adverse inferences could be drawn from a refusal to waive privilege and that, even if we concluded that privilege had been waived, we

should not draw an adverse inference from the Appellant's failure to produce the relevant documents. Mr Kamal subsequently submitted that if we were to decide that there had been a waiver of privilege, the Appellant would be willing to disclose the contested documents to the Respondents in order to prevent us drawing an adverse inference from the lack of disclosure. However, this supplementary submission came just after the short adjournment on the second day, after the Appellant had concluded its case (and after the Respondents had opened their case by making their submissions on waiver). We reminded Mr Kamal that neither party had sought to have the issue determined as a preliminary point, and so the appeal hearing had proceeded on the basis that the question of whether privilege had been waived would be determined as part of the substantive decision. Given that agreed approach, we were concerned that there were a number of practical objections to the Appellant's offer, not least that disclosure of material after our decision had been released would not allow the Respondents to put that material to Mr Sullivan (as Mr Sullivan had already been released as a witness). In response to our questions on this point, Mr Kamal suggested that potentially Mr Sullivan could be recalled as a witness. However, it did not seem to us that disclosure of material after the release of the substantive decision would allow the Respondents to put the material to Mr Sullivan or make submissions upon it. Once we had released our decision then we would have no jurisdiction to direct that a witness be recalled and, even if we could recall a witness at that point, cross-examination of a witness at that stage would have no effect on a decision which had already been issued. In the circumstances we advised Mr Kamal that we would note the offer but record that it came late in the proceedings. During the Appellant's reply, Mr Kamal resurrected this offer, in part to clarify that the offer was that the Appellant would disclose the material to the Respondents, so that the Respondents could rely upon it if they wished, but that the Appellant did not accept that privilege had been waived at any earlier stage or that privilege would be waived by that disclosure. Unfortunately, it was still not clear to us how the Appellant proposed that the Respondents could rely upon that material if disclosure occurred after the conclusion of the hearing and the release of the decision. We noted the fact of the repeated offer and that it came extremely late in the proceedings.

Our conclusion on this issue

35. In considering the effect of our conclusion that privilege has been waived, we are anxious that we should attempt to achieve the fairness between the parties which would have been achieved if the documents in question had been disclosed before the hearing took place. We have noted Mr Kamal's offer to disclose the material after our decision is released but, as we set out above, there appear to us to be practical issues which prevent us (and the Respondents) from taking up that offer. In the circumstances of this case, we consider that it would be appropriate for the Tribunal to draw an adverse inference from the Appellant's failure to disclose documents containing legal advice over which we have determined privilege has been waived.

36. Having reached our conclusions in respect of that final preliminary issue, we now set out the evidence we heard and our approach to that evidence before stating the facts we find as a result of hearing the evidence and drawing relevant inferences from not being shown material over which privilege has been waived.

Facts found

The evidence before us

37. We heard oral evidence from Mr Sullivan, a director and the beneficial owner of the Appellant. We also had the benefit of reading the documents in the bundles of documents provided.

Our approach to the evidence

38. The Respondents were careful to remind us of the approach which we should take to the evidence, and directed us to paragraphs 34 – 37 in *Piper v Hales* [2013] All ER (D) 257 (Jan), which starts with an extract from The Judge as Juror: The Judicial Determination of Factual Issues, an article by the late Lord Bingham of Cornhill, and also cites guidance from Lord Goff in *Grace Shipping v Sharp & Co.* [1987] 1 Lloyd's law Rep 2017, and Lady Justice Arden in *Wetton (as liquidator of Mumtaz Properties) v Ahmed and others* [2011] EWCA Civ 610.

39. In accordance with that guidance our starting point should be to understand what is common ground between the parties and the "facts which are shown to be incontrovertible" (per Lord Bingham). Contemporaneous documentation is vital in this regard as, to quote Lord Bingham again, "In many cases, letters or minutes written well before there was any breath of dispute between the parties may throw a very clear light on their knowledge and intentions at a particular time".

40. When assessing the witness evidence, we should weigh this with the objective facts. Lord Goff, in *Grace Shipping*, stated:

> And it is not to be forgotten that, in the present case, the Judge was faced with the task of assessing the evidence of witnesses about telephone conversations which had taken place over five years before. In such a case memories may well be unreliable; and it is of crucial importance for the Judge to have regard to the contemporary documents and to the overall probabilities. In this connection their Lordships wish to endorse a passage from a judgment of one of their number in *Armagas Ltd v Mundogas SA (The Ocean Frost)* [1985] 1 Lloyd's Rep 1, when he said at p. 57:
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> > Speaking from my own experience, I have found it essential, in cases of fraud, when considering the credibility of witnesses, always to test their veracity by reference to the objective facts proved independently of their testimony, in particular by reference to the documents in the case, and also to pay particular regard to their motives and to the overall probabilities. It is frequently very difficult to tell whether a witness is telling the truth or not; and where there is a conflict of evidence such as there was in the present case, reference to the objective facts and documents, to the witnesses' motives, and to the overall probabilities, can be of very great assistance to a Judge in ascertaining the truth.

That observation is, in their Lordships opinion, equally apposite in a case where the evidence of the witnesses is likely to be unreliable; and it is to be remembered that in commercial cases, such as the present, there is usually a substantial body of contemporary documentary evidence.

41. Although the passages set out above primarily deal with conflicting accounts, it is equally the case that the contemporary documentation and other incontrovertible facts can support or undermine a witness' account of events, even when there are no other witnesses to offer a conflicting version.

42. Lord Goff had referred to witness evidence becoming unreliable due to the passage of time. Mr Saoul took us to paragraphs 15 – 22 in *Gestmin SGPS S.A. v. Credit Suisse (UK) Limited and another* [2013] EWHC 3560 (Comm), which helpfully set out in some detail the results of psychological research into the nature of memory and some of the issues arising. To quote just a few sentences from those paragraphs:

> Underlying both these errors is a faulty model of memory as a mental record which is fixed at the time of experience of an event and then fades (more or less slowly) over time. In fact psychological research has demonstrated that memories are fluid and malleable, being constantly re-written whenever they are retrieved… (paragraph 17)

> The process of civil litigation itself subjects the memories of witness to powerful biases. The nature of litigation is such that witnesses often have a stake in a particular version of events… (paragraph 19)

> Considerable interference with memory is also introduced in civil litigation by the procedure of preparing for trial. A witness is asked to make a statement, often (as in the present case) when a long time has already elapsed since the relevant events. The statement is usually drafted for the witness by a lawyer who is inevitably conscious of the significance for the issues in the case of what the witness does or does not say … (paragraph 20).

43. At paragraph 37 of *Piper v Hales*, Judge Simon Brown QC summarises:

> Contemporaneity, consistency, probability and motive are key criteria and more important than demeanour which can be distorted through the prism of prejudice: how witnesses present themselves in a cramped witness box surrounded for the first time with multiple files can be distorted … Lengthy witness statements prepared by the parties' lawyers long after the events also distort the accurate picture even though they are meant to assist the court.

44. So, our starting point is the contemporaneous documentation, supplemented by the evidence of Mr Sullivan. Although our impression of Mr Sullivan was that he was straightforward, forthright and candid in his evidence, we must be conscious of our own biases and bear in mind that consistency, probability and motive are more important than demeanour. We should reflect whether Mr Sullivan's evidence is consistent with the contemporaneous documents, and must bear in mind that, in this case, there are other contemporaneous documents which have not been disclosed. Finally, we should

be aware of Mr Sullivan's ready acceptance that he was not a tax expert and that he had instructed his advisors to identify how he, and the entities at his disposal, should carry out his wishes. We should allow for the "considerable interference with memory" which Mr Sullivan is likely to have undergone in making his statement (which, as he accepted in oral evidence, was drafted by his legal team), and in preparing for the hearing before us.

Our findings

45. On the basis of the oral evidence and the documents in the bundle, and approaching the evidence as we describe above, we found the following facts:

a) As a child, Mr Sullivan was a fan of West Ham United Football Club (the "football club"). Mr Sullivan attended home games and followed the football club's progress. Through his business success, initially in publishing, in 1993 Mr Sullivan (together with two business partners, Mr David Gold and Mr Ralph Gold) was able to purchase Birmingham City Football Club. Mr Sullivan and his partners owned this club until 2009 before selling it.

b) Mr Sullivan's main business by the time with which are concerned was investing in land and property. Mr Sullivan's principal vehicle for investments was the Appellant, an investment company. Mr Sullivan is a director of the Appellant and was the Appellant's controlling shareholder, holding all of the issued share capital at the relevant time.

c) In 2009, the opportunity arose for interested persons to submit bids to buy WH Holding Limited ("WHH"), the ultimate parent of the football club. At that time the owner of WHH was CB Holding ehf ("CBH"), an Icelandic company which was suffering financial difficulties following the 2008 financial crash. CBH engaged the Rothschild Group to seek potential purchasers for WHH.

d) Mr Sullivan was keen not to miss the opportunity to own the football club. During December 2009 and January 2010, Mr Sullivan, through his advisors, submitted his proposal to Rothschild. Mr Sullivan's proposal included the basis of his preferred bid (under which Mr Sullivan and his entities proposed to buy a 50% shareholding in WHH), an alternative bid proposal, and Mr Sullivan's management proposals for the future of the football club.

e) Two other interested bidders had also submitted serious proposals for the purchase of the football club, and Rothschild held a competitive auction between the three bidders for shares in WHH. It was not until after 11 p.m. on 18 January 2010 that Mr Sullivan and his advisors were informed that Mr Sullivan's bid (via entities which he owned, including the Appellant) to buy 50% of WHH's shareholding had been the successful bid.

Events of 18 January 2010

f) The issued share capital of WHH was 111.5m ordinary shares of £1 each. On 18 January 2010, CBH (then the sole member of WHH) passed an ordinary

resolution to consolidate all but 1,000 of WHH's ordinary shares into one ordinary share, and then subdivide that one ordinary share into deferred shares of £1 each. The deferred shares had no voting or dividend rights, and the holders of deferred shares had no entitlement to assets in the event of WHH being wound up. At the same time WHH also passed a special resolution (again passed by CBH as sole member) approving and adopting new Articles of Association which permitted WHH to purchase any number of deferred shares at any time for an aggregate consideration of £1 per deferred shareholder.

g) Also on 18 January 2010, CBH, Mr Sullivan, the Appellant and the Trustees of Roldvale and Associated Companies Pension Scheme ("Roldvale") entered into a Subscription and Shareholders' Agreement in respect of WHH (the "18 January Agreement"). Roldvale is a pension fund instituted primarily for the benefit of Mr Sullivan. Mr Sullivan's brother had a 1% interest at one stage; at the relevant time Mr Sullivan had either a 99% interest or 100% interest in Roldvale (Mr Sullivan could not recall the precise date on which he became sole beneficiary). Mr Sullivan accepted he was the effective controller of Roldvale at all relevant times.

h) Pursuant to the 18 January Agreement, the Appellant and Roldvale agreed to pay £20m. £15m of this sum was to be paid to WHH, to be used for the parent company of the club, and the remaining £5m was to be paid on behalf of WHH to repay part of a loan which WHH had taken from Straumur-Burduras Investment Bank hf ("Straumur", an Icelandic bank which was itself in significant financial difficulties by early 2010). In return for these payments, CBH agree to procure the issue and allotment of 750 ordinary shares in WHH to Roldvale, and 250 ordinary shares in WHH to the Appellant.

i) In his examination in chief Mr Sullivan told us that while it was impossible to value the ordinary shares in WHH at that time, he considered the price paid (amounting to £20,000 per share for each of the 1,000 shares allotted) to be a fair value at the time. Under cross-examination, Mr Sullivan told us that if he was to sell any shares in WHH then he would want to receive not less than £20,000 per share.

j) Under the 18 January Agreement, CBH retained a 50% shareholding in WHH. Therefore, as at 18 January 2010, the full issued ordinary share capital of WHH was held 50% by the Appellant and Roldvale together (holding 250 and 750 shares respectively) and 50% by CBH (holding 1,000 shares). CBH also held 111,499,000 deferred shares.

k) Additionally, on 18 January 2010, Roldvale and the Appellant (as new members of WHH) passed a special resolution agreeing that the deferred shares in WHH were capable of being repurchased by WHH as set out in WHH's newly adopted Articles of Association, and that the directors be authorised to repurchase at their discretion. Following this resolution, again on 18 January 2010, WHH served notice on CBH (as the holder of the 111,499,000 deferred shares) that WHH intended to purchase those deferred shares for total consideration of £1.

Put option, call option and transfer rights under the 18 January Agreement

l) Although his bid had been for 50% of WHH's shareholding, Mr Sullivan wished to ensure that, in due course, he would be able to acquire the remaining 50%. CBH was also anxious that it would eventually be able to sell its remaining 50% shareholding. To achieve these joint aims the 18 January Agreement included a put option (clause 11, exercisable by CBH during the month of July in the years 2013-2015 over the entirety of CBH's remaining shareholding) and also a call option (clause 12, exercisable by Mr Sullivan, the Appellant and/or Roldvale, over a minimum of 200 of CBH's remaining shares). Under Clause 12, the shares in WHH were priced at £20,000 per share if the call option was exercised by 17 May 2010, and priced at £25,000 per share if the call option was exercised between 18 May 2010 and 30 June 2013.

m) The 18 January Agreement also permitted the Appellant and Roldvale to transfer up to 50% of the total number of WHH shares owned between them, to Mr David Gold (one of Mr Sullivan's business partners in his earlier purchase of Birmingham City Football Club) or any entities wholly owned by Mr Gold.

Events from 19 January 2010

n) On 19 January 2010, Roldvale transferred 500 of its 750 shares in WHH to Mr Gold. As a result of this transfer, from 19 January 2010, the 2,000 ordinary shares in WHH were owned by CBH (1,000 shares), by entities controlled by Mr Sullivan (500 shares) and by Mr Gold, or entities controlled by him, (500 shares).

o) Once Mr Sullivan and his team took over management of the football club, it became clear to him that the football club needed (at least) a further £4m to keep afloat and to begin to return to a more sustainable financial position. Mr Sullivan was in a position to provide further funds to the football club, and he was inclined to assist. Mr Sullivan told us, and we accept, that he wanted the football club to be successful in order to make a contribution to the community in which he had grown up.

p) Accordingly, towards the end of April 2010, Mr Sullivan began to discus with his advisors how he and his entities could provide funds to WHH in a way which would benefit the football club (and not simply route funds to CBH for the benefit of Straumur).

q) Mr Sullivan's original suggestion to his lawyers, on 25 April 2010, was that his entities would assign to WHH their option (agreed in the 18 January Agreement) to buy 200 of CBH's 1,000 shares in WHH, WHH would invoke the option (at £20,000 per share) and would then reissue 200 shares (100 shares to Mr Sullivan's entities, 100 shares to Mr Gold's entities) at £40,000 per share. Under cross examination Mr Sullivan told us that he expected this injection of funds into the football club to be tax neutral, with neither a loss nor a chargeable gain. However, Mr Sullivan's lawyers raised a concern that Mr Sullivan's suggestion could result

in a charge to capital gains tax. Various variations were proposed over the next few days in the hope of mitigating the risk of a charge to tax.

r) On 29 April 2010, Mr Sullivan's lawyers advised there was:

> … an unacceptable risk of a CGT charge arising if you assign the benefit of the option to [WHH] as a higher market value for a share will be established on a subscription for new shares by you and David Gold …

s) Mr Sullivan's lawyers proposed that WHH agree to buy 200 shares from CBH at £20,000 per share conditional upon WHH issuing 200 new shares within an agreed period. Mr Sullivan and Mr Gold would then subscribe for 200 new shares. This proposal was apparently acceptable to the parties commercially but by 4 May 2010, the lawyers had identified a further issue. This fresh issue was set out in an email sent to Mr Sullivan on 4 May 2010:

> In the meantime I understand that the shares to be acquired from CBH were not originally acquired at a premium as first thought which means that they cannot be bought back by [WHH] out of the proceeds of the fresh issue of shares to you and David. The premium element to be paid on the repurchase has to be funded from distributable reserves. Clearly there are no such reserves.
>
> So we are currently thinking of what alternative ways are open to us to achieve the same economic effect of the original proposals.

t) The economic effect of the original proposals was, as Mr Sullivan told us, that the football club should receive further funds with neither a loss nor a gain for tax purposes. This was confirmed in Mr Sullivan's email of 5 May 2010 sent in reply to the email set out above:

> There must be a way to do it? We want to buy for £4m, but give the club £8m, with no tax liabilities to anybody. ANY IDEAS?

u) Later on 5 May, the football club's Finance Director, Mr Igoe, replied to Mr Sullivan, suggesting that a solution might be offered if the restructuring of WHH's share capital (which took place on 18 January) could be unravelled. Mr Igoe's suggestion concerned WHH repurchasing CBH's shares at par and not at a premium. Mr Sullivan replied to Mr Igoe:

> Lets see what Mel [a member of Mr Sullivan's legal team] says. Your info might open up a better route?
>
> His solution is we buy 200 shares for £4m from Straumur – the company then votes to make these shares value less (like the vast number of Straumur shares) – so £4m is written off and there is really only 1,800 shares on issue. WHH then issues us with 200 new shares at £20k each - £4m.

> Mel can we progress. We need extension from May 18th on other 40/50 option.

v) Mr Sullivan's reference to an extension and 18 May 2010 was to the deadline (set out in the 18 January Agreement) for Mr Sullivan, Roldvale and/or the Appellant to exercise their call option with a share price of £20,000. The parties had already agreed informally that this period could be extended by three months.

w) We now come to the short period where it is clear that Mr Sullivan continued to take advice but where that correspondence has not been disclosed. The next document we were shown was an email dated 10 May 2010 from Mr Sullivan to his lawyers, copied to Mr Gold:

> IMPORTANT-the plan re buying 10% of [WHH] for £8m (200 shares) is as follows.
>
> We buy from [CBH] 200 shares at £20k each – CBH get £4m (£2m each) – [WHH] turn these shares into non voting, nothing shares and buy them in off us at £1. - so between us there is a £3,999,999 capital loss. DO YOU HAVE A COMPANY OR INDIVIDUAL WITH A CAPITAL GAIN to buy these in? TRANSACTION A
>
> The next day WHH (having cancelled/bought in 200 shares) issues 200 new shares at £20k a share. TRANSACTION B
>
> I'm planning to buy the shares that end up worthless and create a capital loss in [the Appellant] - TRANSACTION A – my share £2m
>
> And Buy 100 shares at £20k each – 5% of WHU – via Roldvale and Associate companies Pension scheme. Again £2m – TRANSACTION B.
>
> Can you advise me entities you plan to use? We won't move until both sides lawyers have agreed.

x) Mr Sullivan's evidence was that he had not asked for a loss to be generated. Mr Sullivan told us that when the accounting team of the Appellant's solicitors drew up the accounts, the method that they had advised the Appellant follow had resulted in a loss. Mr Sullivan told us that he regarded that as a bonus; he told us:

> I was pleased, but thought it wouldn't be allowed. I'm still here, and I'm still not getting it allowed.

y) We accept that Mr Sullivan did not set out with the specific aim of generating a tax loss. Mr Sullivan's original aim was simply to provide funds to the football club in a way which ensured that the football club received the benefit of those funds and which did not leave him and the entities he controlled vulnerable to a charge to tax. However, it is clear that by 10 May 2010, the possibility of a loss for tax purposes had become a sufficiently important feature of the arrangements

for Mr Sullivan to draw it specifically to the attention of Mr Gold. We find that, from 5 May 2010, the possibility of a tax loss being available was a consideration for Mr Sullivan (and the Appellant) and that this possibility influenced the choice of steps taken. We infer that between 5 and 10 May 2010 Mr Sullivan's advisors provided Mr Sullivan and the Appellant with advice upon how a capital loss might arise, and that the steps followed were taken, at least in part, to try to achieve this potential capital loss.

z) On 12 May 2010, Mr Sullivan's lawyers sent Mr Sullivan a "letter of tax advice in connection with the current proposals". We were not shown that letter. We infer that this letter included advice upon the capital loss which would potentially be created as a result of following certain transactions.

aa) It is clear that Mr Sullivan had considered at least one other way of providing funds to the football club as this is mentioned in Mr Sullivan's emailed reply on the same date to his lawyers.

bb) On 13 May 2010, Mr Sullivan emailed to a member of his legal team and Ray (a member of Mr Gold's team):

> RAY – we urgently need to know which entity is putting in #2m that will end up with worthless shares (and a POSSIBLE tax loss) and which entity is putting in #2m and end up with 100 shares at 20,000 a share.

cc) A member of Mr Gold's team emailed in response later that day:

> We have no capital gains in the current year to use the losses against. We will therefore be buying the shares in the name of David Gold.

dd) On 17 May 2010, Mr Sullivan's lawyers email Mr Sullivan to summarise the proposed steps and to suggest that Mr Gold subscribe for new shares:

> In light of the fact that David Gold has no capital gains to use the potential losses against, we think it is best not to assign the option over 100 ordinary shares to him. …

ee) Mr Sullivan agreed to the proposed steps, suggesting a minor revision. The legal team then emailed (also on 17 May 2010):

> One thing we should have pointed out about the structure set out in my email is that the stamp duty charge would fall upon you and not on David Gold. [The Appellant] and Roldvale would each pay stamp duty of £10,000 on acquiring the call option shares and David Gold would not pay any stamp duty as he would be subscribing for new shares. Are you okay with that?

ff) Mr Sullivan confirmed his agreement.

<u>The events of 20 and 24 May 2010</u>

gg) On 20 May 2010, the parties signed an Amendment Agreement (the 20 May Agreement"). Under this agreement CBH agreed to extend the call option (granted in the 18 January Agreement), granting to Mr Sullivan, the Appellant and Roldvale, the option to buy 200 or more of CBH's 1,000 ordinary shares in WHH. If the option was exercised on or before 18 August 2010, the price payable was £20,000 per share; if the option was exercised between 19 August 2010 and 30 June 2013, the price payable was £25,000 per share.

hh) Also under the 20 May Agreement, the Appellant and Roldvale each gave CBH written notice of their exercise of the extended call option in respect of 100 ordinary shares in WHH (together achieving the minimum of 200 shares). The consideration payable by the Appellant and Roldvale was £2m each.

ii) On 24 May 2010, following the Appellant and Roldvale's exercise of the call option, CBH transferred 100 ordinary shares in WHH to the Appellant and a further 100 ordinary shares in WHH to Roldvale. Also on 24 May 2010, Mr Gold and Gold Group International Limited ("GGIL", a company owned by Mr Gold) each subscribed for 100 ordinary shares in WHH. As a result of these transactions, CBH held 800 ordinary shares in WHH, the Appellant and Roldvale held (between them) 700 ordinary shares in WHH, and Mr Gold and GGIL held (between them) 700 ordinary shares.

jj) Following the subscription for shares, also on 24 May 2010, the members of WHH passed an ordinary resolution (the "First 24 May resolution") converting 200 ordinary shares (100 held by the Appellant and the 100 held by GGIL) into 200 deferred shares of £1. That resolution provided:

> THAT 100 of the ordinary shares of £1 each in the capital of the Company held by Conegate Limited and 100 ordinary shares of £1 each in the capital of the Company held by Gold Group International Limited be converted into deferred shares of £1 each in the capital of the Company, such deferred shares having the rights set out in the articles of association of the Company.

kk) Finally on 24 May 2010, the members of WHH passed a further resolution (the "Second 24 May resolution") authorising the repurchase of the deferred shares. The Second 24 May resolution was as follows:

> 1. THAT the deferred shares of £1 each in the capital of the Company ("Deferred Shares") be capable of being repurchased by the Company on the terms set out in the articles of association of the Company ("Articles").
>
> 2. THAT subject to the provisions of the Act, the directors be authorised at their discretion to exercise their right to purchase all or any of the Deferred Shares in accordance with the provision of the Articles.

ll) Following the Second 24 May resolution, WHH wrote to the Appellant notifying it that the 100 deferred shares which the Appellant held would be repurchased for

£1. (We assume that a similar notification and re-purchase took place in respect of GGIL).

mm) In August 2010, the parties entered into a further arrangement, in essence repeating the May 2010 steps set out above, under which there was a further purchase by the Appellant of 12 ordinary WHH shares. Minor tweaks were made to the structure to address a third party investor's concern that the shares were worth £40,000. The 12 ordinary shares bought by the Appellant were also converted into deferred shares, which were then bought back for £1. In June 2010, Mr Sullivan described this prospective transaction as follows:

> I'm using [Roldvale] to buy the real shares and [the Appellant] to buy the useless shares where I get a capital loss.

nn) Following the Appellant's submission of its tax return for the accounting period ended 30 September 2010, on 21 May 2012 the Respondents opened an enquiry into that tax return. The parties were unable to agree the correct treatment of the transactions described above and the Appellant's entitlement to a capital loss. On 2 October 2015, the Respondents issued a formal decision, against which the Appellant appealed to this Tribunal.

oo) We conclude that the Appellant entered into transactions in May 2010 primarily because Mr Sullivan wished to give additional funds to the football club. This was Mr Sullivan's over-arching aim. However, we find that there were additional and more complex reasons for entering into the specific transactions which were agreed. These reasons included commercial constraints (such as the position of Straumur), legal constraints (such as the Companies Act constraints) and tax considerations.

pp) Having considered the evidence before us, in particular the email chains we were shown, the reference to tax advice in a document we were not shown and Mr Sullivan's decision to suffer stamp duty rather than revise the transaction steps which offered the potential of a loss, we find that one of Mr Sullivan's many aims in entering into the May 2010 transactions (and subsequent August 2010 transactions) was to achieve a loss for tax purposes. Had this not been one of Mr Sullivan's objectives, we consider it likely that Mr Sullivan would have proceeded differently in May 2010 (for example, as Mr Gold did, to avoid the charge to stamp duty) and that he would have placed far less focus on the possibility of a tax loss when describing the transactions to Mr Gold and to his advisors.

Relevant legislation

46. Having set out the facts we have found, we turn to consider the parties arguments and the relevant legislation. In defending their decision the Respondents relied, in the alternative, upon Sections 29, 17 and 16A of TCGA 1992. It is relevant to note that the Respondents need only be successful in their arguments in respect of one of these sections in order to be successful in their defence of their decision, whereas the

Appellant must persuade us that its interpretation of each of these sections is correct if it is to be successful in this appeal.

Section 29 TCGA 1992

47. The parties failed to agree on the construction or application of either Subsection (1) or (2) of Section 29 TCGA 1992. Given that Subsection (1) provides the treatment where the requirements of any of the following Subsections are met, it is logical first to consider Subsection 29(2). We will consider Subsection 29(1) below if we conclude that the requirements of Subsection 29(2) are met in this case.

Subsection 29(2) TCGA 1992

48. Subsection 29(2) TCGA 1992 provides as follows:

> (2) If a person having control of a company exercises his control so that value passes out of shares in the company owned by him or a person with whom he is connected, or out of rights over the company exercisable by him or by a person with whom he is connected, and passes into other shares in or rights over the company, that shall be a disposal of the shares or rights out of which the value passes by the person by whom they were owned or exercisable.

49. The Appellant's main submission in respect of Subsection (2) was that the only party involved in the transactions which was connected to the Appellant was Roldvale, and so the Appellant (together with Roldvale) held only a minority shareholding in WHH. In those circumstances it was asserted that the initial requirements of Subsection (2) were not met as the Appellant did not hold or exercise control of WHH. The Respondents' submission was that Subsection (2) did not require the persons having and exercising control to be connected. The Respondents argued that the requirements of Subsection (2) had been satisfied as the Appellant had acted with the other shareholders, exercising control of WHH so that value passed out of WHH shares which the Appellant owned. Both parties relied upon *Floor v Davies* [1980] AC 695.

50. There was one further point in dispute before us in relation to Subsection (2): although in his skeleton argument Mr Kamal had accepted that value did pass out of the shares held by the Appellant (though not by reason of an exercise of control by the Appellant), before us Mr Kamal's position was that no value had passed out of the WHH shares held by the Appellant as the reduction in the number of shares had resulted in the remaining WHH shares being fixed with a greater proportion of the overall debt of WHH. Shortly after the hearing before us, the Appellant provided the Respondents and the Tribunal with a copy of the accounts of WHH for the year ended 31 May 2010, which reported an overall loss. In response to this point, the Respondents argued that there was still value passing out of the Appellant's WHH shares and passing into the remaining WHH shares, even if WHH's balance sheet showed a negative value.

Our conclusions on Subsection 29(2)

51. We start by considering *Floor v Davies* [1980] AC 695, in which Paragraph 15(2) of Schedule 7 to the Finance Act 1965 (the predecessor to Section 29) was considered

by the House of Lords. Viscount Dilhorne, giving the opinion of the majority of the House, held that "a person having control of a company" applied not only to a single person having control but also to two or more persons who together had control. This outcome came as a result of applying Section 1(b) of the Interpretation Act 1889, which provided that words in the singular should include the plural unless the contrary intention appeared. In *Floor v Davies,* Lord Diplock and Lord Edmund-Davies agreed with Viscount Dilhorne that the contrary intention did not appear in respect of Paragraph 15, and so the application of the Interpretation Act to Paragraph 15 was not contrary to the intention of Parliament.

52. Mr Kamal accepted that control of a company could be exercised by two or more persons acting together but submitted that for Subsection (2) to apply, the persons who were said to have control together must be connected, as they were in *Floor v Davies*. Mr Kamal submitted that in this case the Appellant was connected only to Roldvale. Therefore, it was not the case that the Appellant acting with one or more connected persons, together having control of WHH, had exercised control so that value passed out of the Appellant's shares in WHH. We note that on 24 May 2010, following the subscription for shares but prior to the First 24 May Resolution, the Appellant and Roldvale held between them just under 32% of the shares in WHH.

53. We agree with the Appellant that in *Floor v Davies*, the majority of the shareholders were in fact connected to each other (the Appellant being the father-in-law of two other shareholders, and the three having together formed a company which was the other relevant shareholder). However, we do not consider the fact that the relevant shareholders were also connected was relevant to the conclusion reached by Viscount Dilhorne that the Appellant and his sons-in-law together had control.

54. In *Floor v Davies*, there are several references to persons being connected, and to Paragraph 21 of Schedule 7 (which determined to whom persons were connected). However, such references appear either to be by way of contrast, or to be a reference to the persons who are to be treated as having disposed of shares out of which value has passed. The references to connected persons in the speech of Viscount Dilhorne do not, it seems to us, suggest that it is necessary for the persons exercising control also to be connected to each other in order for Paragraph 15 (or Section 29) to apply. The focus of the majority was upon whether the plural applied so that "person" included "persons" and the effect of such an interpretation.

55. At page 712, Viscount Dilhorne states:

> Applying the Interpretation Act does not change the character of the transaction as it did in the *Blue Metal case* [1970] A.C. 827. It merely *enlarges the number of persons who by the passing of value out of their shares are to be treated as having disposed of them*. Applying that Act and paragraph 3 of Schedule 18 does not appear to me to make paragraph 15 (2) unworkable; nor do I think that the width of that paragraph when they are applied, is such that it can properly be said that the result is one that Parliament cannot have intended. Parliament clearly cast the net wide

> enough *to include in it a person who exercised control and any person connected with him as defined by paragraph 21*. *(Emphasis added)*

56. Thus the reference to the persons caught in the "net" is to the persons who held shares out of which value has passed: those who exercise control and those connected to persons who exercise control. Viscount Dilhorne continued:

> I can see no reason for not treating the passing of value out of shares owned by two or more persons as the result of the exercise by them of control and out of shares owned by persons connected with them in precisely the same way. I can see no indication that Parliament intended to secure that what would be a disposal if effected by the exercise of control by one person would not be a disposal if the control was exercised by two or more …

57. There is no reference in that paragraph to a requirement that the persons exercising control also be connected. If Viscount Dilhorne had concluded that Paragraph 15 only applied to connected persons exercising control together then we would have expected such a conclusion to have been stated explicitly. This is particularly so given that it would have gone some way to answering the criticism (made on behalf of the taxpayers in *Floor v Davies*) that interpreting "a person" to include "persons" resulted in the Revenue's net being cast too wide. Applying the Interpretation Act so that "a person" applied to "persons" but only if those persons were also connected to at least one other as well as holding control together, would have restricted the persons to whom Paragraph 15 (and Section 29) applied.

58. Finally, dealing with the suggestion that minority shareholders would inadvertently be treated as having made a disposal simply by virtue of holding shares, Viscount Dilhorne concluded (also at page 712):

> This construction of paragraph 15 (2) does not in my opinion involve any extension of it but gives effect to the language used and to the intention of Parliament. It is said that a minority shareholder owning say 10 per cent of the shares will be liable to be taxed if one or more others have shares which with his add up to a controlling situation. I do not agree that this is so. Such a minority shareholder will only have the value passing out of his shares treated as a disposal if he has joined with other shareholders in the exercise of control to bring that about *or* if he is a person connected with those whose exercise of control has brought it about. *(emphasis added)*

59. We conclude there is no requirement that there be a connection between the persons who have control of a company for the purposes of Subsection 29(2).

60. We agree with the Respondents that, following the 24 May 2010 subscription for shares, Mr Sullivan's entities and Mr Gold's entities together held the majority of the ordinary shares of WHH (just under 64%) and that they acted with common purpose in causing WHH to pass the First 24 May Resolution and the Second 24 May Resolution. We conclude that the Appellant (acting with Roldvale and Mr Gold's entities)

controlled WHH and that it exercised its control in passing these two resolutions. The first requirements of Subsection 29(2) are met.

61. Having reached that conclusion, we consider the Appellant's additional point in respect of Subsection (2), namely that no value passed out of the WHH shares held by the Appellant and into the remaining WHH shares because of WHH's indebtedness. We have noted that the WHH's accounts show that WHH made a loss in the period in question. However, we remind ourselves that Subsection (2) focusses upon the value passing out of certain shares and into other shares, and not the value of the company in which those shares were held.

62. The best evidence before us as to the value of the ordinary shares in WHH on 24 May 2010 is the price of £20,000 per share which the Appellant paid at the beginning of that day. Other relevant evidence before us concerning the value of the WHH shares includes:

- Mr Sullivan's oral evidence to us that he thought £20,000 per share was a fair price to have paid in January 2010 and that he would not sell shares in WHH for less than that price;
- CBH's agreement to extend the period (laid down in the 18 January Agreement) in which Mr Sullivan could call for the shares at £20,000 per share to include 24 May 2010 (before they rose to £25,000 per share from 19 August 2010); and
- an email of 16 July 2010 from Mr Sullivan's legal team to Mr Sullivan explaining that there would be a minor variation to the anticipated August transactions to address a third party investor's concern that "the market value is arguably £40,000 per share".

63. The Appellant has not produced any evidence demonstrating that, contrary to the evidence set out above, ordinary shares in WHH were so worthless that no value at all could pass into the remaining WHH shares despite the conversion and re-purchase resulting in a reduction in the overall number of shares.

64. We consider that the overall value of WHH must have remained the same throughout the events in question as the transactions of 24 May 2010 occurred in quick succession. We have found that, as a result of those 24 May 2010 transactions, the overall number of ordinary shares in WHH was reduced. In the absence of any evidence that the WHH shares had no value whatsoever, we conclude that as the overall value of WHH did not change then the value of each of the remaining ordinary shares in WHH must have changed. Therefore, value passed out of the Appellant's WHH shares into other WHH shares.

65. We conclude that the requirements of Subsection 29(2) are met in this case. The Appellant's exercise of control of WHH, so that value passed out of the 100 ordinary shares in WHH it owned, is a disposal of those shares by the Appellant.

Subsection 29(1) TCGA 1992

66. Having concluded that the requirements of Subsection (2) are met, we turn to consider Subsection (1) in order to determine the effect of that conclusion. Subsection 29(1) TCGA 1992 provides as follows:

> (1) Without prejudice to the generality of the provisions of this Act as to the transactions which are disposals of assets, any transaction which under the following subsections is to be treated as a disposal of an asset—
>
> > (a) shall be so treated (with a corresponding acquisition of an interest in the asset) notwithstanding that there is no consideration, and
> >
> > (b) so far as, on the assumption that the parties to the transaction were at arm's length, the party making the disposal could have obtained consideration, or additional consideration, for the disposal, shall be treated as not being at arm's length and the consideration so obtainable, or the additional consideration so obtainable added to the consideration actually passing, shall be treated as the market value of what is acquired.

67. The Appellant's first argument in respect of Subsection (1) was that the effect of Subsection 29(1)(b) was that the market value of the acquired asset was deemed to be the total consideration which could have been obtained by the person making the disposal but, in this case, there had been no actual acquisition. In addition, Subsection (1) did not prescribe the consideration received, or deemed to have been received, by the person making the disposal. Before us, Mr Kamal added that the parties were at arm's length so it was questionable whether any more consideration could have been obtained; if necessary, the matter could be remitted for the market value to be determined. For the Respondents, Mr Saoul submitted the application of Subsection (1) to the current case resulted in treating the market value of the shares acquired as the consideration which could be obtained for the Appellant's disposal of its shares in WHH. The Respondents argued that the consideration which could be achieved must be £2m, the sum which the Appellant was willing to pay for 100 ordinary WHH shares earlier the same day.

68. In the alternative, the Appellant submitted that, if Section 29 applied at all, it was for the Respondents to demonstrate that any additional consideration could be achieved. In response, Mr Saoul submitted that the Appellant bore the burden of proof, and the Appellant had failed to make a positive case in respect of market value.

Our conclusions on Subsection 29(1)

69. We consider first the application of Subsection (1) before discussing the points made regarding valuation and market value.

70. Although the Appellant is correct to state that in this case there has been no actual acquisition of the 100 ordinary WHH shares held by the Appellant, Subsection (1)(a) provides that there shall be treated to be an acquisition corresponding to the disposal which occurs as a result of Subsection (2) applying. Thus on 24 May 2010, the Appellant called for 100 ordinary WHH shares, then caused WHH to pass two resolutions resulting in the conversion of 100 of the Appellant's ordinary shares in

WHH to deferred shares in WHH, and the subsequent repurchase of those deferred shares. The application of Subsection (2) treats the conversion of 100 ordinary shares into 100 deferred shares as a disposal of the 100 ordinary shares from which value has passed. Subsection (1)(a) provides that there shall be an acquisition corresponding to this disposal.

71. So, when applying Subsection 1(b), we consider the relevant transactions to be the Appellant's disposal of 100 ordinary WHH shares (because the conversion is treated as such by Subsection (2)), and the corresponding acquisition (treated as such by Subsection (1)(a)). We consider that this corresponding acquisition must be an acquisition of 100 ordinary shares in WHH. If the parties to this (statutorily created) disposal and acquisition are at arm's length but the consideration which could have been obtained on the disposal is greater than was actually obtained, then the disposal is to be treated as not being at arm's length. In that event, the consideration which could have been obtained is the market value of what is acquired (under the corresponding acquisition).

72. The consideration which the Appellant received for its disposal, the conversion of its 100 ordinary shares in WHH, was 100 deferred shares in WHH. These deferred shares had a total value of £1. If the consideration which could have been obtained for 100 ordinary shares in WHH is in excess of the £1 which the Appellant actually received, then Subsection 1(b) treats the consideration which could have been obtained as the market value of what is acquired. Therefore, we need to consider whether additional consideration could have been achieved, and, if so, the market value of 100 ordinary WHH shares.

73. This brings us to the arguments made by the parties with regard to the market value of 100 ordinary shares in WHH. It is convenient to begin our discussion of these points by considering which party bears the burden of demonstrating that additional consideration could, or could not, have been achieved.

74. In an appeal against an assessment to tax, the onus is upon the taxpayer to demonstrate that the assessment is incorrect. Therefore the burden is upon the Appellant to demonstrate either that no consideration greater than £1 could be achieved or, if it fails in that first objective, that the market value of 100 ordinary shares in WHH is less than the £2m asserted by the Respondents.

75. Looking first at the question of whether the Appellant could have achieved greater consideration than £1 on its disposal of 100 WHH shares, it seems to us obvious that this must be the case given that the Appellant paid £2m for 100 WHH ordinary shares very shortly before the disposal. The Appellant has not presented the Tribunal with any evidence to support an argument that it could not have achieved greater consideration than £1. Therefore, we conclude that the Appellant could have achieved greater consideration, we treat the disposal as not being at arm's length, and we go on to discuss the market value of what is acquired under the corresponding acquisition.

76. We have noted above some of the evidence before us as to the value of the ordinary shares on 24 May 2010. We consider the best evidence to be the price which

the Appellant paid for 100 shares earlier that day (£20,000 per share). This valuation is supported by much of the other evidence, such as Mr Sullivan's oral evidence as to the minimum he would expect to be paid if he was selling WHH shares (£20,000 per share) and the July 2010 email from Mr Sullivan's legal team (suggesting the correct price was not in excess of £20,000 per share). There was no formal valuation evidence but, given that the Appellant was aware of the issues in dispute and had the opportunity to seek directions for the presentation of expert valuation evidence if it considered that necessary, we do not consider it appropriate for this appeal to be remitted for such evidence to be presented at this stage. The evidence before us does not persuade us that, on the balance of probabilities, the Respondents' assertion of a market price of £20,000 per share is incorrect.

77. When making his submissions, Mr Kamal made it clear that the Appellant specifically disputed that consideration of £4m could have been achieved. We assume that this reference is to the price of £40,000 which Mr Sullivan originally suggested (in late April 2010) the Appellant should pay for each WHH share. It is clear from the context that Mr Sullivan was proposing a price which he considered to be twice the fair value. We consider that this evidence of the market value in April 2010 also supports, rather than detracts from, the suggestion that the market value on 24 May 2010 was £20,000 per share.

78. The Appellant has failed to persuade us that the market value of 100 ordinary shares in WHH on 24 May 2010 was less than the £2m asserted by the Respondents. As the Appellant has failed to displace the figure asserted by the Respondents, the effect of applying Section 29 TCGA 1992 to the 24 May 2010 transactions is that the Appellant is to be treated as receiving consideration of £2m on its disposal of 100 ordinary shares in WHH. As the Appellant paid £2m for the 100 shares, the effect of our conclusions that the Appellant has not made a loss. Therefore the Appellant is not entitled to claim an allowable loss of £2m for the accounting period ended 30 September 2010.

79. As we noted above, in order for the Appellant to be successful in this appeal, it was necessary for it to persuade us that it was correct in its arguments in respect of all of Sections 29, 17 and 16A. The Respondents only needed to persuade us that they were correct in respect of any one of those sections for this appeal to be dismissed. Given our conclusion in respect of Section 29, it is not strictly necessary for us to go on to consider Sections 17 and 16A but given the time and care spent by the parties in developing their points, we consider it appropriate to do so.

Section 17 TCGA 1992

80. The relevant part of Section 17 TCGA 1992 provides:

> 17 Disposals and acquisitions treated as made at market value
>
> (1) Subject to the provisions of this Act, a person's acquisition or disposal of an asset shall for the purposes of this Act be deemed to be for a consideration equal to the market value of the asset—

(a) where he acquires or, as the case may be, disposes of the asset otherwise than by way of a bargain made at arm's length, and in particular where he acquires or disposes of it by way of gift or on a transfer into settlement by a settlor or by way of distribution from a company in respect of shares in the company, or

(b) ….

81. The Appellant's submission was that the overall bargain concluded by the Appellant was not "otherwise than by way of a bargain made at arm's length", and that in considering whether a bargain was at arm's length it was important to look at the overall bargain reached. The Appellant referred us to *Bullivant Holdings v CIR* [1998] STC 905, *Berry v Warnett* [1980] 3 All ER 798 and *Postlethwaite's Executors v HMRC* [2007] STC (SCD) 83. Mr Kamal submitted that what might be regarded by others as a bad bargain could still a bargain at arm's length if it was the best agreement which could be reached, as it was unlikely that a party would wish to confer benefit on an unconnected person. In addition, Mr Kamal argued that even if Paragraph 17(1)(a) did apply, it was still necessary to establish the market value of the shares, and the Appellant disputed that the market value of the 100 WHH shares disposed of was £2m.

82. The Respondents submitted that the correct test to establish whether a transaction was otherwise than by way of a bargain at arm's length was that set out in *Mansworth v Jelley* [2002] EWHC 442 (Ch). If the agreement was not at arm's length then Section 17 applied to deem the consideration received as a result of that transaction to be the market value of the asset which had been disposed of or acquired. The Respondents submitted that the onus was on the Appellant to establish a market value for the shares which could displace the best judgment figure of £2m used in assessing the Appellant.

Our conclusions on Section 17

83. Section 17 applies where there has been an acquisition or a disposal which is otherwise than "by way of a bargain made at arm's length". The logical place for us to start is with *Mansworth v Jelley*, where Ferris J helpfully sets out what that term means. At paragraph 13 he states:

> The formula of words connotes more than a transaction: it connotes a transaction between two parties with separate and distinct interests who have each agreed terms (actually or inferentially) with a mind solely to his own respective interests.

84. The Appellant referred us to *Bullivant Holdings* and *Postlethwaite's Executors*. The latter concerned Section 10 IHTA and was accepted by the Appellant to involve a different test. Mr Kamal submitted that, despite the differences, *Postlethwaite's Executors* gave authority to the proposition that we could look at the economic reality of the whole in ascertaining whether there had been gratuitous benefit as a result of a specific transaction. We have found that the overarching aim of the transactions as a whole was to give funds to the football club, but it does not seem to us that this alone is determinative of the question of whether the transactions entered into by the Appellant were at arm's length. We derived more assistance from *Bullivant Holdings*

where it was held that the relevant transaction, seen in the context of a composite transaction, was at arm's length. At page 921 Ferris J held:

> But to my mind this suggests that the transactions as a whole *were* negotiated at arm's length rather than that they were not so negotiated. A process under which a party has to yield in respect of one part of a composite transaction in order to obtain the much desired benefits of another part of the same transaction is of the essence of a genuine commercial bargain.

85. We agree with the Appellant that it can be relevant to look at the overall or composite bargain reached when considering whether a party to a specific transaction was acting solely in his own interests. We accept that, as in *Bullivant Holdings*, there can be circumstances in which a person who is acting in his own interests might reach an apparently poor deal when looking at an individual transaction in isolation, but can be seen to be agreeing to that poor deal only in order to achieve a much better bargain overall.

86. So, in looking at the Appellant's acquisition or disposal of shares, we consider that the test is whether the Appellant agreed the terms of that acquisition or disposal with a mind to its own interests. In considering whether the Appellant has acted solely in its own interests, we can have regard to the overall bargain of which the specific transaction forms a part.

87. The Respondents case was that neither the acquisition nor the disposal of shares by the Appellant was at arm's length. We look first at the Appellant's share disposal, which we consider to be the conversion of the ordinary shares into deferred shares. When considering this disposal, we bear in mind the overall bargain reached by the Appellant and, with that overall deal in mind, we ask whether the specific transaction entered into by the Appellant was one which would be agreed by a person acting solely in its own interests? Mr Kamal urged us to take account of the benefit to the Appellant in protecting its investment in WHH, just as the Court of Appeal had considered there to be a retention of a beneficial interest in *Berry v Warnett*. We do not consider that the evidence before us can support that interpretation of the facts. We have found that the May events took place because Mr Sullivan wanted to provide the football club with additional funds, not in order to protect the Appellant's investment. Mr Sullivan's description (in his email of 10 May 2010) of the Appellant's overall deal is as follows:

> "I'm planning to buy the shares that end up worthless and create a capital loss in [the Appellant] - TRANSACTION A – my share £2m"

88. We conclude that the Appellant's disposal of the 100 ordinary shares (by way of agreement that those shares which it had just purchased for £2m could be converted to 100 deferred shares) was otherwise than by way of a bargain made at arm's length. It was not an agreement which would be reached if the Appellant was acting solely in its own interests, and it was not – to use Mr Kamal's suggested formulation – the best deal the Appellant could reach in the circumstances. Looking at the Appellant's overall deal (purchasing 100 ordinary shares for £2m, knowing that those shares would be converted

into deferred shares and bought back for £1) reinforces the conclusion we reach in respect of the specific transaction.

89. Having concluded that Paragraph 17(1)(a) applies to the share disposal, we go on to consider the application of Subsection 17(1) and the question of what amounts to market value. The Respondents' position was that the market value for 100 ordinary shares was £2m. The Appellant disputed that this was the case but did not put forward a positive alternative.

90. As we noted above in the context of Section 29, in an appeal against an assessment the onus is upon the taxpayer to displace the figures which form the basis of that assessment. When discussing the application of Section 29 we set out some of the evidence before us as to the market value of WHH shares on 24 May 2010. As we noted, the Appellant did not provide us with evidence which would counter the Respondents' use of £20,000 per share as being the market value on 24 May 2010. Therefore, as with Section 29, we are not persuaded that, on the balance of probabilities, the Respondents' assertion of a market price of £20,000 per share is incorrect and should be displaced.

91. The effect of our conclusions in respect of Section 17 TCGA 1992 is that the Appellant's disposal of the 100 ordinary shares in WHH shall be deemed to be for consideration of £2m, the market value. As the Appellant bought the shares for £2m, the result of this deeming is that the Appellant did not make a loss on its disposal of its 100 ordinary shares. It follows that the Appellant is unsuccessful in respect of its case in relation to Section 17 TCGA 1992

Section 16A TCGA 1992

92. Section 16A TCGA 1992 provides:

> 16A Restrictions on allowable losses
>
> (1) For the purposes of this Act, "allowable loss" does not include a loss accruing to a person if—
>
> (a) it accrues to the person directly or indirectly in consequence of, or otherwise in connection with, any arrangements, and
>
> (b) the main purpose, or one of the main purposes, of the arrangements is to secure a tax advantage.
>
> (2) For the purposes of subsection (1)—
>
> "arrangements" includes any agreement, understanding, scheme, transaction or series of transactions (whether or not legally enforceable), and
>
> "tax advantage" means—
>
> (a) relief or increased relief from tax,

(b) repayment or increased repayment of tax,

(c) the avoidance or reduction of a charge to tax or an assessment to tax, or

(d) the avoidance of a possible assessment to tax,

and for the purposes of this definition "tax" means capital gains tax, corporation tax or income tax.

(3) For the purposes of subsection (1) it does not matter—

(a) whether the loss accrues at a time when there are no chargeable gains from which it could otherwise have been deducted, or

(b) whether the tax advantage is secured for the person to whom the loss accrues or for any other person.

93. The Appellant's submission was that this legislation is intended to target artificial losses which have been engineered, and that the loss incurred by the Appellant did not fall within this category. The Appellant also submitted that even if the loss it had incurred was within Section 16A, as a matter of fact the main purpose of the transaction had not been to create a loss. The Appellant relied on the evidence of Mr Sullivan in this regard, submitting that although, theoretically, there might be an infinite number of ways of the Appellant achieving its objective of providing funding to the football club, in reality, because of the legal and commercial constraints, there was only one way in which the investment into the football club could be achieved.

94. The Respondents relied upon Section 16A only if they were unsuccessful with regard to either Section 17 or 29. Their case in respect of Section 16A was that the legislation required the securing of a tax advantage to be only "one of the main purposes" not "the main purpose" of the relevant arrangements.

Our conclusions on Section 16A

95. We agree with the Appellant that the overarching reason for the transactions taking place was for the Appellant to provide funds to the football club. However, we agree with the Respondents that Section 16A refers to "one of the main purposes" and not "the main purpose", and so we should look at the underlying factors which caused the transactions to take place in the way that they did, as well as the overall reason for the arrangements. It is clear from our findings of fact that there was more than one way to provide funding to the football club and that one of the reasons that Mr Sullivan chose to provide funds to the football club in the specific way that transpired was so that the Appellant could claim a capital loss. Therefore we consider securing a tax advantage to have been "one of the main purposes" of the arrangements.

96. As the loss claimed by the Appellant arose as a result of transactions where one of the main purposes was to secure a tax advantage then Subsection 16A (1) applies to

prevent that loss being an allowable loss. It follows that the Appellant is also unsuccessful in respect of its case in relation to Section 16A TCGA 1992.

Conclusion

97. We conclude that in respect of its disposal of 100 ordinary shares in WHH in May 2010, the application of Section 29, 17 or 16A TCA 1992 to the relevant transactions results in the Appellant making neither a gain nor a loss for the purposes of capital gains tax. The same conclusions apply to the Appellant's very similar disposal of WHH shares in August 2010.

98. For the reasons set out above, we dismiss the Appellant's appeal.

99. 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.

JANE BAILEY
TRIBUNAL JUDGE

RELEASE DATE: 13 FEBRUARY 2018