[2017] UKFTT 0322 (TC)

TC05800

Appeal number: TC/2011/09337

Income tax and capital gains tax – "bed and breakfast" scheme to generate capital loss under s 106A TCGA – claim to income tax relief for the loss under s 574 ICTA 1988 – whether "repo" rules in s 263A TCGA, value shifting rules in s 30 TCGA or Ramsay principles applied to prevent loss arising – whether waiver of loan to appellant gave rise to a receipt subject to income tax under s 687 ITTOIA 2005 (income not otherwise charged) – appeal allowed in part

FIRST-TIER TRIBUNAL
TAX CHAMBER

ADRIAN KERRISON — **Appellant**

- and -

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

TRIBUNAL: JUDGE SARAH FALK

Sitting in public at The Royal Courts of Justice, The Strand, London WC2A 2LL on 20 to 23 February 2017

David Ewart QC and Edward Waldegrave, instructed by Reynolds Porter Chamberlain LLP, for the Appellant

Julian Ghosh QC, Katherine Apps and Charles Bradley, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. This appeal relates to claims the appellant made in his tax return for the year 2006-07 in respect of certain transactions carried out in 2006. The appellant claimed that the transactions gave rise to a capital loss of £1,102,655, and further claimed relief from income tax in respect of £1,083,984 of the loss. Following an enquiry into the return HMRC issued a closure notice on 10 August 2011. The closure notice concluded that the claims should be denied and that one of the transactions, a loan waiver, gave rise to a charge to income tax on the amount waived. The total income tax arising from the amendments made by the closure notice was £820,222.04. The appellant appealed against the closure notice.

2. There is no dispute between the parties that the relevant transactions were entered into by the appellant in order to give rise to a loss. The appellant's position is that this is not relevant to the tax analysis.

The transactions in outline

3. The scheme that the appellant entered into was designed and promoted by Premier Strategies Limited ("PSL"), a company in the Tenon group of companies. It was known as the Excalibur scheme. The appellant was one of a number of participants. The key transaction steps and their intended tax analysis can be described relatively straightforwardly, and it is convenient to summarise them here to explain how the scheme was intended to work. A detailed description of the steps is set out from [14] below.

4. In outline the steps were as follows:

(1) A new company, Broadgate Trading Limited ("Broadgate"), was incorporated in the Isle of Man and acquired a small UK retail trade.

(2) The appellant subscribed for 20 shares in Broadgate at their par value.

(3) The appellant sold his shares to an unconnected company, Braye Finance Limited ("Braye"), for a similar sum and granted Braye a put option to sell the shares back to him within 30 days for their "fair value" plus 9.1%.

(4) Braye borrowed to subscribe for one share in Broadgate at a very significant premium (the amount reflected the participation of other scheme users as well as the appellant). Broadgate guaranteed the borrowing.

(5) Braye exercised the option and sold 20 shares back to the appellant for around £1.1m. Braye repaid its borrowing. This step was funded by borrowing by the appellant, which was also guaranteed by Broadgate.

(6) Broadgate capitalised a British Virgin Islands ("BVI") subsidiary, Broadgate Group Holdings Limited ("Holdings"). Holdings advanced an

interest-free loan to the appellant which repaid his bank borrowing. The interest-free loan was subsequently written off.

(7) The appellant donated his Broadgate shares to a charity.

5. The intended tax analysis was that the sale and repurchase from Braye would fall within s 106A Taxation of Chargeable Gains Act 1992 ("TCGA"), such that the shares acquired from Braye would be identified with the shares disposed of to Braye for capital gains tax ("CGT") purposes, giving rise to a substantial capital loss on the basis that the appellant had acquired shares for a significant sum and sold them for a nominal amount. The appellant would be entitled to claim relief against income tax in respect of the loss under s 574 Income and Corporation Taxes Act 1988 ("ICTA"). The disposal to charity was a "no gain no loss" disposal (s 257 TCGA).

6. The relevant legislation, as in force for 2006-07, is set out in the appendix to this decision. In summary, s 106A(5) TCGA provides that if within a period of 30 days after a disposal the person making the disposal acquires securities of the same class, then the securities must be identified with securities acquired by him in that period rather than with other securities. Section 574 ICTA permits relief from income tax to be claimed in respect of an allowable loss for CGT purposes which is incurred by an individual on the disposal of shares which he or she subscribed for in a "qualifying trading company".

The issues in dispute

7. By the date of the hearing the parties had agreed a list of issues for the Tribunal to determine, reflecting various ways in which HMRC have sought to challenge the intended tax analysis. I have summarised these below in the order in which I intend to address them. A further potential area of challenge, relating to the application of s 144ZA TCGA to the put option, was not pursued.

Issue 1: HMRC contend that the sale of the shares by the appellant to Braye and their subsequent repurchase fall to be disregarded for CGT purposes by virtue of s 263A TCGA, read with s 730A ICTA (the "repo" rules).

Issue 2: If the appellant would otherwise be treated as having realised a loss on the sale and repurchase, then the value shifting rules in s 30 TCGA have the effect that the loss should be reduced to nil.

Issue 3: *Ramsay* principles apply to prevent the scheme achieving its intended effect. The potential alternative approaches under *Ramsay* are:

(1) all the transactions should be ignored: the appellant started with nothing and ended with nothing;

(2) either or both of the appellant's subscription for shares and his disposal of those shares to charity should be respected, but the other transactions should be ignored; or

(3) the amount purportedly paid to reacquire the shares from Braye was not consideration given "wholly and exclusively" for the acquisition of the shares, and therefore does not constitute allowable expenditure under s 38 TCGA.

Issue 4: Any capital loss that did arise may not be relieved against income tax under s 574 ICTA, either because Broadgate was not a "qualifying trading company", or because the disposal of shares to Braye was not "by way of a bargain made at arm's length for full consideration" within s 575 ICTA.

Issue 5: The waiver of the loan by Holdings, made with the approval of Broadgate, is analogous to a dividend paid by Broadgate, and gave rise to an income tax liability under s 687 Income Tax (Trading and Other Income) Act 2005 ("ITTOIA").

8. Clearly, a number of these arguments were put in the alternative. Any of Issues 1 to 3 would, if accepted in full, mean that no capital loss arose, so Issue 4 would not arise. Issue 5 is more of a self-standing point, but would also not arise if either alternative (1) or (2) in Issue 3 (*Ramsay*) applied.

Evidence

9. The Tribunal heard evidence from two individuals employed by the Tenon group at the relevant time, Mark Schofield and Matthew Hall, and two expert witnesses, Ashley Hayman (appointed by the appellant) and Daniel Ryan (appointed by HMRC). Mr Schofield is a chartered certified accountant based in the Isle of Man. At the relevant time he was the managing director of Tenon (Isle of Man) Limited ("Tenon IOM"), and he became one of the two initial shareholders and directors of Broadgate. Mr Hall, who has a background as a tax professional, worked for PSL and was closely involved in the development and marketing of the Excalibur scheme, although he did not personally deal with the appellant.

10. Mr Hayman is a Fellow of the Institute of Chartered Accountants in England and Wales and a Chartered Tax Adviser. He is the senior partner of Cassons, a regional firm of chartered accountants and business advisers, and his main focus is on corporate finance. He has practical experience of providing share valuations in his professional practice. Mr Ryan is the managing director of Berkeley Research Group (UK) Limited. He is also a Fellow of the Institute of Chartered Accountants in England and Wales. He has significant experience in valuing shares and regularly acts as an expert witness.

11. Both Mr Schofield and Mr Hall provided witness statements. Mr Hayman and Mr Ryan each prepared two expert reports, comprising their original report and a supplemental report. In addition they produced a helpful joint statement setting out areas of agreement and disagreement. Other documentary evidence included scheme documentation, minutes of Board meetings, relevant bank account entries and accounts of Broadgate for the year ended 30 April 2007.

12. I found Mr Schofield to be a straightforward, candid and credible witness. I found Mr Hall to be a truthful witness, but rather circumspect and obviously very careful in framing his responses. Both expert witnesses were clear and helpful.

Findings of fact

13. I have set out below a chronology of the relevant events, followed by additional findings on specific issues that are relevant to the dispute. These additional issues are relevant valuation aspects, findings relevant to the purpose for which Broadgate was established and its financial position, and the appellant's own purpose in undertaking the transactions and his role in them.

Chronology of events and key documents

14. PSL developed the Excalibur scheme in early 2006. The nature of the planning was explained to Mr Schofield by members of the management team at PSL, with whom he had a strong relationship. Mr Schofield understood that one of the elements of the planning required a company which was trading in the UK, and he and his fellow director at Tenon IOM, Maureen Quayle, agreed to incorporate a company to purchase a UK trade. Various types of business were considered. It was important to Mr Schofield and Ms Quayle that the business could be managed from a distance (bearing in mind that they were both living and working on the Isle of Man) and they were concerned to ensure that the business did not involve significant risk, for example a significant risk of litigation. They were not concerned about potential fluctuations in the value of the business: their concern was the level of risk. They also wished to acquire a business that was cheap. This led to a focus on florists, bars and sandwich shops. After an initial attempt to acquire a student bar, an offer was made to acquire a flower shop business called the Flower Emporium, based in a small village in Nottinghamshire. An offer was made on 5 April 2006. There followed some difficulty with the landlord of the premises, which was sufficiently resolved to allow the purchase to proceed on 28 April.

15. Broadgate was incorporated in the Isle of Man on 28 April 2006, initially as a public limited company. Broadgate had an authorised share capital of £20,005 divided into 10,003 A ordinary shares of £1 and 10,002 B ordinary shares of £1. The A shares were issued on incorporation to the two directors of Broadgate, Mr Schofield (who subscribed for 5,002 shares) and Ms Quayle (who subscribed for 5,001 shares).

16. The Flower Emporium trade was acquired on 28 April. The minutes of the initial board meeting of Broadgate on that date noted that immediately on incorporation the directors had authorised the purchase of the Flower Emporium, and that the agreement had been entered into and completed. The sale and purchase agreement provided that the total purchase consideration was £33,018.30. Mr Schofield's evidence was that this was funded by a loan from Barclays to Broadgate secured by a guarantee and deposit by PSL, and although there is no mention of that in the relevant Board minutes the valuation referred to at [27(2)] below refers to a loan of £28,500 from Barclays with the balance being funded from the share subscription.

17. Following the acquisition the Flower Emporium continued to work in much the same way as before. The business had previously been managed by an individual who was one of the owners of the vendors, and she agreed to manage the shop as an employee of Broadgate during a transitional period until a new manager was found. A new manager was appointed in June 2006, also employed by Broadgate, and an 18 month lease was formally agreed with the landlord in July. Mr Schofield recalled that he probably visited the shop once every couple of months, and that he got involved in some discussions about business strategy. There was also some email correspondence between shop staff and Broadgate directors about operational matters, such as arrangements concerning suppliers. However, the overall impression is that the directors' input into the operation of the business was limited. Company administration was carried out by Tenon IOM under a service agreement. It was clear from Mr Schofield's evidence that none of the steps involved in the tax planning affected the operation of the Flower Emporium business at the time they were implemented, and the employees who worked in the business did not have any involvement in – and indeed were unaware of – the tax planning steps.

18. Over the same period that the flower shop business was being identified and acquired, PSL continued to work on the Excalibur planning. On 7 May 2006 a PSL employee sent an email to Schroder & Co. Limited ("Schroders London") enclosing an updated spreadsheet providing example cashflows in respect of Excalibur steps. The covering email recorded that "I think Braye needs to inject £49,995 per share and charge a mark up of 9.1% for all 'normal' clients". An undated letter containing an agreement between Braye and Premier Strategic Investments ("PSI", another "trading style" within the Tenon group) confirmed that Braye would pay PSI a fee of 7.61% of the price paid under the sale back.

19. Braye was a company controlled by The Braye Finance Limited Charitable Trust, the trustee of which was Schroder Executor and Trustee Company (CI) Ltd. HMRC and the appellant agree that Braye was not connected with any of the other parties to the relevant transactions within the meaning of s 286 TCGA. Mr Hall's evidence was that he had been introduced to individuals working for Braye at a meeting with Schroders, and that he understood that Braye and Schroders had worked on a number of transactions previously and were comfortable dealing with each other. In fact, the documentary evidence indicates that Schroders London was involved in establishing Braye.

20. On 16 May PSL sent an engagement letter to the appellant which he countersigned on 17 May. The engagement letter was headed "Excalibur" and set out the terms of PSL's engagement in respect of the "planning" but did not provide any details of the planning. I accept Mr Hall's evidence that the only description that had been provided to clients at this stage was a single sheet which explained the (intended) tax benefits of the "Excalibur income tax mitigation strategy", noted that borrowing would be available for up to 90% of the income to be sheltered and that total costs would be 10% of the income to be sheltered, and set a closing date for applications of 19 May. Also on 17 May the appellant applied to open a loan account, described as a "high interest call account", with Schroders (C.I.) Limited ("SCIL")

and completed a statement certifying that he was a high net worth individual for the purposes of the Financial Services and Markets Act 2000.

21. On 17 May Matthew Hall emailed various colleagues asking if they were trustees of a charity that would be interested in a donation. Martin Jeffs, an associate director of the Tenon group, replied saying that he was the trustee of two charities that might be interested. One of the charities that Mr Jeffs was a trustee of was called Change4Change. This charity that had been created by trust deed on 8 May 2006 and was registered as a charity on 16 June 2006.

22. There is no indication that anyone apart from Mr Jeffs suggested a charity that could be used. Mr Hall sent an email to Mr Jeffs on 18 May referring to Broadgate and its role in a new scheme, and explaining that after the scheme was finished they wanted individuals to get rid of their shares (mainly to avoid any risk of retroactive legislation should they continue to hold the shares) and that the plan was to advise individuals to give their shares to charity. They would not force anyone down a particular charity route but would recommend a charity that they knew would be happy to receive the shares. The email said that "clients are very likely to follow our advice". They had built in a "small percentage of funds" that would be left in Broadgate for the charity. Mr Jeffs confirmed to Mr Hall that he was getting confirmation from his fellow trustees but "am pretty certain that we will be interested". He did not give the name of the charity to Mr Hall at this stage. The charity name was only provided on 26 July, when Mr Jeffs was asked whether the charities he was connected with were still interested.

23. The documentary evidence included an undated Excalibur timetable which, from the contents, must have been produced between 28 April and 12 May, almost certainly by PSL. The description of the steps is detailed, although the dates differ from the final version. It is clear that at the stage this was produced Holdings was not contemplated and the plan was instead for Broadgate to offer scheme participants interest-free loans which would subsequently be written off. This is consistent with Mr Hall's evidence that the details of the scheme changed in mid May. The final steps listed refer to "email to clients suggesting that he gift shares to charity" and to "a draft letter to CHARITY", indicating that the person preparing the timetable did not yet know the name of the charity.

24. On 22 May PSI sent an email to the appellant attaching a letter regarding an "investment opportunity" in Broadgate. The email stated that the deadline for subscription requests was 5 pm on 23 May and that if the appellant wished to participate then payment was required no later than 26 May. The attached letter set out some details about Broadgate, its share rights, the fact that the company "currently trades in a UK floristry business" and that investment in it would be a high-risk speculative investment. An application for allotment was also attached. A further email on the same date attached a draft power of attorney in favour of Tenon IOM acting by either of two of its employees, Brent Thomas and Vanessa Roberts. This email explained that they would act as attorneys "as necessary" in connection with shares in Broadgate, that they "will sign certain documents as attorney later in the process", but that in addition "if you are not around for the whole period from now

until the end of June” they could “sign documents when you are not available”. The email also attached a draft letter appended to the power of attorney which was addressed to Tenon IOM and which provided that unless the appellant gave written notice to the contrary to the attorneys, he approved the terms of any document which had been reviewed by PSL. On 23 May the appellant signed the application for allotment, under which he applied for the allotment of up to 20 B shares at £1 per share, executed the power of attorney as a deed, and signed the letter relating to the power of attorney. At this point the appellant had still not been informed of the details of the scheme, although he knew that the proposed acquisition formed part of arrangements intended to generate an income loss for tax purposes. Mr Hall explained, and I accept, that the reason that he was not given details at this stage was that PSL was keen to delay triggering their obligation to notify the scheme under the Disclosure of Tax Avoidance Schemes (DOTAS) rules in Part 7 Finance Act 2004 until after the subscriptions had occurred.

25. The power of attorney authorised the attorneys to acquire shares in Broadgate, to sell or dispose of any interest in shares in Broadgate, to exercise all shareholder rights and to execute any documents in connection with Broadgate shares, including any agreement to acquire or dispose of shares or any agreement relating to any associated funding or security arrangements, in each case as (and on such terms as) the attorneys considered necessary or desirable.

26. On 24 May PSL sent an email to the appellant telling him that his account at SCIL was now open and requesting him to “deposit the 10% originally discussed” with SCIL no later than 1 June 2006. A further email of the same date, in response to a “number of common questions” relating to recent emails, confirmed that there was no need to transfer money now and that “you have until 1 June for cleared funds to reach the account by which time you will have had a chance to digest the scheme”, and pointed out even if money was transferred “it is your bank account and therefore no transfer can be made from this account unless you decide to proceed with the planning and give permission for monies to be taken from the account”. The email also said that access to Counsel’s opinion and “full details of the scheme” would be made available “this Friday” (which would have been Friday 26 May).

27. On 26 May:

(1) Broadgate held a total of three board meetings at which it was resolved that B shares should be issued to a number of applicants, all of whom were noted to be clients of PSI. The appellant was issued (and became the owner of) 20 B shares in Broadgate and he was informed that his subscription had been successful. Mr Schofield accepted in evidence that he and his fellow director would have had details of the Excalibur scheme, at least in general terms, by this point.

(2) Braye confirmed to Tenon Corporate Finance plc (“TCF”) that it was interested in acquiring the B shares in Broadgate and requested a valuation from TCF. TCF carried out a “desktop valuation” of Broadgate on the same date which arrived at an equity value of £902, plus the subscription proceeds received in respect of the B shares less any associated costs. Mr

Hall's evidence was that he could not recall any specific discussions as to the price which Braye would pay for the B shares, but his understanding was that Braye was content to pay a price which was consistent with a formal valuation of Broadgate.

(3) PSL sent a second advice letter to the appellant by email, together with a draft put option agreement. The draft option agreement was in similar form to the final version but without the parties or bank details and without specifying the 9.1% figure. The advice letter contained details of the scheme, including the fact that a bank was willing to lend about 90% of the put option price and that "one method" for the loan to be repaid would be for Broadgate to make a loan to the appellant which could later be written off, and explained the tax planning. It did not contemplate the involvement of a subsidiary of Broadgate and did not mention any gift to charity. The letter noted that the put option price would be market value plus a premium and that this could be very high "for example if [the third party purchaser were to] invest significant cash into the company prior to the re-sale". The letter asked the appellant to indicate whether he either wished to be introduced to potential buyers of his shares without proceeding with the planning, or to be introduced to potential buyers who would also be interested in entering into a put option to sell the shares back to him. The appellant confirmed to PSL (also on 26 May) that he was interested in the latter option.

28. I accept Mr Hall's evidence that, whilst the original plan involved loans from Broadgate to participants which would subsequently be waived, this changed following the identification in mid May of company law problems with the original proposal, but clients were not informed of the change until later. The loan waiver was not covered in the original Counsel's advice to which clients were given access on 26 May. It is not clear exactly when the revised proposal was adopted internally by PSL, but it appears from a chronology Mr Hall prepared for the HMRC investigation that the necessary BVI company law advice and accounting advice (which covered a loan waiver) had been received by 2 June. Mr Hall's evidence was that details of the revised proposal were only given to clients in the autumn of 2006, but this cannot be entirely correct bearing in mind that Holdings offered interest-free loans to them in July, as described below. The chronology prepared for the investigation does however indicate, and I accept, that PSL explored some possible alternatives to the loan waiver between July and October (after the sale and repurchase was implemented but before the loans were written off), including amending the repayment terms, doing nothing and leaving the loans in place or subscribing additional share capital to create base cost.

29. An extraordinary general meeting of Broadgate was convened for 31 May at which it was resolved to reregister the company as a private limited company and adopt a new Memorandum and Articles of Association. The proposed Memorandum and Articles were sent to the appellant on 30 May in connection with this EGM. It is convenient to summarise the share rights of the A and B shares at this point, since in one respect they differed from the original version.

30. The A ordinary shares carried no right to participate in any dividend or distribution, and no rights on a liquidation until holders of the B shares had received £50,000 per share. Both the A and B shares carried voting rights. However, A shareholders could control the Board, not only because the number of A shares exceeded the maximum number of B shares but also because the Articles of Association required the approval of A shareholders as a class to appoint any director.

31. The version of the Articles adopted on 31 May also contained a provision under which a holder of B shares who had held the shares for at least three months could effectively force a liquidation of Broadgate or a sale of his shares. The Articles permitted such a shareholder to requisition an extraordinary general meeting to be convened within 28 days to vote on a resolution to wind Broadgate up, and conferred weighted voting rights to ensure that the resolution would be passed. However, this was subject to a proviso that the member requisitioning the meeting had first given the A shareholders a period of 60 days to accept an offer to purchase all his shares in Broadgate at fair value, as certified by the company's auditors and on the basis that the company was valued by reference to its net asset value excluding goodwill, taking account of the rights and restrictions in the Articles, and making no discount for any minority holding.

32. On 31 May PSI also sent an email to the appellant stating that Braye had confirmed that they would be interested both in acquiring the appellant's Broadgate shares and entering into a put option to sell the shares to the appellant at a later date, and notifying him that it would receive a commission of 7.61% if the put option was exercised. Also on 31 May PSL sent the appellant an email the attachments to which included a draft share sale and purchase agreement, a draft put option agreement, an instruction letter to Brent Thomas and Vanessa Roberts and a notice to Broadgate invoking the drag along provisions (described further at [35] below), and a short explanation of the documents. The email said that if the appellant did not want to proceed with the planning then only the sale and purchase agreement needed to be completed. The version of the put option agreement attached to this email included all the details omitted from the previous version (including the 9.1% figure) and was in a form ready for signing. The explanatory document explained that Counsel had opined that granting the option offshore would save stamp duty and the purpose of the instruction letter was to instruct Tenon (IOM) to grant the option on the appellant's behalf. It also set out how the price would be calculated under the option agreement and key terms of the SCIL loan facility.

33. On 1 June the appellant paid £100,000 into the account he had opened with SCIL. PSL sent the appellant a stock transfer form for the sale of his Broadgate shares, which the appellant signed and left undated. Broadgate was re-designated as a private limited company.

34. On 2 June SCIL agreed to provide the appellant with a loan facility of up to £1 million, and the appellant countersigned the loan facility letter. The letter provided for a loan to the appellant of up to £1m "to assist with financing your obligations under an option agreement between you and Braye Finance Limited relating to shares in

Broadgate Trading Limited". The loan was repayable after six months or earlier on demand by SCIL. Clause 2.3 stated as follows:

> "2.3 By accepting the Facility:
>
> (a) you hereby irrevocably authorise the Bank to rely on the written instructions of Braye Finance Ltd:
>
> (i) that the Facility be drawn down and the Loan paid to an account specified by Braye Finance Ltd; and
>
> (ii) that any monies held by the Bank on deposit in your name may be transferred to an account specified by Braye Finance Ltd;
>
> (b) you hereby acknowledge that you will not be entitled to
>
> (i) draw down the Facility; or
>
> (ii) make withdrawals from the account specified by Braye Finance Ltd in accordance with paragraph (a)(i) above; or
>
> (ii) otherwise deal with any monies which are held by the Bank on deposit in your name and which are transferred to an account specified by Braye Finance Ltd in accordance with paragraph (a)(ii) above."

The effect of this was that the appellant gave exclusive authority to Braye to draw down the loan on his behalf, and to transfer not only the amount of the loan but the £100,000 previously deposited by the appellant in his SCIL account to an account specified by Braye. The appellant had no right to access the funds himself.

35. The instruction letter sent on 31 May with the final version of the put option agreement was signed by the appellant and has a date of 5 June. It referred to the power of attorney granted to Brent Thomas and Vanessa Roberts and instructed them "to grant an option over shares in [Broadgate] to [Braye] and sign the letter of instruction to [SCIL] set out in Schedule 2 of the Option Agreement", adding that PSL would email them the Option Agreement for signature. The appellant also signed a notification to Broadgate that he intended to sell his B shares and, subject to those holding a majority of the voting rights attaching to the B shares requiring likewise, he wished to exercise his right to require all the B shareholders to sell their shares to Braye. This instruction related to the "drag along" provisions in Broadgate's Articles, which provided for the compulsory purchase of B shares where the holders of a majority of the voting rights attaching to the B shares intended to sell them to a bona fide purchaser on arm's length terms. A further Board meeting of Broadgate was held at which it was resolved to implement the drag along provisions. This mechanism enabled shares to be acquired from clients who had decided not to proceed with the planning.

36. The appellant's agreement to sell his B shares to Broadgate was executed by Braye and dated 9 June. The appellant had previously signed the agreement in person. The sale price for the 20 shares was £24.20 (or £1.22 per share), with completion to occur immediately with cash payment into the client account of the "Vendor's Solicitors" on behalf of the appellant. This was a firm in Nottingham and was also the firm that drafted both the sale agreement and the put option. I infer that the firm was appointed to act by PSL or another Tenon group company, since there is no indication

that the appellant was separately advised. A further board meeting of Broadgate was also held on 9 June which resolved to execute stock transfer forms in respect of those B shares that were being compulsorily transferred under the drag along provisions. All the B shares in Broadgate were registered in Braye's name. HMRC did not dispute that Braye became the owner of the appellant's B shares as a result of the sale to it.

37. Also on 9 June the appellant and Braye entered into the put option agreement. This document was executed by Brent Thomas or Vanessa Roberts under the power of attorney, and the letter in Schedule 2 to the agreement was also signed by Brent Thomas under the power of attorney. Under the terms of the put option agreement the appellant granted Braye an option to sell 20 B shares to him for a price equal to 109.1% of the "fair value" of each share, up to a maximum of £55,000 per share, and with an option exercise period of 30 days from the date of grant. The key operative provisions were in clauses 2 and 3. Under clause 2 the appellant agreed to grant the option, to make a deposit of £5,000 per share in his bank account at SCIL and to deliver a signed letter in the form set out in Schedule 2 to SCIL with a copy to each of Braye and Schroders London. (The deposit referred to must be the £100,000 deposit that the appellant had already made.) Clause 3 provided for fair value to be determined as follows:

> "3.1 An independent accountant selected by [Braye], at [Braye's] cost, shall be requested to certify the fair value ("Fair Value") of each of the Shares by valuing the Company with reference to its net asset value using generally accepted accounting principles applicable in the UK and taking account of all rights and restrictions under the Company's articles of association and without applying any discount to reflect a minority holding of the shares.
>
> 3.2 The independent accountant shall act as expert and not arbitrator and his decision shall be binding upon the parties in the absence of manifest error."

38. The letter in Schedule 2 to the option agreement required SCIL to act on the instructions of Braye in relation to the appellant's loan facility. This largely replicated clause 2.3(a) of the loan facility (set out at [34] above) and so was probably strictly unnecessary, although unlike clause 2.3 it also referred to a specified account of Braye at SCIL.

39. The put option agreement also provided that during the 30 day option exercise period Braye was not permitted to dispose of any interest in the shares, dealt with the mechanics of option exercise and provided that the benefits of the option agreement were not assignable. The exercise mechanics included that Braye would deliver a letter in the form set out in Schedule 3 to the agreement to SCIL, with a copy to Schroders London, and that the price would be paid pursuant to the terms of the letters in Schedules 2 and 3 and the loan facility between SCIL and the appellant. The letter in Schedule 3 referred to the provisions in clause 2.3 of the loan facility and required that the loan be drawn down and that both it and the amount on deposit should be paid to Braye's specified account at SCIL.

40. Also on 9 June:

(1) PSL wrote to Braye advising them that the simplest way of increasing the value of Broadgate was to subscribe for an additional B share in Broadgate, stating that there was “clearly an incentive for Braye to capitalise the company to such a level that the price it can sell the shares back to the shareholders is equal to the maximum cap” and advising that the optimum value for the shareholders’ CGT loss purposes would be an exercise price of £54,551 per share, to give the original shareholders a loss of £50,000 per share.

(2) Schroders London agreed to provide Braye a loan facility of up to £200 million “for the sole purpose of financing a capital injection into [Broadgate] by way of subscription for one “B” ordinary share in the capital of [Broadgate]”. The facility was conditional on Broadgate guaranteeing all amounts lent and securing them by a fixed charge over money of an equivalent amount to be deposited in an account with SCIL in Broadgate’s name, and by a pledge over Braye’s shares in Broadgate. The loan was repayable after 30 days, or earlier if demanded by the lender. The loan facility document was executed on 12 June and signed by Broadgate as guarantor on 13 June. There was an arrangement fee of 0.75% payable on repayment of the loan.

41. On 12 June Braye applied to subscribe for one B share in Broadgate at a subscription price of £155,269,464. The application was conditional upon (among other things) (a) Broadgate agreeing to guarantee Braye’s liabilities to Schroders London and to secure this with a charge over the funds in Broadgate’s account with SCIL, and (b) Broadgate agreeing to guarantee the liability to SCIL of each person who had granted an option to Braye in respect of Braye’s shares in Broadgate, on request by each such person within eight weeks and secured by a similar charge.

42. On 13 June Broadgate held a board meeting in which it was resolved to accept Braye’s application and to give financial assistance to Braye and to the other investors. The same board meeting approved the repurchase by Broadgate of 862 B shares at their par value from Braye, presumably reflecting the number of shares that had been subject to the drag along provisions. The share repurchase was completed on the same day. In order to authorise the financial assistance in respect of the guarantee arrangements the directors executed a formal solvency declaration, supported by an auditor’s report, confirming that in their opinion Broadgate could pay its debts and would be able to do so for the following 12 months, and further that Broadgate had net assets and that it was not necessary to provide for any contingent liability under the guarantee arrangements. Broadgate allotted one B share to Braye, executed a guarantee in respect of Braye’s liabilities to Schroders London and assigned its interest in its deposit account with SCIL to Schroders London by way of security for its obligations under the guarantee. Braye also executed an equitable mortgage of its shares in Broadgate in favour of Schroders London.

43. On 14 June Braye drew down £155,269,464 from the Schroders London loan facility and paid that amount to Broadgate. On 15 June, following another board

meeting, Broadgate entered into an agreement guaranteeing the liabilities of the appellant and other option grantors to SCIL, and assigned its interest in the money in its deposit account at SCIL in favour of SCIL by way of security. (It is clear from the Broadgate board minutes and also from the terms of Braye's subscription application that Braye held options on the same terms over all the shares it held in Broadgate.)

44. On 16 June Braye asked TCF to value the B shares in Broadgate on 20 June. On 20 June TCF produced a short update of their earlier valuation, under which they valued Broadgate at £155,389,949. This was produced on the basis that there had been no change in the level of trade in the business, and that the relevant transactions that had affected value were the subscription of 3,969 B shares at par, the repurchase of 862 B shares at par, Braye's subscription of a single B share and interest earned on the deposit. Also on 20 June the directors of Braye resolved to exercise the put options, and Braye served a notice on the appellant requiring him to purchase 20 B shares in Broadgate from Braye for a price of £54,546.47 per share, a total of £1,090,929.40. The sale completed on the same date, with Braye authorising the money transfer from the appellant's loan account at SCIL. Braye repaid £155,390,701.80 to Schroders London, made up of the £155,269,464 loan together with £121,237.80 of interest. The appellant was registered as the holder of 20 B shares in Broadgate. HMRC did not dispute that the appellant became the owner of the shares.

45. Broadgate incorporated Holdings on 30 June in the British Virgin Islands with a single $1 share. Holdings opened a deposit account with SCIL and on 7 July agreed to guarantee the liabilities of the appellant and other scheme participants to SCIL and assigned its interest in all sums in the deposit account to SCIL by way of security. On 10 July Broadgate applied for and was allotted and issued one further $1 share in Holdings at a premium of £155,793,339.59, conditional on Holdings giving a guarantee on the same terms as Broadgate had done. Broadgate's board minutes record that SCIL had agreed to release Broadgate's third party security agreement if Holdings granted equivalent security. On 11 July Broadgate paid the £155,793,339.59 to Holdings' account at SCIL. The difference between the amount paid to Holdings and the amount subscribed in Broadgate reflected the accrual of interest on Broadgate's deposit at SCIL. (Broadgate was formally released from its obligations under the guarantee to SCIL on 30 August, following the provision of replacement security by Holdings.)

46. On 12 July the directors of Holdings resolved to offer interest-free loans to the individuals whose borrowings it had guaranteed (who were also B shareholders in Broadgate) to enable them to repay their borrowings from SCIL, the minutes recording that Holdings would pay the loans directly to SCIL at the direction of the borrowers in order to obtain the release of the security. On 13 July Tenon IOM emailed the appellant to explain that Holdings wished to offer him an interest-free loan in the sum of £1,001,848.96. The loan was repayable on one month's notice. The appellant accepted the offer. On 18 July Holdings instructed SCIL to pay the amount of the loan to the appellant, and that amount was transferred to the appellant's loan account at SCIL, repaying his loan. SCIL released Holdings from its obligations under the guarantee except to the extent of £9,217,107.64 plus accrued interest. This amount

reflected the amounts owed by scheme participants who had not yet responded to the offer. It appears that this remaining amount was dealt with by further loans made on 21 July.

47. On 28 November a board meeting of Holdings was held at which it was resolved that the loans it had made to the appellant and other individuals should be written off. The minutes record that approval for the release had been sought and obtained from Holdings' sole shareholder and contain a confirmation by the sole (corporate) director that it had acted "bona fide in the best interests of Holdings". Broadgate signed a written resolution approving the write off of all loans made by Holdings, other than loans totalling £75,000 to Broadgate. In cross-examination Mr Schofield said that he thought that the main reason for seeking shareholder approval was that it was a significant transaction, but also said that he thought it was because it was a transaction that probably would not have been in the best interests of Holdings. This appears to conflict with the statement in the Holdings board minutes but makes more sense and I accept it as the most likely explanation.

48. The formal release was made by a deed dated 29 November. PSL wrote to the appellant on the same date advising him that the value of his Broadgate shares would now be "significantly reduced", referring to the potential application of the CGT value shifting rules to a future disposal, noting that the issue could be avoided if the shares were not disposed of, but suggesting that if the appellant preferred a more "permanent" solution an alternative was to give his shares to a UK registered charity. The letter said that the appellant would be free to choose whichever charity he preferred but PSL recommended "an excellent charity", Change4Change. The appellant transferred his 20 B shares to Change4Change on 3 December. Subsequent emails indicate that all the B shares in Broadgate had been transferred to Change4Change by 27 February 2007, and an email of 20 March 2007 to Martin Jeffs confirmed this and indicated a cash balance of around £80,000 in Broadgate.

49. Mr Hall's evidence was that the planning did not require a disposal of shares to charity, but there was a risk of subsequent legislation and also a tax charge might have arisen on a disposal, so PSL wanted to find some way for taxpayers to divest themselves of their shares in Broadgate. He believed that they considered several possibilities but the idea of a disposal to charity seemed attractive. That view had clearly been arrived at by the time Mr Hall emailed colleagues on 17 May 2006. I have concluded that the gift of the B shares to a charity was part of the overall plan devised by PSL prior to implementation of any of the steps, but that the particular charity in question was not decided at that time. It was also highly likely, but not certain, that the charity to which the shares would be transferred would be the one recommended by PSL.

Valuation

50. The expert reports cover a number of areas that are not relevant to the issues now in dispute between the parties. The only questions which are potentially relevant are (a) the value of the 20 B shares sold by the appellant on 9 June and (b) the value of

the 20 B shares sold back to the appellant on 20 June, and in particular the effect of the cash injection made by Braye into Broadgate on that value.

51. Dealing first with the position at 9 June, both experts agreed that there were errors in the methodology of TCF's 26 May valuation of Broadgate, but correcting those errors did not materially change the outcome. Mr Hayman did not think that the Flower Emporium would have been worth what had been paid for it if Broadgate had not been a special purchaser, and his corrections to TCF's calculations resulted in a valuation of £1. Mr Ryan considered the purchase by Broadgate to be the best starting point, and did not consider TCF's valuation of £902 to be materially incorrect. Overall the experts agreed that their final valuation conclusions were not materially different from each other. Taking account of an agreed liquidity discount of 10% Mr Ryan valued 20 B shares at £39.42 at 9 June, and Mr Hayman valued the shares at £1. In each case this was a view as to the market value of the shares, rather than a value on any other basis. (Separate figures were produced for values on the basis that a purchaser had "foreknowledge" that the subsequent events up to and including the loan waiver occurred, being £965.16 and £943.80 respectively.)

52. There was a much more significant disagreement over the value at 20 June. The key difference between the experts related to the expectations that a purchaser of the shares would have in relation to the cash injected by Braye. Mr Hayman did not think that a purchaser would expect either of the guarantees that Broadgate had given to be called. In reaching this view he relied on the fact that Broadgate's directors gave a solvency declaration in connection with the guarantees which was supported by an auditors' report, and that the natural course of events was for the loans to be repaid (as in fact occurred) rather than the guarantees called. He also took account of the provision in Broadgate's Articles that allowed a B shareholder to require a liquidation. This could be done to repay the loans to the scheme participants. In Mr Hayman's view the taxation treatment of any such liquidation for the shareholders was irrelevant to the question of value.

53. Mr Hayman pointed out that what he had been asked to comment on in his report was TCF's assessment of "fair value". This was not necessarily the same as market value and the concept was intended to allow the valuer some discretion. In Mr Hayman's view it could well have been "fair", in the sense of fair between the parties, for TCF to ignore the guarantees even if there was a remote possibility of a liability under them. Mr Hayman thought that it would have been reasonably self-evident that the guarantees would not be called, and this proved to be correct.

54. Whilst I agree that the report focused on fair value I do not think it is correct, as Mr Ewart suggested in submissions on s 30 TCGA, that Mr Hayman's comments are irrelevant to questions of market value. In my view it is clear from Mr Hayman's oral evidence that although he was commenting on fair value in his original report he had since considered questions in relation to market value, and did so in his oral evidence. It seems to me that his comments about the solvency declaration, the likelihood of the guarantees being called and the ability to liquidate the company are potentially relevant to the question of market value. (Market value is also considered in the joint report, although in Mr Hayman's case the impact of the guarantees is somewhat

sidestepped: when considering the scenario of an assumed hypothetical seller and hypothetical buyer, Mr Hayman considered that that meant that Braye must have previously sold its shares and repaid its loan, and that the loans to scheme participants would not come into being.)

55. In contrast Mr Ryan thought that a purchaser would expect at least one of the guarantees to be called, and would therefore not include the cash in his valuation. Mr Ryan pointed out that the solvency declaration did not mean that the directors were declaring that the guarantees would not be called, merely that Broadgate would be solvent in the event that one was called. To the extent that the directors implicitly attested to the net assets without deducting the value of either guarantee, then in Mr Ryan's view they would have been incorrect to do so. A simple level of due diligence by any rational potential purchaser would have revealed that Braye at least would be unable to pay its obligations without calling on Broadgate's guarantee.

56. Mr Ryan's view was that, since the controlling A shareholders and directors were Tenon employees and any SCIL loans would be to Tenon clients, Broadgate would not have sought to recover the money from the borrowers if the guarantee of those loans was called. A hypothetical purchaser would also have considered Braye's financial position and would have concluded (based on financial statements to 31 December 2005 showing net assets of £14,831) that it would not have the means to repay a meaningful amount of its debt. The net result in Mr Ryan's view was that TCF should have excluded from its 20 June valuation the amount of £155,385,940, comprising the amount subscribed by Braye plus accrued interest (making the assumption that the interest earned by Broadgate on the cash balance would be offset by interest accrued on the Braye loan). This led to TCF's valuation of the company being revised from £155,389,949 to £4,009, and to a value for the 20 B shares (after the 10% liquidity discount) of £45.36. In contrast Mr Hayman valued 20 B shares at £899,936.60. (The values with "foreknowledge" were £1,603.80 and £1,576.40 respectively.)

57. Leaving to one side the foreknowledge scenario, it is worth noting that the sole reason for the difference between Mr Ryan's figures for the value of the B shares on 9 and 20 June, of £39.42 and £45.36 respectively, was that the latter amount reflected the repurchase of 862 B shares at par, which clearly resulted in an increase in the value of the remaining B shares.

58. In approaching the question of valuation I have considered the concept of "market value" as defined for CGT purposes, namely the price at which the shares might reasonably be expected to fetch on a sale in the open market, and (because the shares were unlisted), on the assumption that any prospective purchaser had all the information that a prudent prospective purchaser might reasonably require (s 272(1) and s 273(3) TCGA). As is well established, the test requires an assumption of a hypothetical willing seller and a hypothetical willing purchaser.

59. I agree with Mr Ryan that a hypothetical purchaser of 20 B shares on 20 June would have been concerned about the guarantees. Such a purchaser would have no control over whether the guarantees were called, and in the absence of a clear

indication that the borrowers had independent means to repay the loans would in my view prudently assume that the cash amount injected by Braye would be exposed to being fully utilised in paying principal and interest on either or both of the loan to Braye and the loans to scheme participants. It is worth noting here that a hypothetical purchaser would be concerned about both Braye's and scheme participants' loans: as a purchaser of only 20 B shares there would be nothing to prevent the other B shares being sold by Braye under the put option arrangements. However, consistently with the approach taken by Mr Ryan I do not think that there was any realistic likelihood that the total principal amount outstanding under the loans would exceed the cash amount injected by Braye. The terms of the SCIL loan facility permitted that loan to be used solely to acquire shares under the put option and it is clear that the funds received by Braye would, at least in practice, be applied in repaying the loan from Schroders London (and if they were not so applied then Braye would in principle have cash available to reimburse Broadgate).

60. Overall I consider Mr Ryan's approach to be a reasonable one to adopt, subject to one question. This is whether, in assessing Braye's financial position and therefore the value of the right of subrogation that Broadgate would have in the event that the guarantee of Braye's loan was called, a hypothetical purchaser would attribute any value to Braye's shareholding in Broadgate or to the value of the put options it held (which would permit it to sell those shares at a premium to "fair value"). In my view it was appropriate for Mr Ryan to disregard these points. The premium would largely be paid away in fees to PSL and Schroders London, and any sale would lead to Braye's loan being replaced by the loans from SCIL to the individuals.

61. I should add that Mr Schofield accepted in cross-examination that, had either or both of the guarantees been called on, that would have "wiped out" Broadgate. However, I consider that Mr Ryan's approach is more accurate and to be preferred.

Broadgate: purpose and financial position

62. As previously explained, Mr Schofield understood that a company was required with a UK trade. Mr Schofield was clear that he agreed to incorporate Broadgate solely to enable a tax planning scheme to operate. He had no personal interest in acquiring a UK trading business, and the acquisition of the Flower Emporium was made in the knowledge that it would be helpful for that planning. Mr Schofield said in his witness statement that the "immediate purpose of the incorporation of Broadgate was the acquisition of the Flower Emporium", although in cross-examination he accepted that the "only purpose" of setting up Broadgate was the tax scheme. He also accepted that he knew about the details of the tax scheme by late May and that he and his fellow director would have been aware of the plan for Broadgate to guarantee the loans to Braye and scheme participants no later than the date on which the B shares were sold to Braye (9 June). However, Mr Schofield was also clear that any non-trading purposes for which Broadgate existed had no effect on the Flower Emporium business. In addition he considered that, in the context of Broadgate's activities as a whole, the tax planning activities were not significant. Broadgate's trading business was carried on every day and its employees (as opposed to the directors) were engaged exclusively in that business. Whilst on occasions the tax-related activities

required work this was not undertaken by Broadgate's employees. As far as Mr Schofield was aware the Flower Emporium business continued until termination of the 18 month lease of the premises.

63. The audited accounts of Broadgate for the year ended 30 April 2007 are consistent with the Flower Emporium business still being carried on as that date. They show that in the period from the date of acquisition on 28 April 2006 to the accounts date the business generated a turnover of £48,964 and a gross profit after cost of sales of £9,862, before administrative expenses. Administrative expenses were £117,058, £54,732 of which related to "professional fees" which Mr Schofield said related entirely to the Excalibur planning and were fees he had anticipated from the start that Broadgate would incur. Excluding these fees and other amounts that did not or may not have related entirely to the Flower Emporium (directors' salaries, audit and accountancy fees and bank charges) leaves operating expenses in the region of £40,000. This indicates that the business made an operating loss after expenses attributable to the business of around £30,000 on a turnover of a little under £50,000.

64. The accounts also show significant entries that relate to the Excalibur steps. The profit and loss account shows bank interest receivable of £523,919 and "amount written off investments" of £155,640,839, leading to a total loss for the period of £155,224,131. The write off relates to the investment in Holdings, which is shown as having a net book value after the write off of £152,501. The accounts indicate that Broadgate had received an interest-free loan from Holdings in the amount of £152,500. Broadgate's share capital is stated as £13,111, comprising the 10,003 A shares and 3,108 B shares. The share premium account is £155,269,463 (reflecting the share subscription by Braye) and there is a deficit on profit and loss account of £155,224,131. Total shareholders' funds are £58,443. Financial information relating to Holdings is stated not to be available, and the Broadgate accounts are single company rather than consolidated accounts.

65. As far as Mr Schofield could recall none of the funds involved in the scheme steps flowed into the Flower Emporium business. There is no indication that this occurred initially. However, I think it is more likely than not that the interest-free loan from Holdings to Broadgate was ultimately used to pay fees and other operating expenses in Broadgate, including (given the scale of the trading loss) operating expenses related to the Flower Emporium business.

The appellant's purpose and role in the transactions

66. The appellant gave no evidence, so my conclusions on this topic are based on the documentary evidence and on Mr Hall's evidence from the perspective of the scheme promoters.

67. It is not disputed that the appellant entered into the transactions in order to create a tax loss. It is clear to me that the sale by the appellant of his 20 B shares to Braye and their subsequent repurchase were solely tax motivated and had no commercial or investment purpose. The earlier subscription of those shares was undertaken by the appellant not for any commercial purpose but because he understood it to be a

necessary preliminary step in order to take part in planning aimed at achieving the desired tax saving, although he had no details of how the planning would be implemented at that point.

68. The interest-free loan to the appellant and its subsequent waiver were not necessary parts of the scheme in the sense that they were required to obtain the loss. Rather, they were implemented in order to unwind the economic effects of the scheme, by enabling the loan from SCIL to be repaid and then removing the resulting liability to Holdings, in a way which PSL hoped would not adversely affect the tax benefit obtained from the sale and repurchase. Even if the precise method of unwind had not been finally fixed it would have been clear at the time of the sale and repurchase that cash would need to be extracted in order to repay the SCIL loan, and the advice was in place that indicated that this could be done through a structure involving a BVI subsidiary. The subsequent gift to charity was made in accordance with PSL's advice that it would avoid future tax issues on a disposal, and doubtless because the appellant had no further use for the shares.

69. Mr Ghosh placed significant stress on what he considered to be the appellant's limited involvement in the transaction steps, and in particular on the scope of the power of attorney he gave and the instruction letter dated 5 June which instructed Brent Thomas and Vanessa Roberts to grant the option. He argued that there were no limits on the scope of authority given, for example as to the price that could be set.

70. I agree that the power of attorney was drafted in broad terms. The instruction letter was ambiguous because it both referred to authorising the grant of "an option" and referred to "Schedule 2 of the Option Agreement", which was clearly a reference to the draft option agreement that had been prepared, but given the scope of the power of attorney I am not persuaded that this ambiguity was sufficient to restrict the extent of the authority granted under it. However, I do not agree with the suggestion that the appellant was not briefed about the terms of the transactions, or that it was ever intended that the power of attorney be used to its widest extent. In particular, the email sent by PSL to the appellant on 31 May enclosed final draft documents governing the sale and repurchase, and an explanation of those documents. The purpose of the power of attorney and the instruction letter was to enable the put option to be granted offshore for stamp duty reasons, rather than being used to allow its terms to be set. As noted at [24] above the power of attorney was also granted to allow documents to be signed when the appellant was not around, but in fact he signed all the other relevant documents personally. This included the share subscription and the sale and purchase agreement under which the appellant sold his shares to Braye.

Issue 1: the repo rules

71. Issue 1 relates to HMRC's contention that the sale and repurchase from Braye fall to be disregarded under s 263A TCGA. The starting point is s 730A(1) ICTA, which describes a situation where securities are sold to another person (the "interim holder") and repurchased at a different price under an obligation imposed by, or an option acquired under, the arrangements for sale. Section 263A(1) provides that in a case

falling within s 730A(1) (or which would do so if the sale and repurchase price differed) both the sale and repurchase are disregarded for CGT purposes. However, s 263A(3) disapplies subsection (1) (so that the sale and repurchase are not disregarded) where either:

> "(a) the agreement or agreements under which provision is made for the sale and repurchase are not such as would be entered into by persons dealing with each other at arm's length; or
>
> (b) any of the benefits or risks arising from fluctuations, before the repurchase takes place, in the market value of the securities sold accrues to, or falls on, the interim holder."

HMRC claimed that in this case none of the benefits or risks from fluctuations in the market value of the shares accrued to or fell on Braye as the interim holder. (HMRC also claimed that the agreements were not at arm's length, but submissions on that point were made in respect of Issue 4 and I have addressed them there.)

72. Mr Ghosh for HMRC submitted that the sale and repurchase took place in the context of a tightly pre-planned scheme in which there were no benefits or risks arising from fluctuations in the market value, so it was hard to see how any such risks or benefits could accrue to or fall on Braye. Any fluctuations arising from the fortunes of the flower shop were de minimis, and Mr Schofield's evidence was that he was concentrating on acquiring a low risk business and was not concerned about value. All Braye was going to do was inject around £155m into Broadgate in a pre-planned arrangement, which would inevitably have to be recycled out to repay the scheme participants' indebtedness. There were no risks or benefits in relation to the cash. Braye had the option of injecting money, but that was not a benefit.

73. Mr Ewart, for Mr Kerrison, relied on the description of what the repo rules are intended to achieve by Lord Walker in the Supreme Court decision in *DCC Holdings (UK) Ltd v HMRC* [2010] UKSC 58, [2011] STC 326. They are intended to apply to what are known as repo transactions, which are in commercial substance secured loans. In a repo the repurchase price would not fluctuate with the underlying value of the securities, and this was why s 263A(3)(b) excluded transactions where the interim holder was economically exposed to changes in value. In this case Braye was so exposed because the repurchase price was linked to "fair value". The value of the flower shop could vary, but also the 9.1% uplift gave Braye an incentive to take steps to increase the value of the shares. Furthermore, section 263A did not require an examination of the likelihood of any fluctuation in value, but simply asked who took the benefit or risk of any fluctuations in value, were any to arise.

74. I have concluded that s 263A(3)(b) does apply in this case, so that the sale and repurchase are not disregarded under s 263A.

75. Although Lord Walker's description of the repo rules in *DCC Holdings* considers s 730A ICTA and related provisions rather than s 263A, the comments are nonetheless relevant. Section 730A also contained a provision broadly equivalent to s 263A(3), in s 730A(8) (albeit that that refers to "all of the benefits and risks…" rather than "any of the benefits or risks"). Lord Walker explained the anti-avoidance

background to the provisions, namely to ensure that amounts that were in economic substance interest were taxed as such. He explained at [6] that whilst in legal form a repo is a preordained sale and repurchase, in economic substance it is a short-term secured loan, and at [14] that s 730A ICTA covered a simple case of a repo which was not complicated by coupons on the underlying securities. Lord Walker went on in the same paragraph to describe the effect of the operative provision in s 730A(2) in that case, namely that the difference between the sale and repurchase price was treated as interest, and noted that this "corresponded to the economic reality, that the interim holder had made a secured loan, at interest, to the original owner".

76. Whilst it is the case that s 263A simply refers to a case falling within s 730A(1), rather than requiring the operative provisions of that section to be engaged, it must still be right that in construing s 263A regard should be had to the statutory framework of which it clearly forms part. The evident intention is that, where parties enter into what is in substance a secured lending, then it is appropriate to disregard the sale and repurchase for CGT purposes. Exposure of the interim holder to fluctuations in value indicates that the transaction is not a transaction of that kind, and it is not appropriate for the sale and repurchase to be disregarded under those provisions.

77. Against that background the question arises as to how to determine whether s 263A(3)(b) is satisfied. Is it, as Mr Ghosh effectively argued, purely a factual question: did any benefits or risks from fluctuations in market value in fact fall on the interim holder? Or is it a question of looking at the terms of the relevant contracts and determining the nature of the transaction from them? On that approach the test would clearly be satisfied in this case given that the repurchase price was determined by reference to fair value.

78. I prefer the approach of asking whether, if there were to be fluctuations in market value, the interim holder would to any extent be exposed to them under the terms of the sale and repurchase arrangements: on that basis s 263A(3)(b) was clearly engaged given the way in which the repurchase price was linked to fair value. This approach seems to me to be consistent with the way in which the provision is worded: it looks prospectively rather than with the benefit of hindsight at the "benefits or risks" arising from fluctuations in market value, rather than simply asking whether there are likely to be any fluctuations or whether the interim holder has in fact been exposed to any fluctuations that have occurred. It also enables the provision to be applied with greater certainty, rather than (potentially) necessitating a determination of market value and whether it has in fact changed or is likely to change. And it is also consistent with what I understand to be the purpose of the provisions, which is to identify the sort of arrangements that amount to what is in substance secured lending, rather than focusing on the nature of the underlying securities that are the subject of the sale and repurchase. Significantly, Mr Ghosh's approach could have the effect that s 263A applied in circumstances far removed from the repo transactions at which I consider it is aimed, because it could apply to any situation of a sale and repurchase arrangement where the nature of the company's assets or other circumstances not relating to the terms of the arrangements meant that fluctuations in value would not or did not occur.

79. However, even if the approach of looking solely at whether, factually, Braye was exposed to movements in market value was the correct one to adopt, I do not think that s 263A(3)(b) would apply on the facts. Although fair value may not be the same as market value there is clearly some correlation between the concepts, and exposure to changes in fair value must to my mind indicate that there is exposure to changes in market value. Although the value of the flower shop was clearly small in the context of the overall transaction, it was certainly possible in principle that there could be a fluctuation in the value of that business between the date of the sale and repurchase which could be reflected in the repurchase price, and it is by no means obvious to me that any fluctuations should be ignored on the grounds that they were de minimis. More significantly, any increase or reduction in value caused by any other events would accrue to Braye, and indeed would be magnified by an additional 9.1%, a fact which gave it an incentive to take steps to ensure that there was an increase and ensured that it was likely to make a profit in respect of any value it injected. I do not accept Mr Ghosh's argument that the ability to inject cash into Broadgate was not a "benefit". If injecting cash or other assets, or taking other steps, did result in a change in value which would accrue to the interim holder then in my view that would be a "benefit" within s 263A(3)(b), and this is made particularly clear when account is taken of the 9.1% premium. Moreover, even if the entire cash subscription by Braye is disregarded because it did not affect market value or because, as Mr Ghosh submitted, it was always going to be recycled out of Broadgate, there was still in fact a fluctuation in market value on Mr Ryan's approach. As it happens this was caused by the repurchase of 862 B shares at par, which caused the value of the remaining B shares to increase. This repurchase was taken into account in the TCF valuation and was not disputed to affect both fair value and market value.

80. I have disregarded in this analysis the point that Braye was not in fact under any legal obligation to sell the shares back to scheme participants: it simply held a put option. In one sense an interim holder in those circumstances can always secure the benefit of fluctuations in value by not exercising the option and retaining the shares. However, that point was not argued before me and I have not considered it further.

81. I should also note for completeness that the submissions on this issue were confined to the application of s 263A(3)(b) TCGA. No submissions were made about whether there was any relevant difference between that provision and the equivalent rule in s 730A(8) ICTA, which refers to "all" rather than "any" of the benefits or risks. The potential relevance of this is that s 730A(4) has the effect of reducing the repurchase price for CGT purposes by the amount of the price differential in circumstances where s 730A applies but s 263A does not. However, I would note that on the approach I have taken it is not apparent that the distinction in wording between the two provisions would make any difference on the facts of this case.

Issue 2: s 30 TCGA

82. HMRC's challenge under s 30 TCGA can be summarised as follows. Reading s 30(1) and (9) together, s 30 applies in respect of the disposal of an asset if a scheme or arrangement has been implemented under which the value of the asset has been materially increased and a tax-free benefit has been conferred on the taxpayer (or

certain other persons). On the facts there was a relevant increase in value of the shares and a benefit had been conferred on the appellant, being the making and waiver of the loan to him. The effect of s 576(2) ICTA is that the benefit need not be tax-free in this case. Where s 30 applies any allowable loss or chargeable gain accruing on the disposal is calculated as if the consideration for the disposal were increased by a just and reasonable amount having regard to the scheme or arrangements and benefit in question. HMRC claimed that the effect in this case was to reduce the loss to nil.

83. Mr Ewart argued that there was no material increase in value, and therefore that one of the two necessary conditions for s 30 to apply was not met. He submitted that the reference to "value" in s 30(1)(a) must be to market value because the test must be objectively determinable, and on the approach of HMRC's expert the condition was not satisfied. He also argued that this was not a case that fell within s 30(9) TCGA, which refers to the disposal of an asset preceding "its" acquisition. The paradigm situation at which that provision was aimed was a short sale, where the asset was not owned at the time of the disposal. Although it was interpreted more widely than that in the Upper Tribunal decision in *Land Securities v HMRC* [2013] UKUT 124 (TCC), [2013] STC 1043 that case was distinguishable because the decision was based on the fact that the shares in question had been owned for many years prior to the scheme and there had been only one acquisition made as part of the scheme, whereas in this case the shares were originally acquired as part of the scheme such that there were two relevant acquisitions that formed part of the scheme. *Land Securities* made it clear that s 30 must be applied by reference to the actual facts, and not by reference to the computational rules in s 106 TCGA (the corporation tax equivalent of s 106A). If no reference was made to s 106A then there was no basis to link the disposal with the later repurchase from Braye. Mr Ewart also suggested that the loan and waiver might not be part of the same scheme, given that it seems that the method of unwind was not finally settled at the time of the sale and repurchase.

84. Mr Ghosh submitted that "value" in s 30 did not mean market value, and that by analogy with the decision in *Stanton v Drayton* [1982] STC 585, 52 TC 286 it meant the value of the asset to the parties in the scheme. He also submitted that the effect of *Land Securities* was that regard must be had to the scheme. In this case the central step of the scheme was to increase the value of the shares by Braye's share subscription, a step which also facilitated the benefit in the form of the making of the loan and its subsequent waiver. The acquisition from Braye was the relevant acquisition for the purposes of s 30(9). Mr Ghosh also noted that this case would be indistinguishable from *Land Securities* if the "scheme" was not regarded as including the initial subscription by the appellant (bearing in mind that scheme participants reached final decisions as to whether to participate in the scheme only after they had subscribed shares).

Increase in value?

85. The term "value" in s 30(1) is not expressly defined. "Market value" is a defined term under s 272 TCGA and there are a number of places in the legislation that refer to that defined term. The use of the term "value" rather than "market value" suggests that the definition in s 272 does not or at least may not apply. However, that leads to

the question of what “value” means in this context if it does not mean “market value”. Mr Ghosh’s answer to this was that *Stanton v Drayton* was authority for the proposition that it meant the value placed on the asset by the parties to the scheme.

86. The issue in *Stanton v Drayton* was the determination of the “value” of the consideration given by the taxpayer company in that case under what is now s 38 TCGA (which governs acquisition and disposal costs for CGT purposes) where the consideration comprised shares issued by the company. The agreement in question had been reached by reference to a price of 160p per share, but by the time the agreement was completed and the new shares were first quoted the market price was 125p per share. The taxpayer contended that “value” should be determined by reference to the agreed value of the shares, whereas the Inland Revenue argued that the right starting point was 125p. Lord Fraser, with whom Lord Russell, Lord Keith and Lord Brandon agreed, gave two reasons ([1982] STC at page 590) why the taxpayer’s interpretation was to be preferred. The first was that as a matter of construction “value” was not used to mean market value, in contrast to other provisions where market value was specified (for example what is now s 17 TCGA) and that there was a clear alternative in that case, namely the price agreed between the parties. Lord Keith found support for this in the reference in what is now s 38 to “the incidental costs to him” (that is, the taxpayer) of the acquisition, which was some indication that the value of the consideration was to be calculated on the same basis. Secondly Lord Fraser relied on the cases of *Osborne v Steel Barrel Co Ltd* [1942] 1 All ER 634, 24 TC 293 and *Craddock v Zevo Finance Co Ltd* [1946] 1 All ER 523, 27 TC 267. Those cases are authority for the proposition that, given that a company is not permitted to issue shares at a discount, where shares are issued for consideration other than cash the consideration must be based on an honest estimate by the directors of the value of the assets acquired. Lord Keith held that those cases demonstrated that, in an honest and straightforward transaction, the Crown was not entitled to go behind the agreed price (page 589h). Lord Roskill, with whom Lord Russell also agreed, reached the same conclusion in rather different terms, on the basis that evidence of Stock Exchange dealings in that case was not sufficient to displace the clear evidence of the value of the consideration in money’s worth, as afforded by the terms of the agreement reached between the parties.

87. Clearly some of this reasoning is not applicable in this case. The *Osborne v Steel Barrel* and *Craddock v Zevo Finance* cases, as well as *Stanton v Drayton* itself, concerned issues of shares. In addition, when determining the acquisition cost of an asset under what is now s 38 it is obvious that there will be a transaction in which a price is likely to have been agreed, as it was on the facts of *Stanton v Drayton*. It is less clear that this would necessarily be the case where s 30 is in point, bearing in mind that the “scheme ...or arrangements” do not have to encompass an acquisition or disposal: all that is required is a material reduction or increase in value and the conferring of a tax-free benefit, and if these conditions are satisfied the consideration received on a disposal (possibly some years later) may be adjusted. However, it is the case that s 30(1), like s 38, refers to “value” rather than “market value”, and as Lord Keith pointed out this can be contrasted with other provisions where market value is specifically referred to.

88. On balance, I think it is right that "value" is not necessarily the same as the defined term "market value". In circumstances where the party or parties to the scheme or arrangement entered into it on the basis that what they regarded as the "value" of the asset was materially reduced or increased, I think it would be appropriate to apply s 30(1) by reference to the reduction or increase contemplated by the parties, even if that was not reflected in a similar change in market value as defined in s 272 TCGA. I think this is consistent with the approach taken in *Land Securities*, discussed further below, of focusing on the scheme or arrangements in question and what it is intended that the scheme or arrangements achieve.

89. However, I do not think that it is necessary to reach a final conclusion on this point on the facts. If Mr Ghosh is right and "value" is the value placed on the asset under the scheme, then it is very clear that there was a material increase in value. If market value were the correct test then even on Mr Ryan's approach there was an increase in the market value of the appellant's 20 B shares between 9 and 20 June, from £39.42 to £45.36. This is an increase of about 15%. No submissions were made on the meaning of "material", but I think a 15% increase should be regarded as material. I note that this approach does not mean that the adjustment of the loss under s 30(5) would also need to reflect that lower amount: that provision requires the adjustment to be determined "having regard to the scheme or arrangements and the tax-free benefit in question", with no reference to value.

Did s 30(9) apply?

90. Key to this question is the effect of the Upper Tribunal decision in *Land Securities*, which is of course binding on this Tribunal. That case concerned s 106 TCGA, which for present purposes was the corporation tax equivalent of s 106A at the relevant time, save that on the facts in *Land Securities* it operated by reference to a period of six months rather than 30 days.

91. The main relevant transactions in *Land Securities* were as follows. In 1969 the taxpayer company acquired nine shares in a company called LM Property Investments Limited ("LMPI"). It sold the shares in March 2003 to a counterparty for a fairly small sum, and the counterparty granted it a call option to reacquire them for slightly more than their market value. The counterparty made a large capital contribution to LMPI. The taxpayer exercised the call option in September 2003 and relied on s 106 TCGA to claim a loss. HMRC argued that *Ramsay* applied but also contended that s 30 had the effect of denying the loss. In the First-tier Tribunal the *Ramsay* argument was rejected but it was held (contrary to the approach taken by both parties) that the identification rule in s 106 was applicable in considering s 30(9), and on that basis the disposal preceded the acquisition and s 30 was engaged.

92. The Upper Tribunal held that it was wrong to rely on s 106 in applying s 30, because that would involve applying s 106 beyond its limited purpose. That purpose was explained by Park J in *Davies v Hicks* [2005] EWHC 847 (Ch), [2005] STC 850 as being purely computational. In the Upper Tribunal's view s 30 was not a computational provision (other than, arguably, subsections (5) and (6)): s 30(9) was

an "enabling or 'threshold' provision defining the circumstances in which a particular form of computational adjustment falls to be made" (see [25] in the decision).

93. Nevertheless the Upper Tribunal decided that s 30(9) applied on the facts of the case, without reliance upon s 106. It is worth setting out the relevant section of the judgement in full given its significance in this case:

> "[28] As set out above, the facts are relatively straightforward and not in dispute. Land Securities acquired the nine shares in question in about 1969. It disposed of those shares on 31 March 2003. And it acquired those shares… again on 9 September 2003. Land Securities therefore acquired the shares on two occasions, and disposed of them once. The fact that the second acquisition can be described as a 'reacquisition' does not make it any the less an acquisition. Accordingly, the disposal followed the first acquisition and preceded the second acquisition.
>
> [29] On that basis, the question has to be asked whether, for the purpose of s 30(9), properly interpreted, this was a case where the disposal of the shares precedes their acquisition. The FTT effectively read the subsection in isolation, as what it described as a 'self-standing sub-section' (at [97]). We do not regard that as the correct approach. In the first place, it is commonplace to observe that a statutory provision should be read as a whole, and this subsection must be read in its context. Indeed, even on its wording, s 30(9) refers back to s 30(1) and (2), giving them a more expansive meaning in certain circumstances. It expressly requires s 30(1) to be read in a broader manner (ie that 'reduction' shall be read as including an increase).
>
> [30] Section 30(9) is part of the provision of the statute that addresses value shifting. It applies, and only applies, in the context of 'a scheme … effected or arrangements … made' which have the effect of changing the value of an asset and conferring a tax-free benefit: s 30(1). In considering whether the relevant acquisition of the asset in this case for the purpose of applying s 30(9) is the first acquisition in 1969 or the second acquisition on 9 September 2003, in our view, it is appropriate to take into account the 'scheme' that engages s 30(1). That is particularly the case where, as here, the scheme has been planned before the disposal. If one asks whether, having regard to the scheme, the relevant acquisition in respect of the disposal of the shares on 31 March is the acquisition over 30 years before, in 1969, or the acquisition less than six months later on 9 September, there can be only one answer: the acquisition of the same shares within the 'prescribed period' following their disposal was at the heart of the scheme. We therefore consider that on the proper interpretation of s 30(9) to the indisputable facts, this is 'a case in which the disposal of an asset precedes its acquisition'. This does not involve any process of 'deeming' or preferring notional facts to actual facts.
>
> [31] There are obvious dangers in seeking to re-phrase the wording of a statute by combining distinct provisions, since that can often be done in different ways leading to different results. Nonetheless, we accept that this can be a useful exercise. But we can, with respect, see no

justification in the view of the FTT that the result sought by HMRC can only be sustained if the wording of s 30(1) was significantly amended, as suggested in the decision at [31] and [96]. On the contrary, given that s 30(9) expressly concerns the way in which a particular word in s 30(1)(a) is to be read, we think that the obvious and logical way to combine the two provisions, while remaining faithful to the drafting, is as follows:

'(1) This section has effect as respects the disposal of an asset if a scheme has been effected or arrangements have been made (whether before or after the disposal) whereby—

(a) the value of the asset or a relevant asset has been materially reduced or, in the case in which the disposal of the asset precedes its acquisition, increased, and

(b) a tax-free benefit has been or will be conferred—

(i) on the person making the disposal or a person with whom he is connected, or

(ii) subject to subsection (4) below, on any other person.'

Read in that way, this confirms the approach that we have adopted above. The wording of s 30(9) is not to be applied without regard to the 'scheme … effected' or 'arrangements … made' of which the disposal of the asset forms part.

[32] The FTT considered that s 30(9) is directed at, and applies only to, a 'bear' transaction, ie the disposal of an asset which is to be acquired *only* after the date of sale and is therefore not owned by the disponor at the time the disposal is made. Mr Gardiner supported that approach. There is no doubt that the wording would cover that situation but we see no basis for confining it to that situation. Nor is it the consequence of our view that whenever there are two acquisitions s 30(9) can only apply to the later acquisition, as the FTT suggests (at [97]). That will depend upon the context.

[33] Mr Gardiner placed great emphasis on the use of the present tense in the word 'precedes' in s 30(9). He submitted that this meant that the question of acquisition has to be looked at as at the point of disposal, and not with hindsight. However, the importance of applying a broad, purposive interpretation to fiscal legislation in place of a formalist approach has received repeated and authoritative emphasis: see, eg, *IRC v McGuckian* [1997] STC 908 at 916, 920, [1997] 1 WLR 991 at 1000, 1005 *per* Lord Steyn and Lord Cooke respectively. We have no doubt that this approach applies generally and not only with regard to tax avoidance schemes in respect of which it has been most frequently articulated. The reference in s 30(1) to a scheme or arrangements made 'before *or after* the disposal', in itself contemplates that the disposal may be viewed with hindsight in the context of post-disposal events. Moreover, here, when Land Securities disposed of the shares in the present case on 31 March 2003, it had as at that date the definite intention to acquire them again within six months. That future acquisition after value had been added to LMPI, and thus the benefit of a loss resulting from s 106, was a major purpose of making the

disposal and inherent to the scheme for shifting value into the company and acquiring a tax-free benefit through the resulting increase in price of the shares. The narrow, literal approach to the wording of s 30(9) can be sustained only when the subsection is read in isolation, as a 'self-standing' provision, and not when it is read purposively in the context of s 30 as a whole.

[34] Mr Gardiner also sought to rely as an aid to construction of s 30(9) upon s 30(6). That provision enables the avoidance of the burden of potential double taxation where the shift of value is into a second asset that may subsequently be sold. He pointed out that there is no equivalent protection in the case where the value increase results from retention of the same asset. On that basis, he submitted that s 30(9) should not be held to apply where, unlike the case of a bear sale, the asset is retained. However, we do not see that the fact that there is no protection from a potential, but by no means certain, hardship that may result from a tax scheme is persuasive so as to displace the interpretation of the provision that we have arrived at for all the reasons set out above."

94. Overall, I have concluded that the fact that the shares in *Land Securities* were acquired independently of the scheme in question is not a sufficient basis to distinguish the reasoning in that case, even if the initial subscription for the B shares was part of the same "scheme or arrangement" as the sale and repurchase. The process by which I have reached this conclusion is as follows:

(1) It is clear that the Upper Tribunal held that s 30(9) was not limited to "bear" (that is, short sale) transactions.

(2) The Upper Tribunal also held that it was not the case that whenever there were two acquisitions s 30(9) could only apply to the later one: whether that was the case would depend on the "context" (see [32]).

(3) The Upper Tribunal was also clear that s 30(9) should be read with s 30(1) in the way set out at [31] in the judgment. Importantly, this means that it applies in the context of, and taking into account, the scheme or arrangements referred to in s 30(1): see [30].

(4) The judgment goes on at [33] to disagree with Counsel for the taxpayer's emphasis on the use of the present tense in the word "precedes" in s 30(9), referring to the need to apply a broad, purposive approach to interpretation and the fact that s 30(1) contemplates the use of hindsight, but also going on to say that in that case the future acquisition after value had been added, and "the benefit of a loss resulting from s 106" was a major purpose of making the disposal and "inherent to the scheme for shifting value into the company and acquiring a tax-free benefit".

(5) Whilst therefore the Upper Tribunal was construing s 30 without reliance on s 106 I do not think that they were wholly disregarding it. In determining what the "scheme" was they clearly had regard to its aim, namely to obtain a loss as a result of the operation of s 106. This is evident not only from [33] but also from the comments at [30] which refer to the

acquisition of the same shares within the "prescribed period" following their disposal as being "at the heart of the scheme". (The prescribed period was the six month period within which shares had to be reacquired in order for s 106 to apply.)

(6) Accordingly, I do not agree with Mr Ewart that *Land Securities* can be distinguished simply on the basis that the shares in that case were not acquired as part of the scheme. Instead I think the question I need to answer is what is the "relevant acquisition", as referred to in [30]. In answering that question, I do not think that it is necessarily the case that the subscription of shares by the appellant is the only acquisition that it is appropriate to consider.

95. Mr Ghosh submitted that, where there was more than one acquisition as part of the scheme, with one acquisition (acquisition 1) preceding the disposal and one being made after it (acquisition 2), s 30(1) and (9) would apply without more if the conditions were satisfied in relation to acquisition 2: all HMRC had to do was identify a disposal and later acquisition that met the conditions, effectively irrespective of acquisition 1. The effect of section 106A should be ignored in that process, because to take account of it would disregard *Davies v Hicks* as applied in *Land Securities*. Mr Ewart argued that this was not correct and that Mr Ghosh was effectively construing "its acquisition" in s 30(9) as "an" or "any" acquisition.

96. In my view *Land Securities* does not go quite as far as Mr Ghosh suggested. For the reasons already given I do not think that the Upper Tribunal entirely disregarded s 106. What they did was have regard to the intended effect of the scheme, which was to produce a capital loss as a result of the application of s 106 by reference to an increase in value between the disposal and the second acquisition. Similarly in this case the undoubted aim of the scheme was to produce a capital loss by virtue of the operation of s 106A. In those circumstances I think the "relevant acquisition" was the acquisition made from Braye on 20 June. This does not mean that s 30(9) can apply to "any" later acquisition: the question is what was the relevant acquisition in the context of the scheme that engages s 30(1).

97. I have also concluded that the loan and its subsequent waiver were part of the "scheme or arrangements" so that there was the necessary "benefit" for s 30 to apply (read with s 576(2) ICTA). Although I have accepted that PSL continued to explore some alternatives to a loan waiver after the sale and repurchase (see [28] above) it was clearly always a part of the scheme that cash would be extracted to repay SCIL in a way that was not intended to impact on the tax loss, and also that scheme participants would need to be left in a position where they had no real exposure in respect of that cash extraction. Realistically this meant that they would receive a benefit. The necessary BVI advice was also obtained for the loan and waiver before the sale and repurchase. I do not think that the fact that there may have been an element of remaining uncertainty about the precise mechanics prevented there being a "scheme or arrangements" which satisfied s 30.

98. Accordingly, I have concluded that s 30(1), read with s 30(9), does apply in this case. Mr Ewart did not dispute Mr Ghosh's submission that the appropriate

adjustment to the disposal consideration under s 30(5) was to increase it by an amount which eliminated the loss entirely. This was the approach taken in *Land Securities* and I can see no reason to depart from it.

Issue 3: *Ramsay*

99. The conclusions I have reached on Issue 2 and Issue 5 (below) mean that it is not strictly necessary to address HMRC's arguments on *Ramsay*. However, given the findings of fact required for some of the points raised I will summarise the parties' submissions and make some comments on them, in case the appeal goes further.

Alternatives (1) and (2)

100. Mr Ghosh submitted that it was necessary to identify the "relevant transaction". In this case, on a realistic view of the facts, he submitted that there was no disposal or acquisition to which the relevant statutory provisions applied. The first possible approach (alternative (1)), under which all the transactions were ignored, was consistent with the fact that all the steps, including the final gift to charity, were in the original plan. The second possible approach (alternative (2)) did not require the final gift to charity or the initial subscription to be ignored, but the same conclusion applied. Although there might have been some uncertainty about the precise method of unwind it was clear that there would be an unwind in some way so that the appellant would be left "flat". Any residual uncertainty about that was analogous to the sorts of contrived risks that can be ignored on the basis of *IRC v Scottish Provident Institution* [2004] UKHL 52, [2005] STC 15. Mr Ghosh relied in particular on *Explainaway v HMRC* [2012] UKUT 362 (TCC), [2012] STC 2525 and *Schofield v HMRC* [2012] EWCA Civ 927, [2012] STC 2019, as well as on *Ramsay* itself (*WT Ramsay Ltd v Commissioners of Inland Revenue*; *Eilbeck (Inspector of Taxes) v Rawling* [1982] AC 300, 54 TC 101) and *Furniss (Inspector of Taxes) v Dawson* [1984] AC 474, 55 TC 324.

101. Mr Ewart relied on the existence of s 106A TCGA. He submitted that it was clearly designed to catch artificial transactions, and it would be ineffective in many of the "bed and breakfast" transactions at which it was aimed if they were ignored on *Ramsay* grounds. This was supported by the reasoning of the First-tier Tribunal in *Land Securities*, which concluded that the sale and repurchase in that case could not be ignored under *Ramsay* principles.

102. Mr Ewart also submitted that it was impossible to reanalyse the transaction as a direct issue of shares to Change4Change, which had not even in principle agreed that it would be willing to acquire the shares when the appellant subscribed for them. Ignoring the sale and repurchase between the appellant and Braye was also not possible. Legal and beneficial ownership changed hands on both the sale and the repurchase. HMRC's approach did not explain how the appellant could be in a position where, without a sale and repurchase, he owned shares in a company into which significant cash had been injected and also owed a significant amount to SCIL. To explain this in terms of the appellant borrowing and injecting cash into Broadgate would be to rewrite what had happened in an impermissible way. This went beyond

Ramsay, where transactions were not ignored in this way and the conclusion instead was that they did not give rise to an allowable loss, and *Furniss v Dawson* where the focus was on the parties to the transaction and it was effectively held that the shares were sold under a tripartite arrangement.

103. As is well established, *Ramsay* requires a purposive approach to statutory construction and an analysis of the facts to determine whether they answer to the statutory description. The scope of the *Ramsay* approach was recently reconsidered in detail by the Supreme Court in *UBS AG v HMRC*; *Deutsche Bank Group Services (UK) Ltd v HMRC* [2016] UKSC 13, [2016] STC 934, where Lord Reed referred to the well-known summary by Ribeiro PJ in *Collector of Stamp Revenue v Arrowtown Assets Ltd* [2003] HKCFA 46, (2003) 6 ITLR 454 that:

> "The ultimate question is whether the relevant statutory provisions, construed purposively, were intended to apply to the transaction, viewed realistically."

104. In this case the relevant statutory provisions are the basic charging provisions in s 1 and 2 TCGA, s 16 TCGA which deals with losses, s 38 TCGA (discussed in relation to alternative (3) below), and s 106A TCGA.

105. In *Land Securities* the First-tier Tribunal concluded that *Ramsay* principles did not apply. The Upper Tribunal did not need to reach a view on the point but noted at [35] the "considerable force" in the FTT's approach. The Upper Tribunal also noted at [16] that the scheme in that case did have some commercial aspects, including the provision of funding for the acquisition of properties.

106. My reading of the First-tier Tribunal decision is that the principal reason for concluding that *Ramsay* could not apply as a matter of statutory construction was that s 106 TCGA was intended to apply in cases where the taxpayer was doing something artificial (see [66]). It was also considered significant that it had been assumed in *Davies v Hicks* that *Ramsay* was not in point and that s 106A applied in that case. In addition, HMRC's case foundered when seeking to determine a realistic analysis of the facts since it required a complete re-writing of the transactions ([81]).

107. In *UBS* a key argument for the taxpayers was that the detailed legislative provisions being considered in that case (in particular Chapter 2 of Part 7 of the Income Tax (Earnings and Pensions) Act 2003), which made specific provision for certain types of tax avoidance, did not leave scope to determine that the schemes in question failed. In rejecting this argument Lord Reed commented as follows at [77]:

> "… the fact that Ch 2 was introduced partly for the purpose of forestalling tax avoidance schemes self-evidently makes it difficult to attribute to Parliament an intention that it should apply to schemes which were carefully crafted to fall within its scope, purely for the purpose of tax avoidance."

108. In this case the key question is whether the transactions gave rise to a "loss" under the relevant statutory provisions. Whilst it is clear that s 106A is intended to catch transactions that may be regarded as artificial – the paradigm being a so-called

"bed and breakfast" transaction aimed at crystallising a loss or a gain that has already accrued in an economic sense – it is less clear to me that its existence in the legislation can facilitate the creation of a wholly artificial loss. In addition, on my understanding of the *Ramsay* principle as explained most recently in *UBS* it is not necessarily the case that an application of the approach in this case would require any particular transaction to be entirely ignored on the basis that it is part of a "preordained" scheme. (This was illustrated in *UBS* itself where the Supreme Court concluded that the proper basis of taxation not only required the receipt of shares by the employees to be respected, but also that those shares should be valued taking account of the restrictions which the Supreme Court had disregarded for the purposes of Chapter 2.) This last point could address some of the difficulties in re-analysing the transactions to, for example, ignore the sale and repurchase but not the subsequent unwind steps.

109. Since I have concluded that any loss is in any event cancelled under s 30 TCGA it is not necessary to reach a conclusion on these points. However, in case the appeal goes further I should record my conclusion that the sale by the appellant of his 20 B shares to Braye, Braye's capital contribution and the subsequent repurchase by the appellant under the put option were all preordained transactions undertaken solely for tax purposes, and that there was no practical likelihood that, once the sale to Braye had occurred, those other steps would not then follow. I have also concluded that there was no practical likelihood that the repurchase would not be followed by an extraction of cash from Broadgate to allow the loan from SCIL to be repaid. This was most likely to be in the form of a loan from a newly established BVI subsidiary.

110. I am not persuaded that, at the time the appellant subscribed his B shares, all the remaining steps were preordained and that there was no practical likelihood that they would not be completed by him. On the contrary, at that stage he had not received details of the scheme and it is evident that a number of other prospective scheme participants chose not to proceed. As far as the loan waiver and gift to charity are concerned, at the time of the sale and repurchase both were likely to occur, but they had not been finally settled. I have recorded relevant findings in respect of those aspects at [68] above.

Alternative (3)

111. Mr Ghosh argued that, if he was wrong on alternatives (1) and (2), then the amount the appellant paid under the put option was not realistically consideration "given…wholly and exclusively" for the acquisition of the shares as required by s 38(1) TCGA. Instead, the appellant was paying for a capital loss, and at most (except as to the original £24 for which the shares were sold to Braye) for the means to access the cash in Broadgate to repay the appellant's borrowing. The case was analogous to *Price v HMRC* [2015] UKUT 164 (TCC), [2015] STC 1975 on this point.

112. Mr Ewart accepted that the 9.1% premium may not have been paid wholly and exclusively for the acquisition of the shares. However, he submitted that the remainder was. The test to apply was not one that turned on the appellant's motives. Instead, the question is what the money was paid for, and this was an objective matter

of fact. The fact that the market value of the shares to a hypothetical purchaser might be adversely affected by the guarantee arrangements did not affect the actual transaction, under which it was clear that Braye would be put in funds to repay its loan and the appellant had no reason to be concerned about that guarantee. The B shares reacquired would, if necessary, allow the appellant to liquidate the company and get access to the cash that way, which would at most cancel out any loss obtained from the scheme. The situation considered in *Price* was completely different.

113. Mr Ewart relied in particular on *Eilbeck (Inspector of Taxes) v Rawling* 54 TC 101, [1980] STC 192 and *Drummond v HMRC* [2009] EWCA Civ 608, 79 TC 793. In the High Court in *Eilbeck v Rawling* Slade J had decided that the taxpayer had not spent £543,600 solely on a reversionary interest but also as part of the price for procuring the steps in the scheme. Although it was not necessary for their decision this reasoning was not accepted by any of the judges in the Court of Appeal. The Crown had accepted that the transactions were not shams and in those circumstances could not assert that the money was not spent on the reversion (Buckley LJ 54 TC at page 162, Templeman LJ at page 166 and Donaldson LJ at page 167). It is worth noting that this was despite the fact that under the terms of the scheme the reversionary interest was materially reduced in value following its acquisition by the taxpayer.

114. In *Drummond* the taxpayer had agreed to buy life assurance policies for £1.96m which had a surrender value of £1.75m. In the High Court Norris J overturned the Special Commissioner's conclusion that none of the amount paid was incurred wholly and exclusively to acquire the policies and concluded that the Special Commissioner's alternative view that £1.75m was spent on the policies was correct, the remainder being for fees and benefits. He commented at [29] that while the taxpayer wanted to acquire the policies because he thought he would obtain a tax advantage on their surrender, he still gave consideration wholly and exclusively to acquire them. Mr Drummond's appeal on this issue was rejected in the Court of Appeal, where the approach taken by Norris J was endorsed at [31].

115. In *Price* the question was whether money spent ostensibly to subscribe for shares in a company was in fact incurred wholly and exclusively for those shares. Under the scheme in question it was clear that the shares were virtually worthless. They were redeemable at a tiny fraction of their issue price, and the subscription also immediately triggered a redemption of preference shares in the same company at a very significant premium, which drained the funds injected out of the company on the same day. The share subscription also automatically triggered a change to the terms of a loan to a trust benefiting the taxpayer (and which had been used to fund the share subscription by means of an onward loan to the taxpayer), deferring repayment for many years and reducing interest to a nominal amount. The First-tier Tribunal held that it was not realistic to conclude that the money was spent wholly and exclusively on the shares, rather than on the benefits arising under the trust and fees. The Upper Tribunal held at [63] that this approach was not flawed.

116. I agree with Mr Ewart that the circumstances considered in *Price* were very different to the situation here. In this case the shares were not obviously of minimal

value. The appellant was purchasing shares in a company with significant cash resources and in circumstances where the guarantee of Braye's borrowing would in fact be discharged. The share rights did include provision which would allow an individual B shareholder to require a liquidation in due course, should that be necessary, which would have underpinned their value as far as the appellant was concerned. There was also no equivalent to the trust arrangement in *Price* to which the expenditure could be attributed: leaving the 9.1% premium to one side, if the money was not spent on the shares it is difficult to see what it was spent on. I do not think it is realistic to say that what the appellant was spending money on was not shares but access to the cash. It is the shares that would give him access to the cash in a liquidation. The motivation for the repurchase, as well as the sale, was to claim a capital loss, but as *Eilbeck v Rawling* and *Drummond* make clear the test is not one of motive. Access to the cash was required subsequently, but this was to unwind the economic effects of the scheme rather than what was acquired on the repurchase.

117. I also note that, since the hearing in this case, the Court of Appeal decision in *Samarkand Film Partnership No. 3 and others v HMRC* [2017] EWCA Civ 77 has been released. One of the issues in that case was whether Samarkand incurred no more than 1% of the amount it purportedly spent as "acquisition expenditure in respect of the original master version of a film", in circumstances where it was later accepted that the rights acquired in a particular film were virtually worthless. The Court of Appeal agreed with Nugee J's conclusion in the Upper Tribunal that the entire amount of the expenditure was incurred on acquiring the rights to the film. The reasons given at [108] and [109] included, in particular, that the issue had to be addressed on the footing that Samarkand entered into the sale and purchase agreement in good faith with the intention of paying the price for the rights, with *Stanton v Drayton* providing strong support for the argument that HMRC was not entitled to go behind the contractual consideration in those circumstances, and also because "the focus should be on the fact and the object of the expenditure, rather than on whether the money was well spent".

118. In conclusion on this point, I think Mr Ewart was right to accept that the 9.1% premium could not realistically be said to have been paid for the shares, but in my view the remainder of the price paid on the repurchase did constitute consideration given wholly and exclusively for the shares.

Issue 4: s 574 ICTA

119. In view of my conclusion that no capital loss arose it is strictly unnecessary to decide whether any capital loss could be relieved against income tax under s 574 ICTA, but given the findings of fact necessary for any decision on that point I will deal with it in case the point falls to be addressed on any appeal.

120. HMRC challenged the application of s 574 on the basis that Broadgate was not a "qualifying trading company" and on the basis that the disposal to Braye was not "by way of a bargain made at arm's length for full consideration" within s 575 ICTA.

Qualifying trading company

121. The test to apply to determine whether Broadgate was a qualifying trading company is set out in s 293(2)(a) ICTA, which refers to:

> "a company which exists wholly for the purpose of carrying on one or more qualifying trades or which so exists apart from purposes capable of having no significant effect (other than in relation to incidental matters) on the extent of the company's activities…"

It was not disputed that the period over which this test had to be satisfied was the period up to the date of disposal to Braye on 9 June. This follows from s 576(4) and (4A) ICTA.

122. Mr Ewart submitted that the non-trading purposes of Broadgate did not have a significant effect on its activities. The activities involved in the financial transactions were minimal, whereas operating the flower shop business required significant daily activities by its employees. The flower shop business carried on much as before. Its finances were not affected by, and its employees were not aware of, the Excalibur scheme and in any event the most significant cash flows occurred after the appellant's shares were sold to Braye. The test also focused on "activities" not on the amounts of cash held by the company: *Price v HMRC* [2013] UKFTT 297 (TC) (this is the First-tier decision in the case of that name considered above under Issue 3). Broadgate carried on its trading activities every day and its employees were exclusively engaged in those activities.

123. Mr Ghosh submitted that this argument did not take proper account of the requirement to consider the purpose for which Broadgate existed, rather than what it did. Broadgate's main purpose was its role in the scheme. Broadgate's non-trading activities clearly also had a significant effect on the extent of its activities.

124. I agree with Mr Ghosh that a key question to consider is the purpose or purposes for which Broadgate existed. In order to be a qualifying trading company Broadgate must either have existed wholly for the purpose of carrying on the flower shop business, or existed for that purpose (see the reference to "so exists") together with other purposes capable of having no significant effect (other than incidentally) on the extent of its activities.

125. As explained at [62] above it was clear from Mr Schofield's evidence that Broadgate was incorporated in order to carry out the Excalibur scheme. Although the scheme involved as a necessary initial step the acquisition of a UK trade, I do not think that it would be right to conclude from this that Broadgate existed in any meaningful sense "for the purpose of carrying on one or more qualifying trades".

126. I also do not agree with Mr Ewart's submission about the extent of the flower shop activities as compared to Broadgate's other activities. First, I do not think that it is right to characterise the activities undertaken by Broadgate in relation to the Excalibur scheme as insignificant. The various steps in the scheme, the amounts involved, the income arising from the cash, the risks taken in relation to the guarantee arrangements and the amount of input required from the directors were all highly

significant. I do not think that it is realistic to test the level of "activities" purely by reference to the amount of time spent by employees in the flower shop business, as compared to (for example) the time spent by the directors on the Excalibur scheme. Instead I think it is relevant to look at the transactions undertaken by Broadgate, their nature and risks. Whilst the most significant activities took place after 9 June I do not think it is correct to disregard them given the focus of s 293(2)(a) on the purposes for which Broadgate existed. The later activities were clearly already planned (subject possibly to a final decision on the use of Holdings for the loan arrangements), the put option arrangement was put in place at that time and the directors were clearly aware of the proposed guarantee arrangements by that date.

127. Secondly, the test to apply is whether the non-trading purposes were "capable" of having any significant effect on the extent of the company's activities. The test is not simply one of measuring the relative extent of the trading activities and the non-trading activities, but whether the non-trading purposes were "capable" of having a significant effect. In my view they clearly were so capable. It is apparent from the financial results of Broadgate for the year ended 30 April 2007 that there was a material operating loss in the business, and I infer that it received less attention than it would have done if it was being run on a serious basis, rather than as a necessary adjunct to the scheme. The lease of the premises that was negotiated was an 18 month lease, and there was no indication that there was any focus on the long-term future of the business. It also seems quite possible that, if Schroders had not been repaid on a timely basis, there could have come a point when the total exposure, including accrued interest, on the debt guaranteed by Broadgate exceeded the cash held by Broadgate, on which it may not have been able to earn interest at the same rate. That would clearly have been capable of affecting Broadgate's trade.

128. I do not think that my conclusions necessarily conflict with the approach of the First-tier Tribunal in *Price v HMRC*. That case concerned a tax avoidance scheme in which participants subscribed for shares in a company called Stony Heating Limited ("SHL") and subsequently disposed of them at a loss. SHL had acquired a subsidiary called Bathroom Supplies Limited ("Bathrooms") which carried on a trade of selling plumbing supplies. It was claimed that SHL was a "qualifying company" within s 293 ICTA on the basis that it was the "parent company of a trading group" within sub-section (2)(aa). This required Bathrooms to be a qualifying subsidiary, which was not disputed, but also required that, taking the companies' activities together and treating them as a single business, the group's business did not consist as to a substantial part in activities carried on otherwise than in the course of the trade (s 293(3A) and 3B)). The First-tier Tribunal decided that point in favour of the taxpayers, finding that although substantial sums of money passed through SHL little time or effort was spent on SHL's activities in comparison to those of Bathrooms. SHL realised a profit from the transactions it undertook which was lent to Bathrooms for the purposes of its trade.

129. I note that the statutory provisions that were in dispute in *Price* were somewhat different, and did not focus on the "purpose" for which SHL existed. There was also no question about the function of Bathrooms: it was an existing trading company which was clearly operating on a commercial basis. In addition, although there were a

number of “rounds” of the scheme in question, it appears that the substantial amounts that SHL received under the scheme in the form of share subscriptions were applied on the day of receipt to redeem other shares, rather than being retained by SHL for any period and generating income. SHL also appears to have taken no material risk, in contrast to the guarantee arrangements in this case.

130. Accordingly, my conclusion on this point is that Broadgate did not satisfy the qualifying trading company requirement.

Bargain at arm’s length

131. In order for relief under s 574 to be available it is also necessary that the disposal to Braye was “by way of a bargain made at arm’s length for full consideration”, s 575(1)(a) ICTA. Mr Ewart submitted that the appellant and Braye were clearly acting in their own interests, in the appellant’s case to obtain the tax relief, and that the disposal was for full consideration. Mr Ghosh did not challenge Mr Ewart’s submission that the disposal was for full consideration, but submitted that the appellant had produced no evidence to demonstrate that the appellant’s disposal involved any element of bargain: the appellant simply signed what he was asked to sign. If there was a bargain, it was not at arm’s length. The disposal to Braye was inextricably linked to the put option granted on the same date. Looked at together the arrangements were entirely uncommercial: the price and other terms could be anything under the power of attorney, and even under the terms agreed Braye could choose the valuer and there was a 9.1% mark up that the appellant could not have agreed to in his own interests. There was also no discount in the put option price to reflect the lack of liquidity or the lack of control conferred by the shares which meant that the cash in Broadgate reflected in the put option price could not readily be accessed, leaving the appellant exposed to SCIL.

132. Guidance on the meaning of the phrase “bargain at arm’s length” was given by Lightman J in the High Court in *Mansworth v Jelley* [2002] EWHC 442 (Ch), [2002] STC 1013 at [13], where he said that it:

> “…stipulates a particular type of transaction. 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…”

133. This guidance was also considered by the First-tier Tribunal in *Price v HMRC,* where it was concluded that the sales of shares at the end of the scheme for modest sums were bargains at arm’s length because the parties were acting in their own separate interests.

134. I agree with Mr Ghosh that it is right to consider the sale and purchase agreement and the put option together, effectively as a single bargain. However, I agree with Mr Ewart that, as between the appellant and Braye, each had separate and distinct interests and the terms of the bargain must (at least inferentially) have been agreed with a mind solely to their respective interests. Braye was unconnected with the

appellant and the Tenon group. Whilst Braye may not have been particularly concerned about the precise price at which it bought the shares given the low amounts involved, it did require a formal valuation of Broadgate. More importantly, Braye knew that under the put option it would be able to sell the shares back at a premium to their then value (as determined by a valuer selected by it). Clearly its own interests were being served, and it was acting principally to secure the premium but possibly also (given its apparent connection with Schroders) to enable Schroders to make a profit from the loans made by Schroders London and SCIL under the scheme.

135. As far as the appellant was concerned, I do not think that he could be taken to have been acting in anything other than his own interests. His object was to obtain the desired tax advantage. He had been told that the cost to him would be 10% of the income sheltered. He clearly relied on the Tenon group to arrange the terms of the transactions on his behalf so as to secure that result. This would involve, among other things, ensuring that there was a suitable unwind of the arrangements after the repurchase. The 9.1% premium and other terms of the disposal and put option are entirely explicable against the background of the benefit that the appellant wished to achieve and the cost he expected to incur. To the extent relevant, it is also the case that the power of attorney was not used to its full extent and the proposed terms of the sale and put option were explained to the appellant, who received the documents and an explanation of them. However, the key point is that the appellant acted in his own interests. Mr Ghosh's criticisms amount to saying that he should not have relied on Tenon to the extent that he did because he did not have the level of control or reassurances he needed as to the terms or effects of the transactions. But the test is whether there was in fact a bargain at arm's length, not whether the bargain was a prudent or even sensible one.

Issue 5: the loan waiver

136. The final question is whether the waiver of the loan gave rise to income tax under s 687(1) ITTOIA, which charges to income tax "income from any source that is not charged to income tax under or as a result of any other provision of this Act or any other Act".

137. Mr Ewart's response to this was that the loan waiver had no source for tax purposes. It was entirely voluntary. *Ryall v Hoare* (1923) 8 TC 521, [1923] 2 KB 447 and *Scott v Ricketts* [1967] 1 WLR 828, [1967] 2 All ER 1009 made it clear that a gift could not constitute "profits or gains" under Schedule D Case VI, and the same principle applied here. The explanatory notes to ITTOIA made it clear that s 687 covered the same ground as Schedule D Case VI, despite referring to "income" rather than "profits or gains". In addition, the waiver of the loan was not *eiusdem generis* with other categories of income subject to income tax as was required in order for a charge under Case VI to arise, because there was no quality of recurrence. This also explained why specific legislation existed to tax loan waivers in some circumstances, for example where a close company makes a loan to a participator and releases it (s 416 ITTOIA).

138. Mr Ghosh confirmed that HMRC accepted that the principles applicable to s 687(1) are the same as those applicable under Schedule D Case VI, and that to fall within s 687 a receipt must be *eiusdem generis* with some other head of charge to income tax. However, Mr Ghosh submitted that the making and subsequent waiver of the loan to the appellant was *eiusdem generis* with a dividend from a non-resident company chargeable under s 402 ITTOIA, in that it was effectively a distribution by Broadgate which did not amount to a reduction of capital and was not therefore of a capital nature. Broadgate had given its express approval to the loan waiver. The appellant got the benefit of the loan and the waiver because he was a shareholder.

139. Mr Ghosh relied on the Special Commissioners decision in *Property Co v Inspector of Taxes* [2005] STC (SCD) 59. The question that arose there was whether the taxpayer company was subject to tax on rental income which it retained the right to receive under two agreements after selling the relevant property. The company claimed that it was not taxable under Schedule A because it had no interest in land, and that it was also not liable under Schedule D Case VI. The Special Commissioners found that there were two types of income in question. The first type was rent that arose after the company had ceased to have any interest in the land. Since the company no longer possessed the source, being the property interest, it could not be taxed on this element under Schedule A, and it was also not taxable under Schedule D Case VI because the income was still rent. The second type was income that had not in fact arisen by virtue of the company's ownership of land, because the effect of the relevant landlord and tenant legislation was that the company was prevented from being entitled to the rent, and its entitlement arose solely from the relevant business sale agreement. This second amount did not have the necessary connection with land to conclude that its source was land, but it was taxable under Schedule D Case VI because it was *eiusdem generis* to Schedule A income.

140. Mr Ghosh also submitted that dividends could be isolated or one off, so it was not necessary to show any capacity for recurrence. The argument that isolated payments were not covered by Schedule D Case VI/s 687 was right in the context of an isolated purchase and resale where the only alternative was that there was a trade, as illustrated by *Leeming v Jones* (1930) 15 TC 333, [1930] AC 415, but that was not relevant here. Mr Ghosh also referred to the Upper Tribunal decision in *Explainaway v HMRC* (referred to above under Issue 3) where one of the questions was whether the loss and gain generated by certain derivative transactions would have fallen within Schedule D Case VI. The Upper Tribunal distinguished *Cooper v Stubbs* (1925) 10 TC 29, where profits from speculating in futures were held to be taxable under Case VI, holding that in *Explainaway* the transactions were not speculative. Mr Ghosh argued that the quality of speculation was not relevant to a dividend.

141. The scope of Schedule D Case VI was considered by the Upper Tribunal relatively recently in *Spritebeam Ltd & others v HMRC* [2015] UKUT 75 (TCC), [2015] STC 1222. In that case a loan had been made between two group companies on terms that, rather than the borrower paying interest to the lender, preference shares would be issued to a third group company (the "Share Recipient"). One of the questions was whether the Share Recipient was taxable under Schedule D Case VI. The Upper Tribunal referred at [54] to four elements, namely: (i) the receipt must

have the character of income, (ii) it must be the recipient's income, (iii) it must have a source, and (iv) there must be a sufficient link or connection between the source and the recipient. (The judgment notes at [55] that in *Brown (Surveyor of Taxes) v National Provident Institution* 8 TC 57, [1921] 2 AC 222 the House of Lords left open the question whether it was necessary to identify a source, but the point was not disputed in *Spritebeam* and I did not understand to be in contention before me either.) Elements (i) and (iii) were not seriously in dispute. On points (ii) and (iv) the Upper Tribunal concluded having reviewed the authorities that the recipient did not need to hold an enforceable legal right to receive the payment in order for it to constitute his income, but that there did need to be an obligation on the payer to make the payment ([68] in the decision), and that the required connection could include a situation where the payment was made pursuant to a legal duty owed by the payer ([84]). There was such an obligation in that case.

142. In reaching this conclusion the Upper Tribunal considered a number of cases that addressed whether a particular payment was outside Case VI because it was "voluntary". These included *Drummond v Collins (Inspector of Taxes)* [1915] AC 1011, 6 TC 525, where the House of Lords held that payments under a discretionary trust were taxable because the limited right that beneficiaries had to require the trustees to consider the exercise of their discretion was sufficient to render the payments taxable, and *Cunard's Trustee v IRC* [1946] 1 All ER 159, 27 TC 122 where the Court of Appeal decided that payments under a power contained in a will were income on a similar basis. In contrast, in *Stedeford (Inspector of Taxes) v Beloe* [1932] AC 388, 16 TC 505 a pension granted to a headmaster on his retirement was held to be entirely voluntary because there was no obligation at all on the governors to make any payment.

143. I have concluded that the loan waiver did not give rise to taxable income under s 687(1) ITTOIA. My reasons for this are as follows:

> (1) The waiver was entirely voluntary. There was no obligation of any kind to make it. In contrast, a dividend or other distribution paid in respect of the share is not entirely voluntary. Although it is typically the case that a shareholder has no right to require a dividend to be paid, any dividend or distribution that is paid is paid in accordance with the rights attaching to his shares, and by virtue of those rights. In my view this is analogous to the situations considered in *Drummond v Collins* and *Cunard's Trustee.* However, the same does not apply to a gratuitous loan waiver which has no legal relationship to the rights attaching to the shares.
>
> (2) The loan waiver was a "one off" transaction which, as a matter of general principle, is in my view clearly capital in nature. The appellant had a significant liability under the interest-free loan which was entirely removed by the waiver. In order to fall within Case VI it was essential for the amount in question to be income: see for example Viscount Dunedin's emphasis on this in *Leeming v Jones* 15 TC at pages 359 and 360. The same clearly applies to s 687. I do not think that Viscount Dunedin's comments were restricted to cases where the alternative head of charge

was trading: see for example the clear statement at the end of page 359 that "the receipt must be of the nature of income", and the explanation of *Cooper v Stubbs* on page 360 in terms that its whole point was that the transaction was not isolated, referring to Lord Justice Atkin's comment in that case that an "annual profit or gain must be something which is of the nature of revenue or income". The same point was picked up by the Upper Tribunal in *Explainaway*: see [35(a)] which explained that one of the reasons for concluding that the gains and losses in that case did not have the character of income was that, unlike the transactions at issue in *Cooper v Stubbs*, the derivative transactions in *Explainaway* were a one off. This was in addition to those transactions lacking the quality of speculation to which Mr Ghosh referred.

(3) I am not persuaded that what was clearly a capital transaction can be viewed as giving rise to income by being linked to the appellant's shares in Broadgate, as Mr Ghosh sought to do. Effectively, what Mr Ghosh was saying was that the loan waiver was a disguised distribution by Broadgate, which was analogous to a dividend. Because the shares held by the appellant remained intact following the waiver (their "corpus" was unaffected) that was enough to mean that the receipt was income, because that was the test to apply in determining whether a dividend is income or capital in nature under s 402 ITTOIA, by reference to cases such as *Rae v Lazard* 41 TC 1. I do not agree that the loan waiver must give rise to income under s 687 simply because the shares still existed.

(4) Even if it is correct that a capital transaction of this kind can be transformed into income by linking it to shares, I do not think that there was in fact a "sufficient link" (as referred to by the Upper Tribunal in *Spritebeam*) to the shares in this case. Neither the Board minutes nor the shareholder approval given by Broadgate in connection with the waiver refer to the fact that the loans were to Broadgate shareholders, and despite Mr Ghosh's emphasis on the importance of Broadgate's approval of the waiver I do not think that that approval (which it is unsurprising that Holdings obtained) was sufficient to recharacterise the loan waiver as effectively a distribution by Broadgate in respect of its shares. In reality, the loan waivers were made because that was what was required in order to implement a key step in the scheme, namely to remove the liabilities that PSL's clients had under the loans in a way that did not compromise the tax losses that they were seeking. The appellant benefited from the loan waiver because he was a client of PSL who had signed up for a scheme which he thought would "cost" him 10% of the income he was seeking to shelter. PSL arranged for the loan waiver to occur because it was seeking to ensure that its clients' expectations were met. The fact that, after the loan waiver, the appellant retained an insignificant shareholding in Broadgate for a very short period (between 29 November and 3 December) was immaterial. The loan waiver could have occurred, and would have been at least as important, if the appellant had already given his shares away.

(5) In determining whether the gains or losses in *Explainaway* were income, the Upper Tribunal also considered that purpose was relevant: see [35(d)], which refers to the question posed by Warrington LJ in *Cooper v Stubbs* as to whether the dealings were "entered into with a view to producing, in the result, income or revenue for the person who entered into them". In my view, insofar as it is relevant here, the purpose of the loan waivers was to complete the scheme as planned, rather than to confer any benefit on scheme participants in their capacity as Broadgate shareholders.

Summary of conclusions

144. In summary, my conclusions on the issues in dispute are as follows:

Issue 1: the sale and repurchase did not fall to be disregarded for CGT purposes under the repo rules;

Issue 2: the value shifting rules applied to reduce the loss to nil;

Issue 3: the repurchase price, excluding the 9.1% premium, was given "wholly and exclusively" for the shares purchased (no conclusion was reached on alternative (1) or (2));

Issue 4: Broadgate was not a "qualifying trading company" for the purposes of s 574 ICTA, but the disposal of shares was by way of a bargain at arm's length; and

Issue 5: the loan waiver did not give rise to an income tax liability under s 687 ITTOIA.

Disposition

145. Accordingly, I dismiss the appellant's appeal against the refusal of his claims to a capital loss and to relief against income tax in respect of that loss, but allow his appeal against HMRC's conclusion that the loan waiver was subject to income tax.

146. 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.

SARAH FALK
TRIBUNAL JUDGE

RELEASE DATE: 19 APRIL2017

Appendix

Income and Corporation Taxes Act 1988

Section 293 Qualifying companies

(1) Subject to section 294, a company is a qualifying company (whether it is resident in the United Kingdom or elsewhere) if it complies with the requirements of this section.

(1A), (1B)…

(2) The company must, throughout the relevant period, be

(a) a company which exists wholly for the purpose of carrying on one or more qualifying trades or which so exists apart from purposes capable of having no significant effect (other than in relation to incidental matters) on the extent of the company's activities, or

(aa) the parent company of a trading group.

…

(3A) For the purposes of this section a company is the parent company of a trading group if-

(a) it has one or more subsidiaries;

(b) each of its subsidiaries is a qualifying subsidiary of the company; and

(c) the requirements of subsection (3B) below are fulfilled by what would be the business of the company and its subsidiaries if all the activities, taken together, of the company and its subsidiaries were regarded as one business.

(3B) A business fulfils the requirements of this subsection if neither the business nor a substantial part of it consists in, or in either of, the following, that is to say-

(a) …

(b) activities (other than research and development) carried on otherwise than in the course of a trade.

…

574 Relief for individuals

(1) Where an individual who has subscribed for shares in a qualifying trading company incurs an allowable loss (for capital gains tax purposes) on the disposal of the shares in any year of assessment, he may, by notice given within twelve months from the 31st January next following that year, make a claim for relief from income tax on-

(a) so much of his income for that year as is equal to the amount of the loss or, where it is less than that amount, the whole of that income; or

(b) so much of his income for the last preceding year as is equal to that amount or, where it is less than that amount, the whole of that income;

but relief shall not be given for the loss or the same part of the loss both under paragraph (a) and under paragraph (b) above.
Where such relief is given in respect of the loss or any part of it, no deduction shall be made in respect of the loss or (as the case may be) that part under the 1992 Act.

(2) Any relief claimed under paragraph (a) of subsection (1) above in respect of any income shall be given in priority to any relief claimed in respect of that income under paragraph (b) of that subsection; and any relief claimed under either paragraph in respect of any income shall be given in priority to any relief claimed in respect of that in-come under section 380 or 381.

(3) For the purposes of this section-

(a) an individual subscribes for shares if they are issued to him by the company in consideration of money or money's worth; and

(b) an individual shall be treated as having subscribed for shares if his spouse or civil partner did so and transferred them to him by a transaction inter vivos.

575 Exclusion of relief under section 573 or 574 in certain cases

(1) Sections 573 and 574 do not apply unless the disposal is-

(a) by way of a bargain made at arm's length for full consideration; or

…

576 Provisions supplementary to sections 573 to 575

….

(2) Where a claim is made under section 573 or 574 in respect of a loss accruing on the disposal of shares, section 30 of the 1992 Act (value-shifting) shall have effect in relation to the disposal as if for the references in sub-sections (1)(b) and (5) to a tax-free benefit there were substituted references to any benefit whether tax-free or not.

…

(4) For the purposes of sections 573 to 575 and this section a qualifying trading company is a company which—

(a) either—

(i) is an eligible trading company on the date of the disposal; or

(ii) has ceased to be an eligible trading company at a time which is not more than three years before that date and has not since that time been an excluded company, an investment company or a trading company that is not an eligible trading company; and

(b) either—

(i) has been an eligible trading company for a continuous period of six years ending on that date or at that time; or

(ii) has been an eligible trading company for a shorter continuous period ending on that date or at that time and has not before the beginning of that period been an excluded company, an investment company or a trading company that is not an eligible trading company; and

(c) has carried on its business wholly or mainly in the United Kingdom throughout the relevant period.

(4A) A company is an eligible trading company for the purposes of subsection (4) above at any time when, or in any period throughout which, it would comply with the requirements of section 293 if—

…

(d) any reference in section 293 (except subsection (1A)), 297 or 308 to the relevant period were a reference to the time that is relevant for the purposes of subsection (4)(a) above or, as the case may require, the continuous period that is relevant for the purposes of subsection (4)(b) above;

…

730A Treatment of price differential on sale and repurchase of securities

(1) Subject to subsection (8) below, this section applies where—

(a) a person (`the original owner') has transferred any securities to another person (`the interim holder') under an agreement to sell them;

(b) the original owner or a person connected with him—

(i) is required to buy them back in pursuance of an obligation imposed by, or in consequence of the exercise of an option acquired under, that agreement or any related agreement, or

(ii) acquires an option to buy them back under that agreement or any related agreement which he subsequently exercises; and

(c) the sale price and the repurchase price are different.

(2) The difference between the sale price and the repurchase price shall be treated for the purposes of the Tax Acts—

(a) where the repurchase price is more than the sale price, as a payment of interest made by the repurchaser on a deemed loan from the interim holder of an amount equal to the sale price; and

(b) where the sale price is more than the repurchase price, as a payment of interest made by the interim holder on a deemed loan from the repurchaser of an amount equal to the repurchase price.

(3) Where any amount is deemed under subsection (2) above to be a payment of interest, that payment shall be deemed for the purposes of the Tax Acts to be one that becomes due at the time when the repurchase price becomes due and, accordingly, is treated as paid when that price is paid.

(4) Where any amount is deemed under subsection (2) above to be a payment of interest, the repurchase price shall be treated for the purposes of the Tax Acts (other than the excepted provisions specified in subsection (4A) below) and (in cases where section 263A of the 1992 Act does not apply) for the purposes of the 1992 Act—

(a) in a case falling within paragraph (a) of that subsection, as reduced by the amount of the deemed payment; and
(b) in a case falling within paragraph (b) of that subsection, as increased by the amount of the deemed payment.

This subsection is subject to subsection (4B) below.

(4A) The excepted provisions are—
(a) this section,
…

…

(8) …this section does not apply if—
(a) the agreement or agreements under which provision is made for the sale and repurchase are not such as would be entered into by persons dealing with each other at arm's length; or
(b) all of the benefits and risks arising from fluctuations, before the repurchase takes place, in the market value of the securities sold accrue to, or fall on, the interim holder.
…

Taxation of Chargeable Gains Act 1992

1 The charge to tax

(1) Tax shall be charged in accordance with this Act in respect of capital gains, that is to say chargeable gains computed in accordance with this Act and accruing to a person on the disposal of assets.
…

2 Persons and gains chargeable to capital gains tax, and allowable losses.

(1) …

(2) Capital gains tax shall be charged on the total amount of chargeable gains accruing to the person chargeable in the year of assessment, after deducting—
(a) any allowable losses accruing to that person in that year of assessment, and
(b) so far as they have not been allowed as a deduction from chargeable gains accruing in any previous year of assessment, any allowable losses accruing to that person in any previous year of assessment (not earlier than the year 1965-66).
…

16 Computation of losses

(1) Subject to … and except as otherwise expressly provided, the amount of a loss accruing on a disposal of an asset shall be computed in the same way as the amount of a gain accruing on a disposal is computed.

(2) Except as otherwise expressly provided, all the provisions of this Act which distinguish gains which are chargeable gains from those which are not, or which make part of a gain a chargeable gain, and part not, shall apply also to distinguish losses which are allowable losses from those which are not, and to make part of a loss an allowable loss, and part not; and references in this Act to an allowable loss shall be construed accordingly.

…

30 Tax-free benefits

(1) This section has effect as respects the disposal of an asset if a scheme has been effected or arrangements have been made (whether before or after the disposal) whereby-

(a) the value of the asset … has been materially reduced, and

(b) a tax-free benefit has been or will be conferred-

(i) on the person making the disposal or a person with whom he is connected, or

(ii) subject to subsection (4) below, on any other person.

…

(3) For the purposes of subsection (1)(b) above a benefit is conferred on a person if he becomes entitled to any money or money's worth or the value of any asset in which he has an interest is increased or he is wholly or partly relieved from any liability to which he is subject; and a benefit is tax-free unless it is required, on the occasion on which it is conferred on the person in question, to be brought into account in computing his income, profits or gains for the purposes of income tax, capital gains tax or corporation tax.

(4) This section shall not apply by virtue of subsection (1)(b)(ii) above in a case where avoidance of tax was not the main purpose or one of the main purposes of the scheme or arrangements in question.

(5) Where this section has effect in relation to any disposal, any allowable loss or chargeable gain accruing on the disposal shall be calculated as if the consideration for the disposal were increased by such amount as is just and reasonable having regard to the scheme or arrangements and the tax-free benefit in question.

(6) Where-

(a) by virtue of subsection (5) above the consideration for the disposal of an asset has been treated as increased, and

(b) the benefit taken into account under subsection (1)(b) above was an increase in the value of another asset,

any allowable loss or chargeable gain accruing on the first disposal of the other asset after the increase in its value shall be calculated as if the consideration for that disposal were reduced by such amount as is just and reasonable having regard to the scheme or arrangements in question and the increase made in relation to the disposal mentioned in paragraph (a) above.

(7) References in this section to a disposal do not include references to any disposal falling within section 58(1), 62(4) or 171(1).

…

(9) In relation to a case in which the disposal of an asset precedes its acquisition the references in subsections (1)(a) and (2) above to a reduction shall be read as including a reference to an increase.

38 Acquisition and disposal costs etc

(1) Except as otherwise expressly provided, the sums allowable as a deduction from the consideration in the computation of the gain accruing to a person on the disposal of an asset shall be restricted to—
(a) the amount or value of the consideration, in money or money's worth, given by him or on his behalf wholly and exclusively for the acquisition of the asset…

…

106A Identification of securities: general rules for capital gains tax

(1) This section has effect for the purposes of capital gains tax (but not corporation tax) where any securities are disposed of by any person.

(2) The securities disposed of shall be identified in accordance with the following provisions of this section with securities of the same class that have been acquired by the person making the disposal.

(3) The provisions of this section have effect in the case of any disposal notwithstanding that some or all of the securities disposed of are otherwise identified-

(a) by the disposal, or

(b) by a transfer or delivery giving effect to it;

but where a person disposes of securities in one capacity, they shall not be identified under those provisions with any securities which he holds, or can dispose of, only in some other capacity.

(4) Securities disposed of on an earlier date shall be identified before securities disposed of on a later date; and, accordingly, securities disposed of by a later disposal shall not be identified with securities already identified as disposed of by an earlier disposal.

(5) Subject to subsection (4) above, if within the period of thirty days after the disposal the person making it acquires securities of the same class, the securities disposed of shall be identified-

(a) with securities acquired by him within that period, rather than with other securities; and

(b) with securities acquired at an earlier time within that period, rather than with securities acquired at a later time within that period.

…

(10) In this section-

…

"securities" means any securities within the meaning of section 104 or any relevant securities within the meaning of section 108.

(11) For the purposes of this section securities of a company shall not be treated as being of the same class unless they are so treated by the practice of a recognised stock exchange, or would be so treated if dealt with on that recognised stock exchange.

263A Agreements for sale and repurchase of securities.

(1) Subject to subsections (2) to (4) below, in any case falling within subsection (1) of section 730A of the Taxes Act (treatment of price differential on sale and repurchase of securities) and in any case which would fall within that subsection if the sale price and the repurchase price were different—

(a) the acquisition of the securities in question by the interim holder and the disposal of those securities by him to the repurchaser, and

(b) except where the repurchaser is or may be different from the original owner, the disposal of those securities by the original owner and any acquisition of those securities by the original owner as the repurchaser,

shall be disregarded for the purposes of capital gains tax.

…

(3) Subsection (1) above does not apply if—

(a) the agreement or agreements under which provision is made for the sale and repurchase are not such as would be entered into by persons dealing with each other at arm's length; or

(b) any of the benefits or risks arising from fluctuations, before the repurchase takes place, in the market value of the securities sold accrues to, or falls on, the interim holder.

…

(5) Expressions used in this section and in section 730A of the Taxes Act have the same meanings in this section as in that section.

272 Valuation: general

(1) In this Act "market value" in relation to any assets means the price which those assets might reasonably be expected to fetch on a sale in the open market.

…

273 Unquoted shares and securities

(1) The provisions of subsection (3) below shall have effect in any case where, in relation to an asset to which this section applies, there falls to be determined by virtue of section 272(1) the price which the asset might reasonably be expected to fetch on a sale in the open market.

(2) The assets to which this section applies are shares and securities which are not quoted on a recognised stock exchange at the time as at which their market value for the purposes of tax on chargeable gains falls to be determined.

(3) For the purposes of a determination falling within subsection (1) above, it shall be assumed that, in the open market which is postulated for the purposes of that determination, there is available to any prospective purchaser of the asset in question all the information which a prudent prospective purchaser of the asset might reasonably require if he were proposing to purchase it from a willing vendor by private treaty and at arm's length.

Income Tax (Trading and Other Income) Act 2005

402 Charge to tax on dividends from non-UK resident companies

(1) Income tax is charged on dividends of a non-UK resident company.

…

(4) In this Chapter "dividends" does not include dividends of a capital nature.

687 Charge to tax on income not otherwise charged

(1) Income tax is charged under this Chapter on income from any source that is not charged to income tax under or as a result of any other provision of this Act or any other Act.

(2) …

(3) Subsection (1) does not apply to income that would be charged to income tax under or as a result of another provision but for an exemption.

(4) The definition of "income" in section 878(1) does not apply for the purposes of this section.

(5) …