Neutral Citation Number: [2009] EWHC 284 (Ch)

Case No: CH/2008/APP/0196

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20/02/2009

Before :

THE HONOURABLE MR JUSTICE HENDERSON

Between :

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS

Appellants

- and –

TIMOTHY MARK COLLINS

Respondent

Ms Nicola Shaw (instructed by **the Solicitor for HMRC**) for the **Appellants**

Mr James Rivett (instructed by **Gregory Rowcliffe Milners**) for the **Respondent**

Hearing date: 13 January 2008

Judgment

Mr Justice Henderson:

Introduction and Background

1. This is an appeal by the Commissioners for Her Majesty's Revenue and Customs ("the Revenue") against a decision of a single Special Commissioner, Mr Richard Barlow, dated 22 January 2008 ("the Decision"). The sole issue dealt with by the Special Commissioner in the Decision was whether a sum of £95,179 formed part of the consideration for capital gains tax ("CGT") purposes obtained by the taxpayer, Mr Timothy Mark Collins, when he disposed of his shareholding in a company called Remington Collins Ltd ("the Company") pursuant to the terms of a share sale agreement dated 25 March 1999 ("the Share Sale Agreement"). The Special Commissioner determined this issue in favour of the taxpayer, holding that the sum did not form part of the consideration for the disposal.

2. In his tax return for 1998/9, which he signed on 14 January 2000, Mr Collins declared the sale of his shareholding in the Company, but did not include the sum of £95,179 as part of the disposal proceeds. The Revenue failed to open an enquiry into the return within the period of 12 months from the filing date of the return (which was 31 January 2000), as permitted by section 9A(1)(a) and (2)(a) of the Taxes Management Act 1970 ("TMA 1970"), nor have they subsequently sought to raise an assessment in respect of the £95,179 under the powers conferred by section 29 of TMA 1970. It is common ground that, in the absence of fraud or negligence (neither of which is alleged), it would now be too late for any such assessment to be made, even assuming that the relevant conditions in section 29 for the making of a "discovery" assessment were satisfied.

3. The Share Sale Agreement provided for some payments by the purchaser to be made immediately upon completion (including the sum of £95,179), but also provided for deferred consideration to be paid on the first, second and third anniversaries of completion, the amounts of which were (broadly speaking) to be calculated, so far as Mr Collins was concerned, by reference to the net tangible asset value of the Company at completion, and to a specified percentage of "relevant income" (as defined) derived from clients of the Company in the year following completion.

4. As a result of these provisions, it is necessary to have regard to section 48 of the Taxation of Chargeable Gains Act 1992 ("TCGA 1992"), which provides so far as material (and as in force at the material time) as follows:

> "**48 Consideration due after time of disposal**
>
> (1) In the computation of the gain consideration for the disposal shall be brought into account without any discount for postponement of the right to receive any part of it and, in the first instance, without regard to a risk of any part of the consideration being irrecoverable or to the right to receive any part of the consideration being contingent; and if any part of the consideration so brought into account subsequently proves to be irrecoverable, there shall be made, on a claim being made to that effect, such adjustment, whether by way of discharge or repayment of tax or otherwise, as is required in consequence."

5. As I shall explain, however, section 48 applies only to future consideration of an amount which is ascertained or ascertainable at the time of the disposal. Where future

consideration is wholly uncertain in amount, and not merely subject to contingencies, the amount that has to be brought into account on the making of the disposal is the value of the right to receive the future consideration, and the right itself is treated as a separate asset for CGT purposes which is the subject-matter of a separate disposal when the future consideration is paid, giving rise to a chargeable gain or an allowable loss as the case may be: see the analysis of the relevant principles by the House of Lords in *Marren v Ingles* [1980] 1 WLR 983, 54 TC 76.

6. It is common ground that the figures for the disposal proceeds of the shares entered by Mr Collins in his tax return included an estimate of the value of the deferred consideration, presumably based on the best information that was available to him at the time. In the box for "additional information" on the capital gains pages of the return, he said:

> "The Capital Gains computation is provisional as the final payments due under the Share Sale Agreement cannot be determined until after 28 February 2000."

7. In the event, it appears that agreement was not reached between Mr Collins and the Company about the amount of the deferred consideration until 2004. On 5 September 2004, he wrote to the Revenue explaining that after the sale of the Company he had settled his liability for CGT and had made two payments of tax totalling £15,946.30. He said that, at the time when those payments were made, certain liabilities were still to be ascertained which would have a considerable effect on the net asset value of the Company and thus on the price payable for his shares. However, agreement had now been reached on the extent of those liabilities. The original figure for the chargeable gain which he had returned, after deducting indexation relief, taper relief and retirement relief, and after taking account of losses brought forward and his annual exemption, had been £39,867, whereas the revised figure "now amounts to £1,691". On the basis of those figures, Mr Collins calculated that he had made an overpayment of tax of £15,269.90, and he claimed a refund of that amount, referring to section 33 of the Income and Corporation Taxes Act 1988. This was obviously a slip, and what Mr Collins meant to do was to claim repayment under section 33 of TMA 1970, which provides so far as material as follows:

> "**33 Error or mistake**
>
> (1) If a person who has paid income tax or capital gains tax under an assessment (whether a self-assessment or otherwise) alleges that the assessment was excessive by reason of some error or mistake in a return, he may by notice in writing at any time not later than five years after the 31 January next following the year of assessment to which the return relates, make a claim to the Board for relief.
>
> (2) On receiving the claim the Board shall enquire into the matter and shall, subject to the provisions of this section, give by way of repayment such relief … in respect of the error or mistake as is reasonable and just:
>
> …
>
> (3) In determining the claim the Board shall have regard to all the relevant circumstances of the case, and in particular shall consider

whether the granting of relief would result in the exclusion from charge to tax of any part of the profits of the claimant, and for this purpose the Board may take into consideration the liability of the claimant and assessments made on him in respect of chargeable periods other than that to which the claim relates.

…

(5) In this section "profits" –

(a) in relation to income tax, means income, and

(b) in relation to capital gains tax, means chargeable gains,

(c) … "

8. Mr Collins pointed out that no enquiry had been opened into his tax return for 1998/9, and said it followed that "no enquiry can be made in respect of this adjustment claim". That assertion was plainly incorrect, however, because the Board are under a duty to enquire into any claim made under section 33: see subsections (2) and (3) quoted above. Mr Collins also said that he was "only too happy to supply the mathematics", if that would assist in dealing with his claim "for a tax refund".

9. In November 2004 Mr Collins supplied a computation in support of his claim, and on 20 January 2005 the Revenue replied to Mr Collins' letter. The inspector of taxes who wrote the reply, Mr P A Shaw, had evidently decided that Mr Collins' claim was to be interpreted as a claim under section 48 of TCGA 1992, and he headed his letter accordingly. He did not, however, explain the reasoning which had led him to this conclusion. He said that he intended to enquire into the claim, and asked for various pieces of information, including a copy of the Share Sale Agreement, copies of subsequent documents evidencing the final valuation of the Company and ascertainment of the sale proceeds, and copies of "any document relating to the payment of the pension contribution of £95,179".

10. The information requested by the inspector was duly supplied, and eventually he wrote to Mr Collins on 26 September 2006 stating the results of his enquiry as follows:

"Dear Mr Collins

Paragraph 7(1), (2) & (3) of Schedule 1A Taxes Management Act 1970

I have now completed my enquiry into your claim for a reduction in your capital gains tax liability for 1998-1999 under Section 48 [*TCGA 1992*]. I have concluded that the pension contribution of £95179 is not an allowable deduction for capital gains purposes under Section 37 TCGA 1992. Thank you for your help during my enquiry. A copy of this notice is being sent to your agent.

Disallowance

I disallow your claim.

[*Information was then given about rights of appeal*]"

11. I should explain at this point that Schedule 1A to TMA 1970 sets out the procedure for dealing with claims made otherwise than in a tax return. Paragraph 5 empowers an officer of the Board to enquire into such claims, within specified periods, and paragraph 7 provides for what is to happen upon completion of the enquiry:

> "7(1) An enquiry under paragraph 5 is completed when an officer of the Board by notice (a "closure notice") informs the claimant that he has completed his enquiries and states his conclusions.
>
> (2) In the case of a claim for discharge or repayment of tax, the closure notice must either –
>
> (a) state that in the officer's opinion no amendment of the claim is required, or
>
> (b) if in the officer's opinion the claim is insufficient or excessive, amend the claim so as to make good or eliminate the deficiency or excess.
>
> …
>
> (3) In the case of a claim that is not a claim for discharge or repayment of tax, the closure notice must either –
>
> (a) allow the claim, or
>
> (b) disallow the claim, wholly or to such extent as appears to the officer appropriate."

12. Paragraph 8(1) of Schedule 1A provides that, within 30 days after the date of issue of a closure notice amending a claim under paragraph 7(2), effect shall be given to the amendment by making such adjustment as may be necessary, whether by way of assessment on the claimant, or by discharge or repayment of tax. By virtue of paragraph 8(3), an assessment so made shall not be out of time if it is made within the specified 30 day period.

13. Despite the apparently mandatory terms of paragraph 8, the inspector did not follow up his letter of 26 September 2006 with any further assessment to CGT on Mr Collins in respect of the sum of £95,179 which he had concluded was not an allowable deduction. Accordingly, the effect of his conclusion was merely to disallow Mr Collins' claim to a refund of the tax of £15,269.90 which he said he had overpaid.

14. By virtue of paragraph 9(1) of Schedule 1A, an appeal may be brought against:

> "(a) any conclusion stated or amendment made by a closure notice under paragraph 7(2) above, or
>
> (b) any decision contained in a closure notice under paragraph 7(3)."

On 24 October 2006, Mr Collins' accountants, Powrie Appleby LLP, appealed on his behalf against the closure notice embodied in the inspector's letter of 26 September. The first stated ground of appeal was that the contribution of £95,179 to Mr Collins'

pension fund was not consideration for CGT purposes. The second and third grounds contended that, even if it were consideration, it had to be left out of account for CGT purposes because it was taken into account for income tax purposes and was therefore excluded by section 37 of TCGA 1992, subsection (1) of which provides as follows:

> "37(1) There shall be excluded from the consideration for a disposal of assets taken into account in the computation of the gain any money or money's worth charged to income tax as income of, or taken into account as a receipt in computing income or profits or gains or losses of, the person making the disposal for the purposes of the Income Tax Acts."

15. This was the appeal which came in due course before the Special Commissioner, sitting in Birmingham, on 12 November 2007. As I have already said, he decided the appeal in Mr Collins' favour, holding that the £95,179 did not form part of the consideration for the sale of Mr Collins' shares in the Company. That was the only issue argued at the hearing, since the contentions based on section 37(1) of TCGA 1992 had been abandoned after service of the Revenue's skeleton argument. No point was taken on Mr Collins' behalf about the procedural route by which the issue had ended up before the Commissioner, nor was it argued that he lacked jurisdiction to entertain an appeal on the issue. Mr Collins was represented at the hearing by his accountant, Mr Dougal Powrie of Powrie Appelby LLP. The Revenue were represented by an officer from the local Appeals Unit, Mr Peter Death.

16. The Revenue appealed against the decision in the usual way, and in a skeleton argument dated 27 March 2008 counsel who had now been instructed, Ms Nicola Shaw, set out the Revenue's arguments for saying that the £95,179 was properly to be regarded as part of the consideration for the disposal of the shares. A hearing date was fixed for a trial window during December 2008, and on 4 December counsel who had now been instructed for Mr Collins, Mr James Rivett, put in a skeleton argument in response. This skeleton, too, dealt only with the question of the taxability of the £95,179.

17. On Tuesday, 9 December 2008, the day before the commencement of the window allocated for the hearing of the appeal, a Respondent's Notice was served which for the first time raised the argument that the Special Commissioner did not have jurisdiction to permit the Revenue to argue before him that the £95,179 formed part of the consideration for the disposal of the shares. The Respondent's Notice was supported by a further skeleton argument which raised a number of procedural and jurisdictional points. Counsel for the Revenue responded on the following day, objecting to the late service of the Respondent's Notice, and requesting an adjournment for at least four weeks to enable the Revenue properly to consider and address the new points raised by Mr Collins if the court were minded to grant him permission to rely on them at such a late stage. The skeleton argument also dealt with the new points on their merits. Counsel for the taxpayer then responded with a third skeleton argument on 11 December.

18. In the event, the appeal did not come on for hearing during the allocated trial window, and it was instead listed for hearing before me on 13 January 2009. By now the Revenue had had further time to consider the new points, and while maintaining her argument that the court should not permit them to be raised, counsel for the Revenue

no longer sought an adjournment if I allowed them to be argued. Since the new points are not purely procedural, but also raise questions of jurisdiction, I took the view that the court would have to consider them, and if it concluded that the jurisdictional arguments were well founded would have no option but to allow them to be raised. In those circumstances I considered that the best course was to proceed to hear argument both on the substantive appeal and on the procedural and jurisdictional questions, and not to rule as a preliminary issue on the question whether the taxpayer should be allowed to raise the new points. That is accordingly the course which I followed. I heard argument first on the substantive appeal, and then on the new points. I will deal with matters in the same order in this judgment.

The substantive appeal

19. The facts relevant to determination of the substantive appeal lie within a narrow compass. As the Special Commissioner records in paragraphs 2 and 3 of the Decision, Mr Collins was a director and shareholder of the Company. In April 1997 he announced his intention to retire from the Company, and began discussions with his advisers about pension contributions to be paid in respect of his past service. On 25 March 1999, Mr Collins and the other shareholders entered into the Share Sale Agreement, whereby all the shares in the Company were sold to an outside purchaser called Beckett Financial Services Group Ltd ("Beckett").

20. Although the Decision does not say so in terms, it is clear that the Company was originally formed to carry on a joint business venture between Mr Collins and Mr Michael Dennis Remington. At the date of the Share Sale Agreement they each owned 50 % of the shares, either in their own names or in the names of their wives, although it appears that at some stage 33% of the shares were allocated in some way to senior employees. Schedule 5 of the Share Sale Agreement shows that the Company was incorporated on 26 August 1983, and that there were two directors apart from Mr Collins and Mr Remington. The issued share capital consisted of 3,000 ordinary shares of £1 each and 3,000 "A" ordinary shares of £1 each. The Company carried on business as insurance brokers and also provided financial services to clients.

21. The Share Sale Agreement was made between Mr Collins, Mrs Remington and Mr Remington as vendors and Beckett as purchaser. It recited that the vendors were the registered holders of the entire issued share capital of the Company, and that they had agreed to sell the shares to Beckett on the terms set out in the agreement. Schedule 1 identified Mr Collins as being the owner of 1,500 ordinary £1 shares and 1,500 "A" ordinary £1 shares, i.e. half of the issued share capital. Clause 3 was headed "Consideration", and provided that the consideration for the shares should be calculated and delivered in accordance with the provisions of Schedule 2. By virtue of clause 4.1, completion was to take place on the date of the agreement, and clause 4.4 provided that:

> "At Completion the Purchaser shall:
>
> 4.4.1 pay to Mr Collins and/or the Company at his direction and to Mr Remington on account of the cash consideration for the Shares the sums specified in Schedule 2; …"

22. Schedule 2 was headed "Consideration", and paragraph 1 said:

> "The Consideration for the Shares shall be calculated and paid on the terms set out in this Schedule".

Paragraph 2 contained definitions, and paragraph 3 then provided as follows:

> "3. On Completion the Purchaser shall, on account of the Consideration:
>
> 3.1.1 pay the sum of £15,267 by cheque to Mr Collins:
>
> 3.1.2 pay the sum of £95,179 to the Company, at the direction of Mr Collins. The Purchaser shall then procure that, immediately following completion, the Company makes a pension contribution on behalf of Mr Collins, of £120,480 (to a scheme or policy designated by Mr Collins). In the event that the Company receives the benefit of deducting part or all or [sic] that expense for corporation tax purposes it shall, when it receives the benefit thereof, pay a cheque equivalent to the amount of the benefit to Mr Collins up to a maximum of £25,301.
>
> 3.2 Issue to Mr Remington 1092 A and 1092 B Consideration Shares.
>
> 3.3 Pay the sums of £80,426 and £176.74 by cheques to Mr Remington."

23. The Schedule then went on to provide for preparation by the Company of a completion balance sheet as at 28 February 1999, on the basis of various specified assumptions, and for the payment of deferred consideration to Mr Collins and Mr Remington on the first, second and third anniversaries of completion.

24. It can be seen from the above provisions that the sums payable by the purchaser on completion, on account of the consideration for Mr Collins' shares, consisted of two sums. The first sum was £15,267 to be paid by cheque to Mr Collins. The second sum was £95,179, to be paid at the direction of Mr Collins to the Company, which was then obliged to make a pension contribution on his behalf of £120,480 (i.e. £95,179 grossed up at the then small companies corporation tax rate of 21%). It was clearly hoped that the pension contribution would be an allowable deduction for corporation tax purposes in the hands of the Company, and one might have expected to find that the contribution was intended by the parties to be neutral from the Company's point of view, so that the Company would not have to account to Mr Collins for the saving of corporation tax attributable to the contribution. However, that is not what the agreement provided, and for whatever reason it was expressly agreed that a sum equal to the whole of the benefit of the tax deduction was to be paid to Mr Collins up to the specified maximum of £25,301.

25. Although not recorded in the Decision, it was an agreed fact before the Special Commissioner that on 30 or 31 March 1999 the Company duly made a pension contribution of £120,480 to the Scottish Widows Fund and Life Assurance Society on behalf of Mr Collins, in respect of his past service with the Company. It was also an agreed fact that the Revenue subsequently confirmed that the pension contribution was an allowable deduction for tax purposes for the Company. It is not clear when

the £25,301 was actually paid to Mr Collins, but it is common ground that he included that sum in his CGT computation as part of the consideration for the disposal shown in his 1998/99 tax return. It is therefore only the treatment of the sum of £95,179 which is in dispute.

26. If the Company had made the pension contribution before the date of the Share Sale Agreement, and if the price payable for Mr Collins' shares had been correspondingly reduced, there would have been no question of the sum forming part of the consideration for the sale of the shares. However, that is not what happened. The reason for not structuring the transaction in that way was, apparently, a concern that, if the assets of the Company were diminished by the amount of the pension contribution before the sale, there would be a detriment to Mr Remington, because the price for the shares was partly based on the asset value of the Company at completion: see paragraph 6 of the Decision. This explanation reinforces the point that the asset value of the Company was *not* diminished by the gross amount of £120,480 before completion, and that this asset value was reflected in the consideration payable for the shares. In any event, the Share Sale Agreement itself is explicit on the point: the £95,179 formed part of the consideration for the purchase of Mr Collins' shares, and was payable as such on completion.

27. It was common ground before the Special Commissioner, and was also common ground before me, that the relevant principles for determining what forms part of the consideration for the disposal of an asset for CGT purposes were correctly stated by Lightman J in *Spectros International Plc v Madden* [1997] STC 114, 70 TC 349, at 136a-e:

> "What is the relevant consideration may depend upon the terms and form of the transaction adopted by the parties. The parties to a proposed transaction frequently can achieve the same practical and economic result by different methods. Take for example the position of the owners of the entire issued capital of a company with gross assets of £2 million and net assets (after discharging a debt of £1 million owed to the owner or someone else) of £1 million. The shares are worth £1 million, but would be increased to £2 million if the owner at his own cost and for the benefit of the company released or discharged the debt. In this situation, the owner may agree to sell his shares for £1 million or, on condition that he first releases or discharges the debt, for £2 million. The law respects the freedom of the parties to a transaction to frame and formulate their agreement as they wish and to suit their own legitimate interests (taxation and otherwise) and, so long as the form adopted is genuine, and not a sham, honest, and not a fraud on someone else, and does not contravene some established principle of public policy, the court will give effect to the method adopted. But as a corollary to this freedom, where the parties have chosen one method, it is not open to them to invite the court to treat as adopted some other method because it is more advantageous to them, because it leads to the same practical and economic result and because it is the more obvious and sensible method to have adopted. If the question is raised what method has been adopted and the transaction is in writing, the answer must be found in the true construction of the document or documents read in the light of all the relevant circumstances. If the terms of the documents are clear, that is the end of the question. If however there

> is any doubt or ambiguity upon the language used read in its proper context, it may be possible to resolve that doubt or ambiguity by reference to the inherent probabilities of businessmen entering into the transaction in one form rather than another."

28. The authorities cited by Lightman J as authority for the principles which he thus summarised were *Aberdeen Construction Group Ltd v IRC* [1978] AC 885, *Booth (EV) (Holdings) Ltd v Buckwell* [1980] STC 578, *Stanton v Drayton Commercial Investment Co Ltd* [1983] AC 501, and *Fielder v Vedlynn Ltd* [1992] STC 553. It is unnecessary for me to review those cases, because in my judgment they provide firm support for Lightman J's conclusions. I will, however, cite one extract from Lightman J's discussion of the *Aberdeen* case, because it was relied upon by counsel for Mr Collins. At 136h-j he said this:

> "Certain principles can be deduced from the speeches of Lord Wilberforce and Lord Fraser (with whom Lord Keith concurred): (1) the guiding principle underlying any interpretation of the relevant legislation lies in its purposes to tax capital gains arrived at upon normal principles: the court should hesitate before accepting results which are paradoxical and contrary to business sense; (2) it is necessary to identify and concentrate upon the asset disposed of and the consideration for such disposal; and (3) any written contract must be read as a whole construed in the light of all relevant circumstances which include the value of the assets disposed of and business sense."

29. In the light of these guiding principles, there can in my judgment be no doubt about the answer to the question whether the £95,179 formed part of the consideration for the disposal of Mr Collins' shares. The answer has to be found in the true construction of the Share Sale Agreement, read in the light of the relevant surrounding circumstances. The terms of the agreement are clear and unambiguous. The £95,179 was part of the consideration payable on completion for Mr Collins' shares. That is what paragraph 3.1 of Schedule 2 expressly provided. The fact that the sum was not payable to Mr Collins himself, but to the Company at his direction, is irrelevant. The sum still formed part of the consideration agreed between the parties for the sale of his shares. It is equally irrelevant that the agreement went on to specify what the Company was to do with the payment. If I dispose of an asset on terms that the purchase price is to be paid, at my direction, to a third party, and then applied by the third party in a specified way for my benefit, none of that alters the fact that the agreed purchase price is the consideration for my disposal of the asset.

30. These propositions seem to me both simple and obvious, but the Special Commissioner nevertheless reached the opposite conclusion. He erred, in my judgment, by fastening on the irrelevant fact that Mr Collins did not himself receive the £95,179, and by looking at the pension contribution made by the Company rather than the sum paid by the purchaser. As he said in paragraph 10 of the Decision:

> "In this case Mr Collins did not receive £95,179 and the benefit of a contribution of £120,480 paid to his pension fund. What he received was a contribution to his pension fund of £120,480 paid by the Company which was funded by the payment to the Company of £95,179 by the Purchaser shortly after it became the owner of the

> shares and by the corporation tax benefit from making the payment …"

As I have already tried to explain, the fact that Mr Collins did not himself receive the £95,179 is irrelevant, because it was paid at his direction to the Company; and what was then done by the Company with that sum is equally irrelevant, because the focus is on the wrong payment. Instead of answering the question of what the consideration consisted of, it answers the question of what was done with the consideration by the Company pursuant to the terms of the Share Sale Agreement. With the greatest respect to the Commissioner, it seems to me that these fallacies run through his discussion of the issue in paragraphs 11 to 15 of the Decision, and are reflected in his conclusion in paragraph 15 that:

> "the plain wording and effect of the document was that Mr Collins did not receive the £95,179 and his role was only to trigger the payment between the Purchaser and the Company."

31. Perhaps recognising the difficulties in his path, counsel for Mr Collins sought to argue that the Special Commissioner's decision was premised on an implied finding of fact that the Company was under a pre-existing obligation to make a contribution of £120,480 to Mr Collins' pension fund. I am unable to accept this submission. In my judgment no such implied finding can be found anywhere in the Decision. The only relevant express finding is that Mr Collins began "discussions" about pension contributions to be made in respect of his past service when he announced his intention to retire in April 1997. There is no finding that those discussions matured into an agreement of any description before the making of the Share Sale Agreement itself. Nor is it possible to build anything on the fact that the Commissioner recognised that it would in theory have been possible for the Company to pay £120,480 to Mr Collins' pension fund before the sale of the shares. As the Commissioner correctly observed, the transaction might have been structured in that way, but it was not. Since it was in fact structured in the way set out in the Share Sale Agreement, and since the entire agreement between the parties is to be found in the Share Sale Agreement (see clause 14.1), it is not permissible to look for the consideration for the disposal of Mr Collins' shares outside the four corners of that agreement, construed in the light of the surrounding circumstances.

32. For these reasons, I have no hesitation in concluding that the Special Commissioner erred in law in his analysis of the transaction, and he should have concluded that the £95,179 formed part of the consideration for the disposal of Mr Collins' shares. Accordingly, subject to the jurisdictional and procedural questions which I will now consider, I would allow the Revenue's appeal.

<u>Questions of procedure and jurisdiction</u>

33. I have already referred to some of the relevant entries in Mr Collins' tax return for 1998/99, and I must now describe them in a little more detail. He divided his holding of 1,500 ordinary shares and 1,500 "A" ordinary shares into four parcels, presumably because they had different acquisition dates and base values, and apportioned the "disposal proceeds" which he entered on the return between the four parcels on a pro-rata basis. The total amount of the disposal proceeds was £392,820. The return itself gave no indication of how this figure was calculated, nor did it refer to any other

document which might elucidate it. However, it was common ground before me that this total comprised:

(a) the sum of £15,267 payable to Mr Collins on completion of the Share Sale Agreement;

(b) the further sum of £25,301 payable to him pursuant to paragraph 3.1.2 of Schedule 2; and

(c) as to the balance of £352,252, an estimate by Mr Collins (or more probably his accountant) of the value of the deferred consideration payable to him on the first, second and third anniversaries of completion.

34. It is important to note at this point that the amount of the future consideration was not ascertainable, even on a contingent basis, at the date of completion. The sums that would be payable depended (on the first anniversary date) on the net tangible asset value of the Company to be shown in a completion balance sheet which was yet to be prepared, and (on all three anniversary dates) on the amounts of "general insurance income" and "financial services income" to be earned by the Company in the 12 months following completion (specified multiples of which would yield the "relevant income", 33.5% of which was to be paid to Mr Collins by stages on the three anniversary dates, but with a fixed payment of 33.5% of one half of £1,136,466 (i.e. £190,358) to be made on the first anniversary if the relevant income had not by then been ascertained).

35. Section 48(1) of TCGA 1992 (which I have quoted in paragraph 4 above) requires deferred consideration to be brought into account without any discount for postponement of the right to receive any part of it, and without regard (in the first instance) to contingencies or the risk that any part of it may be irrecoverable. However, it has long been established that section 48 applies only to deferred consideration which is ascertained or ascertainable in amount as at the date of the disposal: see *Marson v Marriage* [1980] STC 177, 54 TC 59, at 190a-e per Fox J, referring to the statutory predecessor of section 48(1) in paragraph 14(5) of Schedule 6 to the Finance Act 1965. See too *Marren v Ingles*, loc. cit, where Lord Fraser of Tullybelton said at 990F that the provision:

> "… seems clearly to be referring to consideration of an ascertained amount. It is appropriate for dealing with a debt which cannot increase in value, but may decrease if it proves to be partly irrecoverable."

36. In these circumstances, I consider that section 48(1) cannot apply to the deferred consideration payable under the Share Sale Agreement, and Mr Collins was therefore correct to include the value of the right to receive the deferred consideration in his computation of the disposal proceeds in accordance with the principles laid down in *Marren v Ingles*. It is a corollary of this treatment that the chose in action consisting of the right to receive the deferred consideration was itself a separate asset for CGT purposes, which he acquired at the date of the Share Sale Agreement with a base value equal to its then market value.

37. I revert to Mr Collins' tax return. In the box headed "Chargeable Gains after reliefs but before losses and taper", he entered a figure of £57,412. There was again no accompanying explanation or computation, although Mr Collins did say (see paragraph 6 above) that the computation was provisional. He also claimed retirement relief in the aggregate amount of £307,414.

38. Much later on, after Mr Collins had made his claim for a tax refund on 5 September 2004, and the inspector had taken up his offer to "supply the mathematics", he submitted a computation on 7 November 2004 which showed, among other things, how the figure of £57,412 in the tax return had been arrived at. This computation is in many respects a puzzling document. It did not refer to the formulae in the Share Sale Agreement by reference to which the deferred consideration was to be calculated, nor did it say anything about the projected income of the Company in the year following completion. Instead, Mr Collins seems to have used as a proxy for the "relevant income" a goodwill valuation of £1,209,644, which was itself rather higher than the default figure of £1,136,466 specified in the Share Sale Agreement in the formula for the consideration payable on the first anniversary of completion. For present purposes, however, the most significant feature of the computation is that it expressly deducted from the "provisional proceeds" of the sale of Mr Collins' shares the whole of the sum of £95,179, describing it (inaccurately) as "paid direct to Pension scheme". The same deduction was made in the revised computation supporting Mr Collins' claim to a refund of most of the tax which he had paid.

39. Having been supplied with this computation, it comes as no surprise that the inspector then decided to open an enquiry into the claim, and made the requests for further information contained in his letter of 20 January 2005 (see paragraph 9 above). It must be remembered that at this stage the Revenue did not even have a copy of the Share Sale Agreement, and since they had failed to open an enquiry into Mr Collins' 1998/99 tax return they must have found the computation largely unintelligible.

40. The matter was then debated inconclusively in correspondence between the inspector and Mr Collins. The questions discussed were (a) whether the £95,179 formed part of the consideration for the sale of Mr Collins' shares, and (b), if so, whether the £95,179 was excluded from the consideration by section 37(1) of TCGA 1992. No agreement was reached, and on 26 September 2006 the inspector concluded his enquiry into the claim, which he still treated as a claim under section 48 of the 1992 Act: see his letter of that date, the relevant part of which I have quoted in paragraph 10 above.

41. The inspector's letter of 26 September 2006 was clearly intended by him to be a closure notice under paragraph 7 of Schedule 1A to TMA 1970, and equally clearly it was so understood by Mr Collins and his accountants, because on 24 October 2006 he appealed against it: see paragraph 14 above. Whether the claim was properly to be analysed as one under section 48 of the 1992 Act or as one under section 33 of TMA 1970, it was plainly a claim for the discharge or repayment of tax within the meaning of paragraph 7(2) of Schedule 1A. It follows that it could not also be a claim under paragraph 7(3), because subparagraphs 7(2) and (3) are mutually exclusive: the former applies to a claim for discharge or repayment of tax, while the latter applies to a claim that is *not* a claim for discharge or repayment of tax. The inspector appears to have overlooked this point when he headed his letter with a reference to both subparagraphs. He also stated his conclusion disallowing the claim in a way that

would have been better suited to a claim under subparagraph (3), and (as I have already pointed out) he failed to comply with the requirements in paragraph 8, which apply where a closure notice amends a claim under paragraph 7(2): see paragraphs 12 and 13 above.

42. In my judgment these defects do not lead to the conclusion that the closure notice was a nullity. The notice sufficiently conveyed the substance of the matter, which was that in the inspector's opinion the claim was excessive and had to be amended to zero (or, which comes to the same thing, had to be disallowed in full). The effect of the inspector's failure to make an assessment in respect of the £95,179 under paragraph 8 was not to nullify the closure notice, but simply to lose (for the second time) the opportunity of assessing that sum to CGT.

43. The only conclusion expressly stated by the inspector in the closure notice was that the £95,179 was not an allowable deduction for CGT purposes under section 37 of the 1992 Act. He did not say, in terms, that the £95,179 also formed part of the consideration for the disposal of Mr Collins' shares. However, if the closure notice is read (as in my view it must be) in the context of the correspondence which preceded it, I think it is clear that the inspector was also implicitly stating a conclusion that the £95,179 did form part of the consideration for the disposal. After all, it was only on that footing that the question of exclusion under section 37 would arise. Furthermore, the notice must have been understood by Mr Collins and his advisers as implicitly so concluding, because the first ground of appeal was that the sum did not form part of the consideration.

44. Unfortunately, the reasons which the inspector gave for rejecting Mr Collins' claim were in my judgment the wrong ones. The question whether the £95,179 formed part of the consideration for the disposal of his shares was irrelevant to Mr Collins' claim for a refund or repayment of the CGT which he had paid, whether that claim was made under section 48 of TCGA 1992 or under section 33 of TMA 1970. If the claim was made under section 48, it was in my view misconceived, but the reason why it was misconceived is that the future consideration payable under the Share Sale Agreement was unascertained and so fell outside the scope of the section: see paragraphs 34 to 36 above. Similarly, if the claim was made under section 33, it was again misconceived, because nothing in the computation supplied by Mr Collins in support of the claim established that there had been any error or mistake in the value assigned to the deferred consideration in his 1998/99 tax return. Mr Collins' point was, rather, that the sum eventually received by him was less than the value which had been taken into account in the original computation. Assuming that to be correct, he might in principle have been able to claim an allowable loss on the disposal of his right to the deferred consideration, which as I have explained was a separate asset for CGT purposes. But that is an entirely different thing from saying that there was any error or mistake in the original computation which could have entitled him to a repayment of the tax which he had already paid.

45. Whichever way the claim was analysed, the question whether or not the £95,179 formed part of the original consideration was in my judgment completely irrelevant. On no view of the matter did it form part of the deferred consideration, nor was it related in any way to the valuation of the deferred consideration. The Revenue should have opened an enquiry into Mr Collins' 1998/99 tax return within the permitted period, and had they done so the sum would have been brought into the CGT

computation as part of the immediate consideration for the disposal of his shares. They failed to do so, and Mr Collins had a lucky escape. What the Revenue cannot do, in my opinion, is try to bring the £95,179 into account in some way as a reason for refusing the claim which Mr Collins made in September 2005.

46. Counsel for the Revenue tried to persuade me that, once a claim has been made under section 48, the Revenue are then at liberty to reopen the whole of the initial CGT computation. I am unable to accept that submission. I agree with counsel for Mr Collins that the only relevant issues when a claim is made under section 48 are:

> (a) whether any consideration to which the section applies was originally brought into account in the stipulated manner, and (if so)
>
> (b) whether any part of the consideration so brought into account has subsequently proved to be irrecoverable.

The claim cannot be used by the Revenue as a second opportunity to bring into charge part of the original consideration which could never have fallen within section 48 in the first place.

47. It does not, however, follow from the fact that the inspector gave the wrong reasons for disallowing Mr Collins' claim that he lacked jurisdiction to investigate the claim, or that the closure notice was a nullity, or that the Special Commissioner lacked jurisdiction to entertain Mr Collins' appeal from the conclusions stated in the closure notice. In my judgment no jurisdictional issues arise in the present case, although the parties got into a dreadful procedural muddle through failing to apply the principles of *Marren v Ingles* and failing to analyse the true nature of Mr Collins' claim. If the matter had been properly analysed, it should have been obvious that Mr Collins' claim had to fail, whether it was made under section 48 or under section 33. The reasons given by the inspector for disallowing the claim were correct, in the limited sense that the £95,179 did indeed form part of the original consideration and was not excluded by section 37 of the 1992 Act, but they were the wrong reasons for disallowing the claim, because they were irrelevant to it.

48. The appeal to the Special Commissioner was, by virtue of paragraph 9(1)(a) of Schedule 1A to TMA 1970, an appeal against "any conclusion stated" by the closure notice. The grounds of appeal confined its scope to the correctness of the conclusions stated (expressly or implicitly) by the inspector in the notice, and by the date of the hearing the only live issue was whether the £95,179 formed part of the consideration for the disposal. The scope of the appeal could have been, but was not, widened to include a contention that the inspector's conclusions were in any event erroneous, because they were irrelevant to the claim actually made. However, even if the scope of the appeal had been thus widened, it would not have availed Mr Collins, because consideration of the question could only have led to the conclusion that the claim was fundamentally misconceived and therefore had to be disallowed in full.

49. The Special Commissioner was in my view quite right to deal only with the single issue argued before him. On the appeal to this court, it is in my judgment sterile to debate whether Mr Collins should be permitted to raise the new points, because (as I have tried to explain) they do not go to jurisdiction, and the only effect of allowing them to be raised would be to provide another, and more fundamental, ground for

disallowing his claim in its entirety. I therefore propose to leave open the question whether Mr Collins should be permitted to raise the new points.

Conclusion

50. For the reasons which I have given, the Revenue's appeal will be allowed.