[2022] UKFTT 00113 (TC)
TC 08444

CGT – disagreement over proceeds amount – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2018/06041 and TC/2018/06042

BETWEEN

MICHELLE MCENROE AND MIRANDA NEWMAN **Appellant**

-and-

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

TRIBUNAL: JUDGE SARAH ALLATT

The Tribunal determined the appeal on 31 January 2022 without a hearing under the provisions of Rule 26 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (default paper cases) having first read the main bundle (489 pages) and the supplementary bundle (130 pages) and the interlocutory decision of Judge Popplewell on 7 April 2021 limiting the additional grounds of appeal by the Appellants. This appeal was first listed on 27 September 2021, and under direction of the Tribunal, adjourned for further information which was received on 12 October 2021 from the Appellant.

DECISION

Introduction

1. Capital gains tax – consideration amount – contract unclear

Background

2. During the tax year ended 5 April 2014, the Appellants sold Kingly Care Partnership Ltd (KCPL) in which they were both 50% shareholders.

3. The sale and purchase agreement stated that the consideration for the 100% share ownership was £8,000,000.

4. KCPL owed an amount of £1,081,136.94 to Allied Irish Bank (the Bank Debt).

5. On the day of the sale, the buyer's solicitors transferred an amount of £8,000,000 to their solicitors. Their solicitors transferred funds to Allied Irish Bank to redeem the loan owed by KCPL. After further adjustments of a few hundred pounds, the remaining balance was transferred to the Appellants' solicitors. After further payments of professional fees by the Appellants' solicitors, the Appellants each received amounts just over £3.3m.

6. The Appellants duly submitted tax returns showing consideration for the shares as 50% of c£6.9m (plus an earn out received later).

7. HMRC enquired into the tax returns and in due course issued closure notices stating that the consideration should be 50% of £8m, plus the earn outs.

8. The Appellants asked for an independent review, and after this confirmed HMRC's position, they then appealed to the Tribunal.

9. The appeals were joined.

10. The only point in dispute is whether the consideration for the shares should be £8m, or £8m less the bank debt.

11. The Appellants appealed in September 2018. On 26 February 2021 they applied to amend their grounds of appeal, and on 7 April 2021 Judge Popplewell refused their application to add grounds of appeal concerning rectification. The grounds of appeal I am therefore considering are those raised in September 2018, and further limited submissions made in November 2020 as allowed by Judge Popplewell.

Grounds of Appeal

12. The Grounds of Appeal raised by the Appellant are:

(1) The consideration of £8m was a payment for the sale of the shares and the discharge of the bank debt. This must be properly apportioned and under such an apportionment £1.1m should be apportioned to the Bank Debt.

(2) The Agreement properly construed is that the Buyer paid some £6.9m for the shares and circa £1.1m to repay the Bank Debt.

(3) The sellers never received £8m. The amount of £1.1m moved directly from the account of the buyer to the bank to discharge the debt. The sellers did not receive any value for this as there was no personal guarantee given by either seller. [This appears to be contradicted by the sale and purchase agreement which says there was a personal guarantee, see below]

(4) The Appellant' treatment of the transaction in their returns also accords with the buyer's treatment of the transaction.

(5) The contract interpretation needs to consider the whole aspect of the transaction and not just the literal interpretation of the contract.

(6) There is evidence that the amount of the Bank Debt was not intended to be treated as consideration for the shares.

THE LAW

13. The law surrounding the calculation of chargeable gains is in TCGA 1992.

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, together with the incidental costs to him of the acquisition or, if the asset was not acquired by him, any expenditure wholly and exclusively incurred by him in providing the asset,

(b)the amount of any expenditure wholly and exclusively incurred on the asset by him or on his behalf for the purpose of enhancing the value of the asset, being expenditure reflected in the state or nature of the asset at the time of the disposal, and any expenditure wholly and exclusively incurred by him in establishing, preserving or defending his title to, or to a right over, the asset,

(c)the incidental costs to him of making the disposal.

(2)For the purposes of this section and for the purposes of all other provisions of this Act, the incidental costs to the person making the disposal of the acquisition of the asset or of its disposal shall consist of expenditure wholly and exclusively incurred by him for the purposes of the acquisition or, as the case may be, the disposal, being fees, commission or remuneration paid for the professional services of any surveyor or valuer, or auctioneer, or accountant, or agent or legal adviser and costs of transfer or conveyance (including stamp duty [or stamp duty land tax]) together—

(a)in the case of the acquisition of an asset, with costs of advertising to find a seller, and

(b)in the case of a disposal, with costs of advertising to find a buyer and costs reasonably incurred in making any valuation or apportionment required for the purposes of the computation of the gain, including in particular expenses reasonably incurred in ascertaining market value where required by this Act.

52 Supplemental.

(1)No deduction shall be allowable in a computation of the gain more than once from any sum or from more than one sum.

(2)References in this Chapter to sums taken into account as receipts or as expenditure in computing profits or gains or losses for the purposes of income tax shall include references to sums which would be so taken into account but for the fact that any profits or gains of a trade, profession, employment or vocation are not chargeable to income tax or that losses are not allowable for those purposes.

> (3)In this Chapter references to income or profits charged or chargeable to tax include references to income or profits taxed or as the case may be taxable by deduction at source.
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> (4)For the purposes of any computation of the gain any necessary apportionments shall be made of any consideration or of any expenditure and the method of apportionment adopted shall, subject to the express provisions of this Chapter, be ... just and reasonable.

14. I was also referred to the following cases: Spectros International Plc v Madden (HM Inspector of Taxes) 70 TC349, Revenue and Customs Commissioners v Collins, Neely v Rouke (Inspector of Taxes) Wood v Capita Insurance Services Limited [2017] UKSC 24, Joost Lobler v The Commissioners for Her Majesty's Revenue and Customs [2015]UKUT 0152 (TCC), Investec Bank (UK) Limited v (1)Arnold Zulman(2)David Zulman [2009] EWHC 1590, Pitt and another v The Commissioners for Her Majesty's Revenue and Customs [2013] UKSC 26

15. A number of these cases (*Lobler* and *Pitt*) are relevant to the rectification point which the Appellant is not allowed to raise as ground of appeal. A number of the others turn on such specific facts that they are of limited relevance. I draw out some of the passages of the cases that I do feel have relevance to this case below:

16. Wood v Capita Insurance Services Limited [2017] UKSC 24:

> The court's task is to ascertain the objective meaning of the language which the parties have chosen to express their agreement. It has long been accepted that this is not a literalist exercise focused solely on a parsing of the wording of the particular clause but that the court must consider the contract as a whole and, depending on the nature, formality and quality of drafting of the contract, give more or less weight to elements of the wider context in reaching its view as to that objective meaning. In *Prenn v Simmonds* [1971] 1 WLR 1381 (1383H-1385D) and in *Reardon Smith Line Ltd v Yngvar Hansen-Tangen* [1976] 1 WLR 989 (997), Lord Wilberforce affirmed the potential relevance to the task of interpreting the parties' contract of the factual background known to the parties at or before the date of the contract, excluding evidence of the prior negotiations. When in his celebrated judgment in *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896 Lord Hoffmann (pp 912-913) reformulated the principles of contractual interpretation, some saw his second principle, which allowed consideration of the whole relevant factual background available to the parties at the time of the contract, as signalling a break with the past. But Lord Bingham in an extra-judicial writing, *A new thing under the sun? The interpretation of contracts and the ICS decision* Edin LR Vol 12, 374-390, persuasively demonstrated that the idea of the court putting itself in the shoes of the contracting parties had a long pedigree.
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> 11. Lord Clarke elegantly summarised the approach to construction in *Rainy Sky* at para 21f. In *Arnold* all of the judgments confirmed the approach in *Rainy Sky* (Lord Neuberger paras 13-14; Lord Hodge para 76; and Lord Carnwath para 108). Interpretation is, as Lord Clarke stated in *Rainy Sky* (para 21), a unitary exercise; where there are rival meanings, the court can give weight to the implications of rival constructions by reaching a view as to which construction is more consistent with business common sense. But, in striking a balance between the indications given by the language and the implications of the competing constructions the court must consider the quality of drafting of the clause (*Rainy Sky* para 26, citing Mance LJ in *Gan Insurance Co Ltd v Tai Ping Insurance Co Ltd (No*

> *2)* [2001] 2 All ER (Comm) 299 paras 13 and 16); and it must also be alive to the possibility that one side may have agreed to something which with hindsight did not serve his interest: *Arnold* (paras 20 and 77). Similarly, the court must not lose sight of the possibility that a provision may be a negotiated compromise or that the negotiators were not able to agree more precise terms.
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> 12. This unitary exercise involves an iterative process by which each suggested interpretation is checked against the provisions of the contract and its commercial consequences are investigated: *Arnold* para 77 citing *In re Sigma Finance Corpn* [2010] 1 All ER 571, para 10 per Lord Mance. To my mind once one has read the language in dispute and the relevant parts of the contract that provide its context, it does not matter whether the more detailed analysis commences with the factual background and the implications of rival constructions or a close examination of the relevant language in the contract, so long as the court balances the indications given by each.
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> 13. Textualism and contextualism are not conflicting paradigms in a battle for exclusive occupation of the field of contractual interpretation. Rather, the lawyer and the judge, when interpreting any contract, can use them as tools to ascertain the objective meaning of the language which the parties have chosen to express their agreement. The extent to which each tool will assist the court in its task will vary according to the circumstances of the particular agreement or agreements. Some agreements may be successfully interpreted principally by textual analysis, for example because of their sophistication and complexity and because they have been negotiated and prepared with the assistance of skilled professionals. The correct interpretation of other contracts may be achieved by a greater emphasis on the factual matrix, for example because of their informality, brevity or the absence of skilled professional assistance. But negotiators of complex formal contracts may often not achieve a logical and coherent text because of, for example, the conflicting aims of the parties, failures of communication, differing drafting practices, or deadlines which require the parties to compromise in order to reach agreement. There may often therefore be provisions in a detailed professionally drawn contract which lack clarity and the lawyer or judge in interpreting such provisions may be particularly helped by considering the factual matrix and the purpose of similar provisions in contracts of the same type. The iterative process, of which Lord Mance spoke in *Sigma Finance Corpn* (above), assists the lawyer or judge to ascertain the objective meaning of disputed provisions.

DISCUSSION

17. In relation to the Grounds of Appeal raised by the Appellant, HMRC makes the following points:

18. Firstly, HMRC say that the valuation of the shares is not disputed.

19. They say that the sale and purchase agreement specifies the consideration to be £8m, that the appellants were not creditors of the company and that the appellant had voluntarily discharged the bank debt.

20. HMRC say that apportionment under s 52(4) TCGA is only relevant where the consideration paid was to cover different requirements. HMRC say there is nothing in the contract to support the appellant's contention that the contract was for the sale of the shares and the repayment of the loan.

21. HMRC also disagree that s52 (4) is in point at all, saying that the consideration should be determined under s 38.

22. HMRC say that the actual contract is quite clear, and the fact that the contracted could have been structured differently does not change the actual contract entered into.

23. I was referred to the case of Spectros International plc vs Madden (Inspector of Taxes) [1997] STC 144. Although turning on its own facts, this was also a case that involved payment of a bank loan in addition to payment for shares. The Judge made the following observations:

24. 'it would be startling and an affront to common sense if the construction were to be adopted that the taxpayer was to receive $20,001,000 for the shares and the Taxpayer was to be under no responsibility to procure the discharge of the subsidiary's debt due to the bank for in that case the price would be $20m in excess of the value of the shares. Likewise it would be startling and an affront to common sense if the construction were to be adopted that the Taxpayer should assume this responsibility and receive only a price of $1000.'

25. I have no such stark differences here. Whilst the difference in amount is considerable, it is not stretching the bounds of common sense that either of the amounts of consideration contended could be said to be within the negotiation limits of the transaction.

26. I start with the sale and purchase agreement. There were two shares in issue and under 'Background' the contract states that the sellers have agreed to sell the shares and the buyer has agreed to purchase the shares. The bank debt is referred to obliquely as the sellers were obliged to show a deed of release and a redemption statement in respect of the loan provided by AIB group.

27. Clause 3.1 says 'The consideration for the sale and purchase of the Shares shall, subject to adjustment as provided in clauses 3.3 and 3.4, be eight million pounds (£8,000,000) by a telegraphic transfer [bank details then given].

28. Clause 3.3 refers to Completion Accounts and any adjustment in relation to them. Neither the Appellants nor HMRC argue that this clause did or should adjust the compensation.

29. Clause 3.4 refers to the Earn-Out. An Earn Out was paid and is not the subject of this appeal.

30. I have been provided with evidence that the Sale and Purchase agreement did, in the Heads of Terms and in earlier drafts, refer to the fact that this price was for the acquisition of the company on a debt free basis. Nevertheless, for whatever reason, this did not make it into the final Sale and Purchase agreement.

31. I accept that what actually happened is that £6.9m was received by the Appellants, and that £1.1m was paid by the Buyers to discharge the Bank Debt. HMRC have not asserted that they believe something different happened. HMRC say in their statement of case that '[the] appellant had voluntarily discharged the KCPL debt' however on request for further information the Appellant set out a very clear movement of funds which HMRC have not disputed.

32. This case does not appear to be one of contractual interpretation. I agree that if the contract were ambiguous, then the facts surrounding what happened may lead to one interpretation over another. However I see no ambiguity in the contract itself. The Bank Debt is not referred to in any clause that is relevant to the consideration for the purchase of the shares.

33. The Appellants' additional submissions do say 'the contract as drafted does not clearly reflect the intentions of the parties.' This is in accordance with the witness statements and of the actions of the parties afterwards, because the Appellants were clearly content with the amount of cash received and have never suggested to the Buyer that the consideration was incorrect.

34. However, the contract was clearly entered into with advice and negotiation on both sides. The fact that the Appellants do not wish to state to the Buyer that additional money may be due under this contract is not determinative of what the contract says.

35. I take the points of appeal one by one.

> (1) The consideration of £8m was a payment for the sale of the shares and the discharge of the bank debt. This must be properly apportioned and under such an apportionment £1.1m should be apportioned to the Bank Debt.
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> (2) The Agreement properly construed is that the Buyer paid some £6.9m for the shares and circa £1.1m to repay the Bank Debt.

36. Both these points are one of contractual interpretation – the Appellant's view is that the contract can (and should, due partly to surrounding evidence) be interpreted to give a consideration of £6.9m to the shares. I disagree. The contract is very clear. If it was unclear, then other matters could be considered to help with the interpretation, but this is not the case.

37. I do not agree with the Appellant that the contract is for the sale of the shares and the discharge of the debt. The contract alludes to the fact that the debt will be discharged, but it does not say anything about how this is to be done and does not refer to the £8 million being anything other than consideration for the shares.

38. I therefore do not think that s52(4) (apportionment of the consideration) is relevant as there is nothing other than the shares to apportion the consideration between.

> (3) The sellers never received (actually or beneficially) £8m. The amount of £1.1m moved directly from the account of the buyer to the bank to discharge the debt. The sellers did not receive any value for this as there was no personal guarantee given by either seller.

39. The Appellants confirmed in the subsequent information to the Tribunal that there were personal guarantees given.

40. I accept the factual point that the sellers did not receive £8m. However, it does not follow that they were/are not entitled to it under the contract. I consider two possibilities. Firstly, there is a possibility that both they are entitled to it and all parties to the contract accept this and it will be paid at a later date. I consider this a possibility on the wording of the contract but as a matter of practicalities and surrounding evidence I consider it extremely unlikely. Secondly, there is the possibility that they are entitled to it under the contract as written but all parties agree that this does not reflect what they meant to agree. To the end that this point leads us to a rectification argument that is not allowable before this Tribunal. To the end that this helps in the contractual interpretation I disagree.

> (4) The Appellant' treatment of the transaction in their returns also accords with the buyer's treatment of the transaction.

41. I do not consider that this is a relevant point in ascertaining what the consideration is under the contract.

(5) There is evidence that the amount of the Bank Debt was not intended to be treated as consideration for the shares.

42. To the extent that this evidence is the drafts of the agreement, it does not follow that what was discussed beforehand is necessarily what the final agreement needed to reflect, as naturally a draft is for discussion and is not a final document. To the extent that the evidence is that the Appellants did not expect to receive £8m, this is the same point as coved in paragraph 40 above.

43. I accept that the Appellants are very clear that the consideration they have received for the shares is not £8m, and that they feel it extremely unfair that £8m should be used as a figure for the consideration. However, I do not view the contract as ambiguous. The Appellants have not discharged their burden of proof to show that their assertion is correct.

DECISION

44. For the reasons given above, this appeal is DISMISSED.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

45. 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 ALLATT
TRIBUNAL JUDGE

Release date: 30 MARCH 2022