UKUT 114 (TCC) 2010

Appeal number: FTC/07/2009

CAPITAL GAINS TAX – exchange of shares for debentures – whether TCGA 1992 s 137 applies to each shareholder separately – no – whether Special Commissioner entitled to conclude that the main purpose was tax avoidance – yes – appeal dismissed

UPPER TRIBUNAL

TAX AND CHANCERY CHAMBER

JOHN COLL AND MARIAN COLL **Appellants**

- and -

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

TRIBUNAL: JOHN F AVERY JONES CBE
JOHN WALTERS QC (JUDGES OF THE UPPER TRIBUNAL)

Sitting in public at 45 Bedford Square, London WC1 on 4 and 5 March 2010

David Southern and Rebecca Murray, counsel, instructed by Gelbergs LLP, for the Appellants

Sam Grodzinski, counsel, instructed by the General Counsel and Solicitor for HM Revenue and Customs, for the Respondents

DECISION

1. Mr and Mrs Coll appeal against a decision of the Special Commissioner (Michael Tildesley) issued on 21 April 2009 dismissing their appeals against capital gains tax assessments for 1997-98 and imposing penalties for a negligent tax return. Briefly the facts are that Mr and Mrs Coll each owned half the shares in Grosvenor Nursing Agency Limited ("Grosvenor"). Their shares were exchanged for loan notes in Nestor Healthcare Group plc ("Nestor") which were redeemed in 1998-99 while they were resident in Belgium for the purposes of the double taxation agreement between the UK and Belgium. The Special Commissioner in a long and detailed decision running to 63 pages following a six-day hearing decided that s 137 TCGA 1992 prevented s 135 from applying, with the result that there was a disposal of the shares in 1997-98 when they were still resident in the UK. They were granted permission to appeal on the s 137 aspect only, permission being refused in relation to the following issues: (a) whether there was a finding that Mrs Coll had an intention of becoming non-resident, (b) that there were no findings as to whether the Appellants acted fraudulently or dishonestly in relation to the capital gains tax assessment, (c) that HMRC were permitted to make allegations of fraud or dishonesty in relation to the capital gains tax assessments that were unpleaded and unparticularised, (d) that the Tribunal admitted evidence of Mr David Collison as a witness of fact and his evidence consisted of matters of opinion without the procedural safeguards applicable to expert evidence, and (e) that there were procedural failings which constituted a denial of a fair hearing. Essentially Mr David Southern and Miss Rebecca Murray, for the Appellants, take issue with findings of fact made by the Special Commissioner. As before, Mr Sam Grodzinski appears for the Respondents ("HMRC").

2. We should also record that Mr Southern's and Miss Murray's skeleton argument raised two further issues: who had the burden of proof that s 137 was satisfied in a case where there is a discovery assessment, and a European law freedom of movement point. Mr Grodzinski opposed the inclusion of these on the ground that the Appellants did not have permission to raise these in the appeal. We agreed with Mr Grodzinski. The Appellants had, as already mentioned, previously raised a number of grounds in their notice of appeal and permission was refused on many of these. The burden of proof was a separate issue in the Special Commissioner's decision, being described as Dispute Three: Burden of Proof (see the heading before [37]). The Appellant could have raised this issue in the notice of appeal and application for permission to appeal, but did not do so. The European law point has never been raised before, although it could have been in view of the Appellants' move to Belgium, and as a matter of case management we declined to allow Mr Southern to introduce it at this late stage. We should add that we considered the Appellants' case on the proposed new issues unlikely to succeed. In particular, Community law authorities suggested to us that if s 137 infringed any right of freedom of movement, such infringement would be objectively justifiable on the ground of prevention of tax avoidance.

3. Sections 126, 127, 135, 137 and 138 of TCGA 1992 provide:

"126. Application of sections 127 to 131

(1) For the purposes of this section and sections 127 to 131 "reorganisation" means a reorganisation or reduction of a company's share capital and in relation to a reorganisation –

(a) "original shares" means shares held before and concerned in the reorganisation,

(b) "new holding" means, in relation to any original shares, the shares in and debentures of the company which as a result of the reorganisation represent the original shares (including such, if any, of the original shares as remain).

127. Equation of original shares and new holding

Subject to sections 128 to 130, a reorganisation shall not be treated as involving any disposal of the original shares or any acquisition of the new holding or any part of it, but the original shares (taken as a single asset) and the new holding (taken as a single asset) shall be treated as the same asset acquired as the original shares were acquired.

135. Exchange of Securities for those in another company

(1) Subsection (3) below has effect where a company ("company A") issues shares or debentures to a person in exchange for shares in or debentures of another company ("company B") and –

(a) company A holds, or in consequence of the exchange will hold, more than one-quarter of the ordinary share capital (as defined in section 832(1) of the Taxes Act) of company B, or

(b) company A issues the shares or debentures in exchange for shares as the result of a general offer –

(i) which is made to members of company B or any class of them (with or without exceptions for persons connected with company A), and

(ii) which is made in the first instance on a condition such that if it were satisfied company A would have control of company B, or

(c) company A holds, or in consequence of the exchange, will hold the greater part of the voting power in company B.

(2) …

(3) Subject to sections 137 and 138, sections 127 to 131 shall apply with any necessary adaptations as if the 2 companies mentioned in subsection (1) above or, as the case may be, in section 136 were the same company and the exchange were a reorganisation of its share capital.

137 Restriction on application of sections 135 and 136

(1) Subject to subsection (2) below, and section 138, neither section 135 nor section 136 shall apply to any issue by a company of shares in or debentures of that company in exchange for or in respect of shares in or debentures of another company unless the exchange, reconstruction or amalgamation in question is effected for bona fide

commercial reasons and does not form part of a scheme or arrangements of which the main purpose or one of the main purposes, is avoidance of liability to capital gains tax or corporation tax.

(2) Subsection (1) above shall not affect the operation of section 135 or 136 in any case where the person to whom the shares or debentures are issued does not hold more than 5 per cent of, or, of any class of, the shares in or debentures of the second company mentioned in subsection (1) above.

138 Procedure for clearance in advance

(1) Section 137 shall not affect the operation of section 135 or 136 in any case where, before the issue is made, the Board have, on the application of either company mentioned in section 137(1), notified the company that the Board are satisfied that the exchange or scheme of reconstruction will be effected for bona fide commercial reasons and will not form part of any such scheme or arrangements as are mentioned in section 137(1).

(2) Any application under subsection (1) above shall be in writing and shall contain particulars of the operations that are to be effected and the Board may, within 30 days of the receipt of the application or of any further particulars previously required under this subsection, by notice require the applicant to furnish further particulars for the purpose of enabling the Board to make their decision; and if any such notice is not complied with within 30 days or such longer period as the Board may allow, the Board need not proceed further on the application.

(3) The Board shall notify their decision to the applicant within 30 days of receiving the application or, if they give a notice under subsection (2) above, within 30 days of the notice being complied with. 8

(4) If the Board notify the applicant that they are not satisfied as mentioned in subsection (1) above or do not notify their decision to the applicant within the time required by subsection (3) above, the applicant may within 30 days of the notification or of that time require the Board to transmit the application, together with any notice given and further particulars furnished under subsection (2) above, to the Special Commissioners; and in that event any notification by the Special Commissioners shall have effect for the purposes of subsection (1) above as if it were a notification by the Board.

(5) If any particulars furnished under this section do not fully and accurately disclose all facts and considerations material for the decision of the Board or the Special Commissioners, any resulting notification that the Board or Commissioners are satisfied as mentioned in subsection (1) above shall be void."

4. In short, these provide that an exchange of shares for (in this case) debentures (loan notes) is treated as a reorganisation of the share capital of a single company with the result that there is no disposal of the original shares by the shareholders. This treatment does not apply unless (a) the exchange is effected for bona fide commercial

reasons, and (b) it does not form part of a scheme or arrangements of which one of the main purposes is avoidance of capital gains tax.

5. Mr Southern and Miss Murray, for the Appellant, contend in outline:

(1) The burden was on HMRC to show what the scheme was, see *Snell v HMRC* [2007] STC 1279 at [13]. It was legitimate to defer capital gains tax by taking loan notes (*Snell* at [35]). Unless there was a scheme or arrangements to become non-resident (we shall use the expression "non-resident" to mean neither resident nor ordinarily resident, and conversely for "resident") in existence at the time of the exchange s 137 was not satisfied (*Snell* at [28]).

(2) There was no scheme or arrangements in existence at the time of the exchange on 20 November 1997. There was no evidence to support the Special Commissioner's conclusion that at that time Mr Coll intended to become non-resident as such plan had been abandoned on 18 November 1997. In the absence of such evidence, he should have concluded that there was at the time of the exchange no scheme, meaning "a plan of action devised in order to attain some end" (*Snell* at [28]).

(3) The Special Commissioner used hindsight, as shown by the passage at [363]: "The critical finding was that they had a substantive intention to become non resident which was demonstrated by their subsequent actions."

(4) There was no evidence that at the time of the exchange Mrs Coll intended to become non-resident. Section 137 applies to each shareholder separately.

(5) The test to be applied is "was there evidence before the tribunal which was sufficient to support the finding which it made?" (*Georgiou v Customs and Excise Commissioners* [1996] STC 463, 476).

6. Mr Grodzinski, for HMRC contends in outline:

(1) The burden was on the Appellants to show that there was no scheme; there was no obligation on HMRC to particularise the scheme. Here, as in *Snell*, the scheme was the issue of loan notes with the purpose of becoming non-resident and redeeming them while non-resident.

(2) There was ample evidence on which the Special Commissioner could come to the conclusions he reached and the Appellants' criticisms come nowhere near to establishing an error sufficient to satisfy the *Edwards v Bairstow* test. In particular, the abandonment of Mr Coll's plan to go to Ireland on the day before the share exchange did not mean that he had abandoned all plans to become non-resident. The fact that they may not have decided where to move to was irrelevant, as is demonstrated by *Snell* at [27-28].

(3) Section 137 applies on an all-or-nothing basis to all shareholders and so it was irrelevant whether Mrs Coll intended to remain resident in the UK.

7. These provisions were recently considered by the High Court in *Snell v HMRC* [2007] STC 1279. Sir Andrew Morritt, C defined scheme or arrangements:

> [28] … The ordinary meaning of the word 'scheme' is 'a plan of action devised in order to attain some end'. Similarly an arrangement is 'a structure or combination of things for a purpose', see for both meanings the Shorter Oxford English Dictionary. Accordingly unless Mr Snell had the purpose of becoming non-resident as at 21 December 1996 so as to link the acceptance of loan notes on that day with their redemption when non-resident after 5 April 1997 there cannot be a relevant scheme or arrangement for the purpose of s 137.

He approved at [36] the following passage in the decision of the Special Commissioners:

> "In principle, if one of the appellant's main purposes of effecting the arrangements is that capital gains tax should not be paid because the loan stocks will be redeemed while he is non-resident, that is avoidance of liability to capital gains tax within s 137."

He also decided in favour of HMRC at [36] that there was no requirement that the taxpayer's purpose in becoming non-resident was final and unalterable.

8. Apart from the issue of whether it is for the Appellant or HMRC to say what is the scheme or arrangements, there was little dispute between the parties on the application of *Snell*. We agree with Mr Grodzinski that there is no obligation on HMRC to identify the scheme or arrangements and it is for the Appellant to prove that there is no scheme or arrangements. Here, in any case, it is obvious that the scheme was the issue of loan notes with the purpose of Mr Coll becoming non-resident and redeeming them while non-resident. We express this as "non-resident" because one of the issues of fact is whether at the time of the exchange Mr Coll had abandoned his intention of becoming resident in Ireland and decided to remain resident in the UK, or whether he was keeping his options open about becoming resident somewhere else. It is common ground that the scheme must exist at the time of the issue of the loan notes.

9. Mr Southern and Miss Murray raised a new issue of law, the determination of which will affect the application of s 137 to Mrs Coll. They contend that s 137 applies to each shareholder separately. Miss Murray in a helpful written submission points out in support of her contention that as s 135 applies to the issue of shares or debentures *to a person*, and s 137 refers to *any issue* of shares in or debentures of that company in exchange for the shares, these must refer to an issue, and an exchange, in relation to a particular person. It follows that Mrs Coll's shares have to be looked at separately from Mr Coll's. She points out that in *Snell* only Mr Snell's 91% holding was considered, the remaining 9% being split equally between his sons, who, as connected persons, would not benefit from the exception for holdings of 5% or less. In short, Mr Grodzinski contends that if s 137 applies to Mr Coll it applies to all the

shareholders including Mrs Coll and so there is no need to consider her circumstances separately.

10. We agree with Mr Grodzinski. The starting point is that if there is a reorganisation of a company's share capital within s 126 then by s 127 the original shares and the new holding are treated as a single asset. Either there is a reorganisation of the share capital of a company or there is not; if there is, the same treatment must apply to all the shares. Section 135(3) applies the same approach to a share exchange by treating both companies involved as a single company and the exchange as a reorganisation of the share capital of that deemed single company. Again, this treatment must apply to all the shares if it applies to any of them. The reference on which Miss Murray relies to the company issuing shares or debentures *to a person* is part of defining what is an exchange, but having determined that there is an exchange then the consequences apply to all the shareholders. Section 137 says that s 135 shall not apply to *any* issue in the exchange unless the conditions there set out are satisfied, except that an unconnected shareholder holding 5% or less will in any event qualify under s 135. This also points to all the shareholders being treated in the same way. Further, s 138 provides for the ability of either company to apply for a clearance which is a further indication that the provisions relate to all the shares involved in the exchange. If s 137 applied to each shareholder separately a clearance application by one of the companies on behalf of all the shareholders in s 138 would make no sense. On the plain words therefore s 137 is an all-or-nothing provision applying to all the shareholders (other than unconnected shareholders holding 5% or less). The point was not considered in *Snell* in which the only appeal was by Mr Snell holding 91% of the shares and so the application of s 137 to his sons was not in issue. We therefore hold that if there is such a scheme or arrangement as is mentioned in s 137 then none of the shareholders qualify for treatment under s 135, other than unconnected shareholders holding 5% or less.

11. Accordingly, we can concentrate on Mr Coll to the exclusion of Mrs Coll who did not originally intend to become non-resident (although she subsequently did become non-resident). We now turn to the findings of fact.

12. Mr Southern's approach to the facts is that the Special Commissioner should have found that (a) Mr and Mrs Coll were separating, (b) as part of their financial arrangements Mrs Coll proposed to transfer 30 of her 50 shares to Mr Coll and Mr Coll proposed to transfer investment properties to Mrs Coll, (c) Mr Coll, who is a dual British and Irish citizen, wanted to go to Ireland, having enjoyed visiting Dublin while he was at university in Belfast, (d) taking loan notes was forced on them by Nestor, the purchaser, which fitted into that plan because Ireland gives a base value of current market value to immigrants so he would have the good fortune not to pay capital gains tax in either country, (e) Mr and Mrs Coll had a reconciliation as a result of which he decided not to go to Ireland and the proposed transfers between them did not take place, (f) when HMRC refused clearance and the refusal was upheld by the Special Commissioners he went ahead with the exchange, decided to remain resident in the UK and was content to pay capital gains tax when the loan notes matured, (g) some seven months later PricewaterhouseCoopers ("PwC") proposed the Belgian route and both Mr and Mrs Coll adopted it as an entirely separate plan. On that basis,

Mr Southern contends that at the date of the exchange Mr Coll had no purpose of avoiding capital gains tax by becoming non-resident, and the fact that some months later he adopted a new plan to go to Belgium is a separate transaction that is irrelevant to his purpose at the date of the exchange. He contends that the Special Commissioner used hindsight to join the Belgian route to the abandoned intention to become resident in Ireland to make one continuing plan of becoming non resident, and that the true and only reasonable conclusion contradicts the determination, to use the words of Lord Radcliffe in *Edwards v Bairstow* 36 TC 207, 229.

13. Mr Grodzinski's approach is that the Special Commissioner did not accept the Appellants' story, some of which is in conflict with contemporary documents for which HMRC obtained orders for disclosure during the hearing, and that the Special Commissioner was entitled to make the findings he did that Mr Coll had a continuing intention of becoming non-resident, initially in Ireland and later in Belgium.

14. In a section of the decision headed "The Disputed Facts" the Special Commissioner sets out the evidence and his findings on the followings questions:

> "(1) The initiative for the use of loan notes came from Nestor.
>
> (2) The original arrangement which involved the transfer of shares to Mr Coll with him emigrating to the Republic of Ireland was not motivated by tax avoidance but reflected the perilous state of their marriage culminating in their divorce.
>
> (3) Prior to the sale of Grosvenor on 20 November 1997 the Appellants decided to give their marriage another go with Mr Coll abandoning his plans to move to the Republic of Ireland.
>
> (4) Their decision to become non-resident in Belgium was solely attributable to later tax advice received from PwC, and had no connection with the disposition of Grosvenor shares."

15. His findings were summarised as follows:

> "253. In summary I found the following facts:
>
> (1) The Appellants' evidence of Nestor initiating the consideration for Grosvenor in the form of loan notes was unreliable. On balance it was the Appellants who required the consideration for the sale of Grosvenor to be structured in loan notes. They chose loan notes because of their potential to reduce the significant tax liability on the gains arising from the sale of the shares.
>
> (2) The Appellants' original plan of Mr Coll holding majority shareholding and residence in the Republic of Ireland was abandoned because Inland Revenue clearance was refused.
>
> (3) As at 20 November 1997 the Appellants held an intention of residing outside the UK with a view to redeeming the loan notes when non-resident so as to avoid capital gains tax on the disposal of shares in Grosvenor."

He made no finding on the question of separation:

> "235. I make no decision under the section 137 dispute about whether the divorce and reconciliation were a sham. I consider this issue was relevant to the penalty dispute. If I made findings of fact on the sham nature under the section 137 dispute it would unfairly displace the burden of proof which was on the Respondents in the penalty dispute."

16. These are essentially the facts that Mr Southern wants to question. We are fortunate that the Special Commissioner listed the evidence on these questions.

Initiative for loan notes

17. On whether the initiative for loan notes came from Nestor, the only contemporary support for this was Mrs Coll's diary entry at 18 June 1997 relating to a meeting with Mr Perriam (the business sale adviser) quoted at [108] "BNA (Nestor) 2.8 loan notes; Alan [Perriam] = book Clyde & Co; ask Clive for cash." Of the diary entries the Special Commissioner said:

> "215. …I considered Mrs Coll's diary a flawed document. Many entries in the diary were rudimentary and conveyed no sense on their own. Mrs Coll acknowledged that she used the diary as a jotter with some entries having no connection with the date under which they were recorded. I was not satisfied that the entries recorded on the 4 and 18 June 1997 represented offers from Corporate Services Group and Nestor."

18. The Appellants wrote this in Appendix 7 of what was described as the Hansard Report:

> "Perriam asked us to meet him on 18.06.97. We met at Coolhurst Road. Perriam told us that Nestor plc had made an offer of £2.8 million to be paid in loan notes. We had at the outset been very clear with Mr Perriam, that we wanted cash and not shares. We were initially angry that in return for signing over our company, we were being offered what appeared to be risky promises to make a future payment, as opposed to the certainty of receiving cash. Loan notes were something that we had never previously heard of, and an offer of payment in this way came as a complete shock.
>
> Perriam explained to us that loan notes were frequently used as a method of payment, but he was not an expert on them, and that we should seek expert legal advice. He said he would introduce us to Jon Rayman of Clyde & Co Solicitors, having used them previously. We told Perriam to contact Nestor and tell them that we would only accept payment in cash. Perriam told us later in a telephone call to Marian that when he told Nestor that we would not accept loan notes, Nestor said that they would not proceed with the purchase if we did not accept loan notes.
>
> <u>26.06.97</u>
> [concerning a meeting with Mr Rayman of Clyde & Co]…Rayman told us that he fully understood our concerns, but also said that Nestor's loan notes would be OK provided they were legally guaranteed by a reputable bank…Rayman asked us if we had taken any

> financial advice regarding the sale. When we responded that we had not, Rayman suggested that we do so, and recommended Price Waterhouse. We told Rayman that we were under the impression that Price Waterhouse would be carrying out the due diligence on Grosvenor on behalf of Nestor plc, so there may be a conflict of interest. Rayman then suggested we approach BDO Stoy Hayward to advise us regarding the proposed sale."

19. On this last point, there was documentary evidence that the Appellants met BDO on 18 June 1997 and the manuscript notes of the meeting show that loan notes and becoming non-resident were discussed, see [109]. This meeting was not disclosed in the Appendix 7. Furthermore it was Mr Perriam who recommended both BDO and Clyde & Co in a letter of 6 May 1997, see [103]. This completely destroyed the credibility of the Appellants' version of the events, leaving the impression they were deliberately covering up that they had met BDO on 16 June 1997 and were given tax advice about the advantages of loan notes then.

20. All the other evidence pointed the other way and included (a) that, as already mentioned, the Appellants met with BDO on 18 June 1997 and were told about loan notes then, (b) according to a BDO file note of a telephone conversation on 16 July 1997 with Mr Perriam the Appellants would instruct BDO in respect of capital gains tax planning, (c) Mr Abrahamson of Corporate Services Group (the rival bidder) wrote to BDO on 16 July 1997 that "I understand that they [the Appellants] are looking for a significant proportion of the consideration to be satisfied by loan notes," (d) Mr Chapman of Nestor wrote to Mr Perriam on 14 August 1997 saying "I would also be interested to learn about the preferred form and timing of the consideration. Once we have that, perhaps we can discuss the total picture and all the outstanding issues," and (e) Mr Collison of Nestor (who did not work for Nestor at the time) gave evidence that of 90 acquisitions made between 1988 [the decision says "1998" at [152] but the following paragraph refers to time periods from 1988 and so we think this should be 1988] and 2007 this was the only one where the consideration was wholly satisfied by loan notes. Item (d) is completely inconsistent with Nestor requiring loan notes, whereas the Appellants knew about loan notes from the meeting at (a) and were at (c) earlier asking for loan notes from the rival bidder. We consider that there was ample evidence on which the Special Commissioner could come to the conclusion stated at [253(1)] quoted in paragraph 15 above and disbelieve the Appellants' story.

The separation and reconciliation

21. The facts relating to the separation are set out in [156] to [166] of the decision and the conclusion at [228] to [235]. In short, the Appellants were arguing that the separation was the cause of Mr Coll's proposing to move to Ireland, while HMRC were arguing that the separation was a sham. The evidence rested entirely on the Appellants' evidence in which there were inconsistencies:

> "230….The inconsistencies included Mrs Coll's statement to Ms Pearson on 11 August 1997 that Mr Coll was moving out of the family home the following day, Mrs Coll's answers to Mr Wood's questions

> about the state of her marriage, and the Appellants' statement in the PwC Hansard report that they reconciled their differences after receiving counselling from Ms Duthie."

22. We have already quoted the Special Commissioner's decision in [235] that he made no decision about whether the separation was a sham because he concluded that the relevance of it to s 137 was minimal:

> "231….The key feature of the separation was not the act of separation but the terms of the proposed separation which was dominated by tax considerations and demonstrated the Appellants tax avoidance purpose for the loan notes."

In other words, since he had concluded that the Appellants had a tax avoidance purpose for the loan notes, it made no difference whether the separation was a sham.

23. Mr Southern contended that it was unreasonable of the Special Commissioner not to have reached a decision on a point that was central to his case.

24. We consider that the Special Commissioner was justified in not reaching a decision. As he said, he did not need to, the matter was not clear from the evidence, and he was sceptical about some of the Appellants' evidence. We would add that if the evidence had been clearly in the Appellants' favour the Special Commissioner would obviously have made a decision on it, having set out the evidence. But the evidence was not clearly in their favour.

Tax avoidance purpose

25. As we have mentioned, the Appellants contended that the original arrangement which involved the transfer of shares to Mr Coll with him emigrating to the Republic of Ireland was not motivated by tax avoidance but reflected the perilous state of their marriage culminating in their divorce. The Special Commissioner did not find in their favour on the separation and so the question that he had to answer was whether the Appellants (or rather Mr Coll) had a tax avoiding purpose on the basis of the other evidence.

26. We have dealt with some of the relevant evidence in connection with who initiated the loan notes. The relevant facts were (a) that the Appellants initiated the loan notes, (b) on 26 August 1997 BDO made a report on tax planning relating to the sale of Grosvenor (see [67]) which included becoming non-resident and Mrs Coll transferring 30 of her 50 shares to Mr Coll as part of the divorce arrangements, (c) the redemption dates for the loan notes originally proposed by Nestor were March 1998, September 1998, March 1999, September 1999 and March 2000 (ie in the UK tax years 1997-98 to 1999-2000), see [66], but on 29 August 1997 BDO started negotiations for a change which ultimately resulted in these being changed to 31 October 1998 and 31 March 1999 (ie both dates falling within the UK tax year 1998-99) (see [68]), (d) Mr Scott had on 12 September 1997 sent details of the tax consequences of five different scenarios of different redemption dates, see [131], (e) the Appellants met a representative of BDO Ireland on 16 September 1997 (see [70]) and on 19 September 1997 BDO advised the Appellants on the tax implications of

taking up residence in Ireland (see [71]). If one leaves out of account the alleged separation there is ample evidence to support the Special Commissioner's conclusions that the terms of the sale were driven by Mr Coll's proposal to become resident in Ireland and redeem the loan notes while resident there without paying tax in Ireland because Ireland gave a base value of market value to the loan notes on his arrival. We regard the change in redemption dates of the loan notes as significant; if he were intending to live permanently in Ireland it would have been sufficient to delay the first proposed redemption date of March 1998 but he arranged to bunch them all into 1998-99, which suggests an intention to go to Ireland for a short time.

27. At that point the terms of the sale were tax driven. We turn to whether there was evidence that Mr Coll's intention to live in Ireland had been abandoned by the date of exchange, 20 November 1997. In the meantime, a clearance application stating the reason for the move to Ireland to be the proposed divorce and including the proposed transfer of shares from Mrs Coll to Mr Coll had been refused on 27 October 1997 (see [73]), the refusal had been upheld by the Special Commissioners on 12 November 1997 (see [78]), and communicated to Mr Coll on 18 November 1997 (see [143]), and the proposed transfer of some of her shares from Mrs Coll to Mr Coll had been abandoned by 19 November 1997 (the day after communication of the Special Commissioners' decision to Mr Coll) (see [80], [144] and [233]). On 7 November 1997 (after the refusal of the clearance and before the Special Commissioners upheld the refusal) Mr Scott of BDO wrote to Mr Rayman with a copy to the Appellants saying that the clearance was refused on the basis of Mr Coll's move to Ireland and that if he remained in the UK, s 135 would apply (the letter is set out in full at [141]). The sale agreement was entered into on 20 November 1997 (two days after the upholding by the Special Commissioners of the refusal of the clearance had been communicated to Mr Coll).

28. It would certainly have been a possible conclusion for the Special Commissioner to have reached that Mr Coll had abandoned his intention to become resident in Ireland and had decided to remain resident in the UK, which would be supported by the abandonment of the share transfer from Mrs Coll to Mr Coll. But there is no clear evidence that this was the case. Mr Coll had approved the letter of 31 October 1997 to the Special Commissioners containing the statement that he proposed to live in Ireland. Abandonment of that intention depended on the alleged reconciliation between Mr and Mrs Coll on 7 November 1997 about which the Special Commissioner found

> "229.…their evidence of reconciliation on the 7 November 1997 was problematical. Mrs Coll was clear about the events of that day, whereas Mr Coll could not recall the name of the restaurant attended. Mr Coll asserted that he told Mr Scott on 8 November 1997 of the reconciliation and that he was not now going ahead with his move to the Republic of Ireland. Ms Pearson confirmed that BDO held no record of the conversation."

The Special Commissioner also pointed to the discrepancy of the purchasers' solicitors being told on 19 November 1997 about the abandonment of the share transfers between Mrs and Mr Coll, whereas if it was a result of the reconciliation on

7 November 1997 what was the reason for the delay? The Special Commissioner concluded:

> "234. The Appellants adduced no evidence to displace the close temporal connection between refusal of clearance and the sale completion. The reliable evidence suggested that they were waiting for the outcome of the clearance application before deciding. On balance I find that the Appellants altered their original plan giving majority shareholding to Mr Coll and residence in Republic of Ireland because clearance was refused."

In other words, the intention for Mr Coll to go to Ireland was not given up because of any reconciliation on 7 November 1997 but was decided between 18 and 20 November 1997 because of the Special Commissioners' upholding the refusal of the clearance. But was this an intention to remain resident in the UK?

29. The next piece of evidence was that the family home was put on the market in January 1998 and the sale was completed in May 1998. A further property in View Road had been acquired (exchange of contracts in February 1998 and completion on 15 October 1998) (see [167] to [170]). The View Road property was said by the Appellants to be for a nursing home but this was found to be unsuitable and in the end the property was rented as flats. The Special Commissioner found:

> "245. The Appellants' action of putting their family home on the market in January 1998 soon after the sale of their business and moving into rented accommodation was indicative of an intention of preparing for a move abroad. The Appellants' reasons for purchasing the View Road property included a nursing home and renting it out as four flats. I find that the Appellants were not seriously considering setting up a nursing home. Mrs Coll accepted that the View Road property was not suitable, requiring considerable investment to bring it up to standards required for a nursing home. Further, the prospect of starting up a new business which would involve 24 hour care of the residents went against the Appellants' stated desire to ease down after the Grosvenor sale. I consider the most likely scenario was that the Appellants purchased View Road with the immediate intention of letting the four flats in the property and then at some time in the future of converting it to a family home which is what happened. The family home project, however, was long term requiring planning permission and then extensive building work which meant that they were not tied down to a fixed residence following the Grosvenor sale, which paved the way for a move overseas."

30. The other evidence about houses was that the Appellants told Coopers & Lybrand (one of the predecessors of PwC) at a meeting on 15 June 1998 that they were currently renting a property in London and were contemplating the purchase of a property in the UK for between £600,000 and £750,000. Details of the "Belgian route" were sent to them on 18 June 1998. This depended on their dual residence in the UK and Belgium being resolved in favour of Belgium under the double taxation agreement on account of their having a permanent home available to them in Belgium and not the UK. The fact of their having sold their home in the UK was useful to this plan. Such a plan was always available but the significance of Belgium was that in

the 1998 Budget the law was proposed to be changed (and was changed by s 127 of the Finance Act 1998 which added s 10A to the Taxation of Chargeable Gains Act 1992) to the effect that if a person became non-resident after 17 March 1998 and was non-resident for less than 5 years then any gains made while non-resident were taxable in the year of return. This was expressed to be subject to relief under double taxation agreements and so if an agreement provided that capital gains were taxable only in the state of residence for the purposes of the agreement (after applying any dual residence provisions in the agreement) the charge was overridden. Many double taxation agreements already provided for gains of a person who was non-resident for a short period to continue to be taxed, but the agreement with Belgium did not (and Belgium did not tax most capital gains of individuals). The Belgian route was in fact adopted by the Appellants who moved to Belgium on 17 September 1998 and returned to the UK in April 2000 (see [84] to [91]).

31. The issue for the Special Commissioner was what was the intention of Mr Coll on 20 November 1997. The Special Commissioner had found that (a) Mr Coll was originally proposing to become resident in Ireland in order to avoid capital gains tax on the redemption of the loan notes, (b) he abandoned that intention because of the Special Commissioners' upholding the refusal of the clearance, not for reasons connected with a reconciliation, (c) they had sold their house in January 1998 and were living in temporary accommodation, (c) although there is no express finding on this point they must have found out in the Budget in March 1998 that if they became non-resident it had to be for five years, (d) as a result of a meeting with Coopers & Lybrand in April 1998 about their US tax returns (see [83]) it was suggested that they take further advice about tax planning, and at a meeting on 15 June 1998 they heard about the Belgian route, which they adopted in September 1998 shortly before the first redemption date of the loan notes on 31 October 1998. The question facing the Special Commissioner was whether Mr Coll had abandoned the intention of becoming non-resident between 18 and 20 November 1997 and only considered it again when they heard about the Belgian route on 15 June 1998, or whether he was keeping his options open. What the Special Commissioner decided was:

> "245. The Appellants' action of putting their family home on the market in January 1998 soon after the sale of their business and moving into rented accommodation was indicative of an intention of preparing for a move abroad….
>
> 248. I find the Appellants' adoption of the Belgian route was not a chance occurrence but a fulfilment of their intention as at 20 November to redeem the loan notes at a time when they were not resident in the UK. I accept that as at 20 November 1997 the Appellants did not have an intention of residing specifically in Belgium. They did, however, have as at 20 November 1997 an intention of living outside UK so as to avoid capital gains tax on the redemption of loan notes. My conclusion was supported by the following findings:
>
> > (1) They knew of the benefits of non-residency as a tax planning tool.
> >
> > (2) They were prepared to execute tax planning based on the non-residency of Mr Coll.

> (3) They were aware before 20 November 1997 that their liability to capital gains tax on the sale proceeds would be deferred until they redeemed the loan notes. They suffered no disadvantage in abandoning their original plan and looking at more suitable options.
>
> (4) They bought themselves time to consider alternative non-resident routes by deferring the first date of redemption for the loan notes.
>
> (5) They were dissatisfied with BDO's tax advice, and decided after consulting their solicitors to seek advice from PwC probably around the time of the Grosvenor sale.
>
> (6) The marketing of their family home soon after the sale of the business was a manifestation of their intention to reside abroad.
>
> (7) The prospect of living abroad held no fears for them.
>
> (8) Their admissions to Mr Wood about living in Europe."

32. Mr Southern was particularly critical of the findings in (3) and (4) as showing that the Special Commissioner had misunderstood the law because if there was a scheme within s 137 at the time of the exchange the tax charge occurred then and the Appellants did not buy themselves time and could not look for alternative plans. We do not agree. The Special Commissioner said this early in the decision:

> "10. …If the exchange was part of a scheme or arrangements, of which the main purpose or one of the main purposes was to avoid liability to tax, then section 137 of Taxation of Chargeable Gains Act 1992 ("TCGA 1992") applied so that the gain was taxable at the time of the share sale in November 1997 and not at the time that the loan notes were subsequently redeemed."

This demonstrates that he understood the effect of s 137 correctly. It follows that [248(3) and (4)] must refer to what was in Mr Coll's mind, whether or not it was correct in law. He had been advised by BDO on 7 November 1997 (see [141]) after the refusal of the clearance and before the refusal was upheld by the Special Commissioner that:

> "If John and Marion remain in the UK, it is our opinion that the provisions of Section 135 will apply (the clearance is not to the effect that s.135 will apply, but that s.137—which prohibits share exchange exchanges with a tax avoidance motive—will not apply)."

This was written on the basis that at the time of the exchange Mr Coll had abandoned his original plan and had decided to remain in the UK. This meant that he had time to decide what to do about minimising his tax when the loan notes were redeemed but it did not mean that he could leave his options open and decide to become resident somewhere else. Presumably Mr Coll thought that he could still become non-resident and the Special Commissioner considered, reasonably in our view on account of the sale of their house, that this was evidence of a continuing intention to become non-resident.

33. Mr Southern also criticised [248(5)]. We agree that there was no evidence that he took advice from PwC (then Coopers & Lybrand) around the time of the sale. The first meeting about this aspect was in June 1998, but it followed a meeting in April 1998 about their US tax return at which it was suggested that they should take further advice about tax planning.

34. Mr Southern criticised [248(6)] on the basis that the sale of their house occurred after 20 November 1997. But if the Special Commissioner was looking for confirmation about an intention to become non-resident on 20 November 1997 in our view he was justified in taking into account later events that served to confirm that intention.

35. Mr Southern criticised [248(7)] as speculation but we consider that such a finding was justified by the fact that they had lived in the US from autumn 1992 to spring 1995 (see [246]).

36. We should mention [248(8)]. The Special Commissioner recorded that during a formal interview with HMRC in February 2004 in accordance with Code of Practice 9 (formerly known as the Hansard procedure) they said:

> "Well we really had planned initially to go to Europe we thought the children as well it would be better for them". (Mrs Coll*)*
>
> "We thought it would be good actually to (*do)* we had a three year restriction after the sale of the business and we couldn't operate in business in the United Kingdom. So we thought we would maybe try and possibly use our any skills we had outside the United Kingdom. We liked the idea of Belgium because it has a very similar climate not that far away, good access for Europe and an opportunity for the kids to learn languages and perhaps help them with University" (Mr Coll).

He also found:

> "247. I found the Appellants' admissions to Mr Wood in interview about their plans to go to Europe telling in respect of a continuing intention of living abroad. In the first interview of 27 February 2004 which was tape recorded Mrs Coll stated that they originally planned to go to Europe and that it would be better for the children. Mr Coll saw a move outside UK as an opportunity to use their skills which they were prevented from exercising in the UK by a covenant in the Grosvenor sale agreement restricting them from operating a business in the UK for three years. Mrs Coll in the interview on 29 June 2005 stated that they had been considering leaving UK to live in Europe and that they had already sold their house before approaching PwC for tax advice. The Appellants offered no satisfactory explanation for their admissions about Europe other than they were inaccurate, and that they only intended to move to Europe when their children were older. The Appellants were in difficulty in challenging the accuracy of the first interview, as it was a transcript of a tape recorded interview. Mrs Coll's statement in the 29 June 2005 interview bore close similarities to what she said on 27 February 2004.

Clearly these statements were something that the Special Commissioner was entitled to take into account.

37. The question for us is whether no reasonable tribunal could have come to the conclusion in [248]. We acknowledge that the Special Commissioner might have come to the opposite conclusion as contended for by Mr Southern. But he came to the conclusion that on 20 November 1997 Mr Coll had a continuing intention of becoming non-resident for the cumulative reasons set out in [248] (it may be that there was no evidence that Mrs Coll had that intention, but for reasons we have given a finding relating to Mr Coll is sufficient). In our view, that is not a finding that can be upset on the ground that no reasonable tribunal could have come to this conclusion. Indeed, it is precisely what the Appellants told HMRC at the interviews was their intention, and they should not be surprised that they were believed, however sceptical one might be of their evidence.

38. The scheme found by the Special Commissioner is set out in [263]:

> "263. I am satisfied that the above findings constituted a scheme or arrangement within the meaning of section 137 and that the main purpose of the arrangements was to avoid liability to capital gains tax. The fact that the Appellants had not finalised the details of the alternative non-resident routes as at 20 November 1997 did not affect my analysis that section 137 TCGA 1992 applied to the transaction. The critical finding was that they had a substantive intention to become non resident which was demonstrated by their subsequent actions. A requirement that the Appellants had crossed the t's and dotted the i's on the non-residency arrangements as at the date of exchange would defeat the anti-avoidance purpose of section 137. In this respect I adopt Respondents' counsel's construction of taxing statutes based on Lord Nicholls' dictum in *Barclays Mercantile v Mawson* [2005] 1 AC 684 paragraph 36:
>
> > 'The ultimate question is whether the relevant statutory provisions, construed purposively, were intended to apply to the transaction, viewed realistically'."

39. While the sentence: "The critical finding was that they had a substantive intention to become non resident which was demonstrated by their subsequent actions" could have been better expressed as it suggests that hindsight was used to make, rather than support, the finding, it is clear that he meant that subsequent actions supported the finding that Mr Coll always intended to become non-resident. It is also unclear what he meant by "substantive" intention but a finding of intention on its own is sufficient. There was therefore a finding of fact for the purpose of s 137 that the exchange was part of a scheme and that a main purpose of the scheme was avoidance of capital gains tax, and so s 137 applied.

40. Accordingly, we dismiss the appeal. Mr Grodzinski asked for costs at the conclusion of the hearing. We direct the Appellants to pay HMRC's costs of and incidental to the appeal to be assessed on the standard basis.

JOHN F AVERY JONES

JOHN WALTERS

JUDGES OF THE UPPER TRIBUNAL