



Neutral Citation: [2024] UKFTT 00565 (TC)

Case Number: TC09221

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

Alexandra House  
14-22 The Parsonage  
Manchester  
M3 2JA

Appeal references: TC/2020/00458, TC/2020/00459  
TC/2020/01654, TC/2020/01655

*CAPITAL GAINS TAX – whether a disposal by constructive trust – yes – whether the hypothetical HMRC officer would have been aware of the insufficiency of tax at the relevant time – no - whether there was a valid assessment – yes – appeal allowed in respect of the closure notices for 2016-2017 – appeal dismissed in respect of the protective assessment for 2015-2016.*

**Heard on:** 25 January 2024  
**Judgment date:** 24 June 2024

**Before**

**TRIBUNAL JUDGE RICHARD CHAPMAN KC  
MS SUSAN STOTT**

**Between**

**(1) MR ROGER WILLIAM MORGAN  
(2) MRS SUSAN JOAN MORGAN**

**Appellants**

**and**

**THE COMMISSIONERS FOR HIS MAJESTY’S REVENUE AND CUSTOMS**

**Respondents**

**Representation:**

For the Appellant: Mr George Rowell of Counsel.

For the Respondents: Mr Paul Marks, litigator of HM Revenue and Customs’ Solicitor’s Office.

## DECISION

### INTRODUCTION

1. This appeal is against two closure notices and two protective assessments to capital gains tax. It arises from a transfer of property at Cranfield, Rhydygaled, New Brighton (“Cranfield”) from Mr and Mrs Morgan to a company, D&R Property Development Ltd (“the Company”). Mr and Mrs Morgan were at all material times the only directors and shareholders of the Company.

2. In essence, the dispute is as to whether a constructive trust arose over a property such that there was a transfer for capital gains tax purposes in the 2015-2016 tax year or, instead, that the operative transfer was upon the transfer of the legal interest in the 2016-2017 tax year. If there was a constructive trust in 2015-2016, there is a dispute as to whether the assessment is barred by virtue of section 29(5) of the Taxes Management Act 1970 (“TMA 1970”). If there was no constructive trust in 2015-2016, there are disputes as to whether there is a proprietary estoppel which might affect the deemed disposal value and whether enhancement costs should be offset against the deemed disposal value.

### FINDINGS OF FACT

3. It is convenient to set out our findings of fact at the outset. Much of the background was not in dispute and HMRC only challenged part of Mr and Mrs Morgan’s witness evidence. In making our findings of fact, we keep in mind that the burden of proof is upon HMRC to establish the conditions for a discovery assessment pursuant to section 29 of TMA 1970 but is otherwise upon Mr and Mrs Morgan to establish that the closure notice and assessment are incorrect. The standard of proof is that of the balance of probabilities.

4. We heard oral evidence from Mr and Mrs Morgan and from Mr Andrew Hickson (the HMRC officer who made the relevant decisions). We note that Mr Morgan’s written and oral evidence largely consisted of agreement with Mrs Morgan, as she was the person involved in the paperwork. We are satisfied that all the witnesses gave their evidence in a clear, helpful and credible manner and that such evidence was to the best of their recollections. We also read a witness statement from Mr Adcock (Mr and Mrs Morgan’s representative from Mitchell Charlesworth LLP Chartered Accountants (“Mitchell Charlesworth”). Given that Mr Adcock did not become involved until early 2017, Mr Marks understandably and helpfully did not challenge his evidence.

5. Mr and Mrs Morgan purchased Cranfield in 1997 as a family home.

6. In 2011, Mr and Mrs Morgan decided to redevelop Cranfield. In order to do so, the existing house and garden were given its own title (which we will continue to call “Cranfield” in this decision) and the remainder was divided into five plots (which we will call “Plots 1 to 5” in this decision). Plot 1 was sold as open land on 6 January 2012 to a developer for £135,000. The majority of the proceeds of sale of Plot 1 were used to redeem Mr and Mrs Morgan’s mortgage on Cranfield. Houses were subsequently constructed on the remaining plots (being Plots 2 to 5).

7. Mr and Mrs Morgan then took accountancy advice as to the appropriate business structure for the development of Plots 2 to 5. This resulted in Mr and Mrs Morgan incorporating the Company on 4 January 2012 for the purposes of carrying out the development and then selling the completed properties. Although there were initially two other directors and shareholders, they ceased their involvement in January 2013, resigned as directors, and disposed of their shareholdings. Since January 2013, Mr and Mrs Morgan have been the only directors and shareholders of the Company.

8. Mr and Mrs Morgan's intention was for the Company to develop the Plots sequentially, with the sale of each one funding the next. Ownership of each of the Plots would be transferred to the Company for the undeveloped value of the relevant Plot; in Plot 2's case, this was £150,000. Mr and Mrs Morgan would make directors' loans to the Company to pay for the development works on Plot 2. The Company would then carry out the development works for each of the Plots. On completion, the property would be sold to a third-party purchaser and the net profits after tax would be used to pay for the works to the next Plot. Following the development and sale of all the Plots, the Company would repay Mr and Mrs Morgan's directors' loans and then any other profits would be available for distribution to Mr and Mrs Morgan as shareholders.

9. Following an inheritance from Mr Morgan's late father, Mr and Mrs Morgan were in a position to fund the Company at the end of 2012 and beginning of 2013. The Company opened a bank account in May 2013, entered into a developer indemnity agreement with AmTrust International Underwriters Ltd (treating the Company as the developer), and registered with Rightmove to enable the Company to market the properties in due course. The Company also registered for VAT, which was granted with effect from October 2013. The Company's VAT registration application dated 25 May 2013 (which was completed by Mrs Morgan) included the question, "Who is (or will be) the beneficial owner of the land or property", to which the Company was given as the answer.

10. The building work on Plot 2 began in May 2013. Mrs Morgan, who is a bookkeeper by profession, kept detailed records of the Company's expenditure on works and the necessary adjustments to the directors' loan account where the funding came from Mr and Mrs Morgan.

11. Mr and Mrs Morgan's evidence was that, once the Company had started work on Plot 2, they regarded it as being, to use her words, "in substance and reality" the owner of the Plot in accordance with the overall plan. They were aware that the Company was to be treated as a separate legal person and that it was carrying out the works at its own expense and at its own risk. They did not contemplate the possibility of causing the Company to undertake the works but keep the property in their own ownership or sell it to a purchaser in their own names. We accept that this was Mr and Mrs Morgan's understanding and intention, both in their personal capacities and in their capacities as directors of the Company. This is because they gave their evidence in a consistent and credible manner and it is consistent with such documentation as there is available.

12. The works to Plot 2 were completed in about March 2014. The total costs of the construction of Plot 2 were £151,202, which Mr and Mrs Morgan had provided funds to the Company to pay for, which they treated as loans from Mr and Mrs Morgan to the Company. Mrs Morgan stated in her witness statement (which was unchallenged in this regard) that the Company engaged external contractors, paid them with money advanced by Mr and Mrs Morgan through their directors' loan account, and kept detailed Sage records showing the transactions on the directors' loan account and the Company's expenditure on each plot. We therefore find that Mr and Mrs Morgan considered their payment of the Company's expenditure to be loans to the Company at the time they were made.

13. Mr and Mrs Morgan appreciated that the legal title to Plot 2 still needed to be transferred to the Company in order for it to sell the completed property on the open market. Mr and Mrs Morgan instructed a solicitor to do this, which was paid for by the Company.

14. Upon the advice of the Company's solicitors (which was not provided until January 2014, despite them first being consulted in July 2013), the Company and Mr and Mrs Morgan were advised that a board resolution should be passed authorising the transfer to the Company before the transfer was completed. The solicitors' letter explained that this was

pursuant to section 190 of the Companies Act 2006, being a substantial property transaction between the Company and its directors. The solicitors provided draft board minutes dated, which Mr and Mrs Morgan approved and signed on 30 April 2014 (albeit wrongly dated 30 April 2012). The board minutes included the following:

“4. Business of the meeting

The chairperson reported that the business of the meeting was to:

4.1. Convene a general Meeting of the Company to consider and, if thought fit, pass an ordinary resolution to:

4.1.1. approve a substantial property transaction whereby four plots of land Plots 2-5 at land adjoining Cranfield Rhydygaled New Brighton Mold Flintshire CH7 6QG (each valued at £150,000) will be transferred from the directors to the Company;

4.1.2. it is intended that the plot of land known as Plot 2 will be transferred immediately as per clause 4.1.1 above and that the remaining plots 3, 4 and 5 will be transferred in the future at dates to be decided; and

4.1.3. approve a loan from the directors to the Company of £150,000 per plot to fund the build and development of the houses to be built on the plots.

...”

15. The board minutes then record that the board meeting was adjourned so that a general meeting of the shareholders (also being Mr and Mrs Morgan) could be held. The board meeting then records that the resolutions had been approved by the shareholders as follows:

“7. Resolutions

7.1. It was resolved that: the substantial property transaction had been approved by the members and was considered in the best interest of the Company by the directors; and

7.2. It was resolved that: the loan from the directors to the Company to fund the build and development of houses on the plots referred to herein was in the best interests of the Company.”

16. During cross-examination, Mr Marks put it to Mrs Morgan that the board minutes did not indicate that an agreement had already been made. Mrs Morgan’s response was that, as directors, she and Mr Morgan had already discussed it all but that the board minutes were signed because the Company’s solicitors had told her and Mr Morgan that it was necessary to comply with company law. Mr Marks said that it was HMRC’s position that there was no previous meeting at which Mr and Mrs Morgan had agreed on behalf of the Company that Plot 2 would belong to the Company before the board meeting or transfer. Mrs Morgan disagreed and said that she and Mr Morgan were always discussing with each other what they were doing and how it was to happen. We take it from her disagreement with Mr Marks’ question that her and Mr Morgan’s discussions included that Plot 2 would belong to the Company before the board meeting or transfer. She said that her understanding was that Plot 2 belonged to the Company but she and Mr Morgan knew that they had to provide legal documents to legally transfer it at the Land Registry. Mrs Morgan accepted that there were no minutes of any such meetings but said that she and her husband would sit at home discussing all matters. We note that “all matters” was not qualified or limited and so we take “all

matters” to denote all matters relating to the development as set out above and in her witness statement. We accept Mrs Morgan’s oral evidence as credible.

17. A TP1 transfer was provided by the Company’s solicitors and executed by Mr and Mrs Morgan and the Company, transferring Plot 2 to the Company for the sum of £150,000. The edition of the Land Register dated 19 May 2014 for the freehold title to Plot 2 records that, “the price stated to have been paid on 30 April 2014 was £150,000.” This was paid for by the Company by way of a credit of £150,000 to Mr and Mrs Morgan’s directors’ loan account on 8 May 2014. Mrs Morgan’s evidence was that the £150,000 credit took place then rather than earlier because she assumed that it was not possible for this to be put into the accounts until what she called, “the legal paperwork” had been completed. The Company then marketed Plot 2 and obtained building regulation certification. By a contract dated 16 April 2015, the Company sold Plot 2 to unconnected third parties for £315,000.

18. The development of Plot 3 commenced in July 2015. The house was fully constructed by February 2016 and the remaining landscaping and ancillary works were completed by May or June 2016. Building regulation certification was obtained on 21 June 2016. The total costs as shown on a spreadsheet prepared by Mrs Morgan were £138,019, which were paid for by the by way of loans to the Company by Mr and Mrs Morgan (the profit from Plot 2 effectively being utilised to repay part of the existing directors loans). The expenditure, loans and reconciliation of the directors’ loan accounts in respect of Plot 3 was the same as in respect of Plot 2. The credit was made in July 2016.

19. The completed Plot 3 and the as yet undeveloped Plot 4 and Plot 5 were transferred to the Company in July 2016. The consideration for the transfer was stated to be £360,000. This was paid by way of an entry in the directors’ loan account on 1 July 2016. Plot 3 was treated as having a value of £120,000. Mr and Mrs Morgan said that they did not see any urgency in registering the transfer of Plot 3 to the Company because the intention for the Company to own Plot 3 had already been documented in the April 2014 board minutes. However, they considered, again to use Mrs Morgan’s words, that “in substance and in reality” the Company was the owner of Plot 3 once it started carrying out the development works and, again, did not see themselves as having any entitlement to take any personal benefit without transferring the legal title. We accept Mr and Mrs Morgan’s evidence as to their understanding, intention and approach as it was credible and consistent. In any event, HMRC fairly did not challenge that this was Mr and Mrs Morgan’s understanding, although of course made submissions as to the dispute as to the effect of this.

20. The Company engaged estate agents in November 2015 and installed utility connections in the Company’s name. Plot 3 was sold on the open market for £345,000 on 14 July 2016.

21. Mrs Morgan’s evidence (which we accept) was that the position as to ownership in respect of Plot 3 was the same as for Plot 2 and involved the same discussions as set out in paragraph 16 above.

22. Plots 4 and 5 were subsequently developed and sold by the Company. The parties agree that the details of these developments and sales are not relevant to this decision as the legal title had already been transferred to the Company.

23. HMRC, through Mr Hickson, began corresponding with Mr and Mrs Morgan’s advisors about the tax ramifications of the disposals of the Plots in January 2017. In the course of correspondence between the parties, Mr and Mrs Morgan’s advisors provided a declaration of trust to HMRC which was executed by Mr and Mrs Morgan on 30 July 2018 and included the following:

“Declaration of trust in connection with plots 2 and 3, being land adjoining Cranfield, Rhydygaled, New Brighton, Mold, Flintshire, CH7 6QG.

We, Roger William Morgan and Susan Jane Morgan, wish to record that we have held the property described as Plots 2 and 3 on trust for D & R Property Development Limited absolutely.

Under the terms of this declaration of trust it is acknowledged that D & R Property Limited attained a beneficial and equitable interest in plots 2 and 3 on 1 January 2012 and 1 July 2015 respectively.

The purpose of this declaration also formally records the authority that was provided to D & R Property Development Limited, under its beneficial interest, to enter the land and commence construction work. There were no conditions attached to this declaration and, by virtue of the beneficial interest granted to it, D & R Property Development Limited was henceforth entitled to the capital of the property and any income derived from it.

The transfer of beneficial interest was a prerequisite for the development of the site and the subsequent formal transfer of legal title.”

24. Further relevant correspondence is set out below in the context of our consideration of the discovery assessment.

25. Mr and Mrs Morgan did not include any charges to Capital Gains Tax in respect of the above transfers until an amendment to the return for the 2016-2017 tax year (which was submitted by their accountants on 11 December 2018), providing for a capital gains disposal of £60,000 in respect of each of them relating to the disposal of Plot 3.

26. On 18 December 2018, Mr Hickson advised Mr and Mrs Morgan’s accountants that he had opened an enquiry into the 2016-17 tax return. On 5 September 2019, Mr Hickson issued a closure notice in respect of the amended 2016-17 tax return and issued an assessment in the sum of £31,500 for each of Mr and Mrs Morgan being, on HMRC’s case, the additional capital gains tax which was due. This was the first occasion upon which any charges to capital gains tax had been included for any of the Plots. Mr and Mrs Morgan’s original self-assessment returns for the 2016-17 tax year had been submitted on 21 December 2017. We note at this stage that Mr and Mrs Morgan submitted their self-assessment returns for 2015-16 on 11 January 2017.

27. On 27 March 2020, Mr Hickson’s successor (Ms Lynne Gallagher-Jenkins) issued protective discovery assessments for the 2015-16 tax year in the sum of £40,191.60 for each of Mr and Mrs Morgan. These assessments were calculated upon the basis of Plot 3 being fully developed but were reduced following reviews to the sum of £8,837.20 for each of Mr and Mrs Morgan based upon Plot 3’s undeveloped value.

28. It is common ground that each of these closure notices and discovery assessments only relate to Plot 3.

#### **THE ISSUES**

29. The appeals in respect of the closure notices and assessments are dated 24 January 2020. The appeals in respect of the discovery assessments are dated 1 May 2020. The grounds of appeal were amended on 30 April 2020, since which the matters in dispute have narrowed. In essence, the issues which are still in dispute can be summarised as follows:

- (1) Whether there was a constructive trust which transferred the entirety of the beneficial interest in Plot 3 to the Company in the 2015-2016 tax year (“the Constructive Trust Issue”).

(2) If there was such a constructive trust, whether (for the purposes of section 29(5) of the TMA 1970) an officer could not have been reasonably expected, on the basis of the information available to him before 31 January 2018, to be aware that any chargeable gain which ought to have been assessed to chargeable gains tax has not been assessed (“the Discovery Issue”).

(3) If there was not such a constructive trust, whether a proprietary estoppel had arisen, and, if so, whether such an estoppel would limit the disposal value of the land to that of the undeveloped value (“the Proprietary Estoppel Issue”).

(4) If there was not such a constructive trust, whether expenses incurred by the Company should be offset against the deemed disposal value under section 38(1)(b) of the Taxation of Chargeable Gains Act 1992 (“TGCA 1992”) (“the Allowable Expenses Issue”).

30. HMRC helpfully accept that if a constructive trust is found to have arisen in the 2015-2016 tax year, this will be treated as a disposal and all relevant capital gains tax is due in the 2015-2016 tax year rather than the 2016-2017 tax year. The parties agree that this would have to be a disposal of the entire beneficial interest in Plot 3. Mr Rowell noted in his skeleton argument that HMRC appeared to be taking issue with the Tribunal’s jurisdiction to reduce to nil the capital gain declared on the amendment to Mr and Mrs Morgan’s 2016-2017 tax returns. However, we take it from Mr Marks’ skeleton argument (and from the absence of oral submissions from either party on the point) that the self-assessment in the 2016-2017 tax year would be adjusted accordingly. In the circumstances, we restrict our findings to the issues set out in paragraph 29 above and (if relevant) direct that, if the parties cannot reach agreement as to the ramifications of those findings, the parties shall refer the matter back to the Tribunal (reserved to us) for further directions.

#### **THE CONSTRUCTIVE TRUST ISSUE**

##### **The legal principles**

31. There was common ground as to the general principles involved in the creation of a constructive trust.

32. A constructive trust based upon the common intention of the parties will arise where there is a common intention that a party will have a beneficial interest in a property (or, where that party already has a beneficial interest, an enlarged beneficial interest) and that that party has acted to their detriment in reliance upon that common intention such that it would be inequitable for the other party to deny the interest. The common intention can be express or inferred. Express common intention requires express discussions between the parties, even if these are imperfectly remembered or are imprecise in their terms. Common intention can also be inferred from the conduct of the parties in appropriate circumstances. These broad principles emerge from the following authorities.

33. *Jones v Kernott* [2012] 1 AC 776 related to a family home purchased in joint names. Lord Walker and Lady Hale SCJJ summarised the principles as follows at [51]:

“[51] In summary, therefore, the following are the principles applicable in a case such as this, where a family home is bought in the joint names of a cohabiting couple who are both responsible for any mortgage, but without any express declaration of their beneficial interests.

(1) The starting point is that equity follows the law and they are joint tenants both in law and in equity.

(2) That presumption can be displaced by showing (a) that the parties had a different common intention at the time when they acquired the home, or (b)

that they later formed the common intention that their respective shares would change.

(3) Their common intention is to be deduced objectively from their conduct: ‘the relevant intention of each party is the intention which was reasonably understood by the other party to be manifested by that party’s words or conduct notwithstanding that he did not consciously formulate that intention in his own mind or even acted with some different intention which he did not communicate to the other party’ (Lord Diplock in *Gissing v Gissing* [1970] 2 All ER 780 at 790, [1971] AC 886 at 906). Examples of the sort of evidence which might be relevant to drawing such inferences are given in *Stack v Dowden* [2007] 2 All ER 929 at [69], [2007] 2 AC 432.

(4) In those cases where it is clear either (a) that the parties did not intend joint tenancy at the outset, or (b) had changed their original intention, but it is not possible to ascertain by direct evidence or by inference what their actual intention was as to the shares in which they would own the property, ‘the answer is that each is entitled to that share which the court considers fair having regard to the whole course of dealing between them in relation to the property’: Chadwick LJ in *Oxley v Hiscock* [2004] 3 All ER 703 at [69], [2005] Fam 211. In our judgment, ‘the whole course of dealing ... in relation to the property’ should be given a broad meaning, enabling a similar range of factors to be taken into account as may be relevant to ascertaining the parties’ actual intentions.

(5) Each case will turn on its own facts. Financial contributions are relevant but there are many other factors which may enable the court to decide what shares were either intended (as in case (3)) or fair (as in case (4)).”

34. It is of note that in a joint names case there is no need to establish the acquisition of a beneficial interest and (subject to any agreements to enlarge the share) the issue is that of the quantification of the shares. However, paragraphs [51](1) to (3) are equally applicable where property is registered in one party’s sole name and the acquisition of a beneficial interest is in issue. Lord Walker and Lady Hale SCJJ stated as follows in *Jones v Kernott, supra*, at [52]:

[52] This case is not concerned with a family home which is put into the name of one party only. The starting point is different. The first issue is whether it was intended that the other party have any beneficial interest in the property at all. If he does, the second issue is what that interest is. There is no presumption of joint beneficial ownership. But their common intention has once again to be deduced objectively from their conduct. If the evidence shows a common intention to share beneficial ownership but does not show what shares were intended, the court will have to proceed as at [51](4) and (5), above.”

35. In *Gissing v Gissing* [1971] AC 886 Lord Diplock stated as follows at 906 in respect of the nature of express agreements, again in the context of a family home):

“But parties to a transaction in connection with the acquisition of land may well have formed a common intention that the beneficial interest in the land shall be vested in them jointly without having used express words to communicate this intention to one another; or their recollections of the words used may be imperfect or conflicting by the time any dispute arises. In such a case — a common one where the parties are spouses whose marriage has broken down — it may be possible to infer their common intention from their conduct.

As in so many branches of English law in which legal rights and obligations depend upon the intentions of the parties to a transaction, the relevant



intention of each party is the intention which was reasonably understood by the other party to be manifested by that party's words or conduct notwithstanding that he did not consciously formulate that intention in his own mind or even acted with some different intention which he did not communicate to the other party. On the other hand, he is not bound by any inference which the other party draws as to his intention unless that inference is one which can reasonably be drawn from his words or conduct. It is in this sense that in the branch of English law relating to constructive, implied or resulting trusts effect is given to the inferences as to the intentions of parties to a transaction which a reasonable man would draw from their words or conduct and not to any subjective intention or absence of intention which was not made manifest at the time of the transaction itself. It is for the court to determine what those inferences are.”

36. The need for detrimental reliance was explained as follows in *Grant v Edwards* [1986] Ch 638 *per* Mustill LJ at 651-652 (see also *Hudson v Hathway* [2023] KB 345):

“...

(2) The question whether one party to the relationship acquires rights to property the legal title to which is vested in the other party must be answered in terms of the existing law of trusts. There are no special doctrines of equity, applicable in this field alone.

(3) In a case such as the present the inquiry must proceed in two stages. First, by considering whether something happened between the parties in the nature of bargain, promise or tacit common intention, at the time of the acquisition. Second, if the answer is "Yes," by asking whether the claimant subsequently conducted herself in a manner which was (a) detrimental to herself, and (b) referable to whatever happened on acquisition. (I use the expression "on acquisition" for simplicity. In fact, the event happening between the parties which, if followed by the relevant type of conduct on the part of the claimant, can lead to the creation of an interest in the claimant, may itself occur after acquisition. The beneficial interests may change in the course of the relationship.)

...”

37. Common intention constructive trusts can also rise in a commercial context. In *Yaxley v Gotts* [2000] Ch 162, Robert Walker LJ stated as follows at 176:

“At a high level of generality, there is much common ground between the doctrines of proprietary estoppel and the constructive trust, just as there is between proprietary estoppel and part performance. All are concerned with equity’s intervention to provide relief against unconscionable conduct, whether as between neighbouring landowners, or vendor and purchaser, or relatives who make informal arrangements for sharing a home, or a fiduciary and the beneficiary or client to whom he owes a fiduciary obligation. The overlap between estoppel and part performance has been thoroughly examined in the defendants’ written submissions, with a survey of authorities from *Gregory v Mighell* (1811) 18 Ves 328, 34 ER 341 to *Take Harvest Ltd v Liu* [1993] 2 All ER 459, [1993] AC 552.

38. In a commercial context, greater emphasis is to be given to whether there is an expectation by the parties as to being legally bound to each other. In *Herbert v Doyle* [2010] EWCA Civ 1095 (“*Herbert v Doyle*”), Arden LJ stated as follows at [56] to [59], analysing the speeches of Lord Scott and Lord Walker in *Yeoman’s Row Management Ltd v Cobbe* [2008] 1 WLR 1752:

[56] The distinction between proprietary estoppel and constructive trust must therefore be kept in mind, but it appears from *Cobbe* that, in some situations at least, both doctrines have a requirement for completeness of agreement with respect to an interest in property. Certainty as to that interest in those situations is a common component. A relevant situation would be where the transaction is commercial in nature. In my judgment, the transaction in the present case should be treated as commercial in nature since the parties were dealing at arm's length, and they had ready access to the services of lawyers had they wished to use them.

[57] In my judgment, there is a common thread running through the speeches of Lord Scott and Lord Walker. Applying what Lord Walker said in relation to proprietary estoppel also to constructive trust, that common thread is that, if the parties intend to make a formal agreement setting out the terms on which one or more of the parties is to acquire an interest in property, or, if further terms for that acquisition remain to be agreed between them so that the interest in property is not clearly identified, or if the parties did not expect their agreement to be immediately binding, neither party can rely on constructive trust as a means of enforcing their original agreement. In other words, at least in those situations, if their agreement (which does not comply with s 2(1)) is incomplete, they cannot utilise the doctrine of proprietary estoppel or the doctrine of constructive trust to make their agreement binding on the other party by virtue of s 2(5) of the 1989 Act.

[58] This interpretation of *Cobbe* is consistent with the observations of Lord Neuberger of Abbotsbury in *Thorner v Major* [2009] UKHL 18, 12 ITEL 62, [2009] 1 WLR 776, which was decided after judgment (3). In that case, Lord Neuberger observed:

[93] In the context of a case such as *Cobbe*, it is readily understandable why Lord Scott considered the question of certainty to be so significant. The parties had intentionally not entered into any legally binding arrangement while Mr *Cobbe* sought to obtain planning permission: they had left matters on a speculative basis, each knowing full well that neither was legally bound: see [27]. There was not even an agreement to agree (which would have been unenforceable), but, as Lord Scott pointed out, merely an expectation that there would be negotiations. Moreover, as he said in [18], an "expectation dependent upon the conclusion of a successful negotiation is not an expectation of an interest having [sufficient] certainty".

[59] The relevant issues in this case are whether there was only an agreement to enter into a further formal agreement or whether there were matters remaining to be agreed which meant that the interests in property to be acquired were not defined with sufficient clarity or whether the parties did not expect their agreement to be legally binding. There is no need to consider in this case whether any outstanding matter was only of a trivial nature as we are not concerned with any such matter."

39. We were also referred to, and have considered, the following authorities: *Austin v Keele* (1987) 72 ALR 579, *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] AC 669, *Yeoman's Row Management Ltd v Cobbe* [2008] 1 WLR 1752 ("*Cobbe*"), *Ghazaani v Rowshan* [2015] EWHC 1922 (Ch), *Ely v Robson* [2016] EWCA Civ 774, *Stack v Dowden* [2007] AC 432 and *Kavanagh v HMRC* [2022] UKFTT 173 (TC). However, in the context of the present case, these authorities did not add to the principles which we have set out above and so we do not analyse them separately within this decision.

## Submissions

40. Both parties provided long, detailed, and helpful skeleton arguments which we have carefully considered. The key areas of their submissions are set out below.

41. Mr Rowell submitted that a constructive trust could be made out. His submissions can be summarised as follows:

(1) The common intention was made out on the evidence, with Mr and Mrs Morgan treating the Company as the beneficial owner of Plot 2 as soon as work commenced at the Company's cost and that the same procedure and common intention followed as regards Plot 3.

(2) The Company and Mr and Mrs Morgan intended that the Company would become the owner of Plot 2 and then Plot 3 as the *quid pro quo* for undertaking the development work and that they regarded themselves as legally bound by this intention once the work commenced.

(3) In turn, the Company relied upon this common intention to its detriment by accepting the expense of the works as its liability, paid for through reconciliations of the directors' loan accounts.

42. Mr Marks submitted that a constructive trust could not be made out. His submissions can be summarised as follows:

(1) There is no evidence to demonstrate a common intention. Indeed, such a purported common intention is negated by the company minute of 30 April 2014 making no mention of it and accepting that the transfer would be in the future at dates to be decided. Mr Marks noted that the Company did not declare a disposition in 2015-2016, which is indicative of Mr and Mrs Morgan's understanding that there had no such disposition. This was a commercial situation where legal advice had been taken as to the legal steps required to be taken to sell the Plots to the Company and all the terms were not agreed until the legal title was transferred, including the price to be paid by the Company and the date upon which the Plot was to be transferred.

(2) The Company cannot think or act on its own and, in the absence of a written record, there can have been no common intention between the Company and Mr and Mrs Morgan and certainly no express discussions; at best, it was an internalised view of the position.

(3) Similarly, no inference can be made as there is no evidence of any words or conduct with regard to their dealings with the Company to take that inference from. If anything, the evidence of their words and conduct was consistent with an intention to sell the land to the Company and not with the Company becoming the owner of the land by commencing building on it.

(4) Mr Marks submitted that the directors' loan account provided evidence that the beneficial interest in Plot 2 and Plot 3 had not been transferred to the Company ahead of the transfers of their respective legal title. He notes that the directors' loan accounts were not credited with the purchase prices until the time of the transfers of the legal title and, as regards Plot 3, was in the sum of £120,000 rather than the £150,000 envisaged in the board minute.

(5) Mr Marks also submitted that a constructive trust could not arise over the entirety of the beneficial interest in Plot 3 because the Company was a vehicle to develop the properties, Mr and Mrs Morgan were the sole shareholders of the Company, and so they would be the ultimate beneficiaries of the net profits despite the legal structure of

the transactions which had taken place. This is effectively what happened by the proceeds of sale of Plot 2 being paid into the directors' loan account and by £309,000 of the proceeds of Plot 3 ultimately being transferred out of the Company.

(6) Mr Marks took issue with the Company's ability to enter into an agreement for the purposes of a common intention as a matter of company law. He relied upon section 190(1) of the Companies Act 2006 to the effect that a company cannot acquire a substantial non-cash asset from a director or connected person unless the arrangement has been approved by a members' resolution or is conditional on such approval being obtained. The failure to comply with this reinforces that no agreement was made prior to the transfers of the legal title. Although it is possible for the unanimous agreement of shareholders to allow for this pursuant to the *Duomatic* principle, there is no evidence of such an agreement. The internalised and unexpressed decision of the shareholders is insufficient. Mr Marks particularly relied upon *Rolfe v Rolfe* [2010] EWHC 244 (Ch) *per* Newey J at [35], [36] and [41]:

“[35] As I have already mentioned, Mr Griffiths founds his argument that Wayne was or is to be treated as having been appointed as a director by TulseSense's shareholders, under article 94 of Table A, on the *Duomatic* principle.

[36] That principle takes its name from the decision of Buckley J in *Re Duomatic Ltd* [1969] 2 Ch 365. In that case, Buckley J said (at 373):

“[W]here it can be shown that all shareholders who have a right to attend and vote at a general meeting of the company assent to some matter which a general meeting of the company could carry into effect, that assent is as binding as a resolution in general meeting would be.”

More recently, Neuberger J summarised the principle in the following terms in *EIC Services Ltd v Phipps* [2004] 2 BCLC 589 1 (in paragraph 122):

“The essence of the *Duomatic* principle, as I see it, is that, where the articles of a company require a course to be approved by a group of shareholders at a general meeting, that requirement can be avoided if all members of the group, being aware of the relevant facts, either give their approval to that course, or so conduct themselves as to make it inequitable for them to deny that they have given their approval. Whether the approval is given in advance or after the event, whether it is characterised as agreement, ratification, waiver, or estoppel, and whether members of the group give their consent in different ways at different times, does not matter.”

[41] Secondly, I do not accept that a shareholder's mere internal decision can of itself constitute assent for *Duomatic* purposes. I was not referred to any authority in which it had been decided that a mere internal decision would suffice. Further, for a mere internal decision, unaccompanied by outward manifestation or acquiescence, to be enough would, as it seems to me, give rise to unacceptable uncertainty and, potentially, provide opportunities for abuse. A company may change hands or enter into an insolvency procedure; in either event, it is desirable that past decisions should be objectively verifiable. In my judgment, there must be material from which an observer could discern or (as in the case of acquiescence) infer assent. The law applies an objective test in other contexts: for example, when determining whether a contract has been formed. An objective approach must, I think, also have a role with the *Duomatic* principle.”

(7) Mr Marks also disputed that the Company relied upon any common intention to its detriment. Again, he submitted that as the Company cannot think for itself it cannot have relied upon any reasonable belief that it was acquiring a beneficial interest in land. In any event, if the Company received the beneficial interest in advance of the works being completed it received an advantage rather than incurred a detriment. Further, it would not have been unconscionable for Mr and Mrs Morgan not to transfer the properties, as they could instead have elected to write off their loans in return for being reimbursed the costs of the development from the costs of sale.

43. Mr Rowell's response to the company law argument was that the board meeting notes complied with section 190 of the Companies Act 2006, and, pursuant to section 195 the agreement would be voidable not void *ab initio*.

### **Discussion**

44. We find that the Company acquired the whole of the beneficial interest in Plot 3 upon the commencement of works and so during the 2015-16 tax year rather than awaiting the transfer of the legal title.

45. There was an express common intention that the Company would acquire such a beneficial interest. This is for the following reasons.

46. First, we accept Mr Marks' point that a company acts through its directors, employees, servants and agents. In the Company's case, it acted through Mr and Mrs Morgan. However, this does not mean that Mr and Mrs Morgan can only interact with the Company through written decisions. The real question is as to the capacity in which Mr and Mrs Morgan are acting at any point in time; to the extent that they were acting in their capacity as directors of the Company then their conduct can be imputed to the Company.

47. Secondly, in order for there to be an express common intention, it is not enough for Mr and Mrs Morgan to have an internalised intention as to the Company's acquisition of the beneficial interest. Regardless of the capacity that they held the common intention, if it is unexpressed then it cannot be an express common intention. In a similar manner to Newey J's comments in *Rolfe v Rolfe*, *supra*, at [41] in the context of the *Duomatic* principle, a mere internal decision is not enough to establish an express common intention.

48. Thirdly, as set out above in our findings of fact, Mr and Mrs Morgan did have express discussions about the Company having a beneficial interest in the Plots ahead of their legal transfers as soon as the Company began the development works. As set out in paragraph 16 above, Mr and Mrs Morgan discussed all matters including their understanding that Plot 2 belonged to the Company prior to the board meeting and the transfer. Plot 3 was approached in the same way and was part of the same overall plan and express common intention. As such, Mr and Mrs Morgan's intention was articulated, vocalised and so was express, rather than being an internal decision by either or both of them.

49. Fourthly, we find that it is artificial to separate out Mr and Mrs Morgan's personal capacities and their capacities as directors of the Company in the course of their discussions as they were effectively acting in both sets of capacities during their discussions. This also means that, although this was technically a commercial arrangement in the sense that one of the parties was the Company, it was not at arms length. It follows that a greater level of informality is to be expected than in an ordinary commercial negotiation or arrangement.

50. Fifthly, the fact that Mr and Mrs Morgan were shareholders of the Company does not mean that the corporate structure is to be ignored. It is right that they effectively received the proceeds of sale of the Plots but this was by virtue of the operation of the directors loan

account. It has not been suggested by HMRC that the Company was a sham or that the legal transfers were artificial.

51. Sixthly, the company law arguments do not override or negate the express common intention. On the face of it, the minutes of 30 April 2014 did serve to authorise the transfer of the Plots to the Company, which included a minute of Mr and Mrs Morgan's agreement as shareholders. Although this did not refer to the transfer of the beneficial interest, it anticipated the future transfer of the Plots as a whole. Even if this were not the case, Mr and Mrs Morgan agreed to the acquisition of the beneficial interest in Plot 3 in the manner set out above by reference to the common intention for the constructive trust. As such, the *Duomatic* principle applies in that they are the only shareholders of the Company and so informally authorised the transaction. Whilst we agree that, on the basis of *Rolfe v Rolfe*, that cannot simply be an internalised decision, for the reasons set out above we find that there were express discussions between Mr and Mrs Morgan about their understanding and intentions. In any event, as Mr Rowell rightly notes, by virtue of section 195 of the Companies Act 2006, the transaction would be voidable rather than void and, far from the Company voiding the transaction, the transfer of the legal interest was also subsequently completed.

52. Seventhly, bringing all the above matters together, the obstacles to a constructive trust in a commercial context highlighted in *Cobbe* are not present. Although it was recognised that a formal agreement was required in order for the legal transfer to take place, this related to the legal interest and does not detract from the fact that a complete agreement (in the form of the understanding that the Company and Mr and Mrs Morgan's plan as set out above was to be followed) had been reached rather than merely an agreement in principle. In turn, there were no additional terms for the acquisition which remained to be agreed so that the Company's interest in the Plots (and, importantly, Plot 3 in particular) was clearly defined. Further, Mr and Mrs Morgan in their personal capacities and the Company (through Mr and Mrs Morgan in their position as directors) expected their agreement to be, and treated it as being, immediately binding.

53. We note that there are similarities between the present case and *Herbert v Doyle*. As set out above, the agreement was *Cobbe* compliant (to adopt Arden LJ's phrase in *Herbert v Doyle*). Further, the fact that the purchase price had not actually been paid did not prevent a constructive trust from coming into existence. In *Herbert v Doyle* the first instance Judge had made the relief conditional upon the payment of the purchase price (see Arden LJ at [30]). Finally, the fact that the price for Plot 3 changed from £150,000 to £120,000 does not mean that there was not a complete and concluded earlier agreement as it just means that there was a variation to that agreement (indeed, the variation to the plan was also that Plots 3, 4 and 5 were transferred together). In *Herbert v Doyle*, later variations did not undermine the finding of an earlier complete agreement (see Arden LJ at [73]).

54. It follows that there is no need for Mr and Mrs Morgan to establish that there was an inferred common intention that the Company would acquire a beneficial interest in Plot 3. For completeness, we note that if there had not been an express common intention, it is difficult to see that an inferred common intention would be possible. The parties' conduct alone was that of the carrying out of works, the payment of works, and (by the board minute) an intention to transfer Plot 3 in due course rather than immediately. As set out above, it is the express discussions which give rise to the express common intention.

55. We find that the Company relied upon this common intention to its detriment. This is because the Company incurred expenditure in developing Plot 3 as set out above in the sum of £138,019. The fact that this was paid by Mr and Mrs Morgan on the Company's behalf and by lending it to the Company through their directors' loan accounts does not prevent this

from being detrimental reliance by the Company; crucially, the Company incurred a liability to Mr and Mrs Morgan in the same sum.

56. We note that, as set out in paragraph 53 above, the fact that the Company did not account for the purchase price until after the legal transfer does not preclude the existence of the constructive trust. Given that this was still outstanding at the time of trial in *Herbert v Doyle*, it follows that it could still be paid at the time of the legal transfer in the present case without preventing the earlier acquisition of the beneficial interest. Of course, the position may well be different if there had been no other detrimental reliance but, as set out above, there was such reliance.

57. It follows that Mr and Mrs Morgan succeed on the Constructive Trust Issue.

#### **THE DISCOVERY ISSUE**

##### **The legal principles**

58. The legal principles were not in dispute.

59. The relevant sub-sections of section 29 of the TMA 1970 provide as follows:

“29(1) If an officer of the Board or the Board discover, as regards any person (the taxpayer) and a year of assessment –

(a) that any income which ought to have been assessed to income tax, or chargeable gains which ought to have been assessed to capital gains tax, have not been assessed, or

(b) that an assessment to tax is or has become insufficient, or

(c) that any relief which has been given is or has become excessive,

the officer or, as the case may be, the Board may, subject to subsections (2) and (3) below, make an assessment in the amount, or the further amount, which ought in his or their opinion to be charged in order to make good to the Crown the loss of tax.

...

(3) Where the taxpayer has made and delivered a return under section 8 or 8A of this Act in respect of the relevant year of assessment, he shall not be assessed under subsection (1) above–

(a) in respect of the year of assessment mentioned in that subsection; and

(b) in the same capacity as that in which he made and delivered the return,

unless one of the two conditions mentioned below is fulfilled.

(4) The first condition is that the situation mentioned in subsection (1) above was brought about carelessly or deliberately by the taxpayer or a person acting on his behalf.

(5) The second condition is that at the time when an officer of the Board –

(a) ceased to be entitled to give notice of his intention to enquire into the taxpayer’s return under section 8 or 8A of this Act in respect of the relevant year of assessment; or

(b) in a case where a notice of enquiry into the return was given –

(i) issued a partial closure notice as regards a matter to which the situation mentioned in subsection (1) above relates, or

(ii) if no such partial closure notice was issued, issued a final closure notice,

the officer could not have been reasonably expected, on the basis of the information made available to him before that time, to be aware of the situation mentioned in subsection (1) above.

(6) For the purposes of subsection (5) above, information is made available to an officer of the Board if –

(a) it is contained in the taxpayer’s return under section 8 or 8A of this Act in respect of the relevant year of assessment (the return), or in any accounts, statements or documents accompanying the return;

(b) it is contained in any claim made as regards the relevant year of assessment by the taxpayer acting in the same capacity as that in which he made the return, or in any accounts, statements or documents accompanying any such claim;

(c) it is contained in any documents, accounts or particulars which, for the purposes of any enquiries into the return or any such claim by an officer of the Board, are produced or furnished by the taxpayer to the officer; or

(d) it is information the existence of which, and the relevance of which as regards the situation mentioned in subsection (1) above –

(i) could reasonably be expected to be inferred by an officer of the Board from information falling within paragraphs (a) to (c) above; or

(ii) are notified in writing by the taxpayer to an officer of the Board.

(7) In subsection (6) above –

(a) any reference to the taxpayer’s return under section 8 or 8A of this Act in respect of the relevant year of assessment includes –

(i) a reference to any return of his under that section for either of the two immediately preceding years of assessment;

(ii) where the return is under section 8 and the taxpayer carries on a trade, profession or business in partnership, a reference to any partnership return with respect to the partnership for the relevant year of assessment or either of those periods; and

(b) any reference in paragraphs (b) to (d) to the taxpayer includes a reference to a person acting on his behalf.

...”

60. The applicable principles were summarised as follows by the Upper Tribunal in *Beagles v HMRC* [2018] UKUT 380 (TCC) (Birss J and Judge Ashley Greenbank) (“*Beagles*”) (with reference to Patten LJ’s judgment in *Sanderson v HMRC* [2016] EWCA Civ 19, [2016] STC 638 and Moses LJ’s judgment in *HMRC v Lansdowne Partners Ltd Partnership* [2011] EWCA Civ 1578, [2012] STC 544) as follows at [100]:

“[100] We endeavour to summarise the principles that we derive from Patten LJ’s judgment as follows:

(1) The test in s 29(5) is applied by reference to a hypothetical HMRC officer not the actual officer in the case. The officer has the characteristics of an officer of general competence, knowledge or skill which include a reasonable knowledge and understanding of the law.

(2) The test requires the court or tribunal to identify the information that is treated by s 29(6) as available to the hypothetical officer at the relevant time and determine whether on the basis of that information the hypothetical



officer applying that level of knowledge and skill could not have been reasonably expected to be aware of the insufficiency.

(3) The hypothetical officer is expected to apply his knowledge of the law to the facts disclosed to form a view as to whether or not an insufficiency exists (Moses LJ, *Lansdowne* [69]; Patten LJ, *Sanderson* [23]).

We agree therefore with Mr Firth that the test does assume that the hypothetical officer will apply the appropriate level of knowledge and skill to the information that is treated as being available before the level of awareness is tested. The test does not require that the actual insufficiency is identified on the face of the return.

(4) But the question of the knowledge of the hypothetical officer cuts both ways. He or she is not expected to resolve every question of law particularly in complex cases (Patten LJ, *Sanderson* [23], *Lansdowne* [69]). In some cases, it may be that the law is so complex that the inspector could not reasonably have been expected to be aware of the insufficiency (Moses LJ, *Lansdowne* [69]; Patten LJ, *Sanderson* [17](3)).

(5) The hypothetical officer must be aware of the actual insufficiency from the information that is treated as available by s 29(6) (Auld LJ, *Langham v Veltema* [33] – [34]; Patten LJ, *Sanderson* [22]). The information need not be sufficient to enable HMRC to prove its case (Moses LJ, *Lansdowne* [69]) but it must be more than would prompt the hypothetical officer to raise an enquiry (Auld LJ, *Langham v Veltema* [33]; Patten LJ, *Sanderson* [35]).

(6) As can be seen from the discussion in *Sanderson* (see [23]), the level of awareness is a question of judgment not a particular standard of proof (see also Moses LJ in *Lansdowne* [70]). The information made available must ‘justify’ raising the additional assessment (Moses LJ, *Lansdowne* [69]) or be sufficient to enable HMRC to make a decision whether to raise an additional assessment (Lewison J in the High Court in *Lansdowne* [2010] EWHC 2582 (Ch), [2011] STC 372, at [48]).”

## Submissions

61. Mr Rowell submitted that the hypothetical HMRC officer could have been reasonably expected, on the basis of the information available to him, to be aware of the unassessed capital gains tax for the 2015-2016 tax year. This is for the following reasons:

(1) There are two critical questions. First, when did HMRC have sufficient information to be aware that the disposal of Plot 3 took place by virtue of a constructive trust rather than the later transfer of legal title? Secondly, when did HMRC have sufficient information to be aware that this disposal took place in the 2015-2016 tax year rather than the 2016-2017 tax year?

(2) As to the first question, Mitchell Charlesworth set out Mr and Mrs Morgan’s position as to the constructive trust in letters dated 17 August 2017, 25 October 2017 and 2 January 2018. Although further detail was included in later letters (and therefore after the enquiry window) there was still sufficient information for the hypothetical officer to be aware of the insufficiency.

(3) As to the second question, Mitchell Charlesworth’s 17 August 2017 letter stated that the Company held a beneficial interest from the date it entered the land and construction commenced. Mitchell Charlesworth again stated in their letter dated 2 January 2018 that the Company acquired the beneficial interest in all the plots immediately that it entered the land and commenced construction work. Mr Rowell accepted that these letters did not state when the works to Plot 3 commenced. However,

it must have been clear that this was before the 2016-2017 tax year because HMRC were aware from letters from the Valuation Office Agency that the completed property on Plot 3 had been sold in July 2016, and so it would not have been possible for the construction to have started in the 2016-2017 tax year.

62. Mr Marks submitted that the hypothetical HMRC officer could *not* have been reasonably expected, on the basis of the information available to him, to be aware of the unassessed capital gains tax for the 2015-2016 tax year. This is for the following reasons:

- (1) The relevant date is 12 January 2018, being the last date to open an enquiry, being twelve months after the filing of the 2015-2016 return.
- (2) Mr Marks accepts that the date of commencement for Plot 2 was disclosed (being early 2013). However, no information was given in writing as to when the construction of Plot 3 began.
- (3) Mitchell Charlesworth stated in their letter dated 13 April 2017 that the construction had begun prior to the legal transfer but did not say when. The enclosures with this letter did not provide any information about when Plot 3 was constructed.
- (4) Mitchell Charlesworth's further correspondence did not provide any date for the start of the construction work or the transfer of the beneficial interest until a letter dated 30 July 2018 referred to the disposal on 1 July 2015. However, this was after the relevant date when a notification of enquiry could have been made under section 8 of the TMA 1970.

## **Discussion**

### ***The correspondence***

63. HMRC's relevant knowledge for the purposes of the discovery issue is to be taken from the following correspondence between the parties.

64. By a letter to HMRC dated 13 April 2017, Mitchell Charlesworth stated as follows:

“As discussed, our clients have confirmed that construction of plots 2 and 3 had commenced prior to the transfer of those plots to the company. We can accept therefore that the plots 2 and 3 will not fall within the Principal Private Residence Exemption.”

65. By a letter to HMRC dated 12 May 2017, Mitchell Charlesworth stated as follows:

“As discussed, we are now enclosing a Capital Gains Tax calculation for the year ended 5 April 2015 in respect of the disposal of Plot 2 at Cranfield. We are also enclosing supporting copy invoices in respect of the costs incurred. Please note that Plot 3 was transferred to the company in July 2016 and details of the disposal will therefore be included on our client's 2016/17 tax returns in due course.”

66. By a letter to HMRC dated 8 June 2017, Mitchell Charlesworth stated as follows:

“Firstly we can confirm that all costs of the construction of the properties has been borne by the company which is why no relief for these costs have been included in the capital gains tax calculation. On the basis that all costs were incurred by the company, the ownership of the buildings (as opposed to the land) has always been with the company which impacts on the valuation of plots 2 and 3 which you are now seeking to determine.”

67. By a letter to HMRC dated 17 August 2017, Mitchell Charlesworth stated as follows:

“It is clearly the case that, immediately construction work commenced, the company was in occupation of the land.

...

It could be argued that the company's beneficial interest, once construction commenced, was held over both the land and the building being constructed. If this is the case it would be bring the deemed date of disposal of the land by Mr and Mrs Morgan forward to the date that construction commenced (rather than the later date when legal title was conveyed to the company). This would seem to be a correct interpretation of the deeming provisions. The transfer of legal title simply followed the earlier transfer of beneficial interest and formalised title so as to facilitate the disposal of the properties by the company. Alternatively the company would have beneficial ownership from day 1 with the beneficial interest in the bare land transferred by Mr and Mrs Morgan at the later date.

...

Bearing in mind the above matters it is clear that the company held a beneficial interest in the land, or the building being constructed on it, from the date that the company entered the land and construction work commenced. Either way, the value at which the two plots were transferred to the company should therefore be based on the bare value of that land and should not include the value of the buildings on it (whether part or wholly complete).

We are enclosing a copy of a letter received from your colleagues at the Statutory Valuations Team providing their opinion on the valuation of plots 2 and 3 in May 2014 and July 2016 respectively. These valuations are not accepted.”

68. The letter from the Valuation Office Agency referred to by, and sent to HMRC with, the 17 August 2017 letter included a valuation of Plots 2 and 3 and stated that, “As at the valuation dates, each plot was fully developed and the valuations provided reflect the developed sites...”

69. By a letter to Mitchell Charlesworth dated 12 October 2017, HMRC stated as follows:

“In law, land includes any buildings situated on it. We would agree ‘that the legal owner of the asset is not necessarily its beneficial owner and that it is the beneficial ownership (not legal ownership) which capital gains tax principally follows’. However for a piece of land there cannot be a legal and beneficial owner of the land and a different beneficial owner of the buildings, the land and its associated buildings are one asset.

In your letter of 17 August 2017 you have set out your view of the matter, which is that although the legal interest did not transfer until the later date to the company, the beneficial interest transferred at an earlier date when the construction commenced. You also indicated that you believe that there was a trust in existence.

It is not up to HMRC to prove that a trust does not exist, rather it needs to be shown that the trust does exist and evidence needs to be provided to support this. There is no indication in your letter that written evidence of a trust is held.”

70. By a letter to HMRC dated 25 October 2017, Mitchell Charlesworth stated as follows:

“We note your agreement that it is beneficial ownership that is relevant for capital gains tax purposes and that the beneficial ownership of the interest could have transferred at the time that construction commenced subject to the existence of a constructive trust over the land. We have outlined in our letter of 17 August 2017 the three factors that are required to establish a

common intention constructive trust and you have repeated these in your letter.

You have stated that there is no agreement or common intention that the parties should share beneficial ownership of the land on the basis that there was no agreement/common intention at the time that Mr and Mrs Morgan originally purchased the land.

...

It is clear from the actions taken by Mr and Mrs Morgan that the company was permitted to enter the land and, from that point, the company was obligated to fund all costs of construction (and shoulder any consequent liability) although subsequently beneficially entitled to receive the entire proceeds from the disposal of the developed plots. A common intention constructive trust was therefore established at the point that the company entered the land (such a trust capable of being established subsequent to the date of acquisition of the land under the authority of the case law outlined above) and at which time beneficial interest was also transferred. Bearing in mind the history of the construction at the site concerned it is difficult to draw any other conclusions.”

71. By a letter to Mitchell Charlesworth dated 11 December 2017, HMRC stated as follows:

“As outlined in my previous letter dated 12 October 2017, whether or not there is a constructive trust is a question of fact, and I need to have details of all of the facts supported by the relevant evidence.

Whilst your latest letter does set down some of your argument as to why there may be a constructive trust, the evidence I have received so far does not support your contention that there was a constructive trust. Should you wish to contend that this was the case then I will need a full and detailed account of all the facts, supported by the relevant evidence. This will then help us to consider the arguments that you have put forward.”

72. By a letter to HMRC dated 2 January 2018, Mitchell Charlesworth stated as follows:

“You are not contending that a constructive trust may have existed as outlined in previous correspondence. You have, however, requested a full and detailed account of all the facts. These facts have been set out in detail in the correspondence, particularly our letters of 17 August 2017 and 25 October 2017. We are not sure what further facts you require and, indeed, you acknowledge in your letter that we have set down our arguments as to why there was a constructive trust. The original ownership of the plots, the transfer of the plots to D & R Developments Limited and the subsequent development and sale of the plots by the company has been clearly explained in earlier correspondence. You state that the evidence that you have received so far does not support the contention that there was a constructive trust although you do not explain or justify this statement. ...

...

It is clearly the case that our clients (husband and wife and directors of the company) would have had discussions on a daily basis about the development of the plots although you would not expect a written record to be kept of those discussions. Rather, as Lord Neuberger states, it is the actions of the parties that speak for themselves in this case. From the outset our clients incorporated a new company as the vehicle to develop all the plots and this indeed, as a matter of fact, is what happened. The company

acquired a beneficial interest in all the plots immediately that it entered the land and commenced construction work; the only difference with plots 2 and 3 (as compared to the other plots) is that legal title (irrelevant for tax purposes) was transferred after construction had commenced. This does not, however, impact on the earlier transfer of beneficial interest which is evidenced by the fact that all the plots were developed in the same way by the company which the company ultimately solely entitled to the sale proceeds from the disposal of the plots.

...”

### ***The hypothetical officer’s awareness of the insufficiency***

73. The relevant material comprises written correspondence and documentation provided to HMRC before 12 January 2018. We note that there was no dispute between the parties as to this.

74. We agree with Mr Rowell’s identification of the critical questions as set out above save that it was not necessary for the hypothetical officer to be aware that the disposal *did* take place by virtue of a constructive trust or that it *did* take place in the 2015-2016 year. The information need not have been sufficient for this to be established, but it must be more than would prompt the hypothetical officer to raise an enquiry. To paraphrase the Upper Tribunal’s summary at [100](6) of *Beagles*, the information made available must justify raising the additional assessment or be sufficient to enable HMRC to make a decision whether to raise an additional assessment.

75. We find that the hypothetical HMRC officer could reasonably have been expected to be aware that the disposal took place by virtue of a constructive trust. Mitchell Charlesworth’s letters set out Mr and Mrs Morgan’s argument that such a constructive trust had arisen in clear terms, including by reference to case law. Whilst we accept that further detail was provided after the enquiry window (including some information which did not even emerge until after the appeals had been issued), it was still abundantly clear that Mr and Mrs Morgan were contending that a constructive trust had arisen prior to the legal transfer.

76. However, we find that the hypothetical HMRC officer could not reasonably have been expected to be aware that the disposal took place in the 2015-2016 year such as to justify raising the additional assessment or be sufficient to enable HMRC to make a decision whether to raise an additional assessment. This is for the following reasons.

77. First, as Mr Rowell fairly accepts, Mitchell Charlesworth (and Mr and Mrs Morgan) did not tell HMRC when the construction began or when the disposal is said to have taken place.

78. Secondly, Mitchell Charlesworth’s letter dated 12 May 2017 refers to the disposal taking place in July 2016 and so in the 2016-2017 tax year. Whilst it may well be that this was with reference to the transfer of the legal interest, it remains the case that Mitchell Charlesworth were at that point actively saying that the disposal took place in 2016-2017 rather than 2015-2016 and did not at any time in the relevant correspondence say that it took place in 2015-2016 instead.

79. Thirdly, it is right that the letter from the Valuation Office Agency (which had been sent to HMRC and so constitutes information notified in writing) refers to Plots 2 and 3 being fully developed. However, this does not say anything about when the construction on Plot 3 began. The information provided does not explain how extensive the construction works were and so the hypothetical HMRC officer could not assume that they were not in the 2016-2017 tax year and instead in the 2015-2016 tax year such as to justify an additional assessment or to enable a decision to be made as to whether to raise an additional assessment. This is particularly in the context in which Mitchell Charlesworth had previously said that the

disposal was in 2016-2017 (as referred to in paragraph 77 above) and not said that it was in 2015-2016 instead. Indeed, it was also the case that there was no information provided to say that the construction work started in the 2015-2016 tax year rather than any earlier tax year. Again, this would mean that the hypothetical HMRC officer could not assume that the disposal by way of a constructive trust took place in the 2015-2016 tax year rather than an earlier year such as to justify an additional assessment or to enable a decision to be made as to whether to raise an additional assessment.

80. It follows that Mr and Mrs Morgan fail on the Discovery Issue.

#### **THE PROPRIETARY ESTOPPEL ISSUE**

81. It follows that there is no need for us to make a determination upon the Proprietary Estoppel Issue. Given that this issue was the subject of argument between the parties, we make the following short points.

82. In *Thorner v Majors* [2009] UKHL 18, Lord Walker set out the ingredients for a proprietary estoppel as follows at [29]:

“[29] This appeal is concerned with proprietary estoppel. An academic authority (Simon Gardner, *An Introduction to Land Law* (2007) p101) has recently commented:

“There is no definition of proprietary estoppel that is both comprehensive and uncontroversial (and many attempts at one have been neither).”

Nevertheless most scholars agree that the doctrine is based on three main elements, although they express them in slightly different terms: a representation or assurance made to the claimant; reliance on it by the claimant; and detriment to the claimant in consequence of his (reasonable) reliance (see Megarry & Wade, *Law of Real Property*, 7th edition (2008) para 16-001; Gray & Gray, *Elements of Land Law*, 5th edition (2009) para 9.2.8; Snell’s *Equity*, 31st edition (2005) paras 10-16 to 10-19; Gardner, *An Introduction to Land Law* (2007) para 7.1.1).”

83. For the reasons set out in respect of the Constructive Trust Issue, we find as follows:

(1) The discussions between Mr and Mrs Morgan constituted assurances to the Company that it would be the owner of Plot 3 in return for carrying out and paying for the construction (such payment being by way of becoming liable to reimburse Mr and Mrs Morgan through their directors’ loan accounts).

(2) The Company relied upon the assurances by carrying out and paying for the works as anticipated.

(3) The Company suffered a detriment by way of its liability to Mr and Mrs Morgan.

84. As such, we would have found that the Company would have been entitled to a proprietary estoppel prior to the legal transfer for substantially the same reasons as in respect of the Constructive Trust Issue.

85. We note that the impact that this would have had upon the value of the disposal of the legal transfer would have depended upon valuation evidence which was not before us. The potential to overreach the Company’s interests would not have been an inevitable answer to this as this would simply be one of the aspects that a valuer would have had to take into account.

## THE ALLOWABLE EXPENSES ISSUE

86. Similarly, there is no need for us to make a determination upon the Allowable Expenses Issue. Again, however, the issue was the subject of argument between the parties and so we make the following short points.

87. Section 38(1) of the Taxation of Chargeable Gains Act 1982 provides as follows.

“(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.”

88. In *Lowe v HMRC* [2022] UKUT 84 (TCC) (Marcus Smith J and Judge Jonathan Richards), the Upper Tribunal held that “on behalf of” is to be treated as denoting agency. They stated as follows at [34] and [35]:

“[34] In our judgment, the short answer to this point is that there is no ‘special statutory context’ (to use Lord Sumption’s expression) which suggests that the phrase should be given any other than its ordinary and natural meaning of connoting a relationship of agency. The parties took us through various hypothetical examples involving A, an owner of land, and B a person prepared to provide some kind of gratuitous benefit to A. In scenario (i) B gives A £1,000 and A spends that on building works on the land. In scenario (ii) A enters into a contract with a builder for works to be performed on A’s land but B gratuitously pays the builder £1,000 of the price of those works. In scenario (iii) B enters into a contract with a builder and pays the builder £1,000 in return for the builder agreeing to perform building works on A’s land. Those three scenarios were, Mr Firth argued, economically indistinguishable and it would make no sense for the expenditure to count in scenario (i) but not in scenarios (ii) or (iii).

[35] However, in our judgment, the discussion of these scenarios does not establish any ‘special statutory context’. At most they establish that economically similar transactions might be taxed differently if the phrase ‘by him or on his behalf’ is held to be limited to situations involving agency. However, that is not a particularly startling outcome. Economically similar transactions are not infrequently taxed in different ways. More generally, scenarios (i)–(iii) are products of the ingenuity of lawyers litigating a particular issue arising out of s 38(1)(b). They do not address the more ‘mainstream’ situation where a person owning an asset incurs expenditure either directly, or through an agent, on the improving of that asset and so are less capable of establishing a ‘special statutory context’ that displaces the ordinary and natural meaning of the words.

89. We find that the Company was not making payments on behalf of Mr and Mrs Morgan. Indeed, the very essence of Mr and Mrs Morgan's evidence was that they were treating the payments as being the Company's liability as they regarded the Company as the owner of the Plots once they started the construction. Indeed, insofar as Mr and Mrs Morgan were in fact making the payments (subject to reimbursement through their directors' loan accounts) they were making the payments on behalf of the Company rather than the other way round.

90. As such, we would have found that Mr and Mrs Morgan would not have been entitled to treat as allowable expenses any construction or other costs that were incurred on behalf of the Company rather than on behalf of Mr and Mrs Morgan.

**DISPOSITION**

91. It follows that we allow the appeals against the closure notices for 2016-2017 and we dismiss the appeals against the protective assessments for 2015-2016. As set out above, if the parties cannot reach agreement as to the ramifications of this, the parties shall refer the matter back to the Tribunal (reserved to us) for further directions.

**RIGHT TO APPLY FOR PERMISSION TO APPEAL**

92. 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.

**RICHARD CHAPMAN KC  
TRIBUNAL JUDGE**

**Release date: 24<sup>th</sup> JUNE 2024**