Neutral Citation: **[2023] UKUT 00166 (TCC)**

Case Number: UT/2022/000040
UT/2022/000042

UPPER TRIBUNAL
(Tax and Chancery Chamber)

Rolls Building, London

INCOME AND CORPORATION TAX – valuation of transfer of licensing agreement between group LLP to group company – taxpayer company's appeal, based on intangibles relief under Schedule 29 FA 2002 in relation to £8.25m valuation of transfer, dismissed – FTT's decision upheld that value for intangibles relief purposes of assets actually transferred was £1 (transfer did not include trademark needed to operate licensing agreement) – FTT decided in favour of individual taxpayer that £8.25m received by relevant individual was paid to him in his capacity as member of the vendor LLP and so not a distribution "in respect of shares" under s209(2)(b) ICTA 1988) - HMRC's appeal against FTT decision allowed - FTT's decision remade: the £8.25m payment was a distribution

Heard on: 14 and 15 February 2023
Judgment date: 12 July 2023

Before

JUDGE SWAMI RAGHAVAN
JUDGE JENNIFER DEAN

Between

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS
Appellants

and

JASPER ALEXANDER THIRLBY CONRAN
Respondent

JC VISION LIMITED
Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS
Respondents

Representation:

For the Appellants/ Respondent:	Elizabeth Wilson KC and Sadiya Choudhury, Counsel, instructed by the General Counsel and Solicitor to His Majesty's Revenue and Customs
For the Respondent /Appellant:	Alun James, Counsel, instructed by BHG Chartered Accountants

DECISION

INTRODUCTION

1. In 2007 Jasper Conran, the established fashion designer, expanded his design range into branded eyewear. An LLP entity, in which Mr Conran was a controlling member, entered into a licensing agreement with Specsavers for the design, manufacture and sale of spectacle frames branded with the trademarked name "Jasper Conran". The appeals concern the income and corporation tax treatment of a subsequent agreement in 2008 transferring the benefits and obligations of the licensing agreement to an entity in Mr Conran's group (JC Vision Limited ("**JCV**") and the sum of £8.25m which Mr Conran received following the transaction.

2. Mr Conran treated that sum as a capital gain (on which he was able to claim entrepreneur's relief). JCV treated the £8.25m sum as consideration. It amortised that expense, claiming intangibles relief under Schedule 29 Finance Act 2002 ("**Schedule 29**"). HMRC's position was that the open market value of the assets transferred was only £1. This was on the basis that, under the transfer agreement, use of the Jasper Conran trademark (which was necessary to make the licence agreement business operable as a going concern) was specifically not transferred. Accordingly no intangibles relief arose. HMRC also considered the £8.25m Mr Conran received amounted to a distribution under s209(2)(b) Income and Corporation Tax Act 1988 ("**s209(2)(b)**") chargeable to income tax. JCV appealed the ensuing HMRC amendments to JCV's corporation tax assessment and Mr Conran appealed HMRC's amendments to his self-assessment. The two appeals were heard together by the FTT, and its decision was published under neutral citation [2022] UKFTT 39 (TC) ("**FTT Decision**").

3. The FTT rejected JCV's argument that the market value of the business was £8.25m, agreeing with HMRC that the valuation was £1. The FTT also rejected JCV's alternative arguments, based on the intangibles relief legislation, that £8.25m was nevertheless the relevant figure for the purposes of such relief. The FTT accordingly dismissed JCV's appeal. JCV appeals against that decision to the Upper Tribunal with the permission of the FTT for certain grounds and of the Upper Tribunal for the remainder.

4. As regards Mr Conran, the FTT considered he received the £8.25m in his capacity as partner in the LLP he controlled, rather than as a shareholder. The sum was therefore not "in respect of shares" as HMRC had maintained. The FTT thus allowed Mr Conran's appeal (in relation to the distribution). With the permission of the FTT, HMRC appeal that decision to the Upper Tribunal.

5. This decision covers both JCV's and HMRC's appeals against the FTT Decision.

FTT DECISION AND BACKGROUND FACTS

6. The FTT made comprehensive and detailed findings of fact from the documentary and expert valuation and accounting evidence before it which are largely undisputed. It also annexed the parties' statement of agreed facts ("**SOAF**") setting out the basic chronology of events preceding and subsequent to the 2008 transaction. We focus on the facts relevant to understand the issues in the appeals before us.

7. Mr Conran, who had since 1977 carried on business as a fashion designer, expanded his range into spectacles in 2007 going into business with Specsavers International Healthcare Limited ("Specsavers") (SOAF [1][2]).

8. An LLP, Jasper Conran Optical LLP ("**JCO**") was formed on 28 June 2007 with two members: Mr Conran as 99.9% owner and JC Eyewear Limited ("**JCE Ltd.**") (which Mr Conran was the sole shareholder of) as 0.01% owner (SOAF [3])).

9. JCO and Specsavers entered into a five year Optical Product License Agreement ("**OPLA**") under which JCO worked with Specsavers to design spectacle frames bearing the trademark "Jasper Conran" and Specsavers paid JCO a licence fee for each frame Specsavers manufactured and delivered ready for distribution. The arrangement resulted in substantial turnover and profits for JCO (for instance £1,151,915 licence fee turnover and operating profits of £931,112 for the first accounting period to 31 March 2008).

10. Under Clause 4.1 of the OPLA, JCO granted Specsavers a "non-exclusive, non-transferable licence" to use the trademark. JCO warranted under Clause 10.3 that it was entitled to grant that right throughout the agreement term. Clause 17 provided that neither party was entitled to assign the benefit of the OPLA or its obligations without prior written consent of the other party, but JCO could assign the agreement to any other member of the JC Group (defined as any entity owned or controlled by Mr Conran) without Specsavers' consent) ([24][25]).

11. The OPLA was subsequently amended on 2 September 2008 and its duration extended to 31 August 2013.

12. The issues in both sets of appeals centre on the treatment of the Business Transfer and Novation Agreement ("**BTNA**") entered into between JCO and JCV on 31 October 2008. JCV was the 100% subsidiary of Jasper Conran Holdings Ltd, which in turn Mr Conran was the sole shareholder of.

13. A major issue is the nature of what exactly was transferred across to JCV as part of this agreement. One of JCV's arguments is that the BTNA transfer included use of the Jasper Conran trademark, whereas the FTT's conclusion, which HMRC support, is that the trademark's use was specifically excluded.

14. Prior to the BTNA, Mr Conran had, in a letter between himself and Jasper Conran Holdings Ltd of 29 July 2008 ("**the July 2008 Licence**"), agreed to grant trademark licences to the JC Group i.e. the entities he owned.

15. The recitals to the BTNA recorded that JCO carried on the Business (defined as JCO's "business relating to the operation of the OPLA") and that JCO "wishes to sell and [JCV] wishes to purchase the Business with a view to carrying on the Business as a going concern in succession to [JCO]".

16. Clause 2, entitled Sale of Business provided:

> "[JCO] shall sell and [JCV] shall purchase the following with a view to the [JCV] carrying on the Business from the Effective Date as a going concern in succession to the Vendor:-
>
> 2.1.1 the benefit (subject to the burden) of the Contract [*the OPLA*]
>
> 2.1.2 the Goodwill
>
> 2.1.3 the Marketing Information
>
> 2.1.4 all records and other documents relating exclusively to the Business

17. Clause 4.1 provided the consideration:

> "for the sale of the Business comprising the Assets and the novation of the [OPLA] shall be the sum of £7,300,000 or such difference[sic] sum in accordance with…

18. "Assets" was defined in Clause 1.1 as

> "…the several assets to be sold by the [JCO] to the [JCV] under this Agreement and described in clause 2".

19. Clause 4.2 provided:

> "For the avoidance of doubt, no part of the consideration is attributable to the grant of any licence by Mr Conran to use or sub-licence any of his trade marks. The Purchaser, by virtue of being a wholly-owned Subsidiary of Jasper Conran Holdings Limited (which is entitled to use the trade marks under licence from Mr Conran and make them available to its subsidiaries) is already entitled to use or sub-licence such trade marks."

20. The FTT explained (at [122]) that the trademark use was not within the list of "Assets", that it was an asset JCO did not have a right to assign (at least without consent), and that JCV did not need it as JCV already had it by virtue of the July 2008 licence. The FTT also explained that BHG, (the accountants advising Mr Conran and his group entities), valued the business of JCO upon its sale at £8.25m and that this figure, rather than value of £7.3m was treated as the consideration for the agreement ([39]).

21. Clause 4.1 contemplated adjusting the consideration in certain circumstances. This included, at 4.1.2, the scenario where HMRC denied JCV "relief from Corporation Tax under Schedule 29 Finance Act 2002 for any amortisation of the consideration" in which case the consideration was "reduced to £1"([36]). Clause 4.1.2 was later amended on 20 May 2009 to apply the £1 reduction to only that element that HMRC denied in respect of assets which pre-existed 1 April 2002 (the cut-off point for applicability of the Schedule 29 intangibles relief regime)([40]). (Reflecting the parties' submissions we use the shorthand "tax reducer clause" to refer to this provision.)

22. The FTT made detailed findings on the evidence of the parties' respective valuation and accounting experts ultimately noting that while the valuation evidence proceeded on different bases, each valuation was sufficiently credible to support the valuation reached on the relevant base ([98]). The valuation and accounting experts instructed by the taxpayers were respectively Ian Brewer and Peter Holgate. HMRC instructed Joanne Beard and Iain Dickinson.

23. HMRC's valuation evidence from Ms Beard was that, without the trademark license agreement the business would be unable to operate and "the value of the goodwill would be nominal, say £1, a sum sufficient only to frank the sale of the assets transferred"([92(1)]).

24. The taxpayer's expert's valuations (which in three consecutive reports put the figure at £8.25m, £11.65m and £10.165m) were based on Mr Brewer's view that the trademark "was implicit in the deal but [that] in any event there were plenty of entities around with the right to use the trademark to whom the business was worth its full value and this would, in turn, drive the market in a real world scenario". He also considered "It would not make economic sense for a willing but not anxious vendor to give away a profitable business" ([86](1)(2)).

25. The FTT then discussed the parties' rival submissions, which we analyse below in our discussion of the grounds of appeal. It identified that although the agreement was framed as a business transfer, the assets actually transferred, whilst including the

assignment of the OPLA itself, and the goodwill of the business, did not include the right to use the trademark. The FTT thus accepted Ms Beard's evidence, on the value of the assets transferred ([123(1)][124]).

JCV'S GROUNDS OF APPEAL

Ground 1 market value was £8.25m not £1

26. Section 272(1) Taxation of Chargeable Gains Act 1992 ("**s272(1)**") defines "market value" as:

> "…the price which those assets might reasonably be expected to fetch on a sale in the open market."

27. JCV raise a number of sub-grounds under Ground 1. Each concern the construction and application of the hypothetical sale raised under the above provision, and argue in summary:

(1) *Relevance of hypothetical vendor.* The FTT failed to address the position of a hypothetical vendor who would not have relinquished a valuable business generating profits of £1m p.a. for less than £8.25m.

(2) *Position of hypothetical purchaser.* Under the relevant case-law principles, it must be presumed that whatever steps that need to be taken to achieve a valid and effective transfer are taken so as to ensure the purchaser can "step into the vendor's shoes".

(3) *Valuation of correct asset*: The asset that was transferred under the BTNA was a business as a going concern. The FTT erred by valuing an asset that was not transferred, namely a business without the necessary access to the trademark.

(4) *Special purchasers*: The FTT were wrong to reject the price impact of other Jasper Conran group entities (who did have use of the trademark, and in relation to whom the assets would be operable and valuable).

28. In broad terms these sub-grounds approach the application of s272(1) from two angles. First, that valuing the transfer, (which it is emphasised, was stated to be of a business as a going concern), but without the trademark, impermissibly changes the asset which is sought to be valued. Second, that in line with the established case-law principles regarding the hypothesised sale, the sale must be assumed to be valid and effective. That in turn, JCV submits, requires the use of the valuable trademark to be viewed as implicit in the transfer.

29. HMRC's general point in response is the FTT were right to focus on valuation of what was actually transferred. The trademark needed to operate a profitable business was specifically excluded. None of the case-law relied on requires one to assume that assets different to those transferred were transferred.

30. We address the taxpayer's sub-grounds slightly out of order from the way they were argued. As became clear from Mr James' oral submissions on behalf of JCV, 1(1) was made in the alternative to 1(2) and 1(3). We will first deal with 1(3), 1(2), which it is convenient to consider together, and then 1(1), and 1(4).

Ground 1(3) and 1(2)

31. JCV argues that the transfer of the business as a going concern presupposed a licence to use the trademark was in place, or would have been put in place. That in turn rendered the absence of an actual grant or transfer of the licence (as a completion matter) irrelevant. The FTT was therefore wrong to rely as it did (at [123(1)]) on this irrelevant consideration.

32. The FTT also, it is submitted, failed to apply and/or misapplied the fundamental premise in the authorities that all necessary pre-conditions to sale were deemed to be in place and satisfied. In this case that included access to the trademark because without a purchaser having that they would be in immediate breach of the agreement (clause 10.3 – see above at [10]). In support of its grounds JCV relies on the following authorities.

33. *IRC v Crossman [1937] AC 26* concerned a similar hypothetical sale in the context of Estate Duty provisions where property was to be valued at the price "such property would fetch if sold in the open market…" (Section 7(5) Finance Act 1894). The shares carried restrictions on transfer and were subject to pre-emption rights. The articles prohibited sale in the open market until pre-emption rights had been exhausted. The House of Lords rejected the Court of Appeal's view that the shares' value was restricted to the price specified on exercise by shareholders exercising pre-emption. Viscount Hailsham LC explained (at pg 42):

> "... the purpose of s 7, sub-s 5, is not to define the property in respect of which estate duty is to be levied but merely to afford a method of ascertaining its value. If the view entertained by the Court of Appeal were correct, it would follow that any property that could not be sold in the open market would escape estate duty altogether. That seems to me quite an unnecessary and unnatural construction to place upon the language of the statute. In the words of Lord Buckmaster …"so to interpret the statute would be to deal with something which was nothing but a measure of value in such a manner as completely to destroy the very object for which that measure was set up." On the other hand, I can see no difficulty in treating the sub-section as meaning that the Commissioners of Inland Revenue are to assume that the property which is to be valued is being sold in the open market and to fix its value for estate duty purposes upon that hypothesis."

34. He went on to hold that: "In order to comply [with the statutory direction as to the method by which value was to be ascertained] it is necessary to make the assumptions which the statute directs", but that that did not involve ignoring the limitations attached to the shares (which meant it was worth as least half as less as a share without such restrictions). His interpretation ensured that the property on which estate duty was levied included all the property that passed on the deceased's death "not merely such part of that property as could be disposed of in the open market".

35. *Re Lynall* [1972] AC 680 also concerned shares with sales restrictions. No sale could take place unless 1) the directors agreed the share transfer to the purchaser and 2) the deceased's husband refused to exercise his pre-emption rights to buy the shares at the stipulated price. The House of Lords maintained the majority's reasoning in *Crossman.* Assessing the open market price meant assuming the directors had agreed the transfer and that the husband had refused to exercise his pre-emption rights.

36. Viscount Dilhorne, endorsing the Revenue's submission in that case, explained:

> "…if property is only saleable in the open market in certain circumstances, then when the Act requires the property to be valued at the price which it would fetch if sold in the open market, one must proceed on the basis that those circumstances exist."

37. In Mr James' submission, the relevant principle requires the assumption of a "valid and effective transfer". Thus, without presuming that trademark use was made available, there could not have been any valid and effective novation of the OPLA and sub-license to Specsavers and therefore the transfer of the business as a going concern could not have happened.

Discussion

38. The core principle these authorities establish is not, we consider, in dispute. The cases establish that an inherent feature of the statutory hypothesis is an assumption that a sale takes place. As part of that hypothesis, pre-conditions or impediments standing in the way of the required sale are assumed to be fulfilled or overcome.

39. Those pre-conditions or impediments are not otherwise ignored however. The authorities are clear they remain in place for the purpose of valuing the asset in the hands of the hypothetical purchaser insofar as they will pre-condition or impede that purchaser's onward sale.

40. The nature of the controversy in this appeal is twofold. First, what is the relevant asset which is the subject of the transfer? Under Ground 1.3, JCV argues that it is the business as a going concern (which entails inclusion of use of the trademark). We consider, in agreement with the FTT and HMRC, that the straightforward construction of the BTNA is that the assets specifically did not include use of the trademark. As explained by the agreement itself (Clause 4.2), that construction reflected the actual position that no such inclusion was necessary; JCV already had access to the trademark. Ground 1.3 must accordingly be rejected.

41. Second, the dispute (raised by Ground 1.2) is around the precise scope of the principle that sale pre-conditions /impediments are to be satisfied or disregarded for the purposes of assuming there to be a hypothetical sale. JCV's argument, in essence, is that a transfer whereby the assignee is put in immediate breach is just as much a pre-condition that must be regarded as satisfied or impediment that must be disregarded. In order for the transfer to be effective and not result in immediate breach, it must be regarded as transferring use of the trademark too.

42. In agreement with HMRC, we consider however that would represent an unwarranted extension of the principle by requiring assets to be considered transferred (trade mark use) that were specifically not included in the transfer. None of the authorities relied on support that proposition. In each of them the assets which are the subject of the hypothesis remain exactly as those which were actually transferred. All that has happened is that the features (pre-emption rights and directors consent) that would have stood in the way of a sale are disregarded (for the purposes of the assumed sale) but not for the purposes of the valuation of what is transferred. That is entirely consistent with the words of the section which apply the hypothesised sale to "those assets" or in the analogous words of the Estate duty provision "those property". There is nothing in the authorities which suggests that the content of "those assets" is changed (on the contrary the fact the pre-conditions / impediments still remain relevant for valuation highlight that the case-law principles do not seek to change the asset).

43. In that sense we do not think there is any real dispute over the proposition that the valuation does not change or destroy the asset. (Although the extract from Lord Hailsham's speech in *Crossman* Mr James relies on uses the term "destroy" – see [33] above, it is important to recognise that refers to destruction of the *object of the legislation* (i.e. the object of estate duty), not the asset.) The point comes back to properly identifying the asset which is the subject of the hypothesised sale. As we have said, those assets did not include use of the trademark. That rendered the goodwill inoperable. It does not therefore make sense to talk of the assets which were transferred being "destroyed" because there was no value in them to destroy from the outset.

44. The FTT's reasoning for rejecting JCV's arguments included (at [123(3)]):

> "The principles established in *Crossman* and *Lynall*, that the assumption that there is a sale in the open market will also sometimes require an assumption that conditions are satisfied or restrictions are removed, do not assist. The OPLA was freely assignable to other members of the JC Group; this remains the case even if an assignment to someone who did not have the right to the trademark and to grant a sub-licence to Specsavers would mean that the assignee was immediately in breach of the terms of the OPLA (including in breach of clause 10.3)."

45. Mr James argues it is irrelevant that the business could have been transferred to a company in the Conran group because the hypothetical purchaser is not such a person. We consider however, in agreement with Ms Choudhury's submissions on behalf of HMRC, that the point being made by the FTT here was not that JCO could assign to other group members *without* being in breach. Rather, it was that JCO were still able to assign (even if that resulted in breach of the OPLA). That was to be contrasted with the restrictions in play in *Crossman* and *Lynall.*

46. In *Lynall,* Lord Reid's judgment (at 406 of the Tax Cases report) noted that it was "legally impossible" for the shareholder to sell the shares without first obtaining an agreement from the pre-emption right holder that they would not exercise their right. It was not that there would be a breach of rights if there was a sale, but that without resolving the rights of the pre-emption no sale could even take place. By contrast on the facts here a sale of assets (despite them not including trademark use) was still legally possible. That was essentially the point the FTT was making in [123(3)].

47. Resisting extension of the scope of the *Crossman/Lynall* principles, by assuming that terms of the agreement being resolved that would otherwise lead to the purchaser being in breach, is also consistent with the principle which the Upper Tribunal's decision in *Dyer v HMRC* [2016] UKUT 381 (TCC). There the Upper Tribunal took away from *Crossman*, *Duke of Buccleuch v IRC* [1967] 1 AC 506 and *IRC v Gray* [1994] STC 360 (all valuation of assets on death) cases (at [45]) that the asset "must be valued as it is on the relevant date, and not as it might be if certain steps were taken".

48. Mr James also relied on *Alexander v IRC* [1991] STC 112. That case concerned IHT on a sale of former council property that had been bought more cheaply under "right to buy" legislation, the terms of which required the seller, if the property was disposed of within five years, to repay an amount in respect of the discount. The trustee /executor argued IHT was charged on the net sum received. The Court of Appeal disagreed confirming the open market value was the value that the purchaser would pay on the basis the purchaser would then be subject to the same repayment obligation when that purchaser came to sell in future. However no repayment was factored in for the immediate sale transaction under consideration.

49. Nicholls LJ emphasised "The notional sale does not change the subject matter of the valuation. What is being valued is the property belonging to the transferor". The case does not assist JCV's case. Rather, it illustrates the importance of focussing on the asset in question to be valued. The repayment on the initial assumed sale transaction was not disregarded because of its status as a "disadvantageous incident of sale" and as part of ensuring a "valid and effective transfer" as Mr James's case entailed. As Nicholls LJ highlighted, the relevant time of valuation (immediately before the transferor's death) of the assumed sale took place at the time the property belonged to the transferor. Accordingly no disposal triggering the discount repayment had yet arisen at that time.

Ground 1(1) – hypothetical vendor

50. Under this sub-ground, JCV argues that even if its submissions on the effect of *Crossman /Lynall* are not accepted, then the FTT failed to consider or misunderstood the position of the hypothetical vendor as detailed in the relevant authorities, who would not have sold a business making around a £1m p.a. profit for less than £8.25m, thus in itself giving a market value of £8.25m.

51. Mr James relies on the following judicial observations in the authorities about the attributes of hypothetical vendors.

52. In *IRC v Clay* [1914] 3 KB 466 Pickford LJ explained:

> "a willing seller means one who is prepared to sell, provided a fair price is obtained under all the circumstances of the case".

53. He went on to explain it did not mean:

> "only a seller who is prepared to sell at any price and on any terms, and who is actually at the time wishing to sell… In other words, …an anxious seller."

54. Mr James also relies on *Gray* where the Court of Appeal (Hoffman LJ as he then was) referred to the hypothetical vendor as:

> "an anonymous but reasonable vendor, who goes about the sale as a prudent man of business, negotiating seriously without giving the impression of being either over-anxious or unduly reluctant…"

55. Mr James emphasises that a vendor would have had the right to use the trademark because without it there was no OPLA with Specsavers to transfer and therefore no business to sell. A willing, not anxious but prudent, hypothetical vendor would require £8.25m for relinquishing the valuable business.

Discussion

56. As to the argument that the FTT did not address the hypothetical vendor argument, we start by noting that the FTT recorded JCV's submissions on this point at [99(2)] in the way which reflected those in which the argument was repeated before us. While the FTT did not, in terms, respond to the argument we agree with HMRC that the FTT did address the substance of the submission made regarding the need to look at matters from the vendor's perspective.

57. JCV's argument effectively amounted to saying the vendor would not have sold a valuable business for £1. However that was a flawed premise having regard to what was transferred. The FTT correctly focussed on identifying the assets which were to be valued. As mentioned those assets did not include use of the trademark. In so doing, the FTT did address the substance of the vendor perspective submissions in that there was nothing peculiar about a vendor willing, not anxious, but prudent, parting with assets for £1 when, significantly, those assets did not include use of the trademark. As Ms Choudhury pointed out, the propositions relied on by JCV from *Gray* and *Clay* said nothing about the vendor perspective mandating what the vendor was selling, merely that the vendor must be regarded as *willing* to sell. In so far as it was being argued that a vendor would *not* have sold at anything less than £8.25m then that would go against the requirement embedded in the statutory provision that a sale had to be assumed. We therefore reject this sub-ground of appeal.

Ground 1(4): The role of 'special purchasers' in the valuation context was misunderstood

58. JCV also argued, in the alternative, that even if the assets were to be valued without use of the trademark, it was significant that there were special purchasers in the form of Mr Conran's group entities who already had access to the trademark and who therefore would pay full value for the business. The evidence of JCV's valuation expert, Mr Brewer, was that the presence of such entities "to whom the business was worth its full value…would, in turn, drive the market in a real world scenario".

59. HMRC's valuation expert, Ms Beard, considered that there first needed to be evidence of special purchasers active in the market. While the FTT recognised "the authorities do provide some support for the role of special purchasers", the FTT considered the scenario whereby there was evidence of special purchasers active in the market to be "factually impossible in most intra-group transactions about which there is no public knowledge" (at [123(5)]).

60. After that discounting of Ms Beard's evidence the FTT continued:

> "…the fact that purchasers may exist who already have the right to use the trademark should not be used to change the identity of what was actually transferred, namely the OPLA."

61. Mr James' submission under this ground is that the above reasoning showed the FTT misunderstood the relevance of special purchasers to pricing. The point was that as regards valuation, anyone bidding for the business would have to compete with such special purchasers to whom the business was worth £8.25m, which in itself would drive the market value to that price.

62. We consider HMRC are right to note that the FTT's conclusion on valuation was ultimately a conclusion of fact based on the evidence before it which is only susceptible to challenge on *Edwards v Bairstow* grounds, or we would add, if the FTT erred in its approach. As regards approach, the FTT clearly considered the relevance of special purchasers as demonstrated by its consideration of Ms Beard's evidence but discounted the lack of evidence of specific activity for the reasons already mentioned above. While the FTT did not specifically address Mr Brewer's evidence we agree it was open to the FTT to reach the conclusion on valuation it did. Mr Brewer's evidence certainly did not compel a conclusion that the value for the business assets, but without the trademark use, was other than £1. The FTT's rejection of Ms Beard's expectation that there should be actual evidence of special purchasers driving up the price, on the basis that was unrealistic in an intra-group context must equally have acknowledged that it was unrealistic in the context of an intra-group transaction that group entities would be bidding against each other to drive up the price. As HMRC point out there was also evidence to show that a group entity which did hold the license (i.e. JCV) would only, by virtue of the tax reducer clause 4.1.2, be willing, in certain circumstances to pay consideration of £1.

63. In conclusion, each of the sub-grounds under Ground 1 must be dismissed.

Ground 2 – FTT erred in concluding that the market value of £1 applies for the purposes of Schedule 29 FA 2002 intangibles regime

64. Under this ground, JCV argues that, even if the market value of what was transferred was £1, the relevant figure, so far as the intangible relief provisions in Schedule 29 Finance Act 2002 is concerned, remains £8.25m. According to JCV, neither of the two paragraphs within Schedule 29 (paragraph 5 and paragraph 92), which HMRC rely on as requiring the market value to be taken, apply.

65. Paragraph 5 (company not drawing up correct accounts) requires in essence the substitution of GAAP compliant accounts for non-compliant ones. JCV argues its accounts, which recognised the intangible at £8.25m, were correctly stated in accordance with GAAP as per the facts and circumstances known at the time and that there is no statutory basis for displacing that £8.25m figure. HMRC's response to JCV's argument is that the market value figure of £1 means JCV's accounts were wrong to recognise the intangible of £8.25m and amortise it. GAAP compliant accounts, which needed to be prepared on the basis the fair value of the acquired goodwill was £1, would not have done this. Under the terms of paragraph 5, Schedule 29 applies as if correct accounts (which would not have recognised and amortised the £8.25m), had been drawn up.

66. Paragraph 92 requires that a transfer is treated as at market value where the parties are related. JCV argued the provision did not apply because JCO and JCV were not related parties for the purposes of the provision.

67. The FTT rejected JCV's case on both these paragraphs. JCV argue it was wrong to do so.

Paragraph 5

68. We address the paragraph 5 issue first. The paragraph provides:

> "*Company not drawing up correct accounts*
>
> (1) If a company does not draw up accounts in accordance with generally accepted accounting practice ("correct accounts")—
>
> (a) the provisions of [Schedule 29] apply as if correct accounts had been drawn up, and
>
> (b) the amounts referred to in [Schedule 29] as being recognised for accounting purposes are those that would have been recognised if correct accounts had been drawn up."

69. As JCV challenges not only the FTT's conclusion that Paragraph 5 applied, but also the reasoning and treatment of evidence underlying that, it is convenient to set out the terms of the FTT's discussion in more detail.

FTT Decision

70. The FTT had earlier set out extracts from the experts' joint report, with which it agreed. The accounting experts agreed the appropriate valuation of the acquired business was one which measured the cost of the business at the "fair value" of the consideration given within the relevant financial reporting standards. It was also agreed that the appropriate accounting treatment depended on the appropriate valuation for accounting purposes. So, if that valuation was £8.25m, it was correct to treat that amount as goodwill, whereas if the accounting valuation was £1, that treatment would be incorrect and the £8.25m should be treated as a distribution. The FTT proceeded to discuss in detail each expert's own written and oral evidence, various difficulties in the evidence, and areas of

disagreement between the experts before reaching its conclusions on the evidence which it stated as follows (at [186]):

> "(1) The Joint Report… sets out two different approaches to prior year adjustments, and records that the distinction between what is an "error" and what is an "estimate" is clear in principle but can be difficult in practice. Mr Dickinson would advise the director to take the former approach whilst Mr Holgate the latter. However, we accept the evidence which both experts gave at the hearing that the decision which is taken in 2022 as to the preferred approach, ie following the decision of the Tribunal, does not determine the answer to the question whether the accounts as drawn up were in accordance with GAAP.
>
> (2) Our decision that the market value of the assets transferred under the BTNA was £1 is made for relevant tax purposes. Nevertheless, we accept, based on Mr Dickinson's evidence, that this should also be fair value for accounting purposes. In accepting this evidence we are conscious that a reason for our decision to prefer the expert evidence as to valuation of Ms Beard over that of Mr Brewer was the identification of the assets which are to be valued. Mr Holgate acknowledged that the accounts should show a true and fair view of the transaction, and reflect a price that makes sense commercially; he accepted that £8.25 million makes no commercial sense if the purchaser has no access to the trademark (or cannot get such access at no cost)."
>
> (3) Mr Holgate's evidence was that, irrespective of the position which is taken now as to prior year adjustments, and as to what we now know about the appropriate valuation, JCV's accounts were, when they were drawn up, prepared in accordance with GAAP for the reasons he gave. There were parts of Mr Dickinson's oral evidence that appeared to agree with this – he stated that each set of accounts is drawn up independently, and had to be considered separately; that they were submitted in accordance with GAAP in 2010; but that they are not now in accordance with GAAP given the decision on valuation. <u>However, when considering the interpretation of paragraph 5(1), we reject an approach which looks only at the GAAP-compliance (or otherwise) at the moment the accounts are finalised and signed-off by the director. To take such an approach would mean that intangibles relief would be available by reference to the accounts as filed, if they could be said to have been thought to be in accordance with GAAP at that time, even if it is subsequently shown that they were not in accordance with GAAP, ie that they should have been prepared on a different basis.</u> This conclusion is supported by Mr Dickinson's evidence when viewed as a whole, including not only his whole report but also his evidence given at the hearing." (emphasis added)

71. Mr James first submits the FTT erred in misconstruing the provision. As a matter of legal interpretation, Paragraph 5 did not apply where, as here, the accounts were correct according to the facts and circumstances known at the time. The reasoning the FTT expressed for its view was based on a misapprehended concern that the appellant was arguing that GAAP compliance was based on the *directors' belief* as to GAAP compliance.

72. We consider the FTT was correct to recognise that the question of whether the accounts were correct according to GAAP was a matter of expert evidence. (The fact it acknowledged that matter was one of accounting evidence was demonstrated by it referring to its conclusion being supported by Mr Dickinson's evidence).

73. In his oral submissions, Mr James argued the FTT had, at 186(3), actually made a finding that the accounts were correct at the time. We reject that submission. In the discussion preceding the conclusions set out above, the FTT had discussed, and probed,

some apparent confusion in Mr Dickinson's evidence as to whether he considered the 2009 accounts were GAAP compliant at the time. It is that to which the FTT was referring to when it commented they were "parts of Mr Dickinson's oral evidence that appeared to agree with [the proposition that the accounts were correct when they were drawn up]". However that was not a finding of fact, just an acknowledgement of the apparent inconsistencies in evidence. It does not appear to us that the FTT made a finding one way or other on whether the accounts, when they were drawn up were correct. The lack of a finding was consistent with its view on the legal interpretation of paragraph 5 that it did not matter whether the accounts were correct at the time. What mattered was simply whether they were incorrect. In accepting Mr Dickinson's evidence, the FTT was clearly satisfied that the requirement of the paragraph, that the accounts were not in compliance with GAAP, was satisfied. That reflected Mr Dickinson's evidence, viewed as a whole, in line with his written evidence, and his clarifications of his oral evidence, that if a tribunal in 2022 decided the valuation was £1, then that would mean the 2009 accounts were not in accordance with GAAP.

Legal interpretation of paragraph 5

74. As a matter of legal interpretation of paragraph 5 we consider, contrary to the taxpayer's case, that the FTT was right to conclude that paragraph 5 would apply where the accounts were in accordance with GAAP according to the facts and circumstances known at the time, but were found to be non GAAP-compliant in line with what was known later.

75. That legal interpretation is consistent with the plain words of paragraph 5 which indicate a binary exercise of determining whether the accounts are correct or not. It also runs with the grain of the legislative scheme under which the accounting treatment gives rise to the fundamental question of what tax is charged. If there were envisaged to be situations where statutory provisions, which determined the amount of tax charged pursuant to the basis of accounts drawn up in accordance with GAAP, had the effect of sanctioning tax charges on the basis of accounts that were not drawn up in accordance with GAAP (because that non-compliance was not apparent according to the facts and circumstances known at the time), we would expect the drafter to specify that in clear terms. The fact a formulation, whereby effectively a concession is made to the facts and circumstances known at the time, also begs all sorts of questions as to the kind of facts and circumstances that would count, to whom they would be considered known, and to what standard of enquiry. There is also nothing in the drafting of the provision to indicate that knowledge that arises subsequently is ignored when assessing the correctness of the accounts. Although Mr James highlights the use of the present tense in paragraph 5(1) ("the company does not draw up [accounts in accordance with GAAP]") that usage is equally capable of covering accounts which are later found to be incorrect.

76. We should add that we did not understand the "facts and circumstances" test JCV referred to, and which HMRC object to, to include the question of what version of GAAP would apply. There was no suggestion from either side that the relevant GAAP would not be anything other than the generally accepted accounting practice which applied at the relevant time. The applicable practice would similarly be a matter of expert accounting evidence.

77. Mr James criticises the FTT's reasoning as based on a misapprehension that the company's accounts would stand as correct just because the directors *thought* they were applying GAAP correctly. That was not an interpretation JCV was ever arguing for.

78. However, read in context, the FTT's language "if they could be said to have been thought to be in accordance with GAAP at that time, even if it is subsequently shown that they were not in accordance with GAAP, i.e. that they should have been prepared on a different basis", does not, we consider, show the FTT was placing any particular emphasis on it being enough that the directors thought the accounts were GAAP compliant at the time. Instead, the FTT's underlying concern was more that accounts which in fact were shown to be incorrect would stand as relevant for tax purposes. If we are wrong on that, and the FTT did reach its reasoning on the basis of a fear of the directors' subjective view of GAAP compliance prevailing, then any such error would not, in our view, be material. The FTT, in any event reached the right legal interpretation of paragraph 5 that correctness of the accounts may be assessed with the benefit of subsequent events. As we have said the focus of paragraph 5 is simply on whether the accounts were correct or not in terms of GAAP.

79. We also do not accept Mr James' submission that paragraph 5(1)(b) could not operate if the above interpretation were correct. The submission was based on the view, arising out of the particular expert evidence, that no adjustments would or could be made to the accounts as submitted for 2009. That in our view misunderstands the nature of paragraph 5(1)(b). The provision is not concerned with the actual form of accounting adjustment or correction mechanism that might be deployed where an error is subsequently discovered (e.g. whether that is a change of estimate or correction of error). Rather, it simply requires the hypothesis of accounts, that *would have* been in accordance with GAAP if accounts had been drawn up.

80. Mr James also argues that the FTT's interpretation, applying paragraph 5 so as to impose market value, is at odds with the legislative scheme. Paragraph 92 is exhaustive as to the situation where the market value rule applies and it would be rendered redundant if paragraph 5 was always applied to impose market value as fair value where that differed from the value in the accounts. He submits paragraph 5 is not aimed at valuation issues.

81. We reject these arguments. Paragraph 5 is a general provision and is not restricted in scope. It obviously covers all aspects of the GAAP compliance of accounts and if valuation were excluded it would be expected to specifically state that. Whether in a given case true and fair value matches up to market value will depend on the evidence. The provisions will obviously not be co-extensive. For instance paragraph 92 is also stated to apply for wider Tax Act provisions whereas paragraph 5 is confined to the purposes of Schedule 29.

Market value does not in any case equate to "fair value"?

82. JCV further argues that even if paragraph 5 contemplated that accounts could be viewed as "incorrect" (despite having being correct according to the facts and circumstances known at the time), the FTT was wrong, in view of the appellant's expert accounting evidence, to consider that "fair value" for accounting purposes equated to "market value" for tax purposes. The fair value figure was based on the actual transaction, where the purchaser already had the trademark, whereas the market value was based on a hypothetical purchaser who did not. Thus, Mr James submits, the only reasonable conclusion on the evidence was to accept Mr Holgate's evidence that fair value was £8.25 million. Although Mr Holgate accepted that £8.25m made no commercial sense if the purchaser had no access to the trademark that observation was made in a context where Mr Holgate had noted the need to stay "as close as possible to the circumstances of the actual transaction" (where there was such trademark access). Mr James refers to the FTT's summary of Mr Holgate's report at [171(3)]. That stated:

> "[Mr Holgate's] report dealt with fair value (at [4.18]), stating "In recent years, "fair value" has been used increasingly in accounting, particularly in International Accounting Standards, and in the new UK GAAP…The use of a model is commonly used in the absence of a quoted price and involves asking, hypothetically, what a knowledgeable, willing party would receive or would pay." His report says (at [4.22]) that "fair value has to be a price that makes sense commercially". The only approach to determining fair value that is commercially rational (and not pointless or, worse, inoperable) and stays as close as possible to the circumstances of the actual transaction is to assume that the buyer either has or is granted, as part of the transaction, the right to use the trademarks for the purposes of the Specsavers contract. On this basis, the fair value would be in the order of £8.25m. He accepted that £8.25m makes no commercial sense if the buyer has no access to the trademark or cannot get it at no cost."

83. We note from this that Mr Holgate's evidence acknowledges that "fair value" involves a hypothetical test but then suggests, in order to make that approach "commercially rational", that it must be assumed that trademark use is already with the purchaser or is granted as well. Mr Holgate thus agreed fair value involved a hypothetical test, but that the hypothetical test had to make certain assumptions. While Mr James highlights Mr Holgate's emphasis on "staying close" as possible to the actual transaction (where the purchaser had the trademark) that terminology only serves to illustrate the hypothetical nature of the exercise. If the transaction was simply the actual transaction no question of closeness would arise in the first place. The disputed issue was around what assumptions were built in to the hypothetical sale.

84. The FTT however ultimately preferred Mr Dickinson's evidence on "fair value" being £1, the same as the market value. That was based on Ms Beard's valuation evidence of the assets without the trademark use. It therefore did not accept the assumption Mr Holgate made in his expert evidence.

85. The question of what was "fair value" for accounting purposes was a matter of expert accounting evidence. We agree with Ms Choudhury that this particular sub-ground represents an *Edwards v Bairstow* challenge to the FTT's conclusion on *which* evidence was to be preferred. We consider the appellant has not surmounted the necessary hurdle of showing the FTT was compelled to accept Mr Holgate's evidence over Mr Dickinson's. It was plainly open, in our view, to the FTT to prefer Mr Dickinson's evidence given its correct focus on the identification of the assets that were actually transferred and given Mr Holgate's £8.25m figure was premised on a valuation of a transaction which was not the transaction that took place because it assumed the trademark was provided to the buyer.

86. As indicated above, the appellant also disputed HMRC's argument, with which FTT agreed, that the market value of £1 would apply for Schedule 29 by virtue of paragraph 92. In particular, the appellant disputes that one of the pre-conditions for that provision (that the parties are related) applies as a matter of law. However even if JCV were right in that view, its appeal would still fail because of the application of paragraph 5. Our conclusion above is therefore sufficient to determine the appeal in relation to the intangibles relief issue in HMRC's favour. We prefer to leave legal pronouncements on the interpretation of paragraph 92 to a case where that interpretation is necessary to decide the appeal.

HMRC'S APPEAL IN RELATION TO THE FTT DECISION ON MR CONRAN'S APPEAL

87. In their closure notice in respect of Mr Conran's 2008/9 return, HMRC concluded the valuation in respect of the BTNA transaction was nil rather than £8.25m. HMRC accordingly treated the £8.25m payment to him as a distribution. The FTT disagreed. It considered that the £8.25m paid to Mr Conran by JCV Ltd on acquisition of assets whose market value it had determined was £1 was not "in respect of shares" as required by s209(2)(b) ICTA 1988 and therefore not a distribution. Instead, the FTT considered the payment was made to Mr Conran in his capacity of a majority partner in the vendor LLP, JCO.

88. Section 209 Income Corporation Taxes Act 1988 ("ICTA") provides so far as relevant:

> "**209 meaning of distribution**
>
> (1) …
>
> (2) In the Corporation Tax Acts "distribution" , in relation to any company, means—
>
> …(b) …any other distribution out of assets of the company (whether in cash or otherwise) in respect of shares in the company, except so much of the distributions, if any, as represents repayment of capital on the shares or is, when it is made, equal in amount or value to any new consideration received by the company for the distribution."

89. Section 254(1) ICTA further defines the terms "new consideration" and "in respect of shares" as follows:

> **"254 Interpretation of Part VI.**
>
> (1) In this Part, except where the context otherwise requires—
>
> "new consideration" means, subject to subsections (5) and (6) below, consideration not provided directly or indirectly out of the assets of the company, and in particular does not include amounts retained by the company by way of capitalising a distribution;
>
> …
>
> …
>
> (2) In this Part, the expressions "in respect of shares in the company" and "in respect of securities of the company", in relation to a company which is a member of a 90 per cent. group, mean respectively in respect of shares in that company or any other company in the group and in respect of securities of that company or any other company in the group.
>
> (3) Without prejudice to section 209(2)(b) as extended by subsection (2) above, in relation to a company which is a member of a 90 per cent. group, "distribution" includes anything distributed out of assets of the company (whether in cash or otherwise) in respect of shares in or securities of another company in the group.
>
> …
>
> (9) A distribution shall be treated under this Part as made, or consideration as provided, out of assets of a company if the cost falls on the company.
>
> ...

> (12) For the purposes of this Part a thing is to be regarded as done in respect of a share if it is done to a person as being the holder of the share, or as having at a particular time been the holder, or is done in pursuance of a right granted or offer made in respect of a share; and anything done in respect of shares by reference to shareholdings at a particular time is to be regarded as done to the then holders of the shares or the personal representatives of any shareholder then dead."

FTT Decision

90. The FTT agreed ([131]) the distribution was capable of being a "distribution out of assets of the company (whether in cash or otherwise)" (s209(2)(b)) and that the cost fell on the company (s 254(9)). It was common ground Mr Conran received / had available to him cash of £8.25m which constituted a receipt sufficient for s383 ITTOIA 2005. The dispute under this ground centres on whether the £8.25m was "in respect of shares" and the accounting against that of any "new consideration" under s209(2)(b) in quantifying any distribution.

91. On the facts of this case, Mr Conran was not, of course, a direct shareholder of JCV Ltd; the shares were held by the holding company, the shares in which were in turn owned by Mr Conran. As can be seen in the excerpt of [134] below, the FTT accepted s209 could capture payments made to such "indirect" shareholders. It rejected, however, HMRC's argument that the payment was a distribution on the basis of the following reasoning:

> "134. Section 254(12) provides that a thing is to be regarded as done in respect of a share if it is done "to a person as being the holder of the share". We consider that this does require that something is done to a person in their capacity as shareholder, albeit that this can extend to capture acts done to indirect shareholders. But the fact that the recipient is a shareholder, whether direct or indirect, is not of itself sufficient to mean that it was necessarily in respect of shares in the company.
>
> 135. The business of JCO was treated by s118ZA(1) ICTA 1988 as being carried on in partnership by its partners, ie JCE and JATC, anything done to or in relation to the partnership in connection with its activities is treated as done to the members as partners, and the property of the partnership is treated as held by the members as partnership property. The BTNA is between JCO and JCV, but this transparency for corporation tax purposes means that the amount stated to be payable as consideration was payable to JCE and JATC as partners in JCO. There was no submission by HMRC that the valuation had been made otherwise than in good faith, and it is notable that although the expert evidence before us as to valuation for the Appellants was the report of Mr Brewer, there had been three earlier reports (albeit that two were prepared by BHG) concluding that the business had substantial value (the lowest being £8.25 million).
>
> 136. JATC received £8.25 million as he was the majority partner in JCO which conducted the business, in the form of the OPLA with Specsavers. We do not accept HMRC's submission that this payment was made by JCV to JATC as the (indirect) holder of the shares in JCV, ie in respect of shares in JCV. For this reason, the payment was not a distribution within s209(2)(b)."

92. HMRC allege the following errors of law in relation to the substance of the decision, in summary:

(1) In finding as it did the FTT effectively reversed the burden of proof which lay on Mr Conran. The fact that £8.25m came into Mr Conran's hands, where it was an overpayment for a business worth £1, demanded an explanation. It was not open to the FTT to treat the existence of the BTNA or the LLP as determinative or to find, in essence, that the parties had entered into a bad bargain (i.e. paying £8.25m for something worth £1).

(2) Furthermore, and alternatively, the FTT's conclusion was not open to it on the evidence. That was an error under *Edwards v Bairstow.*

93. Mr James emphasises that HMRC's case challenges a finding of fact. He submits HMRC's case fails to surmount the familiar additional hurdles necessary in order to show that a fact-based challenge amounts to an error of law. No misdirection of law is alleged. The FTT correctly appreciated the onus lay on Mr Conran. There was clearly ample evidence which the FTT had to make its finding, indeed the evidence compelled the finding the FTT had correctly reached. There was a genuine sale of business between LLP and company on the basis of an £8.25m valuation. That was what drove the transaction and payment by JCV, not Mr Conran's status as indirect shareholder.

94. We address the further detail of the parties' submissions as necessary in our discussion section below.

Discussion

95. In *Sharon Clipperton and another v HMRC* [2022] UKUT 351 (TCC) the Upper Tribunal described the purpose of the distributions code as being:

> "[58]…. to tax shareholders on value which a company delivers to them out of its assets, directly or indirectly, by some non-prescribed means."

96. It went to explain that:

> "…the requirement for a distribution out of assets to be "in respect of shares" refers to a situation where the relevant asset or value is put into the hands of a shareholder in [the shareholder's] capacity as such, in effect, as a return on or by reference to [the shareholder's] shareholding as an investment in the company, and not in some other capacity and for some other reason."

97. The Upper Tribunal reinforced this reasoning in *Shinelock Limited v HMRC* [2023] UKUT 00107 TCC), (a recent Upper Tribunal decision that was issued after the hearing in this case but in respect of which both parties had the opportunity to make submissions). There, the Upper Tribunal (at [81]) applied the above reasoning from *Clipperton* to provisions in s1114(3) CTA (which was analogous to s209(2)(b) but which referred to "in respect of security" instead of to "in respect of shares"). The Upper Tribunal had noted (at [80]) that s1114(3) was "given a wide meaning by s1114(4) and (5)" (which provisions are analogous to s254(12) ICTA) "effectively asking whether the [relevant payment] was made to [the person who was said to have received the distribution] *qua* holder of the security".

98. Both parties accept that whether there is a distribution "in respect of shares" is a question of fact and degree. There is no dispute that whether there is a distribution is to be considered as a matter of substance, not simply the label the parties put on it.

99. Nor, it seems, is there any real dispute that if a benefit is received by a shareholder (and by extension to a non-shareholder in certain circumstances) the onus is on that direct or indirect shareholder to explain in what other capacity they received the

benefit. Mr James points out that the FTT were well aware of the onus insofar as HMRC had referred the FTT to the following extract in *Bramwell on Taxation of Companies and Company Reconstructions (paragraph E1.2.6) [footnotes omitted]:*

> "If, therefore, a benefit is received by a shareholder from a company, the onus is on the shareholder to establish in what other capacity he received the benefit if it is not to be treated as a distribution. Indeed, even a benefit conferred by a company on a non-shareholder may be "in respect of shares" if it is conferred at the request or wishes of a shareholder. A presumption to this effect may arise if, for example, an asset is transferred to an associate of a member and there is no apparent commercial reason for the transfer other than that person's connection with the shareholder."

100. As mentioned, the closure notice in respect of Mr Conran's 2008/9 return was issued on the basis that the £8.25m payment was chargeable to him as a distribution paid to him and the return was amended by HMRC accordingly. It must, in any event be uncontroversial that the burden of proof was on the taxpayer to show the amendment was incorrect.

101. As a question of fact and degree, and one which turns on whether a payment is received as shareholder or in some other capacity, we agree with HMRC that the issue will inevitably call for an assessment of all the facts and circumstances.

102. That exercise, of looking at the whole picture, would tend to point against the sort of analysis which singles out a particular factor as determinative. As well as the labelling of the payment by the party being inconclusive as already mentioned, other features which cannot necessarily be assumed to be determinative will include the legal nature of the transaction by which the sum is delivered to the recipient, or the means, if different, by which the sum (said to give rise to the distribution) emerges from the relevant company.

103. This is illustrated, as Ms Wilson argued on behalf of HMRC, through the facts of *Clipperton.* There, the taxpayer's company paid £200,000 to a subsidiary company by way of subscription for a new class of shares in the subsidiary. The taxpayer company settled those shares onto an interest in possession trust in favour of the taxpayer. The subsidiary declared a dividend which the trustees then paid to the beneficiary (the taxpayer). The taxpayer sought to argue the disputed income was the income of the taxpayer company (under the legislation relating to settlements in chapter 5 Part 5 ITTOIA), rather than a distribution "in respect of shares", as HMRC argued. The Upper Tribunal agreed with the FTT that, for the purposes of determining whether there was a distribution, the series of transactions could be viewed as a composite whole. As Ms Wilson pointed out, neither the fact the receipt of payment came to the taxpayer as beneficiary of the trust, nor the fact that the payment from the taxpayer's company was in return for share subscription proved determinative of the issue of whether what the taxpayer received was "in respect of shares".

104. In response, Mr James sought to distinguish the case on the basis it concerned an "out and out" scheme to avoid tax on paying a dividend. We disagree that limits the principle established in the case. The approach the Upper Tribunal endorsed, of looking at the transactions as a composite whole, was not dependent on the particular nature of the scheme but started with a purposive construction of the relevant distribution statutory provision. As the Upper Tribunal explained (at [73]) a *Ramsay* approach to purposive construction was not restricted to cases of tax avoidance. The Upper Tribunal's view that, as a matter of statutory construction, the term "in respect of shares" was interested in the

composite whole of the transactions, is also entirely consistent with the need to look at all the facts and circumstances when determining whether the provision is satisfied.

105. As regards HMRC's appeal in this case, Mr James rightly highlights that the conclusion HMRC challenge, is a finding of fact. HMRC's grounds do not however shrink from the task of demonstrating why the finding nevertheless constituted an error of law. They squarely advance that it was not open to the FTT to find that the taxpayer had satisfied the relevant burden of showing the payment was not received in Mr Conran's capacity as shareholder by levelling a series of specific criticisms against each of the points which underpinned the FTT's finding of fact on the capacity in which Mr Conran received the £8.25m payment.

106. The FTT concluded at [136] that Mr Conran "..received £8.25 million as he was the majority partner in JCO which conducted the business, in the form of the OPLA with Specsavers." The reasoning for that, in comparison to the FTT's detailed analysis in relation to other issues in the decision was sparse. The totality of the points were set out in the preceding paragraph in the FTT Decision at [135] (see [91] above).

107. The first point was that the transparency of the LLP for corporation tax purposes (under s118ZA ICTA 1988) meant that the payment of consideration was to Mr Conran and JCE "as partners in JCO". We agree with HMRC that this statutory deeming for corporation tax purposes is irrelevant to the question of whether Mr Conran received the £8.25m in the capacity of a partner in JCO (as opposed to as indirect shareholder of JCV). The question of capacity turned on an analysis of all the factual circumstances, not the corporation tax consequences of the consideration stipulated in the BTNA. The point also assumes the legal agreement under which the sum was formally paid was determinative. That was also incorrect as illustrated by the approach taken in *Clipperton* discussed above.

108. The second reason concerned that there were valuations concluding the business had substantial value (£8.25m at minimum) whose good faith HMRC had not challenged. This appears to be drawn from a statement in HMRC's skeleton before the FTT. In response to the taxpayer's argument that the accounting treatment revealed there was no distribution, HMRC said "However that is because at the time the 2009 accounts were prepared, JCV took the view that it had received a valuable asset as a result of which it had not made a distribution". As we will come on to, one of the procedural errors of law HMRC take issue with is the late stage at which the taxpayer's argument (that the payment was not "in respect of shares" and therefore the issue of the capacity in which the payment was received) was raised. HMRC's admission, such as it was, was made not knowing the capacity point was in issue as it had not been pleaded. HMRC submit, in any case, that all that was being admitted was that there had been no deliberate attempt to inflate the accounts or to make a disguised distribution. However, none of that meant the transaction and pricing were not driven by Mr Conran in his capacity of controlling JCV Ltd (in other words none of that meant the situation did not still arise where JCV Ltd was entering into the transaction to pay £8.25m to Mr Conran in his capacity as shareholder). Mr Conran was the ultimate owner of the purchaser and vendor. Even though the valuations could be conducted in good faith, that would not mean that, in these circumstances, the valuations would be considered with the same due diligence, in terms of assessing the value obtained for the asset, as they might be otherwise. Mr Conran as owner of the group entities could afford to take the risk the valuations were wrong because he was getting paid either way.

109. We agree with HMRC that, on analysis, neither of the above points were matters which would enable the FTT to be satisfied that the taxpayer had met the burden on him of displacing the basis of the amendment to Mr Conran's self-assessment, namely that the

£8.25m payment was paid to Mr Coran in his capacity as shareholder. As HMRC point out the fact that £8.25m came into his hands in circumstances where there was an overpayment for a business worth £1 demanded an explanation. The above points do not provide that and the FTT ought not to have accepted the burden had been discharged. It erred in doing so. While it is correct the FTT may well have appreciated the onus lay on the taxpayer (through being referred to the extract above from *Bramwell*) the reasoning and outcome of its decision show the FTT did not then apply that requirement in its eventual decision.

110. Mr James submits there was ample evidence on which the FTT could reach its conclusion. However beyond his point that the payment arose from the good faith purchase of a business under the BTNA, which the FTT considered, but which we have said was insufficient to meet the burden for the reasons explained, it is not clear what other evidence the FTT relied on. The FTT decision certainly does not reflect that any other evidence was considered in reaching a conclusion on the "in respect of shares" issue.

111. The above analysis, that the FTT was wrongly satisfied, given the reasoning it gave, that the burden on the taxpayer was met, provides a sufficient basis to dispose of HMRC's ground of appeal in HMRC's favour.

112. If there was any doubt, then we would agree with HMRC that there were a number of the other inferences in favour of HMRC's case that could be drawn from the totality of the evidence, and in many cases the absence of evidence that was before the FTT. These inferences pointed towards Mr Conran receiving the payment in his capacity as indirect shareholder of JCV, and it would have fallen to the taxpayer to displace them:

(1) A basic point was to step back and recognise Mr Conran's ultimate ownership of the various entities. In relation to the selling LLP, JCO, Mr Conran was a member of the LLP and owner of the other member (JCE). In relation to the purchaser and paying entity JCV Ltd. Mr Conran was also shareholder and sole director. Mr Conran was thus wearing many different hats. HMRC are right to say the taxpayer's case requires him to say that he had no regard to himself as ultimate owner of JCV Ltd when agreeing a price that might have turned out to be excessive.

(2) There was also no evidence that the OPLA business was offered to anyone other than entities owned and controlled by Mr Conran. In other words Mr Conran was simply moving his assets/ cash around wholly controlled vehicles.

(3) The "tax reducer" clause 4.3 (where if JCV Ltd did not get a certain tax treatment from HMRC the consideration reduced to £1) showed Mr Conran was willing to protect shareholder value in that company at the expense of the LLP. The presence of that clause was also consistent, as Ms Wilson submitted, with Mr Conran being the architect / decision maker in the transaction. The tax reducer clause was not consistent with a party acting at arm's length, or "as if at arm's length" so there could be no question of the transaction being rationalised as a mere bad bargain (i.e. paying £8.25m for an asset worth £1). We reject Mr James' argument that the tax reducer clause was consistent with the parties being concerned about market value and a reflection of the connected nature of the parties which had nothing to say about the question of capacity. On the contrary, it shows the price was driven, not by the value of the business, but by the extent of favourable tax treatment to JCV. This feature was far more consistent with the payment being made in respect of Mr Conran, taking a directing role as shareholder and the payment being in respect of his being ultimate shareholder in JCV rather than as his status as partner in JCO.

(4) The joint statement of accounting experts (Mr Holgate and Mr Dickinson) agreed that if the valuation was £1, the payment would be treated as a distribution. This was

explained on the basis that JCV paid £8.25m to JCO (thus in substance to Mr Conran) but gained nothing of value in return. The payment to JCO was therefore equivalent in its effect to JCV paying a dividend distribution to its parent JCH (which was owned by Mr Conran). It could be inferred that advice along these lines (regarding the risk of the payment being treated as a distribution) would have been given to the taxpayer around the time of the transaction. The fact Mr Conran nevertheless entered into such a transaction knowing such risk was consistent with his status as the ultimate shareowner driving the transaction.

113. Mr James submits that, to the extent HMRC say the transaction only happened in the way it did because Mr Conran was a shareholder, that would amount to satisfying a "but for" test. However, that did not mean Mr Conran received the payment in a shareholder capacity. Even if his status as shareholder did in this sense play some part in him getting the payment, that was not necessarily inconsistent with him also receiving it in his capacity as partner in the LLP.

114. As a general proposition a "but for" test (i.e. but for the person being a direct or indirect shareholder, the payment would not have been received) will not, as the FTT indicated (at [124]), be enough to show the payment was received in that capacity. However, in the context of an appeal against a closure notice amendment predicated on the sum being paid as a distribution, whether the above inferences amount to a "but for" test is irrelevant. That is because it was for the taxpayer to show the payment was not received in that capacity. Following from the *Bramwell* extract above, the taxpayer would moreover need to show what capacity the payment was received in. The inferences HMRC raise above were all matters which increased the difficulty of challenge that Mr Conran faced in showing the true cause of the payment was not Mr Conran's shareholding but some other capacity.

115. We therefore conclude there was an error of law in the FTT decision in respect of Mr Conran's appeal. The FTT reached a decision it was not entitled to (because there was insufficient evidence before it to displace the relevant burden on the taxpayer). Although, as Mr James pointed out, HMRC have not alleged any misdirection of law, we consider HMRC's points, in essence, also encapsulate an error of the FTT in taking the wrong legal approach. The question of what capacity the payment was received in was agreed to be a question of fact and degree. A more holistic approach, which considered all the facts and circumstances surrounding the payment and the context in which the transaction took place, was required. The error, as regards misapplying the burden was, we consider, a consequence of failing to take such approach.

116. Before we consider the materiality of the error, whether the FTT decision in respect of Mr Conran's appeal should be set aside, and if so whether it should be remitted to the FTT or remade by the Upper Tribunal, it is necessary to address the alternative arguments Mr Conran makes in his respondents' notice supporting the FTT's decision to allow his appeal.

TAXPAYER'S RESPONDENT'S NOTICE

Value to JCV argument: taxpayer argues, even if market value was £1, value to JCV was £8.25m

117. In brief the argument here is that, even if the benefit Mr Conran received of £8.25m was received in his capacity as shareholder (and even if the market value for CGT purposes of what was transferred was £1), the value of the new consideration to JCV entirely offset that (pursuant to the legislation (s209(2)(b) – see [88] above). That was because the value of the new consideration <u>to JCV</u>, (JCV being an entity which <u>did</u> have

access to the trademark), was an asset worth £8.25m. (This argument was also described in terms of the marriage value of uniting the OPLA asset with trademark use).

118. The FTT dealt with this at [137]-[141] but rejected it concluding as follows (at [141])

> "The difficulty we have with Mr James' argument is that whilst it may well be said that the business has a greater value to JCV than to a purchaser which does not already have a licence, the definition looks at the new consideration received, ie the assets transferred.
>
> Whilst we consider the point finely balanced, we have concluded that we should not allow a marriage value concept here. The consequence of this is that JCV has not received new consideration of £8.25 million."

119. The taxpayer relies on *HMRC v Pickles* [2022] UKUT 253 (TC) in support of his case (it should be noted this is on appeal to the Court of Appeal and is currently expected to be heard in November 2023).

120. *Pickles* concerned a sale agreement of a business as a going concern, by taxpayers in partnership, to a company they set up, and the legislative provisions covering distributions arising on a transfer of assets or liability between a company and its members whereby the benefit received by the member exceeded the new consideration the member gave (s1020 Corporation Tax Act ("**CTA**") ("**s1020**")– the equivalent provision in ICTA being s209(4) ICTA).

121. Section 1020 provided:

> "(1) This section applies if on a transfer of assets or liabilities—
>
> (a) by a company to its members, or
>
> (b) to a company by its members,
>
> the amount or value of the benefit received by a member exceeds the amount or value of any new consideration given by the member.
>
> (2) The company is treated for the purposes of the Corporation Tax Acts as making a distribution to the member of an amount equal to the excess. …
>
> (3) For the purposes of subsection (1) the amount or value of a benefit, or of any consideration, is determined in accordance with the market value.'

122. The amount attributed to goodwill (£1.19m) was credited by the company to the directors' loan account. Before the Upper Tribunal the parties were agreed the new consideration was the goodwill (valued at £270k).

123. The dispute was over the value of the benefit received for s1020, namely the promise to pay £1.19m and in particular whether that was the face value of the debt (as HMRC argued) or a discounted value of £365k (as the taxpayer argued – on the basis the company's actual state of finances meant it was not in fact good for the full amount). Part of HMRC's case, which the Upper Tribunal rejected, was that it was not necessary in valuing the benefit consisting of a cash sum to engage with the question of "market value" in s1020(3). The Upper Tribunal considered "market value" was relevant both to new consideration and the benefit. However, it also rejected the taxpayer's submission that market value meant "open market value" for CG purposes (on the basis that if that was what was intended it would be expected that a definition to that effect would be included as it had been elsewhere ([43]). The Upper Tribunal understood market value as the "value attributed to the benefit by a member of a company (sharing the attributes and knowledge of the taxpayers), rather than the value which might be placed on the relevant asset by an

arm's length third party trader" (at [44]) but noted (at [45]) that the circumstances which inform market value will "vary depending on the transaction and the nature of the asset or benefit" and might require evaluation of the asset itself (giving the example of a car) or in other cases the intention and knowledge of the parties. The Upper Tribunal emphasised that: "Ultimately…the valuation must remain grounded in objective considerations…". Applying that approach to the facts the Upper Tribunal, considered the member had every expectation the relevant promise to pay would be honoured holding the benefit was the £1.19m amount rather than the discounted amount.

124. The taxpayer relies on *Pickles* for the proposition that CGT market value has no relevance in a distribution context and also that it is the position of the actual parties that governs value. Hence Mr James argues it is the value of the assets <u>to JCV</u> (who already had trademark use), namely £8.25m which is the relevant value of the new consideration.

125. We agree with Ms Wilson there is some need for caution in any mapping across of the Upper Tribunal's analysis to the situation here where there is not the same provision referring to "market value" in s209(2)(b), and also we note, any rule that applies market value explicitly to both the benefit and the new consideration as s1020(3) CTA does. On the other hand the Upper Tribunal's reasoning as to why the CGT definition of open market value should not be adopted (because a specific legislative reference to that effect would be expected) would seem to suggest such a test is equally not intended for the provisions at issue here.

126. Ultimately however, we do not consider that *Pickles* establishes that the value for s209(2)(b) purposes must necessarily be looked at in the same terms as "market value" was in respect of s. 1020. Even if that was the case, it cannot be assumed that the kind of valuation analysis the Upper Tribunal had in mind, grounded as it was in objective considerations, dependent on the particular transaction, and involving the nature of the transaction and intentions of the parties, would inevitably equate to the same subjective "value to JCV" valuation of £8.25m advanced by the taxpayer.

127. In any case, even making an assumption in the taxpayer's favour that *Pickles* does mean value is looked at from the perspective of the company receiving the asset (JCV), we do not consider that, in the end, helps the taxpayer. The FTT was right to focus on the new consideration being the assets that were transferred. As Ms Wilson submitted, the provision looks at the *quid pro quo* for the benefit received and that must exclude account being taken of items the company already has. While JCV obtained an asset, that when combined with the trademark use it already had, was worth £8.25m to it, that does not mean the assets without the use of the trademark provided new consideration worth that amount.

128. The arguments in the taxpayer's respondents notice do not therefore mean Mr Conran's appeal would succeed despite the error of law we identified above. That error was plainly material in that if the FTT had not wrongly considered that the burden on the taxpayer was satisfied, it would have been bound to dismiss the taxpayer's appeal. We accordingly set aside the FTT's decision allowing Mr Conran's appeal. Our remade decision is that Mr Conran's appeal in relation to the distribution issue fails. This is on the basis there is insufficient evidence to displace the burden on him to show he received the £8.25m in some capacity other than as an indirect shareholder, and all the more so when the inferences HMRC invite (see [112]) are taken account of. The argument that there is no distribution because the new consideration was £8.25m is rejected for the reasons stated above in relation to the Respondent's notice.

129. In view of our conclusion above allowing HMRC's appeal, we do not deal with HMRC's alternative argument. This was that the FTT was procedurally unfair in addressing the "in respect of shares" argument and finding against HMRC on it. (HMRC submits the "in respect

of shares" argument, a new fact sensitive point, had not been pleaded at any point (orally or in writing), or that if it was pleaded orally, then this was not until closing submissions and therefore ought to have resulted in FTT treating it as an application to amend pleadings. That application, HMRC argues, ought properly to have been refused because it affected the shape of the litigation in terms of evidence that had been put together. Mr James' position was that no such error arose. He accepted the issue had not been pleaded and was not raised until day 4 of the hearing but submitted that it was open to the FTT to address the issue. (There was for instance no indication that HMRC would realistically have called evidence to deal with the point).

130. It is accordingly also unnecessary for us to reach a view on whether the cases *Gary James Keane -v- David Sargen and others* [2023] EWCA Civ 141, and the *Hawksworth -v- Chief Constable of Staffs* [2012] EWCA Civ 293, established a proposition, applicable to tribunals litigation, that a party wishing to take a point on appeal that an issue was not pleaded must have first objected to and insisted on a ruling from the first instance hearing judge hearing on the new matter being taken. We were nevertheless grateful for the brief post-hearing submissions on the relevance of those authorities to HMRC's procedural ground of appeal with which Mr James and Ms Wilson/Ms Choudhury provided us.

DECISION

131. JCV's appeal is dismissed. HMRC's appeal is allowed. The amendments to JCV's corporation tax self-assessments and to Mr Conran's income tax self-assessment are upheld in HMRC's favour (subject to any adjustment as appropriate to take account that the value of the assets transferred stands at £1 rather than nil as originally argued).

JUDGE SWAMI RAGHAVAN
JUDGE JENNIFER DEAN

Release date: 13 July 2023