[2010] UKFTT 457 (TC)

TC00722

Appeal no SC/3215/2006

CAPITAL GAINS TAX — value of shares in private limited company — shares disposed of in 1994 — stated consideration of £20,000 — whether arm's length sale — no —tax to be based on market value of shares — TCGA 1992 ss 17, 272 — identification of market value

FIRST-TIER TRIBUNAL
TAX

OLIVER ISAAC INY **Appellant**

and

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

Tribunal: Judge Colin Bishopp
John Cherry FCA

Sitting in public in London on 20 to 22, 26 and 27 January 2010, with written submissions concluding on 5 May 2010

Roger Thomas, counsel, instructed by Olswang, for the Appellant

Michael Gibbon, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs for the Respondents

DECISION

Introduction

1. This is an appeal by Oliver Iny against an assessment to capital gains tax in respect of a gain which the Commissioners say accrued to him in the year 1994-95. He has appealed also against a related penalty, imposed in consequence of his failure to declare the gain, if there was a gain, in his tax return for that year. Mr Iny acknowledges that no gain was declared. The questions for ultimate determination by the tribunal are, in summary: first, whether a taxable gain was in fact made; second, the amount of the gain, if any; third, whether a penalty is properly due; and fourth, if so, the amount of the penalty which should be imposed. We are, however, asked by the parties to deal in this decision only with the first two questions (although, as will appear below, we shall reformulate them before providing answers), and to allow them to make further submissions on the third and fourth should our conclusions on the first two not render them redundant.

2. The relevant disposal occurred on or about 10 October 1994. It is not certain that is the exact date, but the parties have agreed it is sufficiently accurate. As we shall later observe in more detail, the evidence available to us was incomplete in many respects and it has been necessary to make assumptions about a number of matters some of which, in themselves, are not the subject of dispute but in respect of which we need nevertheless to make a finding of fact. The disposal consisted of the sale by Mr Iny of the entire share capital of Castlegold Properties Limited ("Castlegold"), of which he was the sole beneficial owner, to a Bahamian company, Harlequin Holdings Limited ("Harlequin"). The documented consideration was £20,000. The acquisition cost of the shares for the purpose of calculating the tax was negligible, being their par value of £100 plus an indexation allowance of £3, and we need not deal with it further.

3. The Commissioners' case is that the sale was not at arm's length and that the consideration, for the purposes of assessing the taxable gain, is to be taken as the shares' open market value on the date of disposal. Mr Iny argues that the sale was indeed at arm's length and that £20,000 was the best price which could be obtained; alternatively that the market value of the shares was nil. The Commissioners advanced also the alternative, but by the time of the hearing subsidiary, argument that Mr Iny and Harlequin were, or are to be treated as having been, "connected persons" within the meaning of s 286 of the Taxation of Chargeable Gains Act 1982 ("TCGA") with the consequence that s 18 of TCGA (which deems a sale between such persons not to have been made at arm's length) is engaged. Mr Iny denied that there is any sufficient connection.

4. We interpose that Mr Michael Gibbon, who appeared for the Commissioners, made much of the parties' change of position during the period before the appeal came on for hearing The Commissioners had initially relied on s 18, while at a late stage Mr Iny raised a separate argument, that the disposal was a sale at arm's length. In his closing submissions, Mr Gibbon asked us to determine the appeal, against Mr Iny, by reference to s 17 and suggested that only if we found ourselves unable to do should we go on to consider ss 286 and thereafter s 18. We shall return to this point later.

5. On 18 January 2001 the Commissioners made an assessment for tax of £80,000, based on their then estimation that Mr Iny had realised a gain of £200,000. An appeal was made by Mr Iny's accountants on 29 January 2001. On 14 December 2005 the Commissioners imposed a penalty, on the grounds that Mr Iny's failure to declare the gain in his return was negligent, and thus contrary to s 95 of the Taxes Management Act 1970 ("TMA"; the section has since been repealed and replaced, but it remains effective for the material time). The penalty imposed amounted to £260,400, or 35% of the tax which the Commissioners had by this time concluded should be as much as £744,000; they then thought that the gain amounted to £1.86 million. The assessment was not, however, amended, and has still not been amended; the Commissioners have been content, assuming it is upheld in principle, to ask the tribunal to determine the correct amount of tax. The appeal against the penalty was made on 9 January 2006.

6. Mr Iny was represented before us by Mr Roger Thomas of counsel and the Commissioners, as we have said, by Mr Gibbon. We had a rather limited statement of agreed facts, supplemented by the statements, disclosed in advance, and oral evidence of Mr Iny, Geoffrey Lansbury, Lance Blackstone and Archibald Edmonstone, as well as the expert evidence of Jennifer Nelder and Graeme Thom for Mr Iny, and Christopher Glover and Jerzy Wielechowski for the Commissioners. We had also the statement of the officer who imposed the penalty, David Higgins, but it was not considered necessary for him to give oral evidence. We were provided with opening submissions and, after the hearing, with lengthy written closing submissions. There was a great deal of material to be identified and analysed and we are grateful to both counsel for marshalling it as well as they have done. As will become apparent, it was a far from easy task.

7. What follows is a largely chronological description of the relevant events. Some of it is uncontroversial and, where that is so, we merely relate the facts as we find them or as the parties have agreed them, without elaboration. The statement of agreed facts produced for the hearing did not deal with a great many matters of detail, some of considerable importance. Where there is a dispute or a difference between the parties, about a fact or the significance of or interpretation to be placed on an event, we set out the evidence in as much detail as is necessary. We have found it impossible to make a firm finding in respect of some matters, because of the lack or poor quality of the evidence, and have correspondingly drawn an inference. We have borne in mind that it is necessary at this stage for us to make findings of fact only so far as they impact on the two principal questions before us, that is whether the disposal was at arm's length and, if not, the market value of the Castlegold shares at the date of disposal.

8. Before embarking on the facts we think it appropriate to dispose of a matter which arose only in the parties' written closing submissions. Mr Thomas took exception to the (as he perceived it) barely veiled contention of the Commissioners that the inadequacies of and inaccuracies in much of the documentary evidence produced were attributable to an intention to deceive on the part not only of Mr Iny but also of those of his professional advisers who were involved in the relevant events. We did not ourselves detect any such contention, veiled or otherwise, in respect of the professional advisers during the course of the oral hearing, though it is certainly true that Mr Gibbon, then and in his written

submissions, made trenchant criticisms of Mr Iny's reliability as a witness, and several adverse comments (which Mr Thomas accepted had some merit) about the lack of detail in many of the documents, and the absence of others.

9. It is undeniable that there were remarkable deficiencies in the documentary evidence, in that some documents one might have expected to be produced without difficulty were not available, and others were inexplicably incomplete or, in some cases, demonstrably wrong; a few were drafts of documents we were asked to accept had been completed, even though the final copy could not be produced, and others still, even when prepared by solicitors, were remarkable in that they lacked much of the detail one would normally expect as a matter of course. The reliability of many of the documents, and one in particular, is therefore questionable; where appropriate we comment below about them individually. There is some force, too, in Mr Gibbon's observation that we had no evidence from some witnesses who might have been able to speak about the documents and thereby assist Mr Iny's case; Mr Thomas's retort that the need to call some witnesses did not become apparent until a late stage, and that at least one was unwilling to attend, is in our view an inadequate response since it must have been clear from the outset that the documents and Mr Iny's own evidence were open to the very criticism Mr Gibbon made.

10. Despite those features, we think it appropriate to record, since Mr Thomas raised the matter, that we have no reason to think that any of Mr Iny's professional advisers acted in any improper manner. Of course, professional advisers necessarily take much of what their clients tell them on trust; and it does not follow that, because a professional adviser has acted with proper care, a document he has produced must necessarily be taken (as Mr Thomas urged upon us) as accurate. The lack of detail in some documents and the, in some cases serious, errors in others is consistent only with the conclusion that the professional advisers were provided with inadequate or inaccurate instructions. In the light of the deficiencies in those documents which were produced to us, as well as the unexplained absence of others, we have taken more than usual care to consider the documents in their context in order to assess their reliability.

11. We shall set out our conclusions about Mr Iny's own evidence on the various topics to which it related as we deal with it below, but it is appropriate to make some general observations now. He made no secret of his being unable to deal with detail and it became quickly apparent, as he gave his evidence, that his recollection of even quite significant events was not merely lacking in detail but also vague and often (as on occasion he conceded) unreliable. It is, of course, necessary to make allowances for the passage of time—some of the relevant events occurred as long as 20 years ago—but it was remarkable, for a man of his evident ability, that Mr Iny recalled so little of some important matters and, on several occasions, gave conflicting accounts of the same events, yet had excellent recall of other matters. It is, in particular, conspicuous that there are significant inconsistencies between Mr Iny's first, undated, statement produced (probably in 2008) in the course of this appeal and the second statement he made in March 2009, between both of the statements and his oral evidence, and within his oral evidence itself. We have consequently felt compelled to treat Mr Iny's evidence with considerable circumspection.

The facts

12. It was undisputed that Mr Iny has spent his working life as a property developer and entrepreneur. His evidence was that he has had periods of considerable success, interspersed with failures which have led to financial difficulty to the extent that, by his own account, he has been more than once on the brink of bankruptcy. It became abundantly clear that during the period with which we are concerned he was not averse to risk, and that he regarded financial reverses as an occupational hazard. It was apparent too that his talent lay in identifying opportunities rather than in their realisation, which he left to others.

13. The chronology of the events in the early 1990s, and much of the detail, are very difficult to determine because Mr Iny's evidence about them was particularly vague. We recognise, as we have said, that the events occurred many years ago and that it would be remarkable if Mr Iny had a clear recollection of the detail without refreshing his memory from contemporaneous documents; what is extraordinary is that, as we have indicated, we were provided with very few contemporaneous documents, recording transactions of considerable value and which must have been of some significance, at the time, to the participants. Much of what follows comes, instead, from a deed of charge dated 19 December 1995, containing (if it is correct) better information than any other available document about events in 1990, the beginning of the period with which we are concerned. Mr Thomas argued that this document, prepared by solicitors, should be treated as accurate unless its reliability was displaced by other evidence. Mr Gibbon maintained that its reliability was displaced by its own internal inadequacies and its inconsistency with other evidence. We shall have more to say about the deed later; for present purposes we take it as a starting point and base the following narrative on the rather sparse information it contains, supplemented by Mr Iny's recollection, such as it was, and the remaining available evidence.

The property acquisitions

14. It is common ground that in the early 1990s Mr Iny was the sole beneficial shareholder of a company, Clerkenwell Holdings Limited ("Clerkenwell"), which in turn owned the shares of three subsidiaries, Glintpatch Limited, Uniglen Developments Limited and Deepfarm Limited (collectively, "the subsidiaries"). Mr Iny's evidence was that, between them, the four companies owned, or had options or similar interests over, a number of development sites—that is, sites with development potential; they were not in the course of being developed and had, at best, no more than outline planning permission. His strategy was to secure planning consent when necessary, and then to sell the sites with the benefit of those consents and, occasionally, some infrastructure so that they might be developed by others. What properties, if any, were owned by each of Clerkenwell and the subsidiaries before 1990 did not emerge, but is probably of no continuing importance. What is important for the purposes of this appeal is that, between 1990 and 1993, companies controlled by Mr Iny acquired interests in three properties.

15. The deed of charge recited that on 19 February 1990 the three subsidiaries agreed, by six separate agreements, to acquire various parcels of land from Cartmel Investments Limited ("Cartmel"), a company registered in Jersey. The

deed referred to, but did not exhibit copies of, the six agreements, and it included only a list of the agreements, identifying merely the date and the parties to each agreement, without even a minimal description of the land. Mr Iny's evidence was that the land consisted of the site of a disused hospital in Lincoln with residential potential. The site extended to over 70 acres and, Mr Iny said, different parts were acquired by each of the subsidiaries; we did not learn why the site was divided in that way, but the reason appears to be of no importance in itself.

16. Cartmel, Mr Iny told us, was owned (and was controlled, in a practical if not legal sense) by Dr Aydan Sakhili, a Turkish businessman apparently of considerable means whom Mr Iny then knew well, though he told us he lost touch with him some years ago. We had no documentary evidence of Cartmel's registration, directors or shareholders. If Mr Iny's evidence about Dr Sakhili is right, he was a somewhat shady character. Mr Iny described him as a "sanctions buster", who spent much of his time in the Middle East, sometimes remaining out of contact with Mr Iny for months at a time. Whatever else occupied his time, Dr Sakhili, too, was involved in property development and the two had, Mr Iny told us, undertaken some joint projects in the past. Over the years, he said, they had built up a relationship of friendship and trust and Dr Sakhili, who was of a generous disposition, often did not insist on properly documenting agreements between them.

17. The deed went on to recite completion of the agreements on terms that Cartmel was willing to accept only part payment of the prices. It referred to (but again did not exhibit) letters from the subsidiaries to Cartmel dated 30 April 1990. That date may well have been the day on which the agreements were completed, though the deed did not say so. Copies of the letters were not produced to us but according to the deed they contained acknowledgments by the subsidiaries of the balances outstanding to Cartmel and undertakings to enter into charges over the land by way of security if called upon to do so. There was no evidence that they were ever called on to do so.

18. Mr Iny's evidence about the price paid or to be paid for the property acquired from Cartmel was confused and confusing. One version was that the six parcels of land were purchased for an aggregate sum of £3,532,401.90. We did not learn why it was such an unusually precise amount. According to his first statement, Clerkenwell or one of the subsidiaries—it did not become clear which—borrowed £2.5 million, as part of the price, from two commercial lenders. We saw no documentary evidence of those loans, or of the manner in which they were serviced. In his first statement Mr Iny said he thought they had to be repaid within one or two years, though he was unable to say anything about the terms for the payment of interest. After reflecting about the loans as he gave oral evidence, Mr Iny told us that the total price for the Lincoln sites was in fact £6 million, for which the loans were used as part payment.

19. It is possible that Mr Iny is mistaken and that these loans related to quite different properties. Had there been commercial loans of that size the lenders would have insisted upon professionally prepared documentation, but there was none, not even evidence of registration of the charges against the borrowing companies. It is conspicuous too that the 1995 deed said nothing of those loans. It

is, of course, also possible that they had been paid off by the time it was entered into and that the solicitors who prepared the deed saw no need to mention them, but the evidence we had of Mr Iny's financial position at the time makes it improbable that he, or companies controlled by him, were able to pay off loans of that size before 1993 (and therefore beyond the year or two to which he had referred) when, as we shall relate, other events with which the 1995 deed dealt occurred. Certainly we had no clear—that is, unequivocal—evidence from Mr Iny of the time of repayment or the source of the funds used for the purpose, nor any documentary evidence relating to the matter, but were instead left to draw inferences.

20. The deed of charge also does not mention the prices agreed to be paid for the sites, even in the aggregate, but it does record that the part of the price Cartmel was willing to leave outstanding amounted to £3,478,474. If Mr Iny is correct in his original evidence, that the aggregate price was a little more than £3.5 million, the subsidiaries had paid Cartmel less than £54,000. If, instead, there were additional commercial borrowings of £2.5 million, Mr Iny's revised recollection that the aggregate price was £6 million becomes more likely to be correct. Whatever the true aggregate price, the amount unpaid was generally referred to in the material before us as "the Cartmel loan", a term we shall adopt. It is of central importance in the appeal. The Commissioners do not go so far as to say it was a fiction, but they do point to the remarkable paucity of evidence about it, and the inconsistencies and oddities within such information as is available. We shall need to deal with the Cartmel loan at several further points in the narrative which follows. At this stage we need to deal only with what Mr Iny told us of the initial terms.

21. His evidence, as it was set out in his first statement, was that when the loan was agreed the only security was to be his personal guarantee, but that assertion is not consistent with the 1995 deed and its recitation of the subsidiaries' letters. In his first statement Mr Iny also said that it was agreed (and recorded in correspondence he was unable to produce) that the Cartmel loan would bear interest at a market rate, with payments to be made at six-monthly intervals. In his second statement, however, he said that the agreement for the Cartmel loan was oral, and that interest was not to be payable; instead Cartmel would receive 25% of the profit from sales of the sites. We shall return to the terms of the loan later.

22. During 1993—precisely when is unclear—Castlegold entered into a development agreement with the London Borough of Brent for the lease of a former swimming pool complex at Kingsbury, which the council wished to see developed for leisure purposes, and in respect of which outline planning permission had been granted. It appears that the negotiations for the agreement had been begun by Clerkenwell, but Castlegold had taken them over following its incorporation, as we shall later relate. On completion of the development the council was required to grant to Castlegold a lease for 125 years, for a premium of £260,000 and an annual rent, subject to review, of £20,000. We did not see a copy of the agreement but, as we shall explain, there was secondary evidence of its terms which we regard as reliable.

23. Clerkenwell was also negotiating to buy the site of another hospital at Fairfield, near Stevenage, which was, or was about to become, disused. The site was owned by the Department of Health. It was much larger than the Lincoln site and had, Mr Iny said, enormous potential, but it also presented major problems, in part because it contained a listed building (the former hospital itself) which was half a mile long. Eventually Castlegold entered into a conditional development agreement, dated 28 June 1993, with the Secretary of State for Health, providing for the acquisition of the Fairfield site by Castlegold if satisfactory planning consent was obtained.

The collapse of the property market

24. We need to digress slightly at this point, in order to put other matters in their context. Mr Iny's evidence, which on this point was not disputed, was that in the early 1990s, very soon after the agreements for the purchase of the Lincoln properties had been concluded, the UK property market began to suffer a severe downturn, lasting for several years, with little demand causing falling prices and a consequent difficulty in raising finance. We accept that, for most of the early 1990s, the climate for the development and construction industry was very poor. Although outline planning permission was obtained for the Lincoln site, providing for the construction of about 500 houses and the refurbishment and conversion of the Grade II listed building on it, Clerkenwell and its subsidiaries, like other companies in their position, were finding it very difficult to generate interest from builders and to earn any profit from the sites they owned or were able to secure; and in consequence Mr Iny's own financial position was increasingly precarious. We shall deal with this topic in some detail later.

25. One is left to assume that Mr Iny continued to negotiate agreements—with the London Borough of Brent and the Department of Health—partly in the hope that the market would recover, though he had, by 1993, another project in mind, in which those negotiations and the agreements to which they led became of some importance.

Merger with Wiggins Group plc

26. Mr Iny told us (and we have no reason to doubt this evidence, which is consistent with other material before us) that in early 1993, at the suggestion of an acquaintance, he approached Wiggins Group plc ("Wiggins"), at that time principally a house builder though it had engaged in commercial developments as well, which was still listed on the main UK stock exchange. Its shares had, however, been suspended because it had very high, and potentially unmanageable, levels of debt. Wiggins had, as he put it, almost become dormant. His idea was to mount a rescue of both Clerkenwell and Wiggins by transferring the Lincoln site and the interests Clerkenwell was then negotiating to acquire over the Brent and Fairfield sites to Wiggins in exchange for cash and shares, by renegotiating and restructuring the debts of the two companies, and by raising additional capital from a placing of new Wiggins shares, using the increased property portfolio as an incentive to investors. His approach was welcomed by the existing board: Mr Iny was in due course appointed chief executive of Wiggins and he became, albeit indirectly, the largest shareholder with almost 20% of its issued shares.

27. Mr Lansbury, a chartered management accountant by profession, has spent his working life in the property business. He joined Wiggins in 1987, initially as chief executive of its commercial property division, later becoming group managing director. He was, therefore, very familiar with Wiggins' history. The group had extensive interests in London's docklands and suffered, like many others, in the property collapse of the early 1990s. It was those difficulties which led to the suspension of its shares in 1992, when many of its senior management team left the company. Mr Lansbury and the chairman, then Stephen Hayklan, endeavoured to find a "white knight" to rescue the company, which they considered could be salvaged; Mr Iny was the only one who put forward a proposal which they thought would work, and the board of Wiggins decided to accept it, subject to the approval of its creditors and shareholders.

28. The manner in which Wiggins was reconstructed was, by contrast with much of the evidence, well documented, no doubt because Wiggins was a public company. In May 1993 it entered into a company voluntary arrangement (CVA). Mr Iny was not then a director or shareholder, but his proposed appointment to the board and the advanced stage reached in negotiations with an "investor group", effectively Mr Iny, were both mentioned in the notices produced for shareholders and creditors. It is clear that by then Wiggins' only alternative to a CVA was insolvent liquidation. The CVA was approved by sufficient majorities of shareholders and creditors in meetings which took place on 24 May 1993; even so, Mr Lansbury said, it was by no means certain that it would be successful, since much depended on the company's ability to raise further funds. In the event, it did succeed.

29. The principal features of the CVA were, first, that small creditors were paid in full, while larger creditors received the first £4,000 of the amount owed in full, ½% of the balance and units, of a nominal value equal to the residue of the debt, which could be converted into ordinary shares between 31 March 1994 and 30 September 1997 at the market value of the shares at the time of conversion. There were, in consequence, large numbers of convertible units in issue. Second, Wiggins reorganised its share structure, enabling it (among other things not now material) to issue new shares. Money was raised by a rights issue and by an underwritten placing, both of which used some of the new shares, and there were further new shares available for use in acquiring the Clerkenwell properties, as well as for the future conversion of the units issued to creditors.

30. Mr Iny told us he was advised that, before the Clerkenwell properties were transferred to Wiggins, he should place them within another corporate vehicle; though the reason is probably not important it seems likely that it was thought desirable to use a company which had no trading debts. It was for this reason that Castlegold, an off-the-shelf company incorporated on 19 May 1993, was acquired. Mr Iny caused the Clerkenwell subsidiaries to transfer the Lincoln properties to Castlegold and Castlegold, rather than Clerkenwell, entered into the agreements relating to the Kingsbury and Fairfield sites. The intention was that, in due course, Castlegold would, in turn, transfer its interests to Wiggins in exchange for Wiggins shares and cash. Mr Lansbury recalled that he considered there was a significant risk that even the Lincoln site would prove financially unattractive, but

as there was outline planning permission the site had some value and the board, supported by an independent valuation, decided to proceed with that purchase.

31. The only clear evidence we have of the acquisition by Wiggins of the Lincoln property comes from the Circular and Listing Particulars produced by Wiggins in August 1993, at which time the reconstruction of the company was well under way. Mr Iny was still not a director but his appointment was an integral part of the proposal. The Particulars invited existing shareholders to take up their rights to acquire additional shares, and new investors to take a stake in the company. Mr Edmonstone, a stockbroker whose firm was instructed by Wiggins in respect of the rights issue and the placing, told us that generating interest had initially proved difficult, although eventually 18 institutions were persuaded to take relatively modest quantities of shares at the offer price (determined by a market maker) of 2.5p. It was nevertheless, he thought, a speculative investment because of the depressed state of the property market to which, of course, Wiggins was and would remain exposed. We should add that Mr Iny's evidence was quite different; he recalled that there had been considerable interest in the shares, and he told us that some investors had been disappointed to be allotted fewer shares than they had applied for.

32. The Listing Particulars record that Wiggins had conditionally bought 71 of the 79 acres of the Lincoln sites from Castlegold. They go on to state that planning permission had been granted (though whether it was outline or detailed permission is not specified, we think only outline permission can have been granted at that stage) with the condition, reflected in Wiggins' own agreement with Castlegold, that implementation of the planning permission was dependent on the acquisition of the remainder of the site. It is unclear from the document, or from the remaining evidence available to us, whether the remainder of the site consisted of the eight acres retained by Castlegold or Clerkenwell (and, again, it is not clear which), or some other land. The consideration payable by Wiggins to Castlegold is stated to have been £4.65 million in cash, of which £600,000 was deferred to 1996 (although it appears it was in fact paid earlier, with a discount for early payment), plus 70,880,000 Wiggins shares. The cash element of the price (Mr Iny said) enabled Castlegold to pay off Clerkenwell's debts (for which it had itself assumed responsibility) save for the Cartmel loan, which remained outstanding. That loan became a continuing liability of Castlegold, in a manner we shall shortly describe. It is possible that it was the cash element of the price which enabled Castlegold to discharge the commercial loans at this point. The available evidence does not enable us to make a firm finding, but we shall nevertheless make that assumption.

33. Mr Iny told us he was optimistic that planning consent for the Fairfield site would be obtained, but Wiggins' directors, as Mr Lansbury explained, were much less confident, and were not willing to make an immediate commitment. The property was instead the subject of an agreement of 27 August 1993 by which Castlegold granted Wiggins a call option to purchase the site should its own agreement with the Secretary of State become unconditional, and subject to some other conditions of no continuing importance. The consideration, if the option was exercised, was to be the allotment to Castlegold of, at the maximum, a further 48,000,000 1p ordinary shares of Wiggins (equivalent, at the assumed value of

Wiggins' shares of 2.5p each, to £1.2 million); the eventual number was to be determined in the light of valuations and the satisfaction of various conditions. The option was exercised, and the rights under the development agreement were transferred to Wiggins by an agreement between the Secretary of State and Wiggins of 25 March 1994. The agreement was still conditional on the grant of satisfactory planning consents; we did not learn what it was which had decided Wiggins to proceed. Mr Lansbury told us that the project became extremely difficult in the following years, though both he and Mr Iny said that, eventually, the Fairfield site was sold at a considerable profit. We also did not learn whether any shares were ever allotted, and if so how many, and when.

34. We had rather less information about the arrangements relating to the Kingsbury site, but Wiggins' accounts (which in this respect we regard as a reliable record) show that Castlegold's interests were acquired by Wiggins on 8 November 1993. The price for the site was not clearly stated—despite our view that they are a reliable record of the fact of the transfer, it is surprising how obscure the Wiggins accounts are on the detail—but they did state that, in part payment, a further 45,920,000 shares were allotted to Castlegold. We had no information about the cash element of the price, beyond Mr Iny's evidence that it too was used to pay off indebtedness. Whose indebtedness was not explained.

35. We add for completeness that, although there was reasonably good evidence about what became of the Brent, Fairfield and most of the Lincoln sites, we had no information about any other property which Clerkenwell or the subsidiaries owned before the transfer of those three properties to Wiggins. As the possibility that there were some other properties was not canvassed at the hearing, we proceed upon the assumption that there were none, or at least that any there might have been were not transferred to Castlegold.

Mr Iny's directorship of Wiggins and his shares

36. Mr Iny became a director of Wiggins on 5 October 1993. His evidence was that he ceased to be its chief executive officer in 1996, as a result of a boardroom disagreement; it is not clear whether he ceased to be a director at the same time, nor whether, and if so when, Castlegold's Wiggins shares were sold, although there is some evidence of a partial sale in 1996, presumably coincident with Mr Iny's ceasing to be the chief executive officer. Mr Iny's shareholding was recorded in Wiggins' accounts, since he was both a director and the holder of a significant proportion—almost 20% from 1993 on—of the total issued shares.

37. In Wiggins' accounts for the year to 31 March 1994 it was noted that "Mr O I Iny's interests are held by Castlegold Properties Limited, a company whose share capital is beneficially owned by Mr Iny." The number of his shares indirectly held in Wiggins was shown in those accounts as 96,800,000. The allotments to which we have referred total 116,800,000 (ignoring the contingent allotment due in respect of the Fairfield site); Mr Iny's explanation of the difference of 20 million shares appears below.

38. The 1995 accounts showed no change in his holding. They also made no mention of the fact that on 10 October 1994 Mr Iny had sold his entire shareholding in Castlegold to Harlequin; the accounts repeated the observation

that he was the beneficial owner of Castlegold's shares. In the 1996 accounts, however, it was recorded that the shares were now held by a trust of which Mr Iny was a potential beneficiary. That was true if it is accepted, as Mr Iny conceded after some initial hesitation, that Harlequin was ultimately controlled by his family through the medium of an off-shore trust (a point to which we shall return). Mr Iny's evidence was that although he overlooked the fact that the 1995 accounts wrongly recorded the manner in which the shares were held, he did notice the error before the 1996 accounts were prepared, and took steps to ensure that a correction was made. The correction did not extend, however, to the addition of a note to the effect that the 1995 accounts were incorrect. Mr Gibbon suggested that there was something sinister about this omission; in our view, whatever the reason for the omission, little turns on it.

39. Mr Lansbury told us that, despite the success of the CVA and the placing of the new shares, Wiggins continued to suffer serious cash flow problems, and had great difficulty financing its development projects while little was coming in by way of income. Mr Lansbury concentrated on the development projects (even though he was at this time a non-executive director, having decided to pursue other interests) while Mr Iny, Mr Blackstone, a chartered accountant who became a non-executive director of Wiggins in the course of the reconstruction, and the chairman of the board, by now a Mr Syson, concentrated on raising money, including by further share placings. Most of the events Mr Lansbury described post-date October 1994, and are of no present relevance; we need only record that his evidence, which we accept, was that Wiggins had a more solid base by October 1994 (by contrast with its position at the time of the CVA), but that it was still suffering from a lack of funds.

40. In 2000 the Wiggins board was required by the Financial Reporting Review Panel to re-state the company's accounts for the years to 31 March 1996, 1997, 1998, 1999 and 2000, pursuant to the Companies (Revision of Defective Accounts and Report) Regulations 1990 (since revoked), because, in short, the accounts as they had originally been published contained major errors which had the effect of showing that the company had made profits in those years when in fact it had made losses. It was suggested that the requirement stemmed from amendments to the manner in which profits were to be shown, effected following the change of government in 1997, though the matter was not fully explored at the hearing. We recognise that the requirement indicates that Wiggins' accounts, at least as they were originally presented, must be treated with some caution. However, there is nothing before us from which we might suppose that the 1994 accounts, the latest available before the October 1994 sale with which we are concerned, gave a misleading impression, nor that the Circular and Listing Particulars to which we have referred may record events incorrectly.

The Teak Trust

41. Although he had recently become the chief executive officer of Wiggins, Mr Iny's personal financial problems had not been resolved and, in the early autumn of 1994 he was again, he said, in fear of imminent bankruptcy. We should add that we had no more than Mr Iny's oral evidence that his financial position remained precarious; there was, again, no documentary evidence of any kind to support it.

His family, concerned to preserve such assets as he had, determined to establish a trust for that purpose. We were provided with a copy of a Declaration of Trust made on or about 10 October 1994 by Indosuez Trust Services Limited ("Indosuez"), an institution whose letter heading shows that it is a subsidiary of Crédit Agricole, a French bank, and that it is based in Guernsey (the trust was to be governed by Guernsey law). We say "on or about" because the deed was originally dated, in manuscript, 13 October, but the date was amended, by whom is unclear, to 10 October. The deed is lengthy, and the cover page shows that it was drafted by a large firm of solicitors in London. The declaration was of a discretionary trust in favour of a class of beneficiaries which included "Mrs Diana Iny and her children and remoter issue together with the spouses, widows and widowers of such persons" and such other persons as the trustees might appoint; Mrs Diana Iny is Mr Iny's mother. The trust is known (and is described in the deed) as the Teak Trust.

42. The settlor of the trust was identified by the deed as Frederick Sopher, though Mr Iny referred to the settlor as his uncle, Abraham Sopher. It appears his full name was Abraham Frederick Sopher, and we deduce he used both of his forenames at different times. The confusion was added to by the fact that, as Mr Iny told us, he has another uncle by the name of Frederick Sopher. Mr Iny's evidence was that the trust was created at the suggestion of his cousin Shaoul Sopher, and it was, as he put it in his second witness statement, Shaoul Sopher who "suggested putting my assets into a family trust to protect them in the event that I was made bankrupt. I was under a great deal of pressure from my family to do this." In the same statement he added that he was not consulted about the matter, but simply did what his family, principally his cousin Shaoul, told him to do.

43. The initial fund of the Trust was the sum of £30,000, which one must assume (in the absence of any other information) to have been injected by Mr Sopher; there was certainly no evidence that Mr Iny provided it, despite his evidence that the purpose of the trust was to protect his own assets. The deed stated that it was "anticipated that further monies investments and/or other property may be paid or transferred to or become held by" the trustees. How, in what circumstances and by whom further assets were to be transferred into the trust is unspecified and remains obscure. Mr Iny's evidence, as we have said, was that the purpose of the trust was the protection of his assets, but it was not at all clear how that objective was to be achieved in the absence of evidence, from him or any other source, that his assets, or any of them, formed part of the trust fund.

44. Among the documents provided to us was a letter apparently dated October 1994 (to coincide with the creation of the trust) from "Abraham F Sopher" addressed to the trustees in which he expressed the wish that the fund be used for the benefit of his sister, Mrs Diana Iny, her son Oliver and her two daughters. As they were included within the class of beneficiaries of the trust it is unclear why this was done. We say "apparently dated" because, beneath the signature at its foot the letter bears Mr Sopher's name followed by "Israel 1995". We have to assume that the letter was in fact produced during that year.

45. It continued with the wish that "until the death of Oliver Iny, you invest the trust funds so as to maximise his capital growth potential". It invited the trustees to "listen to investment suggestions made to you by Oliver Iny and have regard to requests made by him concerning the distribution of income or capital to the class of beneficiaries". The trustees were also requested to heed the advice of Mr Sopher's nephew Richard Sopher following Oliver Iny's death. Shaoul Sopher was not mentioned, by name or otherwise. The letter concluded with a request that, should the trust fund have built up to a sum in excess of the beneficiaries' needs, the bulk should be given to charity.

46. The first known payment out of the trust fund, for which the evidence is a letter of 29 October 2002 written by Indosuez to what was then the Inland Revenue, was made on the day on which the trust was created. It lent £20,000 to Harlequin, against loan notes to a nominal value of US$5,000 convertible by 2010, on terms which would allow the trustees to acquire the whole of the issued share capital of Harlequin. We are left to deduce that Harlequin used the £20,000 loan to buy Mr Iny's Castlegold shares, since the only documentary evidence of the payment which was available consisted of a copy of Mr Iny's bank statement for 20 October 1994, showing a receipt of £20,000. It is recorded to have been received from Indosuez rather than Harlequin; the assumption—not difficult to make if the two were in common control—must be that it was paid to Mr Iny at Harlequin's direction.

47. There was no material before us about the ownership of Harlequin at that time. However, as Mr Gibbon pointed out, it is clear even to the untutored eye that the signatures of one of the persons who signed the trust deed on behalf of the trustee, Indosuez, and the person who signed the agreement for the purchase of Mr Iny's Castlegold shares on behalf of Harlequin's director, itself a limited company, are identical, and it seems to us probable that in October 1994 Harlequin was a creature of Indosuez or Crédit Agricole. We had no accounts or any other similar documentation which might have thrown some light on Harlequin. Mr Iny told us his belief was that it was owned, in October 1994, by a company or institution he identified as "Leeman" or "Leman" (not Lehman Brothers), but as his evidence on this point, as on most other matters relating to the trust, was vague in the extreme and unsupported by any other evidence, and he was unable to give any evidence about the ownership or control of "Leeman" or "Leman" beyond what we can only regard as a wild guess that it had some connection with Guinness Mahon, his recollection takes us no further. We saw (for once clear) evidence, in Castlegold's accounts for the year to 31 March 1999, that Harlequin's ultimate owner is now the Teak Trust, but it is not known when that became the case. As we have mentioned, Mr Iny eventually accepted that Harlequin now formed part of his family's trust structure; in our view it is likely (though we cannot be certain) that Harlequin was created as a part of that structure, specifically for use as a vehicle for the purchase of Mr Iny's Castlegold shares for the ultimate benefit of the trust.

48. In the months following the creation of the trust Mr Iny received cash payments, which he said came from Harlequin, totalling several hundred thousand pounds: the evidence of the receipts came from Mr Iny himself and is set out in correspondence between him or his then representatives and the Inland Revenue.

Some of that money, he said, was used to defray the cost of repair and refurbishment of his and his mother's homes, which were at the same Mayfair address, and some was used to pay off his debts. He was, of course, also receiving his Wiggins salary at the time. The sums paid by Harlequin were, he said, loans which he had later repaid.

49. We had no evidence of any kind of receipts by Mr Iny from the trust, although he agreed he had received money from it, and was still doing so, nor of the exercise by the trustees of their discretion. All that Mr Iny could tell us was that—despite the terms of Mr Sopher's letter—when he needed money he would talk to his mother or to "the trust". He denied that he had any control or even influence over the trustees' decisions; the impression he gave, if his evidence is to be accepted at face value, is that he was the recipient of sums of money whenever he needed them, but that he had no curiosity about the source of such largesse, and was discouraged from enquiring.

50. If anything was reduced to writing, it was not produced to us. We had no trust accounts, nor any evidence from the trustees or another member of Mr Iny's family who might have been able to shed some light on the purpose of the trust and the source of its funds. Similarly, if there was any documentary evidence of the payments, it was not produced to us. The only evidence we had, apart from what Mr Iny said and a copy of the trust deed, was the letter of 29 October 2002 written by Indosuez to which we have referred. That letter stated that no assets had been added to the fund after the initial injection of £30,000, and no loan had been made to the trust; and that the trustees held the unsecured (and as yet unconverted) loan notes provided as security for the loan of £20,000, plus a small bank balance. Indosuez refused to provide any further information on the grounds that the trust was established in Guernsey, and the Inland Revenue were not entitled to it. The letter suggests (contrary to the indication given in Castlegold's 1999 accounts) that the trust had not yet converted the loan notes it received in exchange for the £20,000 loan into Harlequin shares.

51. Against that background it is in our view an inescapable conclusion that we were not told the entire truth about Harlequin, the Teak Trust and Mr Iny's relationship to them. If the Indosuez letter of 29 October 2002 can be taken at face value—and it should be possible to take a letter from a trust company subsidiary of a French bank at face value—the source of any sums paid to Mr Iny, apart from the £20,000 consideration for the Castlegold shares, cannot have been the trust. It is also entirely unclear how Harlequin, which had borrowed the initial payment to Mr Iny of £20,000, was thereafter able to make (as Mr Iny told us) loans to him of very large sums. Mr Gibbon made the point that for an apparently astute businessman Mr Iny's casual and incurious approach to what must have been at the time a matter of extreme importance to him is remarkable. We would go further: it is astonishing that, although it is a family trust, and Harlequin is now controlled by the same trust, Mr Iny was unable or unwilling to produce any evidence apart from his own, vague as it was, about the manner in which the trust was funded and administered, and how Harlequin was managed. It may be there was another trust of which we have not been told, or there may have been quite different arrangements. We do not propose to speculate; we simply record that we

are quite certain Mr Iny was far from candid about the trust, Harlequin and the source of the substantial sums he received.

52. However, although his lack of candour about the trust is relevant to Mr Iny's overall credibility, it does not directly impact upon the undisputed evidence that there was an agreement between Mr Iny and Harlequin for the sale and purchase of the Castlegold shares. This agreement is, of course, at the core of the issue between the parties and we now come to consider it in detail.

The sale of the Castlegold shares to Harlequin

53. Mr Iny's evidence was that the sale was prompted by his pressing need to raise money, but that he was in a weak bargaining position, having shares of doubtful value (since the underlying asset, Wiggins shares, were themselves of unclear value at that time, while the Cartmel loan was substantial) and was effectively ordered by his family to sell at the only price offered. We should perhaps make the observation that if this evidence is correct, it seems to us to amount to further evidence that the family—by whatever means—was ultimately in control of Harlequin, even at this stage. We also make the point that the sale and the creation of the Teak Trust occurred (if the dates on the documents are correct) on the same day and there can, in our view, be no real doubt that they are linked.

54. Mr Iny's precarious financial position was due, he said, to the fact that he had given several personal guarantees of his companies' borrowings from commercial lenders, to the extent that his potential personal exposure, by 1992, was as much as £7 to £8 million. He said, too, that he would have been quite unable to pay such an amount had he been called on to do so. By late 1992 and for some time to come he was in considerable fear of bankruptcy. We should perhaps add, even if only for completeness, that we have only Mr Iny's word for it that he and the companies he controlled were in serious debt in the early 1990s. He produced no independent evidence of the indebtedness, for example the companies' audited accounts, nor did he produce anything to support his own evidence that the cash received by Castlegold from Wiggins, in 1993 and early 1994, for the various properties was used to pay off debt. If his evidence that the cash was used for that purpose is correct, it is all the more surprising that his financial position continued to be so poor. In short, and even allowing for the passage of time, it is remarkable that there was nothing available to us to corroborate Mr Iny's own vague account that this was a forced sale, because he was in serious financial difficulty, and that £20,000 was a fair and reasonable—or, if his alternative argument is to be accepted, generous—price.

55. We can conveniently deal with a relatively minor issue at this point. The Commissioners advanced the argument that, rather than sell his Castlegold shares in order to raise some money, Mr Iny could instead have arranged for Castlegold to sell some of its Wiggins shares. Mr Iny said as he gave his evidence that a sale by him of his shares in 1994 was out of the question. He had very recently become the chief executive officer of Wiggins, a quoted company which had itself recently suffered considerable financial difficulty. A sale by him of what, if it was to achieve the objective of raising a worthwhile sum, would need to be a substantial number of shares would quickly become public knowledge and would

inevitably have led to the conclusion that he had no confidence in Wiggins' future, and the consequent risk of a run on the shares. At the very least, the sale of a significant part of his shareholding would have led to a price reduction. Mr Thomas identified some other practical problems, particularly whether Castlegold, which had no distributable profits, could legitimately have paid the proceeds to Mr Iny. The Commissioners retorted that Castlegold sold some (though only a small part of its total holding) in 1996, without noticeable adverse effect, and there was no reason, they said, to think there would have been any materially greater effect in 1994.

56. Though we do not need to deal with all the detail, we are willing to accept that a sale, in October 1994, by Castlegold of a significant number of Wiggins shares in order to raise money for Mr Iny's benefit, had it otherwise been a desirable course, was rejected for valid reasons. We do not, however, regard this as a significant matter; more important is our conclusion that Mr Iny's evidence about the circumstances of the sale is quite implausible.

57. First, the only evidence we have that the price of £20,000 was one which reflected the true value at that time of the shares is Mr Iny's recollection or belief that his family obtained advice which it did not share with him. He did not take advice of his own, but by his own account simply accepted the price he was told to accept. We have already indicated that we are not satisfied Mr Iny was candid about the trust; we are equally sure he was not candid about the negotiation, such as it was, of the price of the shares. Second, we agree with Mr Gibbon that the price was a matter of little importance to Mr Iny since he knew that he was going to benefit, as he did, either from the trust or, as it would appear, from Harlequin or some other source of funds. Indeed, it is not even clear to us what purpose was to be served by Mr Iny's raising £20,000 by this means. It was a trivial sum compared to his potential indebtedness which he measured, himself, in millions of pounds; and it was an almost equally trivial sum when compared with the hundreds of thousands of pounds he received, ostensibly from Harlequin, in the months following the sale. We can only guess at the true reason for the sale; what we can be sure about is that it is impossible to conclude, even allowing for the relaxed approach to be expected within a family, that £20,000 was a price arrived at by true negotiation, and which can be regarded as a reasoned reflection of the value of the shares in October 1994.

58. The agreement included a price adjustment clause, which was to come into effect only if the Inland Revenue should question the price of £20,000. In that eventuality, Castlegold's auditors were to value the shares as at the date of the agreement, the valuation to be made within the six months following the first indication by the Inland Revenue of its concern. The valuation so made was to be binding on the parties and, should the value so ascertained differ from £20,000, a payment, with interest, was to be made immediately in the appropriate direction. The Commissioners argue that the inclusion in the agreement of this clause is itself an indication that the bargain was not one at arm's length. Mr Thomas argued that the clause was explicable as a means of achieving fairness between the seller and purchaser of an asset whose value was difficult to determine. In the absence of any United Kingdom authority on the point he referred us to a similar United States case, *King v USA* 545 F 2d 700. In that case the taxpayer was, like

Mr Iny, in financial difficulty. He sold a substantial number of shares, at a price of $1.25 each, to four trusts established for the benefit of his children. The agreements for sale included provision for upwards adjustment of the price should the Internal Revenue Service contend, as it did, that the true value of the shares was greater—in the event, $16. The Tenth Circuit Court of appeals said:

> "25. The district court [found] that the parties intended that the trusts pay a full and adequate consideration for the stock and that the clause was a proper means of overcoming the uncertainty in ascertaining the fair market value of the stock. The court concluded that there was an intention to cause the trusts to pay full and fair consideration for the stock and to make an actual adjustment of the price paid upon the event of a determination by the IRS. We agree. It is important to observe that the IRS does not dispute the contention that it was difficult, if not impossible, to accurately value the stock at the time of its transfer in 1969 and that the parties inserted the specific valuation paragraph in the agreement because the transaction was intended as a sale and not as a gift. The trial court's determination was one of fact. That finding is not clearly erroneous .…"

59. We are not persuaded that that case offers much useful guidance here. The determination of the true value, in *King v USA*, was to be made by the IRS. Here, if there should be a challenge by the Inland Revenue, it was Castlegold's auditors who were to make the valuation. It is difficult, if not impossible, to understand why, if the auditors might be required to make a valuation, possibly several years later, in the event of a challenge, they were not asked to make one shortly before the agreement for sale was concluded. As we have said, Mr Iny told us that he believed his family had taken advice on the value of his shares; if so, it is odd that he was unable to produce the advice and, if the advice was obtained from someone competent to give it, that it was thought necessary to provide for later adjustment of the price. It is also odd, though perhaps no more, that the auditors' valuation was to be binding on the parties to the agreement, whether or not the Inland Revenue accepted it and whether or not it was upheld in an appeal such as the appeal before us.

60. In our view the conclusion to be drawn is not that the adjustment was designed to achieve a fair balance between the vendor and the purchaser, but that its purpose was to give the impression that a genuine attempt had been made to arrive at a fair price.

Renegotiation of the Cartmel loan

61. We take this development a little out of sequence since the main source of evidence about it is the 1995 deed of charge. There was (if the deed is correct) some renegotiation in 1993, which the 1995 deed was designed to record, and a final renegotiation leading to discharge of the loan in 2005. The deed was made on 19 December 1995, between Castlegold and Cartmel, and shows on its cover page that it was prepared by the solicitors who then acted for Mr Iny; he told us Dr Sakhili did not instruct solicitors of his own. We observe in passing that although provision was made for execution of the deed by Cartmel, it did not execute it. The copy of the deed provided to us bears a stamp showing that the original was registered by the Companies Registrar on 8 January 1996.

62. At this point the chronology becomes particularly obscure. In both of his statements, Mr Iny said that the inability of the subsidiaries to pay the interest on the Cartmel loan (evidence which, itself, cast doubt on the ability of the subsidiaries to discharge or even service the commercial loans) led to his renegotiating its terms with Dr Sakhili, but his explanation of the manner in which the renegotiation was undertaken makes little sense in the context of other contemporaneous developments and is, moreover, inconsistent with other parts of his evidence (itself inconsistent, as in the case of the difference between his two statements about whether interest was payable at all) and with the 1995 deed. What follows is our own reconstruction of what we consider to be the most likely sequence of events.

63. The evidence we had showed, as we have mentioned, that a total sum of £3,478,474 was left outstanding when Cartmel sold the six properties to Clerkenwell's subsidiaries, and that the loan was secured by undertakings by the subsidiaries to execute legal charges if so required. As we have also recorded, there was no evidence that any did so—such evidence as we had was to the contrary. Nevertheless the existence of the undertakings (if they did exist; as we have said, they do not feature in any of Mr Iny's own descriptions of the arrangements with Cartmel), and the equitable charges they created, made it necessary for Mr Iny to come to revised arrangements with Cartmel in order to make it possible for him, or his companies, to deal with the Lincoln properties, in particular by transferring them to Wiggins.

64. As we have recorded, the consideration Castlegold received in respect of its transfers to Wiggins of the Lincoln and Brent sites included cash and the allotment of 116,800,000 Wiggins shares. Mr Iny, or Castlegold on his behalf, was shown in Wiggins' accounts, however, to hold only 96,800,000. Mr Iny's evidence—though, conspicuously, this too did not appear in either of his statements—was that the remaining 20 million shares were transferred to Cartmel in part discharge of the Cartmel loan, and as an inducement to Cartmel to permit the transfer of the Lincoln properties to Castlegold and thereafter to Wiggins. The deed of charge records that all six of the properties acquired from Cartmel were transferred to Wiggins. The deed also states that Castlegold "would secure the issue to Cartmel of five hundred thousand pounds worth of shares"; this record is consistent with Mr Iny's oral evidence if it is assumed (as we are willing to do) that the shares referred to were in Wiggins (the deed is not specific) and they were treated as having a value of 2.5p each: that value is the same as the value ascribed to the remaining Wiggins shares allotted to Castlegold.

65. Wiggins would have been required to record a holding by Cartmel of 20 million shares in its accounts to 31 March 1994, since a holding of that size represented more than 3% of the total issued shares. There is no such record, but it is of course possible that Cartmel had disposed of the shares before 31 March 1994, and we therefore read nothing of significance into the absence of a record.

66. The deed of charge also recites that Castlegold would pay the "Balance of the Purchase Monies", being the outstanding Cartmel loan of £3,478,473.66 less £500,000, the value of the shares, leaving a rounded amount of £2,978,474, a commitment fee of £750,000 and interest; and that it would in addition deposit its

own Wiggins shares with Cartmel by way of security. For the future, interest was to be due at 5% above base rate, with a minimum of 17%. The commitment fee was, however, to be abated, once the total interest charge reached £750,000, "by such sum as is difference [*sic*] between on the one hand the aggregate of the interest due to Cartmel to the date the commitment fee becomes payable plus the commitment fee and on the other £1,400,000". Mr Iny's explanation of that rather obscure wording was that, once the interest amounted to £750,000 the commitment fee reduced, pound for pound, until the interest reached £1.4 million, when it ceased to be payable.

67. There are some distinct oddities about the deed. Mr Iny's evidence was that all the changes in the arrangements between the companies he controlled and Cartmel had been agreed orally between himself and Dr Sakhili in 1993, but not reduced to writing until 1995. We find that surprising, to say the least. There can be little doubt that solicitors were engaged to draw up all the necessary documents when the properties were transferred from the Clerkenwell subsidiaries to Castlegold and then to Wiggins in 1993. The 1995 deed recites that Castlegold took the Clerkenwell properties "with full notice of [Cartmel's] Equitable Interests"; if so one would expect Wiggins' solicitors to have made sure there was no possibility of the continuing existence of any residual equitable charge over the properties once they were in Wiggins' ownership, and accordingly to have insisted on a release from Cartmel. It would have been simplicity itself, and elementary prudence on Cartmel's part, to have the revised arrangements between itself and, now, Castlegold recorded in writing at the same time. Even without that background it is impossible to understand why Mr Iny and Dr Sakhili did not think it necessary to reduce their agreement to writing in 1993 yet, for no good reason which Mr Iny was able to provide, decided they should do so in 1995.

68. There are further oddities in the deed itself. It contains no indication that any interest had accrued in respect of the period from 1990, when the Clerkenwell properties were bought from Cartmel, to 1993 (or 1995). Instead, the impression is given (even if only by silence) that the Cartmel loan was, initially, interest-free. The commitment fee was expressed to be "due on and as from 5 October 1993" but, while the rate of interest was specified, and provision was made for annual rests on 5 October each year, it did not state the date from which interest was to run, and it did not state the frequency with which interest payments were to be made nor, instead, provide that interest should accrue until the charge was paid off in full. The deed did, however, make it clear that liability for the loan rested entirely with Castlegold, and not with Clerkenwell or its subsidiaries.

69. The security given to Cartmel was said to be subject to a "First Charge", defined as "the First Charge over the Castlegold Shares [that is, Castlegold's 96,800,000 Wiggins shares] dated the 11th day of November 1994 between Castlegold (1) and Banque Indosuez (2)". Banque Indosuez, too, is a subsidiary of Crédit Agricole. We did not see that charge, but its existence suggests that Harlequin, to which Mr Iny had sold his Castlegold shareholding (and with it beneficial ownership of Castlegold's Wiggins shares) raised money by borrowing against the shares very soon after it acquired them, a month before. We did not learn the purpose of that borrowing, nor whether the money found its way into the Teak Trust, or to Mr Iny by way of the loans to which he referred. Nor did we

learn how Castlegold had borrowed against shares it had already deposited by way of security with Cartmel, and the deed said nothing about any change of priority. Mr Iny remained a director (indeed, the only director) of Castlegold after he had sold his shareholding, and it was he who signed the deed of charge on its behalf in December 1995, yet he was unable to give us any information about those matters.

70. Castlegold's most recent accounts before Mr Iny sold his shares were made up to 31 March 1994, but were not signed until 29 January 1996, some 15 months after the sale of his shares by Mr Iny to Harlequin. They showed assets with a book value of £2,910,137, consisting solely of Castlegold's holding of 96,800,000 Wiggins shares of 1p nominal value. The accounts add that the market value of the shares on 31 March 1994 was £5,566,000; the corresponding figure in the 1995 accounts was £4,114,000. Mr Iny was, as we have recorded, the only shareholder and director of Castlegold on 31 March 1994, and it was he who signed the accounts. The Cartmel loan was disclosed, but it was stated to be "interest-free with no specific terms of repayment". The same observation was made in the accounts to 31 March 1995 and again in the accounts to 31 March 1996, both of which Mr Iny signed as sole director. The accounts to 31 March 1997 were different: the Cartmel loan was disclosed, but the accounts were silent about interest and repayment. Mr Iny's evidence was that these accounts (which he signed, again as sole director, in January 1998) represented a correction but, as Mr Gibbon emphasised, no accrued interest was shown. The 1998 accounts, signed by Mr Iny as early as April 1998, were in the same form. All these accounts were prepared by chartered accountants.

71. Mr Iny ceased to be a director of Castlegold on 1 April 1998, when he was replaced by a Mr Brannam and a Mr Willis. We were not told whether either had any connection with Mr Iny's family. The accounts to 31 March 1999, prepared by a large firm of chartered accountants which had, we were told, absorbed the smaller firm which prepared the earlier accounts, showed the Cartmel loan as a liability of £6,932,931 (rather than the unchanging £2,978,474 which had appeared previously). These accounts contained two notes relating to the loan. Under "Results and review of business" appeared the following:

> "… in 1983 [*sic*—this seems to be a simple mistake, 1993 being intended] it was agreed with the provider of the long term loan that in exchange for that party agreeing not to demand repayment at the time and to accept the assignment of this loan to the company that the loans would bear interest at 5% over base with a minimum interest rate of 17%. As no repayments [*sic*] of this interest have been made, again, in error, the changed status of this loan to one that was interest bearing had not been reflected in the earlier accounts. Both these errors have been corrected in these accounts as a prior year adjustment …"

72. There was a restatement of the 1998 accounts to show the total amount outstanding at 31 March 1997 as £5,934,984; the interest charge for the year to 31 March 1998 was shown as an accrual since nothing was actually paid. Note 9 to the accounts added the comment:

> "The loan is secured by way of a charge over the company's assets and interest accrues calculated annually based on the Base Rate existing at 30th

> June of each year at Base Rate plus 5% with a minimum rate of 17% per annum. There are no specific terms for repayment."

73. We should also add that the accounts contain the further notes that Castlegold's parent company was Harlequin, that its ultimate parent was Investec Inc, a company incorporated in South Africa, and that "The ultimate controlling party is the Teak Trust". After some initial hesitation, Mr Iny agreed that the last of those observations was correct. We had no evidence of any kind about Investec Inc. Although Mr Iny's being a potential beneficiary of the Teak Trust is also recorded, the accounts make it plain that, save in that capacity, he no longer had any interest in the shares of Castlegold.

74. In February 2005 (the precise date is not specified) Dr Sakhili executed a further deed by which he warranted that he was absolutely beneficially entitled to the principal and interest of the Cartmel loan as it was redefined by the December 1995 deed, less any money which had already been paid. If any had been (apart from the 20 million shares, to which no reference was made), it was not identified. The deed went on to record that in consideration of £10,000 he transferred all his rights to Harlequin. Mr Iny's evidence was that by this time Dr Sakhili had recognised that the Cartmel loan would never be paid off, that the Wiggins shares had by then become poor security, and that he was willing to put the matter behind him in return for what can only be regarded as a token payment, a sum which (Mr Iny said) was all he could raise at the time.

75. We are bound to say we find this a most curious development. Mr Iny did not suggest that there was any change from the position recorded in Castlegold's 1999 accounts between then (when he was neither a director nor a shareholder) and 2005, when he and Dr Sakhili negotiated the transfer of the benefit of the loan to Harlequin—in effect its discharge, as Harlequin was Castlegold's parent company. It is quite unclear what authority he had to negotiate on Castlegold's (or Harlequin's) behalf, nor did he explain the source of the £10,000, though he left us with the (as usual, somewhat nebulous) impression that it was he who had paid it, from his own pocket. Though it is perhaps a small point of little relevance we should add that there was no evidence that Harlequin gave notice to Castlegold of the assignment of the debt.

The issues

76. Leaving the penalty to one side, there are three questions we must answer:

- Was Mr Iny's disposal of the Castlegold shares on 10 October 1994 a disposal made otherwise than by a bargain at arm's length, thus engaging s 17 of TCGA? (As we were asked by the Commissioners to concentrate on that issue rather than determine the alternative argument that Mr Iny and Harlequin were "connected persons" within the meaning of s 286 of TCGA, we proceed below to consider only the circumstances of the sale.)

- If the answer to the first question is "yes", what was the open market value of the shares on 10 October 1994? It is undisputed that if the answer is "no", the consideration to be adopted for the assessment of tax is £20,000.

- In the light of the answers to the foregoing questions, should the assessment be discharged, reduced, confirmed as it stands, or increased?

Was the disposal a bargain at arm's length?

77. Section 17 of TCGA is (and at the material time was) as follows, so far as is relevant to this appeal:

> "(1) Subject to the provisions of this Act, a person's acquisition or disposal of an asset shall for the purposes of this Act be deemed to be for a consideration equal to the market value of the asset—
>
> (a) where he acquires or, as the case may be, disposes of the asset otherwise than by way of a bargain made at arm's length …."

78. The Act does not attempt to define a bargain at arm's length, and there is little, if any, judicial authority on the meaning of the expression, no doubt because it is an easily understood concept. Mr Thomas argued that Mr Iny's weak bargaining position at the time, due to the threats that he might be made bankrupt, and the "take it or leave it" attitude of his family, both indicated that he did indeed obtain the best price available. Mr Gibbon pointed to the implausible character of much of Mr Iny's evidence on the subject, as we have set it out above, and to the unexplained failure on his part to produce better or more comprehensive documentation, despite his indication as recently as 2008 that he would approach "the trust" in order to obtain such documents. He did not seek to deny that he had a continuing relationship with the trust.

79. It will be apparent from what has gone before that we did not find Mr Iny's evidence persuasive. We have little doubt, even allowing for the passage of time, that his memory was selective, and that he knows a good deal more about the trust and Harlequin than he was prepared to concede. There is, in our view, considerable force in Mr Gibbon's argument that much more documentary evidence could have been produced with little effort. The only reasonable conclusion to draw from Mr Iny's failure to produce it is that it would not have assisted him. We have already pointed out that a sale which yielded for him no more than £20,000 made little sense against the background of debts of the magnitude he claimed. It may well be that there was a good reason for the transfer of his Castlegold shares to Harlequin, but it plainly was not the need for him to raise money. We do not accept his claim (from which he effectively resiled as he gave oral evidence) that there was a valuation, nor do we accept that the price of £20,000 was the product of any negotiation. It was, we are satisfied, no more than a token payment bearing no necessary relation to the underlying value of the asset sold. As we have already indicated, we are satisfied too that the price adjustment clause was included for the sake of appearances, rather than because it had the genuine purpose of providing a means of determining the true value of the shares should that course be necessary.

80. We accordingly conclude that the sale was not a bargain made at arm's length, and that s 17 is engaged. The disposal is therefore to be treated as having been made at market value.

81. That conclusion makes it unnecessary to decide, had we been asked to do so, the Commissioners' alternative argument, that Mr Iny and Harlequin were, or are to be treated as, connected persons. While not deciding the point, we think it nevertheless appropriate to add a few brief comments for completeness. The opacity of the relationships between Mr Iny, the trust and Harlequin—relationships about which Mr Iny is either astonishingly incurious or deliberately unforthcoming, if not evasive—was remarkable. The result is that establishing the statutory criteria would be very difficult. However, it seems to us that, were we required to come to a conclusion the inference we would probably draw, not least by reason of Mr Iny's failure to produce evidence which we are sure is easily within his reach, is that there was (and is) a close, even if not the statutory, connection between them.

The true value of the Castlegold shares at 10 October 1994

82. We begin this section of our decision with the relevant legislative provision, s 272 of the Taxation of Chargeable Gains Act 1992. As it was in force in the tax year 1994-95, it was as follows:

> "(1) In this Act 'market value' in relation to any assets means the price which those assets might reasonably be expected to fetch on a sale in the open market.
>
> (2) In estimating the market value of any assets no reduction shall be made in the estimate on account of the estimate being made on the assumption that the whole of the assets is to be placed on the market at one and the same time.
>
> (3) Subject to subsection (4) below, the market value of shares or securities listed in The Stock Exchange Daily Official List shall, except where in consequence of special circumstances prices quoted in that List are by themselves not a proper measure of market value, be as follows—
>
> > (*a*) the lower of the 2 prices shown in the quotations for the shares or securities in The Stock Exchange Daily Official List on the relevant date plus one-quarter of the difference between those 2 figures, or
> >
> > (*b*) halfway between the highest and lowest prices at which bargains, other than bargains done at special prices, were recorded in the shares or securities for the relevant date,
>
> choosing the amount under paragraph (*a*), if less than that under paragraph (*b*), or if no such bargains were recorded for the relevant date, and choosing the amount under paragraph (*b*) if less than that under paragraph (*a*) …."

83. The remainder of the section is immaterial for present purposes. Further relevant provisions appear in s 273 (again in the version in force at the time):

> "(1) The provisions of subsection (3) below shall have effect in any case where, in relation to an asset to which this section applies, there falls to be determined by virtue of section 272(1) the price which the asset might reasonably be expected to fetch on a sale in the open market.
>
> (2) The assets to which this section applies are shares and securities which are not quoted on a recognised stock exchange at the time as at which

their market value for the purposes of tax on chargeable gains falls to be determined.

(3) For the purposes of a determination falling within subsection (1) above, it shall be assumed that, in the open market which is postulated for the purposes of that determination, there is available to any prospective purchaser of the asset in question all the information which a prudent prospective purchaser of the asset might reasonably require if he were proposing to purchase it from a willing vendor by private treaty and at arm's length."

84. We were, as one might expect, referred by counsel to various authorities about the approach to be adopted in reaching a conclusion about market value. Several of them are well-known, and we think there is little to be gained by embarking on an analysis of established principles. Perhaps the best guidance comes from Hoffmann LJ's judgment in *IRC v Gray* [1994] STC 360 at 372:

" … the theme which runs through the authorities is that one assumes that the hypothetical vendor and purchaser did whatever reasonable people buying and selling such property would be likely to have done in real life. The hypothetical vendor is 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. The hypothetical buyer is slightly less anonymous. He too is assumed to have behaved reasonably, making proper inquiries about the property and not appearing too eager to buy. But he also reflects reality in that he embodies whatever was actually the demand for that property at the relevant time. It cannot be too strongly emphasised that although the sale is hypothetical, there is nothing hypothetical about the open market in which it is supposed to have taken place. The concept of the open market involves assuming that the whole world was free to bid, and then forming a view about what in those circumstances would in real life have been the best price reasonably obtainable. The practical nature of this exercise will usually mean that although in principle no one is excluded from consideration, most of the world will usually play no part in the calculation. The inquiry will often focus on what a relatively small number of people would be likely to have paid. It may have to arrive at a figure within a range of prices which the evidence shows that various people would have been likely to pay, reflecting, for example, the fact that one person had a particular reason for paying a higher price than others, but taking into account, if appropriate, the possibility that through accident or whim he might not actually have bought. The valuation is thus a retrospective exercise in probabilities, wholly derived from the real world but rarely committed to the proposition that a sale to a particular purchaser would definitely have happened.

It is often said that the hypothetical vendor and purchaser must be assumed to have been 'willing', but I doubt whether this adds anything to the assumption that they must have behaved as one would reasonably expect of prudent parties who had in fact agreed a sale on the relevant date."

The value of the Wiggins shares

85. We had both factual and expert evidence about the value of Castlegold's principal asset, its shares in Wiggins, and changes in that value, between the

reconstruction of the company in August 1993, when the shares were placed (and in Wiggins' agreements with Castlegold valued) at 2.5p each, and October 1994, by which time their quoted price was about 6p. Although we have set out sub-s 272(3), for completeness, we were not addressed on its application in this case and we shall take 6p as the price which would be derived from its application. We shall deal with the factual evidence first. Before we do so, however, we think it worth making the point, if only to make it clear that we have not overlooked it, that although the evidence, both factual and expert, focused on the value of Wiggins shares, for understandable reasons, the question before us is not the value of Wiggins shares, but the value of Castlegold's entire share capital.

86. The starting point for all the witnesses who spoke of the value of the shares was, necessarily, the quoted price. The Commissioners' position, in summary, is that a holding of almost 20% of Wiggins' shares would command a premium over the quoted price, because it would confer on the owner, if not *de facto* control over the company, then at least great influence over its direction and, probably, a seat on the board. Mr Iny's position is that the 6p quoted price did not reflect the company's true value, essentially its net asset value or NAV, but carried with it a large speculative element, principally the hope that, under his control, the company would succeed. An arm's length sale by him of his shares (even though they were held by Castlegold) to an outsider would signal that he had no confidence himself in the company's future, and would provoke a marked fall in the share price, a factor which any prospective purchaser would have very much in mind. Far from commanding a premium, the shares would have to be sold, in such a situation, at a significant discount.

87. Mr Iny, Mr Edmonstone, Mr Lansbury and Mr Blackstone all emphasised the speculative nature of an investment in Wiggins, not merely in 1993 or 1994 but for several years afterwards. It had substantial interests in development sites, but it was, they said, by no means certain that they would come to fruition. One problem was that Wiggins itself did not have the resources to undertake development itself; it could do no more than attempt to secure planning permission where none existed, or detailed permission where outline permission had already been granted, and sell the sites to others. In the meantime, it was perpetually short of cash, while the main sites, those introduced by Mr Iny and some others which Wiggins had acquired before its reconstruction, were all long-term projects. They had potential, even if speculative potential, but were not generating any income. Mr Iny agreed that he had been optimistic, in 1993 and 1994, about the company's prospects, but the other witnesses were much more cautious.

88. Eventually, the Lincoln site proved to be profitable, but not until several years after the reconstruction of Wiggins. Parts of the Fairfield site were sold, at what was regarded as a profit, in the late 1990s—it was only later that the majority of the profit from that site was realised—but, as we have related, the Financial Reporting Review Panel took the view that the profit had been incorrectly stated and demanded a re-writing of Wiggins' accounts, and a true profit was not shown until some time later. The Kingsbury site proved to be problematic and Wiggins did not succeed in developing it. Wiggins' other sites—

those it had not acquired from Mr Iny's companies—were successful, though again not until some time after 1994.

89. All of the witnesses of fact were of the view that a price of 6p per share in October 1994 reflected not the true value of Wiggins' underlying assets, but was inflated because investors hoped for more, were willing to take a chance on a company with a low share price and modest market capitalisation, and were optimistic that Mr Iny could turn Wiggins round. He told us that many of the smaller investors were friends who, though hoping for a profit, were in reality motivated by a desire to support him and not truly concerned about the price they paid for the shares, which they did not consider to represent an investment on which they relied. Their purchases had the effect of pushing up the price of the shares, beyond their true value. He had, he said, a high personal profile, partly because he appeared on television from time to time, and that increased the number of people willing to take a gamble on the shares. However, Mr Edmonstone, whom we take to be the witness best qualified to speak of trading in Wiggins shares, accepted that there was an active market for them at the time, and that it could not be said to be in any way artificially generated. He added that there were institutional shareholdings, and institutions were unlikely to be swayed by sentiment, or a desire to support Mr Iny.

90. Mr Lansbury, who later returned to Wiggins as its finance director, was able to speak (as we accept) with some authority about the company's finances. The quoted price in October 1994, he said, must have included a considerable element of hope for the company's future prospects, because it was considerably in excess of the net asset value, at that time no more than 2.4p per share. He referred us to a report prepared by the company's brokers in February 1995, in which they discussed Wiggins' prospects, concluding with the view that, optimistically assessed, the net asset value could rise to 3.7p per share by March 1996, although the underlying asset value, taking into account the potential of the projects then under way, was as much as 6.3p. That, he considered, carried with it a substantial "hope" element, and we accept that the report was prepared by the company's brokers and was, for that reason, worded in an optimistic manner. Nevertheless, Mr Lansbury agreed he had not kept a close eye on Wiggins' share price at the time, and both he and Mr Blackstone agreed they had no expertise in share valuation. Contrary to Mr Edmonstone, they and Mr Iny thought that in October 1994 there was only a thin market in Wiggins shares.

91. Mr Thom's and Mr Wielechowski's evidence was directed to the effect on the market value of Wiggins shares of the sale of a large holding, either of the size of Castlegold's holding of just under 20%, or of a substantial proportion of it. Mr Thom (who had been instructed to consider what amounted to a forced sale, or something close to it) initially took a pessimistic approach, considering that Wiggins' future prospects were poor, that even a 20% holding would not offer a purchaser any real prospect of control, and that the purchase of a shareholding of any size would be regarded as a gamble, resulting in the purchaser demanding a significant discount from the quoted price. He considered too that the sale of a large part or the entirety of his shareholding by a director would be seen as indicative of a lack of confidence, making it difficult to find a purchaser at all, and

itself dictating a discount from the quoted price. In his report he dismissed entirely the proposition that a sale of so many shares might attract a premium.

92. Mr Wielechowski took a rather different view. It was true, he conceded, that a 20% holding would not guarantee control, but in the absence of a shareholder with a greater number of shares, and there was none in this case, the board could not lightly disregard such a purchaser's wishes, since he could make their management of the company difficult if he chose to do so. A prospective purchaser wishing to acquire a large stake, either for its own sake or as the starting point for a takeover, would almost certainly be willing to pay a premium for a single purchase, rather than buy many smaller parcels at the fluctuating quoted price. He accepted that there was no guarantee that such a purchaser could be found, and that the holder of such a large stake in the company who wished to sell might need to resort to an institutional placing, but even then he doubted whether a discount from the quoted price would have to be conceded.

93. He too cast doubt on the evidence that there was a thin market in Wiggins shares, producing data which indeed demonstrated that Wiggins shares were more actively traded at that time than those of other, comparable, companies. The purchaser of shares in a company like Wiggins, which was dependent for its profits on the success of long-term projects, would always look beyond the NAV: the evidence that the quoted price included a "hope" element was no more than a statement of the obvious, and did not indicate that there was anything unusual about Wiggins. We should record that Mr Thom modified his stance somewhat as he gave oral evidence, accepting that even if a 20% shareholding did not confer overall control (as would be the case if there were a larger shareholder), it would certainly give its holder a considerable degree of influence over the company's direction. He was not willing to accept that a premium would be achieved, but agreed that a sale at the quoted price was not unrealistic.

94. Miss Nelder and Mr Glover had been asked to express their views about the value of Castlegold, rather than Wiggins, shares, though of course they began with them as they represented the major asset. Miss Nelder made the point that a hypothetical purchaser would be unlikely to buy Castlegold for the purpose of acquiring Wiggins shares for quick re-sale, since there was (as she accepted) an active market in them, but might make a long-term investment in that way. Because the quoted price was already substantially in excess of the NAV, she considered that any element of premium was already reflected in that price, and the purchaser would be unlikely to pay more. She did not argue that the hypothetical seller would be required to concede a discount from the quoted price. She did, however, take the view that the purchaser would demand a reduction in respect of the corporation tax for which Castlegold would be liable should it sell its Wiggins shares, a sum which (her report recorded, though we do not think it is correctly so recorded) was agreed between the parties at £936,029. She reached that view on the basis that the hypothetical purchaser could avoid the contingent liability by purchasing the shares in the open market instead.

95. Mr Glover started from the position that, hypothetical though he was required to be, the only likely purchaser of Castlegold's shares would be a property developer or entrepreneur wishing to replace Mr Iny on Wiggins' board,

by himself or his nominee. Castlegold's holding in Wiggins in October 1994 was greater than all the other significant holdings combined, a factor which would have made it much easier for such a hypothetical purchaser to achieve his assumed purpose, and that would have made him willing to pay a premium of, Mr Glover thought, 10%. He allowed for a contingent corporation tax liability of £1.125 million; although he made the point that the hypothetical purchaser whom he assumed would not in fact incur that liability, or would defer it by retaining Castlegold's holding of Wiggins shares, he was nevertheless willing to allow it in full on the ground that, as Miss Nelder had said, the purchaser could avoid it by buying the shares in the open market instead. He made a further calculation, designed to demonstrate that a purchaser would save £345,000 by buying Castlegold's shares rather than Wiggins shares, and suggested that it was a factor which would allow the hypothetical seller to demand even more, but it depends on some conjectures and assumptions and we did not find it convincing. We do not take it into account.

96. Though we are not persuaded by the evidence we heard that we should assume that any hypothetical prospective purchaser would have been willing to pay a premium over the quoted price, we are equally not persuaded that the hypothetical seller would have been forced to concede a discount. We do not mean by that that there was no possibility of either a premium or a discount, but that there is no basis on which we could find that one is more likely than the other. What can be said, particularly from Miss Nelder's and Mr Glover's evidence, is that it is little more than a matter of speculation whether, in what would inevitably be a small field of possible purchasers, one would be found who might be willing to pay a premium or the hypothetical willing seller (by which we mean a person who wishes to sell, even though under no form of compulsion to do so) would have to resign himself to selling his large shareholding at a discount from the quoted price if he was to sell it at all. Accordingly we have concluded that the value of Wiggins shares on 10 October 1994 must be taken as their quoted price for which purpose, as we have indicated, we adopt 6p. From the gross value so calculated (£5,808,000) we deduct £1 million, as a (rounded) contingent corporation tax liability.

The Fairfield option

97. It will be recalled that in August 1993, in the course of the reconstruction of Wiggins, Castlegold granted to Wiggins a call option to purchase the Fairfield site, which was exercised in March 1994, when Wiggins entered into a development agreement with the Secretary of State for Health. Castlegold became entitled, although contingently, to an additional allotment of Wiggins shares, to a maximum of 48 million. By 10 October 1994 the obligation to allot further shares had not crystallised, and the evidence we heard, from Mr Iny, Mr Lansbury and Mr Blackstone, was that it would be some time before it ever did crystallise. Though Mr Iny was optimistic (and, as events were to show, rightly so), Mr Lansbury and Mr Blackstone told us they were not, at least at that time. That evidence is not altogether borne out by some contemporaneous evidence, particularly that contained in Wiggins' accounts, which were optimistic about the prospects of success. We accept, however, that Wiggins was by then in the hands

of Mr Iny, who was anxious to inspire confidence, and that we should not read too much into what might be regarded as little more than a “puff”.

98. Mr Iny’s position before us was that the contingent allotment was, if not worthless, then of negligible value in October 1994: even on his own optimistic assessment, it would be several years before Castlegold became entitled to anything, and it was a matter for considerable conjecture what its eventual entitlement might be. Mr Lansbury and Mr Blackstone were more dismissive still of the value to Castlegold of that entitlement, as it was perceived in October 1994, since they regarded the Fairfield site as unlikely to be successful. They were, however, obliged to concede that Wiggins had invested fairly substantial sums of money in the venture and that Mr Lansbury spent a good deal of his time on possible development schemes for the site, and on negotiations with the planning authorities and others in 1994 and the following years. It seems to us also pertinent to observe, as the evidence indicated, that although the site was in the green belt and contained a listed building, both factors which made the project more difficult, there were other reasons why some redevelopment would eventually be necessary since, as all the factual witnesses agreed, without it the building would fall into disrepair, unless the Secretary of State spent considerable sums on it, and the Department of Health was anxious to recover the value of the site and use the money for other purposes.

99. Miss Nelder took the view that there was little likelihood of suitable planning permission being obtained within the three-year period for which Wiggins’ agreement with the Secretary of State provided and no certainty that the period would be extended and, that being so, no purchaser of Castlegold’s shares would have attributed any value to the prospect that more Wiggins shares would be allotted to it. It was, she considered, too speculative a prospect to have made any significant difference to the price a prudent purchaser would have been willing to pay for Castlegold as it stood in October 1994. Mr Glover, however, took the contrary view. In his opinion, the hypothetical vendor of Castlegold’s shares would certainly seek to enhance the price so as to reflect the chance of a further allotment, and a purchaser, however prudent, would be forced to recognise that a further allotment was by no means a fanciful prospect. It was, for the reasons we have given, in the interests of both Wiggins and the Secretary of State to achieve a sale; in October 1994 there were 2½ years of the option period still to run, and the possibility, if no more, of an extension if the application for planning permission was making progress; and Wiggins had invested time and money in the project, which he did not consider it would have done had the board not thought there was a reasonable prospect of eventual success.

100. It is obviously difficult, if not impossible, to value a contingent right of this kind, many years after the event, and when it is necessary to eschew hindsight. We had a good deal of detail from both the experts, and it was suggested that this might be an issue we should refer to the Lands Chamber of the Upper Tribunal in accordance with s 47 of TMA or rule 5(3)(k) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009, but we do not think it necessary to do so. We are not called on to value land, but to determine the additional consideration a prospective purchaser might be willing to pay for the right to receive additional shares. It is true that, to some extent, the number of shares to be allotted was

referable to the future value of the land, but the value we must determine is of the contingency rather than the land. What is really in issue is not land values, but the prospects that the project would succeed. The view we have come to is that it is impossible to reach a value by a systematic analysis of every known factor, weighing them against each other. The prospective purchaser would have been in no better position: he would have to come to a conclusion about the additional price he was willing to pay, not by reference to such an analysis, but by reference to feeling or instinct, and he would of necessity adopt a "broad brush" approach.

101. While we think he has overstated the value to be attributed to the contingent right, which he put at as much as £776,000, we agree with Mr Glover that it did have a significant value. It is true that even by Mr Iny's optimistic account, the Fairfield project was speculative and far from guaranteed to succeed, but it is in our view clear that it had, even in October 1994, a measurable chance of doing so. Naturally the prudent purchaser would require a considerable discount from the possible additional allotment of £1.2 million of shares, for the possibility that no shares at all would be due, for the possibility that, even if some shares were due, Castlegold would not be entitled to the full number, and for the fact that, whatever the eventual allotment, it was still some years in the future. On the other hand, the gain he would make if the project were to succeed would be considerable, even leaving out of account, as we must since the possibility of success is built into to quoted price of Wiggins shares, that the value of Castlegold's existing and prospective shares in Wiggins would themselves increase in value. In our view, and adopting the broad-brush approach to which we have referred, the additional element of the price a prudent purchaser would pay for the contingent allotment is to be assessed at one quarter of the possible maximum, namely £300,000.

The Cartmel loan

102. We start with our finding that the Cartmel loan, when it came into existence on or about 30 April 1990, amounted to £3,478,474, the figure recorded in the 1995 deed of charge. Although this was not an agreed figure and there was, as we have related, scant evidence, some of it inconsistent with other evidence, about the loan, the Commissioners expressly disavowed any suggestion that the loan was a fiction, and did not advance any other possible figure for its original amount. The expert witnesses, Miss Nelder and Mr Glover, both proceeded on the footing that the loan had been of that amount, though reduced by 10 October 1994 (ignoring accrued interest or other charges, if there was indeed any liability to pay them) to £2,978,474 by the passing on to Cartmel, by Castlegold, of 20 million Wiggins shares at an agreed aggregate value of £500,000 during the course of 1993. What is far less clear is whether the value of Castlegold should be reduced by a greater sum, to take account of interest, the commitment fee to which Mr Iny referred, the 25% share of profit he also said he had promised to Dr Sakhili, or for any other reason. Miss Nelder and Mr Glover, for want of anything else, proceeded on the basis of assumptions, but it is necessary for us to make findings of fact.

103. The only evidence we have comes from Mr Iny, the deed of charge and the 2005 receipt, by which, it will be recalled, Dr Sakhili is recorded to have accepted

£10,000 in consideration of his transfer of the benefit of the debt to Harlequin. None of that evidence is verifiable by reference to any independent evidence—independent, that is, of Mr Iny. His evidence, as we have already indicated, was inconsistent: he said, at various times, that the loan was interest-free; that it was subject to a commitment fee and interest at a minimum rate of 17%, albeit there was a formula by which the commitment fee could be eliminated; that Dr Sakhili agreed to take a share of profit in lieu of interest; and that Dr Sakhili was persuaded to accept as little as £10,000 in effective discharge of a loan which, even if there was no interest, commitment fee or profit share, still amounted to almost £3 million. We bear in mind that Castlegold's accounts recorded that the loan was interest-free, and did so at a time when Castlegold was a new company and very soon after 1993 when, according to Mr Iny and the deed of charge, the terms of the loan had been renegotiated to provide for interest. We also take into account as a significant factor that when 20 million Wiggins shares were transferred to Cartmel in 1993, they were treated as a repayment of capital and not as a payment in respect of accrued interest.

104. Mr Thomas made the point that Castlegold's accounts contained a number of other errors, and that there were some noticeable omissions, for example there was no mention of the benefit of Castlegold's contingent right to more Wiggins shares should the Fairfield development be successful, and no provision was made for possible corporation tax liabilities. These errors and omissions must, he said, lead to the conclusion that the accounts are unreliable, and that the failure to mention the Cartmel loan should not be thought remarkable. The problem we perceive with that argument is that it is difficult to see how Mr Thomas can properly argue that the deed of charge (which helps Mr Iny's case) can be treated as a reliable document because it was prepared by solicitors, while arguing that the Castlegold accounts (which harm Mr Iny's case) are unreliable even though they were prepared by chartered accountants. The fact remains that both the deed and the accounts were prepared on Mr Iny's instructions, and we see no reason to prefer one over the other. It is conspicuous too that the deed of charge was executed in December 1995 while Castlegold's 1994 and 1995 accounts were both signed by Mr Iny in January 1996. It is in our view incredible that in the space of a month or so he had forgotten about arrangements involving substantial sums of money, important enough to have solicitors document them.

105. The burden is on Mr Iny to satisfy us that the value of Castlegold's shares is to be reduced by more than the capital value of the loan, in October 1994, of £2,978,474. We are not satisfied that any additional reduction is called for, since we do not consider it possible, on the evidence available to us, to make a confident finding that anything beyond the capital sum was payable. In reaching that conclusion we have taken particular account of the inconsistencies in Mr Iny's evidence, but we also find it remarkable, as we have indicated, that in 1993, when many transactions of significance were undertaken, including the claimed renegotiation of the Cartmel loan, the new terms were not even reduced to writing, still less the subject of a document prepared by solicitors, despite the partial repayment and the transfer of the properties acquired from Cartmel from the subsidiaries, via Castlegold to Wiggins; and yet, for no reason which Mr Iny could give beyond Dr Sakhili's possible absence from the United Kingdom

(though he must have been in the UK, or at least in easy contact, in 1993 at the time of the renegotiation), solicitors were instructed to document the supposed renegotiated terms in 1995.

106. For those reasons we find ourselves unable to treat the 1995 deed of charge as a reliable document. It was prepared by solicitors, whose integrity we have no reason to doubt, but, as we have already pointed out, solicitors can record in documents only what they are told. The absence from the deed of elementary details, particularly a description of the properties sold by Cartmel to the subsidiaries, and the fact that the deed did not come into existence until two years after the events it purports to record are in our view consistent only with the conclusion that the solicitors prepared the deed almost entirely from what they were told by Mr Iny, and not by reference to original documentation. We do not, therefore, take the deed as acceptable evidence of the terms of the Cartmel loan. In particular, we do not accept it as evidence that interest, or a commitment fee, were payable. In reaching that conclusion we take into account that it was not until 1999 that Castlegold's accounts showed that any interest was payable. We do not disregard Mr Thomas's observation that a prior year adjustment should not be made lightly, and without evidence, (though we might add that there was nothing before us to show what prompted the restatement, still less did we see the evidence on which it was based unless, as the wording of the note to the accounts suggests, it was limited to the 1995 deed of charge) but we nevertheless find it incredible that, if he had agreed to pay interest at 17% or more in 1993, Mr Iny did not instruct the chartered accountants who prepared Castlegold's accounts at that time accordingly, or even instigate a correction in 1996, within a month or so of the deed of charge, when he was asked to sign the accounts as a true and fair record. It is not credible that the accountants would record the loan as interest-free if they had not been instructed that that was the case. And if they had no instructions about the terms of the loan it defies belief that they did not ask.

107. On the other hand, we do not consider the fact that Dr Sakhili eventually accepted as little as £10,000, despite the comments which appear above about the circumstances in which he apparently did so, is a matter to be taken into account (that is, as an indication that the capital sum should be discounted for the prospect that not all of it would be paid); it was too far into the future and is, moreover, a hindsight point. We have concluded therefore that the whole capital sum, £2,978,474, should be treated as a debt of Castlegold at 10 October 1994.

108. We recognise that the hypothetical purchaser could not be certain that the loan (whatever its terms) would be left outstanding indefinitely, and would need to allow for the possibility that it would be called in immediately, so would have to be in a position either to discharge it from his own resources or to re-finance it, but we are not persuaded that this need dictates an addition to the capital sum for "nuisance value". Castlegold, as Mr Glover agreed, would find it difficult to raise a loan, but we see no reason to assume that the hypothetical purchaser would encounter the same difficulty; nor do the authorities support Mr Thomas's argument in this respect that the purchaser's financing arrangements are a material consideration, still less that it must be assumed that he would need to dispose of Castlegold's Wiggins shares, or a large number of them, almost immediately after the purchase of Castlegold, in order to raise the funds necessary to discharge the

loan. There is nothing in the extract from Lord Hoffmann's judgment set out above which favours his argument, nor did Mr Thomas refer us to any other judgment which does; and it is difficult to see why any prudent purchaser of Castlegold's shares, however hypothetical, might buy them without first ensuring that he could withstand the immediate calling in of the loan.

Castlegold's other assets and liabilities

109. It will be recalled from the narrative above that while the Lincoln properties were transferred to Wiggins by Castlegold after it had itself acquired them—and on what precise terms is unknown—from the subsidiaries, the interests in the Kingsbury and Fairfield sites had been acquired by Castlegold itself. Substantial sums of cash were paid by Wiggins to Castlegold, and were used, according to Mr Iny's evidence for which there was no other support, to pay off what had hitherto been Clerkenwell's and, one is left to assume, his own debts; Castlegold was a new company and had no debts of its own. There is no dispute that the Castlegold accounts for the 1994 and 1995 years were defective, since (leaving the Cartmel loan to one side) they failed to disclose the contingent rights, did not show what had happened to the cash receipts, and made no provision for corporation tax. Mr Thomas argued that these were additional factors pointing to the conclusion that Castlegold was worthless at October 1994.

110. The statute and the authorities require us to assume that a prudent purchaser would make proper enquiries and that he would be able to establish what was the value of the remaining assets and liabilities, actual and contingent. That is not an exercise it is possible for us to undertake. We had no evidence, from Mr Iny or any other source, of the manner in which the transactions between Clerkenwell and Castlegold were effected, how and by which company the commercial loans were discharged, whether there was an eventual surplus or deficit, if the former what happened to it, or if the latter how it was made up. We return to the point in our conclusions.

Conclusions

111. We are satisfied that Mr Iny's sale on 10 October 1994 of his shareholding in Castlegold to Harlequin was not a disposal at arm's length, and that tax is to be assessed by reference, not to the consideration actually paid, but to the market value of the shareholding. For the reasons we have given, we assess the value of Castlegold's net assets at that date, subject to what we say in the next paragraph, at £2,129,526, being the value of Castlegold's holding of Wiggins shares (£5,808,000 less the contingent tax liability of £1 million, leaving £4,808,000) plus the value of the contingent additional allotment dependent on the success of the Fairfield project (£300,000), from which must be deducted the Cartmel loan of £2,978,474.

112. It may be, however, and for the reasons we have just described, that a further adjustment is necessary to take account of additional assets or liabilities, though we do not know whether any such adjustment might result in an increase or reduction or, in either case, by how much. We therefore leave the parties to agree an adjustment, if they are able to do so, or to apply for a direction that the

hearing of the appeal be continued in order that it may be determined, and for the appeal against the penalty to be dealt with.

113. These are full reasons for the conclusions we have reached. Any party dissatisfied by those conclusions may apply for permission to appeal to the Upper Tribunal. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party.

COLIN BISHOPP
Tribunal Judge
Release date: 30 September 2010