Appeal numbers: TC/2015/02564
TC/2015/02565

CORPORATION TAX - Group Relief - Section 154 CTA 2010 - Appointment of receivers over the whole of the property of a company - Whether Effect 2 of section 154(3) of CTA 2010 engaged? - Yes - Whether group relief could be surrendered to the Appellants? - No - Appeals dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

(1) FARNBOROUGH AIRPORT PROPERTIES COMPANY LIMITED
(2) FARNBOROUGH PROPERTIES COMPANY LIMITED **Appellants**

- and -

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

TRIBUNAL: JUDGE CHRISTOPHER MCNALL

Sitting in public at The Royal Courts of Justice, Strand, on 27 and 28 January 2016

Mr Philip Ridgeway, Counsel, instructed by KPMG LLP for the Appellants

Mr Jonathan Bremner, Counsel, instructed by the General Counsel to HM Revenue and Customs, for the Respondents

DECISION

1. These appeals are each made pursuant to Notices of Appeal dated 26 March 2015. They challenge Closure Notices issued on 24 December 2014 which denied claims to group relief by each Appellant. On 19 May 2015, the Tribunal directed that these appeals were to proceed together.

The Agreed Facts

2. These appeals are being decided on the basis of an 'Agreed Statement of Facts', of which the relevant parts read as follows:

(1) The Appellants and Piccadilly Hotels 2 Limited ('PH2L') are each at least 75% subsidiaries of Kelucia Limited ('KL') for the purposes of section 152 of the Corporation Tax Act 2010 ('CTA 2010'). The relevant group relationships are as follows:

(a) The Appellants are 100% subsidiaries of Gatevalley Limited, which is in turn (partly directly and partly indirectly) an 80.5% subsidiary of KL;

(b) PH2L is a 100% subsidiary of Piccadilly Hotels 1 Limited, which is in turn (partly directly and partly indirectly) a 92.3% subsidiary of KL.

(2) On 27 June 2011 PH2L was placed into receivership. This was effected by the appointment of a receiver by Bank of Scotland plc over the whole of the property of PH2L.

(3) By a letter dated 16 January 2014, Mr Bruce Hunter of Rotch Property Group Limited requested non-statutory clearance in respect of claims and surrenders of group relief between the Appellants and PH2L. The Respondent refused clearance by email on 31 January 2014.

(4) On 30 May 2014, the First Appellant (Farnborough Airport Properties Company Ltd) submitted an amended corporation tax return for the period ended 31 May 2012 ('the First Appellant's Amended Return') including a claim to group relief of £5,721,318 surrendered to it by PH2L.

(5) Also on 30 May 2014, the Second Appellant (Farnborough Properties Company Ltd) submitted an amended corporation tax return for the period ended 31 May 2012 ('the Second Appellant's Amended Return') including a claim to group relief of £4,906,391 surrendered to it by PH2L.

(6) The Respondent opened enquiries into the Amended Returns on 3 October 2014. The Respondent wrote to Mr Hunter on 13 October 2014, setting out why HMRC considered that the two claims to group relief surrendered by PH2L were not valid.

(7) KPMG wrote to the Respondent on 3 December 2014, setting out why they considered that there should be no bar to the group relief claims and surrenders between the Appellants and PH2L. KPMG's letter concluded with a request for a 'determination' against which an appeal could be made if the Respondent was still unable to accept the group relief claims.

(8) On 24 December 2014 the Respondent issued closure notices which amended the Amended Returns and their effects were explained in a letter to Mr Hunter dated 23 December 2014. The closure notices denied the group relief of £5,721,318 and £4,906,391 claimed from PH2L.

(9) The Appellants wrote to the Respondent on 19 January 2015 appealing against the conclusion stated in the closure notices and requesting reviews.

(10) Reviews were performed and on 6 March 2015 the Respondent notified the Appellants of their decision to refuse claims for group relief.

The Receivership

3. I refer to Agreed Fact (2) above. Some further account is required.

4. The Bank of Scotland appointed receivers on 27 June 2011, by virtue of a deed of appointment of that same date.

5. The statutory Notice of Appointment (Form LQ01) records - by way of a ticked box - that the receivers were appointed, as 'Receivers' (rather than as 'Administrative Receivers' or 'Managers') over *'The whole of the property of the company'*, as opposed to '*Part of the property of the company'*.

6. The Bank of Scotland's rights flowed ultimately from its appointment as Security Trustee under a Deed of Debenture dated 10 October 2006. By Clause 3.1 of that Deed of Debenture, PH2L, as one of the Original Chargors, granted security in favour of the Security Trustee by way of (i) a first legal mortgage against all its Property (meaning the Real Property from time to time owned by the Chargor or in which the Chargor has an interest together with all proceeds of sale deriving from any such Real Property, the benefit of all covenants given in respect of such Real Property and any monies paid or payable in respect of such covenants), (ii) a first fixed charge on all the land and buildings, (iii) a first fixed charge on plant and machinery, other chattels, investments, insurances, book debts, bank balances, intellectual property, authorisations, goodwill and uncalled capital.

7. By way of Clause 3.5 of that Deed of Debenture, PH2L granted a first floating charge of 'all their assets and undertakings whatsoever and wheresoever both present and future not effectively charged by way of legal mortgage or fixed charge pursuant to the provisions of clause 3.1 (fixed charges) or effectively assigned by way of security pursuant to clause 3.2 (assignment by way of security), but extending over all its property, assets, rights and revenue as are situated in Scotland or governed by Scottish law'.

8. Clause 3.7.2 of the Deed provides for the automatic crystallisation of the rights under the floating charge if a receiver is appointed in respect of PH2L, thereby converting the rights under it into a fixed charge.

9. Clauses 9.6 and 9.7 of that Deed of Debenture provide for Enforcement of Security as follows:

> 9.6 The Receiver will have the power on behalf and at the cost of the Chargor he acts for:
>
> 9.6.1 to do or omit to do anything which he considers appropriate in relation to the Secured Assets; and
>
> 9.6.2 to exercise all or any of the powers conferred on the Receiver or the Security Trustee under this deed or conferred upon administrative receivers by the Insolvency Act (even if he is not an administrative receiver) or upon receivers by the LPA or any other statutory provision (even if he is not appointed under the LPA or such other statutory provision).

10. The 'powers' which are referred to in Clause 9.6.2 are to be found in Schedule 1 of the *Insolvency Act 1986* ('Powers of Administrator or Administrative Receiver') and include (except insofar as they are inconsistent with any of the provisions of the Deed of Debenture) the following powers:

> "12. Power to do all such things (including the carrying out of works) as may be necessary for the realisation of the property of the company.
>
> 13. Power to carry on the business of the company"

11. Those powers are not inconsistent with the Deed of Debenture.

12. Schedule 12 of the Deed of Debenture sets out the Receiver's Specific Powers. The Receiver will have *'full power and authority in relation to the Chargor ... it is appointed to act as agent for'* including the following power:

> "2. **CARRY ON BUSINESS**
>
> generally to manage the Secured Assets and to manage or carry on, reconstruct, amalgamate, diversify or concur in the carrying on the business of that Chargor or any part of it as he may think fit"

The legislation

13. In order for each of the present Appellants to be able to make a claim for group relief it is necessary (inter alia) for each Appellant, as 'claimant' companies, to be a member of the same Group of companies as PH2L, as 'surrendering' company: CTA 2010 section 130(2) Requirement 3(a) and section 131(1)(a)

14. CTA 2010 s152 explains '*how to determine if a company is a member of a group of companies*': see section 150(1)(b). Section 152 provides:

> *"**152 Groups of companies***
>
> *For the purposes of this Part two companies are members of the same group of companies if –*
> *(a) one is the 75% subsidiary of the other, or*
> *(b) both are 75% subsidiaries of a third company."*

15. Section 154 qualifies that explanation *'in cases involving transfers of companies'*: s 150(2)

16. Section 154 provides:

> ***154 Arrangements for transfer of member of group of companies etc***
>
> *(1) This section applies if, apart from this section, one company ('the first company') and another company ('the second company') would be members of the same group of companies.*
>
> *(2) For the purposes of this Part the companies are not members of the same group of companies if –*
>
> *(a) one of the companies has surrenderable amounts for an accounting period ('the current period'), and*
>
> *(b) arrangements within subsection (3) are in place.*
>
> *(3) Arrangements are within this subsection if they have any of the following effects.*
>
> *[Effect 1…]*
>
> *Effect 2*
>
> *At some time during or after the current period a person (other than the first or second company) has or could obtain, or persons together (other than those companies) have or could obtain, control of the first company but not of the second company".*
>
> *[Effect 3 ...]*

17. "*Arrangements*" is defined by CTA 2010 s 156(2) as follows:

> *"'Arrangements' –*
>
> *(a) means arrangements of any kind (whether or not in writing), but*
>
> *(b) does not include a power of a Minister of the Crown, the Scottish Ministers or a Northern Ireland department to give directions to a statutory body as to the disposal of assets belonging to the body or to a subsidiary of the body."*

18. "*Control*" is defined by CTA 2010 s 1124(2) as follows:

> *"(2) In relation to a body corporate ('company A'), 'control' means the power of a person ('P') to secure –*

(a) by means of the holding of shares or the possession of voting power in relation to that or any other body corporate, or

(b) as a result of any powers conferred by the articles of association or other document regulating that or any other body corporate,

that the affairs of company A are conducted in accordance with P's wishes."

19. The parties agree that Effects 1 and 3 of section 154(3) CTA 2010 are not relevant.

20. Therefore, the only point in dispute is whether Effect 2 is engaged or not.

Statutory interpretation - the approach

21. To some degree, this is a question of statutory interpretation. In *Pollen Estate Trustee Co v Revenue and Customs Commissioners* [2013] 3 All ER 742, Lewison LJ gave (at [24]) the following guidance:

> "The modern approach to statutory construction is to have regard to the purpose of a particular provision and interpret its language, so far as possible, in a way which best gives effect to that purpose. This approach applies as much to a taxing statute as any other [...]. In seeking the purpose of a statutory provision, the interpreter is not confined to a literal interpretation of the words, but must have regard to the context and scheme of the relevant Act as a whole [...]. The essence of this approach is to give the statutory provision a purposive construction in order to determine the nature of the transaction to which it was intended to apply and then to decide whether the actual transaction (which might involve considering the overall effect of a number of elements intended to operate together) answered to the statutory description. Of course this does not mean that the courts have to put their reasoning into the straitjacket of first construing the statute in the abstract and then looking at the facts. It might be more convenient to analyse the facts and then ask whether they satisfy the requirements of the statute. But however one approaches the matter, the question is always whether the relevant provision of statute, upon its true construction, applies to the facts as found"

22. That passage was adopted by Morgan J. (with whom Upper Tribunal Judge Nowlan agreed) in *Project Blue Limited (formerly Project Blue Guernsey Ltd) v HMRC* [2014] UKUT 564 (TCC) at [51]. Although the Court of Appeal (Patten, Lewison, and Underhill LJJ), in a decision handed down on 26 May 2016 ([2016] EWCA Civ 485), allowed an appeal from the decision of the Upper Tribunal in *Project Blue*, the general approach to statutory interpretation articulated by Lewison LJ in *Pollen Estate* and adopted by the Upper Tribunal in *Project Blue* was not disturbed.

23. Having established the approach to be adopted, I must then turn to consider the materials which are properly available to me in conducting the interpretative exercise.

Admissible materials

24. Mr Ridgeway invited me to take account of certain extracts from the proceedings before the Parliamentary Standing Committee in which the group relief provisions of the *Finance Bill 1973* were discussed. These provisions, eventually enacted in the *Finance Act 1973,* are the immediate precursors to the provisions in issue in this case.

25. He drew my particular attention to remarks by the then-Chief Secretary of the Treasury, Mr Bernard Jenkin, a promoter of the Finance Bill, in which Mr Jenkin said that the group relief provisions were "*designed to prevent avoidance of tax through the manipulation of artificial group arrangements*". The Chief Secretary described the kinds of arrangements at which the legislation was aimed, including "*a switch of ownership at a future date, so that a company has moved from one group to another group for a period long enough to allow the second group to, as it were, "milk" the tax allowances, and then the company reverts to its previous owner."*

26. Whilst it seems to me reasonably arguable that the tenor of those remarks was that the Chief Secretary regarded the group relief provisions as being ones designed to counter avoidance, he also stressed that the provisions were not intended to impede '*normal commercial transactions'* or *'tax arrangements which reflect the financial management arrangements by which groups are run'*. He summarised the intended purpose as "*stopping the undesirable exploitation of group relief without impeding normal commercial business*".

27. In *Pepper (Inspector of Taxes) v Hart* [1993] AC 593, a seven member Appellate Committee of the House of Lords considered the circumstances in which Parliamentary proceedings of the above kind could be used as an aid to construction of a statute (in that case, another tax statute, the *Finance Act 1976*). A majority of their Lordships (Lord Mackay of Clashfern, L.C. dissenting) held that the self-imposed judicial rule excluding reference to Parliamentary material as an aid to statutory construction should be relaxed, but only to a limited degree.

28. In his leading speech, Lord Browne-Wilkinson (with whom Lords Keith, Bridge, Griffiths, Ackner and Oliver agreed) remarked (at 634C-E):

> "I have come to the conclusion that, as a matter of law, there are sound reasons for making a limited modification to the existing rule (subject to strict safeguards) unless there are constitutional or practical reasons which outweigh them. In my judgment, subject to the questions of the privileges of the House of Commons, reference to Parliamentary material should be permitted as an aid to the construction of legislation **which is ambiguous or obscure or the literal meaning of which leads to an absurdity**. **Even in such cases references in court to Parliamentary material should only be permitted where such material clearly discloses the mischief aimed at or the legislative intention lying behind the ambiguous or obscure words.** In the case of statements made in Parliament, as at present advised, I cannot foresee that any statement other than the statement of the Minister or of a promoter of the Bill is likely to meet these criteria.": emphasis added

29. Lord Oliver remarked as follows (at 620C-D):

> "It is, however, important to stress the limits within which such a relaxation is permissible ... It can apply only where the expression of the legislative intention is **genuinely ambiguous or obscure or where a literal or prima facie construction leads to a manifest absurdity and where the difficulty can be resolved by a clear statement directed to the matter in issue.**": emphasis added

30. In *Pepper*, the majority of their Lordships were only prepared to allow reference to Parliamentary proceedings on the footing (i) that the statutory provision in question was found to be ambiguous, obscure or absurd and (ii) where the very question which was the subject matter of the appeal had been clearly answered in the course of debate by the Financial Secretary: see Lord Browne-Wilkinson at 629E-G and 642E. This is therefore a two-stage test, and both limbs must be satisfied.

31. On the basis that I am bound by *Pepper v Hart* then, in my view, the *Pepper v Hart* criteria are not met in this case so as to enable me to consider the above Parliamentary materials as part of the interpretative exercise. In obvious distinction to *Pepper v Hart*, there is no *'clear statement directed to the matter in issue'*. Nor do I consider that the material referred to by Mr Ridgeway *'clearly discloses the mischief aimed at or the legislative intention lying behind the ambiguous or obscure words*':

(1) The statements, albeit those of the promoter of the Bill, are couched in very general terms. They do not condescend to any degree of particularity;

(2) There is no discussion at all of insolvency, or the appointment of receivers;

(3) There is no reference to mortgages, security arrangements, or deeds of debenture;

(4) It is far from self-evident what '*normal commercial transactions*' meant or now can (even with the benefit of hindsight) be said to mean. It is thus far from self-evident whether this expression (which is not a term of art) was intended to encompass, or can sensibly be read as encompassing, the appointment of receivers, especially the appointment of receivers over the whole of the property of a company in circumstances such as those pertaining in the present appeals;

(5) References to countering avoidance are an unsurprising thing for the promoter of the Bill to have said. But I am unable to read these comments as a springboard so as to allow the provisions before me to be genuinely characterised as anti-avoidance;

(6) But, even if I were wrong about that, I nonetheless consider that, even if there were some element of anti-avoidance behind the provisions, that would still have to be shown (taking the Appellants' case at its highest) to have been the dominant or principal objective of the provisions, and I simply do not see anything in the materials which would justify such a conclusion.

32. Given that the second limb of the *Pepper v Hart* gateway is not satisfied, then I do not need to consider whether any of the statutory provisions which I am called upon to consider are 'ambiguous' 'obscure' or 'absurd'. Accordingly, I do not need to resolve what Mr Ridgeway characterised as 'anomalies' if the appointment of receiver

indeed does operate (more generally) to 'degroup' a company or (more narrowly) operates to disentitle that company from surrendering group relief.

33. I am bound to say that I am doubtful whether it is open to the Appellants to advance arguments of this kind where the factual scope of the appeals is not 'at large' but is circumscribed by the parties' agreement in terms of the Agreed Facts. Given that the Agreed Facts set out, with a degree of precision (and doubtless as the result of an iterative and collaborative process between the parties) the parameters of these particular appeals by these particular appellants, I am not persuaded that I can properly go beyond the Agreed Facts, except insofar as I can have regard to contemporary, and unchallenged, documentation.

34. Whilst the existence of the Agreed Facts and the contemporary documents means that I am not deciding these appeals in the abstract, or as a simply academic exercise, there were no witness statements or oral evidence which would have enabled me to assess and make findings of fact in relation to (for example) the purpose of this particular receivership, or, once receivers had been appointed, the scope of the receivers' powers (by assessing the decisions which the receivers had taken, or had abstained from taking, and the reasons for any action or inaction).

35. In my view, that limitation - imposed by the parties on the Tribunal - has a real impact not only on the conclusion which I have already expressed as to whether the Appellants could pray in aid alleged anomalies, but also when it comes to assessing what weight to give, in the context of these appeals, to the authorities put before me on the question of 'control'.

36. Even if I was wrong in the above analysis, I nonetheless still do not consider that the examples put forward by Mr Ridgeway go so far as to demonstrate that section 154(3), read literally, or with a prima facie construction, are *'absurd'* (in the sense of ridiculous) so as to enable recourse to be had to the Parliamentary materials relied upon as an aid to construction. For example, I do not agree that it is an absurd outcome if the appointment of a receiver over PH2L has the effect of degrouping it. To my mind, CTA 2010 section 155B (which enacts Extra Statutory Concession 10) answers the point, since it makes clear that it is not the entry into the security instrument which degroups, but the actual exercise of the rights under the security.

The use of marginal notes, and Explanatory Notes

37. Whilst a marginal note to a section cannot control the language used in the section, it is at least permissible to approach a consideration of the section's general purpose and the mischief at which it is aimed with the note in mind: *Stephens v Cuckfield RDC* [1960] 2 QB 373 at 383 per Upjohn LJ (with whom Hodson and Pearce LJJ) agreed. It is therefore appropriate to take into account, from the marginal notes:

(1) The marginal note to Section 29 of the *Finance Act 1973* (being the statutory precursor to section 154 of CTA) says: *'Group relief: effect of arrangements for transfer of company to another group, etc'*;

(2) The marginal note to section 154 CTA says: '*Arrangements for transfer of member of group of companies, etc'.*

38. I was also referred to the Explanatory Notes to the Corporation Tax Act 2010. I am guided by the remarks of Lord Steyn in *R (Westminster City Council) v National Asylum Support Service* [2002] UKHL 38 at [5] where (albeit obiter) he supported the use of Explanatory Notes as an aid to interpretation, even in the absence of ambiguity (and hence falling outside the scope of *Pepper v Hart*) where these cast light on 'the objective' or 'contextual sense'. That approach was supported by Sales J. in *Eclipse Film Partners (Nr 35) LLP v HMRC* [2013] UKUT 0639 (TCC) who nonetheless remarked that Lord Steyn's observations should be approached "*with a little caution, since none of the other members of the Appellate Committee referred to them or endorsed them*." I must bear that observation in mind. It is therefore appropriate to take into account, from the Explanatory Notes:

(1) The CTA 2010 was not intended to change the general effect of primary corporation tax legislation;

(2) The CTA 2010 did not generally change the meaning of the law;

(3) Section 154 counteracts arrangements designed to obtain group relief.

The purpose

39. CTA 2010 section 154 is the statutory successor to *Finance Act 1973* s 29. Bearing in mind the Explanatory Notes, I consider that I am able to consider the purpose of FA 1973 s 29 as an aid to interpreting CTA 2010 s 154.

40. Section 29(1) of the Finance Act 1973 ('*Group relief: effect of arrangements for transfer to company to another group, etc'*) reads:

> "If, apart from this section, two companies (in this subsection referred to as 'the first company' and 'the second company') would be treated as members of the same group of companies and-
>
> (a) in an accounting period which ends on or after 6th March 1973, one of the two companies had trading losses or other amounts eligible for relief from corporation tax which it would, apart from this section, be entitled to surrender as mentioned in subsection (1) of section 258 of the Taxes Act, and
>
> (b) arrangements are in existence by virtue of which, at some time during or after the expiry of that accounting period,-
>
> (i) the first company or any successor of it could cease to be a member of the same group of companies as the second company and could become a member of the same group of companies as a third company, or
>
> (ii) any person has or could obtain, or any persons together have or could obtain, control of the first company but not of the second, or
>
> (iii) [....]

> then, for the purposes of the enactments relating to group relief, the first company shall be treated on and after 6th March 1973 as not being a member of the same group of companies as the second company"

41. It is useful to set out at this point that the purpose of section 29 FA 1973 was discussed by the House of Lords in *Pilkington Brothers Ltd v Inland Revenue Commissioners* [1982] STC 103. Lord Bridge (with whom Lords Fraser and Brandon agreed, Lords Wilberforce and Russell dissenting) remarked as follows (at p 113d-h):

> *".... if one seeks to discern a legislative purpose underlying section 29(1)(b)(ii) one is driven, I think, to conclude that this provision was intended to introduce a requirement, as a qualification for entitlement to group relief, in addition to those introduced by section 28, that the two companies (in the original terminology of the Taxes Acts, "the surrendering company" and "the claimant company") claiming membership of the same group of companies should be under the same control. This requirement is, I would assume, introduced in section 29(1) rather than in section 28 because the draftsman found it convenient to include in a single provision both the original requirement of unified control and a requirement that there should be no arrangements in existence during the relevant accounting period making provision for a future severance of control and it is in section 29(1) that he deals with other cases where the benefit of group relief will be lost by reason of existing arrangements providing, in one way or another, for future severance of the group. The narrow construction of "arrangements" adopted by the learned judge would have what to my mind would be the startling consequence that the only kind of scheme setting up a group of companies, where none existed before, for the purpose of obtaining group relief, which would be liable to disqualification under section 29(1)(b)(ii), would be a scheme specifically designed to embody the very disqualifying features at which the provision is directed. Such a construction must, it seems to me, effectively deprive the provision of any practical operation as limiting the circumstances in which group relief is to be available. It was presumably intended to have such a practical operation and I can see no room here for applying any restrictive interpretation so as to cut down the plain meaning of the statutory language to make it accord with some supposedly limited legislative intent."*

42. I do not consider the marginal notes of assistance in the interpretative exercise. The difficulty which the appellants face, and in my view do not succeed in overcoming, is that these notes are all, by the use of the concluding '*etc*', obviously intended to be illustrative at best. Moreover, none refers to avoidance or (to paraphrase the promoter of the *Finance Bill 1973*) 'normal commercial transactions', whether in those or similar terms.

43. Nor, in my view, do the Explanatory Notes give any real assistance to assessing the 'objective' or 'contextual' sense.

44. In my view, the purpose of the statute emerges clearly from the words which are used. I agree that the purpose of section 154 was to introduce a requirement, as a qualification for group relief, that the surrendering company - here, PH2L - and the

claimant companies - here, the Appellants - be under the same control: no more, and no less.

45. I cannot infer any different purpose without a proper foundation for doing so. As Lord Hoffmann put it, extra-judicially, in an article on 'Tax Avoidance' ([2005] BTR 197): "It is one thing to give the statute a purposive construction. It is another to rectify the terms of highly prescriptive legislation in order to include provisions which might have been included but are not actually there". I respectfully agree.

46. I do not discern in section 154, or in the Part of the Act in which it falls, any suggestion that the purpose of the section, or of that Part of the Act, is anti-avoidance meaning that section 154 has to be read narrowly, so as to disentitle a claimant company from group relief only where there has been some manipulation or disposition of an 'abnormal', 'undesirable', or 'exploitative' character. Nor do I discern anything in section 154, or indeed that Part of the 2010 Act, which would support a principle that group relief should be denied only where the 'arrangements' are artificial, in the sense of being contrived to secure group relief.

47. Taking the above into account, it seems to me that the clear purpose of section 154, read purposively, is simply to make group relief unavailable between companies which are not under the same control. Applying the guidance in *Pollen*, then the nature of the transaction to which section 154(3) and Effect 2 was intended to apply was simply a transaction whereby the control of two companies came to be in separate hands, irrespective of whether that motive or purpose was (put neutrally) a salutary one or not.

'Arrangements'

48. I must now therefore turn to whether the circumstances of these appeals amounted to 'arrangements'.

49. The term is put compendiously: 'Arrangements' can be 'of any kind (whether or not in writing)'. It is not without significance that the term is in the plural. Like Lord Bridge in *Pilkington Brothers, loc. cit.*, I cannot see any justification for applying to the plural the concept of *'a combination for a singular purpose'* derived from the dictionary definition of the singular 'arrangement.'

50. Nor do I regard the discussion of the meaning of 'arrangements' in *In re British Basic Slag Ltd* [1962] 1 WLR 986 (Cross J, affirmed by the Court of Appeal [1963] 1 WLR 727) as helpful, since the discussions in that case (*per* Cross J *loc.cit* at 995; *per* Diplock LJ *loc. cit* at 746) are predicated on the definition of 'agreement' in section 6 of the *Restrictive Trade Practices Act 1956*, which makes express reference to 'acceptance by two or more parties', and hence connotes an element of mutuality or meeting of minds. The CTA 2010 contains no such qualification.

51. I am attracted by Mr Bremner's submission, which to my mind chimes with section 154, read purposively, that it is not necessary to ascertain whether group relief is available through the application of a 'motives' based test. It seems to me that section 154 is designed to be of straightforward and practical application, both for

taxpayers, their advisers, and HMRC, without needing to inquire into concepts such as meetings of minds, or consensus.

52. I therefore read the term widely. My conclusion that this is the correct reading is fortified by CTA 2010 s 155B (*'Certain mortgage arrangements not within section 154 and 155'*) which excludes from section 154(3) CTA 2010 'Arrangements entered into by a company which, apart from this section, would be arrangements within section 154(3) ... if and so long as (a) the arrangements are a mortgage, secured by way of shares or securities in the company, which on default or the happening of any other event allows the mortgagee to exercise its rights against the mortgagor; and (b) the mortgagee has not exercised its rights against the mortgagor'. Section 155B(1)(a) and (b) are cumulative conditions. 'Mortgage' means, in England, Wales, and Northern Ireland, any legal or equitable charge' (CTA 2010 s 155B(4)(a)) and, in Scotland 'any right in security' (CTA 2010 s 155B(4)(b)). Section 155B only makes sense if 'arrangements' is given a broad meaning. Otherwise, section 155B is redundant. That cannot be right, especially given that section 155B enacts an Extra Statutory Concession (ESC C10) of long-standing.

53. Section 155B, both read literally, and also as an aid to construction of section 154(3), clearly points to the Deed of Debenture being 'arrangements', within the meaning and effect of s 154(3), at least once the receivers were appointed.

54. A wide approach to 'arrangements' is also consistent with the approach of Special Commissioners Shirley and Dr Avery Jones CBE in *Scottish and Universal Newspapers Ltd v Fisher* [1996] STC (SCD) 310 at Para [16] in which the Special Commissioners considered the meaning of 'arrangements' in section 410(1)(b) of the *Income and Corporation Taxes Act 1988*. The expression used in that section is strongly similar to that in this case ('arrangements are in existence by virtue of which, at some time during or after the expiry of the accounting period ... any person has or could obtain, or any persons together have or could obtain, control of the first company but not of the second').

55. It is also consistent with the decision of Special Commissioner Julian Ghosh in *Barclays Bank plc v Revenue and Customs Commissioners* [2006] STC (SCD) 100. In that case, the Special Commissioner was called upon to consider the meaning of the word expression *'other arrangements'* in section 611(2) of the *Income and Corporation Taxes Act 1988*. He rejected the taxpayer's argument that the ordinary meaning of the word 'arrangements' was a bilateral agreement, and accepted HMRC's argument that an 'arrangement' need not be bilateral.

56. Therefore, and taking the above into account, I conclude that the appointment of the Receivers pursuant to the Deed of Debenture constituted 'arrangements' for the purposes of s 154.

'Control'

57. I remind myself that I am not assessing the question of 'control' in a general company law sense, but rather am assessing whether the arrangements reflect CTA 2010 s 1124(2).

58. I agree with Mr Bremner that the correct approach to section 154(3) is simply to ask whether PH2L and the Appellants are under the same control. To my mind, this simply reflects what Lord Bridge said in *Pilkington Brothers*:

> "...the consideration of overriding significance is that the whole sentence is concerned with those arrangements which determine the control of *both* the companies whose entitlement to be treated as members of the same group is in issue. To construe "arrangements" as excluding ... those arrangements which regulate the conduct of the affairs of *either* of the companies in accordance with the wishes of its controlling shareholders seems to me simply to negate the plain meaning of the statutory language."

59. It is common ground that the Receivers do not control the Appellants. The question is whether the Appellants control PH2L. As such, it seems to me that the question of whether there is still common control of the Appellants and PH2L is most intelligibly addressed by assessing whether someone else (that is, the Receivers) are in control of PH2L. If they are in control, then the question of whether Effect 2 is engaged is answered.

60. In *Moss Steamship Company Ltd v Whinney [1912] AC 254* the court, at the suit of debenture-holders, appointed Mr Whinney receiver and manager of a brewery company. I do not consider that anything material turns on the fact that Mr Whinney was appointed by the court, in an action, rather than by the debenture holder directly, without an action.

61. Lord Loreburn LC remarked (at p 257) that the effect of that appointment *'in law was that the company still remained a living person, but was disabled from conducting its business, of which the entire conduct passed into the hands of Mr Whinney'* (at p257). The Earl of Halsbury remarked (at p 260):

> "A great many joint stock companies obtain their capital, or a considerable part of it, by the issue of debentures, and one form of securing debenture-holders in their rights is a well-known form of application to the Court, which practically removes the conduct and guidance of the undertaking from the directors appointed by the company and places it in the hands of a manager and receiver, who thereupon absolutely supersedes the company itself, which becomes incapable of making any contract on its own behalf or exercising any control over any part of its property or assets" (emphasis supplied).

62. Lord Atkinson remarked (at p 263):

> "This appointment of a receiver and manager over the assets and business of a company does not dissolve or annihilate the company, any more than the taking [of] possession by the mortgagee of the fee of land let to tenants annihilates the mortgagor. Both continue to exist;

> but it entirely supersedes the company in the conduct of its business, deprives it of all power to enter into contracts in relation to that business, or to sell, pledge, or otherwise dispose of the property put into possession, or under the control of the receiver or manager. Its powers in these respects are entirely in abeyance" (emphasis supplied).

63. I regard these as useful and instructive analyses.

64. Assistance can also be derived from *Commissioners of Inland Revenue v Lithgows, Ltd* (1960) 39 TC 270. There, the First Division of the Court of Session considered the meaning of section 333(1) of the *Income Tax Act 1952*, which has a materially identical definition of 'control', including 'the power of a person to secure ... that the affairs of the first-mentioned body corporate are conducted in accordance with the wishes of that person'. Lord Guthrie remarked that, in his view, that phrase 'means that ability to achieve an isolated result, the power to carry a particular resolution, is insufficient to establish control in the statutory sense, and that what is required is **power to secure the continuing conduct of the company's affairs in accordance with the will of that person**' (at 278): emphasis supplied.

65. It does not seem to me as if arguments as to whether the Receivers (for example) could bring proceedings are productive. I do not derive any particular assistance from *Newhart Developments Ltd v Co-operative Commercial Bank Ltd* [1978] 1 QB 814 which is an unreserved decision of a two-member constitution of the Court of Appeal, save to the extent that it appears to articulate the uncontroversial proposition that directors could do a particular thing - in that case, pursue a right of action - so long as they had not been divested of such power by the receiver, and doing so did not impinge prejudicially on the debenture holders.

66. Mr Ridgeway urged me to consider that the receivers' powers are limited pro tanto the scope of their appointment - that is, '*in relation to the particular assets to which the security attaches, his appointment entirely supersedes the powers of the company and the authority of its directors in the conduct of its business which remain in abeyance during his appointment*': see Palmer's Company Law §14.112. But, whether that genuinely reflects the ratio of *Moss Steamship* (for which it is cited as authority) I must nonetheless decide these appeals on their own Agreed Facts, including the terms, emerging from the documents, upon which the Receivers were appointed.

67. In my view, the receivers of PH2L, on the facts of these appeals, control it within the meaning of CTA 2010 s 1124(2). Both on the Agreed Facts, and on the terms of their appointment as set out above:

(1) The whole of the property of the company was put into the hands of the Receivers;

(2) The Receivers had very extensive powers, including the power to do or omit to do anything which they considered appropriate in relation to the Secured Assets;

(3) The Receivers had the power to do all such things (including the carrying out of works) as may be necessary for the realisation of the property of the company;

(4) The Receivers had the power to carry on the business of the company.

68. It seems to me that the entire affairs of PH2L, read practically, were put into the hands of the Receivers.

69. As a cross-check, it does not seem to me as if there were any relevant powers outside the scope of the receivership, nor any suggestion that the receivers had disavowed any of their powers, so as to permit any realistic argument, on the facts, that some sufficient control of PH2L's affairs, for the purposes of CTA s1124(2) remained vested in the directors or shareholders of PH2L. I have already remarked that there is no evidence as to what the Receivers have actually been doing. Whilst the directors did remain in office, their powers of management were rendered incapable of being exercised. The receivers replaced the boards as the persons having the authority to exercise the companies' powers.

70. In my view, once the receivers had been appointed, the affairs of PH2L were no longer being conducted in accordance with the wishes of the Appellants' shareholders. That was sufficient to degroup PH2L. Whilst the Appellants' shareholders continued to have control over the Appellants, they did not have control over PH2L, in the sense that they were no longer able to secure that PH2L's affairs were conducted in accordance with their wishes.

71. Accordingly then, the effect of the appointment of receivers over the whole of the property of PH2L constituted 'arrangements' which had 'Effect 2' of CTA 2010 s 154(3).

Decision

72. The effect of the above conclusion is that that PH2L was, in the accounting period ending 31 May 2012, no longer a member of the same group of companies as the Appellants for the purposes of CTA 2010. In consequence, PH2L could not validly surrender group relief to the Appellants, as subsequently claimed by either Appellant.

73. Therefore, and for the above reasons, the Appeal of each Appellant is dismissed.

74. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to “Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)” which accompanies and forms part of this decision notice.

Dr Christopher McNall

TRIBUNAL JUDGE

RELEASE DATE: 17 JUNE 2016