Neutral Citation Number: [2018] EWCA Civ 1185

Case No: A3/2016/4588

**IN THE COURT OF APPEAL (CIVIL DIVISION)**
**ON APPEAL FROM THE UPPER TRIBUNAL**
**(TAX AND CHANCERY CHAMBER)**
**[2016] UKUT 320 (TCC)**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23/05/2018

**Before :**

**LADY JUSTICE ARDEN**
**LORD JUSTICE SALES**
and
**LORD JUSTICE HENDERSON**

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**Between :**

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| **LEEKES LIMITED** | **Appellant** |
| **- and -** | |
| **THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS** | **Respondents** |

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**Mr Nikhil Mehta** (instructed by **Sharpe Pritchard LLP**) for the **Appellant**
**Ms Elizabeth Wilson** (instructed by the **General Solicitor and Counsel to HMRC**) for the **Respondents**

Hearing date: 13 March 2018

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# Approved Judgment

**Lord Justice Henderson:**

## Introduction

1. This second appeal from the Tax and Chancery Chamber of the Upper Tribunal (Roth J and Judge Colin Bishopp) ("the Upper Tribunal") raises a short question of construction of the legislation which, in specified circumstances, entitles a company to obtain relief from corporation tax for the carried forward losses of a trade, previously carried on by another company, to which it has succeeded. At the time with which we are concerned (the financial year 2009/10), the relief in question was still conferred by section 343 of the Income and Corporation Taxes Act 1988 ("ICTA 1988"), although the main legislation relating to corporation tax had recently been rewritten to the Corporation Tax Act 2009 ("CTA 2009") which came into force on 1 April 2009 and applied to accounting periods ending on or after that date. The question has, however, been one of general application to the law of corporation tax since the introduction of that tax in the Finance Act 1965 ("FA 1965"), because the relevant provisions remained in materially the same form from their first enactment in section 61 of FA 1965 until they were repealed and replaced (with some modifications) in Chapter 1 of Part 22 of the Corporation Tax Act 2010.

2. The parties have agreed a formulation of the issue which we have to decide, as follows:

> "Where a company succeeds to a trade of a predecessor in which losses have been incurred and that trade forms part of a larger trade carried on by the successor including its existing trade, how does section 343(3) of [*ICTA 1988*] apply to the successor in relation to carry-forward loss relief for those losses?"

3. It is not in dispute that the appellant taxpayer, Leekes Limited ("Leekes"), was in principle entitled to relief in respect of the losses of a predecessor trade carried on by another company, Coles of Bilston Limited ("Coles"), following the acquisition by Leekes of the entire issued share capital of Coles on 18 November 2009, and the hiving up of Coles' existing business to Leekes on the next day so that it then formed part of a single continuing trade carried on by Leekes.

4. The issue which divides the parties, shortly stated, is whether (as Leekes contends) it was entitled to set the accumulated losses of Coles against the trading income of the whole of its enlarged trade, or whether (as HMRC contend) it was only entitled to set those losses against trading income derived from the former business which it had acquired from Coles, albeit as part of the now enlarged business. At the material time, in the first few months after the acquisition, the Coles part of the enlarged business remained unprofitable, so it generated no trading income (if viewed separately) against which any of the

accumulated Coles losses could be set. On the other hand, the remainder of the Leekes' business was profitable, and in its corporation tax return for the financial year to 31 March 2010 Leekes purported to set approximately £1.7 million of the Coles losses (which amounted in all to about £3.2 million) against its income for the year, thus reducing its taxable profit to nil. The return also indicated that Leekes intended to carry forward the balance of Coles' accumulated losses to be utilised in a similar way in future years.

5. HMRC opened an enquiry into the return, and on 17 September 2013 they issued a closure notice disallowing the claim for relief. That conclusion was upheld on review, and Leekes then appealed to the Tax Chamber of the First-tier Tribunal ("the FTT"). Following a hearing in London on 8 January 2015, the FTT (Judge Rachel Short and Mr Nicholas Dee) allowed Leekes' appeal for the reasons given in their decision ("the FTT Decision") released on 27 February 2015. HMRC then appealed to the Upper Tribunal, with permission granted by Judge Short. The appeal was heard on 4 May 2016, and by their decision released on 12 July 2016 ("the UT Decision") the Upper Tribunal allowed HMRC's appeal.

6. Leekes now appeals to this Court, with permission granted by Gloster LJ on 21 December 2017. In granting permission, Gloster LJ said she was persuaded that the appeal "raises an important point of principle", and that all four grounds of appeal had a real prospect of success.

7. The parties have at all stages been represented by the same counsel, Mr Nikhil Mehta appearing for Leekes and Ms Elizabeth Wilson for HMRC.

8. For the reasons which follow, I am satisfied that HMRC's construction of section 343 is correct, and although the point of principle involved is indeed an important one, I do not for myself feel any real doubt about the answer to it. It is perhaps worth observing, in this connection, that HMRC's interpretation of the legislation does not appear to have been challenged during the period of some fifty years between the enactment of FA 1965 and the present case, nor does its practical application appear to have given rise to significant difficulties.

9. The UT Decision is reported at [2016] STC 1970, and its neutral citation is [2016] UKUT 320 (TCC). The FTT Decision is also reported, at [2015] SFTD 433, neutral citation [2015] UKFTT 93 (TC).

## Facts

10. There is little more that needs to be said about the facts, which are simple and have at all times been agreed.

11. Leekes carries on a trade of running out-of-town department stores, and at the relevant time it owned four such stores, three in Wales and one in Wiltshire. On 18 November 2009, as I have already said, Leekes purchased the entire share capital of Coles for £1. At that date, Coles carried on a similar trade from three furniture stores and a distribution centre in the West Midlands. In its eight months of trading prior to the sale, Coles had a turnover of £12.7 million and its

trading loss for the period was £950,321. It also had trading losses carried forward of £2,262,120.

12. On 19 November 2009, the business of Coles was hived up to Leekes at fair values which yielded a net positive amount of £892,928. Coles then became dormant, and retained no liabilities. One of the Coles stores was renovated and re-opened in November 2010 selling Leekes' products. All three Coles stores were re-branded under the Leekes name and continued to trade, selling the same types of products as before. In August 2013 one of the former Coles stores was closed, leaving Leekes with a total of six stores.

13. As the FTT recorded, at [8], no specific price was paid by Leekes for the trading losses recognised in Coles' accounts.

14. The FTT also had before it an unchallenged witness statement of Mr Mike Fowler, the group finance director of Leekes. He explained Leekes' growth strategy in 2009, which had been targeted on the Midlands. He said that Leekes became aware that the Coles business was up for sale, and he knew that both companies had a wide range of common brands and suppliers in the furniture sector, and shared a similar customer base. The firms had a similar history, and there was every prospect that the merger of the two businesses would be a success, with enhanced product offerings. Leekes decided that there was no need to keep the Coles business as a separate trading entity, because their stores could be operated within the same structure as the existing Leekes stores. After the acquisition, the stores continued to sell substantially the same products and customers were served by the same staff. Unfortunately, however, the results achieved by the Coles stores after the acquisition did not hit the projected sales figures: see the FTT Decision at [9] to [11].

## The statutory framework

*The charge to corporation tax*

15. UK resident companies are chargeable to corporation tax on their profits for financial years: see section 2 of CTA 2009, which defines "profits" as meaning "income and chargeable gains" unless the context otherwise requires. By virtue of section 8 of CTA 2009, corporation tax for a financial year is calculated and chargeable, and assessments to tax are made, by reference to accounting periods. The tax is charged on profits arising in the year, on the full amount of profits arising in the relevant accounting period or periods, and if an accounting period falls within more than one financial year, the profits arising in that period must be apportioned accordingly.

16. The rules for calculating the profits (or losses) of a trade for an accounting period are set out in Chapter 3 of Part 3 of CTA 2009. For present purposes, nothing turns on those rules, except to note that (by virtue of section 47) losses are calculated on the same basis as profits, subject to any express provision to the contrary.

17. The basic provision which enables trading losses to be carried forward and set off against the trading income of a succeeding accounting period, so as to

reduce the trading income for that later period, was at the material time contained in section 393 of ICTA 1988:

> "(1) Where in any accounting period a company carrying on a trade incurs a loss in the trade, the loss shall be set off for the purposes of corporation tax against any trading income from the trade in succeeding accounting periods; and (so long as the company continues to carry on the trade) its trading income from the trade in any succeeding accounting period shall then be treated as reduced by the amount of the loss, or by so much of that amount as cannot be relieved under this subsection…
>
> …
>
> (7) The amount of a loss incurred in a trade in an accounting period shall be computed for the purposes of this section in the same way as trading income from the trade in that period would have been computed.
>
> (8) For the purposes of this section "trading income" means, in relation to any trade, the income which falls or would fall to be included in respect of the trade in the total profits of the company…
>
> …
>
> (10) In this section references to a company carrying on a trade refer to the company carrying it on so as to be within the charge to corporation tax in respect of it."

*Cessation of a trade and successions to a trade*

18. Section 337(1) of ICTA 1988 provides that:

> "Where a company begins or ceases –
>
> (a) to carry on a trade, or
>
> (b) to be within the charge to corporation tax in respect of a trade,
>
> the company's income shall be computed for the purposes of corporation tax as if that were the commencement or, as the case may be, the discontinuance of the trade, whether or not the trade is in fact commenced or discontinued."

19. Accordingly, when Coles ceased to carry on its trade and became dormant, the trade was treated as discontinued for corporation tax purposes, notwithstanding its acquisition by Leekes. In the absence of further provision, as the Upper Tribunal rightly said at [6] of the UT Decision, there could be no question of Leekes having any right to relief for Coles' accumulated losses. Nor could the losses be utilised by Coles itself, because Coles had ceased to carry on the trade and it could no longer satisfy the requirements of section 393.

20. This is the background to section 343, which in prescribed circumstances entitles a successor company which begins to carry on the trade of a predecessor company to obtain relief for the predecessor's losses. In cases of the present type, where the successor carries on the same trade as the predecessor, the main relevant provisions of section 343 are the following:

> "343 **Company reconstructions without a change of ownership**
>
> (1) Where, on a company ("the predecessor") ceasing to carry on a trade, another company ("the successor") begins to carry it on, and -
>
> (a) on or at any time within two years after that event the trade or an interest amounting to not less than a three-fourths share in it belongs to the same persons as the trade or such an interest belonged to at some time within a year before that event; and
>
> (b) the trade is not, within the period taken for the comparison under paragraph (a) above, carried on otherwise than by a company which is within the charge to tax in respect of it;
>
> then the Corporation Tax Acts shall have effect subject to subsections (2) to (6) below.
>
> In paragraphs (a) and (b) above references to the trade shall apply also to any other trade of which the activities comprise the activities of the first mentioned trade.
>
> …
>
> (3) …the successor shall be entitled to relief under section 393(1), as for a loss sustained by the successor in carrying on the trade, for any amount for which the predecessor would have been entitled to… relief if it had continued to carry on the trade."

21. As Ms Wilson points out in her skeleton argument, there are in principle two different ways in which a company may succeed to the trade of a predecessor. A new company may be established to acquire the trade, so that it carries on the same trade as the predecessor without alteration. Alternatively, a company with an existing trade of its own may take over the predecessor's trade by adding it to

its old trade and then carry it on as part of its expanded business. This second type of case is exemplified by the facts of Bell v National Provincial Bank of England, Limited [1904] 1 KB 149 (CA), where the respondent bank, which had numerous branches in England and Wales, purchased the business and premises and other assets of the County of Stafford Bank, which carried on business only in Wolverhampton. The respondent then opened a branch at the purchased premises, and proceeded to carry on the business with the same manager and staff as before. The profits and outgoings of the new business were merged in those of the National Provincial Bank as a whole.

22. The issue was whether there had been a succession to the trade of the County of Stafford Bank, within the meaning of the Fourth Rule applicable to the First and Second Cases in Schedule D, section 100, of the Income Tax Act 1842. Disagreeing with the judge below, the Court of Appeal held that there had been a succession. As Collins MR said, at 161:

> "The words of the Fourth Rule appear to me quite plain. If the National Provincial Bank had not been in existence, and a new company had been formed for the purpose of taking over the business of the County of Stafford Bank, the case would have been directly within the terms of the Rule. In that case the new company would clearly "have succeeded to" the "trade, adventure, or concern" of the old. I do not see how it can make any difference that the person succeeding to a business had an existing business of his own of a similar kind. He none the less succeeds to an existing business… The respondents acquired by purchase the goodwill and assets of the County of Stafford Bank, and carried on its business in the same way as before, except of course that the accounts and profits of the business became merged in those of the National Provincial Bank."

See too, to similar effect, the judgments of Mathew LJ at 163, and Cozens-Hardy LJ at 164.

23. It is common ground in the present case that the succession by Leekes to the business of Coles was a succession of the type described in Bell, and as such came within the scope of section 343(1) of ICTA 1988. It is also common ground that the conditions set out in paragraphs (a) and (b) of section 343(1) were satisfied, because of the interval of one day between Leekes' acquisition of the shares in Coles and the hiving up of the business: see the UT Decision at [8]. Accordingly, it is agreed that Coles is to be treated as the predecessor, and Leekes as the successor, for the purposes of the section. The sole issue which divides the parties, as I have already said, concerns the construction of section 343(3), and specifically whether the subsection entitled Leekes to set the accumulated losses of Coles against the trading income of the whole of its enlarged trade, or only against trading income derived from the predecessor trade as part of the enlarged business: see [4] above.

## Analysis and discussion

24. The point is a short one of statutory construction, and a pure question of law. I will therefore begin by addressing it directly, without at this stage referring to the detailed arguments of counsel which are fully rehearsed in the two Decisions below, and were repeated to us in much the same terms.

25. I begin with the obvious point that the relief to which the successor (here Leekes) is entitled under section 343(3) is "relief under section 393(1)", that is to say relief for trading losses of a single trade carried on by a company, which are then set off against any trading income from the trade in succeeding accounting periods until the losses have been exhausted. This process can only operate while the company continues to carry on the same trade, and the losses cannot (under section 393) be set off against income of any other kind. Section 393A of ICTA 1988 enabled a company, in specified circumstances, to make a claim requiring trading losses to be set off "sideways" against other profits of whatever description in the relevant accounting period, or to be carried back and set off against the profits of earlier accounting periods; but these options are not available to a successor company under section 343(3). That subsection is expressly made subject to "any claim made *by the predecessor* under section 393A(1)" (my emphasis), but does not itself enable the successor to do anything other than obtain relief for the predecessor's unrelieved losses in accordance with section 393(1).

26. The relief to which the successor is entitled under section 393(1) is stated by section 343(3) to be "as for a loss sustained by the successor in carrying on the trade, for any amount for which the predecessor would have been entitled to relief if it had continued to carry on the trade." The first limb of this formulation ("as for a loss sustained by the successor in carrying on the trade") provides a retrospective hypothesis of continuity in respect of the trade to which the successor has succeeded. Without this hypothesis, the successor could have no right to claim relief for losses incurred while the trade was carried on by the predecessor. The gateway to section 393(1) is thus opened for the successor, in respect of the accumulated losses of the trade which it has acquired and begun to carry on for itself. The next question is one of quantum: for how much of the accumulated losses of the predecessor is the successor entitled to obtain relief?

27. The answer to this question is provided by the second limb of the wording which I have quoted. The successor is entitled to relief "for any amount for which the predecessor would have been entitled to relief if it had continued to carry on the trade". This wording introduces a further hypothesis, namely that the predecessor (here Coles) had itself continued to carry on the trade. In this context, the words "the trade" can only refer to the trade previously carried on by Coles. They cannot refer to the enlarged trade carried on by Leekes, because that trade had never been carried on by Coles, and Coles cannot therefore be deemed to have continued to carry it on. The hypothesis thus requires the former trade of Coles to be identified in the hands of Leekes, as a component of the enlarged trade, and confines the availability of relief to any trading income which Leekes may derive from the former Coles trade. In other words, it is necessary to ascribe a deemed continuity to the former trade of Coles, although it now forms part of the merged business carried on by Leekes, and relief may

only be obtained if and to the extent that Leekes then derives trading income from the former Coles trade.

28. This is the construction of section 343(3) for which HMRC have always contended, and which was upheld by the Upper Tribunal. In my opinion, it is the only construction which the ordinary and natural meaning of the statutory language can bear, and it produces an obviously sensible result. If the construction advanced by Leekes were correct, the result would be to place the successor company in a more favourable position than the predecessor, because it would enable the successor to utilise the accumulated losses of the predecessor against trading income derived from a business which the predecessor had never carried on. It is hard to think of any sensible reason why Parliament should have wished to confer such an advantage on the successor to a trade, and (had it done so) there would have been obvious potential for tax avoidance and the development of a thriving secondary market in corporate trading losses. Furthermore, the vendors of the shares in Coles would appear to have lost out by selling them to Leekes for only £1, if the effect of the sale was that Leekes would at once be able to utilise approximately £1.7 million of Coles' accumulated losses to set against its own profits from its existing business in the same accounting period.

29. The reasoning which I have outlined above is, I think, essentially the same as that of the Upper Tribunal, who said (more concisely) at [29] of the UT Decision:

> "It is in our view clear that "the trade" to which subsection (3) refers is the same trade as that to which subsection (1) refers; there is nothing in the wording of the section to suggest that the draftsman intended to refer in subsection (1) to the predecessor's trade but in subsection (3) was contemplating the enlarged trade of the successor. We do not see how the subsection can be interpreted in any other way. As Ms Wilson, in our judgment rightly, argued, the predecessor could not have carried on the enlarged trade but only its own, smaller, trade and it is only by reference to the profits, if any, of that trade that it would have been entitled to relief for accumulated losses."

30. One of the main factors which weighed with the FTT in reaching the opposite conclusion was a concern about how section 343(3) could be applied in practice if HMRC's interpretation were correct, "and a separate trade needs to be traced and its profits streamed after a succession has occurred": see the FTT Decision at [55]. The FTT pointed out that the original trade will often make no profits in the year of succession, as a newly-acquired target business, but how then would the rules be applied for later years, "firstly to determine whether the original business had made profits, which would be counterfactual once the succession had occurred, and at what stage would the losses from the original business be recognised and why?" (ibid). According to the FTT, HMRC had no realistic answer to these points. The FTT then said:

> "56. In this instance because of the geographic location of the acquired business, it was possible to physically indentify a separate trade after the succession and more realistic to identify a separate stream of profits. But the fact that these particular circumstances make it more straightforward to identify a separate stream of profits can have no implications for what is in principle the correct interpretation of this legislation. In many instances a succession will mean a loss of identity for the acquired trade, as was recognised in the *National Provincial Bank* case and the legislation needs to be able to provide a sensible answer in those circumstances."

31. Leekes submits that further support for this argument may be found in subsections (8) and (9) of section 343, which apply where there is a succession to the activities of the predecessor trade, or to part of the predecessor trade, but not a succession to the whole of the trade within section 343(1). Subsections (8) and (9) provide as follows:

> "(8) Where, on a company ceasing to carry on a trade, another company begins to carry on the activities of the trade as part of its trade, then that part of the trade carried on by the successor shall be treated for the purposes of this section as a separate trade, if the effect of so treating it is that subsection (1) or (7) above has effect on that event in relation to that separate trade; and where, on a company ceasing to carry on part of a trade, another company begins to carry on the activities of that part as its trade or part of its trade, the predecessor shall for purposes of this section be treated as having carried on that part of its trade as a separate trade if the effect of so treating it is that subsection (1) or (7) above has effect on that event in relation to that separate trade.
>
> (9) Where under subsection (8) above any activities of a company's trade fall, on the company ceasing or beginning to carry them on, to be treated as a separate trade, such apportionments of receipts, expenses, assets or liabilities shall be made as may be just."

32. The drafting of section 343(8) is compressed, and its purpose far from obvious on a first reading. I will return in a moment to what it was designed to achieve. The point which is relied upon as providing support for the views of the FTT quoted in [30] above is the express provision, made in subsection (9), for "such apportionments of receipts, expenses, assets or liabilities" to be made "as may be just", in cases to which subsection (8) applies. Similar express provision would be needed, it is said, if for the purposes of subsection (3) Parliament had

envisaged the need to identify the continuing trading income derived from the predecessor trade, post-succession, in circumstances where the trade itself had been taken over or absorbed by the successor.

33. In order to answer this point, it is first necessary to understand what section 343(8) was intended to do. Fortunately, the answer to this question is found in a typically incisive and cogent analysis by Millett J (as he then was) of the materially similar precursor provisions in section 252 of the Income and Corporation Taxes Act 1970, in Falmer Jeans Limited v Rodin (HM Inspector of Taxes) (1990) 63 TC 55, [1990] STC 270. The relevant passage in Millett J's judgment runs from 66E to 72C. It needs, and deserves, to be read as a whole, but is too long for citation in full.

34. For present purposes, I hope that the following summary will suffice. Millett J began by reviewing the case law on the separate question of what constituted succession to a trade for the purpose of the (now obsolete) opening year provisions in relation to Schedule D income tax. Although concerned with a different tax, these authorities formed the legal context in which the precursor of section 343 of ICTA 1988 was enacted, and in his view provided a key to the proper understanding of subsections (8) and (9) (then subsections (7) and (8) of the 1970 Act). The first of those authorities was Bell v The National Provincial Bank of England, Limited, to which I have already referred. That was a simple case of succession to a trade, and as Millett J said at 66H:

> "Neither the fact that the taxpayer had previously carried on a similar business, nor the fact that after the acquisition it carried on the business which it had acquired as an indistinguishable part of its expanded business, prevented there from being a succession."

35. The second, and in Millett J's view the most important, of the earlier cases was Laycock v Freeman, Hardy and Willis Limited [1939] 2 KB 1, 22 TC 288. In that case, the parent company taxpayer carried on a retail business of selling shoes, which were manufactured by two subsidiaries who sold them wholesale to the parent. The parent then acquired the wholesale businesses of the subsidiaries, but after the amalgamation the wholesale businesses ceased to exist because they had been absorbed in the retail business of the parent. That, at least, was the reasoning of Sir Wilfrid Greene MR, with whom Finlay and Luxmoore LJJ agreed. It followed that there was no "succession" to the business of the subsidiaries. Millett J clearly regarded this as an unsatisfactory result (see 68C), because the ground of decision was "essentially semantic", depending as it did on the description ("wholesale") given to the predecessor's business. Millett J also referred to a further decision of Sir Wilfrid Greene MR, in Briton Ferry Steel Co, Limited v Barry [1940] 1 KB 463, 23 TC 414, where it was held that there had been a succession, although in Millett J's view the decision was again reached "on essentially semantic grounds". In the light of those cases, Millett J was satisfied that the anomalies to which they gave rise were such that "it cannot be assumed that Parliament intended to leave the law unchanged when the statutory provisions were recast": see 69F.

36. Against this background, Millett J proceeded to analyse the provisions of section 252, describing them as "a very detailed and carefully drawn scheme, deliberately constructed in the light of the decisions on succession to a trade" to which he had referred: see 69I. Four different situations were covered. (For ease of comprehension, I will refer to the corresponding provisions in section 343 of ICTA 1988.) The first situation, provided for in section 343(1), "requires the successor to begin to carry on the very same trade as that which the predecessor formerly carried on". Further, the subsection requires the successor to carry on the trade itself, not merely the activities of the trade. The requirement may, however, be satisfied in cases like Bell, where the successor begins to carry on the trade which it has acquired as part of its own existing trade.

37. A second type of case, covered by the second limb of subsection (8), applies where the predecessor has ceased to carry on *part* of a trade, and the successor has begun to carry on the activities of that part as its trade.

38. The third type of case, provided for by the first limb of subsection (8), covers factual situations like that in Laycock, where the activities of the predecessor are carried on by the successor, but the description of the new trade is such as to prevent a succession. These cases are brought within the ambit of subsection (1) by treating the relevant activities of the predecessor trade which the successor has begun to carry on as constituting a separate trade, if the effect of so treating them is that subsection (1) would apply.

39. The fourth type of case, for completeness, is where the predecessor has ceased to carry on part of a trade, and the successor has begun to carry on the activities of that part as part of its trade.

40. It was in relation to the deemed trades posited by subsection (8) that Millett J said, at 71H (with substituted references to section 343 of ICTA 1988):

> "Finally, and to my mind most significantly, subsection (9) provides that where any of the deeming provisions of subsection (8) come into operation, any necessary apportionment shall be made of receipts or expenses. The reference to the apportionment of receipts is of the first significance. It throws a flood of light on subsection (8). It shows, above all, that the requirements of subsection (8) (that the predecessor has ceased to carry on a trade and the successor has begun to carry on the activities of the trade as part of its trade) may be satisfied even though the trading activities in question are no longer turned to account or charged for separately by the successor but are absorbed into a single trade in which profits are realised by receipts which do not distinguish between the various activities by which they are earned."

41. Millett J then added, at 72B:

> "The solution adopted by subsection (8) is to concentrate on the trading activities and not the trade; to treat the

> trading activities which the successor begins to carry on as if they were a separate trade; to apportion part of the successor's receipts to the notional separate trade which it has begun to carry on, and then to apply subsection (1) with any semantic considerations which may be involved in that application to that notional separate trade. I can hardly think of a clearer way to bring a case like [*Laycock*] within subsection (1)."

42. With the benefit of Millett J's penetrating analysis, it can now be seen that the requirement in subsection (9) for the apportionment of receipts, expenses etc was specifically directed to the three types of case provided for in subsection (8), each of which involves a deemed trade and none of which would otherwise have fallen within the comparatively simple case of succession to an existing trade in subsection (1). In cases of that simple nature, Parliament presumably saw no need to provide for apportionment, because the predecessor trade would either have been taken over by the successor as its sole trade, or would have been merged in a recognisable form (as in Bell, and as in the present case) with the existing trade of the successor. It cannot therefore be argued with much force that, in cases falling within subsection (1), Parliament would have made express provision for apportionment etc had it intended the relief to be confined to trading income derived from the predecessor trade. As the Upper Tribunal said, at [31] of the UT Decision, there are two answers to the concerns expressed by the FTT about possible practical difficulties in identifying the income which may qualify for relief in cases which fall within subsection (1). The first answer is "that it is not permissible to disregard the words of a statute because of a perception of practical difficulty". The second answer is that "the difficulty can be avoided or minimised by careful record-keeping". I would add that this is hardly an onerous requirement, because the possibility of claiming relief under section 343 should be apparent to any well-advised company when it acquires the business of a predecessor and merges it with its own business.

43. In his written and oral submissions to us, Mr Mehta sought to draw a distinction between cases where the predecessor trade is carried on alone by the successor, and cases where it is amalgamated with the successor's existing trade, arguing that in the latter type of case there is only one undivided trade, post-succession, to which section 343(3) can apply. He sought to develop this submission in various ways, but to my mind his arguments all fall down on the simple point that the wording of subsection (3) is clear and unambiguous. The amount of the relief is confined to that which the predecessor would have been entitled to obtain, on the hypothesis that it had continued to carry on the predecessor's trade. The successor thus notionally steps into the shoes of the predecessor, and cannot obtain more by way of relief than the predecessor could have done, had it continued to carry on the business itself.

44. For these reasons, which amplify those lucidly given by the Upper Tribunal, I would dismiss this appeal.

**Sales LJ:**

45. I agree.

**Arden LJ:**

46. I also agree.