[2013] UKUT 0124 (TCC)
Appeal number: FTC/11/2012

Corporation tax on capital gains – scheme to generate a capital loss in reliance on the identification rules for matching a disposal of shares with an acquisition under s 106 TCGA 1992 – value shifting rules in s 30 TCGA 1992 – application of s 30(9) notwithstanding that the shares were owned at the time of the disposal, where disposal and acquisition form part of the scheme which engages s 30 – whether, in the alternative, the disposal and acquisition for the purposes of s 30(9) is determined by the computational rules required by s 106 – Davies v Hicks applied – application of s 30(5) to eliminate the capital loss

UPPER TRIBUNAL (TAX AND CHANCERY CHAMBER)

Between :

LAND SECURITIES PLC

Appellant

- and -

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS

Respondents

TRIBUNAL: Mr Justice Roth and Judge Edward Sadler

Sitting in public in London on 29-30 January 2013

John Gardiner QC and Philip Walford (instructed by **Linklaters LLP)** for the **Appellant**

Julian Ghosh QC and Elizabeth Wilson (instructed by **the General Counsel and Solicitor to HM Revenue and Customs)** for the **Respondents**

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DECISION

INTRODUCTION

1. This is an appeal by Land Securities PLC ("Land Securities") against the decision of the First-tier Tribunal (Judge Nowlan and Sonia Gable) ("the FTT") released on 14 September 2011. The FTT dismissed appeals made by Land Securities against the decision of Her Majesty's Revenue and Customs ("HMRC") to disallow claims made by Land Securities for a capital loss for corporation tax purposes arising from transactions entered into between March and September 2003. Those transactions raised short-term financing for Land Securities, but as the FTT found, the more material benefit of the transactions, which they were designed to achieve, was to create the capital loss in question, which amounted to £202,415,181.

2. The capital loss was realised in the accounting period of Land Securities ended 31 March 2003. The capital loss was not fully utilised by Land Securities in that accounting period, so that the unutilised portion was carried forward and claimed in later accounting periods. Claims to utilise portions of the capital loss were made by Land Securities for each of those relevant accounting periods. All those claims have been disallowed by HMRC and the appeals made by Land Securities relate to those accounting periods and the respective amounts of capital loss disallowed in each such period. The decision of the FTT was concerned with the principle of whether Land Securities is entitled to the capital loss it has claimed, which is accordingly the issue on this appeal.

3. The circumstances of the decision are a little unusual in that the FTT, in dismissing the appeal of Land Securities, did so on a ground of statutory construction which was not argued by either of the parties at the hearing, but which was advanced by the FTT itself, and on which the FTT invited the parties to make written submissions after the hearing and before it reached its decision. In reaching its decision, therefore, the FTT rejected not only the case argued by Land Securities, but also the case argued by HMRC. In the proceedings bringing the appeal before this tribunal HMRC entered a Response seeking permission to argue the case they had put to the FTT as well as to argue in support of the ground on which the FTT had based its decision.

THE FACTS

4. The facts relating to the transactions which gave rise to the capital loss in question were not in dispute, and for the purposes of the hearing before the FTT the parties had prepared a Statement of Agreed Facts setting out those transactions.

5. Questions of motive and purpose on the part of Land Securities and related group companies in entering into the transactions were in dispute, and the FTT heard witness evidence from a senior executive of the Land Securities group in relation to such matters. That evidence, and the FTT's findings based on that evidence, principally relates to HMRC's case (citing the *Ramsay* line of authorities) that a purposive construction of the relevant statutory provisions should be adopted in applying those provisions to the relevant transactions, as they should be viewed realistically, to the effect that no capital loss arises.

6. The FTT rejected HMRC's case that, on *Ramsay* principles, the relevant statutory provisions did not have effect to give rise to the capital loss which Land Securities claimed. As explained below, we reach our decision without resorting to that strand of dispute between the parties. In relation to the findings of the FTT with regard to motive and purpose, it is necessary therefore only to record that the FTT found that the transactions comprised a tax scheme which would not have been entered into but for the hope that a capital loss would thereby arise; but that the transactions provided to the Land Securities group, through the joint venture created by the transactions, short-term financing which it required to make certain property acquisitions.

7. By way of introduction to the transactions themselves, it is perhaps helpful to mention at the outset that they were structured to fall within the anti-avoidance provisions in the capital gains tax legislation (as those provisions then applied to companies) designed to nullify the effect of so-called "bed and breakfast" transactions – the realisation of a potential loss (or of a potential gain) by the sale of securities followed by their re-purchase within (in this case) a six-month period. Those provisions specify certain computational rules and Land Securities hoped to exploit those rules to create the capital loss it claimed.

8. The transactions comprising the scheme are set out in detail in paras 9 to 19 of the FTT's decision. The facts relating to those transactions may be summarised as follows:

   (1) Land Securities is a subsidiary of Land Securities Group PLC, a publicly-quoted company and the parent company of the Land Securities group of companies. The group holds, develops and manages commercial property.

   (2) LM Property Investments Limited ("LMPI") is a subsidiary company in the Land Securities group of companies. Prior to the transactions with which this case is concerned, it had in issue 9 unclassified shares (out of its authorised share capital of 100 shares). Those 9 shares were acquired by Land Securities in or around 1969.

   (3) The US investment bank, Morgan Stanley, proposed the scheme to Land Securities and, through its Cayman Islands subsidiary, Morgan Stanley Canmore Limited ("Canmore"), acted as counterparty in the transactions to implement the scheme.

   (4) On or shortly before 27 March 2003, the rights attaching to 41 of the unissued shares in the share capital of LMPI were changed, and those shares were designated as B ordinary shares. The B shares had rights to dividends and to be repaid on any capital distribution any premium at which they were issued and also any capital contribution specifically made in relation to the B shares. The 9 shares held by Land Securities remained unclassified and no changes were made to the rights attaching to them.

   (5) On 27 March 2003, LMPI issued the 41 B shares to Ravenseft Properties Limited ("RPL"), another subsidiary in the Land Securities group of companies. RPL paid a premium on issue of the B shares totalling £3.75 million.

(6) Also on 27 March 2003, Land Securities made a capital contribution to LMPI of £1.25 million in respect of and attributed to the 9 shares it held in LMPI.

(7) On 31 March 2003, Land Securities sold its holding of 9 shares in LMPI to Canmore for £1.25 million. On the same occasion, Land Securities granted Canmore a put option entitling Canmore to sell the 9 shares back to Land Securities at their market value. Canmore could exercise the put option at any time before 29 February 2004.

(8) The rights attaching to the 41 B shares and the 9 shares respectively were changed to reflect the "joint venture" nature of the investment in LMPI: thus each of RPL and Canmore had the right to appoint 2 directors to the board of LMPI.

(9) By the end of July 2003, LMPI had identified certain commercial properties which it wished to acquire.

(10) On 1 August 2003, Canmore granted Land Securities (for consideration of £1.4 million) a call option to acquire the 9 shares it held in LMPI for their market value plus a further payment equal to 3.5% of the amount of any capital loss resulting from these transactions which Land Securities might eventually establish. Canmore's put option in respect of the 9 shares was adjusted to provide for a like "success fee" on the sale of the shares.

(11) Also on or shortly after 1 August 2003, Canmore made a capital contribution to LMPI of £200 million in respect of and attributed to the 9 shares it held in LMPI.

(12) Also on 1 August 2003, Land Securities and Morgan Stanley & Co International Limited entered into a cash settled forward agreement, the broad effect of which was that should the amount payable for the 9 shares on exercise of either the put or the call option differ from £202,741,491, an adjustment payment would be made between the parties to restore the net position to that amount.

(13) Shortly after 1 August 2003, LMPI loaned, at interest, £200 million to Land Securities.

(14) Later in August 2003, LMPI purchased a property for £4.5 million out of its cash reserves.

(15) On 20 August 2003, Land Securities repaid £35 million to LMPI from its borrowing of £200 million and LMPI used this money to purchase a property in the City of London.

(16) On 9 September 2003, Land Securities exercised its call option in relation to the 9 shares in LMPI, agreeing to pay £202,265,179.50 which the parties agreed was the market value of the shares. This purchase was completed on 25 September 2003, with Land Securities paying the purchase price (funded from a loan facility for the purpose) and paying also £476,317.50 to Morgan Stanley & Co International Limited pursuant to the cash settled forward agreement.

(17) Prior to completion of the purchase of the 9 shares, Land Securities repaid to LMPI the balance of the £200 million loaned to Land Securities by LMPI.

THE INTENDED TAX CONSEQUENCES OF THE SCHEME

9. The principal purpose of Land Securities in entering into the transactions described above was to establish a capital loss for the purposes of corporation tax on chargeable gains of over £200 million. In order to understand how such a capital loss arises in these circumstances it is necessary to look at the relevant statutory provisions directed against "bed and breakfast" transactions in relation to shares and other securities. Those provisions are found in section 106 of the Taxation of Chargeable Gains Act 1992 ("section 106")[1] as it applied at the relevant time (the provisions have since been repealed).

10. Section 106 is part of Chapter I of Part IV (Shares, Securities, Options etc). The part of Chapter I in which section 106 is found is headed "Share pooling, identification of securities, and indexation", and so far as relevant for this appeal the section provides as follows:

> **"106 Disposal of shares and securities by company within prescribed period of acquisition**
>
> (1) For the purposes of corporation tax on chargeable gains, shares disposed of by a company shall be identified in accordance with the following provisions where –
>
> (a) the number of shares of that class held by the company at any time during the prescribed period before the disposal amounted to not less than 2 per cent. of the number of issued shares of that class; and
>
> (b) shares of that class have been or are acquired by the company within the prescribed period before or after the disposal.
>
> ….
>
> (3) References in subsection (1) above to a company's disposing, holding and acquiring shares are references to its doing so in the same capacity; and references in that subsection to the holding or acquisition of shares do not include references to the holding or acquisition of shares as trading stock.
>
> (4) The shares disposed of shall be identified –

[1] All statutory references hereafter are to the Taxation of Chargeable Gains Act 1992 ("TCGA 1992").

(a) with shares acquired as mentioned in subsection (1)(b) above ("available shares") rather than other shares; and

(b) with available shares acquired by the company making the disposal rather than other available shares.

(5) The shares disposed of shall be identified with available shares acquired before the disposal rather than available shares acquired after the disposal and –

(a) in the case of available shares acquired before the disposal, with those acquired later rather than those acquired earlier;

(b) in the case of available shares acquired after the disposal, with those acquired earlier rather than those acquired later.

….

(10) In this section –

…

"the prescribed period" means –

(a) in the case of a disposal through a stock exchange or Automated Real-time Investments Exchange Limited, one month;

(b) in any other case, 6 months

….

11. Section 106 is found within provisions which comprise special computational rules in the case of shares and other securities. Shares of the same class, being fungible in their nature, are "pooled", that is, a holding of such shares is treated as a single asset. If the holding is enlarged by the acquisition of further shares the asset is treated as enhanced; if it is reduced by the disposal of some of the shares there is a part disposal of the asset, and the computation of any gain or loss on such part disposal is made accordingly.

12. The provision was introduced to counteract a perceived abuse: if a company had a holding of shares which stood at a market value below the acquisition cost of that holding and therefore at a potential loss, and the company had also realised, on the disposal of a different asset, a capital gain, it could realise that potential loss (to set against the gain) by disposing of the shares at their market value, and then purchase shortly thereafter shares of the same class in the market, restoring the holding (but now with a reduced base value). Section 106 provides that in such a case the shares disposed of in the "bed" transaction are identified with the shares acquired in the

"breakfast" transaction. In consequence of the shares being so identified the cost of the shares acquired is, in the computation made on the prior disposal, treated as the base value of the shares so disposed of. By that means no loss (or gain) is realised when the computation is made on the disposal, except to the extent that there has been movement in the value of the shares between the "bed" transaction and the "breakfast" transaction. The section also applies where the acquisition occurs, within the defined period, before the disposal.

13. Applying section 106 to the circumstances of the transactions entered into by Land Securities, it sold its holding of 9 shares in LMPI on 31 March 2003 and reacquired those shares by purchasing them from Canmore on 9 September 2003, and so within the 6 month period prescribed by the section for unlisted shares. The section therefore has effect to identify the 9 shares on disposal with the 9 shares reacquired, so that Land Securities' base cost on the disposal is computed as its cost of reacquiring the shares. That cost was £203,665,180 (the aggregate of the price paid for the call option and the amount paid for the shares on exercise of that option), and therefore on the disposal of the 9 shares on 31 March 2003 Land Securities' loss was £202,415,181 (after taking account of the price of £1.25 million it received for the shares on that occasion).

THE FTT DECISION

14. In resisting the appeal before the FTT, HMRC relied on two alternative grounds. First, as already mentioned, they mounted a challenge based on the *Ramsay* line of jurisprudence to the application of section 106 to the facts of this case, where shares have been disposed of and reacquired for the purpose of a tax avoidance scheme. They submitted that, realistically viewed, for the purpose of section 106, the 9 shares should not be regarded as having been disposed of to Canmore, or that section 106 should not on its proper construction apply to such an artificial series of transactions. Secondly, they contended that the case came within the value shifting provisions of section 30 by reason of section 30(9). The capital injection of the £200 million made by Canmore shifted value into LMPI, thereby increasing the value of the 9 shares, so that when Land Securities subsequently acquired those shares, at a correspondingly increased price, it would be able to claim a loss against corporation tax on capital gains under the share identification provisions in section 106. Pursuant to section 30(5), the allowable loss otherwise arising by reason of section 106 should therefore be eliminated.

15. Section 30 provides as follows, insofar as material:

> "**30 Tax-free benefits**
>
> (1) This section has effect as respects the disposal of an asset if a scheme has been effected or arrangements have been made (whether before or after the disposal) whereby—
>
> (a) the value of the asset or a relevant asset has been materially reduced, and
>
> (b) a tax-free benefit has been or will be conferred—

(i) on the person making the disposal or a person with whom he is connected, or

(ii) subject to subsection (4) below, on any other person.

…

(3) For the purposes of subsection (1)(b) above a benefit is conferred on a person if he becomes entitled to any money or money's worth or the value of any asset in which he has an interest is increased or he is wholly or partly relieved from any liability to which he is subject; and a benefit is tax-free unless it is required, on the occasion on which it is conferred on the person in question, to be brought into account in computing his income, profits or gains for the purposes of income tax, capital gains tax or corporation tax.

(4) This section shall not apply by virtue of subsection (1)(b)(ii) above if it is shown that avoidance of tax was not the main purpose or one of the main purposes of the scheme or arrangements in question.

(5) Where this section has effect in relation to any disposal, any allowable loss or chargeable gain accruing on the disposal shall be calculated as if the consideration for the disposal were increased by such amount as is just and reasonable having regard to the scheme or arrangements and the tax-free benefit in question.

(6) Where—

(a) by virtue of subsection (5) above the consideration for the disposal of an asset has been treated as increased, and

(b) the benefit taken into account under subsection (1)(b) above was an increase in the value of another asset,

any allowable loss or chargeable gain accruing on the first disposal of the other asset after the increase in its value shall be calculated as if the consideration for that disposal were reduced by such amount as is just and reasonable having regard to the scheme or arrangements in question and the increase made in relation to the disposal mentioned in paragraph (a) above.

…

> (9) In relation to a case in which the disposal of an asset precedes its acquisition the references in subsections (1)(a) and (2) above to a reduction shall be read as including a reference to an increase."

16. As we observed at the outset, the FTT rejected both grounds put forward by HMRC. As regards *Ramsay*, the FTT held, in summary, that although this was a tax avoidance scheme with certain unrealistic features, it had commercial aspects which went beyond that, including the provision of funding for the acquisition of properties which Land Securities had originally wished to acquire and which LMPI undoubtedly did acquire; and that it could not be said that there was not a genuine disposal of the 9 shares to Canmore. Adopting a "realistic interpretation of the facts", the circumstances accordingly attracted the application of section 106.

17. Secondly, the FTT held that on the proper interpretation of section 30(9), the facts did not fall within it. This was not a case, in the FTT's view, "where the disposal of the asset preceded its acquisition" (para 97). It will be necessary to return to the FTT's reasoning in that regard below.

18. However, the FTT dismissed the appeal on the basis that the identification rule in section 106 was applicable in considering section 30(9). The FTT explained section 106 earlier in its decision as creating a "statutory fiction" that produced results not related to the actual facts (para 63). But applying the fiction which resulted from section 106 to section 30(9), the 'notional facts' which resulted from the identification rule[2] were that the acquisition on 9 September was matched to the disposal on 31 March and, on that basis, the disposal preceded the acquisition and section 30(9) was engaged. In reaching that conclusion, the FTT distinguished the case of *Davies v Hicks* [2005] EWHC 847 (Ch), [2005] STC 850. The FTT proceeded to reduce the allowable loss under section 30(5) to nil.

THE APPEAL

The FTT's approach

19. For Land Securities, Mr Gardiner argued forcefully that the approach of the FTT was entirely contrary to the reasoning in *Davies v Hicks*, which was binding on the FTT and should be followed in the Upper Tribunal.

20. *Davies v Hicks* concerned a scheme designed to avoid a liability to capital gains tax ("CGT"). The taxpayer who wished to dispose of his holding of shares in a company ("AIT") first transferred them to UK resident trustees of a settlement that he established under which he was a beneficiary. Those trustees sold the shares on the open market on 24 October as the first stage of a 'bed and breakfast' transaction. The UK trustees then immediately retired and were replaced by a trustee resident in Mauritius. The new Mauritius trustee purchased on 25 October shares in the same company for the equivalent amount to the net proceeds received from the sale the day before. By reason of section 106A (the equivalent to section 106 for an individual

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[2] Although the FTT refers (at para 99) to section 106(5)(b) as setting out the relevant identification rule, it is the basic rule of identification in section 106(4)(a) that applies in this case and the supplementary rule in section 106(5)(b) is not engaged.

taxpayer), the shares disposed of on 24 October were identified with the shares acquired on 25 October, with the result that the disposal did not give rise to a chargeable gain.[3] Some months later, the Mauritius trustee sold the shares, but it was common ground that by reason of the UK-Mauritius double taxation agreement, no capital gains tax accrued to the UK resident settlor as a result of that sale.

21. The Revenue nonetheless sought to impose CGT on the basis of section 80 whereby if trustees of a settlement became at any time neither resident nor ordinarily resident in the UK, they were deemed immediately before the change of residence to have disposed at market value of all the assets of the settlement at that time. However, section 80 would not have applied in that case, since at the time when the trustees retired and the Mauritius trustee was appointed, the trust fund did not hold the shares but only the cash proceeds of the sale earlier that day (or a debt owed by the brokers for that amount), and the disposal of cash in sterling (or a debt) would not attract CGT. The Revenue contended that the effect of the application of section 106A in identifying the shares disposed of on 24 October with the shares acquired on 25 October was that the trust fund at the point when the Mauritius trustee was appointed should be treated as holding the shares.

22. This contention was rejected by the Special Commissioners, whose decision was upheld on appeal by Park J. The Commissioners, in a passage quoted with approval by the judge, stated that section 106A(5)(a) had:

> "a specific and limited purpose, that of providing a set of rules, to be applied in computing a gain on a disposal of shares, directing how to ascertain the acquisition cost of the shares disposed of and the time at which those shares are treated as acquired …. If Parliament had wanted the rules to have wider effect - for example, as the Revenue contend, to treat the shares as retained for CGT purposes beyond the scope of the computational rules - it would have had to use clear and compelling words that it was introducing a deeming provision to be applied for such other CGT purposes."

Thus, there was "no reason to read into the section the consequence that the trustees owned shares at the time of the deemed disposal when they did not …."

23. Expressing his agreement with this approach, Park J said, at [20]-[21]:

> "20. In my view s.106A is a computational section, and I believe that that applies to s.106A(5)(a) just as much as to all the other detailed rules in the section. What triggers the operation of the section is a disposal of securities (see s.106A(1)), and the purpose of the section is to lay down rules as to how the chargeable gain or allowable loss on that disposal is to be computed. When that computation has been made the purpose of the section has been fulfilled.

[3] The identification rule there applicable was in section 106A(5)(a).

> 21. If there is not a disposal of securities the section does not begin to apply. Most disposals will be actual disposals. The section certainly can apply to deemed disposals, but the deemed disposal must be one provided for by some provision other than s.106A itself. Further, and even more importantly, for s.106A to apply the subject matter of the actual or deemed disposal must be securities, which term … includes shares. When there is a disposal, actual or deemed, of such assets (which I will assume to have been shares, as they were in the actual case), the shares disposed of are matched with shares acquired in accordance with the rules in s.106A. Once they have been so matched the gain or loss on the disposal is computed accordingly. When that process has been completed the application of s.106A to that particular disposal is at an end. The way in which the section operates on that disposal may affect the way in which it applies to future disposals by the same taxpayer of shares of the same class, but apart from that the section has no further statutory function to perform in consequence of the disposal of shares which caused it to apply in the first place. In particular it does not, in my judgment, operate additionally to cause the continuing settled property of the settlement to be treated for the purposes of different CGT provisions as consisting of assets different from those which actually are the continuing settled property."

And the judge explained further, at [25]-[26]:

> "25. … s.106A, including s.106A(5)(a), is a computational provision and not a deeming provision. I believe that to be the case. But I add that, even if s.106A can be regarded in some way as a deeming provision, I agree with the Special Commissioners that the deeming is solely for the purpose of computing the gain or loss on the disposal of the 100,000 AIT shares which the trustees sold on 24 October 2000. It would carry with it the normal consequences for subsequent computations on future disposals of AIT shares of the same class by the trustees of the same settlement. But that is all. The deeming, if that is an appropriate description of what the section did, would not have any further consequences beyond those which I have stated earlier in this paragraph.
>
> 26. I was reminded of several of the cases which consider the questions of how far a deeming provision is to be taken, and of at what point the deeming stops so that the actual facts resume as the subject matter upon which legal consequences are based. … But however far a deeming provision may go, I cannot accept in this case that a provision which was intended to identify which shares acquired by a particular taxpayer should be matched with shares sold by the same taxpayer can be deemed to have had effects going far beyond that and

> requiring it to be imagined, for a quite different statutory purpose, that the assets held by the taxpayer at a different time did not consist of the actual assets then held by him, but rather consisted of different assets altogether."

24. Unsurprisingly, it was not suggested to us that the decision of Park J, with his great experience of tax matters, was wrong. Mr Ghosh accordingly accepted that section 106, like section 106A, is to be regarded as establishing a purely computational rule. He submitted that in that function it attributed to the shares disposed of not only an acquisition cost but also an acquisition date. And he emphasised that in *Davies v Hicks* the Revenue was attempting to use section 106A to deem the disposal to be of something that it was not, whereas in the present case it was common ground that there was in fact a disposal of the shares on 31 March; section 106 was not being relied on to deem the contrary.

25. However, despite the valiant efforts of Mr Ghosh, we cannot accept that section 30(9), which we agree is to be read with section 30(1), is a computational provision or involves the application of computational rules. Of course, in a general sense, section 30 is concerned with the determination of tax on chargeable gains: that is the whole purpose of the TCGA 1992 of which it is part. But that is clearly not what Park J meant in holding that section 106A had a limited computational function. The only provisions in section 30 that are arguably "computational" are subsections (5) and (6), which enable adjustment to the amount of chargeable gain or loss. The section as a whole is an anti-avoidance provision concerned with a scheme or arrangements that give rise to value shifting, and section 30(9), which is to be read with section 30(1), sets out the circumstances in which it is to apply. In short, section 30(9) is not addressing computation at all: it is an enabling or 'threshold' provision defining the circumstances in which a particular form of computational adjustment falls to be made.

26. The FTT addressed the question "whether section 30(9) applies by reference to the actual facts, or the notional facts that result from the identification made in this case by section 106". However, in determining that the latter was the correct approach, it was, with respect, applying section 106 for a purpose beyond the limited, computational scope of the rule, as held in *Davies v Hicks.* Although the actual issue to which it applied section 106 here was of course different from that in *Davies v Hicks* (as the FTT observed at para 115), we do not consider that that is a sufficient basis for distinguishing the case. The rationale of *Davies v Hicks* is expressed in broader terms, and we accept the submission of Mr Gardiner that it applies to the present case. Accordingly, we cannot uphold the decision of the FTT on its terms.

Section 30(9)

27. We turn to the question of whether section 30(9) applies to this case, without reliance upon section 106.

28. As set out above, the facts are relatively straightforward and not in dispute. Land Securities acquired the 9 shares in question in about 1969. It disposed of those shares

on 31 March 2003. And it acquired those shares[4] again on 9 September 2003. Land Securities therefore acquired the shares on two occasions, and disposed of them once. The fact that the second acquisition can be described as a "reacquisition" does not make it any the less an acquisition. Accordingly, the disposal followed the first acquisition and preceded the second acquisition.

29. On that basis, the question has to be asked whether, for the purpose of section 30(9), properly interpreted, this was a case where the disposal of the shares precedes their acquisition. The FTT effectively read the subsection in isolation, as what it described as a "self-standing sub-section" (para 97). We do not regard that as the correct approach. In the first place, it is commonplace to observe that a statutory provision should be read as a whole, and this subsection must be read in its context. Indeed, even on its wording, section 30(9) refers back to section 30(1) and (2), giving them a more expansive meaning in certain circumstances. It expressly requires section 30(1) to be read in a broader manner (i.e. that "reduction" shall be read as including an increase).

30. Section 30(9) is part of the provision of the statute that addresses value shifting. It applies, and only applies, in the context of "a scheme … effected or arrangements … made" which have the effect of changing the value of an asset and conferring a tax-free benefit: section 30(1). In considering whether the relevant acquisition of the asset in this case for the purpose of applying section 30(9) is the first acquisition in 1969 or the second acquisition on 9 September 2003, in our view, it is appropriate to take into account the "scheme" that engages section 30(1). That is particularly the case where, as here, the scheme has been planned before the disposal. If one asks whether, having regard to the scheme, the relevant acquisition in respect of the disposal of the shares on 31 March is the acquisition over 30 years before, in 1969, or the acquisition less than 6 months later on 9 September, there can be only one answer: the acquisition of the same shares within the "prescribed period" following their disposal was at the heart of the scheme. We therefore consider that on the proper interpretation of section 30(9) to the indisputable facts, this is "a case in which the disposal of an asset precedes its acquisition." This does not involve any process of 'deeming' or preferring notional facts to actual facts.

31. There are obvious dangers in seeking to re-phrase the wording of a statute by combining distinct provisions, since that can often be done in different ways leading to different results. Nonetheless, we accept that this can be a useful exercise. But we can, with respect, see no justification in the view of the FTT that the result sought by HMRC can only be sustained if the wording of section 30(1) was significantly amended, as suggested in the decision at paras 31 and 96. On the contrary, given that section 30(9) expressly concerns the way in which a particular word in section 30(1)(a) is to be read, we think that the obvious and logical way to combine the two provisions, while remaining faithful to the drafting, is as follows:

> "(1) This section has effect as respects the disposal of an asset if a scheme has been effected or arrangements have been made (whether before or after the disposal) whereby— "

[4] Since these were the only shares in LMPI that had been issued that were not classified (and indeed the only issued shares in LMPI in which Land Securities at any time had an interest), there is no need for the pooling provisions in TCGA 1992 to reach this conclusion: they were in fact the identical shares.

> (a) the value of the asset or a relevant asset has been materially reduced *or, in the case in which the disposal of the asset precedes its acquisition, increased*, and
>
> (b) a tax-free benefit has been or will be conferred—
>
> > (i) on the person making the disposal or a person with whom he is connected, or
> >
> > (ii) subject to subsection (4) below, on any other person.

Read in that way, this confirms the approach that we have adopted above. The wording of section 30(9) is not to be applied without regard to the "scheme … effected" or "arrangements … made" of which the disposal of the asset forms part.

32. The FTT considered that section 30(9) is directed at, and applies only to, a "bear" transaction, i.e. the disposal of an asset which is to be acquired *only* after the date of sale and is therefore not owned by the disponor at the time the disposal is made. Mr Gardiner supported that approach. There is no doubt that the wording would cover that situation but we see no basis for confining it to that situation. Nor is it the consequence of our view that whenever there are two acquisitions section 30(9) can only apply to the later acquisition, as the FTT suggests (para 97). That will depend upon the context.

33. Mr Gardiner placed great emphasis on the use of the present tense in the word "precedes" in section 30(9). He submitted that this meant that the question of acquisition has to be looked at as at the point of disposal, and not with hindsight. However, the importance of applying a broad, purposive interpretation to fiscal legislation in place of a formalist approach has received repeated and authoritative emphasis: see, eg, *IRC v McGuckian* [1997] 1 WLR 991, per Lord Steyn at 1000 and Lord Cooke at 1005. We have no doubt that this approach applies generally and not only with regard to tax avoidance schemes in respect of which it has been most frequently articulated. The reference in section 30(1) to a scheme or arrangements made "before *or after* the disposal", in itself contemplates that the disposal may be viewed with hindsight in the context of post-disposal events. Moreover, here, when Land Securities disposed of the shares in the present case on 31 March 2003, it had as at that date the definite intention to acquire them again within 6 months. That future acquisition after value had been added to LMPI, and thus the benefit of a loss resulting from section 106, was a major purpose of making the disposal and inherent to the scheme for shifting value into the company and acquiring a tax-free benefit through the resulting increase in price of the shares. The narrow, literal approach to the wording of section 30(9) can be sustained only when the sub-section is read in isolation, as a "self-standing" provision, and not when it is read purposively in the context of section 30 as a whole.

34. Mr Gardiner also sought to rely as an aid to construction of section 30(9) upon section 30(6). That provision enables the avoidance of the burden of potential double taxation where the shift of value is into a second asset that may subsequently be sold. He pointed out that there is no equivalent protection in the case where the value increase results from retention of the same asset. On that basis, he submitted that section 30(9)

should not be held to apply where, unlike the case of a bear sale, the asset is retained. However, we do not see that the fact that there is no protection from a potential, but by no means certain, hardship that may result from a tax scheme is persuasive so as to displace the interpretation of the provision that we have arrived at for all the reasons set out above.

The *Ramsay* issue

35. In the light of the conclusion we reached after hearing argument on section 30, we did not hear oral submissions on HMRC's contention that section 106 should not apply to these transactions, realistically analysed. Accordingly, we have not come to any concluded view on that issue. We would only observe that we see considerable force in the reasoning of the FTT that on the facts of this case, as found below, there is no basis to displace the application of section 106 on its proper interpretation.

Section 30(5): the "just and reasonable" adjustment to the disposal consideration

36. Having concluded that section 30 has effect, we have to consider the extent (if any) by which the consideration for the disposal of the 9 shares should, in the computation relating to that disposal, be increased applying the principle of what is just and reasonable having regard to the arrangements which have brought the section into effect: see section 30(5).

37. Before the FTT, Land Securities argued that there should be no increase in the consideration it received on the disposal of the 9 shares on 31 March 2003, i.e. that the whole of the loss it claimed should stand. This, it argued, was just and reasonable since on the future disposal of the 9 shares a taxable capital gain would arise equal to the amount of the loss (as increased or decreased by any change in the value of the shares until that disposal). If the loss were denied, Land Securities would suffer both that consequence and also tax on the corresponding gain on such a future disposal.

38. The FTT rejected that argument in these terms (at para 120):

> "We find that suggestion to be completely untenable, because if the whole loss was then conceded, [Land Securities] would plainly avoid the realisation of the gain indefinitely, even if it found it difficult to reverse the gain with tax-free dividends, and the result would in practice be precisely as if we had allowed, rather than dismissed, the Appeal."

39. The FTT then went on to say that the risk of the latent gain had been acknowledged by Land Securities in its dealings with Morgan Stanley as a risk of implementing the scheme, and that there was the possibility that Land Securities could take steps to reduce or eliminate the latent gain, for example by reducing the value of the shares by procuring LMPI to pay dividends or other distributions out of reserves representing the capital contributions made in respect of the 9 shares.

40. Mr Gardiner argued that the FTT was wrong to suggest that the latent gain on the eventual disposal of the 9 shares could be reduced by extracting tax-free dividends

from LMPI, since the provisions in Part 15 of the Corporation Tax Act 2010 (Transactions in Securities) would apply to counteract any tax advantage derived from such dividends, which for the purposes of those provisions would be regarded as abnormal dividends.

41. Mr Gardiner submitted that we should look to section 30(6) for the right approach in applying a just and reasonable adjustment. That subsection, as we have already mentioned, deals with the situation where value is shifted from the asset disposed of to another asset, and a just and reasonable adjustment is made to the consideration for the disposal of that other asset when such a disposal eventually occurs, having regard to the adjustment which will have been made, under section 30(5), on the disposal of the asset from which value was shifted. By this means, what would otherwise be an effective double charge to tax (taking the respective disposals of the two assets) is, quite fairly, avoided.

42. Mr Ghosh argued that in deciding what adjustment to the consideration is just and reasonable we must have regard to "the scheme or arrangements" and also "the tax-free benefit in question". He said that in this case the purpose of the scheme was to enable Land Securities to claim a substantial loss when it had suffered no real or economic loss whatsoever, and that this was achieved by means of the tax-free benefit of the capital contribution made by Canmore. The adjustment should have effect so as to exclude the increase in the value of the 9 shares derived from that capital contribution, since the loss would not have arisen had those shares not been increased in value by that means. A latent gain is inherent if a shareholder chooses to invest capital in a company by way of a capital contribution, so Land Securities cannot reasonably complain that it is left with such a latent gain when such a contribution was the crux of the scheme. Mr Ghosh also pointed out that Land Securities might never realise the latent gain on the 9 shares, and that LMPI has full acquisition cost for the properties it holds. In all these circumstances it was just and reasonable to adjust the consideration so as to eliminate the loss claimed by Land Securities.

43. Section 30(5) requires an increase to be made to the consideration for the disposal on 31 March 2003 of the 9 shares in LMPI by Land Securities. That increase has to be just and reasonable having regard to the scheme or arrangements and the tax-free benefits which have brought the disposal within the scope of section 30. Section 30(5) may perhaps be seen as a somewhat blunt instrument, and although section 30(6) permits a degree of sophistication to be applied (by way of a consequential adjustment) in circumstances where value is shifted into another asset, those are not the circumstances of Land Securities' appeal. It is clear to us, as it was to the FTT and to the parties, that we must either increase the consideration for the 31 March 2003 disposal by an amount which eliminates the loss, or make no increase whatsoever. There is no scope to adjust the consideration which Land Securities receives on any future disposal of the 9 shares. There is no logic to a partial adjustment to consideration for the 31 March 2003 disposal.

44. In our view, there is little point in speculating whether, should Land Securities eventually decide to dispose of the 9 shares, it could in some way, and without adverse tax consequence, reduce the latent gain by extracting value from LMPI. What is relevant is that the realisation of such gain may be deferred indefinitely, since Land Securities has put forward no commercial imperative for a sale of the shares (they have, after all, been held in the group since 1969). To Mr Ghosh's point that LMPI

has proper base values for its properties, Mr Gardiner rightly responded that the scheme of capital gains tax treats as separate and distinct assets the shares in a company and the underlying assets in that company. But Mr Ghosh touches on a relevant matter, in that, in a property investment group such as the Land Securities group, there will be commercial reasons to dispose of properties, and an adjustment to the consideration for the 9 shares will have no consequence for any disposal by LMPI of its property assets.

45. The reasoning of the FTT on this point is both straightforward and compelling: if the consideration is not adjusted, the effect is to allow Land Securities to claim the loss. That cannot be the "just and reasonable" result where the proper application of the relevant statutory provisions denies that the loss is available. In the circumstances of this case, having regard to the scheme undertaken by Land Securities and the tax-free benefit which the scheme delivered and which enabled Land Securities to claim the loss in question, the just and reasonable adjustment we must make, within the confines of section 30(5), is to increase the consideration for the disposal of the 9 shares to the extent necessary to eliminate the loss claimed. The only countervailing factor – the possible realisation (as a taxable gain) on any eventual disposal by Land Securities of the 9 shares of the latent gain in its holding – is too remote and contingent to have any weight.

CONCLUSION

46. For these reasons, we dismiss Land Securities' appeal.

MR JUSTICE ROTH
UPPER TRIBUNAL JUDGE

EDWARD SADLER
UPPER TRIBUNAL JUDGE

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