THE HIGH COURT

[2023] IEHC 555

Record Nos. 2021/12R
2021/13R

BETWEEN

MICHAEL MALONEY

APPELLANT

- AND –

THE REVENUE COMMISSIONERS

RESPONDENT

Judgment of Ms. Justice Butler delivered on the 12th day of October 2023

Introduction

1. This is an appeal by way of case stated under s.949AP of the Taxes Consolidation Act 1997 from a determination of the Tax Appeal Commissioner dated 11 January 2021 to the effect that the exercise of a put option by a group of investors by way of notice dated 24 January 2014 was chargeable to tax stamp duty under s.31A of the Stamp Duty Consolidation Act 1999 ("SDCA 1999"). The central issue is whether the option itself had been absolutely assigned by the investors to Barclays Bank ("the bank") under a Deed of Mortgage, Charge and Assignment dated 28 February 2013 ("the deed") such that the purported exercise of the option by the investors nearly a year later was invalid. If the court agrees that the exercise of the option was invalid, then this would determine the appeal in its entirety. However, if the court were to hold that the exercise of the option were valid then certain other issues will fall for determination.

2. These questions arise in the context of the complex commercial structure put in place, on the one hand, to provide finance to a partnership (of which the appellant is a member) to facilitate the development of a hotel complex and, on the other, to enable the investors providing the finance to avail of tax allowances under a statutory scheme designed to promote financing of certain types of development including hotels. That structure was a three-cornered one in that, in addition to the partnership promoting the hotel development and the investors investing in order to avail of capital allowances, much of the necessary finance was provided to the investors by a financial institution. When the original structure was put in place in 2005/2006 a loan was provided to the investors by Anglo Irish Bank. That bank subsequently got into difficulties and although the loan itself was not under-performing, it was transferred to IBRC. In 2013 the loan was brought out of IBRC and refinancing organised through Barclays Bank.

3. In order to answer the questions posed in the case stated it will be necessary to look in some detail not just at the notice of 24 January 2014 ("the put option notice") which Revenue contends is a stampable instrument but also at the underlying documentation. This includes, most particularly, the option agreement dated 3 November 2006, a facility agreement for the loan between the bank and the investors and a deed of mortgage, charge and assignment both dated 28 February 2013 and a notice of the assignment of material contracts sent by the investors to the promoters also on 28 February 2013. The appellant contends that under the deed the investors very clearly assigned their interest under the option agreement absolutely to the bank. Revenue contends that when that document is read as a whole and read in the context of the related documentation, it is clear that the assignment was not absolute and indeed that this was the understanding of the investors when they purported to exercise the put option in January 2014.

4. Obviously, these constructions of the deed are mutually inconsistent and cannot both be correct. The parties were generally agreed as to the relevant legal principles which apply to the construction of contracts but disagree as to the application of those principles in this case. Notably the parties to the most relevant document – the deed executed as between the bank and the investors in February 2013 – were not before the court and no person representing either of those parties gave evidence before the Appeal Commissioner.

5. In the course of this judgment, I propose firstly to look at the factual background to the transactions in issue and at the salient provision of the relevant documents. I will then look at the determination of the Tax Appeal Commissioner and the questions raised in the case stated. Then I will turn briefly to the applicable or potentially applicable statutory provisions before considering the legal principles applicable to the interpretation of contractual documents. Although these are not really in dispute between the parties, they each emphasise different aspects of what is now a very large volume of case law. Finally, I will consider how those questions should be answered in light of the relevant legal principles.

6. It may be appropriate to flag at the outset that the Appeal Commissioner agreed with the appellant that there had been an absolute assignment of the investors' rights under the option agreement to the bank but did not accept the consequences the appellant argued should flow from that as regards his appeal. Instead, the Appeal Commissioner concluded that a number of the documents in issue (the 2006 option agreement and the 2013 facility agreement and deed) constituted in aggregate an agreement for the sale of an estate or interest in land and thus were subject to stamp duty as they came within the provisions of s.31A of SDCA 1999. This argument had not been made by the Revenue nor was it raised by the Appeal Commissioner during the course of the appeal hearing. Consequently, it was an issue upon which neither side had made submissions. The third question in the case stated queries the correctness of this conclusion. As Revenue did not seek to stand over this conclusion,

this aspect of the case stated was not argued before me. I have assumed that the parties are agreed that Question 3 should be answered in the negative.

7. Finally, different terms have been used to describe the various parties to the documentation which the court must consider and indeed to describe the parties to this appeal during the course of the tax appeals process. In fact, as appeals have been taken against the determination of the Appeal Commissioner by both the appellant and by Revenue, technically both are appellants before the High Court. For ease of reference in this judgment I shall refer to Mr. Maloney as "the appellant" and to the group to which he belongs as either "the partnership" or "the promoters". I shall refer to the group who invested in the scheme for tax purposes collectively as "the investors". I note that they are described variously in the documents as the *"purchaser"* (memorandum of agreement for the sale of the lease), the *"vendor"* (under the option agreement), the *"borrowers"* (under the facility agreement) and as *"mortgagers"* (under the deed). Those terms are occasionally used by me when looking at the contents of those documents. I shall refer to the Revenue Commissioners simply as "Revenue".

Background Facts

8. The origin of this dispute lies in a structure put in place in 2005 under which the investors borrowed money to invest in a hotel development in County Mayo which was being promoted by the appellant in partnership with a number of others. The investors did not intend to become involved in the development or operation of the hotel complex but were using the scheme to avail of certain tax allowances which were available to them under statue by reason of such investment. Legally, the mechanism used involved an agreement by the partnership to sell the property to the investors by way of a 999-year lease at a nominal price (€1,000 plus €1,500 rent per annum). This is recorded in a memorandum of agreement

dated 5 December 2005 and, in addition to nine special conditions, the sale is stated to be subject to the Law Society General Considerations of Sale 2001 (Revised) Edition.

9. The sale evidenced in this memorandum was never completed nor indeed was it intended to be completed. Instead, the sale *"rested in contract"* for the duration of the tax life of the hotel scheme (colloquially referred to as a *"tax shelter"*). The investors borrowed money for the purpose of their investment from Anglo Irish Bank and also from a company related to the partnership. The latter loan is of no relevance to the issues which I must decide.

10. As the investors did not intend to acquire or operate the hotel, it was necessary for the parties to put in place what counsel for the appellant has aptly referred to as an "exit mechanism". This took the form of a put and call option agreement entered into between the partnership and the investors in November 2006. This agreement noted that under the contract for sale the investors ("the vendors") were entitled to the grant of a 999-year lease. The partnership granted to the investors a put option under which the investors could require the partnership to purchase their rights and title to the hotel property. Conversely, the investors granted the partnership a call option under which the partnership could require the investors to sell (and by extension the partnership would purchase) the same rights and title. In effect, on the exercise of the option by either party the partnership would be required to buy back the investors' rights in the property which were resting in contract pursuant to the memorandum of sale. There were, in fact, three versions of this option but the court is only concerned with the third.

The Third Put and Call Option Agreement

11. The exercise of the put option was subject to a number of conditions. Most particularly under clause 2.2(a) it had to be exercised by the vendors (which term was defined to include their successors-in-title and permitted assigns) by notice in writing during the option period. The option period, defined in clause 1.1 as a period commencing on the fourth business day after the seven-year date and ending at midnight three months later, was linked to the anticipated life of the tax shelter running from the date on which the hotel first traded. It is common case that the option period expired on midnight on 25 January 2014.

12. Further, the purchase price payable by the partnership on the exercise of the option was set out in clause 2.4. The largest and most significant elements of the purchase price comprised the amount due by the investors to their bank (the identity of which subsequently changed) under the facility agreement plus interest etc. and the amount due by the investors under a loan agreement entered into between them and a company related to the partnership. These two sums exceeded €11 million. Of significance for the purposes of this case is clause 2.4(a)(viii) which provides as follows:

> *"A sum equal to the amount (if any) certified by the vendor's tax advisors as being an amount equal to all costs, charges and expenses which the vendors have suffered or will suffer as a consequence of exercising the Put Option or as a consequence of the purchasers exercising the Call Option or as a consequence of enforcing their rights under this Agreement including, without prejudice to the generality of the foregoing…"*

The following sub-paragraphs which deal *inter alia* with capital gains and VAT are not relevant as the debate between the parties has centred on the certification of professional fees incurred by the investors and whether payment of a lesser amount under this heading means that payments made by the promoters were not made pursuant to the option agreement.

13. The mechanism by which the total purchase price was to be made known to the partnership is set out in clause 2.4(d) which provides as follows:

> *"A statement of the purchase price by the vendors' tax advisors shall be served by or on behalf of the vendors on the purchasers not later than seven (7) business days after the exercise of an option hereunder. Such statement is subject to revocation, adjustment and reissue at any time or times as the vendors may require prior to completion provided it is re-certified by the vendors' tax advisors."*

14. The terms of sale to be applied to the exercise of the put or call option are set out in clause 2.5 which provided that *"the Law Society Conditions shall apply save as varied herein"*. Under the Third Schedule, para. 1(g) a number of the Law Society's General Conditions are expressly deleted from the proposed terms of sale. The deleted provisions do not include clauses 20 or 24(a). Further, para. 3 of the Third Schedule provides:

> *"On completion the vendor shall deliver to the purchasers a Deed of Assurance in the appropriate form if required by the purchasers."*

This echoes the provisions of clauses 20 and 24(a) of the Law Society General Conditions under which a formal assurance is to be provided in respect of the sale of property.

15. Finally, clause 4.3 of the option agreement provided for the assignment of the parties' rights under the agreement. Under clause 4.3(a) the partnership was not entitled to assign its rights without the written consent of the investors. However, under clause 4.3(b) the investors had an unrestricted entitlement to assign their rights and obligations without the consent of the partnership subject only to the assignee acceding to the option agreement unless the assignment was by way of security assignment to the bank. I note that the bank was specifically defined in the option agreement as the Anglo Irish Bank which would suggest that the investors required the consent (although not the written consent) of the partnership to assign their interest to Barclays Bank.

16. As noted, the option agreement was intended as an exit mechanism which would not be brought into play during the tax life of the scheme. As it transpired, although the hotel development was impacted by the economic downturn in 2008, both it and the related tax shelter remained afloat. The fate of the original bank was not so positive and due to the collapse of Anglo Irish Bank the loan was transferred to IBRC. Whilst this did not initially affect the arrangements discussed above, as the tax life of the scheme began to run down, the parties sought to extract the loan from IBRC and secure alternative commercial financing. According to the evidence before the Appeal Commissioner, this process was largely driven by the partnership and, following extensive negotiations, Barclays Bank agreed to provide alterative finance in 2013. This, in turn, necessitated the execution of a suite of documents between the bank and the investors under which the bank provided funds to the investors on foot of the provision of security by the investors which security included the option agreement.

Facility Agreement (February 2013)

17. The first document in this suite of documents is a facility agreement dated 28 February 2013 between the investors as borrowers, the promoters who provided a guarantee for the investors' indebtedness and the bank. There was a dispute between the parties to the appeal as to whether the loan facility provided under this agreement was properly characterised as a non-recourse loan and, by extension, whether the investors had a level of personal exposure which require them to retain the benefit of the option agreement. This in turn was relied on by Revenue to contend that it would not have made business sense for the investors to absolutely assign their rights under the option agreement to the bank since they depended on those rights to ensure that the promoters would allow them to exit the scheme at the point in time when it would cease to have tax benefits for them.

18. Basically, under clause 2 of the facility agreement the bank granted the investors a term loan of €6 million to refinance the amounts previously advanced by IBRC. The term was defined by the repayment date being either the end of the period of the tax shelter (7 years and 3 months from the date the hotel opened) or *"(b) the date on which the borrowers [i.e. the investors] received the full sale proceeds following the exercise of any of the option agreements"*. The investors were not required to make repayments on the loan during its lifetime. Instead, under clause 8, the loan together with all interest due was to be repaid in full on the repayment date as set out above. I note that the definition of *"option agreements"* includes all three put and call option agreements entered into between the investors and the promoters *"and as supplemented by a supplemental deed to option agreement between the promoters and the investors dated on or about the date hereof"*. No such supplemental deed has been put in evidence nor referred to and I can only assume that, notwithstanding the terms of the facility agreement, no such supplemental deed was executed.

19. Under clause 12, the investors agreed to execute certain security documents in favour of the bank. Specifically, under clause 12.1 the investors agreed to execute a deed of mortgage, charge and assignment over specific items which included at clause 12.1.3 of the option agreements. That deed was duly executed on the same date as the facility agreement. Nothing turns on the fact that it is called a deed of "*mortgage, charge and assignment*" as it dealt with a number of different items provided by way of security some of which were mortgaged or charged in favour of the bank and others of which were assigned to it.

20. The relevant portions of clause 10 which is headed *"Recourse"* are as follows:

> *"10.1.1. Notwithstanding any other provision of any Transaction Document but save as provided for in this Clause 10.1 and in Clauses 10.2, 10.3 and 10.4, the Lender's recourse to each investor in respect of such investor's obligations under the Transaction Documents shall be limited to amounts realised in connection with the*

enforcement, disposal or other action taken by the Lender in respect of the Recourse Assets, any sale of any of the Recourse Assets or any payments made by any third party to an investor in respect of any contractual or other obligation owed to such Investor pursuant to the contracts which are comprised in the Recourse Assets.

10.1.2. The Lender shall not take or pursue any judicial or other steps or proceedings or exercise any other right or remedy that it may have against an Investor or against an Investor's Other Assets for the discharge of any outstanding indebtedness under the Transaction Documents and no action, proceedings, claim, levy, judgment or other process shall be taken or levied against such investor unless:

(1) the Borrowers fail to exercise their rights under the Option Agreements when called upon by the Lender to do so pursuant to Clause 22.2.3(1) or following the exercise of such rights, the Promoters fail to comply with their obligations under the Options Agreements: and

(2) such action, proceedings, claim, levy, judgment or other process are necessary to enable the Lender to enforce or realise the Security.

In the interpretation section the investors' "*recourse assets*" are defined as those provided as security for the loan and the proceeds of any insurance policy relating to those assets. "*Excluded assets*" are defined as the investors' rights, interests and monies under the tax scheme. "*Other assets*" are defined as including the excluded assets plus all other assets of the investors.

21. Further, under Clause 10.2.1 each investor undertook to co-operate with the bank *"(to the extent necessary)…in any enforcement or realisation of the investor security documents when the security has become enforceable in accordance with its term".*

22. Revenue argues that the effect of these clauses is that the loan is not strictly speaking a non-recourse loan but can only be characterised as such for as long as the investors co-

operate with the bank in the exercise of the put option and the partnership complies with its obligations when the option is exercised. Counsel explained that this is known as a *"bad boy"* clause – i.e. the loan remains non-recourse only as long as the borrower behaves and in the event of misbehaviour or non-compliance on the part of the borrower, the lender has full recourse to all of the borrower's assets. The characterisation of the loan as a recourse or alternatively a non-recourse loan is important as Revenue argued that the potential exposure of the investors under these clauses meant that the absolute assignment of the option would expose them to a level of risk which it would not make commercial sense for them to undertake. The appellant argued that, on the contrary, as the investors had absolutely assigned the option to the bank, they had no rights to exercise under clause 10.1.2(1) and their involvement of the exercise of rights under the option would not be *"necessary"* for the bank to enforce its security under clause 10.1.2(2). If that be the case, it does beg the question as to why clause 10.1.2 was included in the facility agreement, a point to which I shall return.

23. The investors entered into certain covenants under clause 21 of the facility agreement. Notably, some of these covenants extended to the promoters who were parties to the facility agreement as they provided a guarantee of the investors' indebtedness to the bank under clause 18. Under clause 21.1.6 the investors agreed to forward to the bank a copy of any notice issued by them under, *inter alia*, the option agreement. Under clause 21.9 both the investors and the promoters agreed to *"exercise their rights under the Option Agreements at the earliest opportunity and that the proceeds of such will be used in accordance with Clause 8.1"*. Clause 8.1 refers to the obligation to repay the loan. Revenue argues that the inclusion of these clauses makes no sense unless the parties understood that the investors retained the right to exercise the option agreement notwithstanding its assignment to the bank and hence that assignment was not absolute. The appellant either treats these provisions as surplusage

and as having no effect because of the absolute assignment of the option or alternatively contends that their inclusion resulted from human error.

24. Clause 22 of the facility agreement deals with events of default, the occurrence of which would entitle the bank to demand immediate repayment of the full amount of the loan. In such circumstances, clause 22.2.3 allows the bank to exercise rights under the security documents and specifically under clause 22.2.3(1) and (2): -

> *"(1) the Lender shall, unless each of the Promoters are bankrupt, prior to enforcing its security under the Security Documents to which the Investors are a party, first request the Borrowers to exercise their rights under (i) the Option Agreements in accordance with the terms thereof or (ii) the Promoters Loan Guarantee and to apply the proceeds of payments thereunder in or towards repayment of the Loan and all other amounts then due hereunder.*
>
> *(2) If in the opinion of the Lender, the Borrowers have failed to exercise their rights under the Option Agreements as required pursuant to Clause (1) above or having exercised such rights, the Promoters have failed to comply with their obligations under (i) the Option Agreements or (ii) the Promoters Loan Guarantee resulting in the amount paid by the Promotors thereunder being insufficient to enable the Borrowers to repay all amounts due by them under the Finance Documents, the Lender may subject to Clause 10 immediately proceed to exercise all of its rights under the Security Documents to which the Investors are a party. "*

Clause 10 contains the recourse provisions discussed above. Again, Revenue argues that this makes no sense unless the investors retained rights under the option agreement. The appellant contends either that the clause was included in error or, alternatively, that it was prudently included lest the bank re-assigned the option agreement back to the borrowers in

order not to be burdened with the costs of exercising it. The facility agreement does not mention the possibility of such reassignment. Equally it is not clear why, in the event of such re-assignment, the deed of reassignment could not include any provision that was necessary to protect the bank's position in light of the overall arrangements between the parties.

Deed of Mortgage, Charge and Assignment

25. On the same date, 28 February 2013, the investors as mortgagors and the bank as mortgagee executed a Deed of Mortgage, Charge and Assignment creating security for the purposes of the loan. Unlike the facility agreement, the promoters were not parties to this deed. The material contracts for the purposes of the deed were set in Schedule 2 and included at item 2 the option agreements. The link between the deed and the facility agreement is evident from a number of clauses not least the definition of *"enforcement event"* as the occurrence of an event of default and the exercise by the bank of its rights under clause 22.2 of the facility agreement following compliance with clause 22.2.3(1) of the same. These provisions have been discussed above in the content of the facility agreement itself. Further, under clause 2.3 (headed *"Limited Recourse"*), the bank's recourse to the investors is limited *"on the terms and conditions set out in Clause 10 of the Facility Agreement"*.

26. The appellant's case is heavily reliant on the contents of Clause 3 of the deed which divides the security provided by the investors into two types. Under clause 3.1 a first fixed charge in favour of the bank is created over the mortgage property (i.e. the lands the subject of the 999-year lease), the investors' ancillary rights in that property and all receivables and rental income from the property. The option agreement is not listed as an item which is to be the subject of a charge.

27. Instead, clause 3.2, which is headed *"Security Assignments"* provides:

"The mortgagors, as beneficial owners, and as security for payment in discharge of the secured obligations in favour of the mortgagee, hereby assign and agrees to assign absolutely (in each case insofar as the same are capable of assignment)…:

3.2.4 the Material Contract".

As the option agreement is listed in Schedule 2 as a material contract, the appellant contends that this clause expressly effects an absolute assignment of the option agreement to the bank.

28. Further, under clause 3.3 on execution of the deed the investors were obliged to deliver to the bank a notice in respect of each of the material contracts duly executed by the investors and acknowledged by the relevant counterparty. A *pro forma* notice is included at Schedule 3 of the deed. This recites that the investors have assigned to the bank *"All our right, title and interest in and to the material contracts including all monies which may be payable in respect of all such material contracts"*. It then proceeds to authorise the recipient of the notice to do certain things. Some debate centred around item 1 of this list which in the *pro forma* version of the notice appears as follows:

"With effect from your receipt of this notice, we hereby irrevocably instruct and authorise you:

1. [Following an Enforcement Event], to pay all monies due to us under or arising from the Material Contract to the Mortgagee or to its order as it may specify in writing from time to time:"

29. Revenue emphasised the fact that the text in the square brackets could be included or excluded from the notice as appropriate. Its inclusion, as in the case of the notice actually served by the investors on the promoters on 28 February 2013, was contended to signify that the assignment of the investors' rights under the option agreement was conditional on the occurrence of an enforcement event. In other words, the option would only be absolutely assigned to the bank in the event of a default whereupon the promoters were then authorised

to pay any sums due under the option agreement directly to the bank rather than to the investors. In the absence of an enforcement event, it remained open to the investors to exercise their rights under the option as they purported to do on 24 January 2014.

30. Notwithstanding the language used in clause 3, Revenue pointed to clauses 5 and 6 of the deed as indicating that the assignment was not absolute. Clause 5.1 is headed *"Nature of Security"* and provides as follows:

> *"Each mortgagor represents and warrants to the mortgagee in relation to himself/herself only that he is and will at all times during the security period, be a lawful and beneficial owner of the secured assets."*

"*Secured assets*" is defined as all of the investor's assets which are the subject of the security and thus includes the option agreement. Revenue contends that it would make no sense for the investors to warrant that they will remain owners of the option agreement if they have absolutely assigned that agreement to the bank pursuant to the very same document in which this warranty is contained.

31. Clause 6 deals generally with undertakings. Clause 6.1.1 specifically contains a negative pledge under which the investors agree not to do certain things without prior written consent from the bank. At clause 6.1.1.(2) these include selling, transferring, leasing etc or otherwise disposing of *"all or any part of their interests in the secured assets save as specifically permitted by the Transaction Documents"*. Again, Revenue argues that a pledge not to dispose of their rights under the option agreement would be unnecessary if the investors had already assigned such rights to the bank. The appellant argues that this is a standard clause in agreements of this nature and whilst it might be inappropriate in the case of the option agreement (and indeed in respect of all items assigned as security assignments under clause 3.2) it has purpose and efficacy in respect of other items of security which were the subject of the deed.

32. Finally, clause 17 provides for the release of the security on the expiration of the security period and obliges the bank to take whatever action may be necessary to release or re-assign secured assets (at the investors' expense). The security period is defined as ending on the date on which all secured obligations are unconditionally and irrevocably paid and discharged – i.e. repayment of the principal due on foot of the loan together with all interests, fees and expenses.

Notice of Assignment of Material Contracts

33. Finally on this date, 28 February 2013, the investors sent a notice of assignment of two of the material contracts, the agreement for the lease and the option agreement to the promoters. As previously noted, this advised the promoters of the assignment of all of the investors' rights, title and interest in the contracts in question to the bank. It then authorised the promoters *"following an enforcement event"* to pay all monies due to the investors under the contracts to the bank. At item 3 the notice authorised the promoters to comply with any written notice or instructions received from the bank *"following an enforcement event"* without reference to or further authorisation from the investors. Although clause 3.3 of the deed required the notice to be executed by the investors and acknowledged "*by the relevant counterparty*", in this case the promoters, the copy of the notice before the court does not evidence that it was so acknowledged.

Events Subsequent to February 2013

34. According to the evidence before the Appeal Commissioner (given by the appellant and his solicitor) there were discussions between the investors and the promoters and their respective advisors as the termination date for the tax shelter approached. Unsurprisingly, the promoters were anxious that the arrangement would conclude in a tax efficient manner

and discussions centred around the possibility of a verbal exit which would optimise (i.e. reduce) liability for stamp duty. The appellant gave evidence that he had not envisaged that the option would be exercised but that the investors refused to participate in a verbal surrender of the option.

35. The solicitor who gave evidence was brought into the matter on behalf of the promoters in January 2014. He was not involved in the drawing up of the option agreement in 2006 or the refinancing of the loan through the bank in 2013. He was centrally involved in the discussions as to the unwinding of and exit from the tax shelter in 2014. It was he who first identified that the mortgage document purported to grant an absolute assignment of the option agreement to the bank. He stated that he first realised this after the investors had served their notice on 24 January 2014. The investors' notice, sent by their agent to the appellant on behalf of the promoters, was served just prior to the expiration of the option period under the agreement. The operative paragraph of the notice invoked Clause 2.2 of the option agreement and required the promoters to purchase the investors' *"rights and title to the hotel property for the purchase price provided at Clause 2.4 of the Option Agreement"*. February 7 was set as the completion date under clause 2.6.

36. On 28 January 2014, the promoter's solicitor sent an e-mail to the investor's solicitor in which he identified the issue which he contended affected the validity of the exercise of the option by the investors, namely the assignment of the option to the bank and the notice of that assignment given to the promoters. This, it was contended, was sufficient to render the assignment absolute under s.28(6) of the Supreme Courts of Judicature Act (Ireland), 1877 ("1877 Act"). Consequently, he asserted that the investors could not exercise rights they no longer had and that the time within which the bank could exercise the option had now expired.

37. There followed an exchange of correspondence between the solicitors in which the arguments for and against absolute assignment of the option agreement were teased out much as they have been on this appeal albeit as between the promoters and Revenue rather than the investors. An email of 30 January 2014 from the promoters' solicitor concluded with the suggestion that notwithstanding the fact that the exercise of the option was allegedly invalid, the promoters *"would be disposed to taking a surrender, to be effected by act and operation of law in the manner previously discussed, and pay your clients the price that would have been payable had the Put Option been exercised"*. They offered to attend at the investors solicitor's office on 7 February 2014 (i.e. the completion date specified in the notice exercising the option) in order to attend to this. The investors' solicitors replied on the same date indicating that the investors did not agree to proceed as proposed.

38. Ultimately, it was agreed that a surrender by act and operation of law would proceed *"without prejudice to our respective clients' positions on the exercise of the Put Option"*. The last e-mail in the sequence before the court (from the promoters' solicitor on 31 January 2014) asks, *inter alia*, that he be sent *"a statement of the price"*.

39. This prompted the service on the promoters of a statement of the purchase price under clause 2.4. This took the form of a letter from the investors' accountant addressed to one of the investors acting on behalf of the group which calculated the sums due under the various headings in clause 2.4 of the option agreement. The letter states that the calculation is *"based on information provided by you and Arthur Cox and the amounts have not been independently verified by us"*. The amount of the bank loan plus interest, costs etc. at €6,053,563 and of a loan due to the associated company at €5,500,000 (being a total of €11,553,563) were undisputed. The only other figure arose under clause 2.4(a)(viii) of the option agreement. No amounts were claimed in respect of VAT or capital gains tax or in

respect of the costs of procuring a security release but a sum of €44,280 was claimed under the heading *"Professional Fees"*.

40. Given the language used by the investors' accountants in their letter and the lack of any independent verification by them of the amount in issue, I do not think that this letter can be characterised as the certification of an amount due under clause 2.4(a)(viii) of the option agreement. Notably, the accountants do not expressly state that they are certifying the figures set out in the letter. Reference is made by them to clause 2.4(a)(vii) of the option agreement as distinct from clause 2.4(a)(viii) in circumstances where it is not clear that this is merely a typographical error. Clause 2.4(a)(ii) refers generically to "*amounts payable under clause 2.4(a)(viii)*" but does not itself stipulate the certification of those amounts. To my mind, in circumstances where the option agreement obliged the promoters to pay the investors' professional fees on the exercise of the option, the requirement for certification of those fees by a tax advisor was included to ensure that the amount claimed was not merely a sum nominated by the investors or their professional advisors but properly reflected professional expenses necessarily incurred by virtue of the exercise of the option. The inclusion in the statement of a sum which the accountants were informed by the investors and their solicitors was the amount due in respect of professional fees without further verification is not a certification within the normal understanding of that term.

41. The promoters disputed the amount claimed as part of the purchase price in respect of professional fees. No documentary evidence of this dispute nor of how it was resolved was placed before the Appeal Commissioner. However, it was evidently resolved as an alternative arrangement was put in place on a without prejudice basis and on 27 February 2014 the parties attended at the investors' solicitor's office where the property was transferred back to the promoters. The purchase price paid was some €30,000 less than that set out in the accountant's letter, presumably reflecting a reduction in respect of the

professional fees claimed. There is no documentary record of this transaction and notwithstanding a video recording was made, it was not adduced in evidence before the Appeal Commissioner.

42. The appellant described this transaction as the investors surrendering their entitlement to a lease under the contract for sale. The promoters' solicitor was of the view that since the form of completion was not that specified under the option agreement (i.e. clauses 20 and 24(a) of the Law Society General Conditions were not complied with and no assurance was provided to the promoters) and the price paid was less than that set out in the investors' statement of purchase price, the notice purporting to exercise the put option was effectively abandoned by the investors. Of course, no evidence was led from the investors suggesting that they agreed with this characterisation and the fact that the alternative arrangement was put in place on a without prejudice basis would suggest that they did not, in fact, agree.

43. All of this does give rise to an interesting question as to whether the validity of the exercise of an option is to be assessed by reference to whether the procedures subsequently put in place by the parties to give effect to the transaction mirror precisely those envisaged in the option agreement if the substance of the transaction gives effect to the entitlements created by that agreement? Clearly, if an option agreement were to provide that the transaction specified in it were to be completed within six weeks and the parties agreed that it could be completed within eight and it was completed within the extended period, nobody would seriously contend that the transaction was not given effect to pursuant to the option agreement. However, the same logic may not apply where the parties are not *ad idem* as to whether the option agreement has been validly exercised in the first place. As this was not the main focus of the parties' arguments, I do not propose to comment further on this issue.

Stamp Duty Implications

44. In argument before the High Court, the appellant placed considerable emphasis on the fact that stamp duty is a tax on certain instruments (i.e., written documents) and not on the underlying transactions reflected in those documents. With certain limited exceptions, themselves governed by statute, this is undoubtedly correct. Thus, the appellant argued that as the put option had not been validly exercised and the transaction was ultimately completed orally, there was no instrument on foot of which the promoters, as purchasers, could be liable for stamp duty. Liability to pay stamp duty falls on the accountable person, usually the purchaser. Consequently, once they could exit the structure at the end of its tax life in a legally sound manner, the investors no longer had a reason to be concerned as to whether the promoters, as purchasers, were liable for stamp duty.

45. It is clear from the evidence before the Appeal Commissioner that the promoters and the investors did not reach agreement as to whether the exit mechanism as originally agreed could be given effect to without incurring liability for stamp duty. The evidence of the appellant and his solicitor was that initially negotiations were focused on whether the option agreement itself could be amended so that it could be exercised orally which, at least implicitly, suggests that their view was that the written exercise of the put option would comprise an instrument capable of attracting stamp duty. As no agreement was reached, notice exercising the option was served by the investors on 24 January 2014 very shortly prior to the expiration of the period within which it could be exercised. According to the appellant's solicitor, he only concluded that the put option had been invalidly exercised after the put option notice had been served. The investors and their advisors did not agree with this conclusion. However, agreement was reached on a without prejudice basis (i.e. each side reserved its position) on an alternative arrangement which resulted in the parole completion of the transaction on 27 February 2014.

46. The appellant's solicitor's evidence was that the promoters took the view, because the transaction was not completed in the manner set out in the option agreement and the price paid was less than that set out in the letter of 31 January 2014, that the investors had abandoned the notice served by them on 24 January 2014. No agreement was expressly reached to this effect and agreement on the manner in which the matter was completed was reached on the basis that each side reserved its position in relation to the validity of the notice. Therefore, I do not think that this conclusion is one which can necessarily be drawn. The circumstances would equally support the conclusion that, subsequent to the service of the put option notice, the parties agreed to amend the terms of the option agreement to allow for completion of the transaction in a manner different to that originally envisaged. Similarly, it could equally be concluded that the parties agreed between themselves as to the variation of one element of the purchase price to be paid by the promoters, namely the investors' professional fees. This is subject to the observation I have already made that there is no evidence that the investors' accountant actually certified the figures quoted in the 31 January 2014 letter to bring that element of the stated purchase price within clause 2.4 of the option agreement.

47. Subsequent to the completion of the transaction, the agents for the promoters filed a stamp duty return in March 2014 disclosing no stampable transaction. On the same date a letter of expression of doubt was delivered to the Revenue Commissioners setting out the details of the transactions and making submissions, similar to those made to this court, that the transaction did not give rise to an instrument for stamp duty purposes. After some considerable time, the Revenue Commissioners responded in February 2016 advising the promoters that the notice exercising the put option was chargeable to stamp duty under s.31A of the SDCA 1999. Further, in June 2017 Revenue advised the promoters that the notice may also be chargeable under s.31 of the SDCA 1999.

48. An assessment was raised for some €231,673 which assessment was appealed by the promoters, including the appellant, to the Appeal Commissioner. Revenue took the view that each of the promoters, as members of a partnership, were jointly and severally liable for the entire of the stamp duty in question and each was assessed on the full stamp duty amount. Although each member of the partnership appealed, only the appellant's appeal was dealt with in full on the basis that the other appeals would depend on the outcome of the first appeal. The appeal was heard over three days between February and September 2020 and a determination issued by the Appeal Commissioner on 11 January 2021.

The Tax Appeal Commissioner's Determination

49. In brief, after a detailed examination of the documentation and a consideration of the case law relied on by each side, the Appeal Commissioner concluded that the documentation created an absolute assignment of the option by the investors to the bank. The Appeal Commissioner had earlier accepted the appellant's argument that s.31 of the SDCA 1999 was not applicable. This was in part because the terms and conditions of sale under the option agreement envisaged that a conveyance of *"the full legal and equitable interest"* held by the investors would follow the exercise of the put option (i.e. under Clauses 20 and 24(a) of the Law Society General Conditions). Thus, he concluded that the exercise of the option did not relate to the sale of an equitable estate in property under s.31(1)(a) of the SDCA 1999. Section 31(1)(b) of the SDCA 1999 did not apply because the exercise of the option related to the sale of lands which are specifically excluded from that sub-paragraph. Consequently, the Appeal Commissioner examined the exercise of the option and the purchase back of the hotel property by the promoters with a view to ascertaining whether the *"resting in contract"* provisions of s.31A apply to them.

50. He concluded that the investors remained the beneficial owners of the land over which they had created charges in favour of the bank but not of their interests under the option agreement. This conclusion was reached by him even though the agreement for the lease (i.e. the subject of the memorandum of sale) is also listed as a material contract in the Second Schedule and thus was subject to the exact same language in clause 3.2 as the option agreement because the investors could not have created charges over property in which they did not retain an interest. Consequently, he concluded that the put option was not validly exercised by the investors since they had assigned their right to do so under the option agreement absolutely to the bank.

51. Notwithstanding the appellant's case that a determination that the option was not validly exercised would dispose of the entire appeal in his favour, the Appeal Commissioner went on to consider the appellant's fall-back argument to the effect that the price paid was not paid pursuant to the contract since the price differed from that stipulated under the terms of the option agreement. The Appeal Commissioner rejected the argument made by the appellant for reasons which had not been advanced by Revenue. Instead of simply concluding that the price was *"identical in all material respects to that envisaged under the 2006 Option Agreement"* (a conclusion reached at para. 157), he went on to hold that this price was paid *"in pursuance of an agreement, pre-existing to the oral agreement"* which *"was the aggregation of the 2006 Option Agreement combined with the 2013 transaction documents/material contracts"*. He described this as *"the intra-linkage, inter-dependence and connectivity between"* the promoters and the investors. Thus, the Appeal Commissioner rejected the Revenue's argument that the stampable transaction was the notice of exercise of the option as he did not regard the option as having been validly exercised. Instead, he found that an *"agreement in aggregate"* existed between the investors and the promoters, and the purchase price had been paid pursuant to that agreement. Despite having won on the most

substantial issue in the appeal (the validity of the exercise of the option by the investors), the appellant lost the appeal.

52. Both sides then requested the Appeal Commissioner to state and sign a case for the opinion of the High Court under s.949AQ of the Tax Consolidation Act, 1997. On 20 April 2021, the Appeal Commissioner certified four questions of law for the opinion of the High Court. These are as follows:

i. *"Was I correct in law in determining, for the reasons set out in paragraphs 52-138, that the Put Option Notice of exercise of the Option given by the Investors to the Appellants, was not a validly exercised Notice and, as such, did not give rise to a charge to stamp duty under s.31 or s.31A of the Stamp Duties Consolidation Act 1999?*

ii. *Was I correct in law in paragraph 64 in concluding that while the Third Schedule to the Option varies the Law Society Conditions in certain respects, however General Conditions 20 and 24(a) were not altered by the special condition in this case?*

iii. *Was I correct in law in determining, for the reasons set out in paragraphs 140-165, that the 2013 Transaction Documents, including: (A) the Facilities Agreement between (1) the Investors (as the borrowers) (2) the Appellant and others (as the promoters) and (3) the Bank, and (B) the Mortgage, Charge and Assignment between (1) the Investors and (2) the Bank, and (C) the 2006 Option Agreement between (1) the Investors and (2) the Appellant and others, together constitute in aggregate, an agreement for the sale of an estate or interest of the Investors in land (i.e. the Hotel Property) between (1) the Appellant and others (as the purchasers) and (2) the Investors (as the vendors), within the provisions of section 31A SDCA 1999?*

iv. Was I correct in law for the reasons set out in paragraphs 140-165 in determining that the consideration paid of €11,583,650 by MFP in February 2014 was made pursuant to an agreement within the provisions of section 31A SDCA 1999?"

53. In the event, only questions 1 and 4 fall for determination by this court. Subsequent to the stating of the case, the parties agreed that Clauses 20 and 24(a) of the Law Society General Conditions were not altered by the special conditions in the Third Schedule to the option agreement (question 2). More significantly, both sides agreed that the Appeal Commissioner was incorrect to conclude that the 2013 transaction documents together with the 2006 option agreement constituted, in aggregate, an agreement for the sale of the investor's interest in the hotel property which was liable to stamp duty as falling within s.31A of the SDCA 1999 (question 3). Apart from the fact that this was not the case that Revenue had made to the Appeal Commissioner, this is a reasonable concession on Revenue's part since the Appeal Commissioner ultimately seems to have concluded that stamp duty was payable on foot of the transaction (see para. 166) without having specifically identified the instrument on foot of which he found it to be chargeable.

Relevant Statutory Provisions

54. There was no dispute between the parties as to the relevant law nor as to the interpretation of the applicable statutory provisions in light of the principles set out by the Supreme Court in *Dunnes Stores v. Revenue Commissioners* [2020] 3 IR 480 and *Bookfinders Ltd. v. Revenue Commissioners* [2020] IESC 60. Instead, the dispute focussed on the meaning and effect of the contractual documentation entered into between the parties and between the investors and the bank and how the statutory provisions applied to those documents when they were properly interpreted.

55. The basic principles are clear. Under s.2(1) of the SDCA 1999 any instrument specified in Schedule 1 and executed in the State shall be chargeable with stamp duty. An instrument is defined in s.1 as including *"every written document"*. Amongst the instruments listed in Schedule 1 are an agreement for the sale of property and a conveyance or transfer on sale. A conveyance on sale is defined in s.1 as including *"every instrument…whereby any property or any estate or interest in any property, on the sale or compulsory acquisition of that property or that estate or that interest is transferred to or vested in a purchaser, or any other person on such purchaser's behalf or by such purchaser's direction."* To be a conveyance on sale the document in question must have the effect of transferring the property. The execution of an instrument which is not under seal means the signing of that instrument. Thus, in order for a transaction of a type capable of coming within s.1 to give rise to a liability for stamp duty it must be reflected in a signed, written agreement. Hence, the promoters' initial desire to have the option exercised orally and, subsequently, to effect the transfer of the investors' interest in the property to them by way of parole transaction.

56. Section 31 of the SDCA 1999 treats contracts for the sale of certain estates or interests in property as if they were conveyances on the sale of that property thereby moving forward the point in time at which a transaction becomes stampable. Section 31(1) provides as follows:

> *"31.(1) Any contract or agreement:*
>
> *(a) for the sale of any equitable estate or interest in any property, or*
>
> *(b) for the sale of any estate or interest in any property except lands, tenements, hereditaments, or heritages, or property locally situated outside the State….*

shall be charged with the same ad valorem duty, to be paid by the purchaser, as if it were an actual conveyance on sale of the estate, interest, or property contracted or agreed to be sold."

57. It is common case that there was no formal conveyance or assurance of the hotel property in this case, either from the promoters to the investors in 2005 or from the investors to the promoters in 2014. Therefore, if the notice of exercise of the put option is stampable as the Revenue contend, it is because the contract reflected in that notice falls within s.31(1) and is thereby deemed to be a conveyance on the sale of that land.

58. The appellant argues that s.31 does not apply to the circumstances of this case. He contends that s.31(1)(a) does not apply because the option agreement provided that on the exercise of the option there would be a further deed of assurance or a formal conveyance of the property. Thus, it could not be characterised as a contract for the sale of an equitable estate or interest in the property. He contends that s.31(1)(b) does not apply because in its terms it expressly excludes a contract for the sale of an estate or interest in lands. As Revenue's case is based on the applicability of s.31(1)(a) and not s.31(1)(b) the latter need not be considered further.

59. It was somewhat unclear whether the appellant accepted, absent any issue as to the validity of the exercise of the option, that the exercise of the put option under the terms of this option agreement was capable in principle of giving rise to liability for stamp duty. The argument premised on the contention that the exercise of the option did not relate to an equitable interest in the hotel property and that tax duty would only arise on the formal deed of assurance or formal conveyance which was to follow under the option agreement would suggest not. However, it was clear from the evidence of the appellant's solicitor at the appeal hearing that the initial discussions between the parties were about whether the written exercise of the put option - which would attract stamp duty - could be avoided by amending

the option agreement to allow the option be exercised orally. Thereafter, the position adopted by the promoters and their solicitor was that the put option had not been validly exercised and thus did not attract stamp duty and the parole transfer under the agreed alternative arrangements could not attract stamp duty because there was no instrument involved.

60. The main argument made by Revenue is that the put option notice gave rise to a contract or agreement for the sale of the investors' equitable interest in the hotel property back to the promoters. Revenue contends that it is fallacious of the appellant to focus on the requirement for a further formal deed of assurance or formal conveyance under the terms of sale included in the option agreement. The 2005 contract for the sale of a 999-year lease in the hotel property to the investors was never completed. Consequently, the investors never acquired a legal estate or interest in the property. The investors' rights, which *"rested in contract"*, to use a term associated with stamp duty, were equitable. They could, in theory, have been enforced by the investors by way of specific performance subject, of course, to the promoters' rights to exercise the call option under the option agreement.

61. In my view this analysis is fundamentally correct. Leaving aside for the moment the question of whether the investors had assigned their rights under the option agreement to the bank, the exercise of the put option could never operate to divest the investors of a legal estate or interest in the hotel property since they have never taken the grant of the lease to which they would have been entitled under the 2005 contract for sale. Pending the completion of this sale, their interest in that lease remained equitable. Consequently, the only interest that could ever be transferred by them back to the promoters was an equitable interest. The investors could only transfer back the interest they held and as, that interest was equitable, formalisation of the transfer of that interest through a deed of assurance or otherwise would not convert the subject of the transaction into a legal estate.

62. The alternative provision relied on by Revenue is s.31A of SDCA 1999 inserted by s.78(1)(a) of the Finance Act 2013. Section 78(3) of the 2013 Act provided that s.31(A) would apply only to an instrument executed on or after 13 February 2013. Thus, it is potentially applicable to the notice provided the other conditions set out in the section are met.

63. Section 31A is a provision designed to deal with the situation described as *"resting in contract"* where an agreement under contract to transfer land remains unexecuted for an extended or indefinite period of time. This apparently occurs frequently in the context of development land. A developer may acquire land for development purposes and leave the purchase resting in contract while the development is carried out thus avoiding liability for stamp duty. The right to complete the purchase under the contract and the consequent liability for stamp duty is then assigned to the ultimate purchasers of the development. In this case the initial transfer of a 999-year lease in the hotel property to the investors under the contract for sale was allowed to rest in contract for the duration of the life of the tax shelter.

64. Section 31A deals with this situation by making a contract for the sale of an estate or interest in land chargeable to stamp duty as if it were an actual conveyance or transfer of that land if certain conditions are fulfilled. The section provides as follows:

"31A. (1) Where -

(a) the holder of an estate or interest in land in the State enters into a contract or agreement with another person for the sale of the estate or interest to that other person or to a nominee of that other person, and

(b) a payment which amounts to, or as the case may be payments which together amount to, 25 per cent or more of the consideration for the sale has been paid

to, or at the direction of, the holder of the estate or interest at any time pursuant to the contract or agreement,

then the contract or agreement shall be chargeable with the same stamp duty, to be paid by the other person, as if it were a conveyance or transfer of the estate or interest in the land."

65. The argument under this section focussed on whether the sum paid by the promoters to the investors, being some €30,000 less than that set out in the investors' auditor's letter of 31 January 2014, was paid *"pursuant to"* the contract created by the exercise of the option agreement. The appellant argues that as the amounts in question were different then clearly the amount paid could not be said to have been paid pursuant to the contract. Further, the appellant points to the fact that the transfer ultimately took place pursuant to alternative arrangements agreed between the parties and not according to the mechanism provided for under the option agreement. The amount was paid pursuant to these arrangements and not the option agreement. Revenue disagree and argue that the difference was not material in the context of the overall price and the fact that that difference was due to a dispute about the investors' professional fees, a dispute which was obviously subsequently resolved between the parties (although no evidence was led as to how this dispute was resolved).

66. In addition to fiscal legislation, the parties also addressed s.28(6) of the Supreme Court of Judicature Act (Ireland) 1877 in the context of the argument as to whether the investors' rights under the option agreement were assigned absolutely to the bank. The relevant parts of this section provide as follows;

"(6.) Any absolute assignment, by writing under the hand of the assignor (not purporting to be by way of charge only), of any debt or other legal chose in action, of which express notice in writing shall have been given to the debtor trustee or other person from whom the assignor would have been entitled to receive or claim such debt

or chose in action, shall be and be deemed to have been effectual in law (subject to all equities which would have been entitled to priority over the right of the assignee if this Act had not passed,) to pass and transfer the legal right to such debt or chose in action from the date of such notice, and all legal and other remedies for the same, and the power to give a good discharge for the same, without the concurrence of the assignor…"

I will return to the arguments made under this section in due course.

67. Finally, it is useful to bear in mind the radical overhaul of property law in Ireland affected by the Land and Conveyancing Law Reform Act 2009 ("2009 Act") which came into force during the life of the tax shelter. One significant reform contained in s.52(1) of that act provided that, subject to any contractual provision to the contrary, the entire beneficial interest passes to a purchaser on the making of a contract for the sale or other disposition of land. This statutorily reverses the decision of the Supreme Court in *Tempany v. Hynes* [1976] 1R 101 which had held that the beneficial interest acquired by the purchaser was proportionate to the amount of the purchase price paid under the contract. This provision obviously did not apply to the contract for sale made in 2006 prior to the enactment of the 2009 Act. However, it would have applied to the notice exercising the put option in 2014, assuming that notice to have been validly exercised, as it created a binding and enforceable obligation for the sale of the investors' interest in the hotel property back to the promoters.

Interpretation of Contractual Provisions – Case Law

68. As in the case of the statutory provisions, there was no substantive disagreement between the parties on the main principles applicable to the interpretation of contractual documents nor as to the jurisprudence from which these principles are drawn. The disagreement really centred on the application of these principles to the transaction

documents which, as the Appeal Commissioner observed, somewhat charitably, *"contains a number of inconsistencies"*. Each of the parties placed different emphasis on the case law dealing more specifically with options and with the assignment of contractual rights.

69. The starting point for consideration of the principles applicable to the interpretation of contractual documents in this jurisdiction is the decision of the Supreme Court, Geoghegan J., in *Analog Devices BV v. Zurich Insurance Company* [2005] 1 IR 274. The case concerned the interpretation of an insurance policy but it is accepted that the principles discussed in the judgment apply more broadly to contracts generally. Firstly, Geoghegan J. approved the judgment of Griffin J. in *Rohan Construction v. ICI* [1988] ILRM 373 to the effect that the *"cardinal rule"* in construing a contract is that *"the intention of the parties must prevail"* but this intention must be ascertained objectively from the terms of the contract itself together with any documents incorporated in it and not from any direct evidence of the parties as to what their intention was. The words of the contract may be interpreted by reference to the surrounding circumstances. In describing what this entails Lord Wilberforce in *Reardon Smith Line Ltd. v. Yngevar Hansen-Tangen* [1976] 1 WLR 989 identified what a court must ascertain as *"what is to be taken as the intention which reasonable people would have had if placed in the situation of the parties"* and to do this the court should *"place itself in thought in the same factual matrix as that in which the parties were"*.

70. Geoghegan J. also approved a then recent restatement of the relevant principles by the House of Lords, Lord Hoffman, in *Investors Compensation Scheme Ltd. v. West Bromwich Building Society* [1998] 1 WLR 896. I do not propose to set out those five principles in full as they are well established and were not the subject of any dispute in the case. The first affirms the basic principle that a court is seeking to identify the meaning of the words used as they would be understood by a reasonable person having the same background knowledge as was available to the parties at the time of the contract. The second emphasises the breadth

of the factual matrix referred to by Lord Wilberforce. It can include anything which would affect how the document would be understood by a reasonable person. The third excludes from the admissible background the previous negotiations between the parties and any declaration of their subjective intent. The fourth points out that the meaning of a document may not be the same thing as the meaning of the words used. The focus is not on the dictionary definition of the words used but on how they would have been reasonably understood by the parties in the context of the relevant background. Fifthly, and finally, although the courts should not lightly assume that the parties have made linguistic mistakes in a formal document, if it is clear from the background that an error has occurred a court is not required to attribute to the parties an intention which they plainly never had.

71. Geoghegan J. then goes on to consider the *contra proferentem* principle under which ambiguous contractual provisions are construed against the party responsible for the preparation of the contract, who will usually be the commercially stronger party. This aspect of the judgment is of little assistance here as neither of the parties before the court are parties to the main contract in issue, namely the deed, and no question arises of the interpretation of the deed against the asserted interests of either the bank or the investors. Apart from noting similarities between some of the transaction documents and those referred to in another judgment involving the same bank (see *Bexhill v. Razzaq* below at para. 82), no evidence was adduced as to which party was responsible for drafting the transaction documents nor the extent to which the other party had a material input into the language used in the clauses in dispute.

72. The decision of Lord Hoffman in *Investors Compensation Scheme Ltd. v. West Bromwich Building Society* and its approval by Geoghegan J. in this jurisdiction has given rise to some discussion as to whether it represents a shift away from a purely linguistic approach centred on the text of the document to a more broad approach focussing on the

factual matrix of the parties and their business relations and designed to ensure that a court gives effect to the commercial intentions of the parties. The difference may not actually be that great because, as was observed by Lord Steyn in *Mannai Investment Co. Ltd. v. Eagle Star Life Assurance* [1997] AC 749, a commercially sensible construction of a contract is more likely to give effect to the intention of the parties. In any event, this discussion and its resolution in this jurisdiction by reference to what is described as a *"text in context"* approach and the judgment of Whelan J. in *Point Village Development Limited (In Receivership) v. Dunnes Stores* [2019] IECA 233 does not really assist me in this case.

73. This is because the court is not tasked with ascertaining the meaning of the contract in the context of a dispute between the parties to it with a view to its enforcement. Thus the court is not considering whether or how commercial efficacy might be given to the parties' intentions and therefore there is no need to inquire as to what insight "*business common sense*" might bring to bear on the task. The relationship between the parties to the main contract in issue, i.e. the investors and the bank, is now historic and the termination of that relationship was, apparently, unproblematic. Instead, the court is examining that contractual relationship, effectively at the behest of a third party, with a view to ascertaining what fiscal consequences might flow from it in circumstances where those fiscal consequences affect only the third party and do not have implications for either of the parties to the contract.

Absolute Assignment – Case Law

74. Central to the appellant's case is the contention that the put option was not validly exercised by the investors because they had assigned the option agreement absolutely to the bank and thus no longer had the right to exercise it. The appellant argued that s.28(6) of the 1877 Act identified four criteria which distinguished an absolute assignment from the creation of a charge. I do not think that is correct. According to the side note, s.28 of the

1877 Act deals with the administration of assets of insolvent estates. The purpose of s.28(6) appears to be to ensure the legal efficacy of any absolute assignment of a debt or chose in action. Whilst debts and choses in action which are absolutely assigned are treated differently to those which are subject only to the creation of a charge, the sub-section itself requires this distinction to exist but does not set out the criteria by reference to which a transaction would be characterised as an absolute assignment as distinct from a charge.

75. The criteria under s.28(6) which must be met for an absolute assignment to be legally effective were identified by Judge Finlay Geoghegan in *O'Rourke v. Considine* [2011] IEHC 191. That judgment dealt with a preliminary issue as to whether a plaintiff who had absolutely assigned to a bank a loan agreement between himself and the defendant retained the entitlement to sue the defendant in his own name for amounts due on foot of the loan. The judgment notes that the parties agreed that the assignment complied with the four conditions in s.28(6) which Judge Finlay Geoghegan identified as being:

> *"(a) The assignment was of a debt or other legal chose in action.*
>
> *(b) The assignment was absolute and was not by way of charge only.*
>
> *(c) It was in writing under the hand of the assignor.*
>
> *(d) Express notice in writing thereof was given to the debtors."*

The plaintiff had argued that provision in the deed of assignment for reassignment to him of the loan agreement in the event he discharged his liabilities to the bank created an equity of redemption by virtue of which he had a continuing interest in the loan agreement. Finlay Geoghegan J. rejected the contention that this preserved to the plaintiff a right to sue the defendant prior to such reassignment taking place.

76. This conclusion is, in fact, well settled. It was determined as long ago as 1889 that a provision in an assignment for re-conveyance does not prevent the assignment being absolute. In *Tancred v. Delagoa Bay & East Africa Railway Company* (1889) 23 QBD 239

Denman J. saw the distinction between an absolute assignment and a charge referred to in a statutory provision equivalent to s.28(6) as being that between an absolute transfer of property with a condition for re-conveyance and the right to payment out of a particular fund or property without the transfer of that property.

77. This proposition was confirmed in *Hughes v. Pump House Hotel Company Limited (No 1)* [1902] 2 KB 190 although Mathew L.J. cautioned as to the need to consider the document as a whole :

> *"In every case of this kind, all the terms of the instrument must be considered; and, whatever may be the phraseology adopted in some particular part of it, if, on consideration of the whole instrument, it is clear that the intention was to give a charge only, then the action must be in the name of the assignor; while, on the other hand, if it is clear from the instrument as a whole that the intention was to pass all the rights of the assignor in the debt or chose in action to the assignee, then the case will come within s.25 and the action must be brought in the name of the assignee. "*

Mathew L.J. held that it was clear from the terms of the document in *Hughes* that the intention was to pass to the bank complete control of all the monies payable to the plaintiff under the original agreement. Both he and Cozens-Hardy L.J., who delivered a separate judgment, confirmed that a mortgage containing an equity of redemption was capable of constituting an absolute assignment within the relevant section.

78. The appellant argues that all four of the conditions identified in *O'Rourke v. Considine* are met in this case. This is undoubtedly so in respect of three of them – the assignment was of a chose in action (i.e. rights under the option agreement), it was in writing and express notice of it was given to the promoters. However, the question of whether the assignment was absolute and not by way of charge was seriously disputed by Revenue.

79. The appellant relied on the decision in *Bovis International Inc. v. The Circle Limited Partnership* [1995] 49 Cons. L.R.12 to argue that, if on its face, the document purports to be an absolute assignment, then it should be treated as such unless it is ascertained that it is excluded by virtue of the other criteria in s.28(6). Staughton L.J. seemed to treat the issue as a binary one, i.e. the transfer of a debt or chose in action must be either an absolute assignment or alternatively only a charge, there being no middle ground. However, I note that the issue was not raised in quite those terms and that ultimately it was conceded without argument. Revenue were more circumspect in their argument on this point contending that they did not have to establish definitively that the deed created only a charge over the option agreement provided they established that the assignment was not absolute.

80. *Bovis* itself involved the developers of a substantial apartment development who wished to sue managers appointed by them for damages for breach of contract in circumstances where the management agreement between them had been assigned by the developers to a bank as security for the provision of ongoing finance. Staughton L.J. regarded as *"probably sound"* the argument that although there had been a legal assignment of the management agreement, the developers still held equitable title to it by virtue of their equity of redemption such that damages for breach of contract must necessarily be based on the developer's losses rather than the *"non existing"* losses to the bank. He regarded it as more significant that the character of the obligations under contract did not change by virtue of the assignment of the benefit of that contract.

81. Millett L.J. was satisfied that the assignment was absolute for two reasons. The first was the statement in a related composite guarantee and trust debenture that the charge created was by way of absolute assignment subject to redemption on repayment. The second was the inclusion of a provision providing for reassignment on repayment of the sums secured. He was of the view that the presence of a clause expressly requiring re-assignment on

redemption was cogent evidence of the party's intention that the security should take the form of an assignment as otherwise no reassignment would be necessary. Whilst the assignment of the agreement might have affected title to sue (which was not material since by the time the proceedings were brought the management agreement had been reassigned to the plaintiff), it had no bearing on the defendant's liability for the amount of damages for which it might be liable. Ward L.J. substantially agreed with this analysis taking the view that the use of language which spoke of an *"absolute assignment subject to redemption"* pointed *"ineluctably"* to an absolute assignment and one which is by way of legal mortgage.

82. The case upon which the appellant places most reliance is *Bexhill U.K. Limited v. Razzaq* [2012] EWCA Civ. 1376 not least because of the involvement of his bank and the use of documentation somewhat similar to that in issue in this case. The defendant in *Bexhill* was an insurance broker who, through a related company called RSA, offered his clients the option to pay for their insurance in monthly instalments. This arrangement was funded by monies lent to RSA by the plaintiff, the loans being guaranteed by the defendant who executed a charge over certain properties to support the guarantee. The plaintiff in turn borrowed money from Barclays Bank to cover this and a number of similar commercial arrangements. The plaintiff assigned to Barclays all of its rights, title and interest in the facilities agreement between itself and RSA which included the charge over the plaintiff's property. Notice was served on RSA of this assignment. RSA fell into arrears in repaying the monies owed to the plaintiff as a result of which the plaintiff sought to enforce its security and brought proceedings against the defendant for possession of the property. The defendant denied the plaintiff's right to sue in circumstances where it had assigned its rights to Barclays.

83. The approach taken by Aikens L.J. to the nature of the security and whether the assignment of it was absolute is interesting. He took as his starting point the fact that

statements in the deed itself reflecting an agreement to assign absolutely all of the plaintiff's rights, title and interest in the security were consistent with an absolute assignment in the sense discussed *inter alia* in *Hughes*. However, he went on to ask:

> *"Does that preliminary conclusion have to be modified in the light of the other provisions of this debenture and the [facility agreement] and by looking at the transaction as a whole to see the commercial sense of it…?"*

84. Counsel for Revenue argues that it follows from this that the transaction documents must be examined and that conclusions as to the meaning of any particular clause cannot be drawn from the outcome of other cases. The appellant on the other hand points to the similarity between the documentation emanating from the same bank and the fact that a number of clauses in the *Bexhill* documentation which would have been inconsistent with an absolute assignment were *"explained away"*. He also emphasised Aikens L.J.'s conclusion (at para. 55) that the obligation to serve notice of assignment was the deciding factor and that the standard form of the letter to be served was more consistent with an absolute assignment than a charge. Revenue points to differences between the notice in that case and in this. On the basis of his analysis, Aikens L.J. ultimately concluded that the charge and the right to sue on foot of it had been absolutely assigned to the bank as a result of which the plaintiff did not have the right to sue the defendant unless the bank were joined to the proceedings.

85. One additional case was relied on by Revenue, namely *Ardila Investments NV v. ENRC NV* [2015] 2 BCLC 560. Again, the facts are very complex and the issue concerned whether the claimant had assigned its rights to claim under the payment provisions in a share purchase agreement which the defendant argued had been assigned to a bank. Simon J. held that the terms of the deed of assignment indicated that it was not intended to take effect as an absolute assignment. As the claimant had retained a legal interest and the bank acquired an equitable

interest in the share purchase agreement, both were required to be joined to the proceedings. Having examined the documents in issue, Simon J. commenced his analysis as follows (at para. 23 of the judgment):

> *"The Deed of Assignment was not a well-drafted document, but there are a number of terms which indicate that it was not intended to take effect as an absolute assignment, and which (at the least) cast doubt on an intention to make an absolute assignment of the right to bring a claim under the SPA…Although Clause 2.3 uses the words of a legal assignment, other provisions indicate an intention that the assignment was to take effect by way of charge (the limited aggregate limit), that it was not an absolute assignment of the whole benefit of the SPA and did not take effect so as to pass the right to bring proceedings…"*

The appellant argues that less weight should be given to *Ardila* than to *Bexhill* as the former is a judgment of the Queen's Bench Division whereas the latter is a judgment of the Court of Appeal (UK). I accept that this is generally correct, were there to be a difference in principle between the two judgments. However, I do not see a difference in principle – it is more a difference in outcome. It is clear from both *Bexhill* and *Hughes* that the documentation must be read as a whole and although the express description of an assignment as absolute must carry significant weight it is not necessarily determinative if the balance of the documentation shows that this was not the intention of the parties.

86. In my view, two overarching and not entirely consistent principles can be drawn from this case law. Firstly, the court must look to the entirety of the contractual arrangements between the parties to the purported assignment of a debt or chose in action to ascertain whether, taken as a whole, the document effects an absolute assignment. Secondly, considerable weight must be giving to the language used by the parties and specifically to express language indicating an intention to assign the debt or chose in action absolutely.

That said, a court is only likely to be considering the issue where the documentation is inherently inconsistent.

Analysis of Transaction Documents

87. The circumstances in which the contractual documentation fall to be interpreted in this case is unusual as there is no suggestion that the parties themselves (i.e. the investors and the bank) were not *ad idem* as to what they intended nor as to how the documents gave effect to that intention. Further, the relationship between those parties appears to have concluded amicably and the court is not tasked with interpreting the documents against the wishes of one or other of them so as to ascertain what was their mutual intention at the time the agreement was entered into. Instead, the dispute is one between the promoters, represented in these proceedings by the appellant, and Revenue.

88. The promoters are contending for an interpretation (i.e. the absolute assignment of the investors' rights under the option agreement to the bank) which, on the evidence of the appellant and his solicitor, was not their initial understanding of the legal relations created by the transaction documents. It was not until after the investors had exercised the put option in writing – the promoters having failed to secure their agreement to do so orally – that the contention was first raised that they lacked power to exercise it at all. The lateness with which the issue was raised does not, of course, preclude the interpretation now advanced on behalf of the promoters being correct. However, it does tend to suggest that a reasonable person reading this documentation with knowledge of the relevant background would have understood that the investors had retained the right to exercise the put option (per *Analog Devices* and *Investors Compensation Scheme Ltd. v. West Bromwich Building Society* above at para. 69-72).

89. Unfortunately, the solution is not quite so simple in light of the many inconsistencies in the documentation itself. Some of this arises from the fact that the key document in issue, the deed of mortgage, charge and assignment, is one which relates to a number of different securities some of which are subject to the creation of charges and others of which are *"assigned"* to the bank as mortgagee. Thus, some clauses which are expressed in very general terms may, in fact, only apply to such of the security that is subject to a charge or conversely to such of the security that is the subject of an assignment. Indeed, counsel for Revenue acknowledged as much when taking the court through a number of clauses in the documents which Revenue contends are inconsistent with the notion of an absolute assignment of the option agreement. Therefore, in the following analysis I have placed most reliance on terms which clearly and expressly relate to the option agreement (even if they may also relate to some other part of the security provided by the investors to the bank).

90. Whilst the assignments under the deed clearly conferred upon the bank a security interest in the subject property, it is less clear that all of them constituted an absolute assignment of the investors' interest to the bank such that the investors no longer had any interest in the subject property. I am mindful that the existence of an equity of redemption – i.e., the right to have property reassigned after a debt has been paid in full – does not prevent the assignment being absolute. Indeed, in *Bovis* (above at para. 79-81) a clause providing for re-assignment was itself seen as supporting the contention that there had been a prior, absolute, assignment. That said, I regard as significant the argument made by Revenue that the absolute assignment by the investors of their rights under the option agreement would have left them very vulnerable as regards compelling the promotors to comply with the agreed exit mechanism at the end of the life span of the tax shelter. Again, the potential difficulty did not materialise but nonetheless the possibility does give rise to

serious questions as to the commercial common sense of the interpretation now contended for by the promotors.

91. I am also not entirely convinced that the effect of s.28(6) of the 1877 Act was to create a strictly binary categorisation of the securitisation of debt and other legal chose in action under which security must be either by way of charge or by way of absolute assignment. The purpose of the sub-section appears to have been to ensure the right of persons to whom debts or choses in action have been absolutely assigned to sue on foot of the rights thereby assigned to them without requiring the consent of the assignor. As Revenue point out, this case is not about the right to sue under the 1877 Act but rather whether the investors retained the right to exercise the put option in light of the security created in respect of the option agreement under the deed.

92. Some of the academic texts open to me suggest a broader categorisation of security and that a variety of types of assignment are possible. The authors of *"The Law of Assignment 3rd Edn"* (Smith and Leslie, 2018) state that in addition to assignment by way of charge, an assignment will not be absolute within the meaning of a statutory provision equivalent to s.28(6) of the 1877 Act where it is either conditional or partial. The text continues to explain that an assignment will be conditional where, under the terms of the assignment the subject of it is not assigned until a condition precedent is satisfied or will revert to the assignee if a condition subsequent is met. This limitation is designed to protect the debtor who would otherwise be prejudiced by reason of uncertainty as to whether a condition in an agreement to which he is not a party has been satisfied. Revenue argue, *inter alia*, that the assignment of rights under the option agreement to the bank was not absolute as it was dependent on the occurrence of an enforcement event (i.e. a default by the investors which included a failure of the investors to exercise their rights under the option agreement). As no enforcement event occurred in this case, Revenue contend that the condition precedent

to the absolute assignment of the investors' rights under the option agreement had not materialised. However, it may not be necessary for me to go so far as to decide whether s.28(6) creates a strictly binary categorisation as, in my view, the question of whether the assignment was absolute in this case is capable of being resolved based on the text of the transaction documents themselves.

93. The appellant relies on three aspects of the deed to support the contention that it provided for an absolute assignment of the option agreement. These are, firstly, the statement in clause 3.2 that the *"material contracts"* (which included the option agreement) were assigned absolutely and the distinction between the absolute assignment effected by clause 3.2 and the charges created by clause 3.1. Secondly, the appellant relies on the requirement to give notice to the promotors of the assignment of the material contracts under clause 3.3 of the deed in the form set out in Schedule 4, notice being the decisive factor in *Bexhill*. Thirdly, and finally, the appellant points to the release of security provisions in clause 17 which require the bank to take whatever action is necessary to *"release or re-assign and discharge the secured assets from the security".*

94. I agree that significant regard has to be paid to the fact that the deed itself states that the material contacts are to be signed absolutely. Were it not for the fact that such absolute assignment would be manifestly inconsistent with the other provisions of the deed and of the related facility agreement (to which the promotors were party) that would most probably be the end of the matter. I do not place significant weight on the reassignment provisions of clause 17 as that clause is clearly drafted in very broad terms to cover the release of all of the security created by the deed. It does not specifically identify the reassignment of the option agreement so as to require an inference to be drawn that it was absolutely assigned in the first place.

95. I also note that clause 3.2 is qualified in that the list of documents are assigned only *"insofar as the same are capable of assignment"*. Whilst the option agreements are listed in Schedule 2, Part 2 as one of the material contracts to be assigned under clause 3.2, they were not, of course, capable of being completely assigned to the bank. Strictly speaking the investors could only assign – or charge – their rights and interests under the option agreements and not, for example, the rights the promoters acquired as against them under the same agreement. What is purported to be assigned under clause 3.2 is the contracts themselves with no distinction being drawn between those parts of it which are prima facie capable of assignment and those which are not. It might be possible to overlook this simply as poor drafting where it not for the fact that the court is asked to examine these provisions in minute detail in order to ascertain what the parties to deed intended to achieve by them. Clause 4.3(b) of the option agreement precluded the investors assigning the option agreement without the consent of the promoters (other than by way of security assignment) unless the assignee acceded to the agreement. The option agreements themselves were not novated and the bank did not become a party to them. The option agreements created rights which were vested in the promotors (the call option) which the promotors remained entitled to exercise against the investors – and not against the bank - notwithstanding its assignment pursuant to the deed.

96. Further, whilst rights under an option agreement are, in principle, capable of being absolutely assigned, I think it is necessary to ask whether the investors' rights under these option agreements were capable of being so assigned in light of the other terms to which those agreements were subject in the deed and the related transaction documents. It is clear from *Hughes, Bexhill* and *Ardila* that whilst a statement in a deed that an assignment is absolute justifies a preliminary conclusion that this is the case, it remains necessary to examine the other provisions of the deed and related documentation to see whether the

parties intended the assignment to take effect as an absolute assignment or whether this preliminary conclusion might need to be modified. In my view, the need to engage in this exercise is even stronger in this case as the assignment which is nominally absolute is expressly subject to this proviso.

97. I note the requirement to give notice of the assignment of the material contracts under clause 3.3 and that such notice was regarded as a strong indicator of an absolute assignment in *Bexhill*. However, part of Aikens L.J.'s rationale for this conclusion was based on the standard form notice under the contract in question being more consistent with an absolute assignment than with a charge. Whilst the language used in a notice subsequently served pursuant to a contractual requirement would not normally assist in the interpretation of the contract itself, where the clause requires notice to be served in a particular form then the prescribed text of that form is itself part of the contract. Revenue argued that the language used in the notice served in this case was materially different to that used in *Bexhill* (at least as far as it is possible to tell from the judgment.)

98. In this case, the language in the notice is, again, inconsistent. On the one hand it purports to notify the promotors that the investors had assigned to the bank *"all our right, title and interest in and to the material contracts including all monies which may be payable in respect of such material contracts"*. The Appeal Commissioner regarded this as persuasive evidence of the absolute nature of the assignment. On the other hand, that statement is immediately followed by an instruction and authorisation requiring the promotors to pay the monies due under the material contracts to the bank but only following an enforcement event. This suggests that the assignment to the bank of the right to payment under the option agreement would not materialise until an enforcement event had occurred – and in this case no such enforcement event in fact occurred. It would be difficult to reconcile these two provisions if the court were looking only at the notice, but I think the

inconsistencies in the terms of the notice certainly means that the fact there was a requirement to serve a notice carries less weight than the equivalent requirement did in *Bexhill*.

99. Revenue point to a number of clauses in the deed and in the facility agreement which are inconsistent with the absolute assignment of the option agreement. For the reasons stated above, I propose to focus on those clauses which deal expressly with the option agreement although I will refer initially to one or two more general clauses which are found in the deed. Firstly, Revenue points to clause 5.1 and 6.1 of the deed as being inconsistent with the contention that the investors had absolutely assigned their rights under the option agreement to the bank, thereby divesting themselves of any continuing interest in those agreements. Under Clause 5.1 the investors warranted that they were and would remain at all time during the security period a *"lawful and beneficial owner of the secured assets"*. Under clause 6.1 the investors entered into a negative pledge not to sell, transfer, or otherwise dispose of any part of their interest in the secured asset without the prior written consent of the bank. Clearly, insofar as those clauses apply to the option agreement they are inconsistent with the notion that the investors had reassigned their rights under that agreement to the bank.

100. Whilst I agree with this in principle, clause 5.1 and clause 6.1 apply generally to all of the secured assets and not just to the option agreements or even just to the material contracts. Therefore, I am not of the view that the option agreements could not have been absolutely assigned by the deed simply by virtue of the fact that such assignment would give rise to an inconsistency under these clauses. In this context, I regard these clauses as being similar to clause 17 (release of security) in that, because they apply to all of the security created by the deed, they do not provide particular insight as to the parties' intention as regards the nature of the security created in respect of the option agreement.

101. I regard the arguments made by Revenue in relation to the facility agreement as being significantly stronger. The facility agreement and the option agreement were both entered into on the same date and clearly comprise a part of a suite of documentation which must be read together. The deed creates the security for the loan envisaged by the facility agreement and is specifically required by clause 12 of the latter. The link is also evident from clause 7 of the deed which deals with the enforcement of security (on the occurrence of an enforcement event) when the secured obligations are deemed to have become due and payable. An enforcement event is in turn defined by reference to the occurrence of an event of default and the exercise by the bank of its rights under clause 22 of the facility agreement. Even if this linkage were not so strong, I would regard the facility agreement as being very much part of the background or context within which a reasonable person would understand the terms of the deed.

102. Revenue points to a number of clauses in the facility agreement, including clause 22, as being inconsistent with the absolute assignment of the option agreement. Firstly, under the recourse provisions of clause 10, and specifically clause 10.1.2(1), the investors, as borrowers, were required to exercise their rights under the option agreement when called upon by the bank to do so pursuant to clause 22.2.3(1). Clearly, the investors could not exercise those rights if they had absolutely assigned them to the bank nor would any purpose be served by the bank calling upon the investors to exercise rights which had been absolutely assigned to it. Revenue argues that the purpose of this provision is to ensure that the investors are required to follow through with the exit mechanism from the tax shelter, as if they do not do so, they then become personally liable to the bank for the loan. In parallel, under clause 10.2 the investors undertook to co-operate with the bank in the enforcement of the security documents, which are expressly defined as including the deed over the investor's rights, title and interest in and to, *inter alia*, the option agreements. Whilst this latter

provision is undoubtedly supportive of and consistent with clause 10.1.2, as it applies to the security documents generally and not specifically and only to the option agreement, it carries less weight than does clause 10.1.2.

103. Included in the covenants under clause 21 the investors agreed to forward to the bank a copy of any notice issued by them pursuant to any of the option agreements (clause 21.1.6). Clearly, there would be no point in the inclusion of this clause if the right of the borrowers to exercise the option agreement and to issue a notice to that effect had been assigned absolutely to the bank. Similarly, a financial covenant is entered into under clause 21.9 under which the investors (and the promotors) agreed that they would exercise their rights under the option agreement *"at the earliest opportunity"* and that the proceeds would be used to repay the loan. Again, if the investors' rights under the option agreement had been absolutely assigned to the bank, this clause would be entirely superfluous. The appellant argues that these (i.e. the covenants under clause 21) are simply standard terms in an agreement of this nature. This might be so as regards the negative pledge in clause 21.4 but this is harder to see in the financial covenant under clause 21.9 where express reference is made to the investors exercising their rights under the option agreement.

104. Finally, under clause 22.2 on the occurrence of an event of default, the bank was required, prior to enforcing its security against the investors to request them to exercise their rights under the option agreement (clause 22.2.3). It was only if the investors failed to exercise their rights (or the promotors failed to comply with their obligations under the option agreement) that the bank could proceed to exercise all of its right under the security documents to which the investors were a party.

105. All of these clauses expressly refer to the option agreement in terms which make it clear that the parties' understanding was that the investors retained the right to exercise the put option and indeed created an obligation on them to do so if called upon by the bank. This

would be superfluous if the investors no longer had any rights under the option agreement and could not exercise the put option. The appellant argued that the inclusion of provisions expressly dealing with the investors' rights under the option agreement in clauses 10 and 22 of the facility agreement should be put down to human error. I do not find this to be a convincing argument. I agree with the Appeal Commissioner that these documents are not well drafted and include a number of inconsistencies. However, in my view the inclusion of at least four separate provisions dealing expressly with the exercise of rights under the option agreement by the investors shows that the parties intended that those rights would remain exercisable by them within the scheme of the loan and the security to be provided for it.

106. Therefore, the deed when read with the facility agreement, which is incorporated in it *inter alia* by virtue of the link between an *"enforcement event"* under the former and an *"event of default"* under the latter, can only be reasonably understood as meaning that the investors retained their right to exercise the put option under the option agreement and indeed the bank acquired a right to compel them to exercise this right in certain circumstances. Each of clauses 10.1.2(1), 21.1.6, 21.9 and 22.2.3 of the facility agreement expressly refers to the exercise by the investors of their rights under the option agreement. These are not provisions which apply generally to all the security created for the loan provided by the bank to the investors. They were specifically drafted to refer to the rights of the investors under the option agreement and prescribe how those rights were to be exercised and how the exercise of them by the investors could be enforced by the bank.

107. The continued entitlement of the investors to exercise these rights is inconsistent with the absolute assignment of the same rights to the bank. Therefore, I do not think that the preliminary conclusion that the investors had absolutely assigned their rights under the option agreement to the bank pursuant to clause 3.2 of the deed can be sustained when the balance of the documentation is taken into account. It is clear that the overall arrangement

between the parties to the loan was that the rights created by the option agreement would continue to subsist as between the investors and the promotors and that insofar as the bank acquired a security in relation to those rights it was primarily a right to demand that the investors exercise the put option and followed by a right to payment of the proceeds of the transaction once the put option was exercised. The arrangement did not envisage that the bank would exercise this option directly as the assignee of those rights.

108. Revenue makes some additional points in relation to the option agreement itself most notably that under clause 4.3(b) the investors were not entitled to absolutely assign their interests in the option agreement (other than by way of a security assignment) unless the transferee acceded to the agreement. In other words, novation of the option agreement would be required for any transfer by the investors other than by way of a security assignment. It is not entirely clear whether a "*security assignment*" in this context means a charge or some other form of assignment which is less than an absolute assignment. As I have not found it necessary to reach a definitive conclusion on whether s.28(6) provides for a strictly binary classification as such that a security assignment must necessarily be either an absolute assignment or a charge, I do not think it necessary to consider this aspect of the argument further.

Response to Case Stated

109. In light of the foregoing analysis, I think it fairly clear that my answer to the first question raised in the case stated is "No". I do not think that the Appeal Commissioner was correct in determining that the investors had not validly exercised the put option. Consequently, the notice served by the investors on 24 January 2014 was an enforceable contract capable of giving rise to a charge to stamp duty.

110. For the reasons previously expressed in this judgment, I am of the view that that charge to stamp duty arose under Section 31 SDCA 1999. The interest held by the investors in the property was an equitable one arising under the contract for sale which contract had not been completed. Therefore, the put option notice comprised a contract or agreement for the sale of the investors' equitable estate or interest in the 999- year lease in the hotel property under the contract for sale. Thus, it falls under s.31(1)(a) SDCA 1999.

111. The parties are agreed that question 2 should be answered positively so the answer to that question is "Yes".

112. In light of the conclusion I have reached on question 1, I do not think it is necessary to formally answer question 4. This question arose in the context of the Appeal Commissioner's conclusion that the transaction was chargeable to stamp duty under s.31A(1) on the basis of an agreement in aggregate comprising the combined inter-dependant set of agreements represented in the transaction documents and including the 2006 option agreement and the 2013 facility agreement and deed. That conclusion was the subject of question 3. The parties are agreed that the Appeal Commissioner erred in this conclusion so the answer to question 3 must necessarily be "No".

113. That leaves question 4 which essentially queries whether the conditions in s.31A(1)(b) which must be met before a contract otherwise coming within s.31A(1)(a) is chargeable to stamp duty have been satisfied in this case. The particular issue concerns the fact that the consideration ultimately paid for the return of the investors' rights in the property was alleged to be slightly lower than that provided for under the option agreement. For the resting in contract provisions of s.31A to apply, at least 25% of the purchase price must have been paid "*pursuant to the contract*". The appellant argued that as the final price was different to that provided in the option agreement, it could not have been paid pursuant to it. The Appeal

Commissioner found the difference to be minimal and the price paid to have been "identical in all material respects".

114. The option agreement does not set out a final price for the resale of the investors' rights under the contract for sale to them of a 999-year lease; rather it sets out the mechanism through which that price is to be calculated. I have set out above my view that the auditor's letter sent to the promoters by the investor's solicitor on 31st January 2014 did not satisfy the provisions of clause 2.4(a)(viii) of the option agreement in that it did not either purport to or actually certify the amount of costs, charges and expenses incurred by the investors in exercising the put option. Apart from the appellant's evidence that he was dissatisfied with the amount claimed for professional fees, there was no other evidence as to how agreement was ultimately reached on the amount which was actually paid. Therefore, I think it would be difficult in principle to hold that the amount paid was not paid pursuant to the contract – and the onus of proof before the Appeal Commissioner lay on the appellant.

115. In any event my views in this regard are necessarily *obiter*. The contract to which the Appeal Commissioner applied his reasoning as regards payment of the purchase price was the "*agreement in aggregate*" and both parties agree it was a legal error for him to have treated the combination of the 2006 option agreement and 2013 facility agreement and deed as a stampable instrument. Given the conclusion I have reached on question 1 and the applicability of s.31(1)(a) to the put option notice, there is no basis for also considering the agreement to have rested in contract under s.31A(1) and consequently for addressing the requirements of s.31A(1)(b). If it were necessary to do so I would probably have answered "Yes" to question 4 although for different reasons to those set out by the Appeal Commissioner.