Neutral Citation: [2024] UKFTT 00116 (TC)

Case Number: TC09058

FIRST-TIER TRIBUNAL
TAX CHAMBER

Taylor House

Appeal reference: TC/2021/11164

CAPITAL GAINS TAX – disposal of a property which had been beneficially owned by the Appellant's trustee in bankruptcy for some part of the period between the Appellant's initial acquisition and completion of the disposal of the property – whether Section 66 of the Taxation of Chargeable Gains Act 1992 applied to deem the property to have been held by the Appellant throughout the period in which beneficial ownership of the property was vested in the trustee in bankruptcy – yes – whether the Respondents were estopped from assessing the Appellant to capital gains tax on that basis because of representations made by the Respondents during the course of the dispute – no – assessment upheld and appeal dismissed

Heard on: 12 JANUARY 2024
Judgment date: 26 JANUARY 2024

Before

TRIBUNAL JUDGE TONY BEARE
MR MOHAMMED FAROOQ

Between

EDWARD NEWFIELD

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

The Appellant represented himself

Mr Max Simpson, litigator of HM Revenue and Customs' Solicitor's Office, represented the Respondents

DECISION

INTRODUCTION

1. This decision relates to an appeal against a discovery assessment to capital gains tax which was made by the Respondents on 23 October 2020 in relation to the disposal by the Appellant of land at Torrington Grove, London N12 9NA forming part of title number NGL752341 (the "Property") in the tax year ended 5 April 2017. The assessment in question is in the amount of £26,305.50.

BACKGROUND AND FACTS

2. Most of the facts which are relevant to this dispute are recorded in the documents comprising the bundle for the hearing of the appeal.

3. They are as follows:

(1) on 31 July 1997, the Appellant inherited the Property from his mother;

(2) on 21 February 2000, the Appellant was made bankrupt and beneficial ownership of the Property vested in Mr James Earp, a partner of Grant Thornton UK LLP ("GT") as his trustee in bankruptcy;

(3) on 21 February 2003, the Appellant was discharged from bankruptcy and a certificate to that effect was issued by Canterbury County Court;

(4) on 14 August 2006, the Appellant wrote to GT enclosing office copy entries for the Property which showed that the Property was subject to bankruptcy-related restrictions. The letter itself was not provided to us but it is apparent from the response to it – see paragraph 3(5) below – that, in that letter, the Appellant threatened the trustee in bankruptcy with court proceedings in the event that the relevant restrictions were not removed;

(5) on 17 August 2006, DLA Piper Rudnick Gray Cary UK LLP ("DLA"), as solicitors for GT, wrote to the Appellant. In that letter, DLA referred to the Appellant's letter dated 14 August 2006 and said as follows:

(a) the bankruptcy-related entries in the registered title for the Property had not been lodged by the trustee in bankruptcy. Instead, those entries:

(i) were automatically placed on the register by HM Land Registry as soon as a bankruptcy petition was issued and could not be removed by the trustee in bankruptcy; and

(ii) would be automatically overreached and removed from the register should the Property ever be transferred to a new proprietor;

(b) alternatively, if the Appellant wished to remove those restrictions now, he would need to apply to HM Land Registry to that effect using form K11 and, when doing so, he would need to send with his application a copy of the deed of settlement and a copy of the certificate of discharge, if available; and

(c) it was entirely inappropriate for the Appellant to be threatening the trustee in bankruptcy with court proceedings. Not only was the removal of the restrictions not the trustee in bankruptcy's responsibility but the trustee in bankruptcy had now been removed from his office and had no authority to assist the Appellant;

(6) on 4 May 2016, in consideration for the sum of £1, the Appellant granted an option to a company called Choiceplace Properties Limited ("CPL") to purchase the Property for the sum of £215,000;

(7) on 28 September 2016, CPL exercised the option;

(8) on 10 October 2016, the Appellant made an application to HM Land Registry to remove the bankruptcy-related entries from the registered title for the Property. A copy of that application was not provided to us but it would seem from the content of HM Land Registry's letter of 1 November 2016 in response to the application – see paragraph 3(9) below - that, in the application, the Appellant made reference to the Property's being held in trust and also enclosed a copy of the letter from DLA referred to in paragraph 3(5) above;

(9) on 26 October 2016, HM Land Registry wrote to the Appellant to say that, in order to achieve the objective of removing the bankruptcy-related restrictions in circumstances where the bankruptcy had not been annulled or rescinded, he would need to provide:

(a) a transfer in Form TR1 executed by the trustee in bankruptcy;

(b) a certified copy of the bankruptcy order;

(c) a certified copy of the certificate of appointment of the trustee in bankruptcy; and

(d) form AP1;

(10) on 1 November 2016, HM Land Registry wrote to the Appellant to say that it was writing further to its letter of 26 October 2016, the Appellant's emailed response of 28 October 2016 and its reply by email of earlier that day. (Neither of the latter two documents was provided to us). In its letter, HM Land Registry said that:

(a) it had not received the trust deed (or a copy of the trust deed) which had been referred to by the Appellant in his application of 10 October 2016;

(b) in any event, there was no indication on the registered title for the Property that, at the time when the Appellant had been made bankrupt, the Property was held subject to any trust;

(c) where a property was held subject to a trust, then it was a statutory requirement that a restriction be entered in the register to the effect that no disposition by a sole proprietor of the registered estate (apart from a trust corporation) under which capital money arises is to be registered unless authorised by an order of court and that this was to ensure that only two trustees could give a valid receipt for capital monies received on a sale of the relevant property;

(d) the bankruptcy-related restrictions which appeared on the registered title for the Property had been entered automatically at the time of the Appellant's bankruptcy and notice to that effect would have been sent to the Appellant at that time;

(e) where a person was the sole legal and beneficial owner of a property:

(i) the effect of that person's bankruptcy was automatically to vest legal and beneficial ownership of the property in the trustee in the bankruptcy; and

(ii) the subsequent discharge of the person from bankruptcy had no bearing on the legal ownership of the property and that legal ownership could be returned to the bankrupt only by the execution of a TR1 by the trustee in bankruptcy;

(f) in contrast, where a property was held on trust, the bankruptcy of the person holding the legal title on the register did not result in the automatic vesting of the

legal title to the property in the trustee in bankruptcy and therefore the bankruptcy restrictions on the title could be cancelled without the execution of a TR1;

(g) however, as previously stated, in this case there was no evidence to the effect that the Property had been held on trust at the time of the Appellant's bankruptcy and the Appellant would need to submit a copy of the relevant trust deed in order to progress his application;

(h) alternatively, noting that the letter from DLA had referred to a "deed of settlement", if this was not the trust deed, then the Appellant should submit a copy of that document as well;

(i) if HM Land Registry were subsequently to accept that the Property had been held on trust prior to the Appellant's bankruptcy, then it would both:

(i) remove the bankruptcy-related restrictions on the registered title for the Property; and

(ii) enter on the registered title for the Property the trust restriction referred to in paragraph 3(10)(c) above; and

(j) those things did not need to delay completion of the transfer of the Property by the Appellant to his proposed purchaser because he would merely need to appoint a second person to act as trustee with him and that appointment could be included in the transfer to the proposed purchaser;

(11) on 7 November 2016, HM Land Registry wrote to the Appellant to inform him that his application had been completed and enclosing an official copy of the updated register. The official copy of the updated register which was enclosed with that letter was not provided to us. However, we were provided with an official copy of the registered title for the retained land out of which the Property had been transferred dated 5 August 2022 which showed that, as of 10 October 2016, the aggregate of the retained land and the Property had been made subject to the trust restriction to which reference was made by HM Land Registry in its letter of 1 November 2016 (see paragraph 3(10)(c) above);

(12) on or around 10 November 2016, the Appellant completed the sale of the Property to CPL for £215,000. A copy of the document of transfer was not provided to us. However, in his evidence, the Appellant said that it had been executed by him and his wife as co-trustee of the Property;

(13) on 24 January 2018, the Appellant filed his self-assessment tax return for the tax year ending 5 April 2017. In that tax return, the Appellant did not declare any capital gain in respect of his disposal of the Property;

(14) on 16 April 2019, Officer Terry Cussons of the Respondents opened an enquiry in relation to the tax return and sought information from the Appellant in relation to, inter alia, any disposals of land and property during the tax year in question;

(15) on 7 May 2019, Mr John Crowder, the representative of the Appellant, forwarded to Officer Cussons an email to Mr Crowder from the Appellant saying that, assuming that the Respondents were referring to the disposal of the Property in their enquiry:

(a) he did not have the ability to sell the Property until late 2016 "as the title had previously been locked into bankruptcy restrictions";

(b) the land had been sold at its acquisition value and indeed at a loss as he had had to deduct estate agents and other fees from the sale price; and

(c) he had not mentioned the disposal in his tax return as there had been no income or gain derived from it;

(16) on 6 June 2019, as the Appellant had not provided the information referred to in paragraph 3(14) above, Officer Cussons issued a notice to the Appellant under Schedule 36 of the Finance Act 2008 ("Schedule 36") requiring the production of that information;

(17) on 11 June 2019, the Appellant wrote to Officer Cussons to say that he wished to appeal against the Schedule 36 notice and that the notice was unsigned and therefore invalid;

(18) on 17 June 2019, Officer Cussons issued his response to that appeal. He said that:

(a) whilst he had agreed with Mr Crowder that there was no need for the Appellant to have included the disposal of the Property in his tax return for the relevant tax year if the disposal had given rise to a loss, that assertion would need to be supported by evidence and, since he had been unable to contact Mr Crowder following his initial call, he had issued the notice to the Appellant in order to obtain the relevant documents;

(b) the documents requested were reasonably required to check the Appellant's assertion that no chargeable gain had arisen on the disposal;

(c) if one property disposal had not been properly recorded in the Appellant's tax return, then there was a reasonable concern that there might be others;

(d) there was no statutory requirement for a notice under Schedule 36 to be subject to a wet signature in order to be valid. A notice with an electronic signature was valid; and

(e) the Appellant's appeal was therefore rejected although he would extend the deadline for the production of the documents requested until 17 July 2019;

(19) on 9 July 2019, the Appellant wrote to Officer Cussons to say that:

(a) the position was "quite clear in law" and he was content to clarify it for the officer;

(b) he had made no dispositions of property other than the Property in the tax year ending 5 April 2017;

(c) the Property had been registered in his name on the death of his mother;

(d) the Property had become vested beneficially in his trustee in bankruptcy when he became bankrupt in 2000;

(e) although the trustee in bankruptcy later affirmed that it was not interested in the land, "it was not released from the bankruptcy charge, and vested in myself and a co trustee until November 2016";

(f) there was an option to buy the Property in May 2016 "and the value was calculated from that date";

(g) the sale could not proceed until the Property "was vested in myself and my co trustee and that in law was the date of acquisition";

(h) there was no increase in the value of the Property from May 2016 until November 2016;

(i) there was a loss arising on the disposal as a result of, inter alia, estate agents' fees and other disbursements; and

(j) he had all the documents to prove the above including the definitive statement of the law from HM Land Registry and could provide copies if required;

(20) on 15 July 2019, the Appellant wrote again to Officer Cussons to say that, as the officer had failed to respond to his letter of 9 July 2019, he was enclosing an additional copy of that letter along with a copy of the notice of option exercise, the letter from HM Land Registry of 7 November 2016 (see paragraph 3(11) above) and an invoice from the estate agent involved in the sale of the Property;

(21) on 29 July 2019, the Valuations Office Agency issued a decision valuing the Property as having a market value on 31 July 1997 of £55,000. (The Appellant has never disputed this figure);

(22) on 31 July 2019, Officer Cussons wrote to the Appellant to:

(a) say that, although the Property had been controlled by the trustee in bankruptcy from 2000, the Appellant remained the beneficial owner of the Property throughout and so was liable for capital gains tax on any chargeable gain arising from the date when the Appellant had acquired it from his mother until the date of disposal;

(b) ask the Appellant to confirm the date when he had acquired the Property;

(c) inform the Appellant that, as he had acquired the Property from a person with whom he was connected under Section 18 of the Taxation of Chargeable Gains Act 1992 (the "TCGA"), his acquisition price would be deemed to be market value;

(d) ask the Appellant whether he had had the Property valued as at the date of acquisition and, if so, to provide a copy of the valuation; and

(e) request a copy of the option agreement between the Appellant and CPL;

(23) on 5 August 2019, the Appellant wrote to Officer Cussons to say that:

(a) as he had previously stated, in a bankruptcy, beneficial ownership passed to the trustee in bankruptcy;

(b) this had been confirmed by HM Land Registry;

(c) the Property had not been vested in him as beneficial owner until November 2016;

(d) he was therefore not liable to capital gains tax in respect of his disposal of the Property;

(e) he was finding the correspondence stressful and worrying and Officer Cussons was bound as a public servant to accept the law as clearly stated; and

(f) he did not have a copy of the option agreement but the officer might be able to obtain one from CPL although the option agreement was irrelevant to the case;

(24) on 30 August 2019, Officer Cussons wrote to the Appellant. A copy of this letter was not provided to us but, from the terms of Officer Cussons's subsequent letter of 14 October 2019 – see paragraph 3(26) below – we infer that, in that letter, Officer Cussons:

(a) reiterated that he considered that the Appellant had remained the beneficial owner of the Property throughout the period from 31 July 1997 until the Appellant's disposal of the Property in 2016;

(b) sought further information from the Appellant including:

(i) when the bankruptcy was discharged;

(ii) when the trustee in bankruptcy had advised that he was no longer interested in the land;

(iii) why there had been a delay in vesting the Property in the Appellant;

(iv) why the Property had been vested in the Appellant and a co trustee; and

(v) why the Appellant had entered into an agreement to sell land that he did not believe he owned; and

(c) sought a copy of the option agreement between the Appellant and CPL and the HM Land Registry documentation;

(25) on 10 September 2019, the Appellant wrote to the Respondents to say that:

(a) he had assumed that officers of the Respondents were employed to fairly ascertain whether tax liabilities arose on the evidence provided but instead the officers of the Respondents in this case "appear to have adopted a closed mind, and determination to justify [their] false belief by any means possible";

(b) he wished to reiterate that a bankrupt could not remain the beneficial owner of his property as that would fly in the face of insolvency law and practice;

(c) he was not liable to capital gains tax in respect of his disposal of the Property because he was not beneficial owner of the Property between the date of his bankruptcy and shortly before his disposal of the Property pursuant to the option agreement;

(d) the Respondents were acting "disingenuously", were "simply engaged in a "fishing" expedition to try and find a loophole in the law" and were "also acting fragrantly [sic] in breach of Article 8 of the Human Rights Act"; and

(e) the Respondents' actions had not helped his state of health and "[any] further ill advised and illegal demands will be met by an application for an injunction with damages and costs";

(26) on 14 October 2019, Officer Cussons wrote to the Appellant to:

(a) apologise for the deleterious impact on the Appellant's health caused by the ongoing enquiry and to suggest that, in order to reduce the stress for the Appellant, he could communicate for the most part with the Appellant's representative;

(b) explain that he was seeking to quantify the capital gain which had arisen to the Appellant in respect of his disposal of the Property and to repeat the Respondents' request for a copy of the option agreement;

(c) say that he did not agree with the Appellant's characterisation of his actions;

(d) explain the reasons for the requests which he had made in his letter of 30 August 2019. The explanations focused largely on the need for the Respondents to understand why it had taken as long as it had after the Appellant's bankruptcy for the Property to be re-vested in the Appellant but Officer Cussons also wished to understand the reasons for the involvement of a co-trustee and to ascertain whether the co-trustee had a beneficial interest in the Property;

(e) say that, as regards the Appellant's argument that he was not the beneficial owner of the Property until shortly before the disposal in November 2016, Section 66 of the TCGA had the effect of disregarding changes in beneficial ownership

resulting from bankruptcy and therefore the Appellant remained the beneficial owner of the Property throughout the period from 31 July 1997 until November 2016;

(f) say that, upon further reflection, to expedite the check, he would be happy to restrict his outstanding requests to a copy of the option agreement as that had the most significant effect for capital gains tax purposes; and

(g) ask for the Appellant's written authority for him to approach CPL to obtain a copy of the option agreement if the Appellant was still unable to locate a copy of that document;

(27) on 1 November 2019, the Appellant wrote to Officer Cussons to say that:

(a) he had found a copy of most of the option agreement and was enclosing the relevant pages of that agreement, along with a copy of the document recording his discharge from bankruptcy;

(b) Section 66 of the TCGA applied only "to a situation where there is a capital gains tax liability prior to the bankruptcy" and, as there was no capital gain in this case, it was irrelevant;

(c) the Property had not been returned to him earlier than it was because no application had been made;

(d) the co-trustee had been appointed on the instructions of HM Land Registry and had no beneficial interest in the Property;

(e) he had entered into the option agreement because the Property was not vested in him at the time but the Property had vested in him subsequent to the execution of the option agreement and before completion of the sale; and

(f) he would not enter into further correspondence on the matter due, inter alia, to his health;

(28) on 14 February 2020, Officer Cussons wrote to the Appellant to set out the Respondents' view on the position and to ask for further information. In that letter, Officer Cussons summarised the facts as the Respondents understood them and then referred to the fact that Section 66 of the TCGA provided for transfers to and from a trustee in bankruptcy to be disregarded for the purposes of capital gains tax. The letter went on as follows:

"**Way forward**

When the option was exercised there was a disposal of an asset for consideration of £215,000 (the sale price) + £1 (the grant of option). The cost of acquiring the asset is allowable against the consideration along with any other reliefs you are entitled to. There is a capital gain but who is liable to the capital gains tax?

Ownership of an asset can be legal or beneficial. Capital gains liability is due upon the beneficial ownership not the legal ownership of the disposed asset.

Based upon the option agreement supplied it suggests that you were the beneficial owner of the land. The question is that at the time of the granting of the option in what capacity was the person holding the land acting?

To resolve the matter of who is liable to the capital gain it would be helpful to ask the trustee some questions: why the land remained vested with them after the discharge of the bankruptcy until 7 November 2016; on what basis was the land held by them during

this period; did they ever become the beneficial owner of the land; was the land vested back to you and co-trustee and why.

Please supply me with the name and address of the trustee in bankruptcy. To facilitate a quick response from the trustee please complete the enclosed authority to discuss the holding of the land. I will forward a copy of it to the trustee with my questions";

(29) on 13 March 2020, as Officer Cussons had received no reply to his letter of 14 February 2020, he issued a second notice under Schedule 36 to the Appellant, requiring the Appellant to provide the name and address of the trustee in bankruptcy who had held the Property from 2000 to 7 November 2016;

(30) on 1 April 2020, the Appellant wrote to the Respondents to say that:

(a) it appeared that the Respondents had failed to read or understand his letter of 1 November 2019;

(b) a delay of nearly four months in dealing with the matter was unacceptable;

(c) he had already complied with all legitimate requests for information and the definitive legal position had already been pointed out to the officer in the clearest possible terms;

(d) if the officer had received contrary advice, which he doubted, the officer was required to forward the details of the source and substance of the advice;

(e) he did not know the name or address of the trustee in bankruptcy and that was his definitive reply; and

(f) he wished to appeal against the Schedule 36 notice;

(31) on 20 October 2020, following a temporary hold in the enquiry because of the pandemic, Officer Mohammed Dawood of the Respondents wrote to the Appellant to say that:

(a) the enquiry was resuming;

(b) he had taken over responsibility for the enquiry from Officer Cussons;

(c) the Respondents' view was that the chargeable gain arising in respect of the disposal of the Property was £156,130 made up of consideration of £215,000 minus allowable expenditure of £58,870 and that the Appellant was liable to capital gains tax of £26,308.50 as a result of that chargeable gain;

(d) interest would be payable in respect of the outstanding tax; and

(e) given the Appellant's circumstances, he did not propose to charge a penalty in respect of the disposal;

(32) on 23 October 2020, the Respondents issued the assessment which is the subject of this decision;

(33) on 2 November 2020, the Appellant notified the Respondents of his appeal against the assessment saying that "the law states that capital gains tax is payable between the date of acquisition and the date of sale or transfer" and that, as the Property had not vested in him until a few days before the disposal in November 2016, there was no capital gain. He asked the Respondents to explain why in their view HM Land Registry was wrong in law and to let him know whether they had taken any legal advice;

(34) on 23 November 2020, Officer Dawood wrote to the Appellant to:

(a) acknowledge the Appellant's appeal;

(b) explain that the Respondents had not taken formal legal advice because the case had been reviewed by capital gains technical specialist officers;

(c) say that, because of Section 66 of the TCGA, despite the fact that the Property had not been vested in the Appellant until shortly before the sale, the Appellant was deemed to be the beneficial owner of the Property throughout the period that it was vested in the trustee in bankruptcy; and

(d) offer the Appellant alternative dispute resolution or a review or a right to notify the First-tier Tribunal (the "FTT") of his appeal against the assessment;

(35) on 7 December 2020, the Appellant wrote to Officer Dawood to:

(a) reiterate that the point which the Respondents were failing to grasp was that, because of the bankruptcy rules, he had not been the beneficial owner of the Property until shortly before the disposal; and

(b) accept the Respondents' offer of a review;

(36) on 15 December 2020, the Appellant wrote to the Respondents to complain about the Respondents' conduct in relation to the dispute. The letter of complaint was not provided to us but we infer from the terms of Officer Ball's response to the complaint of 26 February 2021 – see paragraph 3(37) below - that the Appellant stated that the capital gains tax had been illegally assessed and was substantially different from the amount set out in the correspondence with Officer Dawood and the Respondents had demanded payment of the tax while the appeal against the assessment was pending;

(37) on 26 February 2021, Officer Ball of the Respondents wrote to the Appellant in response to the Appellant's complaint of 15 December 2020. In that letter, Officer Ball:

(a) began by saying that "my role as a complaints officer is to investigate the service you have received rather than to intervene in any ongoing tax dispute";

(b) went on to say that "our complaints procedure is not an alternative to appeal: regardless of whether a customer exercises their appeal rights, we will not consider appealable matters under our complaints policy";

(c) said that, having looked into the circumstances surrounding the points made in the Appellant's letter, he was unable to uphold the Appellant's complaint and that he would set out his findings and reasoning in the letter;

(d) then said the following:

"**My consideration**

I have looked at our record of actions and all correspondence in this matter. Our enquiry officer's view was summarised in his letter of 14 February 2020. He sought the relevant guidance applicable to the situation and identified the information he believed would settle the issue. In short, we needed evidence that the trustee in bankruptcy held the beneficial ownership during the bankruptcy period. He needed to satisfy this point before the case could be closed. As we have not received the information, we have made an assessment. I find that our enquiry officer has carried out the enquiry as I would have expected, and within our guidance. In short, we needed evidence that the trustee in bankruptcy held the beneficial ownership during the bankruptcy period. He needed to satisfy this point before the case could be closed";

(e) said that, as the Appellant had not previously requested postponement of the tax pending the outcome of his appeal, the Respondents had not taken steps to do so but that, now that he had made that request, the Respondents had agreed to do so; and

(f) confirmed that, as he had not established that the Respondents had made any mistakes in the handling of the compliance check, he would not uphold the Appellant's complaint but that, should the Appellant wish the complaint to be considered by another complaints handler, he had the right to do so because the Respondents operated a two-tier complaints system;

(38) on 19 March 2021, the Appellant wrote to Officer Ball to say, inter alia, that, as he had already demonstrated clearly that the beneficial ownership of the Property had passed to the Trustee, "I agree with your decision that the case should have been closed". He then said that GT appeared to have erased its records but clearly he had been made bankrupt and the Property had vested in his trustee in bankruptcy;

(39) on 12 April 2021, Officer Dawood wrote to the Appellant in relation to the Appellant's letter of 19 March 2021. In that letter, Officer Dawood said that:

(a) with regard to the aspects of the matter that related to the complaint decision, his colleagues from the complaints team would contact the Appellant separately; and

(b) with regard to the enquiry, the case was effectively on hold until the reviewing officer had made his decision and that, in the meantime, if the Appellant wished to provide any further evidence to support his legal position, he could do so;

(40) on 16 April 2021, Officer Nicola Johnson of the Respondents issued the review conclusion letter, which upheld the assessment. In the course of the letter, Officer Johnson:

(a) said that the Respondents had been unable to find any legislation to support the proposition that, as a matter of general law, beneficial ownership of a bankrupt's assets passed to his trustee in bankruptcy;

(b) noted that the Respondents had asked for details of the trustee in bankruptcy in Officer Cussons's letter of 14 February 2020 and these had not been provided by the Appellant;

(c) made it clear that, in reaching their conclusion, the Respondents were relying on Section 66 of the TCGA as establishing that the Appellant was deemed to remain the beneficial owner of the Property for the purposes of capital gains tax throughout the bankruptcy period; and

(d) notified the Appellant that, whereas the normal period for giving notice of appeal to the FTT was thirty days following receipt of the review letter, the Respondents would not object to a late appeal made within three months of the usual deadline date because of the impact of Covid -19;

(41) on 4 May 2021, the Appellant wrote to Officer Johnson in response to the review conclusion letter and said that:

(a) he would be appealing against what he referred to as the "flawed finding";

(b) he would give the Respondents one further opportunity to withdraw the assessment;

(c) in the light of the Respondents' letter of 26 February 2021, the Respondents were estopped from pursuing the assessment because the only missing piece of information required in order to close the matter was the name of the trustee in bankruptcy and this had now been supplied;

(d) all that remained was for the Respondents to clarify the position with GT and HM Land Registry, whose finding was in direct contrast to the Respondents', to conclude the matter; and

(e) the trustee in bankruptcy had remained the beneficial owner of the Property until shortly before the disposal of the Property;

(42) on the same day, the Appellant wrote to Officer Dawood enclosing a copy of his letter of the same date to Officer Johnson. In that letter:

(a) he said that it was clear from Officer Ball's letter of 26 February 2021 that the only outstanding point the Respondents required to close the case was the details of the trustee in bankruptcy;

(b) he said that he had confirmed in his letter of 19 March 2021 that the trustee in bankruptcy was GT but that the Respondents appeared to have ignored this information;

(c) he said that the further evidence to which Officer Dawood had referred in his letter of 12 April 2021 was the name of the trustee in bankruptcy; and

(d) he repeated that this was GT and that this was the only outstanding information requested by Officer Cussons before his departure; and

(e) he asked Officer Dawood to confirm that, in the circumstances, the matter was now closed;

(43) on 12 May 2021, Officer Dawood wrote to the Appellant to say that:

(a) he apologised for the fact that Officer Johnson had not been made aware of the Appellant's letter of 12 March 2021 – by which we believe Officer Dawood meant 19 March 2021;

(b) the terms of Officer Ball's letter of 26 February 2021 did not estop the Respondents from pursuing the assessment because the Respondents required further information from the trustee in bankruptcy before the matter could be closed, as noted in Officer Cussons's letter of 14 February 2020; and

(c) in order to get that information, he needed the Appellant to provide the contact details and a reference number at GT and the Appellant's authority to contact GT;

(44) on 25 May 2021, the Appellant wrote to Officer Dawood:

(a) to provide some of the information requested, including the name of the trustee in bankruptcy (a Mr James Earp), and his authority for the Respondents to contact GT;

(b) to threaten the Respondents with judicial review unless the findings made in the review conclusion letter were not set aside for the moment; and

(c) to reiterate that the Property was not vested in him until a few days before completion of the disposal to CPL;

(45) on 3 June 2021, Officer S Naik of the Respondents wrote to the Appellant to say that:

(a) she was considering the Appellant's complaint as part of the Respondents' two-tier complaints process;

(b) she was unable to become involved in any matter involving assessments and her role was limited to considering whether the Respondents had followed their internal guidelines and policies correctly;

(c) she was unable to uphold the Appellant's complaint because the Respondents had complied at all times with the legislation relating to the making of assessments, the postponement of tax and the accrual of interest;

(d) in their letter of 14 February 2020, the Respondents had asked the Appellant to provide contact details for the trustee in bankruptcy and an authority for the Respondents to contact GT and the Appellant had not done so until three months after Officer Johnson's review had commenced; and

(e) in his letter of 12 May 2021, Officer Dawood had already apologised for not forwarding the Appellant's letter of 19 March 2021 to Officer Johnson and, in any event, that letter had not provided the new or detailed information requested by Officer Dawood – by which we think she meant Officer Ball - in his letter of 26 April 2021 and had been sent to the Respondents' complaints team and not to Officer Dawood;

(46) on 15 June 2021, Officer Dawood wrote to GT to enquire as to the location of the beneficial ownership of the Property between the date on which the Appellant was discharged from bankruptcy in 2003 and 7 November 2016 and, in particular, the basis on which the trustee in bankruptcy had held the Property during that period and whether and why the Property had been re-vested in the Appellant and the co-trustee;

(47) on the same day, Officer Dawood wrote to the Appellant to say that he had now written to GT and that, depending on the information which was provided to him by GT, the Respondents would make a final decision about their view of the matter and inform him about the process available to him if he disagreed with it;

(48) on 6 July 2021, GT wrote to Officer Dawood to say that, whereas the trustee in bankruptcy would normally have continued to hold the beneficial interest in the Property following the Appellant's discharge from the personal restrictions of bankruptcy, as the Property would have continued to form part of the Appellant's bankruptcy estate, a settlement had been reached with the Appellant in early 2005 pursuant to which the interest of the trustee in bankruptcy in a number of assets including the Property was either assigned to the Appellant and another individual – whom we were led to believe at the hearing was the Appellant's then-wife - or waived and that, consequently, following that settlement, the trustee in bankruptcy had had no further interest in the Property;

(49) on 6 August 2021, Officer Dawood wrote to GT to ask why the Property had remained vested in the Appellant's bankruptcy estate for so long after he had been discharged from the restrictions of bankruptcy and why, absent the settlement referred to in GT's letter of 6 July 2021, the Property would have remained vested in the trustee in bankruptcy;

(50) on the same day, GT wrote to Officer Dawood to explain that a person's bankruptcy estate was different from the restrictions which were applicable to the bankrupt as a result

of the bankruptcy and that the bankruptcy estate continued in perpetuity even after the bankruptcy restrictions were lifted so that, absent the settlement referred to in GT's earlier letter, the Property would have remained vested in the trustee in bankruptcy in perpetuity;

(51) on 12 August 2021, Officer Dawood wrote to the Appellant:

(a) to convey the substance of the information which had been provided to him by GT in its letter of 6 July 2021 and its email of 6 August 2021;

(b) to say that this information did not change the Respondents' view of the matter from that set out in the Respondents' review conclusion letter of 16 April 2021 because Section 66 of the TCGA meant that, even if beneficial ownership of an asset vested in the bankrupt's trustee in bankruptcy, it was deemed to remain with the bankrupt for capital gains tax purposes; and

(c) to say that, if the Appellant wished to appeal against that conclusion, he must do so within thirty days of the date of Officer Dawood's letter;

(52) on 20 August 2021, the Appellant wrote to Officer Dawood to say that:

(a) no settlement of the kind suggested by GT had ever been executed and that this could be shown by the fact that HM Land Registry had confirmed over a number of years that the bankruptcy notice could not be released until shortly before completion of the disposal of the Property by the Appellant; and

(b) in any event, even if the Property had re-vested in the Appellant in 2005 as GT had suggested, the market value of the Property at that time was in fact greater than the disposal proceeds received in November 2017 and therefore no capital gains tax was payable in any event;

(53) on 2 September 2021, Officer Dawood wrote to the Appellant to say that, regardless of when the beneficial ownership of the Property had reverted to the Appellant – whether under the settlement to which GT had referred or only shortly before the disposal of the Property - the effect of Section 66 of the TCGA was that the Property was deemed to be owned by the Appellant throughout the period from his acquisition of the Property on 31 July 1997 until his disposal of the Property to CPL. Accordingly, the Respondents' view of the matter had not changed and, if the Appellant wished to appeal against that conclusion, he must do so within thirty days of the date of Officer Dawood's letter; and

(54) on 9 September 2021, the Appellant notified the FTT by post that he wished to appeal against the assessment. In his notification, the Appellant said that he had made earlier attempts to notify the FTT of his appeal digitally.

GROUNDS OF APPEAL

4. Against that background, the Appellant has appealed against the assessment to capital gains tax on two grounds.

5. The first is based on his belief that he should be liable to capital gains tax in respect of his disposal of the Property only on any increase in value arising while he was the beneficial owner of the Property. Relying on that belief, he says that the Property did not increase in value between the time when he re-acquired beneficial ownership of the Property following his bankruptcy (which was only shortly before the date of disposal) and the date of the disposal and that therefore there is no gain on which he should be liable to capital gains tax. In the rest of this decision, we will refer to this ground of appeal as the "Legislative Issue".

6. The second is that, even if he is wrong in relation to the Legislative Issue, the Respondents are estopped from assessing him to capital gains tax on the gain arising in respect of the Property because of certain assurances which the Respondents gave to him in the course of their extensive correspondence on this question – namely, statements which were made by Officer Cussons in his letter of 14 February 2020 and Officer Ball in his letter of 26 February 2021. In the rest of this decision, we will refer to this ground of appeal as the "Estoppel Issue". It is because of the Estoppel Issue that we have summarised the correspondence which passed between the parties in the course of the dispute as extensively as we have.

OUR CONCLUSIONS IN RELATION TO BENEFICIAL OWNERSHIP AS A MATTER OF GENERAL LAW

7. Before we turn to consider those two tax issues, we think that it is important to start our analysis in this case by setting out our conclusions in relation to the question of beneficial ownership of the Property as a matter of general law. In the preceding sentence:

> (1) by "beneficial ownership" of the Property, we mean the right to deal with the Property as owner in equity regardless of the location of the legal title to the Property and thus as distinct from the concept of legal ownership, which, in the case of registered land such as the Property, is determined solely by reference to the proprietorship register on the registered title for the Property at HM Land Registry; and
>
> (2) by "general law", we mean the law of England and Wales before taking into account any deeming that might be required for tax purposes by the applicable UK tax legislation.

8. It is common ground that, immediately before his bankruptcy commenced, the Appellant was the sole beneficial owner of the Property as a matter of general law. That has never been in dispute.

9. However, there has been some dispute over whether the Appellant remained the beneficial owner of the Property as a matter of general law once the bankruptcy commenced. In that regard, we agree with the Appellant that, as a matter of general law, the Appellant's bankruptcy would have resulted in the automatic loss of beneficial ownership by the Appellant of the Appellant's assets, including the Property, by virtue of Section 306 of the Insolvency Act 1986. Those assets became part of the bankruptcy estate automatically so that the trustee in bankruptcy would be able to deal with the assets freely in the course of the bankruptcy.

10. The precise location of the beneficial ownership of the Property as a matter of general law from time to time following the Appellant's discharge from bankruptcy is not entirely clear. The only thing that we can say for certain is that, at the point when the Appellant finally completed his disposal of the Property in November 2016, he was the sole beneficial owner of the Property as a matter of general law. We say that because the Appellant candidly accepted at the hearing that he had received the sale proceeds for the Property from CPL on his own account and that CPL had acquired beneficial ownership of the Property as a matter of general law as a result of completion. Moreover, the trustee in bankruptcy did not play any role in the disposal to CPL, which means that the Property clearly did not form part of the bankruptcy estate at that time.

11. At the start of the hearing, we asked the parties to confirm that the conclusion set out in paragraph 10 above was common ground – confidently expecting an affirmative answer from both parties - and were somewhat taken aback when the Appellant sought initially to deny that he agreed with it, saying that beneficial ownership of the Property as a matter of general law had never re-vested in him. Our surprise stemmed from the fact that the correspondence summarised in paragraph 3 above is replete with instances where the Appellant clearly accepted that that re-vesting had occurred by the time that he completed the disposal – see, for example,

the Appellant's letters of 9 July 2019, 5 August 2019, 10 September 2019, 1 November 2019, 2 November 2020, 7 December 2020 and 25 May 2021.

12. We believe that, during the course of the hearing, the Appellant came to accept that, as a matter of general law, he was the beneficial owner of the Property as a matter of general law by the time that he completed the disposal of the Property to CPL but, in any event, to the extent that he did not, we find that this was the case for the reasons set out in paragraph 10 above. It is perfectly apparent that, regardless of the precise date when beneficial ownership of the Property as a matter of general law was re-vested in the Appellant, the relevant process had occurred by the time that the disposal of the Property was completed.

13. Whilst that finding is sufficient to determine the Legislative Issue in the Respondents' favour – for reasons to which we will come and which are set out below – and it is not necessary to identify the precise date on which the Appellant re-acquired beneficial ownership of the Property as a matter of general law prior to his disposal of the Property, we would add the following.

14. The mere fact that the Appellant was discharged from bankruptcy in 2003 did not, in and of itself, re-vest in the Appellant beneficial ownership of the Property as a matter of general law. The Property remained part of the bankruptcy estate and, as such, it required an act of the trustee in bankruptcy to re-vest the beneficial ownership of the Property in the Appellant. GT said as much in their communications with Officer Dawood set out in paragraphs 3(46) to 3(50) above and GT's view is echoed in a recent research briefing paper to MPs in the House of Commons Library entitled "Bankruptcy: assets that pass to the trustee" by Ms Lorraine Conway dated 14 March 2023. In that paper, Ms Conway said as follows in the chapter entitled "What happens to the bankrupt estate after discharge":

"Importantly, discharge from bankruptcy does not return ownership or control of property to the bankrupt. Similarly, discharge does not prevent the trustee from carrying out any of their remaining functions in relation to the bankrupt's estate. After discharge there may still be assets the trustee has not yet dealt with (e.g property, insurance or pension policy, or an interest in a Will or trust fund). These assets remain under the control of the trustee, who can deal with them in the future. In practice, it may be some time after the bankrupt's discharge before all assets are dealt with."

15. The above inevitably raises the question of when, following his discharge from bankruptcy, did the Appellant re-acquire beneficial ownership of the Property as a matter of general law? In our view, the answer to that question is that the Respondents are correct in their submission that beneficial ownership of the Property as a matter of general law was re-vested in the Appellant in 2005 when the deed of settlement to which GT referred in its correspondence with Officer Dawood summarised in paragraphs 3(46) to 3(50) above was executed. We say that because, although a copy of that deed of settlement has not been provided to us:

(1) in its letter of 17 August 2006, DLA informed the Appellant that the trustee in bankruptcy had been removed from office and no longer had any authority to assist the Appellant and that, if the Appellant wished to remove the bankruptcy-related restrictions from the registered title for the Property, he would need to send form K11 to HM Land Registry along with a copy of the deed of settlement;

(2) in its correspondence with Officer Dawood in 2021, GT said that the Property had been re-vested in the Appellant pursuant to the deed of settlement;

(3) the trustee in bankruptcy would have had no interest in retaining the Property within the bankruptcy estate once the Appellant was discharged from bankruptcy in 2003; and

(4) given the substance of the communications from DLA and GT set out in paragraphs 15(1) and 15(2) above, it is plain that, as at November 2016, the trustee in bankruptcy, GT and DLA all considered that beneficial ownership of the Property as a matter of general law had already been re-acquired by the Appellant pursuant to the deed of settlement in 2005 and that there was nothing further that the trustee in bankruptcy could (or would wish to) do in order for that to occur. Since a positive act was required from the trustee in bankruptcy in order to re-vest in the Appellant beneficial ownership of the Property following the Appellant's discharge from bankruptcy – see paragraph 14 above - it follows that, in November 2016, when HM Land Registry removed the bankruptcy-related restrictions on the registered title for the Property, it could have done so only in the belief that the Property was no longer part of the Appellant's bankruptcy estate because of the deed of settlement. We have been provided with no other document on which HM Land Registry could have relied to effect that change.

16. In that regard, we are not persuaded by the Appellant's insistence that the Property could not have been included in the deed of settlement simply because the Appellant's then-wife was one of the parties to the deed. It is perfectly possible that the deed of settlement encompassed, in addition to the Property, a number of assets other than the Property – as GT's letter of 6 July 2021 in fact made very clear – and that some of those other assets were to be re-vested in the Appellant's then-wife as well as, or instead of, the Appellant so that she needed to be a party to the deed as well as the Appellant.

17. Finally, while it does not relate to the issue of beneficial ownership as a matter of general law but instead relates only to the issue of legal ownership – and is therefore not relevant to our decision – we think that we should comment briefly on the evidence which was provided to us at the hearing in relation to the trusteeship of the Property. The Appellant said in his oral evidence that he had had to appoint a co-trustee in order to effect completion of the transfer of title to the Property to CPL. It is also apparent from the copy, as at 5 August 2022, of the registered title for the land out of which the Property was conveyed that, despite the misgivings which it expressed as to the absence of any evidence of a trust in its letter to the Appellant of 1 November 2016, HM Land Registry was ultimately persuaded to enter the trust-related restriction on the registered title to the aggregate of that retained land and the Property as at 10 October 2016 – see paragraphs 3(10) and 3(11) above.

18. Without copies of the transfer of title to CPL or any of the letters written by the Appellant to HM Land Registry in relation to his application to remove the bankruptcy-related restrictions from the registered title to the aggregate of that retained land and the Property, it is impossible for us to be certain as to why HM Land Registry was ultimately persuaded to enter the trust-related restriction on that registered title. We can only surmise that the Appellant might have been confused by the trusteeship of the trustee in bankruptcy and convinced HM Land Registry that the Property was subject to a trust prior to the bankruptcy.

19. All that we can say is that we have seen no evidence whatsoever that the Property was subject to a trust before the start of the Appellant's bankruptcy and nor had HM Land Registry, certainly at the time of its letter to the Appellant of 1 November 2016. On the contrary, such evidence as we have seen suggests that the Appellant was the sole legal owner of the Property at that time, in addition to being the sole beneficial owner of the Property. That is what the registered title said and no trust deed has been produced to suggest that, prior to his bankruptcy, the Appellant's legal ownership was as trustee or that there was a co-trustee. Indeed, the fact

that the Appellant was the sole registered owner of the Property prior to his bankruptcy, coupled with the fact that, by his own admission, the Appellant was the sole beneficial owner of the Property as a matter of general law prior to his bankruptcy, means that there could of necessity be no trust of the Property in existence prior to that date.

PRELIMINARY ISSUES

Introduction

20. Now that we have addressed the position under general law, we will turn to address the two tax issues to which the grounds of appeal give rise. Before doing so, we need to refer briefly to two areas of tax law in relation to which there was no dispute between the parties but which go to the question of our jurisdiction to hear the appeal.

Late notice of appeal

21. The first concerns the timeliness or otherwise of the notification of the appeal by the Appellant to the FTT.

22. Pursuant to Section 49G of the Taxes Management Act 1970 (the "TMA"), if a taxpayer fails to notify his or her appeal to the FTT within thirty days of the review conclusion letter issued under Section 49E of the TMA, the appeal can be considered only with the permission of the FTT – see Section 49G(3) of the TMA. In considering whether or not to exercise its discretion to permit a late appeal, the FTT is required to follow the principles set out by the Upper Tribunal in *Martland v The Commissioners for Her Majesty's Revenue and Customs* [2018] UKUT 178 (TCC), namely:

(1) establish the length of the delay;

(2) establish the reasons for the delay; and

(3) evaluate all the circumstances of the case, including weighing up the length of the delay, the reasons for the delay, the extent of the detriment to the applicant of not giving permission and the extent of the detriment to the party other than the applicant of giving permission.

23. In this case, the review conclusion letter was dated 16 April 2021 and the Appellant did not notify the FTT of his appeal until 9 September 2021. It follows that, strictly speaking, the appeal was notified outside the thirty-day time limit set out in Section 49G of the TMA and it cannot proceed without our permission.

24. There are various reasons why we think that it is entirely appropriate to exercise our discretion to permit the late appeal in this case.

25. First, the review conclusion letter was issued during the period of the Covid-19 pandemic when the general practice of the Respondents, which they conveyed to the Appellant at the time, was not to object to late notifications to the FTT made within three months of the end of the usual thirty-day notice period. Once those additional three months are taken into account in this case, the notification to the FTT is barely late.

26. However, leaving that aside, it is in any event plain from the ongoing correspondence between the parties which ensued following the issue of the review conclusion letter that the Respondents were still gathering information over that period and had not yet concluded that the position which it had adopted in the review conclusion letter was one behind which it was going to stand. For instance, in their letter of 15 June 2021, the Respondents said that their final decision on the matter would depend on the information which they subsequently received from GT. And then, in both their letter of 12 August 2021 and their letter of 2 September 2021, after they had received that information and concluded that they did wish to stand behind the conclusion set out in the review conclusion letter, the Respondents indicated to the Appellant

that he had thirty days following the receipt of the relevant letter in which to notify his appeal to the FTT. In the event, the date on which the Appellant notified the FTT of his wish to appeal against the assessment was only a week after the later of those two letters.

27. In the circumstances, we are satisfied that, in this case, the failure on the part of the Appellant to notify his appeal to the FTT within the thirty-day time limit is entirely understandable. When we take into account the relative brevity of the delay, the reasons for that delay, the extreme prejudice to the Appellant in our not entertaining the appeal and the much more limited prejudice to the Respondents in our doing so, we think that it is hard to conceive of a more appropriate situation in which to exercise our discretion to permit the late appeal. The Respondents have recognised this in declining to object to the late notice and we think that they were right to do so. We therefore hereby exercise our discretion to hear the appeal despite the late notice to the FTT.

Discovery

28. The second preliminary question which we need to address is whether or not the conditions for the issue of a discovery assessment set out in Section 29 of the TMA have been satisfied in this case.

29. An officer of the Respondents is entitled to issue a discovery assessment as regards any taxpayer and tax year if, inter alia:

(1) he discovers that any chargeable gains which ought to have been assessed have not been assessed;

(2) the error made by the taxpayer in his return was not in accordance with, or on the basis of, generally-prevailing practice at the time when the return was made;

(3) at the time when the officer ceased to be entitled to notify the taxpayer of his intention to enquire into the taxpayer's return in respect of the relevant tax year, the officer could not reasonably have been expected on the basis of the information made available to him before that time to be aware of the failure to assess the chargeable gains in question; and

(4) the assessment is made within four years of the end of the tax year to which it relates.

30. In this case:

(1) Officer Dawood of the Respondents discovered that the Appellant had not reported the chargeable gain arising in respect of the disposal of the Property;

(2) the failure on the part of the Appellant to report that chargeable gain was not in accordance with, or on the basis of, generally-prevailing practice at the time when the return was made;

(3) the information made available to the Respondents before the time referred to in paragraph 30(1) above, both within and outside of the Appellant's returns, could not have alerted the Respondents to the disposal of the Property; and

(4) the assessment in question was made on 23 October 2020, which was within four years of the end of the tax year ending 5 April 2017.

31. It follows that the four conditions set out in paragraph 29 above have all been satisfied and the Respondents have satisfied us to that effect. The Appellant accepted at the hearing that this was the case and we therefore propose to say no more about it.

DISCUSSION

32. Having dealt with those two preliminary questions of law, we now turn to the two substantive issues – namely, the Legislative Issue and the Estoppel Issue.

The Legislative Issue

33. We can deal briefly with the first of those questions because, in our view, it is clearly covered by Section 66 of the TCGA.

34. Section 66 of the TCGA is headed "Insolvents' assets" and sub-section (1) of that Section provides as follows:

"(1) In relation to assets held by a person as trustee or assignee in bankruptcy or under a deed of arrangement this Act shall apply as if the assets were vested in, and the acts of the trustee or assignee in relation to the assets were the acts of, the bankrupt or debtor (acquisitions from or disposals to him by the bankrupt or debtor being disregarded accordingly), and tax in respect of any chargeable gains which accrue to any such trustee or assignee shall be assessable on and recoverable from him."

35. It may be seen that the section is a deeming provision, which deals with assets which come to be held by a bankrupt's trustee in bankruptcy. (Although the section does not expressly use the word "deemed", it is apparent from the words "as if" that the operation which is required to be carried out by the section is to treat as existing something which does not in fact exist and that operation can properly be described as "deeming". Indeed, in the leading textbook on statutory interpretation, Bennion, Bailey and Norbury on Statutory Interpretation ("Bennion"), the authors point out that the language used to set up a statutory hypothesis varies and that "[the] traditional form of words 'shall be deemed' has generally given way to expressions such as 'treated as', 'regarded as' or 'taken to be'. Whatever form is used the effect is the same" (see Bennion at paragraph [17.8]).)

36. When one looks at the language of the section, it can be seen that it requires the TCGA to be applied as if the following four things were true in relation to assets held by a trustee in bankruptcy:

(1) first, it provides that the TCGA will apply as if the assets in question were vested in the bankrupt;

(2) secondly, it provides that the TCGA will apply as if the acts of the trustee in bankruptcy in relation to the assets were the acts of the bankrupt;

(3) thirdly, it provides that the TCGA will apply as if the acquisition of the assets by the trustee in bankruptcy from the bankrupt are disregarded; and

(4) fourthly, it provides that the TCGA will apply as if the disposal of the assets by the bankrupt to the trustee in bankruptcy are disregarded.

37. Having set out the extent of the deeming, the section goes on to provide that any tax in respect of chargeable gains which accrue to the trustee in bankruptcy will be assessable on, and recoverable from, the trustee in bankruptcy. However, that stipulation is of no relevance in the present context.

38. Reverting to the four matters which are to be deemed, as set out in paragraph 36 above, they make it clear that the TCGA is to operate on the basis of the statutory fiction that, when a person becomes bankrupt and his or her assets are vested in the trustee in bankruptcy, those assets are to be treated for the purposes of the TCGA as continuing to be owned by the bankrupt and that therefore the disposal of the assets by the bankrupt to the trustee in bankruptcy and the

acquisition by the trustee in bankruptcy of the assets from the bankrupt are to be disregarded for the purposes of the TCGA.

39. Although the provision, on its terms, is stated to apply only to the bankrupt's assets while those assets are held by the trustee in bankruptcy and therefore does not expressly deal with the position once the assets have re-vested in the bankrupt (or the disposal of the assets by the trustee in bankruptcy to the bankrupt and the corresponding acquisition of those assets by the bankrupt from the trustee in bankruptcy which that re-vesting entails), it is in our view a necessary implication from the terms of the provision that that re-vesting (and the disposal and re-acquisition which that re-vesting entails) should similarly be disregarded, and that the assets in question should be deemed always to have continued to be owned by the bankrupt for the purposes of the TCGA. After all, if they are to be treated for the purposes of the TCGA as if they have continued to be owned by the bankrupt throughout the period in which they are held by the trustee in bankruptcy, then they can hardly be the subject of a disposal by the trustee in bankruptcy to the bankrupt or the subject of an acquisition by the bankrupt from the trustee in bankruptcy after the end of the bankruptcy. It therefore goes without saying that there can be no disposal by the trustee in bankruptcy, or re-acquisition by the bankrupt, at that stage.

40. This necessary implication is consistent with the dicta of Peter Gibson J in *Marshall v Kerr* [1994] STC 638 at 649 to the following effect:

"For my part I take the correct approach in construing a deeming provision to be to give the words used their ordinary and natural meaning, consistent so far as possible with the policy of the Act and the purposes of the provisions so far as such policy and purposes can be ascertained; but if such construction would lead to injustice or absurdity, the application of the statutory fiction should be limited to the extent needed to avoid such injustice or absurdity, unless such application would clearly be within the purposes of the fiction. I further bear in mind that because one must treat as real that which is only deemed to be so, one must treat as real the consequences and incidents inevitably flowing from or accompanying that deemed state of affairs, unless prohibited from doing so."

41. It is also consistent with the conclusion in Bennion that "[the] effect of the authorities discussed below may be summarised as being that the intention of a deeming provision, in laying down a hypothesis, is that the hypothesis shall be carried as far as necessary to achieve the legislative purpose, but no further."

42. In this case, the legislative purpose is absolutely clear. It is that the bankruptcy is not to affect the ownership of the relevant assets for the purposes of the TCGA. The bankrupt is to be treated as holding the relevant assets throughout the period when ownership of the assets is vested in the trustee in bankruptcy. That is not only apparent from the language used in the section but also makes sense as a matter of tax policy. There is no injustice or absurdity involved. On the contrary, treating the Appellant as re-acquiring beneficial ownership of an asset which has been deemed to continue in his ownership while it was vested in the trustee in bankruptcy would be unjust and absurd.

43. At the hearing, the Appellant submitted that the section was inapplicable in the present case because it applied only to "assets" and the Property was not an "asset". We do not agree. The Property was plainly an asset for the purposes of the section, as may be seen in Section 21(1) of the TCGA, which provides that "[all] forms of property shall be assets for the purposes of this Act, whether situated in the United Kingdom or not…"

44. Turning then to the application of the provision in the present context, it is common ground, and we have, in any event, found, that:

(1) the Appellant was the sole beneficial owner of the Property as a matter of general law before the commencement of his bankruptcy in February 2000;

(2) the Appellant was also the sole beneficial owner of the Property as a matter of general law at the time that he completed his disposal of the Property to CPL in November 2016; and

(3) in between those two dates, there was a period during which beneficial ownership of the Property vested in the Appellant's trustee in bankruptcy as a matter of general law. We have already set out in paragraphs 14 to 19 above our conclusions as to how long that period was but ultimately nothing turns on that question because, however long it was, it is clear that the Appellant was deemed by Section 66 of the TCGA to remain the beneficial owner of the Property for the purposes of the TCGA throughout the relevant period.

45. It follows that it does not matter whether the Appellant re-acquired beneficial ownership of the Property from the trustee in bankruptcy in 2005 – when we have held that he did– or whether the Appellant re-acquired beneficial ownership of the Property from the trustee in bankruptcy only shortly before completing his disposal of the Property to CPL in November 2016 – as he says he did. In either case, the Appellant is to be treated for capital gains tax purposes as having held the Property throughout the period from his acquisition of the Property on 31 July 1997 until his disposal of the Property to CPL in November 2016. We would add that, given the effect of Section 66 of the TCGA as outlined above, Section 27 of the TCGA has no relevance in the present case. Even if, contrary to our conclusion in paragraph 15, the Appellant had re-acquired beneficial ownership of the Property as a matter of general law only after the exercise by CPL of the option in September 2016 and therefore only after a binding unconditional contract for the disposal of the Property had arisen, the Appellant was deemed by Section 66 of the TCGA to have remained the beneficial owner of the Property throughout. There would therefore be no need for the Respondents to rely on the decision in *Jerome v Kelly* [2005] UKHL 25 to establish that the disposal in question was made by the Appellant despite the fact that he did not re-acquire beneficial ownership of the Property as a matter of general law until after the unconditional contract arose.

46. The analysis set out above means that, unless the Appellant is entitled to succeed in relation to the Estoppel Issue, the appeal necessarily fails.

47. For completeness, we would observe that, even if Section 66 of the TCGA did not apply, the Appellant has not satisfied us that he should be deemed to have re-acquired the Property from the trustee in bankruptcy at its market value at the time of re-acquisition. The Appellant gave no consideration to the trustee in bankruptcy at the relevant time and therefore, unless there is a provision in the TCGA which would deem his acquisition to be for consideration equal to the Property's market value at that time, his acquisition cost for the purposes of capital gains tax would be nil. The Appellant has not explained to us what provision that might be.

The Estoppel Issue

Introduction

48. The Appellant submits that, even if he is wrong in relation to the Legislative Issue, the Appellants are precluded, on the basis of the doctrine of promissory estoppel, from assessing him to capital gains tax.

49. The case law reveals that, in order for a person (B) to rely upon promissory estoppel to prevent another person (A) from enforcing A's legal rights, B must show that:

(1) A freely made a clear and unequivocal promise or assurance that he or she would not enforce those strict legal rights;

(2) that promise or assurance was intended by A to affect the legal relations between the parties or A knew or could reasonably foresee that B would act on it; and

(3) before that promise or assurance was withdrawn, B acted upon it, so altering his or her position that it would be inequitable for A to withdraw the promise -

see Lord Henderson in *Harvey v Dunbar Assets PLC* [2017] EWCA Civ 60 ("*Harvey*") at paragraph [60] and Lord Goff in *Johnson v Gore Wood & Co* [2002] 2 A.C. 1 at 40.

Preliminary matters

50. However, before we turn to examine whether each of those requirements is satisfied on the facts in the present case, we would note that it is by no means clear that the doctrine of promissory estoppel is even available to the Appellant in the present context. We say that for two reasons.

51. First, promissory estoppel normally requires the existence of a pre-existing legal relationship (such as a contract) between A and B in the context of which the relevant promise or representation by A is made – see Lord Henderson in *Harvey* at paragraphs [60] to [63] and Lord Walker in *Thorner v Major* [2009] UKHL 18 at paragraph [5]. In *Harvey*, although he preferred to express no concluded view on the question because it was unnecessary in the context of that case for him to do so, Lord Henderson said that "it seems clear to me that the weight of existing authority supports the view that a promissory estoppel can only arise in the context of an existing legal relationship" (see paragraph *Harvey* at [62]). The alleged promise or assurance on the part of the Respondents in this case was not made in the context of an existing legal relationship between the parties but was instead made in the context of a dispute between the parties over the Appellant's tax affairs. There was no pre-existing legal relationship between the Respondents and the Appellant to which the alleged promise or assurance on the part of the Respondents can be related.

52. Secondly, the fact that the alleged promise or assurance was made in the context of a dispute over the Appellant's tax affairs raises the question of whether the Respondents can ever be estopped from raising new arguments in the context of a dispute over a taxpayer's tax liabilities. Those liabilities are to be determined by the terms of the tax legislation and it is the duty of the Respondents to collect the proper amount of tax according to law. In *Tower M'Cashback v The Commissioners for Her Majesty's Revenue and Customs* [2011] SC 19, at paragraph [15], Lord Hope endorsed the following passage from Henderson J's judgment in the High Court in that case:

"There is a venerable principle of tax law to the general effect that there is a public interest in taxpayers paying the correct amount of tax, and it is one of the duties of the commissioners in exercise of their statutory functions to have regard to that public interest...For present purposes, however, it is enough to say that the principle still has at least some residual vitality in the context of s 50, and if the commissioners are to fulfil their statutory duty under that section they must in my judgment be free in principle to entertain legal arguments which played no part in reaching the conclusions set out in the closure notice. Subject always to the requirements of fairness and proper case management, such fresh arguments may be advanced by either side, or may be introduced by the commissioners on their own initiative."

53. In *Telent Technology Services Limited v The Commissioners for Her Majesty's Revenue and Customs* [2022] UKFTT 00147 (TC) ("*Telent*"), Judge Redston referred to the above passage, and a passage to similar effect from the Upper Tribunal decision in *Ritchie v The Commissioners for Her Majesty's Revenue and Customs* [2019] UKUT 71 (TCC) at paragraph [36], in reaching her conclusion that the Respondents were not estopped from changing their arguments in the circumstances of that case. In Judge Redston's view, "a party can change its view of the law at any time subject to the other party having a fair opportunity to respond" (see *Telent* at paragraph [99]).

54. Although the claimant in *Telent* was seeking to rely on the doctrine of estoppel by convention whereas the Appellant in this case is seeking to rely on the doctrine of promissory estoppel, we can see no reason why the principle that a party to a dispute cannot be precluded from changing its arguments in relation to the law at any time subject to the guiding principles of fairness in the circumstances of the case and proper case management should not apply equally in the latter case. We would add that, in our view, the facts in this case are, if anything, more favourable to the Respondents than the facts in *Telent*. In *Telent*, the Respondents were allowed to change their position more than three years after the Appellant had lodged its notice of appeal and the Respondents had issued their statement of case whereas, in this case, the Appellant was made aware during the course of the enquiry and long before the assessment was issued and he appealed that the Respondents proposed to assess him to capital gains tax in reliance on Section 66 of the TCGA regardless of whether or not he had lost beneficial ownership of the Property upon his bankruptcy. The point was first mentioned by the Respondents in Officer Cussons's letter of 14 October 2019 and the assessment was not issued until over a year later.

55. We would note that the decision in *Telent* was one to which we drew the parties' attention seven days prior to the hearing, asking them both to be prepared to make submissions on it at the hearing. The Respondents provided their submissions at the hearing but the Appellant asked for additional time in which to do so and so we directed that he could make written submissions on the subject within the seven days following the hearing. We did not receive any submissions from the Appellant in relation to *Telent* within the period provided by our direction.

56. For the above two reasons, we do not think that the doctrine of promissory estoppel is one that is even potentially applicable in the present circumstances. However, for completeness, we have considered whether, assuming that we are wrong about that, the Appellant has satisfied us that the three conditions set out in paragraph 49 above are met by the facts in the present case.

The first requirement

57. Turning to the first of those conditions – the question of whether the Respondents made a clear and unequivocal promise or assurance to the effect that they would not be assessing the Appellant to capital gains tax as long as he could show that he had lost beneficial ownership of the Property upon becoming bankrupt - we have considerable difficulty in seeing how this is met.

58. The Appellant relies in this regard on the terms of the letter from Officer Cussons of 14 February 2020 and the letter from Officer Ball of 26 February 2021.

59. Looking at Officer Cussons's letter of 14 February 2020, the relevant part of which is set out in full in paragraph 3(28) above, Officer Cussons first explained to the Appellant that liability to capital gains tax depended on identifying the beneficial owner of the relevant asset at the time of disposal and then said that, in order to resolve that question, it would be helpful to ask the trustee in bankruptcy some questions, which he then set out before asking the Appellant for the name and address of the trustee in bankruptcy. We can see nothing in Officer Cussons's letter which comes anywhere near a clear and unequivocal promise or assurance to the effect that, upon the provision by the Appellant of the name and address of the trustee in bankruptcy, the Appellant would not be assessed to capital gains tax. The officer was simply saying that further information was needed before the person who was liable to the capital gains tax could be identified and asking for the Appellant's assistance in obtaining a response from the trustee in bankruptcy in order to further that process.

60. As for Officer Ball's letter of 26 February 2021, the relevant parts of which are set out in full in paragraph 3(37) above, it is first of all important to observe that this was not a letter that was dealing with the outstanding substantive issues in the ongoing enquiry or to make any proposal for the resolution of the dispute. Instead, as Officer Ball made very clear at the start of the letter:

(1) his role as a complaints officer was simply to investigate the service which the Appellant had received from the Respondents rather than to intervene in the ongoing tax dispute; and

(2) the complaints procedure was not an alternative to appeal.

61. It follows from these statements in the introduction that, even before considering the precise terms of Officer Ball's statements later in the letter, they could never amount to an unequivocal promise or assurance as to the future conduct of the dispute or the ultimate assessment to capital gains tax because the letter was not going to deal with those issues. Officer Ball had made that very clear from the outset.

62. When one then looks at the content of the section of Officer Ball's letter which is headed "My Consideration", it may be seen that, in that section, Officer Ball was looking back to the letter of 14 February 2020 and explaining to the Appellant why Officer Cussons was looking for the information he was and why, in the absence of that information, the assessment had been made. Whilst we agree with the Appellant that, in giving his explanation, Officer Ball mistakenly gave the impression that, had the Respondents been satisfied that the trustee in bankruptcy was the beneficial owner of the Property during the bankruptcy period, the case would have been closed without the Appellant's being assessed, that was in the context of his explaining the past actions of Officer Cussons. It fell some way short of a clear and unequivocal promise or assurance as to the future conduct of the dispute or a statement that the Appellant would not be subject to capital gains tax if he had lost beneficial ownership of the Property upon becoming bankrupt, particularly in the light of the introduction to the letter.

The second requirement

63. It follows from the analysis set out in paragraphs 58 to 62 above that, in our view, there was no unequivocal promise or assurance made by the Respondents to the effect that they would not assess the Appellant to capital gains tax if he had lost beneficial ownership of the Property upon becoming bankrupt. It is therefore axiomatic that the Respondents did not make any promise or assurance on which they intended the Appellant to rely or could reasonably foresee that the Appellant would rely. The second condition for the doctrine of promissory estoppel to apply is thus also not satisfied.

The third requirement

64. Finally, even if, contrary to the conclusions we have set out above:

(1) the statements made by Officer Cussons and Officer Ball in the letters described above could properly be seen as unequivocal promises or assurances to the effect that the Respondents would not assess the Appellant to capital gains tax if he had lost beneficial ownership of the Property upon becoming bankrupt; and

(2) in making those statements, Officer Cussons and Officer Ball either intended the Appellant to rely on the statements or could reasonably foresee that the Appellant would rely on the statements,

the Appellant has not satisfied us that he suffered any detriment as a result of his reliance on the statements.

65. In his submissions, the Appellant alleged that his having to pay the capital gains tax set out in the assessment was such a detriment but we consider that that is patently not the case. Whilst we agree that having to discharge a tax liability is undoubtedly a detriment, that detriment does not stem from an action taken by the Appellant in reliance on the alleged promise or assurance but instead stems from the disposal made by the Appellant which is the subject of the dispute. The tax liability in question would have arisen even in the absence of the alleged promise or assurance. It does not arise from the alleged promise or assurance and is therefore incapable of satisfying the third condition.

66. Moreover, it is clear from the Appellant's letters of 1 April 2020, 19 March 2021 and 4 May 2021 – the one to Officer Johnson in which he first alleged that the Respondents were estopped from assessing him to capital gains tax - that:

> (1) prior to 19 March 2021, the Appellant could not have thought that the Respondents were going to withdraw the assessment because, based on what he now says he understood to be his understanding of the position, he believed that he needed to provide the Respondents with the name of the trustee in bankruptcy before they would do that and he had already told them "definitively" on 1 April 2020 that he did not have the name or address of the trustee in bankruptcy;
>
> (2) thus, based on his alleged understanding, he could have started to believe that the Respondents would withdraw the assessment only on 19 March 2021 when he provided the name and address of the trustee in bankruptcy and fulfilled the necessary pre-condition to the withdrawal; and
>
> (3) the review conclusion letter of 16 April 2023 made it clear to him that the Respondents were not going to withdraw the assessment and were relying on Section 66 of the TCGA in doing so, a fact that he acknowledged in his letter of 4 May 2021 to Officer Johnson. Indeed, the Respondents had first mentioned Section 66 of the TCGA to the Appellant in Officer Cussons's letter to the Appellant of 14 October 2019, well before 19 March 2021, which was the earliest date on which the Appellant's reliance could have started.

67. It is hard to see what detriment could have arisen to the Appellant in the narrow window between his letter of 19 March 2021 and the review conclusion letter of 16 April 2021. This is hardly the same as the period of several years between the Respondents' change in position that was in issue in *Telent*.

68. It follows from the above that, even if the first two conditions had been satisfied in this case, it would not be inequitable for the Respondents to withdraw their promise or assurance.

Conclusion

69. For the reasons set out above, we consider that the Appellant cannot rely on the doctrine of promissory estoppel to defeat the assessment in this case and we find for the Respondents in relation to the Estoppel Issue.

DISPOSITION

70. It follows from the above that, in our view, both of the Appellant's grounds of appeal are misconceived. In short, we consider that:

> (1) Section 66 of the TCGA means that, for the purposes of the chargeable gains legislation, the Property was deemed to remain vested in the Appellant throughout the period from 31 July 1997 until his disposal of the Property to CPL in November 2016 so that the acquisition price of the Property which is to be taken into account in determining

the chargeable gain arising on the disposal of the Property is the market value of the Property on 31 July 1997, when he acquired the Property; and

(2) the Respondents are not estopped by anything in their conduct of the dispute from assessing the Appellant to capital gains tax in reliance on that section.

71. In terms of calculating the chargeable gain:

(1) is common ground that, if the Appellant's acquisition price for the Property is properly to be determined by reference to the market value of the Property on 31 July 1997, then that market value was £55,000, as determined by the Valuations Office Agency on 29 July 2019;

(2) it is common ground that the Appellant incurred sale costs of £3,870 which qualify as base cost in determining the chargeable gain; and

(3) as regards the consideration for the disposal of the Property, the assessment has been made on the basis that that consideration was £215,000, the figure which was payable at completion of the sale of the Property, as set out in the option agreement. However, since Section 144 of the TCGA deems the consideration received for a disposal made pursuant to a call option to be increased by the consideration given for the grant of the call option – in this case £1 – the chargeable consideration in this case was in fact £215,001. However, Mr Simpson indicated at the hearing that the Respondents were content to disregard that additional £1 as de minimis in the present circumstances.

72. Once the additional £1 of disposal consideration is disregarded, the chargeable gain made by the Appellant in respect of the disposal of the Property was £156,130 (£215,000 of disposal proceeds minus £58,870 of base cost (£55,000 of deemed acquisition cost plus £3,870 of disposal expenditure), leaving a chargeable gain of £156,130. After the deduction of the capital gains tax annual exemption for the relevant tax year of £11,100, the amount subject to capital gains tax in respect of the disposal is £145,030 (£156,130 minus £11,100). That is the amount on which the assessment is based. It follows that the assessment in this case is upheld and the appeal is dismissed.

CONDUCT OF THE DISPUTE

73. Whilst it is technically not a matter which we are required to address in this decision, we think that it is appropriate in concluding to make some observations about the manner in which the parties have conducted themselves in the course of the dispute, as revealed by the correspondence which we have summarised in paragraph 3 above.

74. As we said at the hearing, we consider that the Officers of the Respondents who have been involved in the dispute can fairly be said to have been slower than they should have been in identifying that, because of the effect of Section 66 of the TCGA, whether or not the Appellant ceased to be the beneficial owner of the Property as a matter of general law as a result of his bankruptcy was not relevant to his liability to capital gains tax in respect of the disposal of the Property. Their failure to identify the relevance and significance of that provision at an earlier stage in the process meant that the Appellant was put to more trouble than he should have been in the progress of the dispute. Even as late as the review conclusion letter of 16 April 2021, in which Officer Johnson ultimately upheld the assessment on the basis of Section 66 of the TCGA, the Respondents were continuing to maintain that they could find no evidence to support the proposition that, as a matter of general law, a bankrupt ceases to be the beneficial owner of his assets upon his bankruptcy. Not only was this incorrect as a matter of general law for the reasons set out in paragraph 9 above but there was no reason for the Respondents to have persisted with that line of debate as it was ultimately irrelevant to the Appellant's capital gains tax liability.

75. Having said that, there is, in our view, no justification for the aggressive stance which the Appellant adopted throughout the course of the dispute, particularly given the absence of any technical merit in his tax position. The Appellant appears not to have taken any independent tax advice but instead to have relied on a number of principles of tax law of his own invention which are unsupported by the tax legislation. His failure to recognise the applicability of Section 66 of the TCGA in the present context is one of them but so too is his assumption that capital gains tax should be payable only on any increase in the value of the Property between his regaining beneficial ownership of the Property and his disposal of the Property.

76. We think that, even though they could have alighted on the answer sooner than they did, the officers in question deserved to be treated with more respect by the Appellant and should be congratulated for the professional manner in which they have conducted themselves throughout the dispute.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

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

TONY BEARE
TRIBUNAL JUDGE

Release Date: 26th JANUARY 2024