UT Neutral citation number: **[2022] UKUT 205 (TCC)**

UT (Tax & Chancery) Case Number: UT/2021/000100

Upper Tribunal
(Tax and Chancery Chamber)

Hearing venue: Rolls Building, London

Heard on: 5 July 2022
Judgment date: 29 July 2022

CORPORATION TAX – S137 of Taxation of Chargeable Gains Act 1992 - whether exchange of shares part of a scheme or arrangements of which the main purpose, or one of the main purposes, is avoidance of liability to corporation tax – appeal dismissed

Before

MRS JUSTICE JOANNA SMITH
JUDGE JONATHAN RICHARDS

Between

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS

Appellants

and

EUROMONEY INSTITUTIONAL INVESTOR PLC

Respondent

Representation:

For the Appellants: David Ewart QC and Sadiya Choudhury, Counsel, instructed by the General Counsel and Solicitor for Her Majesty's Revenue and Customs

For the Respondent: Kevin Prosser QC, Counsel, instructed by KPMG LLP

DECISION

1. The taxpayer company ("Euromoney") agreed in principle to transfer its shares in a company ("CDL") to an acquiring company ("DTL") for a total consideration valued at $80.44 million, of which some $21 million consisted of cash and the remainder consisted of ordinary shares in DTL. After striking that commercial deal, it realised that it would be more tax efficient if it received some $21 million worth of redeemable preference shares in DTL ("Preference Shares") instead of the cash consideration as no tax charge would arise on redemption of such Preference Shares whereas it would arise on a receipt of cash. Therefore, Euromoney renegotiated the commercial deal so that it exchanged its CDL shares for a combination of ordinary shares and Preference Shares. In due course the Preference Shares were redeemed giving Euromoney the tax-free receipt that it sought.

2. The question raised by this appeal is whether the exchange formed part of a scheme or arrangements of which the main purpose, or one of the main purposes, is the avoidance of liability to corporation tax.

Relevant background facts

3. There is no dispute as to the following relevant background facts which we draw from the FTT's decision under appeal (the "Decision") which is reported as *Euromoney Institutional Investor plc v HMRC* [2021] UKFTT 61 (TC). References to numbers in square brackets are to paragraphs of the Decision unless we say otherwise. So that our decision can readily be read together with that of the FTT we will use defined terms set out in the Decision where practicable.

4. Euromoney owned shares in CDL and another company ("CNL") both of which were incorporated in, and tax resident in, the UK. CDL and CNL were the vehicles for joint ventures between Euromoney and an unconnected company, Dealogic Ltd ("DL") which was in turn a subsidiary of Dealogic Holdings plc ("DHPLC"). The respective holdings in the joint venture companies, CDL and CNL were, so far as material, as follows:

> (1) Euromoney held A Shares in CDL which represented 50% of CDL's issued share capital. Since Euromoney was entitled to receive a royalty equal to 28% of CDL's turnover pursuant to a licence agreement, Euromoney's A Shares carried no right to a dividend unless that licence agreement was terminated.
>
> (2) DL held B Shares in CDL which represented 50% of CDL's issued share capital. The B Shares carried dividend rights.
>
> (3) Euromoney and DL each held 48.4% of the ordinary share capital in CNL with the remaining 3.2% held by individual investors.

5. Importantly for what follows, since Euromoney's A Shares in CDL carried no dividend rights, Euromoney would not be entitled to the usual exemption (the "substantial shareholdings exemption" or "SSE") applicable where a company disposes of a "substantial shareholding" (see Schedule 7AC of the Taxation of Chargeable Gains Act 1992 ("TCGA")).

6. In September 2014, an unconnected private equity group ("Carlyle") commenced negotiations to acquire Euromoney's CDL and CNL shares in conjunction with its proposed acquisition of DHPLC. Following some discussions on price, Euromoney agreed in principle that it would sell its shares in both CDL and CNL for an aggregate consideration valued at around $85m to be satisfied by (i) the issue of equity representing 15.5% of DTL, which was the bid vehicle that Carlyle proposed to form in order to acquire DHPLC, CDL and CNL and (ii) $26 million in cash.

7. Since Euromoney was to sell its shares in CNL for $4.56 million in cash (see [18]), the economic effect of the arrangement summarised in paragraph 6 above was for Euromoney to sell its CDL shares for a total consideration of approximately $80 million worth of which approximately $59 million was represented by DTL ordinary shares and approximately $21 million would be cash. Since the parties are agreed that the arrangements relating to the shares in CNL are not material to this dispute we will, in the analysis that follows, focus on the terms on which the CDL shares were sold.

8. Daily Mail and General Trust Group held approximately 63% of Euromoney's shares. On 17 October 2014, William Flint ("Mr Flint"), its director of tax, set out in an email to Alfonso Marone (Euromoney's Chief Development Officer) a proposal that would make the transaction more tax efficient for Euromoney. That proposal involved DTL issuing redeemable preference shares to Euromoney instead of part of the cash consideration. This was hoped to be more tax-efficient because of the following chain of reasoning:

> (1) To the extent that Euromoney received cash in return for its A Shares in CDL, that would trigger a liability to corporation tax on chargeable gains ("CGT") because SSE did not apply (see paragraph 5 above).
>
> (2) The exchange of A Shares for preference shares would not be a disposal for CGT purposes because of s135 of TCGA which applies to share-for-share exchanges provided that certain conditions are met.
>
> (3) After a year, the substantial shareholdings exemption would apply to the preference shares.
>
> (4) Therefore, after a year, Euromoney could request redemption of its preference shares in DTL and receive cash that would not give rise to a CGT liability.

9. Carlyle was prepared to accommodate that amendment to the commercial deal and, on 5 November 2014, a binding agreement was reached under which DTL agreed to acquire Euromoney's A Shares in CDL for $80.44 million to be satisfied by (i) the issue of 4,902,803 "B" ordinary shares of $0.01 in DTL and (ii) the issue of the Preference Shares (which consisted of 21,214,992 redeemable preference shares of $1 each in DTL).

10. Also on 5 November 2014, CDL and DTL submitted an application to HMRC for clearance under s138 of TCGA. HMRC refused this application on 19 December 2014.

11. The exchange of CDL shares for DTL shares completed on 18 December 2014. On 17 January 2016, the Preference Shares were redeemed for $21,214,922 in cash with Euromoney taking the position that SSE applied such that the resulting gain was treated as exempt from corporation tax.

12. Euromoney's company tax return for the accounting period ended 30 September 2015 was prepared on the basis that s135 of TCGA applied to the exchange of CDL shares for Preference Shares so as to prevent that exchange from giving rise to a disposal for CGT purposes. HMRC opened an enquiry into that tax return and, by closure notice issued on 21 September 2018, amended the return so as to include a liability to corporation tax on a chargeable gain of £10,483,731.87. That amendment was made on the basis that there was a disposal of Euromoney's entire holding of CDL shares, and not just the proportion that was represented by consideration in the form of Preference Shares.

The legislative background

13. We need not set out in full all statutory provisions that had a bearing on these arrangements. That statutory code is complex, but it is sufficient to note that:

> (1) the tax outcome that Euromoney sought, summarised in paragraph 8 above, depended on s135 of TCGA applying when Euromoney exchanged its CDL shares for a combination of DTL ordinary shares and Preference Shares;
>
> (2) if s135 applied, its effect would be that there was no immediate disposal for CGT purposes of the CDL shares and so no CGT liability arising on such a disposal. Instead, any gain on the CDL shares would be "rolled over" into the consideration DTL shares with that gain coming into charge on a subsequent disposal of those shares (which would include a redemption of the Preference Shares); but
>
> (3) s135 could be disapplied in circumstances set out in s137 of TCGA with the result that, if s137 of TCGA applied neither outcome set out in (1) or (2) above would be available.

14. Section 137(1) of TCGA provides, so far as material, as follows:

> "…neither section 135 nor section 136 shall apply to any issue by a company of shares in or debentures of that company in exchange for or in respect of shares in or debentures of another company unless the exchange … in question is effected for bona fide commercial reasons and does not form part of a scheme or arrangements of which the main purpose, or one of the main purposes, is avoidance of liability to capital gains tax or corporation tax".

15. Therefore, the central issue addressed in the Decision was whether s137 did indeed operate to prevent s135 from applying. The parties were agreed that if s137 did apply, it would prevent s135 from applying to the entire disposal of CDL shares and not just the proportion of those shares that was represented by consideration in the form of Preference Shares. That meant that, if s137 disapplied s135, there was a "downside" to the planning involving the Preference Shares: Euromoney would be treated as making a taxable disposal of all of its CDL shares whereas, had it not effected the planning, only the proportion of those shares treated as sold for the $21m of cash would give rise to a disposal with it being uncontroversial that s135 applied to the exchange of the remainder of the CDL shares for DTL ordinary shares.

The Decision

Secondary findings of fact

16. The FTT received written and oral evidence from Mr Fordham, who was Euromoney's Group Managing Director at the relevant time. It also received written and oral evidence from Mr Flint. The FTT commented at [30] that it found both witnesses to be credible and that it accepted their evidence. Therefore, although [31] to [49] are drafted as recitations of Mr Fordham's and Mr Flint's evidence both parties treated them, as do we, as findings of fact.

17. A flavour of the conclusions that the FTT drew from the evidence of Mr Flint and Mr Fordham can be seen from the following summary:

> (1) Mr Fordham regarded the potential tax saving that the preference shares offered as "immaterial in the context of getting the transaction through". He regarded the potential tax saving as "wholly subsidiary to the commercial imperatives" ([34]).

(2) Mr Flint was not involved until a very late stage in the transaction ([39]). The transaction team at Euromoney were keen to ensure that the transaction went through smoothly without delay, so tax considerations would only be taken into account provided that they did not give rise to downsides in terms of getting the deal done ([42]). Mr Flint's own instructions to his external tax advisers were that "Euromoney is going to do this deal anyway, so tax is not a driver of whether the transaction takes place" ([44]).

(3) Obtaining a tax saving by use of the preference shares was a "nice to have" rather than an essential. If Carlyle had said no to Mr Flint's suggestion, or if they had asked for anything in return, he would not have pressed the point ([43] and [45]).

(4) The transaction was effected without waiting for the response from HMRC to the application for advance clearance under s138 of TCGA. Mr Flint himself spent less time on this transaction than he normally would on transactions where the tax analysis was important ([45], [46]).

(5) Mr Flint was not aware at the time that the use of the Preference Shares carried a "downside risk", referred to in paragraph 15 above. If he had been aware of that downside risk he would have ensured that "all the angles were fully explored" ([41]).

18. On the basis of the documentary and witness evidence, the FTT made the following additional findings of fact:

> "51. The potential tax saving from their preference share request was not important to Euromoney, who regarded it as no more than a bonus.
>
> 52. Tax was not a main driver of the transaction, which would have gone ahead whether or not tax could be saved.
>
> 53. It was Euromoney's intention, if Carlyle had refused the preference share request, to proceed with the cash deal.
>
> 54. Euromoney devoted limited resources to the tax aspects of the transaction. Mr Flint spent no more than 1-2 days in total on the tax elements of the transaction.
>
> 55. The clearance application made to HMRC did not hold up the transaction timetable. The exchange had already been agreed when the clearance was applied for.
>
> 56. Euromoney believed that there was no tax downside to the exchange, and it was therefore completed without waiting for HMRC's formal response, even though Euromoney knew that there was a risk that the tax saving would not be obtained".

The FTT's analysis

19. At [71] the FTT directed itself by reference to the judgment of the High Court in *Snell v HMRC* [2007] STC 1279 ("*Snell*") that it needed to determine two issues of fact, namely:

> "(1) was the exchange part of a scheme or arrangements and if so what were they? (2) did the purposes of such scheme or arrangements include the purpose of avoiding a liability to capital gains tax and if so was it a main purpose?"

20. Neither side makes any criticism of that self-direction. Moreover, the parties agreed before the FTT, and agree before us, that the "exchange" in question consisted of the entire exchange of CDL shares for ordinary shares in DTL (with an aggregate value of some $59.2 million) and Preference Shares (with an aggregate value of some $21.2 million). Neither party argues that the relevant "exchange" consisted only of a transfer of part of the CDL shares for a consideration consisting entirely of Preference Shares (see [78]).

21. The parties also accept the FTT's self-direction at [75] that, if Euromoney wished to assert that the exchange was not part of any scheme or arrangements, it bore the burden of doing so, and that HMRC were not themselves obliged to identify any such scheme or arrangements. That said, HMRC did put forward a formulation of what they considered to be the relevant scheme or arrangements. The FTT summarised HMRC's formulation at [73] and neither side argues that the FTT misunderstood HMRC's submissions in this regard, or erred in identifying HMRC's case:

> "73. HMRC submitted that the arrangements are those in relation to the preference shares only, namely the arrangements under which the cash consideration payable for the CDL shares was replaced with the preference shares in DTL with the intention of holding the preference shares until such time as they could be disposed of subject to SSE so that no tax charge would arise on that disposal".

22. At [72] to [92], as the heading shows, the FTT considered the first factual issue it had identified in paragraph [71]. It approached that issue by contrasting what Euromoney submitted was HMRC's unduly "narrow" view of the arrangements with Euromoney's approach that the arrangements should be viewed as a whole (see [79]).

23. At [81], the FTT concluded that the judgment of the House of Lords in *IRC v Brebner* [1967] 2 AC 19 ("*Brebner*") supported the view that the scheme or arrangements must be considered as a whole, rather than by reference to one element in isolation from another.

24. At [86] to [91], the FTT considered what conclusions, if any, it should draw from *Snell*. At [90], the FTT set out its view that *Snell* was a case in which a "narrower" view of the arrangements was taken, but that a different approach should be followed in the circumstances of this case saying:

> "The total consideration for the sale of the shares in *Snell* was £7,317,000, of which the £6,580,000 payable in loan stock was identified as being the arrangements. The loan stock in *Snell* represented the fundamental part of the arrangements as a whole. The circumstances of this appeal are very different, where the total consideration was $85 million, of which the preference shares in CDL were redeemed for $21,214,992. To identify the arrangements in this appeal as those concerning only the preference shares would give a wholly distorted view of the circumstances and would again be lacking in reality".

25. The FTT's conclusion, at [92], was that the "arrangements must be taken as a whole and not limited to the arrangements that concern only the preference shares". The FTT did not set out a full statement of what it considered the "arrangements" to be. However, its analysis at [93] to [117], of the "purpose" and "main purpose" of the arrangements indicates that it considered them to include the exchange of CDL shares for ordinary shares and Preference Shares, the holding of the Preference Shares for the 12 months necessary to secure SSE and the redemption of the Preference Shares for cash once SSE was available.

26. At [96] and [97], the FTT concluded that the avoiding of a liability to capital gains tax was <u>one of</u> the purposes of the arrangements as a whole because there was no commercial purpose for receiving consideration in the form of Preference Shares rather than cash.

27. Between [98] and [107], the FTT considered the <u>main</u> purpose of the arrangements. At [102], it noted that it had accepted the evidence of Euromoney's witnesses that their main subjective purposes were commercial and that tax considerations were not important. However, it went on to consider HMRC's submissions to the effect that the evidence of witnesses was not dispositive of the question and that "all the other evidence in the case must be taken into account as well", noting that in *Travel Document Service v HMRC* [2018] EWCA Civ 549 ("*Travel Document Service*"), the

Court of Appeal upheld a finding that loan relationships of a company had a main purpose of tax avoidance notwithstanding the unchallenged witness evidence that the company's purpose was entirely commercial.

28. Having regard to evidence which went beyond the witnesses' statements of subjective intention (as HMRC had invited it to do), the FTT concluded:

> (1) At [104], that the size of the tax advantage that Euromoney sought was £2.8 million and that while this was a significant sum of money in absolute terms, in relative terms it represented less than 5% of the total sale consideration and so was not "of such significance in the context that gaining it must have become a main purpose" (a quotation derived from *Travel Document Service*).
>
> (2) At [105], that the "natural inference" it drew from the fact that Euromoney did not explore the tax implications and was not aware of the "downside" risk identified in paragraph 15 above was that it did not consider the tax advantage to be significant in the context of the arrangements as a whole.
>
> (3) At [106], that the overall investment of time, effort and expense by Euromoney in the preference share arrangements was not significant in the context of the arrangements as a whole.

29. Based on the witness evidence and all the other evidence in the appeal, the FTT therefore concluded, at [107], that avoiding a liability to capital gains tax was a purpose of the arrangements, but not one of the main purposes. That was sufficient to determine the appeal in Euromoney's favour but, at [108] to [116], the FTT considered Euromoney's argument that there was no "avoidance" in any event because, by arranging matters so that it could benefit from SSE on redemption of the Preference Shares, Euromoney was simply accepting "an offer of freedom from tax which Parliament had deliberately made". The FTT rejected that argument, reasoning at [114] to [115] that, since a straightforward sale of Euromoney's shares would not have benefited from SSE, Euromoney was doing something more than availing itself of an exemption that was straightforwardly available.

The Grounds of Appeal and the Respondent's Notice

30. HMRC appeal against the Decision on the following grounds:

> (1) The FTT erred in law by applying the wrong test in determining whether the exchange was part of a scheme or arrangements, and what the scheme or arrangements were, within the meaning of s137(1).
>
> (2) Even if, contrary to HMRC's case, the FTT followed the correct approach to ascertaining the scope of the arrangements, the FTT's conclusion that those arrangements did not have a "main purpose" of avoiding a liability to corporation tax was vitiated by errors of law of the kind set out in *Edwards v Bairstow* [1956] AC 14.

31. In its Respondent's Notice, Euromoney invites us to conclude as follows:

> (1) That the FTT erred in law by finding that structuring the transaction so as to obtain SSE was one of the purposes of the arrangements.
>
> (2) That the FTT erred in law in concluding that structuring the transaction so as to receive Preference Shares instead of cash with a view to obtaining SSE was "avoidance" of a liability to tax within the meaning of s137(1).

HMRC's Ground 1

The proper construction of s137(1)

32. As noted in *Snell*, s137(1) contains two limbs. The first limb is concerned with whether the "exchange" that arises in the circumstances of this appeal is effected for "bona fide commercial reasons". The second limb is concerned with whether that "exchange" forms part of a scheme or arrangements and, if so, whether the main purpose, or one of the main purposes, of that scheme or arrangements is avoidance of liability to capital gains tax or corporation tax.

33. At the hearing and in its Grounds of Appeal, HMRC contended that the "fundamental error" on the part of the FTT (notwithstanding its express adoption of the approach taken in *Snell* at [71] of the Decision) was a failure to apply *Snell*, although this was not developed in its skeleton argument for the hearing.

34. *Snell* provides some direct authority on how the first limb of the test should be applied. In that case Mr Snell sold shares in a company for a total consideration of £7,317,000 of which £6,850,000 was to be satisfied by loan stock and was, therefore, an "exchange" for the purposes of s135 of TCGA. At the time of that exchange, Mr Snell had some notion (which, in their findings of fact the Special Commissioners described as a "purpose") that he might emigrate from the UK. If s135 of TCGA applied to the exchange, and Mr Snell subsequently redeemed his loan stock when he was no longer resident in the UK, he would pay no tax on the gain he realised on redemption of the loan stock. HMRC therefore asserted that s137(1) prevented s135 from applying.

35. HMRC argued, as regards the first limb of s137(1), that in assessing whether the "exchange" was effected for bona fide commercial purposes, it was relevant to ask why Mr Snell chose to take consideration in the form of loan stock, rather than cash. No doubt HMRC considered there could only be one answer to that question: by taking loan stock rather than cash Mr Snell obtained the ability to "roll over" part of the gain into the loan stock with the prospect of escaping tax on that part altogether if he redeemed the loan stock while resident outside the UK. However, both the Special Commissioners and Sir Andrew Morritt C rejected HMRC's argument holding that the first limb of s137(1) had to be applied to the actual exchange effected and not some other transaction that Mr Snell could have effected.

36. At [11] of his judgment in the High Court, Sir Andrew Morritt C noted first that s135 applies to treat a transaction as a "reorganisation" falling within ss127 to 131 of TCGA. None of the wider reorganisation rules made the reason for the reorganisation question relevant to the question of whether rollover treatment was available. He then reasoned, at [12]:

> "Sections 135 and 136 apply [the reorganisation provisions in ss127 to 131] to exchanges of securities, whether involving a scheme of reconstruction or amalgamation or not, in which more than two persons are involved. In such circumstances it is obviously necessary for the exchanges to be for commercial reasons if the new and the old holdings are to be treated as the same. But if there is appropriate identity and value commensurate with bona fide commercial reasons I can see no reason why Parliament should have been concerned with whether the same result might have been achieved by some other legal form or means. **This is particularly so when the same sub-section introduces a non-avoidance test by reference to the scheme or arrangements as a whole.** In my judgment this conclusion is confirmed by the wording of the subsection. The question is whether 'the exchange in question is effected for bona fide commercial reasons'. If the answer is in the affirmative it is irrelevant to consider the reasons why the parties chose to structure their transaction in that way. For these reasons I dismiss the cross-appeal of HM Revenue and Customs."

37. The emphasis in the above quotation is ours, added because HMRC submit that this passage is of significance and demonstrates that one of the reasons why the first limb of s137(1) did not ask why Mr Snell chose to take loan stock rather than cash is because this question will inevitably arise when the second limb comes to be considered.

38. We do not accept that, in the passage we have quoted, Sir Andrew Morritt C was making any determination as to how the scope of any "scheme" or "arrangements" should be determined when applying the second limb of s137(1) in any particular case. In our judgment, that passage simply notes that the first limb and second limb are phrased differently and so concerned with different matters. The first limb is concerned with the reasons for "the exchange" which suggests a focus on the actual transaction the taxpayer effected rather than a different transaction it could have effected. The second limb, by contrast, looks at matters other than the exchange itself, reinforcing the court's conclusion on the extent of the enquiry under the first limb. Put shortly, the highlighted sentence on which HMRC rely is part of the court's reasoning as to the interpretation of the first limb, rather than a determination as to the scope of any scheme or arrangements for the purpose of the second. In our judgment, it remains for the FTT to determine the scope of any scheme or arrangements as a question of fact in the light of the evidence in front of it. The only (limited) guidance given in the passage above is that the purpose test in the second limb of s137(1) must be applied by reference to the "scheme or arrangements as a whole".

39. We consider that *Snell* offers relatively little by way of guidance as to how to ascertain the precise scope of any "scheme" or "arrangements" for the purposes of the second limb of s137(1), beyond the observation that "scheme" and "arrangement" should bear their ordinary meanings (see [28] of the judgment, which was expressly followed by the FTT at [76]) and the need, already mentioned, to analyse the "scheme or arrangements as a whole". Both parties accepted before us that the scheme or arrangements must be considered as a whole, although they advance very different explanations of what that approach entails in the specific circumstances of this appeal. In the circumstances we cannot see how the FTT can be said to have misapplied *Snell* in its approach to this case. While the FTT spent time dealing with the detailed facts in *Snell* at [86]-[90], it plainly did so in the context of submissions from HMRC to the effect that the appeal in this case was "on all fours with *Snell*" (see [91]), concluding, in our judgment correctly, that HMRC was wrong about that.

40. That *Snell* provides little guidance on how to determine the extent of any "scheme" or "arrangements" for the purposes of the second limb of s137(1), and is not on all fours with this case, is scarcely surprising given the matters in dispute in *Snell*. If Mr Snell exchanged shares for loan stock as part of a scheme or arrangement under which he would dispose of the loan stock after emigrating from the UK, the second limb of s137(1) clearly required analysis. The questions in *Snell* were (i) whether the Special Commissioners' factual findings supported a conclusion that there was such a scheme or arrangement and (ii) if so whether, having regard to authorities on the concept of "tax avoidance" such as *IRC v Willoughby* [1997] 1 WLR 1071 the main purpose of such a scheme consisted of "avoiding" a liability to capital gains tax. *Snell* did not need to, and did not, lay down any detailed test for establishing the constituent elements of any scheme or arrangements.

41. Furthermore, although the FTT relied on *Brebner* in light of submissions made to it by Euromoney, we understood it to be accepted by Mr Prosser QC, on behalf of Euromoney, that *Brebner* was not in fact a helpful authority. In our judgment, it does not offer any guide as to how the second limb of s137(1) should be interpreted or applied. *Brebner* concerned a completely different statutory provision applying a different test.

42. In his oral submissions, Mr Ewart set out what HMRC argue to be core propositions applicable to the second limb of s137(1) including:

(1) that the second limb of s137(1) must be applied to all schemes of which the exchange forms part so that, as a matter of principle, it is wrong for the FTT to seek to identify a single "appropriate" scheme or arrangements with a view to ascertaining the "purpose" of that scheme or arrangements. Instead, it is necessary to identify all possible "candidate" schemes or arrangements of which the exchange could, realistically, form part. If the main purpose, or one of the main purposes of any of the "candidates" so identified is avoidance of a liability to capital gains tax or corporation tax then s137(1) will prevent s135 from applying;

(2) that the scheme or arrangements must be "related" to the exchange but is not itself the exchange and that the requisite relationship will be established if one of the steps of the scheme forms part or all of the consideration for the exchange – if that is so then it is "obvious" that the exchange will form part of the scheme or arrangements;

(3) that the relevant purpose in the second limb is the purpose of the plan of action devised, i.e. the scheme or arrangements and not the purpose of individual steps in the scheme looked at in isolation – in other words, one must look at the scheme or arrangements as whole (see *Snell*). Equally, argued Mr Ewart, the purpose of the scheme or arrangements is not to be determined by looking for the purpose of the exchange such that it would be an error to consider the purpose of the exchange (indeed this is the error that HMRC contends the FTT fell into in this case in paragraph [80] of the Decision).

43. The proposition set out in paragraph 42(1) is not set out in s137(1) itself and we see no reason why it should be inferred to be Parliament's intention. The propositions set out in paragraphs 42(2) and 42(3) are at best glosses on the statutory language and, at worst deviations from it. In our judgment, the propositions that Mr Ewart put forward are over-complicated and apt to confuse. There is no substitute for the words of the statute which set out a straightforward test.

44. We draw the following conclusions on the second limb of s137(1) derived from the limited assistance provided by *Snell* and the ordinary meaning of the statutory words used:

(1) The first question to be addressed is whether the exchange "form[s] part of" a "scheme or arrangements" and, if so, what the scheme or arrangements consist of. These questions involve ordinary words of the English language and it is a question of fact for the FTT to determine how they should be answered in any particular case.

(2) If an exchange forms part of a scheme or arrangements, there is then a second question of fact for the FTT to determine, namely whether the main purpose, or one of the main purposes of that scheme or those arrangements is avoidance of liability to capital gains tax or corporation tax. That requires an examination of the purpose or purposes of the totality of the scheme or arrangements. Identification of the purpose or purposes of individual steps or constituents of the scheme or arrangements is not irrelevant as it may help to ascertain the purposes of the scheme or arrangements as a whole. However, it is the purpose or purposes of the overall scheme or arrangements that matter.

(3) We express no view as to whether ascertaining the "purpose" of any scheme or arrangements involves a subjective test, an objective test, or a combination of the two. That issue was not argued before us as both parties were content to proceed on the basis that it was a purely subjective test.

Application of s137(1) in this case

45. There is no dispute as to the first limb of s137(1) of TCGA since it is common ground that the exchange was effected for bona fide commercial purposes. HMRC's Ground 1 relies on the

proposition that the FTT made an error of approach which led to it wrongly identifying the appropriate scheme or arrangements for the purposes of the second limb of s137(1).

46. The proposition that the FTT made an "error of approach" has an unpromising beginning because, as we note in paragraph 44 above, s137(1) does not mandate any particular "approach" beyond that set out on the face of the statutory provision which requires the FTT to address the two factual questions we have set out in paragraph 44. Nevertheless, we will examine with some care the submissions made by HMRC as to the "correct" formulation of the scheme or arrangements and their criticisms of the FTT's reasoning.

47. HMRC's explanation of what it regarded as the "correct" formulation of the scheme or arrangements has evolved over the course of these proceedings.

48. In paragraph 5 of their Grounds of Appeal to the FTT, HMRC submitted that it is "not a natural reading of s137(1)" to require any scheme or arrangements which are to be tested to include the whole of the "exchange" referred to in that sub-section. Rather, it was enough that the scheme or arrangements "must include, in whole or in part, the exchange referred to in s137(1)". Accordingly "it is not necessary for every element of the exchange to be an element of the arrangements before one can say, in ordinary English, that the exchange forms part of the arrangements". In their Grounds of Appeal, HMRC argued that the "easily identifiable set of arrangements" in this case consist of issuing redeemable Preference Shares (in substitution for cash) as part of the exchange, combined with a plan for DTL to redeem those Preference Shares shortly after they qualified for SSE. The "arrangements" on this case, do not include other elements forming part of the overall transaction, such as, for example, the issue of the B ordinary shares.

49. That formulation suggested that HMRC considered the correct focus to be on the reasons why Euromoney requested Preference Shares in place of cash consideration of approximately $21m. In answer to a question from the Tribunal, Mr Ewart QC initially agreed that HMRC's argument was that the FTT should have focused on Euromoney's decision to take Preference Shares rather than cash as a "subset" of the overall transaction (he later put the point slightly differently by reference to a Venn diagram). That, he said, was the scheme or arrangements – all other elements of the transaction did not form part of that scheme or arrangements. We reject that submission. The FTT was not compelled to focus on any particular aspect of the transaction, whether described as a "subset" of another part or identified by reference to hypothetical Venn diagrams. Rather, it was for the FTT to decide, as a question of fact, on the scope of any scheme or arrangements in the particular circumstances of this case.

50. Before the FTT, as noted at [73], HMRC suggested that the relevant scheme or arrangements consisted of "replacing" the cash consideration of $21m with Preference Shares in the manner highlighted in Mr Flint's email of 17 October 2014. However, in oral submissions before us, Mr Ewart explained that it was not central to HMRC's case that prior to Mr Flint's email there was a commercial understanding that $21m of consideration would be in cash. On HMRC's case, the analysis would be exactly the same if Euromoney had requested Preference Shares right from the beginning in order to secure the SSE treatment it sought. Mr Flint's email simply made the existence of the scheme easier to prove.

51. HMRC's submissions included some criticisms of [80] of the Decision in which the FTT held that s137(1) required "consideration of the entire exchange". However, those criticisms did not sit entirely comfortably with the fact that s137(1) itself required the FTT to consider the purpose of any scheme or arrangements of which the "exchange" formed part and the fact that HMRC accepted that

the "exchange" for these purposes consisted of the whole exchange of CDL shares for both ordinary shares and Preference Shares.

52. We did not, therefore, find it entirely straightforward to ascertain precisely what HMRC considered the "correct" approach to be. Nevertheless, despite the various formulations of HMRC's position, at their heart was a consistent point. HMRC's objection is that Euromoney took part of its consideration in the form of Preference Shares that could readily be converted into cash after 12 months without any CGT charge arising whereas, had it taken $21m of cash instead, there would have been an immediate CGT charge. However, we do not accept HMRC's submission that the FTT made any error of principle in failing to confine its analysis of the second limb of s137(1) to the reasons why Euromoney took consideration in the form of Preference Shares rather than cash.

53. As we have noted in the section above dealing with the interpretation of s137(1), ascertaining the extent of the scheme or arrangements was a question of fact for the FTT. There is nothing obviously irrational with a finding that the scheme or arrangements included both (i) the exchange of CDL shares for a combination of ordinary shares in DTL and Preference Shares (with the ordinary shares in DTL being much the more valuable component of the consideration) and (ii) the subsequent redemption of the Preference Shares for cash at a time when SSE was available.

54. The FTT did not overlook the fact that Euromoney had requested Preference Shares in place of $21m of the cash consideration precisely because it hoped that the Preference Shares would confer an SSE benefit. It made careful and detailed findings about the circumstances in which Euromoney obtained those Preference Shares. No doubt HMRC would have preferred the FTT to focus its analysis on the arrangements involving the Preference Shares in isolation rather than on the entire exchange. However, the FTT's decision not to accept HMRC's submissions in this regard involved no error of "approach" since it was for the FTT to determine, as a factual matter, the nature and extent of any scheme or arrangements of which the exchange formed part. Understood in that light, HMRC's arguments that the FTT followed an incorrect "approach" simply represent a disagreement with the factual determinations that the FTT made.

55. HMRC counters that, if it were correct, to focus on the totality of the exchange, the decision in *Snell* would have been approached very differently as it would have required the commercial purposes of Mr Snell's transactions (selling shares for consideration) to be weighed against the tax avoidance purpose (the wish to redeem the loan stock when he was no longer UK resident). Yet there is no hint of such an approach in *Snell* suggesting, argue HMRC, that the focus should be, as in *Snell* itself, on why Euromoney chose to take Preference Shares as consideration rather than cash.

56. We reject that submission. The approach in *Snell* was different because its facts were different. Mr Snell exchanged his shares for a total consideration of £7,317,000 of which £6,580,000 was in loan stock. He chose to defend HMRC's assessment by contending that (i) he had no settled intention to become non-resident when he received the loan notes and (ii) in any event, redeeming loan notes while resident outside the UK did not amount to "tax avoidance" because the scheme of the UK legislation is such that non-UK residents are not subject to capital gains tax. He chose not to make an argument based on the relative weight of any tax avoidance purpose as compared with purely commercial purposes, but if he had, it would have been considered.

57. Nor do we accept HMRC's submission that a focus on the purpose of the totality of an exchange or transaction would be unworkable because it would invite a consideration of the subjective purposes of all persons involved in those transactions. The FTT's task was simply to make findings on the nature and extent of any scheme or arrangements of which the exchange formed part and the purpose or purposes of that scheme or those arrangements. In this case, the FTT was entitled to conclude that

a consideration of Euromoney's subjective purposes was at the heart of the analysis since the initiative for the creation of the Preference Shares came from Euromoney. In different cases, it may be that a wider examination of the subjective intentions of a wider number of counterparties will be relevant. Since the FTT's conclusion was essentially factual, it cannot be shown to be incorrect by considering consequences that might follow if that approach were followed in different situations.

58. As Euromoney conceded at the hearing, the FTT was in error in concluding that *Brebner* supported its approach to the determination of the extent of the scheme or arrangements since *Brebner* concerned a completely different statutory provision. However, that error was not material to the outcome since the FTT correctly applied s137(1), even if its reasons for following the approach it did were flawed to the extent they involved placing reliance on *Brebner*.

59. We dismiss HMRC's appeal on Ground 1.

HMRC's Ground 2

60. As Ground 2, HMRC argue that even if the FTT correctly identified the scheme or arrangements as embracing the entirety of the arrangements summarised in paragraph 25 above, the FTT erred in law in its determination of the purposes of those arrangements. HMRC do not challenge the FTT's self-direction at [100] to [101] as to the legal principles that it had to apply in ascertaining the purpose or purposes of the scheme or arrangements. Nor do HMRC challenge the FTT's finding of fact at [102] that Euromoney's main subjective purposes were commercial and that tax considerations were not important. The factual finding at [102] may well, as Euromoney argues, of itself prevent HMRC's Ground 2 from succeeding. However, we will not express a concluded view on that point and will instead focus on the detail of HMRC's challenge under Ground 2 which is brought under *Edwards v Bairstow* principles: HMRC argue that, in its evaluation of purpose, the FTT took into account irrelevant considerations, failed to take into account relevant considerations and reached irrational conclusions.

61. HMRC's first argument under this ground relates to the FTT's conclusion at [104] that, while the tax advantage that the Preference Shares delivered was significant in absolute terms at £2.8 million, it represented less than 5% of the sale consideration and so was not significant in relative terms. That, argue HMRC, was an irrelevant consideration since the question is one of subjective purpose and Euromoney's own witnesses had not considered the tax saving relative to total consideration.

62. We reject that argument. In oral submissions, HMRC's counsel before the FTT, Ms Choudhury, had asked the FTT to look beyond what Euromoney's witnesses said about their own subjective thought processes and take into account other evidence that might cast a light on their intentions. Ms Choudhury had drawn the attention of the FTT to the judgment of the Court of Appeal in *Travel Document Service* to which we have referred in paragraph 27 above. Having heard those submissions, the FTT made no error of law in turning its mind to the relative size of the tax saving.

63. Nevertheless, argue HMRC, the apparent analogy that the FTT drew with *Travel Document Service* as revealed by its quote from that case in the final sentence of [104] was misplaced. *Travel Document Service* was concerned with whether, despite the evidence of witnesses as to their subjective intentions, tax avoidance must have been a purpose of a loan relationship. Yet in this case, the question before the FTT was whether tax avoidance was a purpose of the scheme or arrangements in question. We reject that submission. Once HMRC had asked the FTT to consider matters other than witnesses' statements of subjective intention it was for the FTT to decide how much weight to give to relevant factors that it highlighted. The FTT was entitled to conclude that the relatively modest size of the tax advantage viewed in the context of the deal as a whole was relevant. Its conclusion,

that this suggested that avoidance of tax was not a "main purpose", was an evaluative conclusion that was open to it.

64. HMRC focused next on paragraph [105] in which the FTT held that the fact Euromoney had not identified the "downside" referred to in paragraph 15 suggested that tax avoidance was not a main purpose of the scheme or arrangements as a whole. That, conclusion, argue HMRC, could not properly be drawn. The "downside" was not identified simply because both Euromoney and its advisers overlooked the point which says nothing about the purposes of the scheme or arrangements as a whole.

65. We reject that submission. It was a matter for the FTT to evaluate the significance or otherwise of Euromoney's ignorance of the downside. There was evidence before the FTT that Euromoney's analysis of the tax consequences of the insertion of the Preference Shares into the structure was limited. The flavour of Mr Flint's evidence recorded at [42] to [46] was that the tax advantage was not very important. There was evidence that the tax advice Mr Flint received from PwC was quite cursory. It was open to the FTT to infer that the downside was not identified because Euromoney did not perform, or ask its advisers to perform, a detailed tax review. The FTT was entitled to conclude that this tended to suggest that Euromoney did not regard the tax advantage as particularly important in the context of the scheme.

66. Next HMRC criticise the FTT's findings at [106], arguing that an analysis of the time and expense that Euromoney spent on the Preference Share aspect of the transaction, relative to the overall investment of time, effort and expense in the transaction as a whole, says nothing about the significance of the tax saving. HMRC point to other indications that Euromoney regarded the tax saving as significant, for example the fact that it was prepared to renegotiate the basis of the transaction with Carlyle, described by Mr Fordham in evidence as a "very, very tough team" who would "argue on every single point". This, however, is simply a disagreement with the FTT's factual conclusion and an invitation by HMRC to go island-hopping in a sea of evidence (drawing on Lewison LJ's well-known analogy at [114] of *FAGE UK Limited and another v Chobani UK Limited and another* [2014] EWCA Civ 5). The FTT was entitled to consider that an analysis of the amount of time and expense Euromoney spent on different components of the overall scheme or arrangements had something to say about its beliefs as to the relative importance of those components. It was for the FTT to evaluate what conclusions should be drawn from that analysis.

67. We dismiss HMRC's appeal on Ground 2.

Disposition

68. Given our conclusions on HMRC's Ground 1 and Ground 2, the FTT's decision stands. In those circumstances, we do not need to consider the points raised by Euromoney's Respondent's Notice which would, even if they succeeded, simply lead to the same overall outcome, but for different reasons.

Signed on Original

MRS JUSTICE JOANNA SMITH
JUDGE JONATHAN RICHARDS

RELEASE DATE: 29 July 2022