[2019] IEHC 807

THE HIGH COURT

REVENUE

IN THE MATTER OF A CASE STATED PURSUANT TO SECTION 941 TAXES CONSOLIDATION ACT 1997

[2018 No. 290 R]

BETWEEN

RAYMOND HUGHES

APPELLANT

AND

THE REVENUE COMMISSIONERS

RESPONDENT

JUDGMENT of Mr. Justice Allen delivered on the 29th day of November, 2019

Introduction

1. This is an appeal by way of case stated from the determination by his Honour Judge Francis Comerford of a tax appeal.

2. The issue, as succinctly expressed in the case stated, is whether the appellant, who is jointly assessed for tax with his wife, is liable for income tax on a benefit which they obtained when shares which they held in a company, Greenane Developments Limited ("*Greenane Developments")* became more valuable by reason of the actions of another company, Hughes Chemical Corporation Limited ("*Hughes Chemical"),* which was also owned and controlled by Mr. and Mrs. Hughes.

3. The net legal issue is whether the enhancement in the value of the shares in Greenane Developments was chargeable to income tax as a distribution to them by Hughes Chemical.

Overview

4. In January, 2006 a scheme was devised to liberate €2 million from Hughes Chemical and to put the money into the hands of the shareholders, the appellant and his wife.

5. Mr. and Mrs. Hughes bought another company, Greenane Developments, off the shelf. The plan was first, that the money would be transferred to Greenane Developments, and then that Hughes Chemical - the person having control of Greenane Developments - would exercise that control so that the value passed out of the shares owned by Hughes Chemical and into other shares in or rights over Greenane Developments owned by Mr. and Mrs. Hughes.

6. The scheme was devised to avoid capital gains tax. By s. 543(2)(a) of the Taxes Consolidation Act, 1997 the exercise by Hughes Chemical of its control of Greenane Developments was to have been a disposal of the shares out of which the value passed. By s. 547(1)(a) of the Act of 1997 the assets of Greenane Developments acquired by Mr. and Mrs. Hughes by means of a bargain made otherwise than at arm's length, would be deemed to be for a consideration equal to the market value of the assets. The hope and expectation was that the disposal would be chargeable to capital gains tax under s. 543, but the liability would be nil.

7. By the means which I will describe in detail, the €2 million which originated in Hughes Chemical came into the hands of Mr. and Mrs. Hughes.

8. On 6th December, 2011 Mr. Hughes (who is jointly assessed with Mrs. Hughes) was assessed to income tax on the amount of the distribution on the basis that there had been - according to the Revenue - a transfer of assets at undervalue, such as came within s. 130(3)(a) of the Taxes Consolidation Act.

The scheme

9. Greenane Developments was incorporated in September 2004. Its sole shareholder immediately prior to 30th January, 2006 was Hughes Chemical, which held 100 ordinary shares. Those shares carried the right to receive notice of, to attend, and to vote at general meetings of the company and to participate in profits and any surplus of capital.

10. On 30th January, 2006 the memorandum and articles of association of Greenane Developments were amended to increase the nominal share capital from €1 million to €3 million by the creation of 2 million A ordinary shares of €1 each. There were no voting rights attached to the A ordinary shares. The articles provided that on a winding up the holders of the A ordinary shares were entitled in priority to the return of capital paid up on those shares but not to participate in any share premium account or surplus of capital.

11. On the same day, Hughes Chemical subscribed for 100 ordinary shares at €20,000 each and Mr. & Mrs. Hughes respectively subscribed for 94 and 6 A ordinary shares, at par.

12. On 31st January, 2006 the articles of association of Greenane Developments were again amended by special resolution so that the voting rights and the right to participate in surplus capital were vested in the holders of the A ordinary shares, to the exclusion of the holders of the ordinary shares.

13. On 1st February, 2006 a special resolution was passed for a members' voluntary winding up of Greenane Developments. The winding up produced a surplus of €1,981,470, which was paid to Mr. and Mrs. Hughes as the holders of the A ordinary shares.

The assessment

14. On 6th December, 2011 the Inspector of Taxes raised an assessment for tax on the distributions amounting in total to €1,999,900. The assessment was not to capital gains tax on a disposal of the shares, but to income tax said to be chargeable on the value of the benefit of a transfer of assets by Hughes Chemical to its members by the passing of the special resolution on 31st January, 2006.

15. Mr. Hughes appealed the assessment to the Tax Appeals Commission but on 21st June, 2016 his appeal was dismissed. Mr. Hughes' further appeal to the Circuit Court judge was also dismissed.

16. The appeals to the Tax Appeals Commission and the Circuit Court judge turned, and the questions posed by the case stated turn, on the correct construction of s. 130(3)(a) of the Taxes Consolidation Act, 1997.

Legal principles

17. The case was argued on both sides with great conviction. For all that the court was presented with two folders of authorities, there was little between the parties as to the applicable principles of law.

18. As to the correct approach to be taken by the High Court in considering a case stated on a question of law, the appellant relies on the decision of the High Court (McWilliam J.) in *Mara (Inspector of Taxes) v. Hummingbird* [1982] I.L.R.M. 421, which, as counsel for the respondent point out, was approved by the Supreme Court in *Ó Culacháin v. McMullan Brothers Ltd*. [1995] 2 I.R. 217 and *Mac Cárthaigh (Inspector of Taxes) v. Cablelink Ltd*. [2003] 4 I.R. 510.

19. *In McMullan Brothers Ltd*. Blayney J. (O'Flaherty and Denham JJ. concurring) distilled from *Hummingbird* and the English authorities five principles of law which were endorsed in Cablelink Ltd. These were: -

> *"(1) Findings of primary fact by the judge should not be disturbed unless there is no evidence to support them.*
>
> *(2) Inferences from primary facts are mixed questions of fact and law.*
>
> *(3) If the judge's conclusions show that he has adopted a wrong view of the law, they should be set aside.*
>
> *(4) If his conclusions are not based on a mistaken view of the law, they should not be set aside unless the inferences which he drew were ones which no reasonable judge could draw.*
>
> *(5) Some evidence will point to one conclusion, other evidence to the opposite: these are essentially matters of degree and the judge's conclusions should not be disturbed (even if the court does not agree with them, for we are not retrying the case) unless they are such that a reasonable judge could not have arrived at them or they are based on a mistaken view of the law."*

20. In this case there is no dispute as to the primary facts but there is an argument as to the Circuit Court judge's *"interpretation of the facts*", which I will deal with in due course. The substance of the appeal is that the Circuit Court judge erred in his construction of the relevant provisions of the Taxes Consolidation Act.

21. As to the principles of law applicable to construing taxing statutes, there was some difference of emphasis.

22. Counsel for the appellant submitted, generally, that the determination of the Circuit Court judge "*failed to adhere to the strict construction of taxation statutes*" and instead took a purposive approach. The submission was not really developed or focussed and in one significant respect the appellant's complaint is that the Circuit Court judge took a literal

approach to s. 130(3)(a) rather than a purposive approach to the Act as a whole, specifically the interaction between s. 130(3)(a) and section 543.

23. In *Revenue Commissioners v. O'Flynn Construction Ltd*. [2013] 3 I.R. 533, O'Donnell J., for the majority of the Supreme Court, undertook a detailed review of the development - or reappraisal - of the law in Ireland, Northern Ireland and England since the *Duke of Westminster's case* in 1935. At para. 72 O'Donnell J. said:-

> *"[72] The suggestion that the principles in McGrath v. McDermott [1988] I.R. 258 preclude a 'purposive approach' is also perplexing. In the first place the express words of s. 86 [of the Finance Act, 1989] require the Commissioners to have regard to the 'purposes for which it [the relief] was provided'. Furthermore, the decision in McGrath v. McDermott itself expressly contemplates an approach to the interpretation of legislation that has always been understood as purposive. In that decision Finlay C.J. restated at p. 276 the orthodox approach to statutory interpretation at the time when he adverted to the obligation of the courts in cases of doubt or ambiguity to resort to a 'construction of the purpose and intention of the legislature'. Indeed, if McGrath v. McDermott stands for any principle of statutory interpretation it impliedly rejects the contention that any different and more narrow principle of statutory interpretation applies to taxation matters. As Lord Steyn observed in the Northern Ireland case of I.R.C. v. McGuckian [1997] N.I. 157, at p. 166, there has been a tendency to treat tax law, almost uniquely in the civil law as continuing to be the subject of a strict literalist interpretation: -*
>
> > *'During the last 30 years there has been a shift away from literalist to purposive methods of construction. Where there is no obvious meaning of a statutory provision the modern emphasis is on a contextual approach designed to identify the purpose of a statute and to give effect to it. But under the influence of the narrow Duke of Westminster doctrine tax law remained remarkably resistant to the new non-formalist methods of interpretation. It was said that the taxpayer was entitled to stand on a literal construction of the words used regardless of the purpose of the statute…[tax] law was by and large left behind as some island of literal interpretation'."*

24. O'Donnell J. at para. 73 noted that in Barclays Finance Ltd. v. Mawson [2005] 1 A.C. 684 the House of Lords had reaffirmed that in England the same principles of statutory construction applied to taxation statutes as to other non-criminal statutes. He went on to say that:-

> *"In Ireland, however, this was something that was acknowledged at least implicitly in McGrath v. McDermott [1988] I.R. 258, and explicitly in the provisions of the Interpretation Act 2005 which embodies a purposive approach to the interpretation of statutes other than criminal legislation and made no concession to a more narrow or literalist interpretation of taxation statutes. Accordingly, the Appeal Commissioners' conclusion that the principles set out in McGrath v. McDermott prohibited the adoption of a purposive approach is incorrect on a number of levels."*

25. This disposes of any criticism of the Circuit Court judge for having failed to adhere to the strict construction of taxation statutes.

Relevant statutory provisions

26. Section 130(3)(a) of the Taxes Consolidation Act 1997 provides:-

> *"(3)(a) Where on a transfer of assets or liabilities by a company to its members or to a company by its members the amount or value of the benefit received by a member (taken according to its market value) exceeds the amount or value (so taken) of any new consideration given by the member, the company shall be treated as making a distribution to the member of an amount equal to the difference (in paragraph (b) referred to as 'the relevant amount')."*

27. Section 543, sub-ss. (1) and (2) of the Taxes Consolidation Act provide:-

> *"(1) Without prejudice to the generality of the provisions of the Capital Gains Tax Acts as to the transactions which are disposals of assets, any transaction which under this section is to be treated as a disposal of an asset —*
>
> *(a) shall be so treated (with a corresponding acquisition of an interest in the asset) notwithstanding that there is no consideration, and*
>
> *(b) in so far as, on the assumption that the parties to the transaction were at arm's length, the party making the disposal could have obtained consideration or additional consideration for the disposal, shall be treated as not being at arm's length, and the consideration so obtainable, added to the consideration actually passing, shall be treated as the market value of what is acquired.*
>
> *(2) (a) Where a person having control of a company exercises that control so that value passes out of shares in the company owned by such person or a person with whom such person is connected, or out of rights over the company exercisable by such person or by a person with whom such person is connected, and passes into other shares in or rights over the company, that exercise of such person's control shall be a disposal of the shares or rights out of which the value passes by the person by whom they were owned or exercisable. …"*

28. Section 547 provides insofar as is material:-

> *"(1) Subject to the Capital Gains Tax Acts, a person's acquisition of an asset shall for the purposes of those Acts be deemed to be for a consideration equal to the market value of the asset where -*
>
> *(a) the person acquires the asset otherwise than by means of a bargain made at arm's length (including in particular where the person acquires the asset by means of a gift),*

(b) the person acquires the asset by means of a distribution from a company in respect of shares in the company …".

The correct approach to the issue

29. The assessment to income tax, as I have said, was raised under s. 130(3)(a) of the Act of 1997. At the hearing before the Circuit Court judge, and on this appeal, the Revenue Commissioners argued that the correct approach was simply and solely to examine whether that provision applied the transactions. The only issue before the Circuit Court judge, it was submitted, was whether the assessment to income tax had been correctly raised and the Circuit Court judge was not, and this court should not be, concerned with and should not entertain any argument as to whether, the transaction might also have fallen within section 543.

30. The scheme devised for the appellant was focussed on section 543. The appellant argued that the correct approach to be taken was to look at both s. 543 and s. 130 and to decide which of those provisions better caught the transactions, or, as it was put in argument on the appeal, which of the provisions was the better fit.

31. The Circuit Court judge acknowledged that the appellant had an argument that s. 543(2)(a) represented a clear manner in which through the use of the ordinary and natural meaning of words, a dealing such as that the subject of this appeal could be identified. He rejected however, the argument that since that "*happier formulation*" had not been used in s. 130(3)(a), or elsewhere in s. 130, that it was not the intent of the legislature to catch the activities so described. He did not think that was a useful approach. Rather, he said, the focus should be on s. 130(3)(a) and the issue was whether the transaction was caught by the words used there and not whether other words might have done this better.

32. The first question posed by the case stated is whether the Circuit Court judge was correct in law in determining that he should not conduct an enquiry to see which provisions of the Taxes Acts better caught the actions of 31st January, 2006, but rather should consider whether s. 130(3)(a) applied, even if some other provision might apply.

33. As I have said, the scheme which was implemented on 30th and 31st January, 2006 was devised to make the transactions chargeable to capital gains tax, for which there would be a nil liability, but the assessment is to income tax.

34. The appellant would make the case that the transaction was a capital transaction involving a disposal, which by the application of s. 547 was deemed to have been a disposal at market value. The fact that the case clearly falls within s. 543 – so the argument goes – goes to show that it does not fall within section 130(3)(a).

35. In support of the argument that the Circuit Court judge ought to have examined which of the provisions was the better fit, counsel for the appellant referred to the decision of the High Court in *Menolly Homes Ltd. v. Appeal Commissioners* [2010] IEHC 49, (Unreported,

High Court, Charleton J., 26th February, 2010) in which Charleton J. adopted from an English case a convenient statement of the function of the Appeal Commissioners:-

> *"[I] may note here at once, that in making the assessment and in dealing with the appeals, the Commissioners are exercising statutory authority and a statutory duty which they are bound to carry out. They are not in the position of judges deciding an issue between two particular parties. Their obligation is wider than that. It is to exercise their judgment on such material as comes before them and to obtain any material which they think is necessary and which they ought to have, and on that material to make the assessment or the estimate which the law requires them to make. They are not deciding a case inter partes; they are assessing or estimating the amount on which, in the interests of the country at large, the taxpayer ought to be taxed."*

36. The passage referred to by Charleton J. does not, as the transcript of the judgment suggests, come from *Sneath's case* 17 T.C. 149 but from a slightly later case of *Rex. v. Income Tax Special Commissioners, ex parte Elmhirst* [1936] 1 K.B. 487 in which *Sneath's case* was considered, first by a divisional court of King's Bench where the judgment was delivered by Lord Hewart C.J., and then by the Court of Appeal, where the principal judgment was given by Lord Wright M.R. The passage cited by Charleton J. comes from the judgment of Lord Wright M.R. in *ex parte Elmhirst* at page 493 of the report.

37. The effect of this statement of the role of the Appeal Commissioners, it is said, is that the role of the Circuit Court judge was to properly determine what legal treatment should be applied to the transaction, specifically which particular provision of the Taxes Consolidation Act applied to the transaction, and not merely whether s. 130(3)(a) applied.

38. In my opinion the appellant's reliance on *Menolly Homes Ltd*. is misplaced. That was an application by way of judicial review for an order quashing a decision of the Appeal Commissioner refusing to allow the taxpayer to cross-examine the Inspector of Taxes who had raised an assessment to value added tax. The object of the proposed cross-examination was to examine the inspector as to his state of mind when he made the assessment, specifically to try to show that the demand had been unlawful because he had not had "*reason to believe*" that the tax was due and payable. Charleton J. found that any issue as to the validity of the assessment was outside the scope of the appeal: which was limited to determining the amount, if any, of the tax due. The Appeal Commissioner's jurisdiction was confined to deciding whether the amount of the liability should be abated in its entirety, reduced, left stand, or increased.

39. The issue in *ex parte Elmhirst* was whether a taxpayer who had appealed an assessment to income tax to the Special Commissioners of Income Tax could withdraw his appeal without the consent of the Special Commissioners. The divisional court of King's Bench and the Court of Appeal in England held that he could not, because when the notice of appeal was given it became the duty of the Special Commissioners to arrive at a true assessment.

40. Both cases are authority for the proposition that the jurisdiction and duty of the Appeal Commissioners is to determine the amount, if any, of the tax assessed properly due and owing on the assessment. In *Menolly Homes Ltd*. it was value added tax; in *ex parte Elmhirst* it was income tax. Neither is authority for the proposition underlying the appellant's submission which effectively is that the Tax Appeals Commission or the Circuit Court judge should have substituted a liability to capital gains tax (albeit a nil liability) for the assessment to income tax.

41. The legislation expressly contemplates that the disposal of assets may attract income tax. Sections 544(7) and 551(2) of the Taxes Consolidation Act, 1997 provide that if a receipt is chargeable to income tax, then it will not also be chargeable to capital gains tax.

42. The object of statutory interpretation is to discern the intention of the Oireachtas. That intention is to be ascertained by construing the words used. If the legislative intention is discernible from the words used, I can see no basis in law or in logic upon which the court might embark on an enquiry as to whether the intention might have been better expressed by the use of other words.

43. Moreover, the premise of the proposition that s. 543 is a better fit, or a happier formulation, or better or more clearly catches the transactions of 31st December, 2006 is that s. 130(3)(a) is a fit – albeit not as good a fit – or catches the transactions – albeit perhaps not as clearly as section 543 – while the appellant's real argument is that they are not caught by s. 130(3)(a) at all.

44. I fully agree with the Circuit Court judge that the approach urged on behalf of the appellant is not helpful and that the correct approach is to consider whether s. 130(3)(a) applied, even if another provision might apply, and that it is not necessary or appropriate to decide whether another provision did in fact apply.

The arguments as to the meaning of s. 130(3)(a)

45. The appellant submits that the transaction was not caught by s. 130(3)(a) of the Act of 1997. Three separate and distinct arguments are advanced as to why this is said to be so: any of which, individually, would entitle the appellant to succeed.

46. The appellant's case is that: -

    (a) The rights attached to the ordinary shares and A ordinary shares were not "*assets";*

    (b) There was no "*transfer of assets*" from one party to another; and

    (c) Insofar as there was (if there was) any transfer of rights, those rights moved from Greenane Developments to its shareholders rather than from Hughes Chemical to its shareholders.

47. The appellant argues that the share rights the subject of the transactions were not assets because, it is said, they are not legally separate from the shares to which they attached and may not be assigned separately from the shares.

48. In support of this argument the appellant refers to the definition of "*asset*" in *Black's Law Dictionary* (10th Edition) and *Jowitt's Dictionary of English Law* (4th Edition).

49. The first of three meanings suggested by Black's is that an asset is "*an item that is owned and has value". Jowitt's* suggests that an asset is "*property available for satisfaction of debts or, in the case of deceased persons, bequests*", which matches *Black's* third suggestion. Combining these two definitions, it is submitted that an asset is something of value which is capable of being realised for value.

50. Seizing on the word "*property*" in the second definition, it is submitted that an asset must be capable of having an independent existence and be legally capable of being assigned or sold. Reference was made to a dictum of Baroness Hale in *OBG v. Allan* [2008] 1 A.C. 1, 88, [2007] UKHL 21, to the effect that: -

> *"The essential feature of property is that it should have an existence independent of a particular person: It can be bought and sold, given and received, bequeathed and inherited, pledged or seized to secure debts, acquired (in the olden days) by a husband on marrying its owner."*

Reference was also made to the well-known definition of a share in *Borland's Trustee v. Steel Brothers & Co., Limited* [1901] 1 Ch. 279 as: -

> *"[T]he interest of a shareholder in the company measured by a sum of money, for the purpose of a liability in the first place, and of interest in the second, but also consisting of a series of mutual covenants entered into by all the shareholders inter se in accordance with s. 16 of the Companies Act, 1862."*

51. Citing *Attorney General v. Jameson* [1904] 2 I.R. 644 and *Arthur D. Little Ltd. v. Ableco Finance LLC* [2003] Ch. 217, counsel submitted that the rights which together make up the bundle of rights which constitute a share are not legally separable from the share in that they do not have an existence independent of the share.

52. It seems to me that the proposition that share rights are not legally separable from the shares to which they attach is shown to be wrong by the transactions in this case. The Circuit Court judge said that he was tempted to say so. In my view there was no reason why he could not have said so. The resolution of 31st January, 2006 stripped the participation and voting rights from the ordinary shares and vested them in the holders of the A ordinary shares. The fact that the rights had to be attached to one or other class of shares does not mean that they are not valuable or capable of being moved (to use an entirely neutral term) from one class to the other.

53. The dictum of Lady Hale in *OBG Limited v. Allan* which is relied upon is a single sentence from one of five separate opinions of the appellate committee on three appeals which raised a variety of issues of law in relation to economic torts. Lady Hale devoted a good part of her opinion to the development, and possible further development, of the law in relation to the tort of conversion. The sentence relied on is taken from a paragraph in

which she recalls the reluctance of the common law to recognise a right of action as property, and the legal fiction employed to extend the tort of conversion from tangible property to choses in action - which was to pretend that the document had the same value as the obligation it evidenced. I understand the list of the essential features of property to be a list of indicia rather than of requirements or prerequisites. For example, it can hardly be doubted that a right to an annuity for life is property, even though it cannot be bequeathed or inherited. In any event, the issue in this case is whether the relevant rights are assets, not whether they are property.

54. In *Attorney General v. Jameson* the issue was the correct basis of valuation for estate duty purposes of 750 shares of £100 each in a joint stock company which had been paying dividends for years of 20% per annum but were subject to pre-emption rights in the event that any member wished to dispose of his shares in favour of all the other members at a "*fair price"* of £100 each. The testator's executors had paid estate duty on the basis that the shares were worth £100. The Attorney General contended that the value of the shares was what they would fetch if sold in the open market. The decision of the Court of Appeal in Ireland was simply that the valuation of the shares at the date of the deceased's death had to take account of the restriction on alienation and transfer in the articles of association. Fitzgibbon L.J. said that:-

> *"In my opinion each of these shares with all rights and liabilities and all advantages and disadvantages, incident to ownership, passed on Henry Jameson's death to his executors as one indivisible piece of property".*

55. Attorney General v. Jameson decided that any estimate or valuation of the open market value of shares transmitted on death could not disregard the pre-emption rights to which they were subject. It is not authority for the proposition that the bundle of rights making up a share is indivisible.

56. In *Arthur D. Little* the issue was whether a charge over the entire shareholding in a company, together with the distribution rights from time to time accruing thereto, was a fixed or floating charge. The High Court in England found that the fact that the charge covered the distribution rights did not alter the nature of the charge over the shares. The court found that the receipt of dividends and other rights arising by virtue of the shares were examples of the principal subject matter of the charge, i.e. the shares.

57. Far from supporting the appellant's argument as to the indivisibility of the rights attaching to shares, it seems to me that *Arthur D. Little* is clear authority against that proposition. The charge in that case (by contrast to the precedent in the standard books) contemplated that until an event of default, the chargor would continue to receive and retain dividends and other distributions and to exercise all rights attaching to the shares, including the right to vote them. Mr. Roger Kaye Q.C., sitting as a Deputy High Court judge, referred at p. 237C to a *dictum* of Nicholls L.J. in *In Re Atlantic Computer Systems plc*. [1992] Ch. 505, 534, where it was said that:-

"A mortgage of land does not become a floating charge by reason of the mortgagor being permitted to remain in possession and enjoy the fruits of the property charged for the time being."

58. *Arthur D. Little,* then, is clear authority for the proposition that the right of disposal of shares in severable from the rights to vote and to receive and retain dividends and distributions. It seems to me that there is no reason in principle why the charge might not have extended to the right to receive and retain dividends and distributions, while leaving in the hands of chargor the right to vote.

59. In this case the effect of the special resolution was that Mr. and Mrs. Hughes became entitled to both the right to vote and the right to participate in the surplus, but it is useful to contemplate that the rights might have been split. Theoretically, if the right to trigger a winding up was divorced from the distribution right, Mr. and Mrs. Hughes' prospects of obtaining the money might have depended on Hughes Chemical voting for a members' voluntary winding up.

60. I am satisfied that the rights attached to the shares in Greenane Developments to attend and vote at general meetings and to participate in a surplus on winding up were valuable rights which were divisible from the shares to which they were attached and were assets.

61. The appellant's second argument is that the Circuit Court judge erred in his finding that the action of Hughes Chemical in voting for the special resolution of 31st January, 2006 was a transfer of assets.

62. The Circuit Court judge found that the extinguishment of a right and creation of a new right could be a mechanism to effect a transfer but that whether or not it did so was a matter of fact depending on the circumstances. He treated the issue as to the effect of the special resolution as an issue of fact.

63. It is submitted on behalf of the appellant that the resolution of 31st January, 2006 which extinguished the rights of the ordinary shareholders to vote and participate in any surplus and created new rights in the A ordinary shares was "*an action of Greenane Developments as orchestrated by its members*". The effect of the resolution, it is said, was to extinguish the existing rights and to create new rights and not to transfer them from one class of shareholder to the other.

64. The appellant relies on the definition of "*transfer*" in *Murdoch and Hunt's Dictionary of Irish Law* (6th Edition) as "*the passage of a right from one person to another either (a) by the act of the parties e.g. in a conveyance of land or (b) by operation of law e.g. forfeiture, bankruptcy, succession.*" What happened in this case, it is said, was not a transfer but an alteration of share rights.

65. The appellant accepts (as Keane J. said in *Re Sugar Distributors Limited* [1995] 2 I.R. 194, 207) that a share in a company is a bundle of proprietary rights which can be sold or exchanged for money or other valuable consideration. The appellant accepts that the

rights may be sold or exchanged by way of a shareholders' agreement and that "*the said rights constitute assets for the purpose of the Capital Gains Tax Acts*". It seems to me that the acceptance that the rights attached to shares can be bought and sold by a shareholders' agreement is an acknowledgment that the bundle of rights is divisible. It is not suggested that there is any special definition of assets for the purposes of the Capital Gains Tax Acts: so if the rights are assets for the purposes of the Capital Gains Tax Acts, they must equally be assets for the purpose of the Income Tax Acts.

66. The appellant submits that there is no authority for the proposition that a sale or exchange of rights attaching to shares may be effected by resolution and that there is no basis in company law for the proposition that the bundle of rights which constitute a share can be broken up and reallocated by the company which issued them to different members of the company.

67. It seems to me that the fundamental flaw in this argument is that it fails to recognise the basic principle of company law spelled out in *Borland's Trustee* that the articles of association are a contract between the members and the company, and between the members *inter se.* The resolutions, which are passed by the members and not by the company, create a contract between the members and the company, and the members *inter se*, as to how the assets of the company are to be distributed in the event of a winding up. While it is perfectly correct to describe the resolutions as resolutions of the company, it does not follow that they are not also resolutions of the members.

68. It is accepted by the appellant that the resolution of 31st January, 2006 effected a "*movement of share rights as between different classes of shares*". The rights moved from the ordinary shares, held by Hughes Chemical, to the A ordinary shares, held by Mr. and Mrs. Hughes. That movement occurred because Hughes Chemical, as the only shareholder in Greenane Developments entitled to vote, voted for the extinguishment of the rights attaching to its shares and the creation of the same rights in the shares owned by Mr. and Mrs. Hughes. As a result of the action of Hughes Chemical, the rights in Greenane Developments theretofore held by it were thereafter held by Mr. and Mrs. Hughes.

69. The appellant, by reference to the definition of a transfer offered by *Murdoch and Hunt*, argues that the rights acquired by Mr. and Mrs. Hughes did not come "*from*" Hughes Chemical but were new rights created on the extinguishment of the rights of Hughes Chemical. That may be so, but as counsel for the Revenue point out, what s. 130(3)(a) captures is a transfer "*by*" rather than a transfer "*from*" a company.

70. On the same day and by the same resolution, by the vote of Hughes Chemical, the rights to vote and to participate in a surplus of assets in Greenane Developments ceased to belong to Hughes Chemical and came to belong to Mr. and Mrs. Hughes. The resolution and the amended articles of association amounted to an agreement between Hughes Chemical and Mr. and Mrs. Hughes that the rights in Greenane Developments formerly enjoyed by Hughes Chemical would thenceforth be enjoyed by Mr. and Mrs. Hughes. I cannot see how this was anything other than a transfer.

71. In my view the Circuit Court judge was correct in his determination that the extinguishment of a right and creation of a new right could be a mechanism to effect a transfer and that there was abundant justification for his conclusion that the resolution effected a transfer.

72. The appellant's third argument is that any transfer (if there was one) of any assets (if any) was not made to them in their capacity as members.

73. It is submitted on behalf of the Revenue that this contention would add to s. 130(3)(a) a requirement which is simply not in the wording. The paragraph, it is said, simply identifies the recipient of the assets, and no more. I agree.

74. The appellant acknowledges that the finding of the Circuit Court judge that s. 130(3)(a) does not require the transfer of assets to the member to be in his capacity as a member "*may be correct as an abstract construction but … it does not elucidate the matter in the instant case".* The argument then goes back to the proposition that there was no transfer.

75. I take the acknowledgement that the finding of the Circuit Court judge may have been correct, absent any argument as to why it was not or might not have been correct, as an acknowledgement that the finding was correct: which it was.

76. The appellant submits that this is a liquidation case to which s. 130 does not apply. While it is true that Greenane Development went into liquidation and the proceeds of the share premium account were distributed by the liquidator, the taxable event was not the distribution made in the winding up but the transfer of assets which occurred on 31st January, 2006.

77. In the course of his determination, the Circuit Court judge suggested that the only legal relevance of the €1,981,470 – which was the amount paid out by the liquidator – was that it was a reliable measure of what the value of the benefit was on 31st January, 2006. While it is a very small point, I think that the Circuit Court judge was not strictly correct. The assessment to income tax was not for the amount of the distribution following the liquidation but for the amount of the share premium account of Greenane Developments, which was €1,999,900: the difference between the €2 million subscribed by Hughes Chemical and the right to the return of the nominal value of the shares, which it retained.

78. I offer one final observation. The Circuit Court judge noted there that was not a complete identity between the rights attaching to the ordinary shares held by Hughes Chemical on 29th January, 2006 and the A ordinary shares held by the appellant and his wife on the morning of 1st February, 2006 because, he said, the surplus was subject to the payment of an additional €200. He thought, however, that because the additional obligation was so small, the rights were essentially the same rights.

79. I quite agree that there was not an identity of rights but, respectfully, not that the rights were essentially the same rights. Nor do I agree that on the morning of 1st February,

2006 the surplus was subject to payment of €200.00 more. Nor, if I may say so, do I agree that it would be appropriate to attempt to equate the rights attached to the two classes of shares by disregarding on a de minimis basis a difference (if there was one) in those rights.

80. On the transfer to Hughes Chemical of the original shares in Greenane Developments, Hughes Chemical became entitled to the return of capital on those shares. On their subscription on 30th January, 2006 for the new ordinary and A ordinary shares, each of Hughes Chemical and Mr. and Mrs. Hughes became entitled to the return of capital on those shares, with the A ordinary shares entitled to priority over the ordinary shares. As of 30th January, 2006 the total amount that had been subscribed was €2,000,200: €100 for the first 100 ordinary shares at par; €2 million for the second 100 ordinary shares at a premium of €19,999; and €100 for the A ordinary shares at par. The share premium account was €1,999,900. Ignoring the inevitable costs of winding up, the surplus on the morning of 1st February, 2006 was €1,999,900.

81. After the passing of the special resolution on 1st February, 2006 Hughes Chemical was entitled to the return of the nominal value of its shares - €200 - and Mr. and Mrs. Hughes to the return of the nominal value of their shares - €100. The right to take the surplus had been transferred to Mr. and Mrs. Hughes: but the amount of the surplus – again ignoring the costs of winding up – was the same. The rights to priority, to vote, and to participate in the surplus had been switched. The ordinary shares no longer carried the right to vote and participate but they now carried the right to priority. Since Greenane Developments had €2 million or so in the bank, the order of priority for distribution was of no practical significance, but legally there was no identity of rights. It seems to me that the fact that the rights were not the same goes to show that the rights attaching to each class of share were divisible and transferrable.

Conclusions

82. The case stated asks for the opinion of the High Court as to whether the Circuit Court judge was correct in law in his determination:-

(a) That the court should not conduct an enquiry to see which provisions of the Taxes Acts better catches the actions on 31st January, 2006; that the correct approach being to consider whether section 130(3)(a) applied even if another provision might apply?

(b) That the share rights in issue were “assets” within the meaning of section 130(3)(a)?

(c) That the actions of Hughes Chemical through voting through the special resolution of 31st January, 2006 was a transfer of rights which were assets for the purposes of section 130(3)(a)?

(d) That the transfer was a distribution and chargeable to income tax as at the time the appellant and his wife were members of Hughes Chemical?

(e) That section 130(3)(a) does not require the transfer of assets to the appellant to be in his capacity as member?

83. For the reasons given, the answer in each case is Yes.