

THE HIGH COURT

[2022] IEHC 43  
[Record No. 2021/2R]

BETWEEN

DERMOT HANRAHAN

APPELLANT

AND

REVENUE COMMISSIONERS

RESPONDENT

**JUDGMENT of Ms. Justice Stack delivered on the 14th day of January, 2022.**

Introduction

1. This is an appeal by way of case stated pursuant to section 949AQ of the Taxes Consolidation Act 1997 ("the TCA") from the Determination of the Appeal Commissioners dated 2 July 2020 ("the Determination").
2. The Determination and consequently this appeal arises out of a Notice dated 23 December 2009 ("the Notice of Opinion"), issued by a nominated officer of the Revenue Commissioners ("Revenue") pursuant to s. 811 (6) TCA, which informed the appellant that the nominated officer had formed the opinion that a particular transaction, to which I will refer in more detail below, was a "*tax avoidance transaction*" within the meaning of s. 811 (2) TCA.
3. The Notice, after setting out the details of the transaction to which it related, then stated that the nominated officer considered that it had resulted in a tax advantage to the appellant by the reduction of his Capital Gains Tax liability in 2004 and 2005 in the total sum of €531,471 (being 20% of the total losses claimed, which were €2,657,358).
4. The Appellant was then informed:

*"The tax consequence that would arise in respect of the transaction should this opinion become final and conclusive shall be that the Revenue Commissioners will (a) make an assessment to Capital Gains Tax for 2004 to withdraw the capital loss relief claimed by you in the sum of €1,408,469 and (b) amend the 2005 Capital Gains Tax assessment to withdraw the capital loss relief claimed by you in the sum of €1,248,889."*

**Findings of fact of the Appeal Commissioner**

5. The case stated contains a section headed "*Material Findings of Fact*", comprising paras. 7-11, which appears to indicate that all of the contents of these paragraphs constitute material findings of fact. While the introductory phrase to para. 7 of the case stated indicates that the subparagraphs of para. 7 contain the material findings of fact, I am satisfied that all of the contents of paras. 7-11 contain material findings of fact, with para. 7 containing the material findings as to the component parts of the tax avoidance transaction the subject of the Notice of Opinion and subsequent Determination and case stated.
6. The tax avoidance transaction as so identified consisted of the following component parts:

- a) The beneficial interests in the issued share capital in CapPartners ("CapPartners") were held by CapPartners Tax Advisors and CapPartners Holdings Limited.
- b) The beneficial interest in the issued share capital in CapPartners Securitisation ("Securitisation") was held by CapPartners Tax Advisors.
- c) CapPartners and Securitisation were commonly owned and therefore connected pursuant to TCA, section 10 and section 432.
- d) CapPartners Parnell Investments Limited ("Parnell") was formed on 2 June 2004 with CapPartners holding the single share entitling it to all voting rights. As a consequence, CapPartners, Securitisation and Parnell were connected pursuant to TCA, section 10 and section 432.
- e) On 25 August 2004, the Appellant acquired 30,000 non-voting non-cumulative preference shares of €1 each in Parnell. The Appellant was therefore connected with Parnell again pursuant to TCA, section 10 and section 432.
- f) On 7 October 2004, Parnell Purchased a German Government Bond ("Bond") with a nominal value of €2,939,466 for €2,977,466 from Davy Stockbrokers.
- g) By Call Option Agreement dated 7 October 2004 for a premium of €2,677,000, Parnell granted a call option to Securitisation with the entitlement to purchase the Bond having a nominal value of €2,939,466.
- h) By Bond Purchase Agreement dated 7 October 2004 between Parnell, Securitisation and the Appellant, whereby Parnell undertook to sell the Bond having a nominal value of €2,939,466 to the Appellant for €578,529.00 subject to the Call Option Agreement between Parnell and Securitisation dated 7 October 2001. At Clause 5 of that agreement, Securitisation granted a put option to the Appellant to sell the Bond to Securitisation on the same terms as set out in the Call Option Agreement between Parnell and Securitisation dated 7 October 2004.
- i) On 7 October 2004, the Appellant acquired the Bond with a nominal value of €2,939,466 from Parnell for €578,529 financed by an interest free loan of €280,000 provided by Parnell and €298,529 from his own resources.
- j) Pursuant to Clause 5 of the Bond Purchase Agreement, the Appellant, by letter dated 22 October 2004, notified the directors of Securitisation of his intention to exercise his put option requiring Securitisation to acquire the Bond from him.
- k) On 22 October 2004, Securitisation issued a Confirmation Note confirming the purchase of the Bond with a nominal value of €2,939,466 from the Appellant for €319,938.

7. I will refer to the transaction as described in paras. (a) to (k) above throughout this judgment as “the Transaction”. Para. 8 sets out the tax consequences of the aggregate arrangements as follows:
- a) The sale of the Bond by Parnell to the Appellant was a transaction between connected persons otherwise than by means of a bargain made at arm’s length.
  - b) The acquisition of the Bond by the Appellant was deemed to be for a consideration equal to €2,977,446, as Parnell and Securitisation were connected persons. As a consequence, the market value of the Bond was calculated as if the option did not exist notwithstanding that the Appellant only paid €578,529 to Parnell for the Bond.
  - c) Having acquired the Bond from Parnell for €578,529 which he sold to Securitisation for €319,938, the Appellant made an actual loss of €258,591. However, the Appellant asserted that in accordance with the combined effect of TCA, sections 31, 547 and 549, the disposal of the Bond gave rise to a capital gains tax loss calculated as follows:

Market Value of Bond on date of Disposal	€2,977,446
Consideration Received by the Appellant	€319,938
Capital Loss Claimed	€2,657,508

8. It should be noted that the two key provisions which resulted in the deemed loss to the appellant are s. 31 and s. 549 TCA, as the deductible loss under s. 31(a) resulted from the operation of s. 549, which, when read in conjunction with s. 547 (1), deemed the appellant to have paid full market value for the Bond, because he and Parnell were “*connected persons*” and required the option which had been created so as to reduce the actual value of the Bond by over 90%, to be ignored.
9. Para. 9 states that the calculation of the capital loss of €2,657,508 is €150 higher than that calculated in the Notice issued by the Nominated Officer which recorded the loss as €2,657,358, and the Appeal Commissioner indicated that he was going to refer to the higher loss of €2,657,508.
10. Para. 10 contains a finding that the Appellant did not make a full and true return to Revenue. This is material to my consideration of the appeal relating to the time limit in s. 955 (2) and the possible disapplication of that time limit to this case by reason of s. 811 (5A), and therefore I refer to it in more detail below.
11. Para. 11 sets out in full the Notice of Opinion, much of which has been set out above and the remainder of which is set out when I deal with the third issue in this appeal, which is whether the Notice of Opinion is void as it contains a material misdescription of the Transaction.

12. The Appellant claimed capital gains tax losses on his sale of the Bond to Securitisation against his capital gains of €1,408,469 in 2004 and €1,248,889 in 2005. These were written off against his capital gains, and as the capital gains tax rate for those years was 20%, the appellant reduced his capital gains tax liability by a total of €531,471 over the two years.
13. These claims were made on the basis of the following alleged tax consequences of the sale of the Bond to Securitisation:
  - (a) Because Parnell and Securitisation were connected persons, the market value of the Bond was calculated as if the Option Agreement between Parnell and Securitisation did not exist and was therefore deemed to be €2,977,466.
  - (b) The Appellant made an actual loss of €258,591. However, he asserted that the combined effect of ss. 31, 547 and 549 TCA was that the capital gains loss should be calculated as €2,657,508, being the deemed market value less the consideration received by the Appellant.
14. The Appellant was advised of his entitlement pursuant to s. 811 (7) TCA to appeal in writing within 30 days and he did so by letter dated 21 January 2010 from his advisers FGS to the Nominated Officer.
15. The Appeal Commissioner issued his Determination on 2 July 2020 and it is exhibited in full to the Case Stated.
16. By Notice pursuant to s. 949AP TCA, the appellant sought to appeal to this Court by case stated. The Appeal Commissioner drafted a case stated dated 23 September 2020 and it was filed in this Court on 2 February 2021.
17. It is agreed that the outcome of this appeal will determine the outcome of three other appeals, brought by Pearse Farrell, Maurice Cassidy and Thomas Higgins. The transactions which in each case have been found to be "*tax avoidance transactions*" within the meaning of s. 811 were in all respects identical to those described above as having been undertaken by the appellant and companies connected to him. I am told that every step in each transaction was identical and was moreover done on the same date. The only differences were that the appellants each used different special purpose vehicles and the amounts involved were different. Mr. Farrell's tax advantage was €536,000, Mr. Cassidy's tax advantage was €1,416,000 and Mr. Higgins's tax advantage was €947,000. The legal arguments made before the Appeal Commissioner were also identical.

**Questions of law for this Court**

18. At para. 142 of the case stated, the Appeal Commissioner stated eight questions of law for the opinion of this Court, asking if he was correct in:
  - (a) holding that the Notice of Opinion was not void;

- (b) determining that he was judicially constrained from departing from the statutory wording in TCA section 811 (5A) and therefore precluded from considering the impact of the Supreme Court decision in *Revenue Commissioners v. Hans Droog* [2016] IESC 55;
  - (c) his interpretation and application of TCA, section 549;
  - (d) determining that the Transaction was a tax avoidance transaction as statutorily defined;
  - (e) holding that the appellants were required to discharge a “positive burden” in the interpretation and application of TCA, section 811 (3)(a)(ii);
  - (f) holding that the intention of the Oireachtas, as discerned from the wording of TCA, section 31, is to provide relief to ameliorate actual financial hardship correlating to actual monetary loss;
  - (g) holding that there was a misuse of TCA, section 31, and
  - (h) determining that the capital gains tax actual loss be restricted to €258,591.
19. These can be grouped into three general issues as follows:
- 1. Question (b): whether the Notice of Opinion is prohibited as being out of time by reason of s. 955 (2) TCA;
  - 2. Questions (c), (d), (e), (f), (g) and (h): whether the Appeal Commissioner was correct to find that the Transaction was a “*tax avoidance transaction*” within the meaning of s. 811 TCA, such that the appellant should be restricted to deducting his actual loss of €258,591 rather than the much greater loss arising from the operation of the deeming provisions in s. 549;
  - 3. Question (a): whether the Notice of Opinion was void by reason of an error in the description of the component parts of the Transaction.
20. In addition, the following issue was raised in argument before the Appeal Commissioner and again before this Court:
- 4. Whether the Appeal Commissioner ought to have dealt with double taxation.

**Jurisdiction of this Court on a case stated**

21. Section 811 (9) provides for the jurisdiction of the Appeal Commissioners on an appeal against a notice of opinion issued by a nominated officer pursuant to s. 811 and makes provision for the stating of a case to this Court on a point of law. Subsection (9) (as amended by s. 38 (8) (d) (iv) of the Finance (Tax Appeals) Act, 2015, provides:

- "(9) (a) On the hearing of an appeal made under subsection (7), the Appeal Commissioners shall have regard to all matters to which the Revenue Commissioners may or are required to have regard under this section, and—*
- (i) in relation to an appeal made on the grounds referred to in subsection (7)(a), the Appeal Commissioners shall determine the appeal, in so far as it is made on those grounds, by ordering, if they or a majority of them—*
    - (I) consider that the transaction specified or described in the notice of opinion or any part of that transaction is a tax avoidance transaction, that the opinion or the opinion in so far as it relates to that part is to stand,*
    - (II) consider that, subject to such amendment or addition thereto as the Appeal Commissioners or the majority of them deem necessary and as they shall specify or describe, the transaction, or any part of it, specified or described in the notice of opinion, is a tax avoidance transaction, that the transaction or that part of it be so amended or added to and that, subject to the amendment or addition, the opinion or the opinion in so far as it relates to that part is to stand, or*
    - (III) do not so consider as referred to in clause (I) or (II), that the opinion is void,*
  - (ii) in relation to an appeal made on the grounds referred to in subsection (7)(b), they shall determine the appeal, in so far as it is made on those grounds, by ordering that the amount of the tax advantage or the part of the tax advantage specified or described in the notice of opinion be increased or reduced by such amount as they shall direct or that it shall stand,*
  - (iii) in relation to an appeal made on the grounds referred to in subsection (7)(c), they shall determine the appeal, in so far as it is made on those grounds, by ordering that the tax consequences specified or described in the notice of opinion shall be altered or added to in such manner as they shall direct or that they shall stand, or*
  - (iv) in relation to an appeal made on the grounds referred to in subsection (7)(d), they shall determine the appeal, in so far as it is made on those grounds, by ordering that the amount of the relief from double taxation specified or described in the notice of opinion shall be increased or reduced by such amount as they shall direct or that it shall stand.*
- (b) This subsection shall, subject to any necessary modifications, apply, to the extent necessary, to the determination by the High Court of any question or questions of law arising on the statement of a case for the opinion of the High Court."*

22. Subsequent to the Determination of 2 July 2020, the appellant's agent sent a Notice pursuant to s. 949AP (2) TCA expressing the appellant's dissatisfaction with the

Determination. This consisted of over three pages setting out why the appellant was dissatisfied by reference to individual paragraphs in the case stated, followed by a page and a half setting out ten different alleged errors of law in the Determination. This Notice is Exhibit 2 to the Case Stated.

23. Counsel for Revenue submits that this Court is not confined to the questions in the case stated as I can answer any question of law argued before the Appeal Commissioner: *Revenue Commissioners v. Bradley* [1943] I.R. 16.
24. I heard no detailed argument on the applicability of *Revenue Commissioners v. Bradley*, which concerned a case stated from the District Court pursuant to the Summary Jurisdiction Act 1857. It should be noted that *Bradley* was a case where the jurisdiction of Revenue to bring the prosecution in that case had been challenged before the District Court. When the respondent failed, a case stated on that issue of law was requested, but it was refused, and a different question of law was stated for the opinion of this Court.
25. The High Court determined only the issue raised in the case stated, but on appeal, the Supreme Court held that it could consider any point of law arising on the face of the case stated. Based on that authority this Court in *Untoy v. GE Capital Woodchester Finance* [2015] IEHC 557 amended an unsatisfactory case stated under s. 2 of the Summary Jurisdiction Act 1857, as extended by s. 52 (1) of the Courts (Supplemental Provisions) Act 1961, so as to amend the questions of law in the case stated to include those which could be answered by reference to the findings of fact of the District judge.
26. *Untoy* has subsequently been extended to cases stated under s. 949AR (1)(c) TCA in *O'Sullivan v. Revenue Commissioners* [2021] IEHC 118 again on the basis that the questions of law could be amended in this Court, pursuant to the power of the court pursuant to s. 949AR (1)(c) to make such orders as it thought fit. This Court was happy to do so without remittal for amendment on the basis there were sufficient factual findings in the case stated from the Appeal Commissioner to determine them. As in *O'Sullivan*, there was no issue in this case as to whether the issues argued before me were all argued before the Appeal Commissioner. More recent authority, therefore, suggests that formal amendments may be necessary. As the only one of the four issues argued before me which is not in the case stated is that of double taxation, I will consider below whether any formal amendment to include that issue is required.
27. The scope of the case stated is also relevant to one of the issues arising in relation to the point taken by the appellant pursuant to s. 955 (2) and I will deal with that issue in more detail when I consider the arguments of the parties pursuant to that provision.
28. A Book of Core Documents was submitted by agreement and this comprised the Notice of Opinion dated 23 December 2009, the Report to a Nominated Officer dated 22 November 2009, the documents relating to the various components of the Transaction, the tax returns of the Appellant for the tax years 2004 and 2005, and correspondence between the parties. The submissions of the parties to the Supreme Court in *Revenue Commissioner v. Droog* were also submitted as it was accepted that these were before

the Appeal Commissioner. Most of the documents relating to the Transaction were not opened to me or relied on in any way in any event, and it will not be necessary to refer to them. However, insofar as they were opened to me, it is clear that even though they were not exhibited to the case stated, they were before the Appeal Commissioner and I have considered them.

**The time limit in s. 955 (2) TCA**

29. A major issue in the case relates to the Appeal Commissioner's findings on the appellant's argument that the Notice of Opinion was out of time having regard to s. 955(2) TCA, as interpreted by the Supreme Court in *Revenue Commissioners v. Droog* [2016] IESC 55. The appellant failed on this point, essentially on the basis that subs. (5A) of s. 811, which was not enacted until after the appeal was pending before the Appeal Commissioner, operated to disapply the time limit such that the Notice of Opinion was validly issued.
30. Subsection (5A) was presumably enacted in response to the judgment of this Court (Laffoy J.) in *Droog*, which first established that the time limit in s. 955(2) applied to notices of opinion pursuant to s. 811. That judgment also post-dated the appeal to the Appeal Commissioners. Therefore, even though the appellant had not, apparently, initially sought to appeal the Notice on the basis of s. 955(2), he was given leave to do so and there was no dispute as to his entitlement to pursue the point in this case stated.
31. Before considering the various arguments on the application of s. 811 (5A) and s. 955 (2) TCA to the Notice of Opinion, it is appropriate to set out the findings of the Appeal Commissioner on this issue, as contained in the case stated.

32. At para. 21 he stated:

*"To determine that the Opinion is void, the Appellant requires that I rely on the judgment in Droog and disregard the express wording of TCA, section 811 (5A). However, I could not accept such a submission as I am jurisdictionally constrained from departing from the statutory wording contained in TCA, section 811 (5A) in respect of the making or amending of an assessment on or after 28 February 2012. Therefore, unlike the Superior Courts, I do not possess the statutory or indeed constitutional authority to dispense with a process which can have no lawful conclusion."*

33. At para. 22 the Appeal Commissioner referred to the need to apply the presumption of constitutionality as set out in *Pigs Marketing Board v. Donnelly* [1939] I.R. 413, at 417.

34. At para. 23, the Appeal Commissioner stated:

*"It is also significant that as the appellate process is extant, the purported unlawful act of making or amending the 2004 and 2005 assessments has not yet occurred. Therefore, as the law currently stands, there is no statutory impediment restricting the Respondent [Revenue] from making or amending an assessment after the appellate process has been completed. On this basis I was unable to consider the Appellant's submission on time limits."*



35. Although it did not form part of the original grounds of appeal to the Appeal Commissioners, it appears that the appellant relied before the Commissioner on the time limits in s. 955 (2) and the Supreme Court judgment in *Revenue Commissioners v. Droog* without objection.
36. The appellant relies on *Revenue Commissioners v. Droog* for the proposition that the Notice of Opinion was out of time when it was issued by reference to the time limit in s. 955 (2), and that s. 811 (5A) can have no application as it was only inserted by s. 130 of the Finance Act 2012, which commenced on enactment and therefore on 31 March 2012. He argued that subs. (5A) is a retrospective provision and therefore unlawful. He also contends that the Supreme Court considered subs. (5A) in *Droog* and therefore that the effect of that judgment has not been diluted in any way by the introduction of subsection (5A) into s. 811.
37. In response, Revenue says that s. 955 (2) has no application to the appellant because he did not make full disclosure of all relevant matters in his tax returns, such as to attract the operation of that provision. Revenue also says that, in any event, s. 811 (5A) applies so as to alter the law from that determined by the Supreme Court in *Droog*.
38. In considering these matters, I will first consider the arguments of the appellant on the operation of s. 955 (2) to the Notice of Opinion and I will then consider the impact of s. 811 (5A) as inserted by s. 130 of the Finance Act 2012.

**(i) Whether the Notice of Opinion is time barred by reason of s. 955 (2)**

39. It is common case that the appellant was obliged to make a return to Revenue in respect of Capital Gains Tax for the tax years 2004 and 2005 pursuant to Part 41 of the TCA. At the time of the Notice of Opinion, s. 950 (2), which was found in Part 41, provided:

*"Except in so far as otherwise expressly provided, this Part shall apply notwithstanding any other provision of the Tax Acts or the Capital Gains Tax Acts."*  
[Emphasis added.]

40. Section 955 (2)(a), which was also in Part 41 TCA, provided:

*"Where a chargeable person has delivered a return for a chargeable period and has made in the return a full and true disclosure of all material facts necessary for the making of an assessment for the chargeable period, an assessment for that period or an amendment of such an assessment shall not be made on the chargeable person after the end of four years commencing at the end of the chargeable period in which the return is delivered and –*

- (i) *no additional tax shall be payable by the chargeable person after the end of that period of 4 years, and*
- (ii) *no tax shall be repaid after the end of a period of 4 years commencing at the end of the chargeable period for which the return is delivered,*

*by reason of any matter contained in the return.”*

41. Section 811(4) provides for the formation of an opinion pursuant to s. 811 as follows:

*“Subject to this section, the Revenue Commissioners as respects any transaction may at any time –*

- (a) form the opinion that the transaction is a tax avoidance transaction,*
- (b) calculate the tax advantage which they consider arises, or which but for this section would arise, from the transaction,*
- (c) determine the tax consequences which they consider would arise in respect of the transaction if their opinion were to become final and conclusive in accordance with subsection (5)(e) and.*
- (d) calculate the amount of any relief from double taxation which they would propose to give to any person in accordance with subsection (5)(c).”*  
*[Emphasis added.]*

42. Section 811(5)(e) provides:

*“For the purposes of this subsection, an opinion of the Revenue Commissioners that a transaction is a tax avoidance transaction shall be final and conclusive –*

- (i) if within the time limited no appeal is made under subsection (7) against any matter or matters specified or described in a notice or notices of opinion given pursuant to that opinion, or*
- (ii) as and when all appeals made under subsection (7) against any such matter or matters have been finally determined and none of the appeals has been so determined by an order directing that the opinion of the Revenue Commissioners to the effect that the transaction is a tax avoidance transaction is void.”*

43. The issue in *Droog* was whether, by providing in section 811 (4) that the Notice of Opinion could be issued “*at any time*”, the Oireachtas had “*provided otherwise*” as required by s. 950 (2) and thereby disapplied the time limit in section 955.

44. It is apparently notorious that it can take a considerable period of time for the appellate procedures provided for by the TCA to be exhausted. Therefore, in at least a large number of appeals against notices of opinion, the opinion will not become final and conclusive until well after four years after the issue of that opinion.

45. That is precisely what occurred in *Revenue Commissioners v. Droog* [2011] IEHC 142, where the respondent had filed his income tax return for the fiscal year 1996/1997 on 30 January 1998. This was filed under the self-assessment system and claimed relief against income tax in respect of his share of certain losses of a partnership in which he had been

involved. An assessment for 1996/1997 was issued on 15 February 1998. The Notice of Opinion pursuant to s. 811(6) TCA issued just short of nine years later on 22 February 2007, and the taxpayer's appeal against that Notice of Opinion did not conclude until the Supreme Court proceedings were determined in 2016.

46. Both this Court and the Supreme Court found that the fact that s. 811 (4) provided that the opinion could be formed "*at any time*" was not sufficient to "*provide otherwise*" as required by s. 950 (2) and therefore the time limit in s. 955 (2) applied to Notices of Opinion pursuant to s. 811.
47. *Droog*, therefore, established that the time limits in s. 955 (2) TCA applied so as to prevent the payment of tax or additional tax or the repayment of tax after the period of four years commencing at the end of the chargeable period for which the relevant return was delivered, and as the purpose of a Notice of Opinion pursuant to s. 811 could only be the recovery of tax or additional tax, the Notice of Opinion was itself unlawful as being incapable of achieving its purpose which was to recover additional tax.
48. The appellant makes a number of related arguments as to the consequences of this for the Notice of Opinion.
49. First, he says that the Notice of Opinion is out of time as regards the tax year 2004, which is of course the year the Transaction was undertaken. This is because s. 955 prohibits either an assessment to tax or the recovery of tax more than four years after the end of the chargeable period in which the return is made. The tax return for 2004 was made on 25 October 2005, the obligation being to make a tax return for 2004 on or before 31 October 2005. 2005 being the chargeable period within which the return was made, the four years was therefore calculated from 31 December 2005. The Notice of Opinion was issued within that four year period but it is clear from s. 811 (5)(e) that the Notice of Opinion could not become conclusive until the time for appeal had expired and then, if an appeal is lodged, on the final determination of that appeal (which has not yet occurred).
50. However, even if he had never appealed, because it was issued on 23 December 2009, it could not have become final and conclusive before 21 January 2010. That was the earliest date on which it could have taken effect. However, that was too late to disturb the tax return for 2004 as the four years expired on 31 December 2009. Accordingly, the four year time limit in s. 955(2) expired on 31 December 2009 and the Notice of Opinion had not become final and conclusive on that date.
51. I agree that the Supreme Court in *Droog* found that it was legally impermissible to issue a Notice of Opinion which could not become final and conclusive within the four year time period as defined in s. 955 (2). It seems to me that, at least in relation to the 2004 tax year, the Notice of Opinion was presumptively invalid as it issued only on 23 December 2009, and therefore, even if the appellant had never appealed, it could not have become final and conclusive within the four year period provided for in section 955 (2).

52. In my view, if the appellant can avail of s. 955 (2), which turns on whether he has made "*in the return a full and true disclosure of all material facts necessary for the making of an assessment for the chargeable period*" and which I consider below, this argument is correctly relied on.
53. It obviously does not, however, apply to the 2005 tax year, as the four year period from the end of the chargeable period in which the return was filed ended on 31 December 2010. It is therefore necessary to consider the appellant's other arguments as to the operation of s. 955 (2), and Revenue's counterarguments.
54. The essential position of the appellant is that *Droog* determined that the purpose of a Notice of Opinion was to recover tax, which the parties were agreed could occur by a mechanism other than the making or amendment of an assessment to tax. As s. 955 (2) prohibits the recovery of tax after the end of the four year period, it is now clear that if s. 955 (2) is applicable to the appellant, no assessment or amended assessment can be raised for the tax years 2004 and 2005 and no additional tax can be recovered from him in respect of either tax year as the period of four years from the end of the chargeable period in which the 2004 and 2005 returns were made has long since elapsed.
55. In this appeal, Revenue sought to distinguish *Droog* on three bases. First it was said that *Droog* was distinguishable because the Notice of Opinion issued well outside the four year time limit in s. 955, whereas here it issued well within the time.
56. The appellant contends that this argument constitutes a mis-reading of the judgments in *Droog*, as the Supreme Court judgment was clear that it was the ultimate assessment to tax which might issue as a result of the Notice of Opinion which had to issue within four years. Section 955 (2) is directed to the payment of tax and the Supreme Court concluded that the purpose of issuing a Notice of Opinion could only be to impose an additional liability to tax over and above that initially assessed. Indeed, Clarke J went so far as to suggest that to issue a Notice of Opinion which could not become final and conclusive within the four year period in s. 955 would be legally impermissible.
57. Section 955 (2) prohibits the recovery of tax after that period and the Supreme Court stated in *Droog* that the time limit in s. 955 (2) applies even where any attempt to recover tax is on foot of an opinion pursuant to s. 811. Moreover, s. 955 (2) does not just refer to assessments and amended assessments, it explicitly provides that "*no additional tax shall be payable by the chargeable person ... after the end of the period of 4 years*". Therefore, the additional tax is simply not payable, and it does not matter whether Revenue seek to recover the tax by way of an assessment or by simply seeking to execute on foot of the Notice of Opinion without raising an assessment or an amended assessment (which it was common case could be done).
58. I agree with the appellant that the reasoning of the Supreme Court in *Droog* was to the effect that s. 955 and the four year time limit therein would apply to the assessment to capital gains tax for 2004 and the amendment of the 2005 assessment which would ultimately issue on foot of the Notice of Opinion if and when it became final and

conclusive, i.e., after the appellate procedures had been pursued to completion. I further agree that *Droog* is authority for the proposition that tax cannot be recovered by any means, even if Revenue seek to collect the additional tax payable without raising or amending an assessment.

59. The question, therefore, is whether Revenue is correct in its other submissions on the applicability of s. 811. The two remaining arguments of Revenue were, first, that s. 955 does not apply as the appellant failed to make the necessary disclosure in his tax returns, and secondly, that in any event, subs. (5A) was inserted into s. 811 so as to provide otherwise as required by s. 950 (2). Accordingly, Revenue can raise an assessment to capital gains for 2004, amend the assessment to tax for 2005, or recover the additional tax payable as identified in the Notice, if of course it is upheld, when it ultimately becomes final and conclusive on the determination of these proceedings.

**(ii) Whether the appellant made "a full and true return"**

60. Revenue claimed that the appellant was not entitled to rely on the time limits in s. 955, regardless of the correct interpretation of the decision in *Droog*, because s. 955 on its face applies only in the circumstances set out in s. 955 (2), i.e., that the chargeable person has delivered a return for a chargeable period and "*has made in the return a full and true disclosure of all material facts necessary for the making of an assessment for the chargeable period.*" In *Droog*, the Supreme Court was careful to state at paras. 6.5 and 6.6 of its judgment that it would not be applicable to a person who had not made a full and true disclosure.
61. I therefore accept Revenue's legal submission on this point and the issue then is whether the appellant made in the relevant returns a full and true disclosure of all material facts such as would permit him to rely on the time limit in section 955 (2). This in turn raises related issues as to the whether it is before me as part of the case stated and, if so, the basis on which I should approach it as it is an issue of fact in respect of which the Appeal Commissioner made a relevant finding.
62. The following finding of the Appeal Commissioner on this issue was originally set out in para. 7 of the Determination and was reproduced in identical terms at para. 10 of the Case Stated:
- "The appellant's tax returns for the years 2004 and 2005 failed to record that part of the arrangements associated with the Transaction were between 'connected parties' and therefore the Respondent had no means of appreciating the particular significance of the Transaction specifically in light of the appellant's reliance on market value rules between connected parties to generate the capital loss claimed."*
63. Revenue argued that there was no appeal against this finding and I therefore need to deal with that objection before this issue can be considered substantively.
64. First, I note that in his s. 949AP (2) Notice of 15 July 2020, the appellant clearly expressed his dissatisfaction with para. 7 of the Determination as follows:

*"The Transaction occurred only in 2004, not 2005. Therefore, there was no requirement to refer to the Transaction at all in the 2005 return. The only reference required in 2005 would be to the loss carried forward."*

There appears to be no expression of dissatisfaction insofar as the finding related to the 2004 return.

65. At p. 7 of this Notice, when identifying how the determination was erroneous in point of law under the heading "Time Bar", the appellant identified the point of law as:

*"Generally, was I correct in refusing the Appellants' submission on time limit grounds, and specifically:*

- a. in not following the Supreme Court decision in Droog;*
- b. in that I was "jurisdictionally constrained" from departing from the statutory words in section 811 (5A);*
- c. that, absent Droog, the appeal should still be upheld."*

66. Section 949AP (3), as substituted by s. 12 of the Finance (Tax Appeals and Prospectus Regulation) Act 2019, altered the requirement previously contained in s. 949AP (3)(a) to state in what particular respect the determination is alleged to be erroneous on a point of law. In the subsection as substituted by the 2019 Act, the dissatisfied party who is seeking to appeal by way of case stated must now, in the s. 949AP (2) Notice,

- (a) state in what particular respect the party concerned is dissatisfied with the determination, and
- (b) state in what particular respect the determination is alleged to be erroneous on a point of law.

67. I am not sure why the Oireachtas thought it desirable to require these to be particularised separately as s. 949AP (2) continues to provide that:

*"A party who is dissatisfied with a determination as being erroneous on a point of law may by notice in writing require the Appeal Commissioners to state and sign a case (in this Chapter referred to as a 'case stated') for the opinion of the High Court."*

68. This would suggest that the dissatisfaction and the errors of law are inextricably linked with the dissatisfaction resulting from the error of law, rather than being a separate matter. It seems to me that the appellant's dissatisfaction should be read into the draft errors of law, particularly as he drafted the latter in somewhat general terms.

69. Even if I am not clear as to the reason why the draftsman has now treated the reasons for dissatisfaction separately from the proposed errors of law, it has had the effect, at least in this case, of provoking a fairly detailed analysis of the determination on a

paragraph by paragraph basis, and it is clear from that that the appellant did not question the finding so far as the 2004 return was concerned.

70. Given that it is stipulated in the s. 949AP (2) Notice as a basis for dissatisfaction, I think the appellant did seek to appeal the finding on the basis that it should not have been made in relation to the 2005 return.
71. In any event, I find it difficult to reconcile the objection of Revenue that I could not look behind the finding of fact at para. 7 of the Case Stated with the opening submission, made in reliance on *Bradley*, that I was not bound by the questions of law in the case stated, and that I could deal with any issue of law that was apparent to me. The arguments at hearing were not framed by either side by specific reference with respect to the questions of law in the case stated.
72. In the specific circumstances of this case, therefore, it seems to me, first, that Revenue have propounded a very broad discretion on the part of this Court to go outside the questions of law in the case stated, and secondly, there is no injustice to either party as no one claimed that they would be in any way prejudiced by such an approach. Indeed, on this particular issue, even though they were not exhibited to the case stated, both parties made submissions to me on the meaning and effect of the 2004 and 2005 tax returns.
73. It therefore seems to me that, on the specific facts of this case, there is no injustice to either party in considering arguments that go outside the questions of law in the case stated. Insofar as the issue is characterised as one of fact, the arguments of the parties related to the consideration of documents, ie, the 2004 and 2005 tax returns, and therefore fall within the issues appropriate to a case stated as defined in *Mara v. Hummingbird* [1982] ILRM 421, at 426.
74. Whether this approach would be appropriate in any other case or as a general practice is a matter for another day, as it is sufficient to say that, in this case, there is broad agreement on the issue of whether I can consider questions of law which are not specifically contained in the case stated.
75. I will therefore now consider the appellant's appeal from this finding, both on the issue with which the appellant expressed dissatisfaction in his s. 949AP (2) Notice and on the broader arguments made by the parties.
76. Revenue says that the appellant in this case did not, in his returns for 2004 and 2005, make a full and true disclosure of all material facts necessary for the making of and assessment to capital gains tax for the chargeable periods 2004 and 2005. For this they rely on the fact that, in the tax returns for 2004 and 2005, the appellant never ticked the box to indicate, when claiming the capital gains tax relief on the alleged loss, that he and Parnell were "*connected persons*", a fact which Revenue says is highly material and would have put it on enquiry prior to the initial notice of assessment.

77. First, the appellant sought to argue that the omission in the appellant's 2004 tax return amounted to an inconsequential failure to tick a box and that it was not material, and therefore did not mean that he had failed to make a full and true return.
78. The appellant's tax returns for 2004 and 2005 were opened to me and were the subject of submissions as to their significance for the purposes of section 955 (2). In the relevant section of the appellant's 2004 tax return, having given details of the disposal of assets in 2004, the tax payer is then asked to indicate by ticking a box if any of the following apply:
- If any disposal was between connected parties or otherwise not at arm's length
  - If any of the original acquisitions were between connected parties or otherwise not at arm's length
  - If the market value has been substituted for the cost of acquisition of any assets disposed of.

Counsel for Revenue indicated at hearing that the appellant should have ticked the box for the second and third of these indents.

79. As set out in the findings of fact of the Appeal Commissioner, already set out above, the disposal of the Bond to Securitisation was not between connected parties as the Appellant and Securitisation were not connected. However, the original acquisition of the Bond from Parnell was an acquisition from a connected party as the appellant was deemed to control Parnell by virtue of the fact that he owned the greater part of its issued shared capital. He and Parnell were therefore connected persons by reason of the combined effect of ss. 10 and 432(2) TCA. Therefore, the appellant should have indicated that the circumstances in the second indent (set out above) applied.
80. Similarly, the appellant only paid €578,529 for the Bond but the return proceeded on the basis that market value was substituted on foot of section 549 TCA. Therefore, the appellant should have indicated that the circumstances in the third indent (set out above) applied.
81. Revenue therefore argues that both of these matters should have been indicated on the 2004 Tax Return. As already stated, this appeal is in the nature of a test case for three other appeals. I am told that in each of the other three cases, there was a similar failure to tick the relevant box to indicate that the transactions in question were between connected parties. This seems - at best - to be an astonishing coincidence.
82. I entirely accept the argument of Revenue that ticking of the boxes across from these phrases in the relevant section of the 2004 tax return was critical information and the very fact that the standard form assessment requires the chargeable person to indicate if either of these statements were applicable by the ticking of the relevant box demonstrates the importance of these issues, as the form specifically provided for that information to be given.



83. Therefore, I would uphold the finding of the Commissioner on this issue insofar as it relates to the 2004 tax return.
84. This brings me to the point made in the s. 949AP (2) Notice as part of the appellant's expression of dissatisfaction with the determination.
85. The 2005 Tax Return was replicated in a very different format in the Core Book of Documents as that was apparently the first year of online returns via the Revenue Online Service (ROS). This appears to record that the appellant was not declaring any disposal between connected parties or any original or market acquisitions. However, as counsel for the appellant pointed out, the relevant disposal took place in 2004 and was only recorded in this return as a loss brought forward in the amount of €1,248,169. While Revenue relied on the failure to disclose an acquisition from connected persons, I think the appellant is correct on this issue: the acquisition took place in 2004 and no acquisition (or indeed disposal which would trigger the need to disclose the circumstances of the acquisition) took place in 2005. The only field in the 2005 return which was material to the Transaction was "*Losses Brought Forward*". There was, therefore, no material non-disclosure on the face of the 2005 return itself.
86. The question is whether, in the case of a non-compliant tax return for 2004, it can be said that the appellant is entitled to rely on s. 955 (2) as regards a 2005 return which claims a deduction for capital losses brought forward from 2004. To recap, s. (2) provides:
- "(a) *Where a chargeable person has delivered a return for a chargeable period and has made in the return a full and true disclosure of all material facts necessary for the making of an assessment for the chargeable period, an assessment for that period or an amendment of such an assessment shall not be made on the chargeable person after the end of four years commencing at the end of the chargeable period in which the return is delivered and –*
- (i) *no additional tax shall be payable by the chargeable person after the end of that period of 4 years, and*
- (ii) *no tax shall be repaid after the end of a period of 4 years commencing at the end of the chargeable period for which the return is delivered, by reason of any matter contained in the return." [Emphasis added.]*
87. It seems to me from the portions of the subsection which I have highlighted above that the appellant's original dissatisfaction with the Notice (which related only to the tax year 2005) is well made. While para. (a) initially refers to "*a return for a chargeable period*", the provision subsequently refers on several occasions to "*the return*", which must be a reference to the "*return for a chargeable period*" as first mentioned. It is in that return that the disclosure must be made.
88. Section 955 (2) appears to assume that matters in a tax return will only relate to tax payable in the chargeable period to which the return relates. That, I think, follows from

the use of the phrase “*return for a chargeable period*” followed later by the phrase “*assessment for the chargeable period*”. It does not contemplate assessments for subsequent chargeable periods which may be affected by the non-disclosure in the return made in respect of an earlier chargeable period. The result is that the failure to disclose that the original acquisition was from a connected person only affects the operation of s. 955 (2) insofar as the 2004 assessment is concerned. The qualification in s. 955 (2) therefore does not affect the operation of the time limit insofar as what is in issue is non-disclosure in a return for an earlier chargeable period, even if that non-disclosure is material to the return for a subsequent chargeable period, as is the case where losses are rolled over pursuant to s. 31 (b) TCA.

89. The third argument made by the appellant on the time issue was to say that, insofar as there was a failure to make a full and true disclosure of all material facts on the tax return, this was not “*necessary for the making of an assessment*” because Revenue proceeded to make an assessment and they had never amended that assessment.
90. I cannot accept that argument. It is tantamount to saying that because the notice of assessment issued on the basis of the material non-disclosure, Revenue is precluded from arguing that the non-disclosure is material. Although not expressed in these terms, this is what it seems to amount to and, in my view, such an interpretation of s. 955 (2) would be absurd.
91. The word “*assessment*” in s. 955 (2) (a) does not refer, as the appellant appears to suggest, to the formal document which issues to a taxpayer who files a tax return under the self-assessment system, but to the process of assessing the tax payable or, in this case, the amount of allowable losses which may be deducted from chargeable gains. In my view, the argument made conflates the assessment with the formal notice of assessment.
92. It is quite clear from the terms of s. 955 (2)(a) that it only has application in the case of “*a fully compliant tax return*”, as clearly stated by the Supreme Court in *Droog*. The appellant’s argument would have the effect of avoiding this pre-condition entirely: once Revenue proceeded to an assessment, a taxpayer could say that because Revenue was able to issue a notice of assessment for some amount, it would follow in all cases where a formal notice of assessment issued that the material non-disclosure could not be said to be necessary to the assessment.
93. In my view, the appellant clearly did not make a full and true disclosure of all material facts necessary for the making of an assessment for the 2004 chargeable period. This means that the appellant is not a person who can avail of s. 955 (2) to prevent an assessment to capital gains tax for 2004. This follows from the Supreme Court judgment in *Droog*.
94. As regards the 2005 chargeable period, the question of material non-disclosure does not arise, and the appellant can avail of s. 955 (2) to resist the payment of additional tax in

respect of that period, as far more than 4 years have elapsed since the end of 2006, the year in which the return was made for that chargeable period.

95. It is therefore necessary to consider Revenue's reliance on s. 811 (5A) and whether the Appeal Commissioner was correct in applying it so as to hold that the Notice of Opinion was not out of time in respect of either 2004 or 2005.

**(iii) Application of s. 811 (5A)**

96. The second submission of Revenue in relation to s. 955 was that subs. (5A) was inserted into s. 811 after the High Court judgment in *Droog* and it clearly, on its face, will apply to the assessment or amended assessment which will follow once the Notice of Opinion has become final and conclusive, or to the recovery of any additional tax or clawback of the relief claimed done by means other than an assessment or amended assessment.

97. Subsection (5A)(b), as originally inserted by s. 130 (1) of the Finance Act 2012, provides:

*"Where the opinion of the Revenue Commissioners that a transaction is a tax avoidance transaction becomes final and conclusive, then for the purposes of giving effect to the section, any time limit provided for by Part 41 or by any other provision of the Acts, on the making or amendment of an assessment or on the requirement or liability of a person to pay tax or to pay additional tax –*

*(i) shall not apply, and*

*(ii) shall not affect the collection and recovery of any amount of tax or additional tax that becomes due and payable."*

98. Section 130 (2) of the 2012 Act then provided for the application of the new subsection (5A):

*"(a) Subsection (1) applies to any assessment to tax or any amendment of any assessment to tax which is made, on or after 28 February 2012, so that the tax advantage resulting from a tax avoidance transaction, in respect of which a notice of opinion has become final and conclusive, is withdrawn from or denied to any person concerned.*

*(b) For the purposes of paragraph (a), 'assessment', 'amendment', 'tax advantage', 'tax avoidance transaction', 'notice of opinion' and 'final and conclusive' shall be read in accordance with section 811 of the [TCA]."*

99. Revenue says that subs. (5A) therefore entirely removes (that is, in relation to both tax years) the benefit of the four year time limit in s. 955 (2) from the appellant, as any new or amended notice of assessment or any steps to recover the additional tax which will become payable as a result of the Notice of Opinion becoming final and conclusive will obviously post-date 28 February 2012. Revenue submits that the meaning of s. 130 (2) and of subs. (5A) is entirely clear and admits of no other interpretation, while Revenue

points in its written submissions to the non-application of s. 27 of the Interpretation Act 2005, a proposition which is evidently correct as subs. (5A) does not purport to repeal any pre-existing statutory provision.

100. In response, the appellant contended that to interpret s. 130 (2) in the manner suggested by Revenue would mean that it was in the nature of retrospective legislation and he relied on *Hamilton v. Hamilton* [1982] I.R. 466 and *Minister for Social, Community and Family Affairs v. Scanlon* [2001] 1 I.R. 64.
101. In addition, while the appellant accepted in oral submissions that no constitutional challenge could be mounted to either subs. (5A) or s. 130 of the Finance Act 2012 in these proceedings, I understood him to rely on the presumption of constitutionality.
102. The common law presumption against retrospective legislation, which is legislation which impairs or affects a vested right, is a rule of construction not of law, and may be displaced by statute. It is important to recognise that the presumption can be displaced either by clear statutory wording or by necessary implication from the statute: see the judgments of Henchy J. in *Hamilton v. Hamilton* and Fennelly J. in *Minister for Social, Community and Family Affairs v. Scanlon* [2001] 1 I.R. 64.
103. In *Scanlon*, disability benefit had been paid to the defendant who was not in fact entitled to it. Subsequently, a revised decision was made by a social welfare officer to the effect that, based on new evidence, the benefit ought not to have been paid to the defendant. At the time the benefit was paid, the sums paid could only be recovered if the payments had been made on the basis of fraud or material concealment of facts. However, the law was then changed to allow for the recovery of benefits paid on the basis of new evidence coming to the attention of the Minister's officers which was not such as to indicate fraud or material concealment of facts. Accordingly, given the reasons of the appeals officer for upholding the revised decision, benefits were recoverable from the defendant only on the basis that the new law applied.
104. The provision in question was conceded to be retrospective in nature, but it was found that the presumption was rebutted as the statute was sufficiently clear to apply to the defendant's situation. There was no ambiguity so as to leave room for the operation of what was no more than a common law presumption which could be rebutted.
105. *Scanlon* seems to be relevant as, if Revenue is correct that the Transaction was a "tax avoidance transaction", then the appellant will have wrongly claimed tax relief. However, prior to the enactment of s. 130 of the 2012 Act, s. 955(2) already applied so as to prevent the formation of an opinion pursuant to section 811. That had occurred by 31 December, 2010, which was the end of the four year period as it applied to the 2005 tax return.
106. This seems to me to be analogous to a situation where social welfare benefits cannot be recovered as the requisite grounds for same have not been made out. By altering the grounds on which the benefits could be recovered – and in effect making it easier to

recover the benefit – an immunity from recovery was removed from the defendant in *Scanlon*.

107. I would have no difficulty in concluding that the elapse of the time limit in s. 955 (2) would constitute a vested right in the nature of an immunity from the recovery of tax on foot of a notice of opinion such that s. 130 is properly characterised as retrospective legislation.
108. The key question is whether there is any ambiguity in s. 130, and particularly s. 130 (2), to which the presumption can be applied so as to “*read down*” its operation in favour of a prospective only interpretation.
109. The only potential ambiguity that emerged from argument was that it was conceded by both sides that the Notice of Opinion could itself give rise to a liability to tax, without the need for a fresh assessment or an amended assessment. I think it is arguable that s. 130 (2) only applies to the recovery of tax where this is done by way of assessment or an amended assessment.
110. Unfortunately for the appellant, however, that is precisely what is contemplated by the Notice of Opinion. It is specifically stated that the “*tax consequences*” will be the making of an assessment to capital gains tax for 2004 to withdraw the capital loss relief claimed in the sum of €1,408,469 and to amend the 2005 capital gains tax assessment to withdraw the capital loss relief claimed by the appellant in the sum of €1,248,889. Therefore, even accepting for the purposes of argument that there might be an ambiguity in relation to the recovery of tax by means other than the raising or amendment of an assessment so as to withdraw the tax advantage resulting from the tax avoidance transaction, Revenue has stipulated that those are the steps that will be taken on foot of the Notice of Opinion.
111. In respect of the raising or amendment of an assessment, there is no ambiguity in s. 130(2) to which the presumption against retrospective legislation can apply. Consequently, subs. (5A) applies so as to deprive the appellant of the benefit of s. 955 (2) and to prevent him from relying on it to argue that the Notice of Opinion is unlawful.
112. As regards the presumption of constitutionality, the appellant did not identify any particular constitutional right which was impinged or affected by subsection (5A) but it seems to me there are two possibilities here. First, it might be argued that the removal from the appellant of the benefit of an expired time limit constituted a breach of a constitutionally protected right. Secondly, it may be arguable that the application of subs. (5A) to his appeal to the Appeal Commissioner, which was lodged over two years before the law was promulgated and commenced, was unconstitutional as interfering with a right to have the appeal determined in accordance with the law as it stood on the date the appeal was lodged.
113. I make no comment on the constitutional basis for any such argument as none was identified to me and, furthermore, it is not necessary to do so given the absence of any

ambiguity in s. 130 (2) so far as the “*tax consequences*” identified in the Notice of Opinion are concerned.

114. The presumption of constitutionality cannot operate so as to disapply an unambiguous provision such as section 130 (2). That being the case, if the appellant is of the view that s. 130 of the 2012 Act infringes his constitutional rights, then the appropriate remedy is to challenge that provision in appropriate proceedings. These proceedings do not (and could not) do so and therefore the only issue before me is whether the presumption of constitutionality prohibits the application of subs. (5A) in this case. However, that presumption cannot alter the very clear meaning of s. 130 (2) and therefore, even if a constitutionally protected right can be identified which is infringed by s. 130 of the 2012 Act, this does not avail the appellant in these proceedings.
115. Accordingly, neither presumption assists the appellant unless he can show that s. 811 (5A) is ambiguous and does not clearly provide (whether expressly or by necessary implication) for retrospective effect. However, the appellant did not put forward any interpretation of s. 130 of the 2012 Act which would permit me to find that subs. (5A) did not apply to the Notice of Opinion so as to prevent the raising of an assessment to capital gains tax for 2004 and an amended assessment to capital gains tax for 2005, which are the “*tax consequences*” stipulated in the Notice of Opinion.
116. Finally, Revenue argued that any issue as to the applicability of s. 130 of the 2012 Act was premature as no assessment had been raised on foot of the Notice of Opinion and that could not be done until the appellate process had been exhausted. I found it somewhat difficult to see how this could be so, given the statement of Clarke C.J. in *Droog* (at para. 8.2) that “[*t*]he raising of an opinion whose only end can be to require the payment of additional tax in circumstances where such additional payment is prevented by the time limits contained in Part 41 is clearly impermissible. To start a process which can have no lawful conclusion must itself be legally impermissible.”
117. In that passage, it seems to me that the Supreme Court were drawing the natural inference that there would be little, if any, point in doing up a Notice of Opinion under s. 811 if the additional tax were not to be charged or the relief to be withdrawn. As a consequence, I do not see how Revenue can argue that the arguments on the time limit are premature.
118. Far from being premature, it seems to me that the only purpose of the issue of the Notice of Opinion on 23 December 2009 was to recover from the appellant the sums claimed in respect of allowable losses in his 2004 and 2005 tax returns. Leaving aside the issue of whether the appellant made a “*full and true*” tax return in those years, it seems that the time limits in s. 955 (2) would apply and Revenue could only recover tax if s. 130 of the 2012 Act were applicable.
119. I would like to add that the argument as made was framed in terms of prematurity and Revenue did not rely on s. 955 (3), which confers a jurisdiction on the Appeal Commissioners to consider an appeal against an assessment to tax on the basis that the

time limit for raising the assessment has expired, for the purposes of this argument. It seems that that provision, which pre-dates the High Court judgment in *Droog* by several years, was probably drafted on the assumption (which has turned out to be wrong) that the time limit in s. 955 (2) would not apply to notices of opinion under section 811. While there may be a logic to saying that any question of time limits for an assessment or amended assessment which may issue on foot of the Notice of Opinion, if upheld, should await the appeal from such an assessment given that the appeal pursuant to s. 811(7) took over ten years to complete, I do not think that deferring consideration of a significant issue such as has been raised by the appellant is desirable, particularly given that the Notice of Opinion issued more than 11 years ago.

120. I do not need to determine Revenue's argument on prematurity, however, as I agree that the Appeal Commissioner was correct in law in finding that subs. (5A) applied so as to disapply s. 955(2) from the Notice of Opinion which is the subject of this case stated.
121. Finally, I need to address the appellant's contention that the Supreme Court considered s. 811 (5A) for the purposes of its judgment in *Droog*. The appellant makes this argument on the basis that, although the Supreme Court nowhere mentions this provision in its judgment, it was referred to in the written submissions before the Supreme Court and therefore the judgment must be read as determining the application of s. 955(2) to notices of opinion under s. 811, notwithstanding the enactment of s. 130 of the 2012 Act.
122. In my view, this contention is not well-founded. The mere fact that a legal issue is mentioned in written submissions does not mean that any written judgment which follows constitutes a binding precedent on that issue. For one thing, it is not unusual for a particular point mentioned in written submissions to be qualified or even fully abandoned at hearing.
123. More importantly, even if a point is fully argued, if it is not mentioned in the judgment, I do not see how the judgment can be said to be a precedent on that issue. Subsection (5A) is not mentioned in the Supreme Court judgment in *Droog* and, as a consequence, is not relevant to the *ratio decidendi* of that case. And of course, subs. (5A) is not mentioned in the High Court judgment in *Droog* because it had not even been enacted at that time. It is therefore difficult to see how it could have formed part of the consideration of the Supreme Court when hearing the appeal in that case.
124. In any event, the written submissions of Revenue only referred to subs. (5A) for the purpose of stating that it constituted a re-statement of the existing law but it was conceded that, in any event, it could not influence the interpretation of the law as applicable in that case. In other words, it was implicitly conceded that subs. (5A) did not apply to that appeal and moreover it was urged on the Supreme Court that the insertion of subs. (5A) was not material to the correct interpretation of s. 811 as it applied in *Droog*.
125. The taxpayer in his written submissions in *Droog* agreed that a subsequent legislative amendment could not influence the interpretation of the law as it applied to the appeal

but took issue with what he saw as a back door attempt to influence that interpretation by classing subs. (5A) as a restatement of the law applicable to the appeal.

126. It is clear from the submissions therefore, that the parties to the appeal in Droog were of the view that subs. (5A) did not apply to the appeal, and its insertion could not affect the interpretation of the pre-existing law. The dispute was whether the pre-existing law was to the same effect in any event.
127. The Supreme Court judgment was therefore an adjudication only on the meaning of s.811 as it existed prior to the insertion of subs. (5A). That is clear from its judgment and I have only referred to the written submissions filed out of deference for the emphasis placed on them by the appellant in this appeal. However, I am of the view that they are not in any event material to the correct reading of the Supreme Court judgment which is self-contained and should be read for what it says, and not on the basis of speculation as to what arguments were made before the Court in that appeal. In my view, the appellant's arguments based on the written submissions filed in the Supreme Court in Droog are, therefore, misconceived.

**Conclusion on issues relating to the time limit in s. 955 (2)**

128. Section 955 (2) does not apply to the appellant insofar as his tax liability for 2004 is concerned, as he did not make a full and true disclosure of all material facts in the 2004 return. Insofar as the Notice of Opinion relates to the losses brought forward and deducted in 2005, there was no material non-disclosure in the return for the 2005 tax year which would prevent the appellant from relying on s. 955(2) in relation to that tax year.
129. Nevertheless, the appellant cannot rely on s. 955 (2) even in relation to the 2005 tax year as, insofar as the "tax consequences" identified in the notice of opinion are concerned (that is, an assessment to capital gains tax for 2004 and an amended assessment for 2005), subs. (5A) provides that the time limit in s. 955 (2) does not apply. While the provision is retrospective in nature, the common law presumption against retrospective legislation is rebutted by the very clear language in s. 130 (2) of the 2012 Act which disapplies s. 955 (2) from any assessment or amended assessment that may be raised on or after 28 February, 2012. Similarly, had the appellant identified a constitutional right or principle infringed by s. 130 of the 2012 Act, the presumption of constitutionality could not prevent the clear language of s. 130(2) from operating. That subsection is clear and unambiguous and, in the absence of any challenge to its constitutional validity, it must be applied. I therefore agree with the Commissioner on this point.
130. I would disagree with the Commissioner insofar as his findings suggest that the presumption of constitutionality precluded him from considering the appellant's arguments, insofar as the appellant contended that any ambiguity in subs. (5A) should be resolved so as to permit him to rely on s. 955 (2), it is within the jurisdiction of the Commissioner to apply the presumption and to choose a constitutional interpretation above an unconstitutional one. However, before the Commissioner would be obliged to



engage in that exercise, he or she would first have to be persuaded that the right or principle asserted by a party to an appeal before him or her was constitutionally protected. It does not seem to me from a recital of the arguments before the Commissioner that any such right was identified.

131. Similarly, if the appellant had identified a vested right which was affected by the retrospective operation of subs. (5A) but which was not constitutionally protected, then the Commissioner would have to apply the presumption against such retrospectivity in interpreting it.
132. However, both of these presumptions only operate to resolve an ambiguity in favour of protecting the vested right so identified. As the appellant has not identified any ambiguity in s. 811 (5A) insofar as the "*tax consequences*" identified in the Notice of Opinion are concerned, it does not seem to me that they could have altered the Commissioner's determination. Subs. (5A) applied and any challenge to its constitutional validity could only be made by proceedings initiated in this Court.
133. I would therefore answer Question (b) by saying that the Appeal Commissioner did not err in considering himself constrained by the wording of s. 811 (5A) from applying the Supreme Court judgment in *Droog* to the Notice of Opinion, and I will now proceed to consider the substantive issues in the appeal.

**Whether the Transaction constituted a "tax avoidance transaction"**

134. The second major issue in this case stated is whether the Commissioner erred in law in finding the transaction was a "*tax avoidance transaction*".

135. Subsections (2) and (3) of s. 811 provide:

*"(2) For the purposes of this section and subject to subsection (3), a transaction shall be a 'tax avoidance transaction' if having regard to any one or more of the following-*

- (a) the results of the transaction,*
- (b) its use as a means of achieving those results, and*
- (c) any other means by which the results or any part of the results could have been achieved,*

*the Revenue Commissioners form the opinion that –*

- (i) the transaction gives rise to, or but for this section would give rise to, a tax advantage, and*
- (ii) the transaction was not undertaken or arranged primarily for purposes other than to give rise to a tax advantage,*

...

(3) (a) *Without prejudice to the generality of subsection (2), in forming an opinion in accordance with that subsection and subsection (4) as to whether or not a transaction is a tax avoidance transaction, the Revenue Commissioners shall not regard the transaction as being a tax avoidance transaction if they are satisfied that-*

(i) *notwithstanding that the purpose or purposes of the transaction could have been achieved by some other transaction which would have given rise to a greater amount of tax being payable by the person, the transaction -*

(I) *was undertaken or arranged by a person with a view, directly or indirectly, to the realisation of profits in the course of the business activities of a business carried on by the person, and*

(II) *was not undertaken or arranged primarily to give rise to a tax advantage*

*or*

(ii) *the transaction was undertaken or arranged for the purpose of obtaining the benefit of any relief, allowance or other abatement provided by any provision of the Acts and that the transaction would not result directly or indirectly in a misuse of the provision or an abuse of the provision having regard to the purposes for which it was provided.*

(b) *In forming an opinion referred to in paragraph (a) in relation to any transaction, the Revenue Commissioners shall have regard to -*

(i) *the form of that transaction*

(ii) *the substance of that transaction,*

(iii) *the substance of any other transaction or transactions which that transaction may reasonably be regarded as being directly or indirectly related to or connected with, and*

(iv) *the final outcome and result of that transaction and any combination of those other transactions which are so related or connected.*

136. In interpreting s. 811 it is common case that I should have regard to the authorities on the interpretation of s.86 of the Finance Act 1989, which was the general tax avoidance provision enacted in light of the Supreme Court decision in *McGrath v. McDermott* [1988] I.R. 258 and which s. 811 has replaced. Indeed, much of the argument of both sides in relation to this strand of the case stated centred on the interpretation of s.86 of the 1989 Act in *Revenue Commissioners v. O'Flynn Construction Co. Ltd.* [2013] 3 I.R. 533.

137. The judgment in *O'Flynn Construction* contains important guidance on the general process of the formation of an opinion pursuant to s. 811 (2) that a transaction is a "tax

*avoidance transaction*" as well as on whether or not s. 811 (3)(a)(ii) is applicable in any given case.

138. The majority in *O'Flynn Construction* held that the considerations set out in what was previously a proviso to s. 86(3) and which is now contained in s. 811 (3)(b) are an inherent part of the formation of an opinion that a transaction is a "*tax avoidance transaction*". Similarly, O'Donnell J. stated (at para. 82) that a consideration of s. 86(3)(b), the precursor to s. 811(3)(a)(ii) on which the appellant heavily relies in his appeal against the Determination on the substantive issue, involved similar considerations to those involved in s. 86(2) and the proviso to s. 86(3).
139. Nevertheless, as s. 811 (3)(a)(ii) raises specific issues along with the more general considerations material to the issue of whether the Transaction is a "*tax avoidance transaction*", it is convenient to deal with the question of whether the Transaction is a "*tax avoidance transaction*" by considering, first, whether the Commissioner erred in law in finding that it was such having regard to s. 811 (2) and s. 811 (3)(b), and then considering whether s. 811 (3)(a)(ii) prevents the Transaction from being considered as a "*tax avoidance transaction*". The appellant does not rely on s. 811 (3)(a)(i).
140. Before turning to the specific arguments in the case, I must first refer to the arguments made by the appellant as regards the general approach to the interpretation of taxation provisions.

#### **Interpretation of taxation statutes**

141. The appellant placed great emphasis in his submissions on the rejection by the Supreme Court in *McGrath v. McDermott* of the English doctrine of "fiscal nullity" and contended that it was not open to the Appeal Commissioners or this Court to look at the purposes for which the relevant provisions of the TCA were enacted. It was also suggested that there had been some qualification of the approach in *O'Flynn Construction* to the interpretation of s. 86 in the recent Supreme Court judgment in *Bookfinders v Revenue Commissioners* [2020] IESC 60. Finally, it was submitted that a purposive approach, not only to the TCA, but to s. 86 itself, had been applied by the Supreme Court in *O'Flynn Construction* and that it had been indicated in *Bookfinders* that such a purposive approach to revenue legislation was inappropriate.
142. I do not accept any of these arguments. In *O'Flynn Construction*, the issue was whether, by a series of elaborate steps, dividends that were declared by a domestic construction company could attract export sales relief (ESR) by, in effect, purchasing that relief from an exporting company which was not in a position to declare a dividend. It was conceded that the scheme had no commercial purpose and was designed to avail of the tax relief, but it was contended that it fell within s. 86(3)(b) as it was not a misuse or abuse of provisions providing for ESR and therefore was not a "*tax avoidance transaction*".
143. The Commissioners were found to have erred in that case by rejecting any consideration of the purposes for which the relevant relief in that case was introduced, even though the plain words of s. 86(3)(b), as is the case also with s. 811(3)(a)(ii), expressly provided

that misuse or abuse should be considered having regard to those very purposes. The Appeal Commissioners had rejected any consideration of the purposes behind ESR based on *McGrath v. McDermott*. The majority (*per* O'Donnell J.) stated (at para. 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 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 'consideration of the purpose and intention of the legislature'. Indeed, if McGrath v. McDermott stands for any principle of statutory interpretation it implicitly rejects the contention that any different and more narrow principle of statutory interpretation applies to taxation matters."*

144. The appellant relies heavily on the judgment of O'Donnell J. in *Bookfinders v. Revenue Commissioners* [2020] IESC 60 as somehow resiling in a fundamental way from the earlier judgment in *O'Flynn Construction*. However, while in *Bookfinders* O'Donnell J. clarified that his remarks in *O'Flynn Construction* on the applicability of s. 5 of the Interpretation Act 2005 to taxation statutes were obiter, I do not read *Bookfinders* as retreating from the earlier judgment. On the contrary, O'Donnell J. reiterated the approach to statutory interpretation applied in *O'Flynn Construction*, stating (at para. 52):

*"It is not, and never has been, correct to approach a statute as if the words were written on glass, without any context or background, and on the basis that, if on a superficial reading more than one meaning could be wrenched from those words, it must be determined to be ambiguous, and the more beneficial interpretation afforded to the taxpayer, however unlikely and implausible. The rule of strict construction is best described as a rule against doubtful penalisation. If, after the application of the general principles of statutory interpretation, it is not possible to say clearly that the Act applies to a particular situation, and if a narrower interpretation is possible, then effect must be given to that interpretation. As was observed in Kiernan, the words should then be construed 'strictly so as to prevent a fresh imposition of liability from being created unfairly by the use of oblique or slack language'."* Later in the judgment in *Bookfinders*, O'Donnell J. referred again to *Inspector of Taxes v. Kiernan* [1981] I.R. 117 where Henchy J. stated:

*"A word or expression in a given statute must be given meaning and scope according to its immediate context, in line with the scheme and purpose of the particular statutory pattern as a whole, and to an extent that will truly effectuate the particular legislation or a particular definition therein."*

145. O'Donnell J. also referred in *Bookfinders* to *Dunnes Stores v. Revenue Commissioners* [2019] IESC 50, where McKechnie J., who had delivered a dissenting judgment in *O'Flynn*

*Construction*, stressed (at para. 63) that, even with the literal approach, “*context is critical: both immediate and proximate, certainly within the Act as a whole, but in some circumstances perhaps even further than that.*”

146. Later in *Dunnes Stores*, McKechnie J. stated (at para. 71):

*“Even in the context of a taxation provision however, and notwithstanding the requirement for a strict construction, it has been held that where a literal interpretation, although technically available, would lead to an absurdity in the sense of failing to reflect what otherwise is the true intention of the legislature apparent from the Act as a whole, then such will be rejected.”*

In support of that statement, he cited the judgment of the Supreme Court in *Kellystown Company v. H. Hogan, Inspector of Taxes* [1985] I.L.R.M. 200, where Henchy J. stated (*per curiam* at p. 202):

*“The interpretation contended for by Kellystown, whilst it may have the merit of literalness, is at variance with the purposive essence of the proviso. Furthermore, it would lead to an absurd result, for monies which are clearly corporation profits would escape the tax and, indeed, the tax would never be payable on dividends on shares in any Irish company. I consider the law to be that, where a literal reading gives a result which is plainly contrary to the legislative intent, and an alternative reading consonant with that legislative intent is reasonably open, it is the latter reading which must prevail.”*

147. It is difficult to square any of these *dicta* with the contention of the appellant that any consideration of the purpose of a taxation provision which fell for interpretation would be to introduce a doctrine of fiscal nullity by the back door. I would respectfully regard this as an exaggeration and, furthermore, it at least to some extent repeats the errors of law identified by the majority in *O’Flynn* as having been made by the Appeal Commissioners in that case. Those errors were (as I think is apparent from para. 72 of *O’Flynn Construction*), first, to ignore the introduction of a general anti-avoidance provision (previously s. 86 of the 1989 Act and now contained in s. 811 TCA) in response to the judgment in *McGrath v. McDermott* and, secondly, to ignore the fact that *McGrath v. McDermott* itself contemplated that the interpretation of taxation statutes requires a consideration of context and indeed the purpose of a legislative provision.
148. Neither of those issues is affected by the comments in *O’Flynn Construction* on s. 5 of the Interpretation Act 2005 and indeed O’Donnell J. explicitly stated in *Bookfinders* (at para. 42) that his comments on s.5 in *O’Flynn Construction* had been *obiter*, while reiterating (at para. 47 to 52) that the courts could have regard to the purpose of the particular provision, which, if discernible, could assist in interpreting it.
149. Indeed, in *Used Cars Importers Ireland Ltd. v. Minister for Finance* [2020] IECA 298, Murray J. has stated (at para. 162), after referring to both *Dunnes Stores* and *Bookfinders*, that the provisions of the Finance Act 1992 dealing with Vehicle Registration

Tax “falls to be construed in accordance with well-established principle. The Court is concerned to ascertain the intention of the legislature having regard to the language used in the Act but bearing in mind the overall purpose and context of the statute.”

150. It therefore seems to me that there is no doubt that, in interpreting taxation statutes generally, context and purpose are relevant as highlighted in the various judgments of the Supreme Court already referred to. Insofar as the appellant contends otherwise, I am satisfied that this is incorrect.
151. Furthermore, it does not seem to me that the majority judgment in *O’Flynn Construction* proceeded on the basis that s. 811 should itself be interpreted in a purposive fashion. Indeed, the minority (per McKechnie J.) were just as clear as the majority that s. 86 (3)(b), on its express terms, required a consideration of the purposes of the relieving provision: see para. 167. On any reading of s. 811 (3)(a)(ii), therefore, the purposes of the relieving provision availed of by the transaction in question must be identified with a view to considering whether or not the transaction is a misuse or abuse of that provision.
152. Section 811, of course, is an unusual provision in the taxation context (or perhaps any context), as it is evidently permitting the Revenue, and, on appeal, the Commissioners, to look beyond the usual meaning of taxation provisions as interpreted in accordance with established principle. It was contended by Revenue in this case that s. 811 *did* in fact permit the use of a purposive approach in the more loaded sense referred to in *Bookfinders* as not generally being appropriate, that is, one “*in which words and text are of lesser importance than the apparent objective of the legislation*” (see para. 42 of *Bookfinders*).
153. It is true that s. 811 is explicit in requiring that the purposes of the relieving provision relied upon for the purposes of subs. (3)(a)(ii) are to be considered, and that, as stated in *O’Flynn Construction*, the starting point of any consideration of whether a transaction is a “*tax avoidance transaction*” is that the relief is available. That must mean that the relief is available when the provision for it is interpreted in accordance with the well-established principles referred to above, which, as already noted, includes some consideration of the context and purpose of the provision. It is not clear to what extent s. 811 (a)(ii) requires a court to go further in analysing the purposes of a relieving provision, beyond those involved in the usual interpretation of such a provision, ie, its interpretation outside of the context of the formation of an opinion under s. 811.
154. It may be that focus should be, not so much on the statutory interpretation of the relieving provision, but on the consideration of a transaction which might ordinarily be analysed as a series of individual steps, each considered separately, but which, for the purposes of s. 811, requires to be considered as a single transaction and which might as a result be viewed very differently. In *O’Flynn Construction*, the majority ultimately decided (at para. 85) that the substance of the transaction there in issue was “*to use the funds of a domestic property company to pay dividends to its shareholders relieved of tax, and that such an outcome is the antithesis of the statutory scheme.*” The decision in that case

I think owed at least as much to the consideration of the substance and results of a series of steps viewed as one overall transaction as to statutory interpretation.

155. In any event, as stated by O'Donnell J. in *Bookfinders* (at para. 39):

*"This case shows that these broad arguments about the approach to interpretation are perhaps best pursued when not conducted in the abstract, but rather should be addressed by reference to the words of a particular statute and the facts of a particular case. This case also illustrates the fact that there is often a mismatch between the lofty principles that are said to be in conflict and the reality of the dispute. It is worth emphasising that the starting point of any exercise in statutory interpretation is, and must be, the language of the particular statute rather than any pre-determined theory of statutory interpretation."*

156. Bearing that in mind, I propose to consider the arguments of the parties as to the correct interpretation of the key provisions relevant to the transaction, rather than by embarking on any consideration of whether the general approach to the interpretation of s. 811 might lean towards the end of the spectrum described by O'Donnell J. in *Bookfinders* as (at para. 42) *"a purposive or teleological approach akin to that employed in the field of European law, and in which words and text are of lesser importance than the apparent objective of the legislation"*. Rather than considering this as an abstract issue, I think it is probably more enlightening to consider the arguments of the parties which are specific to this case stated.

157. The appellant clarified at hearing that the significance of his submissions on statutory interpretation was that no purposive approach could be applied to the interpretation of s.31 TCA, and the court could not look at the purposes for which the Oireachtas might have provided that capital losses were deductible. He also said that the correct approach to statutory interpretation was material to a consideration of the limits of section 811.

158. In tandem with those arguments, he argued that s. 31 was a technical provision with no purpose. By contrast, Revenue contended that s. 31 only applies to *"real"* or *"monetary"* losses and not wholly artificial losses created by the application of s. 31 and s. 549 as interpreted in accordance with the well established principles of interpretation relevant to revenue statutes. These submissions were directed to the operation of subs (3)(a)(ii), which was the focus of the appellant's appeal against the Determination of the Appeal Commissioner.

159. Before turning to that key issue of the applicability of subs. (3)(a)(ii) in this case, the context for a consideration of that provision is the finding of the Appeal Commissioner that the Transaction was a *"tax avoidance transaction"* within the meaning of s. 811 (2). I therefore propose to set out the applicable law on the formation of an opinion that a transaction is a *"tax avoidance transaction"*.

**Whether the Transaction is a "tax avoidance transaction": s.811(2) and (3)(b)**

160. A reading of *McGrath v. McDermott* shows that the argument rejected in that case was one which invited the courts to look at the substance of a transaction (or a series of transactions) rather than its form, and it may well be that s. 811 (2) and (3)(b) were drafted with that argument, and the English caselaw on which it was based, in mind. In any event, *O'Flynn Construction* establishes that s. 811 (2) and s. 811 (3)(b) both require a consideration of the form, substance, results and consequences of the "transaction" (as defined in s. 811(1)(a)) which is alleged to be a "tax avoidance transaction". At para. 65, O'Donnell J. stated:

*"Prior to s. 86, the only question was whether or not the transaction came within the strict words of the statute sometimes literally and narrowly construed. In the case of a tax statute, if the component parts of the transaction did not come within the provision, then it was not possible to look at the substance of the transaction to contend that tax should be applied. Similarly, in the case of a relief, if the transaction came within the words of the provision granting relief then the relief must be granted, no matter how contrived the scheme, nor how far removed it was from the activity sought to be encouraged by the relief. But under s. 86 the potential tax benefit to a taxpayer may be disallowed if the Revenue Commissioners come to the conclusion that the transaction is one designed to confer a tax advantage and constitutes a tax avoidance transaction. As the Appeal Commissioners in this case observed, the essential starting point to the application of s. 86 is a determination that absent its provisions the taxation charge would not apply, or in the case of an exemption, that its benefit would be available to the tax payer, on a literal construction of the language of the relevant statute." [Emphasis added.]*

161. In passages which, in *McNamee v. Revenue Commissioners* [2016] IESC 33 Laffoy J. described (at para. 17) as "particularly enlightening", O'Donnell J. went on to state (at para. 66):

*"Looked at in this light, s. 86 (2) and (3) appear to be directed towards making the difficult distinction between a commercial transaction which has been legitimately structured in such a way as to mitigate the tax view on the one hand, and a purely tax driven transaction designed to give rise to a tax advantage on the other. ... The fact that any given transaction gives rise to a tax advantage is not in itself enough to disallow that benefit. Such a transaction only becomes a tax avoidance transaction if it satisfies the requirements of s. 86 (2). That subsection directs the Revenue Commissioners to have regard to the results of the transaction, and its uses and means of achieving those results and any other means by which part of the results could have been achieved. In considering this issue the proviso to s. 86 (3) [now. s. 811 (3)(b)] requires that the Revenue Commissioners have regard both to the form and substance of the transaction. The transaction will be a tax avoidance transaction if the Revenue Commissioners (having considered the matters set out above, i.e. results, use, form and substance) form the opinion that the transaction gives rise to a tax advantage and that 'the transaction was not*



*undertaken or arranged primarily for purposes other than to give rise to a tax advantage’.*” [Emphasis in the original.]

162. Subsections (2) and (3)(b) of s. 811 therefore require a consideration of the substance, results and use of a transaction as well as its form. Even on a literal interpretation of the section, therefore, Revenue, and subsequently the Appeal Commissioners, are required to look behind the form of the Transaction (or component parts thereof) in favour of the substance of what was done.

163. At paras. 120 and 121 of the case stated, the Appeal Commissioner made the following findings:

*“120. Having considered the evidence and reviewed the statutory provisions, I was satisfied that the purpose of the Appellant’s investment in Parnell was to ‘connect’ him with that company in accordance with TCA, section 549. That connection was an essential component of the Transaction as was the disposal of the Bond to Securitisation, a company unconnected with the Appellant but connected with Parnell. In the absence of these carefully structured arrangements, the Transaction would not have resulted in the ‘tax advantage’. Furthermore, the disparity in the market value of the impaired Bond, the price paid to acquire the Bond and the consideration received by the Appellant on the sale of the Bond ostensibly demonstrated that there was no commercial motive for this investment apart from the ‘tax advantage’.*

*121. Therefore, the purchase and disposal of the Bond by the Appellant had no commercial purpose other than to crystallise an artificial tax loss. As such, in structuring the Transaction to avail of the connected party provisions in TCA, section 549, I was satisfied that the Appellant procured a significant ‘tax advantage’ of €531,471 and that the purchase and sale of the Bond ‘was ... arranged primarily ... to give rise to a tax advantage’ thereby constituting a ‘tax avoidance transaction’.*”

164. It is very difficult to contend in this case that the transaction in question was undertaken or arranged primarily for purposes other than to give rise to a tax advantage. Indeed, this is not disputed by the appellant, who does not contest the finding of the Appeal Commissioner that there was no commercial logic to the Transaction. As repeatedly stressed by counsel for Revenue, the fact that the Transaction was a “*tax avoidance transaction*” within the meaning of s. 811 (2) unless it could be saved by s. 811(3)(a)(ii) was conceded by the appellant before the Appeal Commissioners. Similarly, in this Court, the argument focussed on section 811(3)(a)(ii).

165. In any event, as regards the substance of the Transaction, counsel for Revenue points to the short period of ownership of the Bond, the fact that the purchase of the Bond had nothing to do with any trade or business conducted by the appellant, the fact that he paid a premium of approximately double the market value of the Bond, and that his investment of €30,000 in Parnell appeared to be solely for the purpose of becoming

"connected" with Parnell within the meaning of the TCA. As a result, Revenue says that the transaction was wholly artificial and designed to create an artificial loss for the purposes of sheltering capital gains derived from the disposal of shares in 2004. No other purpose for the transaction has been put forward at any time by the taxpayer.

166. I accept this submission in its entirety and I am satisfied that the Appeal Commissioner did not err in finding that the transaction was wholly artificial, gave rise to a tax advantage (the sheltering of capital gains), and was not arranged for any purpose other than to give rise to a tax advantage.
167. The evidence before the Commissioner was that the appellant purchased an impaired Bond which had nothing to do with any trade or business carried on by him and in respect of which he exercised a put option, ensuring that it was sold at far below its market value. It seems highly improbable - and in any event no evidence was given to this effect - that this was an intended investment.
168. This, presumably, is why the appellant relies so heavily on s. 811 (3)(a) which stipulates the matters which would not be regarded as a "tax avoidance transaction."
169. In answer to question (d) of the case stated, therefore, I find that the Appeal Commissioner did not err in determining that the Transaction was a "tax avoidance transaction" as statutorily defined save insofar as subs. (3)(a)(ii) applies so as to compel the conclusion that it was not a "tax avoidance transaction".

**Whether s. 811 (3)(a)(ii) prevents the Transaction from being regarded as a "tax avoidance transaction"**

170. Section 811 (3)(a), provides that Revenue "shall not regard the transaction as being a tax avoidance transaction if they are satisfied that-

(ii) *the transaction was undertaken or arranged for the purpose of obtaining the benefit of any relief, allowance or other abatement provided by any provision of the Acts and that the transaction would not result directly or indirectly in a misuse of the provision or an abuse of the provision having regard to the purposes for which it was enacted."*

171. Section 811(3)(a)(ii) applies to "any relief, allowance or other abatement" and, therefore, in order to consider its application to the Transaction, it is first necessary to identify the relieving provision, to then identify the purpose of the relevant relieving provision, and finally to consider whether the Transaction is an "abuse or misuse" of the provision having regard to its purpose.

**Identifying the "relief, allowance or other abatement" for the purposes of s. 811(3)(a)(ii)**

172. A number of interlocking provisions resulted in the claimed allowable loss which was deducted from the appellant's capital gains in 2004 and 2005, and it is convenient to refer to these here in the form in which they existed at the time they were availed of by the appellant. (The fact that the appellant and various other actors were regarded as "connected" for the purposes of capital gains tax has already been mentioned but it is not

necessary to set out those provisions in full as they do not require consideration for the purposes of s. 811 (3)(a)(ii)).

173. Section 31 TCA provides:

*"Capital gains tax shall be charged on the total amount of chargeable gains accruing to the person chargeable in the year of assessment, after deducting-*

- (a) any allowable losses accruing to that person in that year of assessment, and*
- (b) in so far as they have not been allowed as a deduction from chargeable gains accruing in any previous year of assessment, any allowable losses accruing to that person in any previous year of assessment (not earlier than the year 1974-75)."*

174. Section 549 TCA, insofar as it applied to the Transaction, provided:

*"(1) This section shall apply for the purposes of the Capital Gains Tax Acts where a person acquires an asset and the person making the disposal is connected with the person acquiring the asset.*

*(2) Without prejudice to the generality of section 547, the person acquiring the asset and the person making the disposal shall be treated as parties to a transaction otherwise than by means of a bargain made at arm's length.*

...

*(6) Where the asset mentioned in subsection (1) is subject to any right or restriction enforceable by the person making the disposal or by a person connected with that person, then (where the amount of the consideration for the acquisition is in accordance with subsection (2) deemed to be equal to the market value of the asset) that market value shall be what its market value would be if not subject to the right or restriction, reduced by the lesser of-*

*(a) the market value of the right or restriction, and*

*(b) the amount by which its extinction would enhance the value of the asset to its owner.*

*(7) Where the right or restriction referred to in subsection (6) –*

*(a) is of such a nature that its enforcement would or might effectively destroy or substantially impair the value of the asset without bringing any countervailing advantage either to the person making the disposal or a person connected with that person,*

*(b) is an option or other right to acquire the asset, or*

(c) *in the case of incorporeal property, is a right to extinguish the asset in the hands of the person giving the consideration by forfeiture or merger or otherwise,*

*then, the market value of the asset shall be determined, and the amount of the gain accruing on the disposal shall be computed, as if the right or restriction did not exist."*

175. Section 547 (1) TCA provided:

*"... [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 it by means of a gift)."*

176. Finally, s. 546 (2) applied the same rules of computation to the calculation of the amount accruing as a loss on the disposal of an asset as applied to the calculation of the amount accruing as a gain.

177. The result of these provisions was that, when the appellant disposed of the Bond to Securitisation, he was regarded as having paid full market value for it when he acquired it from Parnell and that market value was calculated as if the call option which had been created in relation to it did not exist.

178. In this case, the appellant wrote off the losses on the disposal to Securitisation in 2004, thereby availing of s. 31 (a), but, not having sufficient chargeable gains in 2004, he deducted the remainder in 2005, thereby availing of s. 31 (b). There appears to be no doubt but that the Transaction was *"undertaken or arranged for the purpose of obtaining the benefit of"* the relief, allowance or abatement provided for in s. 31(a) and (b). As a consequence, it seems to me that s. 31 (a) and (b) each provide for a *"relief, allowance or abatement"* within the meaning of s. 811 (3)(a)(ii).

179. By contrast, s. 549 appears to be an anti-avoidance provision. The appellant argues that it pursues the principle of *"fiscal neutrality"* but I think it is clear that this is not the case. The Appeal Commissioner accepted (at para. 121, Case Stated) that the purpose of s. 549 as discerned from the statutory wording was *"to prevent the avoidance of tax by a disponent who is connected to the acquirer ... disposing of the asset at an undervalue by the simple device of artificially depressing the consideration or disposing of it at an undervalue."*

180. In my view, the Commissioner was correct in this finding. It seems clear that Revenue is correct in arguing that s. 549 is itself an anti-avoidance provision. Indeed, the appellant himself in his written submissions cites Revenue Guidance which appears to regard it as such: *"this section provides measures to prevent avoidance of capital gains tax by the use of arrangements entered into by connected persons."* This appears to be a statement that s. 549 is an anti-avoidance provision directed at schemes and arrangements entered

into by connected persons. While Revenue Guidance of this nature is not binding as to the interpretation of a statutory provision, the purpose identified by the Appeal Commissioner is somewhat apparent from the words of the section itself.

181. Revenue, as the Appeal Commissioner specifically notes at para. 57 of the case stated, submitted to him that s. 549 was an anti-avoidance provision and that a deeming provision which created an artificial result is the hallmark of anti-avoidance legislation, before citing other provisions of the TCA. As is apparent from the Determination (para. 133), the Appeal Commissioner accepted this submission.
182. The Appeal Commissioner then moved on to a consideration of whether the manner in which the appellant had structured the Transaction was a “*misuse or abuse*” of section 31.
183. I agree with the Appeal Commissioner that it is s. 31 which must form the focus of analysis in considering whether the Transaction is or is not a “*tax avoidance transaction*”. The next step is to identify the purpose of that provision, before moving to a consideration of whether the Transaction is a misuse or abuse of it.

**The purpose for which s. 31 was enacted**

184. The appellant, perhaps seizing on a passage from the majority judgment in *O’Flynn Construction* to which I refer in more detail below, argued that s. 31 has no purpose, by which I understood him to mean that it was a purely technical provision that did not pursue any particular policy. As a result, the appellant argues that faithful compliance with it would be sufficient to rely on s. 811 (3)(a)(ii).
185. Revenue, by contrast, submitted that s. 31 was intended to operate in the real world and only applied to “real” or “monetary” losses but no submission was made other than at the most general level to demonstrate how this purpose was identified. There was a brief reference to the indexation provision relied upon by the Appeal Commissioner, but that section was not opened and it seems to be one specifically designed to deal with the effects of inflation on the computation of gains and losses for the purpose of capital gains tax.
186. Looking first at the purpose of s. 31, it is designed to permit the deduction of “allowable losses” as defined in s. 546 from chargeable gains and further to allow those losses to be rolled over into future years so as to reduce the capital gains tax payable in those years. Its purpose, on its face, is simply to allow for deduction of losses where there is a charge to capital gains tax. It seems to me that the purpose of s. 31 is clear: before a chargeable person is assessed to capital gains tax, they may deduct allowable losses.
187. I understand the appellant’s argument that s. 31 has no purpose to speak to the fact that it does not seem to pursue any particular economic policy, as was the case with the relief under consideration in *O’Flynn Construction*, nor does it pursue any social policy, as is the case where taxpayers can deduct pension contributions from their income for the purposes of assessment to income tax. But that does not mean it has no purpose: it establishes an important principle for the assessment of capital gains tax at the general

level. The manner in which those losses and gains are computed are dealt with elsewhere in the TCA.

188. The Appeal Commissioner agreed with Revenue that the purpose of s. 31 (a) and (b) was to relieve against actual financial losses, as opposed to paper or artificial ones, and, essentially on that basis, found that the Transaction constituted a "*misuse ... or ... abuse of [section 31] having regard to the purposes for which it was provided.*" As a result, it was a "tax avoidance transaction" and the Notice of Opinion was upheld, subject to an adjustment of the amount of allowable loss.
189. Before considering whether or not the Commissioner erred on the fundamental finding that the Transaction constituted a misuse or abuse of the relieving provision, such that s. 811 (3)(a)(ii) did not apply, an important feature of the Transaction and its tax consequences must be borne in mind, that is, were s. 31 to operate without s. 549, the appellant would not be in a position to write off €2,657,358 capital gains: he would be confined to writing off €258,591, which was the actual loss suffered, being the difference between the acquisition cost (€578,529) and the disposal price (€319,938). The Appeal Commissioner has determined that the appellant is entitled to the actual loss suffered and this is not challenged by Revenue. It is only the operation of the deeming provision in s. 549 which is in issue in this case.
190. The losses claimed by the appellant in 2004 and rolled over for 2005, therefore, do not turn on the interpretation of s. 31(a) or (b) but on the application of s. 549 as a matter of law. Revenue has argued, correctly in my view, that this is an anti-avoidance provision. It is not, therefore, the interpretation of s. 31 itself which has benefitted the appellant but the application to him of s. 549.
191. On one analysis, if s. 549 is not a relieving provision, then one does not look at whether it was abused or misused by the appellant in claiming relief for an entirely artificial loss. That is not material to s. 811(3)(a)(ii), which speaks of "*the provision*", which means the provision (or provisions) providing for the "*relief, allowance or other abatement*". The focus, therefore, is on the purpose for which s.31 was enacted, and not on the purpose of s. 549.
192. At hearing, counsel for the appellant said that his reliance on the principles of statutory interpretation relevant to taxation statutes was relevant in interpreting s. 31 as those principles prevented s. 31 from being interpreted so as to interpret "*losses*" in s. 31 as "*real*" or "*monetary*" losses. He argued that the principles set out in *O'Flynn* and, in particular, *Bookfinders* simply did not permit the importation of these words into the section.
193. He also contended that the argument made by Revenue was one which had been rejected in *McGrath v. McDermott* [1988] I.R. 258. The appellant points out that the scheme at issue in that case was very similar to the Transaction at issue here, albeit that it related to the purchase of shares subject to an option, rather than a bond. However, it was the interaction between the provisions allowing for the deduction of a loss and the deemed

acquisition cost which created an artificial loss which could be used to shelter capital gains.

194. The Supreme Court, as is well known, were unanimous in refusing to read into the relevant provisions of the Capital Gains Tax Act 1975, words which were not there. Finlay C.J. stated (at p. 275):

*"The market value of an asset coming within the provisions of [s.33 (5)(ii) of the 1975 Act] is not its true or real market value but one artificially calculated by ignoring the existence of a restriction or right as defined. The amount of the gain accruing on the disposal of such an asset is computed at a figure which is artificial and may not coincide with the real or any gain.*

*There being no express provision to the contrary contained either in the Act of 1975 or in any other statute, the amount of loss accruing on the disposal of an asset coming within the provisions of [s.33(5)(ii)] is similarly to be computed at a figure which is artificial and may not coincide with the real or any loss."*

195. At p. 276, Finlay C.J. continued:

*"What is urged upon the Court by Revenue in this case is no more and no less than the implication into the provisions of either s. 12 or s. 33 of the Act of 1975 of a new subclause or sub-section providing that a condition precedent to the computing of an allowable loss pursuant to the provisions of s. 33, sub-s. 5, is the proof by the taxpayer of an actual loss, presumably at least coextensive with the artificial loss to be computed in accordance with the sub-section."*

196. Finlay C.J. rejected this argument (at p.276):

*"I must reject this contention. Having regard to the finding in the case stated, that these transactions were not a sham, the real nature, on the facts by which I am bound, of this scheme was that the shares were purchased and the purchaser became the real owner thereof; that shares were sold and the vendor genuinely disposed thereof and that an option to purchase shares really existed in a legal person legally deemed to be connected with the person disposing of them.*

*In those circumstances, for this Court to avoid the application of the provisions of the Act of 1975 to these transactions could only constitute the invasion by the judiciary of the powers and functions of the legislature, in plain breach of the constitutional separation of powers."*

197. I would have no difficulty in saying that, had s. 811 not been enacted, this judgment would guide the proper interpretation of the relevant provisions of the TCA.
198. The question which now falls for consideration is whether this position has changed by reason of the fact that s. 811 (3)(a)(ii) explicitly requires me to consider the purposes for which s. 31 was enacted. Revenue submits that this means that *Bookfinders*, and the

non-application of s.5 of the Interpretation Act 2005, is irrelevant, and I can proceed to a purposive interpretation, which I understood to go beyond the consideration of context and purpose which is the norm in interpreting revenue statutes and to approach or perhaps even go as far as the more loaded sense in which a purposive interpretation is sometimes meant, as identified by O'Donnell J. in *Bookfinders*.

199. By contrast, the appellant says that *Bookfinders* means that a purposive interpretation cannot be attempted because it is to the effect that s. 5 of the Interpretation Act 2005 does not apply to revenue statutes.
200. Of these arguments, I think Revenue is closer to the correct approach. There is no ambiguity in s. 811 (3)(a)(ii): it requires a consideration of the purposes for which the relieving provision was introduced. Whether that means that a purposive approach in the sense of a European style teleological approach can be applied so as to disapply the plain meaning of a statutory provision is another matter which I find I do not have to decide in light of the arguments made in this case, as it is my view that no legislative purpose which would support such an approach was in any event identified.
201. The key question would appear to be: how does a court identify the purpose of the relieving provision?
202. Revenue's submission on the fact that s. 31 applied only to "real" or "monetary" losses remained at all times at a general level. I was not directed to any other provisions of the TCA or indeed any surrounding context for the purposes of identifying the purpose of s. 31 as contended for by Revenue and which would justify the reading into of these words. While it is true to say that s. 86 of the 1989 Act and now s. 811 may justify a more purposive approach, the fact is that, notwithstanding *McGrath v. McDermott*, where similar arguments were made (albeit by reference to the precursors of s. 546 (2) and s. 549), no such words were included in s. 31 when it was enacted some years later.
203. The Appeal Commissioner accepted Revenue's submission that the purpose of s. 31 was to provide relief for the actual loss sustained and he stated that he was fortified in this by the fact that s. 556 restricted indexation relief to prevent turning an actual loss into a gain, increasing an actual loss or converting an actual gain into a loss (para. 138, case stated). As already stated, while this was referred to briefly in submissions by Revenue, the section was not opened nor was any detailed submission made to me as to its relevance. I find it hard to accept that s. 556 is concerned with anything other than the taking into account of inflation in computing gains and losses.
204. This is where the second submission of the appellant as to the relevance of the principles of statutory interpretation comes into focus. He argued that those principles operated to identify the limits of s. 811.
205. In considering those limits, it must be recalled that, as submitted by Revenue, s. 549 is itself an anti-avoidance provision, designed to remove from consideration impairments on value (such as options) created by connected persons. As s. 549 is an anti-avoidance



provision which appears to have been designed to counteract the creation of artificial losses by transactions between connected persons, it might best be regarded as a limitation on the relief available under section 31. Insofar as it is relevant to the purposes of the relief or abatement available by virtue of s. 31 (a), its relevance lies in identifying those artificial losses which will not be recognised by the TCA.

206. The fact that s. 31 has its own anti-avoidance provision, s. 549 seems to raise different considerations from those arising in respect of the relief which was relevant to the judgments in *O'Flynn Construction*. In that case, not only the provisions of the legislation providing for ESR, and its failure to impose certain restrictions were considered, but also the impact of company law on the transaction in issue (see para. 81 of the judgment of O'Donnell J.) were referred to. It is furthermore clear from the minority judgment of McKechnie J. in *O'Flynn Construction* that all members of the Court agreed that the Act as a whole could be read so as to ascertain the policy of the Oireachtas for the creation of ESR relief against the payment of income tax on dividends received by any shareholder.
207. The difference was that McKechnie J. (with whom Macken J. agreed) looked at the legislative history of the Act which showed that ESR had received considerable legislative attention over the years. Nevertheless, no restriction had ever been introduced so as to prevent the effective onwards transfer of the benefit of ESR as dividends percolated through into the hands of the ultimate recipients (see para. 180). From this, the minority inferred that the policy pursued by the Oireachtas was to place no restriction whatsoever on the right to claim ESR relief. By contrast, the majority were of the view that it had not been intended to allow ESR relief to be, in effect, traded by the exporting company to a company with no connection whatsoever with manufacturing goods for export, solely for the purpose of allowing that company's shareholders to avoid the income tax which would ordinarily be payable on dividends received by them. The absence of any express restriction on the effective transfer of tax relief so as to allow shareholders of non-exporting companies to avoid paying income tax on dividends was interpreted differently by the majority and the minority.
208. The situation here is somewhat different, however, as the deemed acquisition cost results from express statutory provisions (s. 549, read in conjunction with ss. 546 and 547) which operated to create a very significant artificial loss. Furthermore, this arises because of the operation of the anti-avoidance provisions themselves.
209. In reality, the effect of the Notice of Opinion and the subsequent Determination of the Appeal Commissioner is to disapply s. 549 on the basis that this is not the purpose for which section 549 was introduced. The Appeal Commissioner accepts, even given the wholly artificial nature of the Transaction, that the loss actually suffered – and indeed it would appear deliberately created – by the appellant must be allowed pursuant to s. 31(a).
210. The difficulty with the determination is that s. 549 is quite clear on its face and is directed specifically to the question of how artificial losses created by transactions between connected persons are to be dealt with for capital gains tax purposes.

211. The question is whether s. 811(3)(a)(ii) permits me to, in effect, disapply s. 549. It has given rise to a consequence, according to Revenue, which was not intended by the Oireachtas when they enacted s. 31. The issue therefore is: what are the limits to the consideration of the purposes of the relief which is required by s. 811 (3)(a)(ii)?

212. In *O'Flynn Construction*, O'Donnell J. identified (at para. 77) the limits of the statutory power to set aside the tax advantage of an otherwise lawful transaction.

*"The idea that any particular scheme can produce a result that the Oireachtas did not intend, is much more easily expressed than applied in practice. The legal intent of the Oireachtas is to be derived from the words used in their context, deploying all the aids to construction that are available, in an attempt to understand what the Oireachtas intended. But in very many cases, the Oireachtas will not have contemplated at all the elaborate schemes subsequently constructed, which will take as their starting point a faithful compliance with the words of the statute. In some cases, it may be that there is a gap that the Oireachtas neglected, or an intended scheme that was not foreseen. In those cases, the courts are not empowered to disallow a relief to apply any taxing provision, since to do so would be to exceed the proper function of the courts in the constitutional scheme. In other cases, the provision may be so technical and detailed so that no more broad or general purpose can be detected, or may have its own explicit anti-avoidance provision. In such a case there may be no room for the application of s. 86 since it may not be possible to detect a purpose for the provision other than the basic one that the Oireachtas intended that any transaction which met requirements of the section should receive the relief."*

213. This seems to be an important passage delineating the limits of the operation of the general anti-avoidance provision now contained in section 811 TCA. A number of different concepts relevant to this case, and which may perhaps overlap in practice, are identified in this passage:

- where the gap was neglected, or where the scheme was not foreseen,
- where a provision is so technical and detailed that no broad or more general purpose can be detected,
- where there is already an applicable, specific anti-avoidance provision

214. In *O'Flynn Construction*, both the majority and minority rejected the argument of the taxpayers that a very specific anti-avoidance provision, s. 54 of the Finance Act, 1974, prevented the operation of section 86. The minority held, for example, that it was *"confined and specific and does not cover a scheme, the nature of which is under review in this case."*

215. The implication of both judgments, however, is that where there is a specific anti-avoidance provision in place which governs the transaction under consideration, a general

anti-avoidance provision such as s. 811 does not apply as this would exceed the proper constitutional role of the courts.

216. The limitations on s. 811 which were identified in *O'Flynn Construction* seem to me to be applicable in this instance. There are specific anti-avoidance provisions, including s. 549, contained in the TCA. There is a "gap" or anomaly flowing from it which the legislature has neglected to address. In those circumstances, it seems to me that the limits of s. 811, as identified by the majority in *O'Flynn Construction*, have been reached, and it cannot be used to go so far as to disapply the express provisions of section 549.
217. Allied to that, the plain meaning of s. 811 (3)(a)(ii) requires me to look at the purposes for which the relieving provision, which in this case is s. 31, was introduced. It is arguable that on a correct interpretation of s. 811 (3)(a)(ii) itself, there is no ambiguity about this and that any abuse or misuse of s. 549 is immaterial. For that reason, I must reject the contention of Revenue that s. 31 should be interpreted in the light of s. 549.
218. In those circumstances, in my view, the appellant can legitimately rely on s. 811 (3)(a)(ii) for the purposes of demonstrating that the Transaction is not a "tax avoidance transaction".
219. The appellant cleverly and deliberately took advantage of the anti-avoidance provision in s. 549 to create an artificial loss solely for the purpose of reducing his capital gains tax liability. The Oireachtas did not foresee - or perhaps more correctly given its similarities to that at issue in *McGrath v. McDermott* many years ago - failed to address the scheme drawn up on behalf of the appellant. It had specifically legislated for tax avoidance schemes drawn up by connected persons for the purposes of avoiding capital gains liability and, even more specifically, addressed its mind to the creation of artificial losses by transactions between connected persons. By the use of a slightly more complicated structure, the appellant has not only avoided the anti-avoidance provisions but has in fact taken advantage of them for his own purposes to create the very artificial loss which they are designed to avoid.
220. For those reasons, it is my view that s. 811 does not, on the facts of this case and given the nature of the statutory provisions by virtue of which the artificial loss was created, permit me to find that the appellant has misused or abused the relief provided for in s. 31.
221. I would therefore answer Questions (d) and (g) by finding that the Commissioner erred in law in determining that the Transaction was a tax avoidance transaction as statutorily defined and in holding that there was a misuse of s. 31 TCA. In answer to Question (c) I would find that the Commissioner did not err in his interpretation of s. 549 TCA but erred in his application of it.
222. As regards the burden of proof, the appellant accepted before the Appeal Commissioner that he bore the burden of proof in relation to the application of either of the exemptions in s. 811 (3). This much seems evident from the judgment of McKechnie J. in *O'Flynn*

*Construction.* The appellant led no evidence before the Appeal Commissioner, but as he does not rely on the business exemption in s. 811 (3)(a)(i), I am not sure that that is particularly telling. It might be that oral evidence would demonstrate that an apparent tax avoidance scheme had a business or commercial logic such that it could fall within that exemption as being, in effect, a more tax efficient manner of conducting one's business.

223. In this appeal, however, it is the relief exemption, and therefore the interpretation of s. 31, which is in issue. This is a question of law rather than fact. There could perhaps be evidence in an appropriate case to the effect that, while the transaction was not in the course of trade or business, it still had a logic, perhaps as an investment, outside of the taxpayer's commercial activity and this evidence would be material to the operation of s. 811 (3)(a).
224. But even without that evidence, it seems to me that the purpose of the relevant relieving provision must be divined in accordance with the usual principles of statutory interpretation and is, in effect, a matter of law. This, I think, is a case where the absence of evidence is not conclusive one way or another as the taxpayer is saying, in effect, that he contends for a particular interpretation of s. 31 and for a particular interpretation of s. 549. In particular, he asserts that he is within the wording of those provisions. I do not think, in the context of the particular legal arguments made in this appeal, that the failure to tender evidence as to the purpose of the transaction determines the matter one way or another.
225. I would therefore answer Question (e) by saying that the Commissioner erred in finding that the appellant was required to discharge a "positive burden" on him as to the interpretation and application of s. 811 (3)(a)(ii) as the questions in issue in this particular appeal were questions of law.
226. Finally, I would answer Question (h) by finding that the Commissioner erred in determining that the capital gains tax actual loss be restricted to €258,591 as the appellant is entitled to all of the capital losses originally claimed in 2004 and 2005, being the sum of €2,657,358.
227. I do not need to answer question (f) but would merely comment that, if I am wrong in how I have answered the earlier questions, such that the correct interpretation of s. 31 is that the relief allowed pursuant to it is confined to actual or monetary losses, I would nevertheless have held that the Commissioner was wrong in identifying the purpose of s. 31 as providing relief to ameliorate "*actual financial hardship*". Section 31 does not it seems, on any interpretation, require that a taxpayer demonstrate actual financial hardship and the only argument made to the Commissioner appears to have related to the existence of actual monetary losses.
228. I think this is most likely an infelicitous phrase on the part of the Appeal Commissioner who was simply stressing that paper losses, artificially created, were not deductible, but

any actual loss was allowable by reference to s. 31 (a), which could then be carried forward into future years pursuant to s. 31 (b).

229. For those reasons, I am of the view that the Transaction was not a "tax avoidance transaction" and I would allow the appeal and I would find, pursuant to s. 811 (7)(a) TCA that the Notice of Opinion dated 23 December 2009 is void.

230. However, in deference to the arguments made on other issues, I will express my view on them on an *obiter* basis.

**Whether the Notice of Opinion was valid**

231. The Notice of Opinion of the nominated officer dated 23 December 2009 stated as follows:

*"I ... have formed the opinion that the following transaction, that is to say,*

- *investment of €30,000 on 25 August 2004, by way of purchase of 30,000 non-punitive non-voting preference shares of 1 euro each in Parnell*
- *the purchase by Parnell on 7 October 2004 of [the Bond] with a nominal value of Euro 2,939,466 for Euro 2,977,446.27*
- *the grant of options, on 7 October 2004 by [Parnell] and [Securitisation], a connected company, under the following terms:*
  - o *in consideration of [Securitisation] paying an option premium of Euro 2,677,000, [Securitisation] was granted the call option to purchase the bond from [Parnell] at an option price,*
  - o *in consideration of the grant by [Parnell] to [Securitisation] of the call option, [Securitisation] granted to [Parnell] a put option, to sell the bond at the option price*
- *your agreement on 7 October 2004 to purchase for a consideration of Euro 570,529, from [Parnell], the [Bond] with a nominal value of Euro 2,939,466 subject to the options outlined above*
- *the arrangement whereby this purchase was partially funded by a loan of Euro 280,000 from [Parnell]*
- *the disposal by you, on 22 October 2004, of the bond to [Securitisation] for Euro 319,938 (the option price)*

*is a tax avoidance transaction (sic) within the meaning of Section 811 Taxes Consolidation Act 1997."*

232. It is accepted that there is an error in the notice of opinion in the second subparagraph to the third paragraph above as the put option was granted by Securitisation to the

appellant directly and not to Parnell, as part of the bond purchase agreement.  
Furthermore, this error appears in all four notices of opinion governed by this judgment.

233. The appellant raised this before the Appeal Commissioner and contended that the failure to accurately describe the "*transaction*" for the purposes of s. 811 meant that the notice was fatally flawed and of no effect. It was further contended that there could only be one composite transaction comprising a number of agreements within the meaning of s. 811 (1) and these must have a reality and could not be fictional. Furthermore, subs. (2) defined "*tax avoidance transaction*" in terms of the result of the transaction, and it was therefore essential that the transaction would be accurately identified in the notice. Similarly, the definition of "*tax advantage*" in subs. (1) depended on an accurate description of the transaction.
234. Reliance was placed on the Supreme Court decision in *McNamee v. Revenue Commissioners* [2016] IESC 33 where Charleton J. confirmed that the nominated officer was obliged to consider the transaction in detail in exercising his functions under section 811 (1).
235. Revenue, by contrast, relied on the fact that the appellant had been notified by letter dated 8 September 2009 (referred to at para. 14 of the case stated) that Revenue were of the view that the Transaction might constitute a tax avoidance transaction, and there was an accurate reference to the put option in that letter. Revenue submits that the appellant could be in no doubt as to what was under consideration pursuant to s. 811, nor could there be any doubt as to the nominated officer's understanding of the Transaction.
236. It was also submitted that this letter identified the key and operative features of the transaction, being:
- The investment by the appellant in Parnell,
  - The purchase of the impaired bond from Parnell as a connected person, and
  - The disposal to Securitisation as an unconnected person.
- This meant, according to Revenue, that the put option was a minor component of the transaction, which did not require to be identified in the Notice.
237. Notably, the Appeal Commissioner did not adopt the submission that the put option was not a critical component of the Transaction nor did he place any reliance on the letter of 8 September 2009.
238. Furthermore, given that the put option was identified in the ultimate Notice of Opinion, it seems to me that the nominated officer decided that it should be included in the description of the Transaction, which suggests that the nominated officer also regarded it as material.

239. In my view, the creation of the put option was a material element and it is notable that it was a provision of the Bond Purchase Agreement. The appellant was already purchasing the Bond at a loss and it was vital that he would, at the same time as he acquired it, have the right to dispose of it in a manner which would procure the necessary tax advantage. I do not think it is accurate to describe the put option as other than a critical step in the Transaction.
240. However, the Appeal Commissioner found in favour of Revenue, stating that he was satisfied that the nominated officer correctly understood the essential fundamentals of the transaction, and that, in any event, the issue was academic as he had formed his own view that the transaction constituted a "*tax avoidance transaction*" from which the appellant was able to procure the tax advantage. This transaction was described correctly and therefore is a slightly amended version of the description of the transaction in the Notice of Opinion.
241. The question then is whether the Appeal Commissioner was required to formally amend the Notice so as to correct the misdescription.
242. Section 811 (9) provides that the Appeal Commissioner may, on an appeal pursuant to s. 811 (7) "consider that, *subject to such amendment or addition thereto as the Appeal Commissioners or the majority of them deem necessary and as they shall specify or describe, the transaction, or any part of it, specified or described in the Notice of Opinion, is a tax avoidance transaction, that the transaction or that part of it be so amended or added to and that, subject to the amendment or addition, the opinion or the opinion in so far as it relates to that part is to stand...*" [Emphasis added.]
243. The key issue for this judgment is that the Determination itself sets out an accurate, and therefore slightly amended, description of the Transaction which the Commissioner viewed as a "*tax avoidance transaction*". That is sufficient for the court to deal with the case stated and, in view of my conclusions on that issue, it is not necessary for me to consider whether the Notice should be formally amended and whether, as submitted by Revenue, this Court should now amend it. This submission was grounded on s. 811 (9) (b), which applies subs. (9) to this Court "to the extent necessary" to the determination by this Court of any questions of law arising on the case stated.
244. It may be more appropriate to remit the matter to the Appeal Commissioner if there is a material misdescription in a Notice of Opinion which the Appeal Commissioner has accepted as such or where the Appeal Commissioner feels it necessary to consider an amended form of the "*tax avoidance transaction*", as appears to have occurred in this case, but does not formally amend the Notice of Opinion.
245. However, as I am not upholding the formation of the opinion by the Appeal Commissioner, this does not arise, and I would reserve to a suitable case any determination of the issues relating to the power of the Appeal Commissioners to amend and whether that requires to be done formally by reference to the Notice of Opinion as opposed to in the body of the determination.

### **Double taxation**

246. On this issue, the appellant points to the fact that Parnell, in disposing of the bond to the appellant, was deemed to have done so at full market value rather than the sum of €578,529 actually paid by the appellant to Parnell. The result was that Parnell paid capital gains tax on the deemed acquisition cost. The appellant referred to Parnell's corporation tax return for the tax year 2005 which was handed into court. The appellant argues that it is incumbent on Revenue, when forming an opinion under s. 811 to consider whether double taxation arises.

247. The legal basis for this argument was based on s. 811 which, at subs. (5)(c) provides that:

*"Where the Revenue Commissioners make any adjustment or do any act for the purposes of paragraph (a), they shall afford relief from any double taxation which they consider would but for this paragraph arise by virtue of any adjustment made or act done by them pursuant to paragraphs (a) and (b)."*

248. The appellant relied on the reference in s. 811 (6) to "any person" which sets out the matters which must be notified in writing to "any person" from whom a tax advantage would be withdrawn or to whom a tax advantage would be denied or to whom relief from double taxation would be given if the opinion became final and conclusive. One of the matters which is required to be specified is set out in sub-para. (iv) as "the amount of any relief from double taxation calculated by the Revenue Commissioners which they would propose to give to the person in accordance with subsection (5)(c)."

249. The appellant sought to emphasise what he said was a distinction between "any person" and "the person" in subsection (6) to demonstrate that these were two different people such that it was a requirement in this case that the Notice of Opinion addressed to the appellant should deal with the alleged double taxation arising by reason of what the appellant appears to have inferred from Parnell's return was a capital gains liability for Parnell in respect of the disposal to the appellant.

250. By contrast, Revenue submit that "the person" in subs. (6)(iv) is the person to whom the notice was given, and they reiterate this by reference to the right of appeal for any person aggrieved by the notice. Obviously, Parnell is not the appellant here and any overpayment of tax by that company is not the appellant's grievance.

251. More fundamentally, Revenue point out that there was no evidence led at all before the Appeal Commissioner which would establish how double taxation arose in this case, and indeed counsel for the appellant says that he got Parnell's tax return from Revenue. It was handed in with the papers and the only factual basis for this argument seems to be an inference drawn from the tax return, but no evidence as to Parnell's Notice of Assessment for the relevant chargeable period or as to the capital gains tax paid by Parnell on the disposal to the appellant has been tendered. Counsel for Revenue pointed out in his submissions that the handwritten words at the end of p. 7 of Parnell's tax return



indicated that it was claiming group relief on the disposal pursuant to s. 617 of the TCA and therefore did not in fact pay capital gains tax at all.

252. The response to that from the appellant was to say that Revenue had not proved that such relief was claimed, nor had they shown how the issue was dealt with in the tax returns of the companies in the group. However, Parnell's tax return for the relevant period does not declare any net chargeable gain and there is no evidence that Parnell paid any capital gains tax on the basis that its disposal of the bond to the appellant was deemed by virtue of s. 549 to have been for market value.
253. In light of that, it is difficult to see how this issue arises. Furthermore, the onus was on the appellant to tender evidence to the Appeal Commissioner as to why the Notice of Opinion was defective for failure to specify the matters in subs. (6) (iv), which he says relates to the capital gains tax which Parnell must have paid based on the operation of s. 549 which deemed the disposal of the bond to the appellant to have been for full market value. No evidence was tendered and therefore I do not see how this issue arises.
254. In any event, it seems to me that the issue can be determined as a matter of law by reference to s. 811 (6). In my view, Revenue are correct in their interpretation of s. 811 (6) and the reference to "the person" in sub-para. (iv) is a reference to the person on whom the Notice was served, which is the appellant. The appellant relies on the phrase "any person" in subs. (6) (a), but this needs to be put in context. Subsection (6) (a) provides:

*"Where pursuant to subsections (2) and (4) the Revenue Commissioners form the opinion that a transaction is a tax avoidance transaction, they shall immediately on forming such an opinion give notice in writing of the opinion to any person from whom a tax advantage would be withdrawn or to whom a tax advantage would be denied or to whom relief from double taxation would be given if the opinion became final and conclusive. ..."*

As can be seen from the full subsection it refers not to "any person" in an unqualified sense, unshackled from the opinion that has been formed, but to "any person from whom a tax advantage would be withdrawn or to whom a tax advantage would be denied or to whom relief from double taxation would be given if the opinion became final and conclusive."

255. Pursuant to s. 811 (5)(a), Revenue may make "all such adjustments and do all such acts as are just and reasonable ... in order that the tax advantage resulting from a tax avoidance transaction shall be withdrawn from or denied to any person concerned." Subsection (5) (b) specifies that, without prejudice to the generality of para. (a), Revenue may-

(i) *allow or disallow in whole or in part any deduction or other amount which is relevant in computing tax payable, or any part of such deduction or other amount,*

- (ii) *allocate or deny to any person any deduction, loss, abatement, relief, allowance, exemption, income or other amount, or any part thereof, or*
- (iii) *recharacterize for tax purposes the nature of any payment or other amount."*

256. In this particular case, the Notice of Opinion stated that the "*tax consequences*" of the opinion would be that the Revenue would:

- (a) make an assessment to Capital Gains Tax for 2004 to withdraw the capital loss relief claimed by the appellant in the sum of €1,408,469 and
- (b) amend the 2005 Capital Gains Tax assessment to withdraw the Capital Loss relief claimed by the appellant in the sum of €1,248,889.

257. It did not specify any relief from double taxation for the appellant and consequently this appeal, brought by the appellant as the "*person aggrieved*" within the meaning of s. 811 (7) and who has nothing to appeal against insofar as double taxation is concerned. There is not even an assertion that the appellant paid double taxation. In my view, counsel for Revenue was absolutely correct in stating that s. 811 (6) was drafted to deal with the various possibilities that might arise as a consequence of the opinion being formed, but that does not mean that they all arise in every case.

258. It seems to me that the issue of double taxation quite simply does not arise, and the Appeal Commissioner was entirely correct in his finding on this issue.

### **Conclusion**

259. In conclusion, the following are my views on the substance of the argument made:

- I. The time limits in s. 955 (2) TCA do not apply to the Notice of Opinion or any part of it, by reason of s. 811 (5A), and, in the case of any tax sought to be recovered in respect of the relief against capital gains allowed in the 2005 tax year, on the alternative basis that the Notice of Opinion will not become final and conclusive until the determination of these proceedings and the said return does not contain any material non-disclosure which would preclude the application of s. 955 (2);
- II. There is an error in the description of the put option which is identified as part of the "*tax avoidance transaction*" by the nominated officer. Were the Opinion to be upheld, it might be necessary to amend this error. I would reserve to a future case in which it is necessary to decide the issue, whether this Court enjoys a power to amend the Notice of Opinion or whether this Court should remit the matter to the Appeal Commissioner for the purposes of effecting such amendment as is required;
- III. The Transaction as described at para. 7 of the case stated is not a "*tax avoidance transaction*" within the meaning of s. 811 (2) TCA, as the claiming of relief pursuant to s. 31 TCA was not a misuse or abuse of that provision. In particular, the tax advantage was achieved by utilising provisions of the TCA which were anti-avoidance provisions specific to the question of which artificial losses would be

accepted for the purposes of deducting losses pursuant to s. 31. As a consequence, the Notice of Opinion of 23 December 2009 should not stand;

IV. Double taxation relief does not apply in this case.

260. I will list the matter before me in early course for the purpose of making the relevant Order and to deal with the costs of this case stated.