TC02061

Appeal number: TC/2010/06000

CGT, s 49 TCGA 1992, contingent liability, capacity, representation on a disposal, costs as a contingent liability

FIRST-TIER TRIBUNAL
TAX CHAMBER

MR BEN NEVIS **Appellant**

- and -

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS **Respondents**

TRIBUNAL JUDGE: ANNE SCOTT, LL.B., NP
MEMBERS: SCOTT A RAE, LLB., WS
DR HEIDI POON, CA., CTA

Sitting in private at George House, 126 George Street, Edinburgh on Monday 1, Tuesday 2 and Wednesday 3 August 2011

Julian Ghosh, QC; Elizabeth Wilson; Ian Hunter, Accountant, Ernst & Young LLP for the Appellant

Iain Artis, Advocate; Stephen Crilly, Solicitor, Office of the Advocate General for Scotland for the Respondents

Background

1. This Hearing was heard in private following an application in terms of Rule 32 Tribunal Procedure (First-tier Tribunal) (Tax (Chamber)) Rules 2009 which was granted on 21 March 2011 on the basis that the terms of the confidential Settlement Agreement dated 2 February 2006 (see paragraph 27 below) might otherwise have to be disclosed.

2. On 25 August 2006, in relation to the 2002-03 Self Assessment Return for the appellant, the appellant's agents had claimed a deduction, from the Capital Gains arising, for payments totalling £12,000,000 (the settlement) made to Lomond Group Limited (LGL) in terms of the Settlement Agreement (see paragraph 27 below) dated 2 February 2006 together with the legal costs amounting to £5,668,648 (the costs) of defending the litigation which was settled by the Agreement. The claim was made under section 49 Taxation of Capital Gains Act 1992 (TCGA) and Extra Statutory Concession (ESC) D52. The claim was therefore that the settlement should be treated as consideration given for the shares and loan notes in LGL, that the legal costs be treated as an additional cost and that both should be deductions in the calculation of the appellant's Capital Gains arising in 2002-03.

3. The decision which is the subject of this appeal was issued on 22 June 2010 and was a Closure Notice under paragraph 7(1), (2) and (3) Schedule 1 A Taxes Management Act 1970 (TMA). That decision denied any relief. Firstly, as far as the settlement was concerned relief was denied on the basis that it was payment of a sum to settle litigation and distinct from a consideration for the share exchange; it was therefore not a contingent liability and could not be brought within the terms of section 49 TCGA. Secondly, the costs were viewed as a wholly separate matter to the share disposal and therefore also did not fall within section 49. Further, the costs were not allowed as a deduction under section 38 TCGA on the basis that they were not wholly and exclusively incurred as part of the acquisition of the Nevis shares nor of the LGL shares or loan notes and nor were they incidental costs of the transfer into trust of the LGL shares and loan notes in 2002. This appeal related only to the application of section 49 and no appeal was taken in respect of that part of the decision relating to section 38.

4. The parties called no witnesses in relation to matters of fact and lodged a Statement of Agreed Issues and Facts; no evidence was heard.

Agreed Issues

5. The first issue in this case is whether the settlement made by Mr Ben Nevis (MBN) (also referred to as BN in the Pleadings)) to settle an action arising out of representations made or allegedly made by him with respect to Nevis plc for the purposes of an offer for purchase of the company by Lomond plc (later renamed Lomond Group Limited) (LGL) was, for the purposes of section 49(2) TCGA, a contingent liability in respect of a representation made on a disposal by way of sale of (MBN's shares in Nevis plc) within the meaning of section 49(1)(c) TCGA.

6. The second issue in the case is whether the costs of defending the action were, for the purposes of section 49(2) TCGA, a "contingent liability in respect of a representation made on a disposal by way of sale of (MBN's shares in Nevis plc)" within the meaning of section 49(1)(c) TCGA.

7. It is common ground that, if the payment and costs are to be treated as contingent liabilities within section 49(1)(c) TCGA, then ESC D52 will apply.

8. It is common ground that, if the settlement payment and costs are to be treated as contingent liabilities within section 49(1)(c) TCGA, they were enforced by LGL's action and its settlement.

Agreed Facts

9. In June 2000 Nevis plc (later renamed LGL Shelf 11 Limited) (NPLC) was a publicly listed company whose shares were traded on the London Stock Exchange. MBN was a major shareholder and the Chairman and Chief Executive of NPLC.

10. In June 2000 LGL was a publicly listed company whose shares were traded on the London Stock Exchange.

11. On or about 20 June 2000 LGL expressed an interest in acquiring NPLC following which discussions took place and certain information was made available to LGL by NPLC.

12. On or about 3 July 2000 as Chairman of NPLC MBN authorised the sending of NPLC's Five Year Strategic Plan to LGL which included the Profit Forecast for the year to 31 March 2001 (the Profit Forecast).

13. In providing the Profit Forecast MBN represented to LGL that he had an honest belief in its accuracy.

14. In the year 2000 LGL announced that it would make an offer (the Offer) to acquire all issued and to-be-issued ordinary share capital of NPLC. The Offer was for a fixed sum in cash for each NPLC share. The terms of the Offer permitted NPLC shareholders, in respect of up to 50% of the NPLC shares for which they accepted the Offer, to elect to receive their consideration in the form of LGL shares on the basis of one LGL share for a fixed sum of cash consideration. As an alternative to the cash consideration to which they would otherwise be entitled, the terms of the offer allowed accepting NPLC shareholders to receive loan notes issued by LGL on the basis of £1 nominal value of Loan Notes for each £1 cash consideration.

15. At the time the Offer was made MBN together with his immediate family and related trusts held 14,593,423 NPLC shares of which MBN was the beneficial owner of 8,668,983 NPLC shares. By a letter dated 23 August 2000 MBN irrevocably undertook to accept the Offer in respect of the 8,668,983 shares and all shares of which he became the registered or beneficial owner after that date.

16. Appendix VI of the Offer provided additional information to shareholders about NPLC and LGL and intimated that MBN and the other NPLC directors accepted responsibility for the information contained in the document relating to NPLC's

Group, the directors of NPLC, members of their immediate families and related trusts, and that "to the best of the knowledge and belief of the directors of NPLC (who have taken all reasonable care to ensure that such is the case), the information contained in this document for which they take responsibility is in accordance with the facts and does not omit anything likely to affect the import of such information."

17. By letter dated 8 September 2000 LGL referred to a disagreement between the board of NPLC and its auditors and sought further information from MBN to allow them to understand better the September 1999 and March 2000 accounts. By a letter dated 11 September 2000 MBN provided further information and referred to discussions between LGL and NPLC's auditors "so you should be well briefed in relation to the background to the issues relating to our 30 September 2000 Accounts"; and gave an assurance that, "There are no other matters of which you should be aware."

18. The Offer was declared unconditional in 2000. LGL acquired NPLC. MBN received 2,650,542 LGL shares and £16,687,792 in value of £1 LGL loan notes in exchange for his 8,668,983 NPLC shares.

19. A scheme of arrangement was carried out whereby LGL was acquired by LGL plc, effective October 2000, as a result of which MBN ceased to be a holder of shares in LGL and instead became the holder of an identical number of shares in LGL plc.

20. As a result of accepting the Offer, MBN received consideration with an approximate value of £33,400,000.

21. On or about 26 July MBN executed a deed of trust creating the Nevis 2002 Maintenance Trust (the 2002 Trust). On 29 July 2002 MBN transferred 2,648,855 LGL plc shares and £16,687,790 of £1 LGL loan notes into the 2002 Trust.

22. On 12 August 2002 solicitors, acting on behalf of LGL, wrote to MBN informing him that LGL was considering pursuing a claim against him in relation to its acquisition of NPLC in 2000.

23. A formal claim (the Claim) was issued in the High Court of Justice Chancery Division by LGL seeking damages of £132,000,000 against MBN and Mr Ben Vrackie (BV (also referred to as MBV in the Settlement Agreement)) in respect of fraudulent misrepresentation, misrepresentation under the Misrepresentation Act 1967 and/or negligent misrepresentation, negligent mis-statement, and interference with LGL's business interests. NPLC in the same action sought damages for breach of fiduciary duty and duties of care owed by MBN as its director and employee.

24. No separate claim was brought against NPLC.

25. The measure of damages claimed was broadly the difference between the price paid by LGL for the whole issued share capital of NPLC, £263,300,000 and the alleged actual value of NPLC at the date of acquisition plus consequential loss.

26. MBN filed a defence denying the claim. He admitted that he had made an implicit representation that he honestly believed that a profit forecast of £30,500,000 was substantially achievable overall, assuming reasonable continuity of management and business and accounting practice. He asserted that the assurance given in his letter of 11 September 2000, that "There are no other matters of which you should be

aware.", was given by him as Chairman of NPLC and not in his personal capacity and was not a representation about the profit forecast.

27. On 2 February 2006 LGL and MBN entered into an agreement (the Settlement Agreement) under which LGL and NPLC undertook to release MBN and BV and each of the persons listed in Schedule 1 to the Agreement as the Nevis Interests, including MBN's immediate family and related trusts, from any liability that he or they might have (and whether or not known about at the date thereof): (clause 1). Without accepting liability, MBN was required by clause 2 to pay £12,000,000 to LGL.

28. As a director of NPLC, MBN (as was BV) was insured under a directors' and officers' liability policy.

29. On 25 August 2006 Ernst & Young wrote to HMRC on behalf of MBN, claiming an adjustment under section 49 TCGA to the CGT liability arising on the disposal of the shares in LGL plc and the LGL loan notes to the 2002 Trust. Following an enquiry this claim was refused and a closure notice was issued on 22 June 2010.

The Settlement Agreement

30. It is common ground that the settlement was paid in terms of the Settlement Agreement described in paragraph 27 above. That Agreement was subject to consent being obtained from the Insurers referred to in paragraph 28 above. That agreement, which is between LGL Group Limited, NPLC and MBN, narrates at:-

> Recital (5): "In proceedings in the High Court of Justice Chancery Division, Claim Number: [ ] initiated by LGL and NPLC in 2003 it was claimed against MBN and Ben Vrackie ("BV") that MBN had made representations to LGL in connection with the said sale which were false as a result of which he was liable to compensate LGL for the reduced value of the shares sold. LGL claimed that it was entitled to receive £132 million by way of such compensation."
>
> Recital (6): "The Proceedings have been contested by MBN and BV and a trial of them is now due to commence with an estimated duration of 9 months."
>
> Recital (7): "The parties have agreed to dispose of all claims between them by the entry into this Agreement ....".

31. It was a matter of agreement between the parties that in Clause 1.2 of the Settlement Agreement the words "This claim" mean the whole litigation proceedings so the settlement relates to the entirety of the litigation proceedings.

32. It was argued for the appellant that the import of Recital 5 was that the litigation, which was based on tort, not contract, was founded on MBN's actions and specifically on the assertions that his alleged representation(s) induced the purchase of shares at over value. The Settlement Agreement states that:-

> "1.8. LGL and NPLC hereby acknowledge that:-
>
> 1.8.1 MBN's willingness to enter into this Agreement and to pay the sums mentioned below

1.8.2 is not an acceptance of liability on the part of MBN

1.8.3 is without prejudice to the continued denial on the part of MBN of any liability on his part.

1.9 The parties hereby agree that they enter into this agreement without reliance on any representation or warranty made by or on behalf of any party."

On the face of it, therefore, the settlement was not paid in respect of a representation since none of the parties to the Settlement Agreement relied upon any representation.

33. It was argued for the appellant that the fact that the Settlement Agreement excluded reliance on representation and that liability continued to be denied did not, in itself, mean that there was no possible connection between any representation which might have been made and the settlement payment. The Tribunal noted the views of Lord Jauncey in *Garner* v *Pounds* [2000] 1 WLR at p.1112 that "However important commercial reality may be, it cannot be invoked to alter the unambiguous terms of an agreement negotiated at arms length". However, earlier in the same paragraph the well known passage in the speech of Lord Wilberforce in *Aberdeen Construction Group Ltd* v *Inland Revenue Commissioners* [1978] AC at p.893 was cited with approval that in the taxation of capital gains "the courts should hesitate before accepting results which are paradoxical and contrary to business sense".

34. Both the appellant and HMRC argued that the Settlement Agreement should not be considered in isolation and that the Pleadings in the litigation should be referred to for their terms on the basis that the settlement arose, *inter alia*, because of the Pleadings and the Settlement Agreement was, in itself, largely silent on the broader issues. The Pleadings consist of the Re-amended Particulars of Claim (the Claim) and the Re-amended Defence and Part 20 claim (the Defence) both dated March 2005 in *Lomond Group Ltd and Others* v Mr Ben Nevis *and Others* Claim No. [ ]. In addition, for the purposes of this Decision the Pleadings are also deemed to include the Claimants' Summary Pleadings (LGL Summary) and the First Defendant's Pleading Summary (MBN Summary).

35. In summary, it was argued for the appellant that there was a requirement to look at both the primary and secondary facts, when considering the application of section 49 TCGA, to enable proper consideration as to whether there was a sufficient connection between any representation and any contingent liability; therefore the Pleadings (which are a matter of public record) were relevant. HMRC looked to the Pleadings to show that there was more than one basis of action, there was a complex background and specifically that the litigation was not founded upon one representation inducing a contract; there were many other factors which were extant and they would have been factors involved in arriving at the quantum of the Settlement. Both parties agreed that consideration of the Pleadings (for both parties), as requested, would inform the Tribunal as to what the Settlement Agreement was based upon. The Tribunal accepted that the wording used, excluding reliance on representations and accepting that liability continued to be denied, was fairly standard

wording for an agreement of this nature and that it might not necessarily represent the whole factual situation; therefore the Tribunal accepted that to restrict consideration to the Settlement Agreement would be paradoxical (see paragraph 33 above).

36. There is no judicial determination of liability in this litigation, only the Settlement Agreement. The evidential value of the Pleadings, in an action which did not progress, and which would have depended on oral evidence in a matter which is subject to English Private Law, is limited. This Tribunal cannot make findings in fact about the various assertions and counter assertions in the Pleadings, not least since, in the main, they were denied and not put to proof as the matter did not proceed to a Hearing. What the Tribunal can do, having due regard to the Tribunal Procedure Rules and in particular Rule 2, and at the request of both Counsel did do, is to note the salient issues in the Pleadings to which they were directed by both Counsel and on which both had the opportunity to comment. The Tribunal accepted the argument advanced for HMRC that, in noting the Pleadings, firstly, it should be assumed that both parties knew what they were doing and had carefully considered the whole position when framing their cases in this very substantial litigation; secondly, that therefore MBN's case had been accurately pled by his advisors and that lastly, the pleadings, whether they would ever have been proven or not, speak to the positions that MBN (and LGL) took in regard to the matters which led to the Settlement Agreement. For the avoidance of doubt, wherever reference in this decision is made to the Pleadings, it is unequivocally accepted that the matters referred to have not been tested in Court.

The Pleadings and the arguments based thereon

37. Where the Tribunal had been referred, in general terms, to the Pleadings on specific matters but, not expressly referred to the specific paragraphs of either the Claim or the Defence by Counsel, the Tribunal sought to ascertain the foundation in the Pleadings for those assertions and have noted the position accordingly in the following two paragraphs.

38. Counsel for the appellant sought to rely on the Pleadings, primarily to point to paragraphs which supported the argument that there was a recurrent theme that the litigation, and therefore the Settlement Agreement, related to the sale and purchase of shares and that that in turn related to an admitted representation by the appellant. In particular, apart from the more general references, attention was drawn to the following:-

(i) Paragraph 4, in the "General Summary of the Claimant's case" of the Claim, states that the acquisition of the NPLC shares was induced by two categories of representation and procured by a third category; the first of these categories of representations included a Profit Forecast (paragraph 4.1 of the Claim). The argument was that it was clear that the acquisition of the shares was the cause of action and the source of loss.

(ii) It was argued, in general terms, that the description and quantification of the Claimant's loss at paragraphs 362 and 363 of the Claim make it explicit that the inducement to purchase the shares is the only cause of action.

(iii) In regard to The Misrepresentation Act Claim, it was argued that that relied, *inter alia*, on the alleged representation by MBN in regard to the Profit Forecast, which is specified at paragraph 375.2 of the Claim. The Tribunal noted that paragraph 375 included details of three other alleged representations (which are denied) and which are specified at paragraphs 375.1, 375.3 and 375.4. It was argued that because of those representations and specifically the only admitted representation, being the Profit Forecast, LGL had been induced to purchase BN's shares in NPLC (paragraphs 377 and 377.1 of the Claim) and to purchase all of the other shares in the company (paragraph 377.2) so therefore that representation was directly linked to the sale of the shares. The Tribunal noted in regard to Paragraph 375, that in the the Defence, Volume 2 of 4, it is averred at paragraph 644.1:- "It is denied that BN made any representations to LGL other than in his capacity as chairman of Nevis." It is averred at 646 that "Paragraph 377 of the Claim is denied. It is specifically denied that LGL is entitled to claim damages under the Misrepresentation Act 1967 from BN as pleaded or at all."

(iv) The first clause of paragraph 386.4 of the Claim was relied upon to support the argument that the litigation related to the disposal of the shares and that the Claimants were dealing with the appellant *qua* shareholder. That clause reads:- "LGL's letter of 8 September 2000 was written to BN seeking assurances from him as Chairman, Chief Executive and 21% Shareholder….". At the outset of the hearing Counsel for the appellant had referred the Tribunal to the said letter of 8 September 2000. It was put to him that that letter was addressed to MBN as Chairman and Chief Executive, that the only reference to capacity in the letter was in paragraph 7 which asked for confirmation of a matter in his capacity as Chairman and that the letter made no mention of BN's capacity as a shareholder. At that juncture, Counsel referred to the Pleadings in general (and without specification) stating that the Pleadings made it explicit. As indicated at paragraph 39 (vi) below, paragraph 654.7 of the Defence does not admit paragraph 386.4 of the Claim.

(v) The Pleadings at paragraphs 386.6.1 - 386.6.3 of the Claim were referred to on the basis that they indicated that, in relation to the correspondence in September 2000, MBN was asked to, and did, assume personal responsibility rather than acting in his official capacities. The Tribunal noted that at paragraph 654.12 of the Defence that that was denied.

(vi) Counsel referred to the MBN Summary at 13 where it states:- "The only representation admitted....as having been made is.... an implicit representation that he honestly believed that a Profit Forecast of £30.5 million was substantially achievable". The Tribunal noted the full detail which is to be found in the Defence, Volume 1 of 4 at paragraphs 3 and 3.1 where it is pled for MBN that:- "3..... It was therefore implicitly represented by each of the ....directors, including BN, that each of them honestly believed that: 3.1 the Profit Forecast was likely to be substantially achieved overall assuming reasonable continuity of management and business and accounting practices".

(vii) At paragraph 14 in the MBN Summary it states :- "This representation was made by MBN and every member of the Nevis Group Board in their capacity as directors." The Tribunal noted the full detail which is to be found in the Defence, Volume 2 of 4 at paragraph 274.2 where it is pled for MBN that:- "It is denied that BN made any representation about the Profit Forecast in his personal capacity or assumed any duty of care to LGL as regards the achievability of the Profit Forecast whether by virtue of the disclosure of the Strategic Plan or howsoever otherwise."

39. Counsel for HMRC sought to rely on the Pleadings on a number of matters and in particular the following:-

(i) It was argued for HMRC that paragraphs 4.1 - 4.3 of the Claim went beyond demonstrating simply that the acquisition of the shares was the cause of action and the source of loss and that what it demonstrated was that there was more than one cause of action, there was a very complex background to the transaction and that very large sums of money hung on different elements of the components of the claim. The nature of those claims is set out in general terms at paragraph 6 of the Claim. Paragraph 6.2 relates to NPLC, rather than LGL, and therefore has a different character.

(ii) As far as the alleged representations were concerned, Counsel referred to paragraph 12 of the Claim where these are set out at length at paragraphs 12.1 - 12.10. The Profit Forecast representation is at 12.1 and 12.2 and Counsel agreed that paragraph 12.1 had effectively been admitted; ie in general terms that which is agreed at paragraphs 12 and 13 of this decision. It was argued for HMRC that, even in regard to that admission, effectively liability had been denied. At paragraph 274.2 it was pled for MBN: “It is denied that BN made any representation about the Profit Forecast in his personal capacity or assumed any duty of care to LGL as regards the achievability of the Profit Forecast whether by virtue of the disclosure of the Strategic Plan or howsoever otherwise”.

(iii) It was argued that when ascertaining what any liability, and indeed the action, "was about" the issues were contained in the entirety of paragraph 12 of the Claim, not just in paragraphs 12.1, or 12.1 and 12.2, but also in paragraphs 12.3 to 12.10 as far as alleged representations by MBN were concerned. In addition, of course, there were also the alleged representations by BV (MBN's fellow defendant who was Group operations director of Nevis) and the Indemnity Claim by NPLC (now the Second Claimant). Accordingly, it was an action in tort, which was predominantly a fraud action, not just based on negligence and, although everything other than the release of a Profit Forecast had been denied, it was that which was the substance of the litigation.

(iv) Counsel for HMRC, like Counsel for the appellant (at paragraph 38(ii) above), relied on paragraphs 362 and 363 of the Claim. However, the argument for HMRC was different and more detailed. Paragraphs 362 and 363 read:-

"362 As a result of BN and/or BV's misrepresentations and each of them, LGL was induced:

362.1 to make its Offer for Nevis' shares in 2000, and

362.2 to declare its offer unconditional.

363 By reason of the misrepresentations of BN and/or BV, LGL has suffered loss and damage. The measure of the damages is:

363.1 the difference between (1) the consideration paid of £263.3m and (2) the actual value of Nevis at the date of acquisition; and

363.2 any consequential loss.....

It was argued firstly, that the litigation related to loss arising out of alleged fraud; secondly, that it related to the acquisition of the whole share capital and did not relate just to the shareholding of MBN, and lastly, that clearly the litigation was not primarily based to any substantive extent on the alleged failure of the Profit Forecast. Further, the primary loss was that set out at paragraph 363.1 of the Claim, which turned on the acquisition date, and that anything quantified or quantifiable after the acquisition date was a separate matter and would fall to form part of the consequential loss element. Specifically, if there was a loss arising out of the profit forecast then it would fall into the consequential loss element.

(v) The Tribunal was invited to note the averments relating to the Interference with Business Interests Claim (paragraphs 364 -374 of the Claim) in order to understand fully the nature of the litigation and this aspect of the claim was not concerned with the Profit Forecast. In particular the specification of loss and damage was referred to at paragraph 374 and the quantification is specified in the same terms as are quoted for paragraphs 363, 363.1 and 363.2 in the preceding paragraph hereof. On a similar basis, the Tribunal was asked to note the averments relating to The Misrepresentation Act Claim (paragraphs 395 - 396 of the Claim) where the quantification is specified in the same terms as are referred to in the two preceding paragraphs hereof. In this instance, however, the profits forecast was included in the matters which were part of that head of claim, as was the case for the heads of claim in paragraph 39(iv) above.

(vi) The Tribunal was also referred to the Negligence Claim (paragraphs 379 - 390). It was argued that at paragraph 386.4 there was the only mention in all of the Pleadings to MBN acting in the capacity of a shareholder and that that was because it was material to a negligence claim that he was a shareholder, as opposed to the other heads of claim. HMRC relied on the Pleadings, again in general terms without specification, to argue that MBN had denied the averment about MBN's alleged 21% shareholding. The Tribunal noted that, at Volume 2 of 4 at paragraph 654.7 of the Defence it is averred:- "Sub paragraph 386.4 is not admitted". It was also noted that the first sentence of Paragraph 3 in the Introduction to the Claim, being the only part of that which is relevant here, reads:- "BN was the chairman and chief executive of Nevis and held or beneficially held 21.4 per cent of its shares". Paragraph 241.1 of the Defence reads in relation to paragraph 3 of the Claim:- "It is denied that BN held or beneficially held 21.4% of the shares in Nevis. The 21.4% shareholding was the combined shareholding of BN, his immediate family and family trusts. Save as aforesaid, the first sentence is admitted."

(vii) As far as the averments in relation to the Profit Forecast in the Introduction to the Defence were concerned (Volume 1 of 1), it was argued that there was a positive assertion in paragraph 3.1 that the forecast was likely to be achieved overall (so that precluded any suggestion of admission of liability) and that the admission which is founded upon by the appellant is to be found at paragraph 4 and extended only to what that stated, given the terms of paragraph 5. Those paragraphs read:-

"4 The implicit representation made by BN as a member of the Nevis Board was true. BN did (up to and including 21 September 2000) honestly believe that:

4.1 The Profit Forecast was likely to be achieved overall, assuming reasonable continuity of management and business practices.

4.2 The other members of the Nevis Board also held a similar belief.

5 BN denies that he made any other representation about the Profit Forecast, express or implied."

There were then, at paragraph 8.9 et seq., positive averments about that Forecast. Counsel agreed that they were not tested in Court and may, or may not, have had substance but argued that they should be noted when considering contingent liability.

(viii) Reliance was placed on paragraph 10.3 of the Defence in the same volume to show that the Profit Forecast was not related to the sale of the shares. It reads:-

"10.3 BN was not seeking to sell his shares. It was LGL who approached Nevis and the Profit Forecast which LGL asserts was fraudulent was set long before LGL's approach."

(ix) Paragraph 22.1 of the Defence was referred to as it indicated that it was explicitly pled for MBN (albeit not in the context of the Profit Forecast) that the correspondence on 11 September 2000 was *qua* Chairman and not in his personal capacity.

(x) Paragraph 28 of the Defence states that:- "Further no responsibility was accepted either by Nevis or its directors (or by LGL or its directors) for information exchanged during the course of due diligence." The argument was that, whether or not that would have been proven, it was indicative of the position adopted by MBN. The Tribunal noted that paragraph 3 of the Defence in Volume 1 of 1 states that:- "BN admits and avers that the Profit Forecast was passed.....to LGL in the course of the due diligence purpose.....authorised by the Nevis Board directors including himself ".

(xi) Paragraph 32 of the Defence deals with the response to the letter of 8 September 2000 referred to in paragraphs 38 (iv) and by implication 39(vi) above and it makes it explicit that it was written by MBN in his capacity as Chairman and Chief Executive and not in a personal capacity and was written to assist in connection for a bid for "shares held by a wide range of shareholders". The argument was that capacity was relevant at all times.

(xii) It was argued that the crux of the matter is to be found at Paragraph 274.2 of the Defence since it encapsulated MBN's position when it states:- "It is denied that BN made any representation about the Profit Forecast in his personal capacity....".

(xiii) Lastly, Volume 4 of 4 of the Defence, deals at length with the NPLC Indemnity Claim, which was denied, and the detail of which was referred to at paragraphs 392 - 400 of the Claim. The argument was that that element of the claim had no relationship to the sale of the shares, albeit the Tribunal notes that although paragraph 393 deals with vicarious liability and 394 with fiduciary duty it is also alleged at 398 that the acquisition would not have proceeded without the Profit Forecast. There is no quantification of this element of the Claim which was also covered by the Settlement Agreement and was the reason NPLC was a Claimant in the litigation.

The Legislation

40. Capital Gains Tax (CGT) is charged on a "disposal" of assets (section 1(1) TCGA) and a person who has disposed of an asset is charged to CGT on the chargeable gain arising less any allowable losses in the year of assessment (section 2 (1-2) TCGA). The chargeable gain and allowable losses are computed, in the first instance, in accordance with section 15 and section 16 TCGA.

41. Section 49 TCGA provides for adjustments to be made in the computation of chargeable gains on the disposal of an asset and apply where events after the date of disposal affect the consideration received for the asset.

42. Section 49 Contingent liabilities

(1) In the first instance no allowance shall be made in the computation of the gain

(a) in the case of a disposal by way of assigning a lease of land or other property, for any liability remaining with, or assumed by, the person making the disposal by way of assigning the lease which is contingent on a default in respect of liabilities thereby or subsequently assumed by the assignee under the terms and conditions of the lease.
(b) for any contingent liability of the person making the disposal in respect of any covenant for quiet enjoyment or other obligation assumed as vendor of land, or of any estate or interest in land as lessor,
(c) for any contingent liability in respect of a warranty or representation made on a disposal by way of sale or lease of any property other than land.

(2) If any such contingent liability subsequently becomes enforceable and is being or has been enforced, there shall be made on a claim being made to that effect, such adjustment, whether by way of discharge or repayment of tax or otherwise, as is required in consequence.

(3) Subsection (2) above also applies where the disposal in question was before the commencement of this section.

Impact of the agreed issues three and four

43. These agreed issues are set out in paragraphs 7 and 8 above. As far as paragraph 7 is concerned, it is common ground between the parties that the "disposal" to be considered in the context of the relevant legislation is the share for share exchange in 2000 (paragraph 18) and in respect of which MBN made the alleged representation (paragraph 13). A share for share exchange is not a disposal for CGT purposes. The relevant disposal for CGT was on 29 July 2002 when the shares were transferred into the 2002 Trust (paragraph 21). The impact of the application of ESC D52 is that HMRC accept that if a payment falls within section 49 in respect of a share for share exchange then the application of the section will be extended to the shares involved in the disposal in 2002 which gave rise to the CGT exposure.

44. As far as paragraph 8 is concerned, the impact is that the Tribunal need not consider the application of section 49(2) since if the Tribunal finds in the appellant's favour in respect of issues 1 and/ or, 2, then it follows that the sum or sums involved would be deductible in the computation of the capital gain. Accordingly the issues for the Tribunal were those at paragraphs 5 and 6 above but, if the appellant does not succeed in regard to the former then the latter cannot succeed.

The First Issue

45. The First Issue is set out in paragraph 5 above. In summary, the arguments were:-

(a) The appellant's case was that the settlement made by MBN was a contingent liability in respect of a representation made on a disposal by way of sale of (BN's shares in NPLC) within the meaning of section 49(1)(c) TCGA. In essence, the appellant's case was that, in relation to the sale of his shares, MBN made a representation about the Profits Forecast, that profit could only be quantified, at the earliest, many months after the sale of the shares, there was therefore a contingent liability and that since there was litigation on the basis that the purchase of the shares was induced by, *inter alia*, that representation, then the sum paid to settle the litigation was the quantum of the contingent liability.

(b) HMRC argued that the payment was not made in respect of a contingent liability but in satisfaction of a contractual obligation; and if BN had any

liability that was compromised by the settlement agreement it was an actual liability and was not a liability that was subject to any contingency.

Representation

46. The first and crucial question was whether there was a representation since, if there was not, then section 49 could not apply as there were no warranties in this case. As far as representations by MBN are concerned, the Claim in the litigation relies on the alleged Profit Forecast representation, the no material change representation, the 11 September 2000 representation, the due diligence representations and the implied representation. In addition, as noted in paragraph 23 above, NPLC also sought damages from MBN.

47. Counsel for the appellant was clear that the only representation that is admitted is the Profit Forecast (paragraph 13 above) and that the other alleged representations are not admitted, were never tested in Court and liability was denied in regard thereto. He was equally clear that since there was the one representation, which was admitted in the Pleadings, he did not need to lead evidence on any other representations.

48. Does the capacity in which MBN made the representation matter? It was argued for him that capacity was irrelevant and all that mattered was whether or not there had been a representation and whether that representation was on the disposal of the shares. HMRC argued that the representation had to be made by the seller, in the capacity of seller, at the time of the sale and that if there was any contingent liability arising from the representation, that must also be incurred in the capacity of seller; if the Profit Representation was a representation for the purposes of section 49 then it was given to LGL by MBN in his role as Chairman, Chief Executive and Director and not as seller.

49. It was argued for the appellant, that references in the Pleadings, in regard to capacity, were made in order to exclude an argument about duty of care to LGL (because the litigation was predicated on tort where a duty of care is the cornerstone). Appendix VI to the Offer makes it explicit that the named directors of NPLC (including MBN and BV) accepted responsibility for the information in the offer and that was alleged to be based, at least in part on the Profit Forecast. The Tribunal finds that, regardless of the motive in averring that the Profit Forecast representation was made in his capacity as a director, the fact is that, on the balance of probability, it was made in that capacity although, of course, it is also a fact that MBN was a minority shareholder in NPLC. Looking to the totality of the evidence, the Tribunal finds that MBN did make a Profit Forecast representation (the Representation) when it was released as part of the Strategic Plan. The fact that that was prepared in advance of the sale negotiations and for a different purpose does not matter; the crucial issue is that it was disclosed to LGL. Liability is, and was, denied in regard thereto.

"on a disposal by way of sale"

50. The next question is whether the Representation was "made on a disposal by way of sale of any property other than land" in terms of section 49(1)(c) TCGA. Undoubtedly, there was a disposal of shares by MBN but was the representation made on the disposal? It was common ground that "on" in this context means in the course of the transaction comprising the disposal.

51. The question of capacity came into play again. HMRC argued that the representation was given to LGL by MBN in his role as Chairman and Director and would have been made whether or not he had owned shares. Accordingly, although it related to the share disposal it did not relate to the appellant in a personal capacity or specifically to the disposal of his shares. It was given as part of the normal course of business and was also given by the other directors. The stance taken by MBN in the litigation is to be found in the Defence and it is noted that he repeatedly emphasised that at all material times he was acting as Chairman and Chief Executive (and therefore as a director) and that he never acted in a personal capacity. The Profit Forecast was certainly prepared before the Offer was made, it was released as part of the due diligence and the Representation was admittedly given as a director. It seems clear that that Profit Forecast which constituted the Representation, whether implied or otherwise, would have been released whether or not MBN was a shareholder.

52. What is the import of that, if any? The Tribunal looked very closely at section 49 TCGA since it was argued for the appellant that the whole notion of capacity is one feature that is never relevant to section 49, and that capacity only arises in the context of CGT where it is specified in the legislation. This section is not a charging section but rather stipulates the specific situations in which the original CGT exposure, based on the position as at the date of the contract (ie the words "In the first instance" in this section construed in terms of section 28 TCGA 1992 mean at the time of disposal), can be adjusted in light of subsequent events.

53. Each sub-section of section 49(1) deals with different scenarios. There is a clear difference between the wording in (a) and (b) and the wording in (c). In the former two there is reference to “the person making the disposal”: there is no such reference in (c). For the first subsection not only is there the reference to the person making the disposal, but a causal test is also applied since a default by an assignee is required. For the second subsection, capacity is specifically stipulated as a requirement in the sense that not only does it refer to the contingent liability having to be that of the person making the disposal, but it also has to relate to a specific interest in the land as either vendor or lessor. The third subsection, with which we are here concerned, does not stipulate capacity but requires only a contingent liability in respect of a representation which was made on the disposal. The contrast with the earlier two subsections and particularly (b) is striking. Given the rest of the section, the Tribunal concludes that had it been intended that the representation had to be made *qua* seller, then it would have been so stipulated as it was in the preceding subsection in regard to assignation, sale or lease. Accordingly, the Tribunal accepts the argument for the appellant that there is no stipulation that a specific capacity or causation is required in the context of the Representation. In all these circumstances,

therefore, the Tribunal accepts that the Representation in this case was a representation made on the disposal of the shares for the purposes of section 49.

Contingent Liability

54. Was there a contingent liability in respect of the Representation? A contingent liability is not defined in the TCGA 1992. Looking to the case law, in *Winter* v *IRC* [1963] AC Lord Guest at page 262 states that a contingent liability is "a liability which depends for its existence upon an event which may or may not happen". The Representation related to the profits for the year to 31 March 2001. Accordingly, the full impact of any defect in the Representation could not crystallise before that date which was after the date of the disposal. The Representation was dependent on how the company actually traded. LGL could not have had any enforceable rights before 31 March 2001 which was after the disposal of the shares. Accordingly, any liability arising from the Representation must have been contingent. Furthermore any liability in terms of this or any other representation by its very nature must be contingent - firstly on the representation, having been relied upon not proving subsequently to be valid, and secondly it would be contingent on an action being raised.

55. It is clear from the Pleadings that there had been reliance on the Representation (and the other alleged representations) and that the litigation was founded *inter alia* thereon. It is beyond doubt that there was litigation in regard thereto. The Tribunal therefore finds that as far as section 49 is concerned:-

(a) as indicated in paragraph 53 above the Profit Forecast was a representation;
(b) it was made on the disposal of the shares; and
(c) there was a contingent liability in respect of that representation.

56. The next question for the Tribunal was to ascertain to what that contingent liability amounted. MBN met the sums stipulated in Clause 2.1 of the Settlement Agreement in order to settle the litigation. The liability was his alone, although as indicated in paragraph 27 above, the Settlement Agreement not only released MBN but also BV and the Nevis Interests.

57. It was argued for the appellant that that was purely incidental and of no moment; the primary benefit was to MBN. HMRC argued that whilst the settlement of the litigation was to the benefit of more than MBN, it was not to the benefit of every shareholder (indeed it did not benefit the majority of those from whom LGL acquired Nevis shares) and that it was not linked to the sale and purchase of the shares. Further, if the settlement were to be the realisation of a contingent liability within section 49, it should be apportioned in the same proportion as the appellant's shares bear to the former shareholdings represented by the BV and Nevis Interests since all were released by the Settlement. Lastly, in that regard HMRC founded on the fact that, as indicated in paragraph 30 above, Insurers were required to consent to the settlement and that supported the argument that the litigation did not relate to the shares. The Tribunal did not attach any weight to that last point since, although MBN

was sued in a personal capacity, it is clear that the litigation was founded in large part on his, and BV's actings as Directors and officers of the Company, so Insurers' consent would be relevant.

58. Was the settlement the extent of the contingent liability? As indicated, it was argued for the appellant that it was in its entirety (together with the costs) because there was only the one admitted representation and that had been relied upon and was a cause of the litigation. Recital 5 of the Settlement Agreement (paragraph 30 above) indicates that the £132 million was sought as compensation for the "reduced value of the shares sold" as a result of false representations. On the same basis that the Tribunal has accepted that the fact that Settlement Agreement did not give the whole "story" in relation to reliance on representations (paragraphs 34-36 above), it is also accepted that that Recital did not give the whole "story" in regard to the basis of the litigation or the quantification of the Claim.

59. It is abundantly clear from the Pleadings that the substance of the litigation was very extensive. In a nutshell, the issue for the Tribunal is to decide on the balance of probabilities, whether, the settlement flowed from the admitted representation. Counsel for the appellant was quite clear that even if it was decided that the settlement was on a "nuisance value" basis ie that it was commercially prudent to settle the litigation on a no liability basis since it was time consuming, very expensive and very public (and it was argued by Counsel for HMRC that it was settled on that basis) nevertheless the settlement would still be "in respect" of the Representation in terms of section 49.

60. There was no evidence at all as to how the settlement had been arrived at. Counsel for HMRC argued that the Pleadings showed that there were at least four heads of claim relating to alleged representations with an appropriate measure of damages for each and the predominant factor in each was for the loss "as at the date of the acquisition" (paragraph 39(iv) *et seq* above). Further since the settlement encompassed all heads of claim (paragraph 31) the settlement "bought out" the counter claim which had nothing to do with sale of shares.

61. Counsel for HMRC argued that capacity was very relevant when looking at the quantum of any contingent liability. A large part of the litigation and the counter-claim was predicated on alleged "improper" dealings by MBN and BV and they were being sued for the whole losses allegedly incurred, not just losses relating to their shareholdings.

62. Both Counsel had repeatedly argued, correctly, that it was not within the Tribunal's jurisdiction to make findings in fact about the underlying litigation; the Tribunal could only note the position.

63. Counsel for the appellant argued that the settlement was the quantum of the contingent liability. However, he also argued that if (in his words) the Tribunal found that the situation was statutorily pure then it was open to the Tribunal to make findings in principle, which the Tribunal has done as specified in paragraph 55 above,

and remit it to the parties to value the impact of the Profit Forecast representation. Alternatively, he invited the Tribunal to accept that the settlement was a good indicator of that value.

64. The Tribunal did not have any evidence on which they could make findings as to the quantum of the contingent liability predicated on the Profit Forecast representation. Accordingly the Tribunal finds that, in principle, the provisions of section 49 are satisfied in this case but that the quantum of any contingent liability cannot be assessed in this forum. Accordingly the Appeal on the First Issue succeeds in part and to the extent of that decision in principle only.

The Second Issue

65. The second issue is set out in paragraph 6 above. It was argued by Counsel for the Appellant that although it was not in the agreed facts, the legal costs only arose because MBN had been sued in relation to the representation, amongst other things. Accordingly, he indicated that if the Tribunal came to a decision on the principles involved it should be remitted to the Parties to discuss what legal costs would be attributable, if appropriate. Counsel for HMRC agreed.

66. As indicated in paragraph 3 above, there was no appeal in regard to the decision that the costs were not allowable as a deduction in terms of section 38. That section which covers the question of the deductibility of costs for CGT generally makes it explicit that costs can only be deductible if they are "wholly and exclusively" incurred in relation to the disposal. The Tribunal was not persuaded by counsel for the appellant's arguments that the costs in this case were incidental to the contingent liability. This was an extremely expensive litigation and legal costs in excess of those now being sought by MBN have already been met under the insurance policy referred to in paragraph 28 above. The Tribunal finds that there is not a close enough nexus between the legal costs incurred and the contingent liability to allow any costs to form part of a contingent liability within the meaning of section 49. Accordingly the appeal fails on this issue.

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

ANNE SCOTT
TRIBUNAL JUDGE

RELEASE DATE: 28 May 2012

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