[2014] UKFTT 924 (TC)

TC04038

Appeal number: TC/2014/630

CAPITAL GAINS TAX – entrepreneurs' relief – Chapter 3 part V TCGA 1992 – whether a material disposal of business assets within s 169I – whether an officer or employee of the company at the relevant time – appeal allowed

FIRST-TIER TRIBUNAL
TAX CHAMBER

Mr RICHARD HIRST **Appellant**

- and -

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

TRIBUNAL: Judge Peter Kempster
Mr David E Williams CTA (Fellow)

Sitting in public at Priory Courts, Birmingham on 19 August 2014

The Appellant in person

Mrs Glynis Millward (HMRC Appeals Unit) for the Respondents

DECISION

1. The Appellant ("Mr Hirst") appeals against a decision by the Respondents ("HMRC") disallowing entrepreneurs' relief ("ER") in respect of a capital gain on a disposal of shares in the tax year 2009-10.

2. The appeal was submitted late but HMRC confirmed they did not object to the lateness and the Tribunal decided to admit the appeal out of time, pursuant to s 49 Taxes Management Act 1970.

Background

3. Mr Hirst's self-assessment return for the tax year 2009-10 recorded a disposal of his shareholding ("the Shares") in Wyse Finance Limited ("the Company") on 7 July 2009. The capital gain calculation included a claim for ER on that disposal. By a closure notice issued on 4 September 2013 HMRC in effect disallowed the ER. HMRC's reason for that decision was that Mr Hirst was not, throughout the period of one year ending with the disposal of his shareholding, either an officer or an employee of the Company, and that the statutory qualifications for ER had not therefore been met in full, having regard to TCGA 1992, S. 169I(6)(b) in the rules set out below. That decision was upheld by a formal internal review issued on 16 December 2013. Mr Hirst appeals to the Tribunal against those decisions.

Law

4. All statutory references are to TCGA 1992 and the legislation is cited as in force at the relevant time.

5. Section 169H provides (so far as relevant):

> "**169H Introduction**
>
> (1) This Chapter provides relief from capital gains tax in respect of qualifying business disposals (to be known as "entrepreneurs' relief").
>
> (2) The following are qualifying business disposals—
>
> (a) a material disposal of business assets: see section 169I,
>
> …"

6. Section 169I provides (so far as relevant):

> "**169I Material disposal of business assets**
>
> (1) There is a material disposal of business assets where—
>
> (a) an individual makes a disposal of business assets (see subsection (2)), and
>
> (b) the disposal of business assets is a material disposal (see subsections (3) to (7)).

(2) For the purposes of this Chapter a disposal of business assets is—

…

(c) a disposal of one or more assets consisting of (or of interests in) shares in or securities of a company.

…

(5) A disposal within paragraph (c) of subsection (2) is a material disposal if condition A or B is met.

(6) Condition A is that, throughout the period of 1 year ending with the date of the disposal—

(a) the company is the individual's personal company and is either a trading company or the holding company of a trading group, and

(b) the individual is an officer or employee of the company or (if the company is a member of a trading group) of one or more companies which are members of the trading group.

…"

7. Section 169S(3) provides:

"(3) For the purposes of this Chapter "personal company", in relation to an individual, means a company—

(a) at least 5% of the ordinary share capital of which is held by the individual, and

(b) at least 5% of the voting rights in which are exercisable by the individual by virtue of that holding."

Evidence

8. The Tribunal had a joint bundle of documents and took oral evidence from both Mr Hirst and Mr Peter Millard (a former director and shareholder of the Company).

9. Mr Hirst's evidence was as follows.

(1) The business of the Company was arranging corporate finance, specifically for IT and telecom equipment. The finance was provided by various financial institutions, each of which had a trading arrangement with the Company. The Company was formed in 2005 and was the successor to a number of similar businesses with which Mr Hirst had been associated since 1997. Mr Hirst had been joint managing director. In 2006 he recruited a chief executive officer and a sales director, and himself took on the role of business development director. During 2007 the business position of the Company became very difficult and, in order to control costs, Mr Hirst resigned his position with the Company in December 2007.

(2) After his resignation Mr Hirst continued to be involved in sourcing new business for the Company. In February 2008 he approached ACF, a finance broker, which presented good opportunities for the Company. That business

would involve broker-to-broker deals, which was a sensitive area and it was important that the financial institutions were fully aware of the arrangements. In July 2008 ACF approached Mr Hirst to become a director of that business, but Mr Hirst made it clear that his role was with the Company.

(3) In February 2008 Mr Hirst was arrested on serious criminal offences. He was charged in April 2008 and at his trial in December 2008 he was found guilty of assault, with a retrial ordered of the other more serious offences. At the retrial in July 2009 Mr Hirst was acquitted of all those other charges.

(4) The criminal prosecution meant that it was not appropriate for him to resume a directorship with the Company. A second effect of the criminal prosecution was that Mr Hirst needed funds to pay for his defence. The intention was that he would receive a commission from the Company in relation to the new business he was introducing, for example from ACF. The arrangements for the sales commissions were agreed with Mr Bassett, chief executive officer. In the event, the Company paid dividends (to all its shareholders) and this provided sufficient funds for Mr Hirst without him having to claim commissions from the Company. The period of the prosecution had been a torrid time for him, and as he had sufficient funds from the dividends he did not bother to pursue payment of the commissions. Mr Hirst also retained the laptop and phone provided by the Company, and the Company continued to pay for his home internet access (a contract with Zen Internet).

(5) The Company's financial situation continued to worsen through to late 2008. In November 2008 there was a shareholders' meeting of the four shareholders. The CEO (who was not a shareholder) was not in attendance. The shareholders agreed that the sales director should be dismissed immediately and that the CEO should also leave the Company unless it returned to profitability. There was a second shareholders meeting in January 2009, at which decisions were taken to remove the CEO, restructure the board, make other staff redundancies and re-engineer the business.

(6) In February 2009 the shareholders were approached with an offer for the business. The sale was completed in early July 2009. Mr Hirst's interest in the Company was around 13.5%.

10. Mr Millard's evidence was as follows.

(1) Mr Millard was director of operations of the Company and a shareholder from 2005 to 2009.

(2) In 2007 the Company was in financial difficulties and it was necessary to consider the cost base. After discussion it was agreed that Mr Hirst would resign as a director, but look at other opportunities. Mr Hirst continued to take profits from the business as dividends.

(3) The relationship with ACF had been introduced by Mr Hirst and Mr Hirst was the conduit for discussions with ACF. That position continued through to the sale of the Company in July. Broker-to-broker transactions were high risk and the arrangement with ACF had to be approved by the financiers because, otherwise, there was a possibility that the Company might be in breach of its

trading agreements with those financiers. The Company explained Mr Hirst's role in negotiating these deals and all parties were content with Mr Hirst's involvement.

(4) The Company also allowed Mr Hirst the role of liaising with the CEO. Mr Hirst received copies of board packs. The CEO would report back to the other directors concerning his discussions with Mr Hirst and convey ideas received from Mr Hirst. There was open feedback with Mr Hirst throughout 2008 and 2009. Mr Hirst's views were a welcome contribution to the strategy of the Company. The decision to dismiss the CEO and the sales director was taken in January 2009 and it had been felt best for Mr Hirst to communicate that to those executives.

(5) Mr Hirst became increasingly involved because of the pressures on the business. The shareholders present at the shareholders' meetings in November 2008 and January 2009 had been the four directors before the CEO joined the Company and they had a ten-year history of working together – they were the original management team who were still trying to pursue the business and they all made a contribution on strategy and direction. Not everything had been documented as there were many telephone conversations between colleagues.

(6) The Company continued to be viable despite its financial problems. The strategy was to produce the best position both in relation to continuation and also an onwards sale. Had the business not been sold, then Mr Millard would have expected Mr Hirst to have been reappointed once the matter of the criminal prosecution had been resolved. Mr Hirst's involvement was as a knowledgeable specialist. Mr Millard had seen the references to Mr Hirst being an "ambassador" of the Company only when he had seen the hearing bundle on the morning of the hearing; he thought that was an expression used by ACF, but not by the Company.

(7)

(8) Mr Millard confirmed that Mr Hirst had a phone and laptop that belonged to the Company; those would have been written off by the Company long ago.

Appellant's case

11. Mr Hirst submitted as follows.

12. He had been both an employee and a director of the Company in the twelve months up to disposal of the Shares.

Employee

13. There were three irreducible minima in any contact of employment.

14. First, that the employee was under an obligation to provide work personally – see *Express & Echo v Tanton* [1999] IRLR 367. Here, Mr Millard had evidenced that Mr Hirst's personal involvement in the relationship with ACF was critical to the success of that project.

15. Second, that there was a mutuality of obligation between the employer and employee – see *Clark v Oxfordshire Health Authority* [1998] IRLR 125. This had been expressed by the Employment Appeal Tribunal in *Younis v Trans Global Projects Ltd* (UKEAT/0504/05/SM) (at [17]) as "whether the employer is under an obligation to provide work and the worker to do it when offered". The Company had to put transactions to Mr Hirst for him to put to ACF, and ACF clearly saw the transactions between the Company and ACF as being through Mr Hirst. The provisions relating to ER did not require any particular hours of work or level of remuneration - that was confirmed by HMRC's own internal manuals (at CG64110). The Tribunal in *Corbett v HMRC* [2014] UKFTT 298 (TC) had held that ER was available to a taxpayer who received no remuneration. In *Secretary of State for BIS v Knight* (UKEAT/0073/13/RN) the EAT had held an individual to be an employee even though she received no remuneration for two years prior to the company's insolvency (at [23]):

> "… although McKenna J suggested in *Ready Mix* that remuneration in some form is an essential ingredient of a contract of employment, there may be a contract of employment, as I see it, in which the employee does not seek payment, yet which would not fail for lack of mutuality or absence of consideration. Under such a contract an employee could owe a duty to carry out whatever work he or she had agreed to do; and the employer would have to fulfil obligations which might not involve the payment of money, e.g. the provision of tools and equipment or the taking of reasonable care for the employee's health and safety. Money is not the only consideration which may move from an employer under a contract of employment."

Here the Company had an obligation to pay commission to Mr Hirst, meet certain expenses and provide certain assets (being the phone, laptop and home internet access). The provision was valuable consideration – as in *Knight*. The commission would have been paid had he demanded it; in the event he did not request the commission because he was receiving sufficient funds through the dividends that the Company was paying at that time to him and his fellow shareholders in accordance with his requests.

16. Thirdly, that the employee both expressly and impliedly agreed that he was subject to the employer's control sufficient to render the employer master – see *Ready Mixed Concrete (South East) Ltd v Minister of Pensions* [1968] 1 All ER 433 (at 440). Mr Hirst's role was as a skilled expert and thus the degree of control must be viewed in that light. He developed strategy but that still required checks by the Company and thus he was a servant under the control of the Company.

Director

17. In *Gemma Ltd v Davies* [2008] EWHC 546 (Ch) the High Court considered the definition of a "*de facto* director" and (at [40]) derived certain propositions from the relevant case law:

> "(1) To establish that a person was a de facto director of a company, it is necessary to plead and prove that he undertook functions in relation

> to the company which could properly be discharged only by a director: per Millett J in *Re Hydrodam (Corby) Ltd* [1994] 2 BCLC 180 at 183.
>
> (2) It is not a necessary characteristic of a de facto director that he is held out as a director; such 'holding out' may, however, be important evidence in support of the conclusion that a person acted as a director in fact: per Etherton J in *Secretary of State for Trade and Industry v Hollier* [2006] EWHC 1804 (Ch), [2007] Bus LR 352 at [66].
>
> (3) Holding out is not a sufficient condition either. What matters is not what he called himself but what he did: per Lewison J in *Re Mea Corp Ltd* [2007] 1 BCLC 618.
>
> (4) It is necessary for the person alleged to be a de facto director to have participated in directing the affairs of the company on an equal footing with the other director(s) and not in a subordinate role: per Etherton J in *Secretary of State for Trade and Industry v Hollier* [2006] EWHC 1804 (Ch), [2007] Bus LR 352 at [68] and [69] explaining dicta of Timothy Lloyd QC in *Re Richborough Furniture Ltd* [1996] 1 BCLC 507 at 524.
>
> (5) The person in question must be shown to have assumed the status and functions of a company director and to have exercised 'real influence' in the corporate governance of the company: per Robert Walker LJ in *Re Kaytech International plc* [1999] 2 BCLC 351 at 424.
>
> (6) If it is unclear whether the acts of the person in question are referable to an assumed directorship or to some other capacity, the person in question is entitled to the benefit of the doubt (per Timothy Lloyd QC in *Re Richborough Furniture Ltd* [1996] 1 BCLC 507 at 524), but the court must be careful not to strain the facts in deference to this observation: per Robert Walker LJ in *Re Kaytech International plc* [1999] 2 BCLC 351 at 423."

18. It was accepted that the Company did not hold out Mr Hirst to be a director, but it was clear from *Gemma* that that was not conclusive. Third parties such as ACF and the financiers saw Mr Hirst as a decision-maker on behalf of the Company, who had authority to make legally binding obligations. He had been central to the business of the Company and exercised real influence in the corporate governance of the Company. In *Holland v HMRC* [2010] UKSC 51 Lord Collins stated (at [91]):

> "In fact it is just as difficult to define 'corporate governance' as it is to identify those activities which are essentially the sole responsibility of a director or board of directors, although perhaps the most quoted definition is that of the Cadbury Report: 'Corporate governance is the system by which companies are directed and controlled' (Report of the Committee on the Financial Aspects of Corporate Governance, 1992, para 2.5)."

19. Mr Hirst had received copies of the board packs. The CEO had to consult him, and he gave instructions to the CEO; it was clear that the CEO considered himself as dealing with a person more senior than the CEO himself.

20. The minutes of the shareholders meetings demonstrated that they were dealing with strategic and executive matters at the highest level.

21. Mr Hirst had been acting as a *de facto* director of the Company from his formal resignation in 2007 through to the sale of the Company in July 2009, and thus throughout the qualifying period of one year ending with the share disposal. It was telling that HMRC in their own internal communications included in the trial bundle appeared to accept this – as evidenced by an internal memo from the caseworker to her superior in March 2012:

> "I have now received a further letter from Maitland Walker [Mr Hirst's solicitors] in response to my letter of the 23 January. You will see that they have still not sent evidence in the form of Minutes of the Board meetings. Instead they have sent another statement from Peter Millard...
>
> You will see that Maitland Walker have put forward their case for Mr Hirst being a director de facto. Considering the three categories in the Donna Davies case to which Peter Nicholls refers, if we accept the evidence now submitted, then in my view a Tribunal may well conclude that Mr Hirst was indeed a de facto director.
>
> Maitland Walker have avoided the question of the qualifying period. However, if we do accept he was acting as a de facto director whilst negotiating with ACF, the statement that he was heavily involved in 2009 in the removal of the CEO Stephen Bassett and in the sale Wyse does seem to confirm this continued throughout the period concerned.
>
> Can you please advise me whether I should now accept the claim to Entrepreneurs' relief, resubmit to Peter Nicholls for further guidance or take another form of action."

Respondents' case

22. Mrs Millward for HMRC submitted as follows.

23. HMRC accept that all the statutory conditions for ER were satisfied *except* for s 169I(6)(b), which requires that "throughout the period of 1 year ending with the date of the disposal … the individual is an officer or employee of the company …". The date of disposal was 7 July 2009 and thus the one year period in s 169I(6)(b) is the period 8 July 2008 to 7 July 2009. HMRC contended that Mr Hirst ceased to be an officer or employee of the Company in December 2007. Thus the condition was not satisfied. ER was intended to be granted only to employees and officers who held shares in a company, not other shareholders and investors. HMRC were of the opinion that Mr Hirst had not been an employee or a director of the Company in the twelve months leading up to the disposal of his Shares. The onus of proof was on Mr Hirst.

24. On the argument that Mr Hirst was a director:

(1) HMRC relied on the definition given in the *Holland* case, in particular the passage quoted with approval (at [29]) from Millett J's decision in *Hydrodam*:

> "I would interpose at this point by observing that in my judgment an allegation that a defendant acted as de facto or shadow director,

> without distinguishing between the two, is embarrassing. It suggests—and counsel's submissions to me support the inference—that the liquidator takes the view that de facto or shadow directors are very similar, that their roles overlap, and that it may not be possible to determine in any given case whether a particular person was a de facto or a shadow director. I do not accept that at all. The terms do not overlap. They are alternatives, and in most and perhaps all cases are mutually exclusive.
>
> A de facto director is a person who assumes to act as a director. He is held out as a director by the company, and claims and purports to be a director, although never actually or validly appointed as such. To establish that a person was a de facto director of a company it is necessary to plead and prove that he undertook functions in relation to the company which could properly be discharged only by a director. It is not sufficient to show that he was concerned in the management of the company's affairs or undertook tasks in relation to its business which can properly be performed by a manager below board level.
>
> A de facto director, I repeat, is one who claims to act and purports to act as director, although not validly appointed as such. A shadow director, by contrast, does not claim or purport to act as director. On the contrary, he claims not to be a director. He lurks in the shadows, sheltering behind others who, he claims, are the only directors of the company to the exclusion of himself. He is not held out as a director by the company."

(2) Mr Hirst had a significant shareholding in the Company, which was in financial difficulties, and the potential of the sale was on the horizon. HMRC's view was as set out in their formal review letter dated 16 December 2013:

> "**My Conclusion**
>
> There is no doubt that you maintained a relationship with Wyse, other than as a mere shareholder, after your formal resignation. It is hardly surprising that you would wish to do so given that you owned a 24% shareholding and a sale of the Company was in the offing. The matter in question is the quality of that relationship and in particular was it such as to make you a de facto (using the terminology of the Gemma case) director of the company. It seems the Board was willing for a relationship to be maintained and it is not disputed that you were a valuable asset.
>
> I have considered a letter from Peter Millard, your former co-director, which mentions the various important things you did in this post resignation period, and how the staff continued to view you as a director. These things are no doubt true but they are not the point. I would expect the staff to continue to treat a respected former director with a measure of respect and deference. A person is only a de facto director if he does things that could only be done by a director. The things listed by Mr Millard, though undeniably important and valuable to the company, could have been done by any trusted and competent person so empowered by the Board. Many companies delegate vital functions to persons who are not directors.

> There is also evidence from your own solicitor where it is stated that you were under the control of the directors and had no authority to unilaterally enter into contracts on behalf of the company.
>
> I do not feel that it is relevant that the Company's employees continued to treat you as a director. The acid test is whether the Company's directors treated you as a director, on a level footing with themselves, and acted in accordance with your instructions. I have seen no evidence that this was the case in the period after you had ceased to be an employee and resigned your office as a director.
>
> Because you were not a director of the company, either legally or on a de facto basis, throughout the 12 months ended on 7 July 2009 your disposal of the shares on that date does not qualify for Entrepreneur's Relief."

25. On the argument that Mr Hirst was an employee:

(1) In *Ready Mixed Concrete* Mackenna J stated (at 439):

> "I must now consider what is meant by a contract of service. A contract of service exists if the following three conditions are fulfilled: (i) The servant agrees that in consideration of a wage or other remuneration he will provide his own work and skill in the performance of some service for his master. (ii) He agrees, expressly or impliedly, that in the performance of that service he will be subject to the other's control in a sufficient degree to make that other master. (iii) The other provisions of the contract are consistent with its being a contract of service. I need say little about (i) and (ii). As to (i). There must be a wage or other remuneration. Otherwise there will be no consideration, and without consideration no contract of any kind."

(2) HMRC believed that Mr Hirst was wholly unpaid after his resignation. Accordingly, there was not the "wage or other remuneration" required by the *Ready Mixed Concrete* case. HMRC had no evidence of any consideration being paid by the Company. The caseworker had found that Mr Hirst had some consultancy income in the tax year 2008-09, which seemed to come from ACF, but nothing in the following tax year.

(3) No evidence had been produced to HMRC concerning the laptop and other assets as to who owned them, or the basis of any provision to Mr Hirst. No details have been filed by the Company with HMRC concerning the provision or transfer of the assets. Although the amounts might not be sufficient to trigger a form P11D requirement, they may, if such provision happened, have been reportable on a form P9D.

(4) Most of the emails produced in evidence showed Mr Hirst using a personal email address rather than a Company email address. That was not consistent with him being an employee of the Company.

(5) In looking at the EAT authorities, it must be borne in mind that although a person may be a worker for the purposes of employment legislation, that did not necessarily make them an employee the tax purposes. There was no evidence of, for example, employer's liability insurance having been maintained.

26. Mr Hirst ceased to be an officer or employee of the Company in December 2007. Thus the condition in s 169I(6)(b) was not satisfied and ER was not available to Mr Hirst.

Consideration, Findings and Conclusions

27. We must determine, on the balance of probabilities and using the evidence available to us, whether Mr Hirst was an officer or employee of the Company in the twelve months up to 7 July 2009.

Was Mr Hirst was an officer of the Company in the twelve months up to 7 July 2009?

28. The relevant meaning of "office" is, by virtue of s 169S TCGA 1992, that given by s 5(3) ITEPA 2003:

> "…"office" includes in particular any position which has an existence independent of the person who holds it and may be filled by successive holders."

While that definition is inclusive rather than exhaustive, we consider it clearly admits of a directorship of a company.

29. Mr Hirst submits that he was a "*de facto* director" of the Company at the relevant time. In relation to the definition of a *de facto* director, we note that the decision in *Gemma Ltd v Davies* (on which Mr Hirst places reliance) was determined before the Supreme Court decision in *Holland*. We adopt the following approach from the very recent Court of Appeal decision in *Smithton Ltd & Naggar v Townsley & others* [2014] EWCA Civ 939, per Arden LJ:

> "16. The question who is a director of a company is important because of the substantial duties which a director has. It is usually easy to tell if a person is a director if he has been duly appointed as such by the company (and is then a *de jure* director or "director in law"), but much less easy if he has not been even purportedly appointed as a director but has simply acted as a director on occasions (when he might be a *de facto* director or director "in fact") or if he has persuaded the directors to act in a particular way (when he might be a "shadow" director). … As explained below, the expressions *de facto* director and shadow director have been defined by statute and considered by the courts in recent case law.
>
> …
>
> **Statutory definitions of de facto and shadow director**
>
> 18. The statutory definitions of *de facto* director and shadow director appear in sections 250 and 251 of the CA 06 respectively:
>
> "250 "Director"
>
> In the Companies Acts "director" includes any person occupying the position of director, by whatever name called.
>
> 251 "Shadow director"

(1) In the Companies Acts "shadow director", in relation to a company, means a person in accordance with whose directions or instructions the directors of the company are accustomed to act.

(2) A person is not to be regarded as a shadow director by reason only that the directors act on advice given by him in a professional capacity..."

…

Case law on whether a person is a de facto and shadow director

20. The leading case is *HMRC v Holland* [2010] 1 WLR 2793 and it is not now necessary to consider many cases in addition to this. …

…

32. The role of a *de facto* or shadow director need not extend over the whole range of a company's activities (see *Re Mea Corporation Ltd* [2003] 1 BCLC 618; *Secretary of State v Deverell* [2001] Ch 340). A person may be both a shadow director and a *de facto* director at the same time (*Re Mea Corporation*).

Practical points: what makes a person a de facto director?

33. Lord Collins [in *Holland*] sensibly held that there was no one definitive test for a *de facto* director. The question is whether he was part of the corporate governance system of the company and whether he assumed the status and function of a director so as to make himself responsible as if he were a director. However, a number of points arise out of *Holland* and the previous cases which are of general practical importance in determining who is a *de facto* director. I note these points in the following paragraphs.

34. The concepts of shadow director and *de facto* are different but there is some overlap.

35. A person may be *de facto* director even if there was no invalid appointment. The question is whether he has assumed responsibility to act as a director.

36. To answer that question, the court may have to determine in what capacity the director was acting (as in *Holland*).

37. The court will in general also have to determine the corporate governance structure of the company so as to decide in relation to the company's business whether the defendant's acts were directorial in nature.

38. The court is required to look at what the director actually did and not any job title actually given to him.

39. A defendant does not avoid liability if he shows that he in good faith thought he was not acting as a director. The question whether or not he acted as a director is to be determined objectively and irrespective of the defendant's motivation or belief.

40. The court must look at the cumulative effect of the activities relied on. The court should look at all the circumstances "in the round" (per Jonathan Parker J in *Secretary of State v Jones*).

> 41. It is also important to look at the acts in their context. A single act might lead to liability in an exceptional case.
>
> 42. Relevant factors include:
>
> i) whether the company considered him to be a director and held him out as such;
>
> ii) whether third parties considered that he was a director;
>
> 43. The fact that a person is consulted about directorial decisions or his approval does not in general make him a director because he is not making the decision.
>
> 44. Acts outside the period when he is said to have been a *de facto* director may throw light on whether he was a *de facto* director in the relevant period.
>
> 45. In my judgment, the question whether a director is a *de facto* or shadow director is a question of fact and degree."

30. Taking in turn the three categories of director envisaged by Arden LJ:

(1) Here, Mr Hirst was not a director *de jure* at the relevant time – he previously held that office but had resigned.

(2) We find that he was also not a director *de facto*, as that concept is explained in *Smithton*, at the relevant time. The test is that Mr Hirst should have acted as a director of the Company: "The question is whether he was part of the corporate governance system of the company and whether he assumed the status and function of a director so as to make himself responsible as if he were a director." (*Smithton* at [33]). From the evidence we conclude that Mr Hirst's influence in the corporate governance of the Company was commensurate with but limited to that of a significant shareholder. His suggestions and proposals were considered by the board and he was consulted on various issues but the decisions were made by the board, not Mr Hirst – as stated in *Smithton* (at [43]), "The fact that a person is consulted about directorial decisions or his approval does not in general make him a director because he is not making the decision." To the extent that Mr Hirst did make decisions he did so as a shareholder at the shareholder meetings, not as a director, and that "hat identification" (per Arden LJ in *Smithton* (at [62])) did not confer a role as a *de facto* director of the Company.

(3) Further, we find that Mr Hirst was not a shadow director of the Company at the relevant time. The test here is (per Millett J in *Hydrodam*, quoted with approval in *Holland*): "A shadow director … does not claim or purport to act as director. On the contrary, he claims not to be a director. He lurks in the shadows, sheltering behind others who, he claims, are the only directors of the company to the exclusion of himself. He is not held out as a director by the company." We also gain some guidance from the definition in s 251 Companies Act 2006 (which we accept is not, so far as we can see, directly imported into the tax legislation relating to ER): "a person in accordance with whose directions or instructions the directors of the company are accustomed to act." From the evidence we conclude that Mr Hirst's behaviour in the relevant

period was neither "lurking in the shadows" nor directing or instructing the board how to act. Again, his influence was commensurate with but limited to that of a significant shareholder.

31. For the above reasons we find that Mr Hirst was not an officer of the Company in the relevant period.

Was Mr Hirst was an employee of the Company in the twelve months up to 7 July 2009?

32. The relevant meaning of "employment" is, by virtue of s 169S TCGA 1992, that given by s 4 ITEPA 2003:

> "… "employment" includes in particular—
>
> (a) any employment under a contract of service,
>
> (b) any employment under a contract of apprenticeship, and
>
> (c) any employment in the service of the Crown."

Again, that definition is inclusive rather than exhaustive.

33. We make the following findings:

(1) We consider that the work undertaken by Mr Hirst between December 2007 (when he resigned his directorship) and the sale of his shares in July 2009 was significant, as evidenced by the correspondence involving ACF. That work went beyond the making of informal introductions of potential new business that might be expected of a former director who retained a significant shareholding. Not only was his relationship with ACF of value to the Company; it was clear from his and Mr Millard's evidence that his acknowledged personal role in the transactions with ACF was crucial in giving the necessary commercial comfort to the Company's financiers and avoiding the risk that they might hold the Company in breach of its trading agreements. We do not consider this work was in the nature of any self-employed business carried on by Mr Hirst.

(2) We accept Mr Hirst's evidence that he agreed with the CEO of the Company that he would be entitled to commissions for the introduction of new business. Also, that the reason such entitlement was not followed through to payment was because Mr Hirst was distracted by the criminal prosecution and his immediate financial needs were being satisfied by the dividends he was receiving from the Company.

(3) We accept Mr Hirst's evidence that the Company continued to provide him with a phone and laptop and met the costs of his home internet contract.

34. Taking together the above points, we consider they constitute the elements of an employment relationship between the Company and Mr Hirst. Looking at the matters identified in *Ready Mixed Concrete*:

(1) Mr Hirst agreed to provide his skills to the Company, and there was consideration in the form of (i) the agreement as to commission, and (ii) the non-cash remuneration consisting of the provision of the assets for the use of Mr Hirst.

(2) Mr Hirst was under the control of the Company – as evidenced by the Company's oversight of the broker-to-broker business which was to be gained from ACF. Mr Hirst reported to the Company and the Company made appropriate decisions.

(3) There are no significant facts that are inconsistent with there being an employment relationship.

35. Further we consider that relationship existed from the time of his resignation as a director in 2007 through to the sale of the Shares in July 2009. For the above reasons we find that Mr Hirst was an employee of the Company in the relevant period.

36. Accordingly the condition in s 169I(6)(b) is satisfied and Mr Hirst is entitled to ER in respect of his disposal of the Shares.

Decision

37. The appeal is ALLOWED.

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

PETER KEMPSTER
TRIBUNAL JUDGE

RELEASE DATE: 29 SEPTEMBER 2014