TC07728

CAPITAL GAINS TAX – transfer of property to a connected party to raise a mortgage – whether transfer a 'disposal' for capital gains purposes – Court Order governing the transaction – contract for sale and completion – whether s 60 TCGA as regards nominees and bare trustees – whether liability affected by the transfer being under an 'implied trust' – constructive or resulting – ss 68 and 70 of TCGA – discovery assessment under s 29 TMA stands good – penalty for inaccuracy in return under Sch 24 FA 2007 confirmed – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2018/05890

BETWEEN

ASIF BHIKHI **Appellant**

-and-

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

TRIBUNAL: JUDGE HEIDI POON
CHARLES BAKER

Sitting in public at Taylor House on 9 July 2019

Mr Jamal Khan, CTA FCCA, instructed by Churchill Tax Advisers, for the Appellant

Mr John Corbett, litigator of HM Revenue and Customs' Solicitor's Office, for the Respondents

DECISION

INTRODUCTION

1. This is an appeal against two assessments in relation to the tax year 2012-13:

   (1) A discovery assessment for capital gains tax ('CGT') in the sum of £43,855 pursuant to s 29 of the Taxes Management Act 1970 ('TMA') issued on 13 March 2017, and confirmed in a 'view of the matter' letter dated 29 May 2018 following the conclusion of Alternative Dispute Resolution ('ADR') process between the parties;

   (2) A penalty assessment issued on 29 May 2018 under Schedule 24 of the Finance Act 2007 ('Sch 24') in the sum of £6,578.25 for inaccuracies in the self-assessment ('SA') return submitted.

2. The taxpayer submitted the Notice of Appeal to the Tribunal on 15 August 2018 when the relevant time limit was 28 June 2018. The explanation given for the late submission was the appellant's ill health due to the stress of the tax investigation. HMRC's Statement of Case noted the position of the late appeal, but did not oppose it. As the delay was not serious, and the parties had prepared for a hearing on a substantive basis, we gave permission to admit the late appeal.

3. The subject matter of the transaction behind the discovery assessment for CGT was the property at 121 and 123 High Street, Plaistow in London, which comprised shop premises and flats above ('the property').

THE LEGISLATIVE FRAMEWORK

4. The statutory provisions from the Taxes Management Act 1970 ('TMA') relevant to this appeal are the following:

   (1) Section 29 TMA provides for an assessment to be raised where a loss of tax is discovered and where the requisite conditions have been met. Under s 29(4), the requisite condition is that the loss of tax has been brought about 'carelessly or deliberately' by the taxpayer or his agent.

   (2) Section 34 TMA provides for the ordinary time limit for an assessment under s 29 to be made within 4 years after the end of the year of assessment to which it relates.

   (3) Section 36 TMA provides for different time limits for a s 29 assessment to be raised where the loss of tax has been brought about carelessly or deliberately. The time limit is 6 years after the end of the year of assessment to which it relates if the loss of tax has been brought about *carelessly*, and is extended to 20 years in a case where the loss of tax has been brought about *deliberately*.

   (4) The Tribunal's appellate jurisdiction is provided under s 50 TMA. On an appeal to the Tribunal, if the Tribunal decides that the appellant is overcharged by an assessment, 'the assessment is to be reduced accordingly, but otherwise the assessment or statement shall stand good' as provided by s 50(6). Conversely, s 50(7) provides that if the appellant is undercharged by an assessment, 'the assessment or amounts shall be increased accordingly'.

5. The penalty regime under Sch 24 to FA 2007 for errors in a document furnished to HMRC provides for a penalty to be calculated as a percentage of the potential lost revenue ('PLR'), being the difference of the tax payable (had the return been correct) and paid (per the incorrect return submitted). The penalty percentage is determined with reference to the relevant category of behaviour, with 30% for 'careless', 70% for 'deliberate but not concealed', and 100% for 'deliberate and concealed'. The penalty percentage can be reduced subject to

disclosure by taking into account: (a) whether the disclosure is 'prompted' or 'unprompted', and (b) the 'quality' of disclosure in respect of 'timing, nature and extent'.

6. From TCGA, the provisions relevant to this appeal are the following:

> **'1 The charge to tax**
>
> **1(1)** Tax shall be charged in accordance with this Act in respect of capital gains, that is to say chargeable gains computed in accordance with this Act, and accruing to a person on the disposal of assets.
>
> **[…]**
>
> **28 Time of disposal and acquisition where asset disposed of under contract**
>
> **28(1)** … where an asset is disposed of and acquired under a contract the time at which the disposal and acquisition is made is the time the contract is made (and not, if different, the time at which the asset is conveyed or transferred).
>
> **[…]**
>
> **60 Nominees and bare trustees**
>
> **60(1)** In relation to property held by a person as nominee for another person or as trustee for another person absolutely entitled as against the trustee, or for any person who would be so entitled but for being an infant or other person under disability (or for 2 or more persons who are or would be jointly so entitled), this Act shall apply as if the property were vested in, and the acts of the nominee or trustee in relation to the property were the acts of, the person or persons for whom he is the nominee or trustee (acquisitions from or disposals to him by that person or persons being disregarded accordingly).
>
> **60(2)** It is hereby declared that references in this Act to any property held by a person as trustee for another person absolutely entitled as against the trustee are references to a case where that other person has the exclusive right, subject only to satisfying any outstanding charge, lien or other right of the trustees to resort to the property for payment of duty, taxes, costs or other outgoings, to direct how that property shall be dealt with.
>
> […]
>
> **68 Meaning of "settled property"**
>
> In this Act, unless the context otherwise requires, "settled property" means any property held in trust other than property to which section 60 applies (and references, however expressed, to property comprised in a settlement are references to settled property).'

EVIDENCE

7. Mr Khan led the evidence of two witnesses in the order of Mr Maksud Bhikhi ('Mr Maksud') and Mr Asif Bhikhi ('the appellant' or 'Mr Asif'), who are brothers and are distinguished by reference to their first name in this Decision. We summarise their evidence as follows, before making any relevant findings of fact.

Mr Maksud's evidence

8. Mr Maksud is the oldest of three brothers. He runs a business as a newsagent from shop premises in London (E13) which he has occupied for six years, (after selling his previous shop premises adjacent to the current ones). He was not one of the original owners of the property. In his evidence, Mr Maksud stated the following:

(1) When asked when the property was acquired, he said in 2001.

(2) When asked how the purchase was funded, he said it was by the three brothers re-mortgaging their family homes in 2001; that the homes were bought in 1988 (Maksud), 1992 (Asif) and 1994 (Sajid).

(3) When asked what use was the property put to before the transaction in May 2012, he stated that: (a) from 2001, Mr Asif had run a business from 123 High Street, making clothing through the trading medium of a company, the Boldgreen Limited; (b) 121 High Street was sub-let to a pharmacist, (c) the upstairs flats were rented.

(4) When asked why the property was transferred in May 2012, he stated:

(a) In 2012, penalties from Crown Prosecution Service ('CPS') in the total sum of £500,000 were raised against Mr Asif, and his other brother Sajid Ibrahim Bhikhi ('Mr Sajid').

(b) That there was a 'charge' on the property, which meant no mortgage could be raised on the property, nor could it be sold.

(c) That not being able to raise a mortgage was 'the problem', and MIS Business Solutions Ltd ('MIS Ltd') which was owned by a relative, 'tried to help us to take the mortgage from the rent'.

(d) That the relative is an IT specialist with 'a good job' and can raise a mortgage on the property to advance funds to pay the CPS penalties.

(5) When asked who was responsible for looking after the property after the transfer, he said: 'we have to maintain tenants'; 'we paid the maintenance costs'.

(6) When asked if MIS reimbursed any maintenance costs, he stated that they (the brothers) had to 'fix' any damage and 'not being reimbursed'.

(7) When asked who received the rentals, he stated: 'the flat rent went to the agent'; 'the chemist's rent to MIS account'; that 'the chemist's rent was for MIS to pay the mortgage'.

(8) When asked who ultimately received the rent from the flats, he stated: 'rent from chemist, rent from flat to MIS Business Solutions Ltd'; that the rent was for MIS to pay the mortgage; any shortfall in rent to meet the mortgage outlay was met by the brothers by 'topping up' the rentals.

(9) When asked who the landlord was for the tenants, he stated: that the title was with MIS but the tenancy agreements were with the brothers. We were directed to a letter from Nasim & Co. Solicitors to D818 Limited dated 15 April 2013 (after the transfer). This letter was headed: 'Rent review of 121 The Broadway, High Street, Plaistow', and continued: 'We act on behalf of the landlords of the above property Messrs Sajid & Asif Bhikhi'. The letter enclosed a draft rent review memorandum to which the parties were Mr Sajid, Mr Asif and the tenant D818 Limited, which owned the pharmacy.

(10) When asked when problems occurred with the property, who would be contacted, he stated: 'my brothers'; that 'it was the brothers' responsibility to do everything', which meant from finding new tenants to fixing any problems.

(11) When asked how often the director of MIS visited, he said that he 'never came to see the property because the brothers were responsible'.

(12) In 2016, planning permission was granted for two more flats to be built on top of 123, Mr Maksud said 'the brothers paid for it'; 'that MIS was not involved'. We were

directed to some preliminary correspondence addressed to Mr Sajid and to the *Certificate Of Lawfulness For Proposed Use Or Development*, which named Mr Sajid as the Applicant.

(13) In May 2016, the completion certificate for the additional flats was granted, and the rent from the 'new' flats were kept by the brothers.

(14) In 2018 the property was transferred from MIS to Bhikhi Property Limited ('BPL') at the same price as it went to MIS; namely for £499,000, even though the market value (with the added flats) was about £1million or £1.1million according to Mr Maksud.

(15) The transfer price had not been paid in full by BPL to MIS; that the total 'buy-back' price was £516,000 inclusive of legal fees and outlays; that a mortgage of £260,000 was raised with NatWest, of which £246,000 was paid to MIS towards the 'buy-back' price; that BPL still owes MIS £253,000.

(16) When asked who is to be benefitted from the ownership of the property by BPL, he said he regards the company as holding the property for the wider family of 39 people, including children and grandchildren. If the property is sold, the brothers will have one-third of the proceeds each.

9. In cross examination Mr Maksud confirmed that Bhikhi Property Limited still owed MIS about £250,000. He was then taken to MIS' annual accounts for the year ended 31 May 2018, in which the notes to the balance sheet stated the property as 'fixed assets' at a cost of £510,228, and was disposed of in that year. He was asked why the property was on the balance sheet if MIS was only a trustee. Not surprisingly, he was unable to speak for MIS.

10. From Mr Maksud's witness statement dated 4 April 2019, evidence supplemental to his oral evidence is summarised as follows:

(1) That Mr Maksud set up BPL to help his two brothers as the vehicle 'to buy back' the property; that he is 'the only director' of BPL and owns 100% of BPL's shares.

(2) BPL obtained the mortgage from National Westminster Bank Plc, and due to the mortgage policy, his two brothers could not be shareholders of BPL.

(3) Mr Asif uses 123 High Street for his business and is made rent-free by BPL.

(4) That BPL is holding the property on trust for his two brothers.

(5) Once the debt to MIS and the mortgage with NatWest are paid off, his two brothers can become shareholders of BPL, each of whom has one-third share of the property.

The appellant's evidence

11. The appellant's evidence in chief was:

(1) He was arrested in 2006, and was subsequently convicted of assisting in illegal immigration. Following the conviction, a confiscation order was imposed against him and his brother (Mr Sajid) in the sum of £212,861 each.

(2) After losing his appeal, the prosecution asked for payment. He paid an initial £20,000 that he had set aside for his children, but could not see how to pay the balance. The whole family was under immense stress. Brokers were asked to raise funds by mortgage, but were unable to do so.

(3) Mr Irfan (Sardar) was a relative who stayed with the family on his business trips to London and so knew them well. Mr Irfan agreed to raise a loan to help: 'he was doing [them] a big favour'. The property would be transferred to him 'on trust'. After one or

two years, Mr Asif would have '[his] business back on its feet' and then the brothers would get the property back.

(4) 'Nothing changed after the transfer of legal title': the brothers continued to look after the property; they dealt with repairs and the tenants only contacted the brothers; MIS did not reimburse any costs.

(5) The brothers paid MIS for any shortfall between the rents paid to MIS and the mortgage payments. Either the brothers paid in cash, or there was a transfer from his company, Boldgreen Limited. The payments from Boldgreen (as shown on the bank statements) did not represent rent and were for variable amounts because they were only making up the shortfall, whatever that was. 'Mr Irfan would telephone when he needed money and it would be sent.'

(6) The decision to construct two new flats above the existing premises was his; and MIS was not involved in the development, and did not reimburse the costs. When the new flats were complete, the appellant collected the rent into his personal account, though they were declared on the tax return of BPL.

(7) Although the property is now registered as owned by BPL, it is in reality held not just for the three brothers but for the 39 members of the family.

12. At this point Mr Corbett indicated that his cross examination would focus on the accounts of MIS and how they accounted for the property transactions. We saw a number of difficulties, and in the main, since Mr Asif had never been an officer of MIS, he could not speak to their actions. Accordingly, this line was not pursued.

13. We then asked why, after the May 2012 transaction, if the brothers remained beneficial owners, they had not declared the rents received? Mr Asif replied that was because all the rents had been paid to MIS to meet the mortgage payments; that he has appointed a new accountant since that time and cannot remember the original advice about the accounting for rentals in his SA tax returns.

14. From the appellant's witness statement dated 4 April 2019, evidence supplemental to his oral evidence is summarised as follows:

(1) The property was purchased by Mr Asif and Mr Sajid in 2001 for 'approximately £140,000' (at paragraph 7).

(2) '[N]o funds were personally received by myself or my brother and the sale was made using a market valuation. The variation of the confiscation order would not have been approved if anything else had been intended or taken place' (paragraph 9).

(3) The appellant's oral evidence referred to how families from his cultural background operate, and reiterated what he stated at paragraph 12 of his statement:

> 'My culture is very family oriented, which is … not special to those with an Asian background, … Culturally our entire family shared the obligation to pay the amount we owed to the Crown. This meant [the property] was part of the economic well-being of all my family … including extended family members. When the decision was taken that my cousin, Irfan Sardar would use his company to buy the property he did not have autonomous control of the property. The property effectively remained a family asset.'

Documentary evidence

15. The key documents in relation to the transaction in question are summarised as follows.

(1) A notice of a Restraint Order Prohibiting Disposal of Assets dated 3 March 2008 was issued by the High Court in the matter of Sajid Ibrahim Bhikhi as the 'Defendant' under the Criminal Justice Act 1988. The notice was served on Mr Sajid, and 'people named in the order', amongst whom was Mr Asif. The order itemised the assets placed under restraint, and the prohibition as respects the property in question was served on both Mr Sajid as on Mr Asif, that they 'must not in anyway dispose of or deal with the property known as 123 High Street Plaistow'.

(2) A Variation Order By Consent was issued by the High Court on 17 September 2010. The consent order permitted the mortgaging of 121 and 123 High Street Plaistow by Mr Asif and Mr Sajid under certain conditions (see §16).

(3) A letter dated 2 April 2012 by Nasim & Co. Solicitors ('Nasim') acting for the Bhikhi brothers in the conveyancing of the property named as '121/123 High Street, Plaistow, London' to Whitefields Solicitors ('Whitefields') acting for MIS Ltd, stating:

> 'We write to inform you that we received a letter from the CPS requesting information on the proposed sale.
>
> We have duly forwarded the information requested by the CPS and we are now waiting for their consent to the proposed sale. As soon as it is received we will be forwarding it to you.'

(4) By a covering letter dated 11 April 2012, CPS replied to Nasim, enclosing two draft Variation Orders By Consent (see § 17) to be signed by following parties:

(a) Messrs Nasim & Co. Solicitors as '**Solicitors for Sajid Bhikh**i';

(b) MIS Business Solutions Limited of [business address] as '**Purchasers**';

(c) Crown Prosecution Service, Organised Crime Division, Proceeds of Crime Unit as '**Prosecutor**'.

(5) The conveyancers' copy of an agreement ('the Conveyancing Agreement') contains a lead schedule bearing some hand-written details, such as the date of agreement being '30 May 2012', and is accompanied by two pages of 'Special Conditions'. The agreement adopts the Law Society Formula (circled to be type 'B'); see details at §18.

(6) The Land Registry Form TR1 to register the 'Transfer of whole of registered title(s)', identifying the subject-matter by the two 'Title numbers' for the 'Property' at 121 and 123 High Street Plaistow, and bearing the following details:

(a) The date of the transfer was stated to be 31 May 2012,

(b) The 'Transferor' is Mr Asif and Mr Sajid.

(c) The 'Transferee' is MIS Business Solutions Limited.

(d) The 'Consideration' is £499,000.00 (box 8 of TR1)).

(e) The transferor transfers with '**full title guarantee**' (as distinct from 'limited title guarantee' being the alternative option in the transfer form) (box 9 of TR1).

(f) Box 10 of TRI for 'Declaration of trust' is left completely blank. The options available under 'Declaration of trust' state that 'The transferee is more than one person' and:

(i) They are to hold the property on trust for themselves as joint tenants;

(ii) They are to hold the property on trust for themselves as tenants in common in equal shares;

(iii) They are to hold the property on trust.

(g) The deed to execute the transfer is signed by Mr Asif and Mr Sajid, and witnessed by the conveyancing solicitor, (Chughtai) of Nasim.

(7) A letter dated 26 September 2016 signed by Mr Irfan Sardar as Director of MIS Business Solutions Ltd to HMRC headed 'Acquisition of 121 The Broadway, High Street, E13 9HH under an implied Trust'. This letter stated as follows:

> 'Please treat this letter as my declaration that:
>
> My company MIS Business Solutions Ltd took legal title to the above property from Asif Bhiki and Sajid Bhiki under an implied trust and an internal family arrangement to raise a mortgage and to help them to pay the CPS penalties by way of court order.
>
> Under the terms of our arrangement the company will transfer the property back to Asif Bhiki and Sajid Bhiki at the same value it was acquired. The company would not be making any profit or loss on the transfer.
>
> As my company holds the property under an implied trust, Asif Bhiki and Sajid Bhiki have retained all rights to capital profits of the property.
>
> Asif and Sajid Bhiki continue to operate their business from the property in the same manner as before the transfer of legal title to MIS … They are responsible for the upkeep and maintenance and other responsibilities same as before.
>
> I would be happy to answer any further questions you may have.'

The Variation Orders of September 2010 and April 2012

16. The first Variation Order of September 2010 identifying Mr Sajid and Mr Asif as 'the defendants' to be permitted:

> '… to mortgage the properties known as 121 and 123 High Street Plaistow [postcode, title numbers etc] for the purposes of raising funds to satisfy payment of the confiscation orders made against the defendants at Leicester Crown Court on the 15 December 2008 requiring each defendant to pay the sum of £212,861.00 subject to the terms and conditions set out … below.'

17. The covering letter to Nasim & Co Solicitors dated 11 April 2012 stated that it was enclosing two draft Variation Orders, but only one was included in the bundle. We infer that a Variation Order was also issued to Mr Asif, which was similar, or identical, to the one below addressed to Mr Sajid. The Variation Order reads as follows:

> 'IT HEREBY ORDERED THAT the restraint order made by the Honourable Mr Justice Beatson sitting in private on the 3 March 2008 (hereafter called "the Order") be varied as follows: -
>
> 1. Notwithstanding paragraphs 1(ii) and 2 of the Order the defendant Sajid Bhikhi (hereafter referred to as "the defendant") be permitted to sell the property known as 121 and 123 High Street Plaistow London [postcode] which are registered at HM Land Registry under title numbers […] for the purposes of raising funds to satisfy payment the confiscation order made against him at Leicester Crown Court on the 15 December 2008 subject to the terms and conditions set out in paragraphs 2,3,4,5,6,7, and 8 below.
>
> 2. The conveyancing in respect of the sale of the property will be undertaken in accordance with the terms of this order by Messrs Nasim & Co Solicitors

[business address]. These solicitors will be served with a copy of the original restraint order and be a party to this variation order.

3. The conveyancing in respect of the property shall be carried out by the firm of solicitors referred to in paragraph 2 and this variation order shall have no effect should they cease to act in that capacity for Sajid Bhikhi; and the said Nasim & Co Solicitors shall notify the Proceeds of Crime Unit in writing forthwith if they no longer act for the defendant. The defendant shall not be permitted to realise his interest in the property in such an event until an alternative firm of solicitors has been nominated and a further variation order obtained.

4. The purchasers MIS Business Solutions Limited of [office address] shall also be a party to this order and will be bound by its terms.

5. Messrs Nasim & Co Solicitors shall be entitled to deduct their reasonable costs and disbursements in connection with the sale of the property subject to these costs and disbursements first being agreed in writing with the Proceeds of Crime Unit.

6. Upon completion of the sale of the property, Messrs Nasim & Co Solicitors shall immediately pay the proceeds of the sale of the property as follows:

(a) to discharge any mortgage that is registered over the title of the property being sold;

(b) to pay the costs and disbursements referred to in paragraph 5 above;

(c) half of the remaining balance to HMCS — East Midlands Regional Confiscation Unit at their bank [details redacted] in respect of Sajid Bhikhi.

7. Upon completion and upon the Proceeds of Crime Unit receiving written confirmation from the Magistrates' Court that the proceeds of sale has been credited to the court's bank account as cleared funds, the Proceeds of Crime Unit shall apply to the Land Registry to remove the restriction registered in respect of the property and shall notify Nasim & Co Solicitors immediately upon the restriction being removed.

8. Nasim & Co Solicitors shall, following the sale of the property, supply the Proceeds of Crime Unit with a full completion statement in respect of the sale of the property.'

The Conveyancing Agreement of 30 May 2012

18. The lead schedule of the Agreement bears the following details:

(1) The names of the 'Buyer's conveyancer' and the 'Seller's Conveyancer' were written in by hand, that it is the Law Society Formula (circling 'B') in a text box at the top-right hand corner;

(2) The heading of the schedule in capital bold type states: 'Agreement (Incorporating the Standard Conditions of Sale (4th Edition));

(3) Agreement Date: 30 May 2012 (handwritten);

(4) Seller: 'Sajid Bhikhi' and 'Asif Bhikhi' with their home addresses (all typed);

(5) Buyer: 'MIS Business Solutions Ltd' (typed) with company registration number and business address (hand-written);

(6) The property: '121 High Street Plaistow London [post code]'; title number (typed);

(7) Encumbrances on the property: 'All encumbrances shown in the charges except entries of financial nature' (typed);

(8) Title Guarantee: 'Full' (typed);

(9) Completion Date: '31 May 2012' (handwritten);

(10) Contract Rate: 4% above base rate of Barclays Bank Plc;

(11) Purchase Price: £249,500.00 (typed);

(12) Deposit: 10% (typed) 'H-T-O' (handwritten)

(13) Balance: (no entry, left blank);

(14) Amount Payable for Chattels: £249,500.00 (hand-written)

(15) After the list of particulars, the lead schedule contains the statement: 'The Seller will sell and the Buyer will Buy the Property for the Purchase Price.'

(16) A text box highlighted as 'WARNING' is placed at the bottom of the lead schedule and states: '*This is a formal document, designed to create legal rights and obligations. Take advice before using it*.'

(17) Adjacent to the Warning text box are two signatures for 'SELLER' and 'BUYER'.

(18) The signatures would appear to be those of the conveyancers (as named at the top right hand corner of the form) acting respectively for the seller and buyer.

19. The 'Special Conditions' appended to the Agreement contain 18 clauses in total, some of which are as follows:

(a) Clause 1 (a) states that the agreement incorporates the Standard Conditions of Sale (4th Edition), and where 'there is a conflict between those Conditions and this Agreement, this Agreement prevails'.

(b) Clause 2: 'The property is sold subject to the encumbrances on the Property and the Buyer will raise no requisitions on them.'

(c) Clause 3: Subject to the terms of this Agreement and to the Standard Conditions of Sale, the Seller is to transfer the property with the title guarantee specified on the front page.

(d) Clause 5: The property is sold as seen and subject to existing lease(s).

(e) Clause 15: 'In the event of the Buyer failing or refusing to complete on the completion date through no fault of the Seller then in addition to interest, the Buyer shall pay to the Seller a sum equivalent to either': (i) 'Any loss suffered or expense incurred by the Seller …', or (ii) 'Any interest payable in respect of the Seller's said purchase …'

20. It was explained to the Tribunal that some of these documents refer to 121 High Street, some to 123 High Street and others to both. We were given to understand that where a document refers to only one property, there was a parallel document to similar effect for the other property, which explains the total consideration of £499,000 on the Form TR1, while the agreement stated the 'purchase price' to be £249,500 (for each property).

Bank statements included in the bundle

21. Two sets of bank statements included pertain to:

(1) The business current account of Boldgreen Limited covering various periods between June 2013 to June 2016, showing transfers to MIS Ltd's business account under the description of 'Rent';

(2) Two pages of statements from Mr Asif's personal bank account from the period 1 April 2016 to 28 June 2016, showing rental income being retained for the newly developed flats above 123 High Street:

(a) On 25 April 2016, payments of £960 and £2,060 for '123 Plaistow';

(b) On 25 May 2016, two payments of £950 each for '123 Plaistow';

(c) On 24 June 2016, two payments of £1,100 each for '123A' and '123B' Plaistow.

Documents exchanged after 'List of Documents'

22. Parties continued to correspond and exchange documents after their lodgement of the 'List of Documents' in accordance with Tribunal's directions. The email correspondence and attachments from this period was copied to the Tribunal, and bounded with the Authorities in bundling, and were referred to at the hearing by both parties.

(1) By email dated 29 April 2019, Churchill Tax Advisers (as representative for the appellants) wrote to Mr Corbett of HMRC, stating the following:

(a) Regarding rental income: '… we had noted [with HMRC enquiry officer] that our client Mr Bhiki [sic] was declaring the rental income on his tax returns. We agree that the same should apply for the previous years as our client and his brother retained beneficial ownership at all times';

(b) Since transfer to MIS, the Bhiki [sic] brothers were responsible for: (i) any maintenance work; (ii) 'the development of the two flats above the shop'; (iii) 'making good any deficit on mortgage where rental income was not enough'; (iv) 'finding and vetting tenants at all times'.

(2) The representative's email of 29 April also attached 'the completion statements as requested'. Although the reference was to 'statements' in the plural, there was only one completion statement attached.

(a) The statement was drawn up by Farani Taylor Solicitors in Ilford, Essex, acting for Bhikhi Property Ltd, and did not name the seller or state the total price.

(b) The named client on the completion statement is 'Bhikhi Property Limited' and the date of completion was on 24 April 2018, and subject matter is stated as 'Purchase of 121-123 High Street Plaistow London [postcode]'.

(c) The 'mortgage advance' was £270,000 in total.

(d) The amount paid to the Seller's solicitors from the mortgage advance was £246,184.93.

(e) A list of outlays are itemised, to include Stamp duty of £4,000, Land Registry Fee of £270, Gift Indemnity Insurance costs of £616, and so on.

(f) The outlays totalled £6,761.20, leaving a balance due to BPL of £17,053.87.

(3) By email dated 14 May 2019, Officer Corbett replied to the representative's email, drawing attention to the following facts ascertainable from documents held by HMRC:

(a) That MIS Ltd returned a capital loss on the disposal of the property in 2018, (attaching a schedule of capital loss calculation);

(b) The property was held on MIS's balance sheet throughout its period of ownership, (attaching a two-page excerpt from MIS' accounts for the year to 31 May 2018, being the Balance Sheet and the first two notes to the accounts);

(c) From 2012 to 2018, MIS Ltd returned rental income and claimed mortgage interest on its returns, (no documents attached);

(d) That Mr Asif 'has not returned the rental income from the properties from 2012 to 2018', (attaching the relevant pages of Mr Asif's SA returns).

(4) The accounts lodged by MIS with Companies House are in the public domain, and from the excerpt we note:

(a) At 31 May 2017, the total value of fixed assets was stated at £511,158, and reduced to £744 at 31 May 2018.

(b) Note 2 to the accounts shows Land and Buildings with a brought forward cost of £510,228 and fully disposed of in the year.

(5) Mr Sajid wrote to HMRC in response to a discovery assessment to chargeable gains on the same basis as that served on Mr Asif. The letter was dated 12 June 2018 was provided by Mr Corbett as an indication that Mr Sajid's did not challenge the discovery assessment, and was taken by HMRC as agreement to the assessment. The letter is short, and states as follows:

'Please note that after the sale of the property, all proceeds were taken by the courts as I was convicted of fraud, therefore, any gains I had made were all taken.

I am writing to you in regard to me being unable to pay this cost. … I am unable to get a loan … thus seeking advice from you as what you wish me to do next.'

Documents lodged on the day of the hearing

23. In support of the appellant's case, Mr Khan requested to lodge further documents during the hearing; HMRC raised no objection; the following documents were admitted.

(1) An email from Mr Irfan Sardar dated 9 July 2019 to Mr Khan to state:

'To confirm, the property on High St, Plaistow, London was bought under MIS Business Solutions Ltd with the assistance of a business loan under MIS Business Solutions Ld. As a result the company was obliged to show the asset on the balance sheet even though there was no expectation of profit/loss from the purchase.'

(2) Land Registry Form TR1 for the transfer of 121 High Street from MIS to BPL for £250,000 on 25 April 2019.

(3) Land Registry Form TR1 for the transfer of 123 High Street from MIS to BPL for £250,000 on 25 April 2019.

FINDINGS OF FACT

24. The relevant findings of fact in this appeal concern: (a) facts as respects the discovery and penalty assessments, and (b) facts pertaining to the nature of the transfer of the property.

Background to the discovery assessment and penalty assessment

25. The chronology of events in relation to the discovery assessment is as follows:

(1) By letter dated 2 June 2016, HMRC opened an enquiry into the appellant's SA return for the year ended 5 April 2013. A schedule was attached to request information as respects the sale of 121 and 123 High Street, Plaistow, and any related rental income.

A copy of the letter was sent to the appellant's registered accountants, Mohindra and Co, which contacted HMRC to say they were no longer acting.

(2) By letter dated 3 August 2016, Churchill Tax Advisers ('the agent') replied on the appellant's behalf. Referring only to the property at 121 (not including 123) High Street, the agent stated that:

> 'the property at 121 … was transferred to his relatives' limited company … in order to pay a large fine by way of court order. The property is being held on deemed trust by our client's relative through a limited company named MIS Business Solutions Ltd. The property will be returned to our client at the same price as that of transferred on May 2012.'

(3) On 8 August 2016, HMRC wrote to say that there had been a disposal for capital gains tax purposes. As the sale had been to a connected party, there would need to be a market valuation, and the letter asked for relevant information. The agent replied to disagree, and correspondence continued.

(4) On 6 March 2017, HMRC wrote to say they were still of the view that there was a disposal of the property. They would issue an assessment shortly, and needed to consider the penalty position and requested information for that purpose. On 13 March 2017, HMRC issued a discovery assessment in the sum of £43,855.00. The agent appealed the assessment on 1 April 2017.

(5) After further correspondence and provision of information, HMRC issued a 'view of the matter' letter on 29 May 2018. This letter offered an internal review. It noted the 30 day time limit for a request for a review, or an appeal to the Tribunal. The same day, HMRC issued a penalty assessment for £6,578.25.

(6) On 27 July 2018, HMRC wrote to note that the taxpayer had neither requested a review nor appealed to the Tribunal within 30 days, and so the matter was settled.

(7) A notice of appeal was given to the Tribunal on 15 August 2018. As noted earlier, this was late. HMRC neither consent nor object to the late appeal.

The transfer of the property

26. In relation to the transfer of the property on 31 May 2012, we find the following facts:

(1) Prior to May 2012, the property at 121 and 123 High Street Plaistow were jointly owned by Mr Asif and Mr Sajid.

(2) The property was subject to restraint orders granted on 3 March 2008. The order principally addressed to Mr Sajid included the term that "ASIF IBRAHIM BHIKHI must not in anyway dispose of or deal with the property known as 123 High Street Plaistow [etc]'. There was another order restraining Mr Asif from dealing with 121 High Street.

(3) In May 2012, the High Court granted two variations to the restraint orders to permit the sale of the property. The conveyancing solicitors were party to the variation orders and so were the 'purchasers' MIS Business Solutions Limited. Accordingly, they were bound to carry out only the sale permitted by the High Court.

(4) The sale was carried out by an agreement incorporating the Standard Conditions of Sale dated 30 May 2012 with completion on 31 May 2012.

(5) The Land Registry Form TR1 signed by Mr Asif (and Mr Sajid) reported a transfer of the property on 31 May 2012 for a consideration of £499,000.00.

The accounting of asset value, income and expenses

27. From parties' evidence in relation to the accounting of income and expenses, we find the following:

(1) Mr Asif ceased reporting the receipt of rents from the property on his self-assessment tax returns with effect from 31 May 2012.

(2) MIS Business Solutions Limited included the cost of the property on its balance sheet as an asset of the company, which was evidenced by the excerpt of MIS' annual accounts for the year to 31 May 2018.

(3) Mr Asif and Mr Sajid continued to manage the property and secured some development at their own expense.

(4) When the rents collected from the property were insufficient for MIS to make its mortgage payments, Mr Asif and Mr Sajid made up the shortfall.

(5) Bhikhi Property Limited, a company wholly owned by Mr Maksud, purchased the property from MIS with completion on 24 April 2018.

(6) The purchase by BPL from MIS was for a price of £499,000 according to Mr Maksud's evidence.

(7) At the date of the hearing, only £246,000 was paid by a mortgage advance, leaving a balance of around £253,000 still owing to MIS.

THE APPELLANT'S CASE

28. Mr Khan's 'Technical Argument' for the appellant as advanced during the ADR is adopted in his submissions. The argument focuses on the distinction between the beneficial and legal ownership of the property, and that:

(a) The transfer of the property to MIS Ltd on 30 May 2012 was not a capital 'disposal' , but 'a transfer to a family member on trust'.

(b) The Bhikhi brothers retained beneficial ownership of the property after the transfer in May 2012, and that MIS held the property on 'an implied trust'.

(c) HMRC guidance CG11730 states that: 'Capital Gains Tax is charged under TCGA92/S1(1) on the disposal of assets, but it is important to bear in mind that the legal owner of an asset is not necessarily its beneficial owner and that it is beneficial owner (not legal ownership) which the tax principally follows.'

(d) HMRC guidance CG34301 on 'Bare trusts', (archived since February 2020): 'If it is not settled property then the trustees are holding it as "Bare Trustees" for one or more persons who are absolutely entitled to it.'

(e) On the basis of the above, Mr Khan submits that:

> 'Both HMRC and the courts accept that capital gains in (sic) only chargeable on a transfer of an asset where the beneficial ownership has been transferred to another legal person.'

29. In support of the technical argument, Mr Khan highlights the respective 'commercial benefits and risks' for MIS Ltd and the appellant:

(a) The appellant did not want to raise a mortgage at prohibitive rates due to the CPS orders, nor to sell or lose the family home; the trust arrangement allowed the appellant to raise sufficient finance to pay off the CPS debts.

(b) MIS acquired the property at a certain price, but the mortgage payments were made good by the appellant (and his brother). MIS has transferred the property back to the Bhiki family at exactly the same price.

(c) MIS has not benefitted from the increase in value despite the rise in the property value; the uplift in market value was passed on to the Bhikhi family.

(d) All risks and responsibilities were assumed by the appellants in finding tenants or bearing the costs as landlords.

(e) The bank statements provided in the bundle show that the rental income from the flats were paid into the appellant's personal bank account.

30. Mr Khan emphasises the property as a 'community property' of the Bhikhi family;

(a) That while the ownership of an asset is recorded against an individual or a corporate body as required by the UK law, 'it is widely an acknowledged practice that families from the Asian sub-continent will share the wealth of the family'.

(b) 'The asset could only be disposed of in a way that allowed the asset to remain in the Bhikhi family'.

(c) 'Hence, instead of obtaining a sale via the open market the property was sold to MIS, a company run by a cousin of Mr Bhikhi … [under] family conditions set with the transfer and trust arrangement.'

(d) 'The purpose of the variation order was to allow the CPS to collect the fines. There was no specific prohibition on a transfer into trust. The family had agreed to the trust arrangement before approaching the CPS for the variation order. Nobody had been wronged by what they did.'

(e) Nothing changed after the transfer; MIS took the property as nominee or bare trustee. As such, s 60 TCGA applied to the transfer and no gain accrued as a result.

31. We asked Mr Khan how he would characterise the May 2012 payment by MIS? If it was not the sale proceeds of the property, what was it? He said it was a flow of funds as part of the family arrangement. It was not a loan by MIS, but it did have a similar effect. We pointed out that it was not normal for there to be 'consideration' for a transfer into trust. Mr Khan replied that was not relevant because the family needed funds.

HMRC'S CASE

32. HMRC are unable to accept the claim that the property bought back from MIS Ltd by Bhikhi Property Ltd had been held in trust. The completion statement requested by HMRC did not support the claim that the property was held in trust by MIS Ltd.

(a) The terms of the variation of the restraint order only permitted the sale of the property to MIS. The solicitors acting were bound by that order to carry a sale into effect.

(b) The sale to MIS Ltd was under an agreement which incorporated the standard Conditions of Sale (4th Edition) for the full market value.

(c) In the absence of some unusual surrounding circumstances, this should readily be construed as constituting a sale and purchase of the entire legal and beneficial ownership: *Ali v Khan* [2002] EWCA Civ 974, at [19].

(d) Any trusts over the land which existed before the sale whilst the legal title remained vested in the appellant and his brother would have been subject to

overreaching on the sale by virtue of s 2(1)(ii) of the Law of Property Act 1925, so that MIS Ltd would have acquired the property free of any trust.

33. HMRC reject the appellant's assertion that MIS Ltd took legal title of the property under an implied trust and by an internal family arrangement to raise a mortgage on behalf of the appellant and his brother. The claim that the transfer of the property to MIS Ltd in May 2012 was a transfer to a bare trustee or a nominee is inconsistent with the facts that:

(a) MIS Ltd held the property as fixed assets on its balance sheet throughout the period of ownership.

(b) MIS Ltd has claimed the mortgage interest and has returned the rental income from the property as its own income;

(c) MIS Ltd has returned a capital loss on the sale of the property to Bhikhi Property Ltd in April 2018.

34. HMRC submit that these facts are inconsistent with MIS Ltd having held the property as settled property within the meaning of s 60 or s 68 TCGA. Consequently, it follows that there must have been a disposal for capital gains purposes by the appellant on transferring the property to MIS Ltd.

35. Furthermore, the following records do not support that the appellant and his brother had retained beneficial ownership of the property:

(a) It is a fact that the appellant had returned no rental income for the years ended 5 April 2013 to 2018. If the brothers had remained the beneficial owners, they would have remained liable to the tax arising on the rental income.

(b) The letter dated 12 June 2018 by Mr Sajid Bhikhi shows that the property was sold, and that Mr Sajid did not appeal the discovery assessment when it was raised. Similarly, Mr Sajid had not returned any rental income for the years ended 5 April 2013 to 2018. (It is to be noted, however, that at the outset of the hearing, the Tribunal was informed that Mr Sajid has since submitted a late appeal against his capital gains tax assessment.)

(c) Mr Asif and Mr Sajid did not reacquire the property in 2018. Instead, the acquisition was by a company wholly owned by the third brother, Mr Maksud.

36. In summary, HMRC submit that:

(1) A discovery was validly made under s 29(1) TMA;

(2) The omitted gain is assessable under s 29(3) TMA as the second condition under s 29(5) has been fulfilled;

(3) The omission of the gain from the appellant's return was due to careless behaviour, giving rise to the penalty range of 15% to 30% under Sch 24 FA 2007.

(4) The minimum penalty of 15% had been charged in this case.

(5) There are no special circumstances that HMRC consider would lead to a further reduction in the penalty.

DISCUSSION

37. The evidence in this case has been set out in greater detail than is normally required for several reasons. Frist, we have regard to the central claim in this appeal being that there had been an 'implied trust' behind the transfer of the property in 2012. The evidence for construing an implied trust is necessarily more nebulous than the evidence required in construing an

express trust, and involves the evaluation of the relevant facts in the round. Secondly, we have set out in detail those relevant facts in the event of any challenge to our findings of fact on grounds per *Edwards v Bairstow* [1956] AC 14 at [36]. Thirdly, in view of a late appeal having been lodged by Mr Sajid against a similar discovery assessment raised on his half share of the chargeable gains arising from the 2012 transfer, the evidence set out in this appeal is likely to be relevant to any judicial consideration of Mr Sajid's appeal (if admitted), and of the preceding application for permission to make a late appeal.

The issues for determination

38. Several issues are involved in this appeal, and the burden of proof on each issue is not borne by the same party. The issues for determination in this appeal are the following:

(1) In relation to the discovery assessment, the competence and time limit issues fall to be considered as preliminary matters.

(2) In relation to the substantive matter, the issues are:

(a) Whether there was a 'disposal' for the purposes of s 1(1) of TCGA when the property was transferred from the appellant to MIS Ltd in May 2012;

(b) Whether the provision under s 60 TCGA pertaining to nominees and bare trustees applied to the 2012 transfer;

(c) Whether an implied trust existed in relation to the 'disposal' and any likely implications under s 68 TCGA.

(3) In relation to the penalty assessment, the issue is whether it has been raised in accordance with the legislative provisions.

The burden of proof

39. In relation to the discovery assessment, HMRC bear the burden to prove that the assessment is procedurally valid, since the relevant statute under TMA attaches conditions to the making of the assessment. If HMRC fail to discharge the initial burden as regards the competence and time limit issues in relation to the making of the discovery assessment, then the appeal falls away: *Burgess & Another v HMRC* [2015] UKUT 578 (TCC). If HMRC meet the initial burden, then in respect of the quantum of the assessment, HMRC have the evidential burden to establish that the amount assessed can be said to be 'fair', as having been based on known facts, or on reasonable inferences from known facts: *Johnson v Scott* [1978] STC 48; (1978) 52 TC 383.

40. Once HMRC have met the burden of proof in these two aspects, the appellant then has the legal burden of proof to displace the assessment; otherwise the assessment 'stands good' by virtue of s 50(6) TMA. The significance of an assessment standing good is given judicial explication in *Hull City AFC (Tigers) Limited v HMRC* [2017] UKFTT 629 (TC) at [58]:

> 'This "stand good" language has been part of the Management Act since at least section 57 of the Taxes Management Act 1880. It is the statutory basis for concluding that the taxpayer has the legal burden of demonstrating that he is overcharged by an assessment. The justification for placing this burden on the taxpayer, even though it may be the Revenue which is asserting that tax is due, is that the taxpayer and not HMRC is ordinarily in possession of the relevant facts and figures. Essentially, HMRC are entitled to call for an explanation from the taxpayer of the circumstances surrounding the determination of his tax position and ultimately put the taxpayer to proof of the facts behind those circumstances. In that respect HMRC may issue an assessment because they are in possession of particular evidence suggesting

> that the taxpayer's explanation is untrue but it may also be that HMRC are not satisfied that what the taxpayer is telling them fully explains the particular circumstances with which they appear to be confronted. That is the justification but it is the particular statutory language used that places the legal burden on the taxpayer to satisfy the tribunal that the assessment is wrong and should be reduced or discharged.'

Judge Gammie QC continues at [90] of *Hull City* to describe the burden placed on the taxpayer in the following terms:

> 'The burden that is placed on the taxpayer is not just to establish by evidence the primary facts needed to determine the tax liability (so far as in issue and unagreed) but extends to the inferences or conclusions of fact that should be drawn from the primary facts, which may then only be challenged on appeal on *Edwards v Bairstow* grounds (see e.g *Kalroon Food Ltd v HMRC* [2007] STC 1100, [2007] EWHC 695 (Ch) at [30]-[38]). …'

41. It means therefore that the appellant bears both the legal and evidential burden to prove that any capital gains arising from the transfer in May 2012 were not subject to tax on the basis that the transfer was under a trust arrangement.

42. The standard of proof in all instances is the civil standard of on the balance of probability, including the burden of proof in relation to the penalty assessment, which is on HMRC to establish that the penalty has been assessed in accordance with the terms of the legislation.

Issue 1: whether the discovery assessment procedurally valid

43. Notwithstanding the fact that there is no challenge against the assessment on the issues of competence and time limit, it is necessary to establish the making of the discovery assessment is procedurally valid before considering the substantive issue. As the appellant had filed a tax return for 2012-13, the discovery assessment must therefore satisfy one of two conditions stipulated under subsections (4) and (5) of s 29 TMA:

> '29(4) The first condition is that the situation mentioned in subsection (1) above was brought about carelessly or deliberately by the taxpayer or a person acting on his behalf.
>
> 29(5) The second condition is that at the time when an officer of the Board–
>
> (a) ceased to be entitled to give notice of his intention to enquire into the taxpayer's return under section 8 or 8A of this Act in respect of the relevant year of assessment;
>
> […]
>
> the officer could not have been reasonably expected, on the basis of the information made available to him before that time, to be aware of the situation mentioned in subsection (1) above.'

44. In the present case, HMRC have relied on s 29(5)(a). The time limit for giving notice of HMRC's intention to enquire into a 2012-13 tax return was 31 January 2015. It is common ground that the information made available to HMRC was the information contained in the 2012-13 SA return submitted for Mr Asif. It is not disputed that the transfer that took place in May 2012 was not reported in the return for 2012-13.

45. It follows that when HMRC wrote to Mr Asif on 2 June 2016, HMRC did not have the relevant information from the taxpayer to make the discovery. Accordingly, the 'second condition' under s 29(5) is satisfied. For completeness, and for the reasons given in relation to the penalty assessment, we find the first condition under s 29(4) is also met on account that the inaccuracy in the 2012-13 return was correctly categorised as 'careless'.

46. The ordinary time limit is four years from the end of the year of assessment. Four years from the end of the 2012-13 tax year is 5 April 2017. The assessment was raised on 13 March 2017, and so was within the ordinary time limit.

Issue 2: the substantive matter of a 'disposal' for CGT purposes

Issue 2(a): Whether a 'disposal' within the meaning of s 1(1) TCGA

47. HMRC bear the burden of proof that the discovery assessment raised is fair, based on the available evidence. The question of law in issue is whether the transfer, based on available evidence, was a 'disposal' for CGT purposes.

The meaning of a 'disposal' for capital gains tax purposes

48. In *Turner v Follett* [1973] STC 148, the Court of Appeal considered the issue whether a 'gift' was a CGT disposal within the meaning of s 19(1) of the Finance Act 1965 ('FA 1965'), which was the legislation introducing for the first time what was then referred to as 'long-term capital gains tax'. The statutory wording for the charging provision under s 19(1) FA 1965 was:

> 'Tax shall be charged in accordance with this Act in respect of capital gains, that is to say chargeable gains computed in accordance with this Act and accruing to a person on the disposal of assets.'

49. Russell LJ remarked in *Turner v Follett* that 'there is nowhere any precise definition of the word "disposal"' in FA 1965. This was similarly observed in *Jenkins v Brown* [1989] STC 577 in relation to the Capital Gains Tax Act 1979 ('the 1979 Act'). The absence of a statutory definition for 'disposal' continues into the current enactment of Taxation of Chargeable Gains Act 1992 (TCGA).

50. Significantly, the exact wording of s 19(1) of FA 1965 has been preserved through successive enactments in Capital Gains Tax Act 1979, and in Taxation of Chargeable Gains Act 1992. The absence of a statutory definition for 'disposal' for capital gains tax purposes would appear to be purposeful rather than an oversight in drafting, so as to allow the meaning of disposal to be construed more widely than otherwise by prescriptive definition. The meaning of 'disposal', for example, was construed with reference to factual contexts, to include a gift transaction where no disposal consideration was involved: *Turner v Follett*. In other areas, the meaning of 'disposal' for CGT purposes has been developed by case law with reference to related legislation and common law principles, such as those pertaining to sale of land in *Jerome v Kelly* [2004] UKHL 25, [2004] STC 887, or in relation to settlement in trusts in the Court of Appeal decision in *Jenkins v Brown*.

A 'disposition' of land in the law of conveyancing

51. The substantive issue in this appeal is whether there was a disposal for CGT purposes by the transfer of the property to MIS Ltd in 2012. The principles governing the analysis of a land transaction under English law are therefore apposite to establishing whether there was a disposal of the property for CGT purposes in 2012. A standard land transaction (i.e. both land and/or buildings) under English law has two stages:

(1) The first stage is the *exchange of contracts* wherein the parties enter into a contract for sale of the land.

(2) The second stage is *completion*, wherein the parties execute a deed to transfer ownership of the land from the vendor to the purchaser.

52. As a matter of law, where a contract exists in relation to the conveyance of a legal estate, the law of equity recognises the contract as a contract for the disposition of the equitable interest

in a legal estate if the formalities under s 2 of the Law of Property (Miscellaneous Provisions) Act 1989 ('LPMPA') are met:

> **'2 Contracts for sale etc of land to be made by signed writing**
>
> **(1)** A contract for the sale or other disposition of an interest in land can only be made in writing and only by incorporating all the terms which the parties have expressly agreed in one document or, where contracts are exchanged, in each.
>
> **(2)** The terms may be incorporated in a document either by being set out in it or by reference to some other document.
>
> **(3)** The document incorporating the terms or, where contracts are exchanged, one of the documents incorporating them (but not necessarily the same one) must be signed by or on behalf of each party to the contract.'

53. In the present case, the Conveyancing Agreement contained the three essential elements for the formation of a valid contract, namely: (a) that there was an *agreement* between the buyer and the sellers to enter into the transaction; (b) that there was an *intention* to create legal relations, and (c) that *consideration* in the sum of £499,000 was tendered.

54. The Conveyancing Agreement was therefore the contract for the sale of the property, and it complied with the formality requirements under s 2 of LPMPA: (a) it was in writing; (b) it set out the terms 'expressly agreed' in the appended document headed as 'Special Conditions'; and (c) it was signed on behalf of each party by their respective conveyancing solicitors. The Conveyancing Agreement was the enforceable contract whereby Mr Asif and Mr Sajid as sellers disposed of their *equitable* interests in the property.

55. The contract for sale of the property was then completed with the registration of title by the deed executed on the Form TR1, which registered the transfer of the *legal* estate with full guarantee of title to MIS Ltd as required by s 52(1) of the Law of Property Act 1925 ('LPA'): 'All conveyances of land or of any interest therein are void for the purpose of conveying or creating a legal estate unless made by deed.'

56. The Form TR1 was the deed, and was validly executed with the transferors' signatures and witnessed; thus complying with the formalities, in particular, ss 1(2) and 1(3) of LPMPA, which require that: (a) it is signed by a person with the authority to execute the deed; (b) signed in the presence of a witness attesting the signature; and (c) delivered as a deed.

57. These two legal instruments are sufficient on their own in establishing that there was a disposition of land – of both equitable interests and the legal estate. In the instant case, there was a third legal document to support this characterisation, in the form of the Variation Order in April 2012 and preceded the contract and the deed. The Variation Order served on the appellant on 11 April 2012 made it clear beyond doubt that the permission pertained to the '*sale*' of the property, to MIS Ltd as the named 'purchasers', making MIS Ltd a party to the Order to be 'bound by its terms'. The selling solicitors, Nasim & Co, were also stipulated, with the responsibility to deliver 'the proceeds of sale' to the Proceeds of Crime Unit, which would apply to the Land Registry to remove the restriction registered in respect of the property upon receipt of 'cleared funds'.

58. The property had been placed under restriction on the Land Registry. The series of Court Orders testified that the property could not have been dealt in any way other than on the terms stipulated by the relevant orders. The original Restraint Order had stated that Mr Asif '*must not in anyway dispose of or deal with the property …*'. The Variation Order of September 2010 permitted the property to be mortgaged by Mr Asif and Mr Sajid to raise funds for the CPS debts. The Order of April 2012 permitted a 'sale' of the property, but subject to prescribed

terms and conditions, and was designed to ensure that half of the net proceeds of sale reached the Proceeds of Crime Unit in respect of Mr Asif (as of Mr Sajid). The Order of April 2012 in effect decreed the transfer of the property to MIS Ltd in May 2012 to be a 'sale' for capital proceeds, and that is how the transfer is to be characterised for CGT purposes.

59. The inevitable conclusion we reach is that there was a 'disposition' of the property under English law of both the legal estate and equitable interests in 121-123 High Street, Plaistow. Consequently, there was a 'disposal' for s 1(1) TCGA purposes of the property in May 2012. The equitable interests were disposed of by the Conveyancing Agreement of 30 May 2012, followed by the transfer of legal title by deed on the Form TR1 on 31 May 2012 in compliance with the Land Registration Act 2002, and the Land Registration Rules 2003, on completion of the contract.

Issue 2(b): whether nominees or bare trustees under s 60 TCGA

60. HMRC have discharged the burden of proof in raising the discovery assessment. The burden is then on the appellant to displace the assessment. To that end, the appellant has argued that MIS Ltd held the property in the capacity of a bare trustee for the Bhikhi family of some 39 members, with whom the beneficial ownership continued to reside despite the transfer in 2012, and that s 60 TCGA applied to remove any gains arising from being chargeable.

61. For the appellant, it is submitted that TR1 did no more than to make MIS Ltd the legal owner of the property (for the purpose of raising funds by way of a mortgage), and that nothing more than the legal title of the property was transferred; that is to say, no equitable interests were transferred to give rise to a CGT disposal.

62. While no technical argument as a point of law has been advanced to support this position, pertinent to the appellant's case is that equitable interests are incapable of being conveyed: s 1(3) of LPA. The only estates capable of being conveyed or created in law are 'legal estates' as defined under s 1(1)(a) and (b) of LPA:

> **'1 (1)** The only estates in land which are capable of subsisting or of being conveyed or created at law are –
>
> (a) An estate in fee simple absolute in possession;
>
> (b) A term of years absolute.
>
> […]
>
> **1 (3)** All other estates, interests, and charges in or over land take effect as equitable interests.'

63. The appellant's case would seem to be staked on the fact that *the* (only) relevant legal instrument to characterise the transfer of May 2012 was the From TR1, which simply is untrue. The Conveyancing Agreement was the contract that disposed of the equitable interests, and cannot be edited out of the transaction.

64. Separately, as a matter of law, the appellant asserted that bare trusteeship was relevant in the transaction, but without having actually made the legal analysis how MIS Ltd could become the bare trustee holding the property. In fairness to the appellant, we consider whether a bare trusteeship could have arisen in the present case in the light of case law principles.

65. Since the statutory wording of the charging provision has remained unaltered, authorities interpreting the earlier enactments (FA 1965 and the 1979 Act) of the capital gains tax regime remain applicable in interpreting TCGA. In *Jerome v Kelly*, Mr Jerome appealed against a CGT

assessment raised on him (and for his wife)[1] as beneficial owners of plots of land that were sold to a developer company under an *unconditional* contract entered into in 1987 (by Mr Jerome, his wife, and his brother). In 1989, Mr and Mrs Jerome assigned part of their share of beneficial interests in the land to the trustee of overseas settlements, Codan Trust Co Ltd in Bermuda ('Codan'). The contract was subsequently completed in three tranches in 1990, 1991, and 1992. The Revenue assessed Mr Jerome to the gains attributable to the share of the beneficial interests held by Codan in Bermuda.

66. The Special Commissioner dismissed Mr Jerome's appeal, but Park J at High Court allowed the appeal. Park J's decision was reversed by the Court of Appeal, and then restored by the House of Lords. The changing fortunes of Mr Jerome's appeal highlighted the difficulty in the interpretation and application of two specific provisions in the 1979 Act, namely:

(1) Section 27(1) as concerns '*Times of disposal and acquisition where asset disposed of under contract*' is the predecessor provision to s 28(1) TCGA;

(2) Section 46 as concerns '*Nominees and bare trustees'* is the predecessor provision of s 60 TCGA.

67. The exact statutory wording of these two provisions in the 1979 Act has been retained by the successor provisions in ss 28(1) and 60 TCGA, and is not repeated here. The issue was whether the gains accrued to the beneficial interests held by Codan (on the dates of completion of the contract) were assessable on Codan, or Mr Jerome. If assessable on Codan, then no capital gains tax would arise, since Codan was non-resident in the UK.

68. The peculiar fact in *Jerome v Kelly* was that the contract of sale was 'unconditional', and the unusually long gap between the making and the completion of the contract gave rise to a beneficial owner, Codan, which was not a party to the 1987 contract. Lord Walker, in giving the leading judgment in *Jerome v Kelly*, described Codan as having sold 'short' in being a disponor in 1987 before its interests were assigned in 1989. For present purposes, the unusual situation in *Jerome v Kelly* due to the long delay between the making of the contract and its completion highlighted the role of the sellers as 'trustees for sale' of the purchaser during this period, as Lord Walker analysed at [44] in his leading judgment:

> 'What happened on completion, by stages, of the contract was that the taxpayer, his wife and his brother executed three Land Registry transfers of three separate pieces of land. Although they were expressed to be transferring "as beneficial owners" (as the contract required) they were necessarily transferring the legal estate in their capacity as trustees for sale …'

69. The principles applicable to analyse a land transaction for CGT purposes in *Jerome v Kelly* that are apposite to the substantive issues in this appeal can be summarised as follows:

(1) As a matter of English law, the significance of a contract for the sale of land is that the contract gives rise to the equitable remedy of specific performance enforceable by a court. Consequently, and at [29]:

> 'If and so long as the contract is enforceable in that way, the seller becomes in some sense a trustee for the buyer; *the buyer has an equitable interest of some sort in the subject matter of the contract*; and the contract (if protected by the machinery appropriate to registered or unregistered titles …) is enforceable (by specific performance) against a third party who becomes owner of the property.' (italics added)

[1] By virtue of s 45(1) of Capital Gains Tax Act 1979, the amount of CGT on chargeable gains accruing to a married woman was assessed and charged on her husband.

(2) A vendor of real estate under a valid contract of sale is a trustee of the property sold for the purchaser: *Rayner v Preston* (1881) 18 Ch D 1 at 6; cited at [30]:

> 'An unpaid vendor is a trustee in a qualified sense only, and is so only because he has made a contract which a Court of Equity will give effect to by transferring the property sold to the purchaser …'

(3) The rights and duties of the respective parties to a contract of sale before its completion are qualified, as analysed at [32]:

> 'It would therefore be wrong to treat an uncompleted contract for the sale of land as equivalent to an immediate, irrevocable declaration of trust (or assignment of beneficial interest) in the land. Neither the seller nor the buyer has unqualified beneficial ownership. Beneficial ownership of the land is in a sense split between the seller and buyer on the provisional assumptions that specific performance is available and that the contract will in due course be completed, if necessary by the court ordering specific performance. In the meantime, the seller is entitled to enjoyment of the land or its rental income. … If the contract proceeds to completion the equitable interest can be viewed as passing to the buyer in stages, as title is made and accepted and as the purchase price is paid in full.'

(4) Capital gains tax is on the whole concerned with assets, not with contractual rights over assets. The essential point is that a contract for the sale of land, until completed, is neither a disposal nor a part disposal: at [45].

(5) Capital gains assessment is made on the basis of beneficial ownership (rather than by reference to the vesting of the legal estate in the land) because of the provision under s 46(1) of the 1979 Act as respects nominees and bare trustees: at [22].

70. The interpretation in *Jerome v Kelly* of bare trusteeship under s 46 of the 1979 Act relevant to our consideration is as follows.

(1) It was observed that from the date of the contract, Mr Jerome and his brother, as trustees for sale, were bound by an unconditional contract to sell the land: at [36].

(2) The assignments of beneficial interests by Mr and Mrs Jerome to Codan were effective in 1989, and Codan as trustee of the Bermuda settlements became entitled to an appropriate share of the net rental income of the land (if there was any): at [37].

(3) The acts to be attributed to the beneficial owners include both the making of the contract and its eventual completion according to its terms: at [41].

(4) Section 46(1) required the trustees for sale (Mr Jerome and his brother) to be treated as nominees for Codan to the extent of the interests which Codan had acquired in 1989 by assignment as trustee of Mr and Mrs Jerome's overseas settlements: [44].

(5) The disposition of Codan's interests on completion of the contract (between 1990-1992) was the vesting of the legal estate of land, and not an occasion of CGT charge.

71. Turning to the facts in question, was there a trust under s 60 TCGA in relation to the property transfer in 2012 to MIS Ltd? In the first instance, there could only be 'a trust for sale' similar to the one arising under s 46 of the 1979 Act in *Jerome v Kelly* if the contract for sale was 'unconditional'; (otherwise s 27(2) of the 1979 Act or s 28(2) TCGA applies). The material point in the application of s 46 of the 1979 Act over a trust for sale is to avoid taxing the same gain twice, as analysed in *Jerome v Kelly* (and by corollary, s 60 TCGA). The chargeable event for CGT purposes is fixed by s 27 in the 1979 Act (now s 28 TCGA), and is referential to the time when the contract is made: that being the *only* chargeable event. The timing of completion of a contract for sale does not give rise to a chargeable event, as the vendor is deemed to be

holding the property for sale as a 'bare trustee' for the purchaser. To avoid taxing the same gain twice, s 46 of the 1979 Act in *Jerome v Kelly* applied to remove those occasions from giving rise to a chargeable event when the plots of land were conveyed by the Jerome brothers (vendors then acting as 'trustees for sale') to the developer company (the purchaser).

72. As a matter of legal construction, the contract for sale in the instant case would appear to be unconditional, and a trust for sale existed between the exchange of contracts and completion. As a matter of fact, the completion of the contract was on 31 May 2012, one day after the contract was signed, making the trust for sale of negligible duration. Insofar as there was a trust for sale to which s 60 TCGA could have applied, it was Mr Asif and Mr Sajid who were the 'bare trustees' holding the property (for the duration of one day) in trust for MIS Ltd as the purchaser after the contract for sale was signed. To that end, the application and relevance of s 60 TCGA is totally contrary to what the appellant seeks to establish, which is to say that MIS Ltd was a 'bare trustee' in holding the property.

73. Admittedly, the appellant's position is not to assert that a bare trusteeship existed during the period of conveyancing, but that the transfer of 2012 to MIS was a transfer to a nominee (and not to a purchaser). For the following reasons, the appellant fails completely in meeting the burden of proof in establishing this position.

(1) No evidence has been provided to displace the legal framework for characterising the transaction as a 'sale' of the property in accordance with the terms of the Court Order of April 2012, and the Conveyancing Agreement of May 2012.

(2) Any trust created over land is governed by the *Trust of Land and Appointment of Trustees Act 1996* ('TOLATA 1996'). In broad terms, the two types of trust that could have existed over land, namely: (a) as strict settlements or (b) as trusts for sale, were replaced from 1 January 1997 onwards by 'trusts of land'.

(3) Whether there was a trust of land in the form of a bare trust with MIS Ltd as a bare trustee is a matter of fact to be determined with reference to the related statutes.

(4) Subsection 1(1)(a) of TOLATA 1996 defines a 'trust of land' as 'any trust of property which consists of or includes land', and includes, as stated under s 1(2)(a):

> '… any description of trust (whether express, implied, resulting or constructive), including a trust for sale and a bare trust …'

(5) To create a trust of land, the instrument must be in writing, as stipulated by s 53(1)(b) of the Law of Property Act 1925:

> '(1)(b) a declaration of trust respecting any land or any interest therein must be manifested and proved by some writing signed by some person who is able to declare such trust or by his will; […]'

(6) The creation of a bare trust by a legal instrument has to be followed by an appointment of a trustee under the Trustee Act 2000.

(7) To appoint nominees, s 16 of the Trustee Act 2000 provides as follows:

> **'16 Power to appoint nominees**
>
> (1) Subject to the provisions of this Part, the trustees of a trust may –
>
> (a) appoint a person to act as their nominee in relation to such of the assets of the trust as they determine (other than settled land), and
>
> (b) take such steps as are necessary to secure that those assets are vested in a person so appointed.
>
> (2) An appointment under this section must be in or evidenced in writing.'

74. A bare trust of land cannot simply be willed into existence in the absence of a valid legal instrument to declare such a trust. There was no declaration of trust in writing to create a bare trust of land with MIS Ltd as the bare trustee; there was no legal document to evidence the appointment of MIS Ltd as a bare trustee in compliance with the Trustee Act 2000. The section for 'Declaration of trust' under Box 10 of the Form TR1 executed on 31 May 2012 was completely blank, which indicated that no such declared trust was in existence. However fervently the appellant might have believed that such a trust existed between the Bhikhi family and MIS Ltd to govern the property transfer in 2012, he has not met the evidential burden of proof that such a trust existed at all in law.

75. Apart from the legal difficulties in establishing the existence of a bare trust, the flow of funds from MIS presented practical difficulty in according a construction of bare trusteeship. Mr Khan submits that the money was neither purchase consideration, nor a loan, but was a flow of funds as part of a family arrangement. No doubt in the appellant's understanding, MIS Ltd was merely acting as an intermediary in obtaining a mortgage that the appellant and Mr Sajid tried to obtain in person in applying for the Variation Order of September 2010. If the brothers had obtained a mortgage on the property in their own names to settle the debts, there would not have been a disposal for CGT purposes. However, the reality was that a different course of action was taken, and by involving MIS Ltd as the means to obtain the mortgage, that path had involved the disposition of the property to MIS – in order to enable MIS to grant an interest in the property by creating 'a charge by way of legal mortgage' under s1(2)(c) of LPA. The commercial reality was that MIS Ltd was able to grant a charge on the property as the owner, not as a bare trustee.

Issue 2(c): Whether there was an implied trust

76. While the appellant has failed to meet the burden of proof that a bare trust existed in law for the transfer in 2012 to MIS Ltd to be construed as a conveyance to a nominee, the appellant has also asserted that there was an implied trust in existence, which meant, as he claimed, no chargeable gains were taxable.

77. The use of the term 'implied trust' in arguing the appellant's case is far from precise. Nevertheless, based on what we understand from the evidence given, and the submissions made on behalf of the appellant, we apply the law as concerns implied trusts to the two possible scenarios where an implied trust could have arisen.

(1) The first scenario is to say that despite the absence of a declaration of an express trust by deed, there was an implied trust between MIS Ltd and the Bhikhi family that the property was held by MIS Ltd in trust for the wider family.

(2) The second scenario is to say that despite the transfer in 2012 being made in the name of Mr Asif and Mr Sajid as the transferors, Mr Asif and Mr Sajid held the property in trust for the 39 members of the Bhikhi family. While the transfer of the property by MIS Ltd in 2018 was to the Bhikhi Property Ltd (and not back to Mr Asif and Mr Sajid), it is submitted that the holding of the property by BPL is evidence that the property is a family asset, with the beneficial interest vested with the extended family of 39 members, and not with any individuals within the extended family.

78. The law of equity accepts that trusts may be created expressly by a deed of declaration (such as a bare trust), or may arise without express creation through recognition by the courts. For completeness, we consider whether the existence of an implied trust could have affected the chargeability of the gains arising on the property transfer in 2012 as a question of law only, without making any finding of fact whether an implied trust could have arisen.

79. The exact categorisation of trusts is complex, but in broad terms, trusts fall into three categories: (i) express trusts, (ii) non-express trusts, and (iii) statutory trusts. No statutory trust has been alleged to have existed; no express trust had been created by a deed of declaration from the available evidence. We are here concerned with non-express trusts. For convenience, the term 'implied trusts' is adopted to refer to trusts that have not been expressly created: see *Cowcher v Cowcher* [1972] 1 WLR 425 at p. 430. The types of implied trusts that the courts can give effect to are either a *constructive* trust, or a *resulting* trust.

Constructive trust analysis

80. A constructive trust arises by operation of law; that is to say, by the court recognising such a trust as being imposed by the law of equity on the owner of property, so that instead of enjoying his property as the beneficial owner, he is required by law to hold it, in whole or in part, for the benefit of some other person. Case law authorities on constructive trusts include:

(1) In relation to a 'definition' for a constructive trust, Davies LJ's remark in *Carl-Zeiss Stiftung v Herbert Smith & Co (No. 2)* [1969] 2 Ch 276 at p.300 is instructive:

> 'English law provides no clear and all-embracing definition of a constructive trust. Its boundaries have been left perhaps deliberately vague so as not to restrict the court by technicalities in deciding what the justice of a particular case may demand.'

(2) In the Court of Appeal decision in *Paragon Finance v DB Thakerer & Co* [1999] 1 All ER 400, Lord Millet stated at p. 409 the circumstances when the law of equity would impose such a trust:

> '[A] constructive trust arises by operation of law whenever the circumstances are such that it would be unconscionable for the owner of property (usually the legal estate) to assert his beneficial interest in the property.'

(3) In *Bannister v Bannister* [1948] 2 All ER 133, the purchaser bought a cottage from his sister-in-law on the understanding (not in writing) that she could continue to live in it rent-free for the rest of her life. The purchaser tried to obtain possession of the cottage; the defendant claimed that the oral agreement amounted to an informal declaration of trust whereby the purchaser would hold the property on trust for her during her lifetime. The formality for such a declaration of trust over land would normally have to be in writing (s 53(1)(b) of LPA) , but the Court of Appeal held that the purchaser's action to take possession was unconscionable, and imposed a constructive trust to give effect to the defendant's lifetime interest in accordance with the oral agreement.

(4) The court in *Bannister v Bannister* also held that the oral agreement had created a settlement under the Settled Land Act 1925 ('SLA'). Under the SLA settlement imposed by the court, the sister-in-law became the tenant for life, and had the power to call for the estate to be conveyed to her and the power to sell it.

(5) In *Yaxley v Gotts and Anr* [1999] 3 WLR 1217, Yaxley (a self-employed builder) was promised by Gotts, that Yaxley would be given the ground floor of a three-storey house (to be purchased by Gotts) in exchange for his labour and materials to convert the house into flats for letting, and for managing the letting of the flats afterwards. The agreement was reached with Gotts Snr, but it was the son who bought the house, and Gotts Jnr refused to grant Yaxley an interest in the property. The oral agreement which would have been void and unenforceable for failing to be in writing (s 2 of LPMPA 1989) was held to be enforceable on the basis of a constructive trust under s 2(5) of LPMPA.

(6) In *Yaxley v Gotts*, Robert Walker LJ described the constructive trust at 1231 as:

> 'the species of constructive trust based on "common intention" is established by what Lord Bridge in *Lloyds Bank Plc. V Rosset* [1991] 1 AC 107, 132, called "agreement, arrangement or understanding" actually reached between the parties, and relied on and acted on by the claimant. A constructive trust of that sort is closely akin to, if not indistinguishable from, proprietary estoppel. Equity enforces it because it would be unconscionable for the other party to disregard the claimant's rights.'

(7) The doctrine of estoppel is generally used as a defence against a claim, but the doctrine of proprietary estoppel is an exception to this general rule and was used as a cause of action in *Gillett v Holt* [2000] 2 All ER 289. The claimant Gillett had worked for some 40 years from childhood for little pay for Holt, a gentleman farmer, and had incurred expenditure on the farmhouse, refused offers of alternative employment, and gone far beyond the extent of employee's duties, on account of the repeated assurance from Holt that he would leave the entire estate to Gillet. In giving the leading judgment, Robert Walker LJ stated (at p. 301) that 'the doctrine of proprietary estoppel cannot be treated as subdivided into three or four watertight compartments' (i.e assurance or encouragement, reliance and detriment), but that:

> '… the quality of the relevant assurance may influence the issue of reliance, that reliance and detriment are often intertwined, and that whether there is a distinct need for a "mutual understanding" may depend on how the other elements are formulated and understood. Moreover the fundamental principle that equity is concerned to prevent unconscionable conduct permeates all the elements of the doctrine. In the end the court must look at the matter in the round.'

81. It is important to note at the outset of this part of the discussion that the Tribunal has no jurisdiction to impose a constructive trust. Neither is the appellant making a claim against MIS Ltd on the principle of proprietary estoppel. The claim the appellant seeks to make in this appeal is that no chargeable gains arose on the transfer in 2012 to MIS Ltd on account of an implied trust (however construed), and no beneficial ownership was transferred to MIS Ltd.

82. If there had been a constructive trust governing the transfer in 2012, it would have been a species of constructive trust based on 'common intention' as observed in *Yaxley v Gotts*, and in accordance with the 'agreement, arrangement or understanding' reached between the parties, namely Mr Asif and Mr Sajid as the 'sellers', and MIS Ltd as the 'buyer'.

83. Looking at the matter in the round, what was the 'mutual understanding' between the sellers and the buyer in the 2012 transfer. We accept that an understanding was reached between the Bhikhi brothers (for the wider family) and Mr Irfan Sardar (for MIS Ltd) so that:

(1) the property would be 'bought back' by the Bhikhi family at some point in the future at the same price as the property was 'sold' to MIS Ltd;

(2) the mortgage payments payable by MIS Ltd would be met by the Bhikhi brothers;

(3) the Bhikhi brothers would act as manager as regards the letting of the property, and would meet all property expenses incurred for development, maintenance and repairs.

84. Taking the appellant's claim as its highest, there could have been a constructive trust by 'common intention' between the Bhikhi brothers and MIS, and that MIS Ltd held the property on trust for the Bhikhi brothers (and 39 others in the family). Even if we were to find that the oral agreement between Mr Asif and Mr Sajid and MIS amounted to a declaration of trust over land as a form of constructive trust, notwithstanding the absence of formality in writing as required under s 53(1)(b) of LPA, we would also need to find consequently that there was a settlement created under the Settled Land Act 1925, in accordance with *Bannister v Bannister.*

85. It follows that if the transfer in 2012 were to be construed as having been made under a common intention constructive trust arrangement, the corollary was that a trust settlement (an SLA trust) was created by virtue of that common intention arrangement; *ergo the property became 'settled property'* within the meaning of s 68 TCGA. On this analysis, the inescapable consequence is that there was a transfer in 2012 for CGT purposes under s 70 of TCGA:

> '**70 Transfers into settlement**
>
> A transfer into settlement, whether revocable or irrevocable, is a disposal of the entire property thereby becoming settled property notwithstanding that the transferor has some interest as a beneficiary under the settlement and notwithstanding that he is a trustee, or the sole trustee, of the settlement.'

86. For the avoidance of doubt, we make no finding of fact whether a constructive trust arose. Insofar as we have considered the issue of the possible existence of a constructive trust, it is solely as a question of law in relation to the chargeability of the 'settled' property for CGT purposes. We conclude that the appellant's assertion that the property was held by an implied trust is of no assistance to his case whatsoever, since it would still have resulted in a disposal for CGT purposes by virtue of s 70 TCGA.

Resulting trust analysis

87. As to the second scenario whereby an implied trust is submitted to have existed, it is that Mr Asif and Mr Sajid, while being the transferors in the 2012 transaction, the beneficial interest of the property resided with the extended family; and that it was the decision of the wider family to advance the property as the security for MIS Ltd to raise funds to pay the CPS orders.

88. Pausing here, there would seem to be resemblance between the arrangement in the present case with the family arrangement in *Ali v Khan*, the only authority introduced by HMRC to which the appellant has not responded. The father (Khan) transferred the title of the family home to two daughters (to be married) for a mortgage to be raised of £25,000 (being one-third of the value of the house) so as to fund their (and one brother's) forthcoming weddings. One of the married daughters (Mrs Ali) became the sole registered proprietor when her sister transferred her interest for no consideration so as to be released of the covenants with the lender. Ali raised an action to take possession of the family home. The High Court's decision in favour of Mrs Ali was reversed by the Court of Appeal on finding that the father remained the sole beneficial owner of the equity of redemption of the family home and was entitled to possession of it subject only to the prior right of the building society as first mortgagee. The conclusion reached by the Vice Chancellor Rix LJ in *Ali v Khan* at [35] is apt.

> 'It is neither unusual nor of itself improper to transfer the legal estate in land to enable the transferee to raise money on its security. If that is the true nature of the transaction then the equity of redemption in the property is held on a resulting trust for the transferor. This was the result in *Haigh v Kaye* LR 7 Ch. 473 and *Re: Duke of Marlborough* [1894] 2 Ch. 133. In my view it is the result in this case too.'

89. It was observed in *Ali v Khan* (at [31] and [34]) that the ability of the daughters to confer a legal charge over the family home was not dependent on their being beneficial owners of the whole or any part of the home property, and that 'it would be sufficient that they had the legal estate and the authority of the Father as the beneficial owner', and with 'the family agreement' that the daughters should borrow £25,000 on the security of the family home. We accept that a parallel situation could have arisen whereby MIS secured a mortgage on the property with the 'authority' of the appellant (and the Bhikhi family), on the parties' understanding that the beneficial ownership continued to reside with the Bhikhi family. Crucially, however, in *Ali v Khan* there was no contract of sale between the father and the daughters as in the present case.

The plain fact remains that the Conveyancing Agreement of 30 May 2012 effected the disposition of the beneficial interest in the property. The legal effect of the Conveyancing Agreement cannot be circumvented for a parallel construction, whereby the equity of redemption in the property could be considered to be held on a resulting trust for the appellant and Mr Sajid as the transferors.

90. Furthermore, as a matter of English law, there is no presumption of 'community of ownership', and the assertion that communal ownership of the property as common within the Asian family culture cannot affect our analysis. The documentary evidence has established clearly that there was a contract for sale of the property to MIS Ltd by Mr Asif and Mr Sajid as the sellers. Even if the wider family were supposed to have equitable interests in the property, the process of conveyance in a contract of sale enabled the purchaser to overreach these equitable interests held on an implied trust under s 2 of LPA:

> '**2 Conveyances overreaching certain equitable interests and powers**
>
> **2(1)** A conveyance to a purchaser of a legal estate in land shall overreach any equitable interest or power affecting that estate, whether or not he has notice thereof, if –
>
> (i) the conveyance is made under the powers conferred by the Settled Land Act 1925, or any additional powers conferred by a settlement, and the equitable interest or power is capable of being overreached thereby, and the statutory requirements respecting the payment of capital money arising under the settlement are complied with; …'

91. The appellant has failed to discharge the legal burden that no chargeable gains arose on account of an implied trust being in place. It is unnecessary to consider whether the appellant has met the evidential burden that there was, on the balance of probabilities, an implied trust in place behind the 2012 transfer.

Conclusion on the discovery assessment

92. In interpreting the capital gains tax regime under its first enactment in FA 1965, Lord Wilberforce's well-known guidance in *Aberdeen Construction Group Ltd v IRC* [1978] AC 885 at 892–893; [1978] STC 127 at 131 remains sound:

> 'The capital gains tax is of comparatively recent origin. The legislation imposing it, mainly the Finance Act 1965, is necessarily complicated, … But a guiding principle must underline any interpretation of the Act, namely, that its purpose is to tax capital gains and to make allowance for capital losses, each of which ought to be arrived at upon normal business principles. No doubt anomalies may occur, but in straight-forward situations, such as this, the courts should hesitate before accepting results which are paradoxical and contrary to business sense.'

93. The business reality of the 2012 transfer was a *sale* of the property by Mr Asif and Mr Sajid, in return for a capital sum as 'consideration' from MIS as the purchaser. In accordance with s 1(2)(c) of LPA, MIS as the new owner of the property, created a charge by way of legal mortgage. In 2018, the property was in turn 'sold' by MIS to BPL at the same price as was purchased in 2012, as evidenced by the copy of completion statement and the two TR1 forms of April 2018 conveying the legal estate of the property. The sale by MIS Ltd in 2018 resulted in a capital loss, which MIS has accordingly claimed in its accounts and CTSA return.

94. The Variation Order of April 2012, the Conveyancing Agreement of 30 May 2012, and the Form TR1 of 31 May 2012 were the legal documents to effect the transaction, and stand as the irrefutable evidence for construing the business reality that characterised the transfer in 2012 as a sale of the property. This characterisation of the transfer remains the only credible

business reality, and is the statutory analysis under which the taxable results are to follow: the transfer of the property in 2012 by the appellant to MIS Ltd was a disposal for CGT purposes.

95. Consequently, the discovery assessment stands good. Neither party made any representations about the quantum of the assessment, but have argued their case on an 'all or nothing' basis. The assessment in the sum of £43,855 is therefore upheld in full.

Issue 3: whether Sch 24 penalty validly assessed

96. Mr Corbett stated that the penalty was at the minimum rate for careless behaviour and so there was no question of a further reduction. Mr Khan has focused on the substantive issue, on the assumption that if the appeal is successful against the capital gains tax assessment, then the penalty would fall away.

97. In the correspondence was a letter from HMRC to the appellant dated 6 March 2017. That letter informed the appellant that HMRC were considering the imposition of penalties. The letter asked questions about the advice sought before completion of the appellant's tax return and, by implication, invited representations on the penalty issue. There appears to be no direct reply from the appellant or his agent on the penalty issue, though correspondence as regards the property transfer continued. In their letter of 29 May 2018, HMRC reminded the appellant and his agent that no response to their letter of 6 March 2017 had been received, and issued the penalty assessment and penalty explanation the same day.

98. With reference to the relevant provisions under Sch 24 FA 2007, we consider the following questions in relation to the penalty assessment.

(1) Was the penalty charge assessment within time and procedurally correct?

(2) Was the behaviour correctly categorised as 'careless'?

(3) Was the rate of mitigation appropriate for helping, telling and showing?

(4) Would it be appropriate to suspend the penalty or to grant special reduction?

99. In accordance with para 13(3), HMRC must issue a penalty assessment before the end of a 12-month period beginning with the end of the appeal period for the decision correcting the inaccuracy. In their letter of 29 May 2018, HMRC gave their 'view of the matter', and offered an internal review. Depending upon whether the taxpayer accepted the offer of an internal review (which he did not in this case) the appeal period ended at least 30 days later. So the time limit for issuing the penalty assessment was at least one year and 30 days after 29 May 2018. The penalty assessment was issued on 29 May 2018, and was in time.

100. Paragraph 3 defines 'careless' behaviour as a failure to take reasonable care, which is to be judged by the standard of a prudent and reasonable taxpayer in the position of the taxpayer in question. In this case, the appellant has run a clothing business, and had owned, managed and rented a mixed commercial and residential property for many years. It must have been obvious that there could be tax consequences for making a property disposal. A reasonable taxpayer would have taken advice. The appellant did not respond to HMRC's questions as to whether he took advice, and the fair assumption is that he had not. We also have regard to the fact that the appellant ceased to return any rental income after the sale of the property, which was, in itself, indicative of his understanding that he was no longer liable for returning the rentals as his income. The corollary of that understanding must be at least of a 'disposal' of the property to render him no longer liable for the rentals.

101. In setting the penalty percentage, HMRC have given full mitigation for 'co-operation' by the appellant in relation to telling, helping and showing during the enquiry process. While we are somewhat surprised that the appellant's response to HMRC's initial enquiries should have

merited full mitigation, the issue of mitigation was not examined at the hearing, and we accept that the mitigation level has been set to the appellant's advantage.

102. A suspension of a Sch 24 penalty is only appropriate where conditions can be agreed with the taxpayer to help him avoid a further penalty. HMRC's practice guidance is that where the tax in question is non-recurrent, it is not normally possible for meaningful conditions to be set. In line with their practice guidance, HMRC have not offered to suspend the penalty, nor do they consider further reduction to be merited in this case.

103. We have considered, and rejected as special circumstances the fact that the brothers were reluctant sellers and only sold the property due to urgent financial pressure, since that urgent financial pressure had no bearing on how the appellant completed his 2012-13 tax return after the transaction. We are of the view that the inaccuracy is correctly categorised as 'careless'; that the relevant penalty rate has been set at the minimum; and there is no good reason for the Tribunal to intervene with HMRC's decisions as regards suspension or special reduction.

DISPOSITION

104. For the reasons stated, the appeal is dismissed. The discovery assessment stands good with the quantum upheld in full; the penalty assessment is also confirmed in full.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

105. 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.

DR HEIDI POON
TRIBUNAL JUDGE

Release date: 29 May 2020