[2013] UKFTT 290 (TC)

TC02696

Appeal number: TC/2012/00156

CORPORATION TAX – debit for accounting charge in respect of amortisation of goodwill – whether goodwill acquired from a related party where transfer of goodwill effected as part of wider transaction under which transferor's shareholding in claimant company was subject to purchase and option arrangements – claimant company arguing for purposive construction of commencement provisions – paragraph 118(1)(b) of Schedule 29, Finance Act 2002 – transferor was related party in relation to claimant company at time it acquired the goodwill – claimant company not entitled to debit – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

BLENHEIMS ESTATE AND ASSET MANAGEMENT LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE EDWARD SADLER
WILLIAM HAARER

Sitting in public at Exeter on 15 and 16 January 2013

Mr M Rutland and Mrs J Rutland representing the Appellant

Mr P Halford, Solicitor, of the Solicitor's Office, HM Revenue and Customs, representing the Respondents

DECISION

Introduction

1. This is an appeal by Blenheims Estate and Asset Management Limited ("the Appellant") against amendments made by The Commissioners for Her Majesty's Revenue and Customs ("the Commissioners") to the Appellant's corporation tax self-assessment return for its accounting period ending 31 December 2008. Those amendments were made by a notice of closure of enquiry issued by the Commissioners on 12 April 2011. The Appellant requested a review by the Commissioners of the conclusions which resulted in the closure notice, and the outcome of that review, notified to the Appellant on 17 November 2011, was to uphold the basis on which the closure notice had been made. The Appellant appealed to this tribunal by its notice of appeal dated 17 December 2011.

2. The amendments made by the closure notice relate to the disallowance of certain debits in respect of amortisation charges which the Appellant had made in its accounts for its 2008 accounting period with respect to goodwill which it acquired on the purchase of its business on 12 May 2006. The Appellant recorded as £565,000 the cost of such goodwill in its accounts, and in its accounts for 2008 it recorded £240,125 as the aggregate amortisation and impairment charges in relation to the cost of the goodwill for its 2008 accounting period.

3. For corporation tax purposes for its 2008 accounting period the Appellant claimed, in computing its profits for such purposes, a deduction for that amount of amortisation and impairment charges under the provisions of paragraph 9 of Schedule 29 to Finance Act 2002.

4. The circumstances in which the Appellant acquired the goodwill in question can be summarised as follows:

(1) An individual, David Marshall, owned an estate management business which he had carried on since before 1 April 2002;

(2) Before 12 May 2006 Mr Marshall formed the Appellant. As at 12 May 2006 there was one ordinary share of its share capital in issue and that was owned beneficially by Mr Marshall. Until 12 May 2006 the Appellant did not trade;

(3) On 12 May 2006 Mr Marshall sold his business and its assets to the Appellant for a price of £565,000 to be satisfied by the issue by the Appellant to Mr Marshall of 564,999 ordinary shares. Completion of the sale and purchase of the business, including the allotment of the consideration shares, took place immediately on the signing of the sale agreement on 12 May 2006;

(4) The tangible assets of the business had nominal value only. The value of the goodwill in the business as stated in the Appellant's accounts on the acquisition of the business was £565,000;

(5) Later on 12 May 2006 an unrelated company:

(a) purchased from Mr Marshall 480,250 of the ordinary shares in the Appellant for cash consideration of £480,250 payable in instalments; and

(b) entered into an option with Mr Marshall to purchase for consideration of £1 the remaining 84,750 ordinary shares he held in the Appellant on terms whereby £84,750 was paid to Mr Marshall for the grant of the option on 12 May 2006;

(6) The option was exercised in February 2007;

(7) The company which purchased Mr Marshall's shares in the Appellant was closely involved in drafting the agreement whereby Mr Marshall sold his business to the Appellant, and it was the intention of all parties that all the transactions entered into on 12 May 2006 should proceed in the sequence in which they took place; and

(8) The arrangements relating to the option were designed to ensure that Mr Marshall retained a holding of 15% of the share capital of the Appellant so as to permit the Appellant to continue trading for a period of months under the business name under which Mr Marshall had carried on the business without causing Mr Marshall to be in breach of certain undertakings he had given with respect to that business name in an unrelated transaction he had entered into some months earlier.

5. The Commissioners contend that the Appellant is not entitled to the deduction claimed by the Appellant for the amortisation and impairment accounting charges in respect of goodwill, since although it acquired the goodwill in question, it made that acquisition after the commencement date for this relief from a person who at the time of the acquisition was a "related party" in relation to the Appellant (namely, Mr Marshall), and accordingly the provisions of paragraph 118(1)(b) of Schedule 29 to Finance Act 2002 prevent the Appellant from claiming the deduction in question.

6. The Appellant's case is that, if the transaction whereby it acquired from Mr Marshall the goodwill is viewed in conjunction with the other transactions entered into on the same day, which is necessary to give a realistic view of those transactions and their effect taken as a whole, and if the relevant provisions relating to relief for the amortisation of goodwill are construed purposively when applied to those transactions so viewed, then the Appellant did not acquire the goodwill in question from a "related party". In consequence, the Appellant is entitled to the deduction claimed. Thus the Appellant claims that in applying the relevant legislation to its circumstances the purposive construction of statutory provisions, established in the line of authorities stemming from *W T Ramsay v IRC* [1982] AC 300, should be adopted, and that the result of so doing is to make clear that it is within the permitted circumstances specified in paragraph 118(1)(b) of Schedule 29 to Finance Act 2002.

7. The issue we have to determine, therefore, is whether the circumstances of the Appellant's acquisition of the relevant goodwill are such as to entitle the Appellant to claim a debit for its corporation tax purposes for the accounting charge it made in its accounts for the amortisation and impairment of goodwill. We are asked to decide that issue in principle, since there is no dispute before us between the parties as to the amount of deduction claimed if in principle the deduction is allowable.

8. The Appellant's case, in both written and oral submissions, was argued with skill and in careful detail by Mr and Mrs Rutland, who represented the Appellant before us (Mr Rutland is a chartered accountant and a director of the Appellant and Mrs Rutland is a consultant to the Appellant; Mr Rutland is also the controlling shareholder of the company which purchased from Mr Marshall the shares in the Appellant). That case cannot, however, succeed, in view of the clear meaning of the relevant statutory provisions as they must be applied to the facts of the case. For good commercial reasons the Appellant's acquisition of the business (and the goodwill of that business) was structured in a careful and particular way which of necessity resulted in the Appellant acquiring the goodwill from a person (Mr Marshall) who was, at the time of such acquisition and for some time thereafter, related to the Appellant within the terms of the relevant statutory provisions. There can be no basis in law, whether by applying the *Ramsay* authorities or otherwise, for construing or applying those provisions in a way which disregards that essential fact. In consequence paragraph 118(1) of Schedule 29 to Finance Act 2002 has effect to deny the Appellant the right to claim under the provisions of Schedule 29 a debit for its corporation tax purposes for the accounting charges it made in its accounts for the amortisation and impairment of the goodwill in question.

9. We therefore dismiss the Appellant's appeal.

The relevant statutory provisions

10. The statutory provisions relevant to this appeal are rather complex. For the most part they are taken from Schedule 29 to Finance Act 2002 as it had effect for the period relevant to this appeal (referred to in this decision as "Schedule 29", and references to a paragraph are to a paragraph in Schedule 29). Schedule 29 deals, amongst many other matters, with the tax treatment of gains and losses of a company from its intangible fixed assets. These are supplemented by various definitional provisions taken from the legislation concerning close companies.

11. Mr Halford represented the Commissioners before us, and we are grateful to him for guiding us through the Schedule 29 provisions in the context of the accounting standards relating to intangible assets which form the starting point for the statutory provisions. Those provisions allow a deduction, by way of debit, in certain circumstances for corporation tax purposes for accounting charges for amortisation or impairment recognised in a company's accounts in respect of expenditure by the company on intangible fixed assets or goodwill.

12. Section 84(1), Finance Act 2002 provides:

> *Schedule 29 to this Act has effect with respect to gains and losses from a company's intangible fixed assets.*

13. Part 2 of Schedule 29 relates to debits in respect of intangible fixed assets (all the legislation is in terms of intangible fixed assets, but paragraph 4 provides that the provisions apply to goodwill – the relevant asset in this appeal – as they apply to an intangible fixed asset). Paragraph 7 provides:

> *7(1) This Part provides for debits to be brought into account by a company for tax purposes in respect of –*
>
> *(a) expenditure on an intangible fixed asset that is written off for accounting purposes as it is incurred (see paragraph 8);*
>
> *(b) writing down the capitalised cost of an intangible fixed asset-*
>
> *(i) on an accounting basis (see paragraph 9), or*
>
> *(ii) on a fixed-rate basis (see paragraphs 10 and 11); and*
>
> *(c) the reversal of a previous accounting gain in respect of an intangible fixed asset (see paragraph 12).*

14. Our concern in this appeal is with the writing down of the capitalised cost of goodwill on an accounting basis, which is dealt with in paragraph 9. Paragraph 9 provides that where in a company's accounting period an amount in respect of the company's capitalised expenditure on goodwill is recognised in determining in the accounts of the company its profits or losses, then a proportion of such expenditure is allowable for computing the company's taxable profits for that accounting period (that is, is brought in as a debit). Paragraph 9(1) is in these terms:

> *9(1) Where in a period of account a loss is recognised in determining a company's profit or loss in respect of capitalised expenditure on an intangible fixed asset –*
>
> *(a) by way of amortisation, or*
>
> *(b) as a result of an impairment review,*
>
> *a corresponding debit shall be brought into account for tax purposes.*

Paragraph 9(6) provides that for these purposes "capitalised" means capitalised for accounting purposes.

15. The manner in which the amount of the debit for tax purposes in such a case is calculated is set out in paragraphs 9(3), 9(4) and 9(5). There is no issue between the parties as to the calculation which is to be made in this case should the Appellant be entitled to a debit in respect of its capitalised expenditure on goodwill, and therefore it is not necessary to consider these rules of calculation.

16. The entitlement a company has to a debit for capitalised expenditure on goodwill by reason of paragraph 9 is subject to the commencement and transitional provisions set out in Part 14 of Schedule 29. It is the application of these provisions, as they relate to the question of whether the Appellant is to be treated as having acquired the goodwill in question before or after the relevant commencement date, which is the issue in dispute between the parties.

17. Paragraph 117 introduces Part 14:

> *117(1) The commencement date for the purposes of this Schedule is 1st April 2002.*
>
> *(2) In this Part –*

> *"after commencement" means on or after that date and "before commencement" means before that date; and*
>
> *"the existing law" means the law as it was before commencement.*

18. Paragraph 118 is headed "Application of Schedule to assets created or acquired after commencement". Paragraph 118(1) is the provision relevant to this appeal. It is in these terms:

> *118(1) Except as otherwise expressly provided, the provisions of this Schedule apply only to intangible fixed assets of a company ("the company") that –*
>
> *(a) are created by the company after commencement, or*
>
> *(b) are acquired by the company after commencement from a person who at the time of the acquisition is not a related party in relation to the company, or*
>
> *(c) are acquired by the company after commencement from a person who at the time of the acquisition is a related party in relation to the company in the cases specified in sub-paragraph (2).*
>
> *As to when assets are regarded as created or acquired, see paragraphs 120 to 125.*

19. The parties are agreed that paragraph 118(1)(a) has no application in this case – although the Appellant acquired the goodwill in question on or after 1 April 2002 (by purchase from Mr Marshall on 12 May 2006), the goodwill was not "created" by the Appellant after the commencement date.

20. The parties are also agreed that paragraph 118(1)(c) has no application in this case – it is not necessary therefore to set out the cases specified in paragraph 118(2) (which, broadly, concern an acquisition from a related company, or an acquisition from any related party where the goodwill was created after the commencement date – it is common ground in this case that the relevant goodwill was created before the commencement date).

21. The dispute between the parties is whether paragraph 118(1)(b) applies in the Appellant's case. The Appellant argues that it does, so that the provisions of Schedule 29 apply to the relevant goodwill because that goodwill should be treated, in the particular circumstances, as acquired by the Appellant from a party (Mr Marshall) who at the time of acquisition (12 May 2006) was not a related party in relation to the Appellant. The Commissioners argue that paragraph 118(1)(b) does not apply to the relevant goodwill (and accordingly the provisions of Schedule 29 are not available to the Appellant) because that goodwill was acquired on 12 May 2006 (and therefore after commencement) from Mr Marshall who at the time of such acquisition was a related party in relation to the Appellant.

22. Paragraph 120 is headed "Assets regarded as created or acquired when expenditure incurred" and, so far as relevant, is in these terms:

> *120(1) This paragraph has effect for the purposes of paragraph 118 ... and applies to all intangible assets except those to which paragraph 121 or 122 applies (certain internally-generated assets).*
>
> *(2) An intangible asset to which this paragraph applies is regarded as created or acquired after commencement to the extent that expenditure on its creation or acquisition is incurred after commencement.*
>
> *As to whether expenditure on the creation or acquisition of the asset was incurred after commencement, see paragraphs 123 to 125.*

23. Only paragraph 123(1) is relevant to this appeal. It provides:

> *123(1) For the purposes of paragraph 120 ... the general rule is that expenditure on the acquisition of an asset is treated as incurred when it is recognised for accounting purposes.*

24. As will be apparent, it is necessary to ascertain the circumstances in which, for paragraph 118(1)(b) purposes, a person is regarded as a related party in relation to the company seeking to obtain a debit for goodwill written down in its accounts. Paragraph 95, headed "Meaning of 'related party'" deals with this. Paragraph 95(1) provides, so far as relevant to this case:

> *95(1) For the purposes of this Schedule a person ("P") is a "related party" in relation to a company ("C") in the following cases:*
>
> ...
>
> *Case Three*
>
> *C is a close company and P is, or is an associate of –*
>
> *(a) a participator in C, or*
>
> *(b) a participator in a company that has control of, or holds a major interest in, C.*

25. Paragraph 100(1) gives the definition for Schedule 29 purposes of "participator", in relation to a close company, being a person who is a participator for the purposes of the close company provisions in the Income and Corporation Taxes Act 1988 ("Taxes Act 1988"), except that it does not include a person who by reason only of being a loan creditor of a company is a participator for those purposes.

26. The close company provisions in the Taxes Act 1988 give us, for Schedule 29 purposes, both the definition of "close company" and the definition of "participator". Section 414 Taxes Act 1988 defines a "close company" to include a company "which is under the control of five or fewer participators, or of participators who are directors." It is common ground between the parties in this appeal that at all material times the Appellant was a close company within this definition.

27. Section 417(1) Taxes Act 1988 gives the definition of "participator" in the following terms (disregarding those matters which concern loan creditors who, as we have mentioned, are excluded from the "participator" definition as it applies for Schedule 29 purposes):

417(1) For the purposes of this Part, a "participator" is, in relation to any company, a person having a share or interest in the capital or income of the company, and, without prejudice to the generality of the preceding words, includes –

(a) any person who possesses, or is entitled to acquire, share capital or voting rights in the company;

(b) ...;

(c) any person who possesses, or is entitled to acquire, a right to receive or participate in distributions of the company (construing "distributions" without regard to section 418) ...; and

(d) any person who is entitled to secure that income or assets (whether present or future) of the company will be applied directly or indirectly for his benefit.

In this subsection references to being entitled to do anything apply where a person is presently entitled to do it at a future date, or will at a future date be entitled to do it.

28. Applying these provisions to identify more particularly the issue between the parties, the Commissioners argue that Mr Marshall, by reason of his shareholding in the Appellant on and after 12 May 2006, was a "participator" in the Appellant for Schedule 29 purposes, and therefore was a "related party" in relation to the Appellant at the time the Appellant acquired the relevant goodwill, so that by reason of paragraph 118(1)(b) the provisions of Schedule 29 conferring a right to a debit for the amount by which goodwill is amortised do not apply to the Appellant. The Appellant argues that these various provisions, as they should be applied purposively to the facts of the case viewed realistically, should have effect so as to disregard Mr Marshall's shareholding, in which case the Appellant's circumstances fall within paragraph 118(1)(b) (the Appellant having acquired the goodwill from a person who was not then a "related party" in relation to the Appellant), and therefore the Appellant is entitled to a debit as provided by Schedule 29.

The evidence and the findings of fact

29. We had in evidence before us a hearing bundle and a supplemental hearing bundle. The documents in those bundles comprised the various agreements dated 12 May 2006 relating to the Appellant's purchase from Mr Marshall of the business and assets of a property management business and related businesses, and the related transactions with Estate and Asset Management Limited; the relevant statutory accounts and corporation tax computations of the Appellant; the correspondence between the Appellant and the Commissioners in relation to the matter in dispute, including the closure notice issued by the Commissioners and their amendment to the Appellant's corporation tax return for 2008; various forms and papers filed at Companies House in relation to the allotment of shares by the Appellant to Mr Marshall and matters relating to the 12 May 2006 transactions.

30. Neither party adduced witness evidence, although in the course of the hearing Mr Rutland, who was closely involved in the 12 May 2006 transactions, made some

observations as to the facts, and Mr Halford had the opportunity to question him on those matters, and so we have taken that as evidence.

31. In preparation for the hearing the parties agreed a statement of facts, in the following terms:

(1) The Appellant was incorporated on 18 March 2005 with the name Marsh & Parsons Property Management Limited. On 16 June 2005 its name was changed to Marsh & Parsons Estate and Asset Management Residential and Commercial Limited, which was its name at the time of the transactions described below. Its name was later changed to Blenheims Estate and Asset Management Limited, in March 2007. It has at all material times been UK-resident.

(2) Following incorporation, David Marshall (**'Mr Marshall'**) held one ordinary share of £1 in the Appellant. Prior to the transactions described below, he was the Appellant's sole shareholder and director, and the Appellant had not commenced trading.

(3) Prior to the transactions described below, Mr Marshall carried on, as sole trader, a business of property management and surveying. He had carried on this business since before 1 April 2002 (the commencement date of the applicable tax legislation).

(4) On 12 May 2006, Mr Marshall entered into an Agreement (Business Transfer Agreement or **'BTA'**) with the Appellant, completion of which took place immediately on signing, and under which he sold to the Appellant his property management and surveying business and all its assets (except insurance policies, financial records, cash and debtors), including goodwill, for aggregate consideration of £565,000 to be satisfied by the allotment by the Appellant to Mr Marshall of 564,999 fully paid up ordinary shares of £1 each in the Appellant. The consideration shares were issued immediately. In consequence, Mr Marshall remained the sole shareholder of the Appellant, being the legal and beneficial owner of 565,000 ordinary shares of £1 each; and the Appellant acquired the goodwill of the business previously carried on by him.

(5) Very shortly afterwards, on the same day (12 May 2006), Mr Marshall entered into:

(a) a share sale and purchase agreement (the **'Share Purchase Agreement'**) with a company named Estate and Asset Management Limited (the **'Share Purchaser'**) for the sale by him to the Share Purchaser of 480,250 ordinary shares of £1 each in the Appellant (representing 85% of the Appellant's issued share capital), completed immediately after execution, for consideration of £480,250 (of which £315,250 was payable on completion and the balance payable in later instalments); and

(b) an Option Agreement with the Share Purchaser, under which, in consideration of payment by the Share Purchaser of £84,750, Mr Marshall granted the Share Purchaser an option, exercisable by the Share Purchaser at any time between 12 May 2006 and 4 June 2007, to purchase 84,750 shares in the Appellant (representing the balance of 15% of its issued share capital) for £1.

(6) The Share Purchaser was at all material times under the control of Mr Michael Rutland, within the meaning of the term 'control' as that term is defined in s.416(2) Taxes Act 1988 (namely, he exercised control over its affairs). The Share Purchaser was therefore a close company within the meaning in s.414 Taxes Act 1988. The Appellant was also a close company at all material times within the meaning in s.414 Taxes Act 1988, being controlled until 12 May 2006 by Mr Marshall, and thereafter by the Share Purchaser, itself a close company.

(7) The transaction outlined in (5) above was a wholly commercial arrangement and there is no connection between Mr Marshall and the Share Purchaser (or its shareholders).

(8) In February 2007, the Share Purchaser exercised the option granted to it under the Option Agreement dated 12 May 2006, thereby acquiring the 84,750 shares in the Appellant which were the subject of the option. At that point, Mr Marshall thereby ceased to hold any more shares in the Appellant, and the Share Purchaser became the sole shareholder of the Appellant.

(9) Note 7 to the Appellant's unaudited accounts for its accounting period ending on 31 December 2006 records goodwill additions of £565,000 (to be amortised over 20 years) and an amortisation charge of £14,125 for the year. The Appellant's unaudited accounts for the next accounting period, ending on 31 December 2007, include amortisation of £28,250. In 2008, the directors changed the Appellant's accounting policy and decided that the goodwill should be written off over the period of 5 years from the date when the Appellant acquired the business, 12 May 2006. Therefore the unaudited accounts for the Appellant's accounting period ending on 31 December 2008 (the **'2008 period'**) include total amortisation of £240,125 (comprising, more precisely, amortisation of £113,000 plus an 'impairment write-down' of £127,125). In the Appellant's corporation tax self-assessment return ('Appellant's tax return') for the 2008 period, filed with the Commissioners on or around 2 October 2009, the Appellant claimed to deduct this charge of £240,125 from its profits for corporation tax purposes. This is the deduction that is the subject of the closure notice amendment under appeal.

(10) By letter dated 23 August 2010, the Commissioners opened an enquiry under paragraph 24 of Schedule 18 to Finance Act 1998 into the Appellant's tax return for the 2008 period.

(11) On 12 April 2011, the Commissioners completed and closed their enquiry into the Appellant's tax return for the 2008 period, making a Revenue amendment to the return to disallow the deduction of £240,125 claimed for amortisation and/or impairment of goodwill, together with consequential amendments.

(12) By letter to the Commissioners dated 10 May 2011, the Appellant appealed under paragraph 34(3) of Schedule 18 to Finance Act 1998 against the amendment, and requested an independent review by the Commissioners under section 49E Taxes Management Act 1970 (**'TMA 1970'**). On 17 November 2011 the conclusions in the closure notice were upheld on review by an independent officer of the Commissioners under section 49E TMA 1970.

(13) The Appellant notified its appeal to the Tribunal under section 49H TMA 1970 by Notice of Appeal dated 17 December 2011.

32. At the hearing Mr Rutland retracted from this statement the previously agreed proposition that Mr Marshall was the beneficial owner of 565,000 ordinary shares of £1 each in the Appellant. He argued, as we refer to below, that the effect of all the documents entered into on 12 May 2006, taken together, was that although Mr Marshall was the legal owner of those shares (and of the remaining 84,750 shares following the purchase of the balance by the Share Purchaser), he was not the beneficial owner of them.

33. The Business Transfer Agreement provides for the sale by Mr Marshall to the Appellant "as at the Transfer Date" of the Business and its assets (including goodwill), and the consideration of £565,000 is to be satisfied by the allotment to Mr Marshall by the Appellant of the "Consideration Shares", being 564,999 fully paid up ordinary shares of £1 each in the capital of the Appellant. Completion of the Business Transfer Agreement is to take place at the offices of the Appellant's solicitors on the signing of the Business Agreement. At Completion Mr Marshall is required to deliver or cause to be delivered to the Appellant the business assets agreed to be sold, and various executed agreements by way of assignment of contracts and similar matters. When Mr Marshall has complied with these provisions the Appellant is required to allot the Consideration Shares to Mr Marshall. The Transfer Date is "the close of business on the date on which Completion occurs".

34. The goodwill which is included in the sale of the Business and its assets is defined as "the goodwill and other know-how of the Business and the exclusive right for the [Appellant] to represent itself as carrying on the Business in succession to [Mr Marshall] and to use all trade names associated with the Business subject to the Restrictions". The significance of the "Restrictions" in relation to the use of the trade names used by the Business is dealt with below.

35. The Business Transfer Agreement was signed by Mr Marshall as vendor and also by him on behalf of the Appellant as purchaser.

36. The Return of Allotment of Shares filed electronically by the Appellant with Companies House shows 565,000 ordinary shares allotted to Mr Marshall on 12 May 2006.

37. The Share Purchase Agreement provides for Mr Marshall to sell and the Share Purchaser to purchase 480,250 ordinary shares in the Appellant for cash consideration (paid in four tranches) with effect from Completion. Completion is to take place at the offices of Mr Marshall's solicitors immediately after execution of the Share

Purchase Agreement. At Completion Mr Marshall is required to deliver to the Share Purchaser duly completed and executed stock transfer forms in favour of the Share Purchaser in respect of the 480,250 ordinary shares in the Appellant together with the relevant share certificates.

38. Included in the covenants given by Mr Marshall in the Share Purchase Agreement to the Share Purchaser is a covenant that Mr Marshall is the sole legal and beneficial owner of the ordinary shares in the Appellant which are to be sold by the Share Purchase Agreement or are to be the subject of the Option.

39. Included in the warranties given by Mr Marshall in the Share Purchase Agreement to the Share Purchaser is a warranty that "The [Appellant] has never traded, has no subsidiaries and has not incurred any liability of whatever nature save for those liabilities expressly assumed by it pursuant to the terms of the Business Transfer Agreement".

40. The Share Purchase Agreement refers to the Business Transfer Agreement as "the business transfer agreement entered into between [Mr Marshall] and [the Appellant] on the date of this Agreement a copy of which is annexed to this Agreement".

41. At Completion of the Share Purchase Agreement Mr Marshall is required to deliver to the Share Purchaser "the duly executed Option". The Option is defined as "the option to be entered into by [Mr Marshall] in favour of [the Share Purchaser] in relation to the Option Shares in the agreed form". The Option Shares are defined as 84,750 ordinary shares in the Appellant.

42. The Option Agreement provides that in consideration of the payment by the Share Purchaser to Mr Marshall of consideration of £84,750 and entry by the Share Purchaser into the Share Purchase Agreement, Mr Marshall grants to the Share Purchaser an option to purchase 84,750 shares of £1 each in the capital of the Appellant registered in the name of Mr Marshall for the purchase price of £1. The consideration of £84,750 is not refundable to the Share Purchaser in any circumstances except in connection with certain specified claims which the Share Purchaser might have under the Share Purchase Agreement (including claims for breach of covenant or warranty by Mr Marshall).

43. The Option may be exercised at any time during the period from 12 May 2006 to 4 June 2007.

44. The Business Transfer Agreement, the Share Purchase Agreement and the Option Agreement were drafted by Roxburgh and Milkins LLP, solicitors, who acted for the Appellant and the Share Purchaser. Mr Marshall was separately advised and his solicitors negotiated and reviewed the documents on his behalf.

45. Completion of the Business Transfer Agreement took place before the Share Purchase Agreement and the Option Agreement were entered into.

46. There was a commercial reason for Mr Marshall retaining a shareholding of 15% of the share capital of the Appellant. Mr Marshall formerly held a number of businesses trading under the "Marsh & Parsons" name, including an estate agency business. On his sale of the estate agency business (which took place in June 2005) Mr Marshall agreed with the purchaser of that business that the block management business retained by Mr Marshall (that is, the business acquired by the Appellant) could be carried on by Mr Marshall personally under the name "Marsh & Parsons Estate and Asset Management Residential and Commercial", or through a limited company under the name "Marsh & Parsons Estate and Asset Management Residential and Commercial Limited" for a period of 12 months from 7 June 2005 and thereafter (if the business were carried on through a limited company) until "the date on which [Mr Marshall] shall cease to be the registered holder and beneficial owner of not less than 15 per cent. of the issued equity shares in" that limited company.

47. This restriction on the use of the "Marsh & Parsons Estate and Asset Management Residential and Commercial" name is referred to in the Business Transfer Agreement. In Clause 2.1 of that agreement Mr Marshall agrees to sell the business and its assets, including "the Name", which is defined as "Marsh & Parsons Estate and Asset Management Residential and Commercial ... as used in the business on or before the Transfer Date subject to the Restrictions". "The Restrictions" are defined to mean the restrictions placed on Mr Marshall with respect to that name as described above.

48. On 21 February 2007 the shareholders in the Appellant resolved to change the name of the Appellant to Blenhiems Estate and Asset Management Limited. A Certificate of Incorporation on Change of Name was issued by the Registrar of Companies on 5 March 2007 recording that the Appellant was from that date incorporated under that changed name. Subsequently the name was corrected to Blenheims Estate and Asset Management Limited.

The parties' submissions

49. Both parties produced skeleton arguments, with the Appellant also producing a supplemental skeleton argument in response to the Commissioners' skeleton argument. Extensive oral submissions were made at the hearing.

The Appellant's submissions

50. Mr and Mrs Rutland made the case for the Appellant. They submitted that the Business Transfer Agreement, the Share Purchase Agreement and the Option Agreement were intended to operate as a single transaction, and that the agreements were interdependent in that no one agreement would have been entered into had the others not been entered into or about to be entered into. There was no commercial reason for Mr Marshall to transfer the business and goodwill to the Appellant if the Appellant was not to be immediately thereafter sold to the Share Purchaser. All the documents were drafted by the solicitors acting for the Share Purchaser. The essential

commercial agreement was that Mr Marshall sold his business and the Appellant, as a subsidiary of the Share Purchaser, purchased that business.

51. In support of this submission Mr and Mrs Rutland referred to the terms of the Business Transfer Agreement, which provided that the sale of the business and the business assets (including goodwill) should take place "as at the Transfer Date", which is defined as "the close of business on the date on which Completion occurs". Although it is provided that Completion takes place on the signing of the Business Transfer Agreement, the sale of the goodwill is agreed to take place at a later time, and by that later time Mr Marshall had agreed to sell his 85% shareholding in the Appellant.

52. They further submitted that Mr Marshall's 15% holding in the Appellant was merely a nominal interest of no value by reason of the terms of the Option Agreement: Mr Marshall had received full value for that shareholding as payment for the Option, and had he sought to exercise any shareholder rights the Share Purchaser would have exercised the Option to prevent him from doing so. Those shares carried full rights to income and capital, but it was inconceivable that the controlling shareholders would have permitted the Appellant to make any distributions to shareholders (and thus to Mr Marshall's benefit) whilst he retained his holding.

53. The Appellant accepted that, to claim the debit for the accounting charge for amortisation and impairment of the goodwill acquired by the Appellant, it had to satisfy the terms of paragraph 118(1)(b), and that the issue is whether at the time the Appellant acquired the goodwill from Mr Marshall he was a "related party" in relation to the Appellant. The Appellant's case is that he was not such a related party at that time because he was not then a "participator", if the relevant legislation is properly construed.

54. The Appellant argued that a purposive construction should be adopted when applying paragraph 118(1)(b) to the transactions entered into on 12 May 2006, as those transactions are realistically viewed having regard to their commercial unity rather than their individual component steps. The Appellant referred to *W T Ramsay Ltd v CIR* [1982] AC 300 (HL) and the development of the rule of statutory construction in the subsequent authorities, including *Collector of Stamp Revenue v Arrowtown Assets Ltd* [2003] HKCFA 46; *Barclays Mercantile Business Finance Ltd v Mawson (Inspector of Taxes)* [2004] UKHL 51; and *Astall and Another v HMRC* [2009] EWCA Civ 1010.

55. Viewing the transactions realistically as a commercial unity in the circumstances of the Appellant's acquisition of the relevant goodwill, there was no genuine commercial connection between the person transferring the goodwill and the person acquiring it. In particular, Mr Marshall would not have entered into the Business Transfer Agreement transferring the goodwill to the Appellant unless the Share Purchaser had shortly thereafter entered into the Share Purchase Agreement and the Option Agreement, and so, viewing matters commercially, he had no interest in the Appellant so as to constitute him a participator in the Appellant at the time the Appellant acquired the goodwill.

56. The Appellant referred to the purpose of paragraph 118 as expressed in the Commissioners' Explanatory Notes to the Finance Bill introducing Schedule 29. It is clear that the Schedule 29 provisions should apply where a company acquires goodwill on or after 1 April 2002 where that goodwill already existed at that date. The restriction is that if the goodwill existed at that date and remains held within the same economic family, then a transfer within that economic family is not an occasion where the Schedule 29 provisions should apply. This, in commercial reality, is not the Appellant's circumstances – in commercial reality Mr Marshall was divesting himself entirely of the goodwill to a company which was a wholly-owned subsidiary of the Share Purchaser, a party totally unrelated to Mr Marshall.

57. Therefore the Appellant is not precluded by paragraph 118 from claiming under the provisions of Schedule 29 a debit for the accounting charge in respect of the amortisation and impairment of the goodwill acquired by the Appellant on 12 May 2006.

The Commissioners' submissions

58. Mr Halford, for the Commissioners, pointed out that the Appellant faces two insurmountable hurdles on the facts in relation to the terms of paragraph 118(1)(b).

59. First, paragraph 118(1)(b) looks at an exact point in time: was the goodwill in question acquired by the Appellant from a person *who at the time of the acquisition* was not a participator in the Appellant? The only answer, on the facts, is that this was not the case. At the time the Appellant acquired the goodwill from Mr Marshall, Mr Marshall was the only shareholder of the Appellant. This was the case when he and the Appellant entered into the Business Transfer Agreement, and it remained the case on completion of that agreement (when further shares were issued to Mr Marshall). No purposive construction of paragraph 118(1)(b) can result in this factual position being disregarded.

60. Even if Mr Marshall entered into the Business Transfer Agreement with the intention of then entering into the Share Purchase Agreement (and the tribunal has no evidence as to Mr Marshall's intentions), on completion of the Business Transfer Agreement he was the legal and beneficial owner of all the shares in the Appellant (in no way was the Business Transfer Agreement conditional upon the parties entering into the Share Purchase Agreement), and gave a covenant to that effect in the Share Purchase Agreement. Clearly therefore the Share Purchase Agreement assumes that the Business Transfer Agreement has been entered into and completed before the Share Purchase Agreement is entered into. It was conceivable, legally and commercially, that Mr Marshall, having transferred the business to the Appellant, would not then proceed to sell his 85% shareholding in the Appellant – there was no remote and synthetic contingency as in the *Arrowtown Assets Ltd* and *Astall* cases.

61. Secondly, Mr Marshall remained a shareholder in the Appellant until the exercise of the Option in February 2007 and therefore both at the time of the acquisition of the goodwill by the Appellant, and for some months thereafter, was a related party in relation to the Appellant. This is so because the "participator"

definition in section 417 Taxes Act 1988, applied by paragraph 95, is in terms of a "person who possesses ... share capital ... in the company". The holding of a single share, even if that share is not held beneficially, renders a person a "participator". In Mr Marshall's case he held the shares beneficially – until the exercise of the Option he was entitled to any dividends declared in respect of the Appellant's ordinary shares, and he was entitled to vote on any shareholder resolutions: that was the case even if in practice it was unlikely that dividends would be paid, or any shareholder resolutions proposed. Again, no purposive construction of paragraph 118(1)(b) can result in this factual position being disregarded.

62. Mr Halford pointed out that Mr Marshall, the Appellant, and the Share Purchaser chose to structure matters in the way they did in order to achieve a particular commercial outcome, namely to permit the Appellant to continue trading for a period under the "Marsh & Parsons" name without causing Mr Marshall to be in breach of covenants he had given to third parties. If they had structured it so that the Share Purchaser (or a wholly-owned subsidiary) had purchased the business and goodwill directly, the terms of paragraph 118(1)(b) would have been satisfied, but that was not the transaction they chose, or were able, to enter into. If parties choose to structure a transaction in a particular way, or are constrained to do so for what they consider to be good commercial reasons, they must accept the legal and tax consequences of the transaction they enter into: *Spectros International plc v Madden* [1997] STC 114 at p 136.

63. Turning to the construction of paragraph 118 (1)(b), Mr Halford said it is necessary to understand the purposes of Schedule 29 and the "mischief" at which paragraph 118 is directed. Schedule 29, in relation to goodwill, introduced relief for amortisation or impairment charges in respect of goodwill, but it is clear from paragraphs 117, 118 and 121 that relief is available to a company only where the goodwill is newly created by the company on or after 1 April 2002, or it is newly acquired after that date from an unrelated party. Although the Explanatory Notes are in terms of goodwill remaining held "within the same economic family", Parliament enacted a stricter test in the case of "close companies" – defining "related party" by reference to "participator" extends the concept beyond that of "the same economic family". The language nevertheless is clear, and permits no scope for a purposive construction.

64. Even if it were accepted that the three agreements entered into on 12 May 2006 comprised a "composite transaction", that is irrelevant to the question whether, immediately upon the signing of the Business Transfer Agreement, Mr Marshall was (or was not) a "participator" in the Appellant. He clearly was, by reason of his shareholding at that time and, additionally, by reason of the shares he acquired by the terms of that agreement: *HSP Financial Planning Ltd v HMRC* [2011] UKFTT 106 (TC). There is no way in which paragraph 118(1)(b) can be applied to the facts so as to reach the conclusion that, at the time of the acquisition of the goodwill, Mr Marshall was not a related party in relation to the Appellant.

65. The Commissioners further submitted that Mr Marshall continued as a "participator" until the Option was exercised in relation to his 15% shareholding in

the Appellant. The Option did not disentitle Mr Marshall from enjoying the rights of beneficial ownership of the shares, and on the authority of *J Sainsbury plc v O'Connor* [1991] STC 318 (CA) and *Wood Preservation Ltd v Prior* (1968) 45 TC 112 (CA) he remained beneficial owner of the shares. That must also have been the intention of both Mr Marshall and the Share Purchaser, since beneficial ownership of the 15% holding was a requirement of compliance with the restrictions placed on the use of the Appellant's name.

66. The principle of the rule of construction developed in the *Ramsay* line of authorities is that the courts, by applying the relevant statutory provisions, construed purposively, to the relevant transactions viewed realistically, should disregard parts of a transaction or composite transaction that have no commercial substance or purpose. Mr Marshall's continuing shareholding had a real commercial purpose, and cannot be disregarded.

67. Accordingly, the Appellant acquired the goodwill from a person, Mr Marshall, who at the time of the acquisition was, for the purposes of Schedule 29, a related party in relation to the Appellant, and paragraph 118(1)(b) therefore has effect to deny the Appellant any claim for debit for the accounting charges in respect of the amortisation or impairment of goodwill.

Discussion and conclusions

68. The issue we have to decide is whether the Appellant is entitled to bring into account for its corporation tax purposes a debit for the accounting charges appearing in its accounts for the amortisation and impairment of the goodwill it acquired on 12 May 2006 when it purchased its business. The Appellant claims that it is entitled to do so under the provisions of paragraph 9.

69. However, the goodwill in question existed at 1 April 2002, which is the commencement date for the Schedule 29 provisions under which the Appellant seeks a debit, and therefore the Appellant must show that its circumstances are within the commencement and transitional provisions of Schedule 29. These, so far as relevant to the Appellant's circumstances, are to be found in paragraph 118(1)(b), which provides that the provisions of Schedule 29 apply only to goodwill that is acquired by a company after 1 April 2002 from a person who at the time of the acquisition is not a related party in relation to the company.

70. The Appellant was, at 12 May 2006, for tax purposes, a "close company", and paragraph 95 provides that a person is a related party in relation to such a company if that person is a "participator" in that company. Paragraph 100 applies (with certain limitations not relevant to the Appellant's case) the definition of "participator" in section 417(1) of the Taxes Act 1988, so that any person who possesses, or is entitled to acquire, share capital in a company is a participator in that company.

71. Therefore the issue to be decided resolves itself into this question: did the Appellant acquire the goodwill in question from a person who at the time of the acquisition was not a person possessing share capital in the Appellant? If the answer

to that question is in the negative – that is, the person from whom the goodwill was acquired was at the time of acquisition a shareholder in the Appellant – then the Appellant has no entitlement to claim the debit it seeks to claim.

72. The Appellant acquired the goodwill in question by the Business Transfer Agreement from Mr Marshall, who sold his property management business and its assets (including goodwill) to the Appellant on 12 May 2006, when the Business Transfer Agreement was signed by the two parties, and with completion of the sale occurring on signing. The Business Transfer Agreement was not subject to any conditions precedent or other provisions which in any way suspended its effect. When it was signed it therefore had immediate effect, and in particular the Appellant at that point in time acquired the goodwill. Nothing further was required to perfect the disposal of the goodwill by Mr Marshall and its acquisition by the Appellant.

73. The provisions of paragraphs 120 and 123 should be mentioned in this connection. In their terms they appear to be relevant only to determine whether in any particular case goodwill is to be regarded as acquired before or after the commencement date, 1 April 2002, for the Schedule 29 provisions. If they have wider application (so as to determine when the Appellant is treated as acquiring the goodwill – which on any basis must be after that commencement date), we consider that they apply so that the Appellant acquired the goodwill upon entering into the Business Transfer Agreement, when the Appellant unconditionally incurred the expenditure on the goodwill by agreeing to issue, and immediately thereafter issuing, the consideration shares to Mr Marshall – we take that to be the point in time when that expenditure is recognised for accounting purposes.

74. The Appellant advanced an argument that since the Business Transfer Agreement provided that "[Mr Marshall shall sell to the [Appellant] and the [Appellant] shall purchase as at the Transfer Date the Business" and the assets, and since "Transfer Date" is defined as "the close of business on the date on which Completion occurs", the goodwill was not acquired until the close of business on 12 May 2006. That is to misunderstand the meaning and purpose of the expression "as at the Transfer Date" in this context. It is not the point in time at which the sale and purchase has legal effect but the point in time by reference to which the assets sold are identified or measured. Customarily in the sale of a business that "as at" point in time is the close of business, when, from the books of account, fluctuating matters such as stock, debtors and cash holdings can be ascertained to the satisfaction of both parties and allowing the vendor to close its accounts as to the business sold and the purchaser to open its accounts as to the business it has purchased.

75. Immediately before the parties entered into the Business Transfer Agreement Mr Marshall held the only share then issued in the share capital of the Appellant. This remained the case at the time the Business Transfer Agreement was signed, and therefore at the time the Appellant acquired the goodwill. At that time, therefore, Mr Marshall was a "participator" in the Appellant, and was therefore, for the purposes of paragraph 118(1)(b), a related person in relation to the Appellant from whom the Appellant acquired the goodwill. The answer to the question posed above (did the Appellant acquire the goodwill in question from a person who at the time of the

acquisition was not a person possessing share capital in the Appellant?) is in the negative and therefore paragraph 118(1)(b) has effect to deny the Appellant the right to claim the debit it seeks in relation to the amortisation and impairment of the goodwill acquired from Mr Marshall.

76. It is not necessary to go further, but it is the case that the Appellant issued further shares to Mr Marshall in satisfaction of the consideration of £565,000 given for its purchase of the business and the assets of that business, including the goodwill. Those shares (comprising 564,999 fully paid up ordinary shares of £1 each in the capital of the Appellant) were issued and allotted to Mr Marshall on completion of the sale and purchase, that is, immediately on the signing of the Business Transfer Agreement. By reason of the issue of those shares also Mr Marshall was, at the time the Appellant acquired the goodwill, a related party in relation to the Appellant for the purposes of paragraph 118(1)(b). That follows from the tribunal decision in the *HSP Financial Planning* case, with which we agree.

77. As we understand it, the Appellant advances two distinct, but related, arguments to challenge this straightforward conclusion. The first argument is that, by reason of the other transactions effected on 12 May 2006, Mr Marshall was not a "participator" in the Appellant at the time the Appellant acquired the goodwill. The second argument is that if paragraph 118 is construed with regard to its purpose and applied to all the transactions effected on 12 May 2006, then, again, Mr Marshall was not a "participator" in the Appellant at the relevant time. Neither of those arguments, in our judgment, succeeds.

78. The first argument looks to the Share Purchase Agreement and to the Option Agreement, both entered into on 12 May 2006. The Appellant argues that, although they were entered into shortly after the Business Transfer Agreement was entered into, they were, so to speak, all part and parcel of the same transaction, so that Mr Marshall was not the beneficial owner of any of the shares in the Appellant at the time the Appellant acquired the goodwill: at that time he had already agreed to sell both the one share previously held and all the shares issued, or to be issued, on completion of the sale of the business.

79. We have no doubt that on the morning of 12 May 2006 all the relevant parties expected – even intended – that by close of business that day all the documents they had carefully negotiated and whose terms they had agreed in draft would be executed. But that is a quite different matter from saying that, as a matter of law, all those documents comprised a single transaction, or followed inevitably in succession.

80. We have already noted that the Business Transfer Agreement was not subject to any conditions precedent. We further note that it was not dependent in any way upon Mr Marshall and the Share Purchaser entering into either the Share Purchase Agreement or the Option Agreement. Nor, when he signed the Business Transfer Agreement, was Mr Marshall legally obliged to enter into the Share Purchase Agreement. Put differently, and as Mr Halford correctly pointed out, after the Business Transfer Agreement had been signed and completed, Mr Marshall was free, if he so chose, to move on to sign the Share Purchase Agreement and the Option

Agreement, or to refuse to do so. Neither, incidentally, could he have compelled the Share Purchaser at that point to enter into the Share Purchase Agreement had the Share Purchaser had a change of heart. Of course, it was a remote eventuality that Mr Marshall would refuse to sign those further documents, but it was a legal possibility, and that is what we are concerned with.

81. It is clear from the terms of the documents themselves that the Business Transfer Agreement was signed and completed before the documents relating to the share sale were entered into, and that the Business Transfer Agreement had effect prior to, and independently of, those other documents. In the Share Purchase Agreement Mr Marshall specifically covenants that he "is the sole legal and beneficial owner of the Shares and the Option Shares" and has the right to transfer them free from third party rights (the Shares and the Option Shares together comprise the original share Mr Marshall held in the Appellant and the shares issued on completion of the Business Transfer Agreement). Mr Marshall would not have been in a position to give such a covenant had he been subject to a legal compulsion, at the time he entered into the Share Purchase Agreement, to sell those shares.

82. Further, it must have been the intention of the parties that Mr Marshall should so legally and beneficially own, after the Business Transfer Agreement had been completed, the shares in the Appellant, since only from that position could he continue to own in that capacity the 15% shareholding necessary for him to ensure compliance (for the commercial advantage of both himself and the Appellant) with the restrictions imposed on him in relation to the "Marsh & Parsons" name. We deal with this further below.

83. The Appellant's first argument therefore does not succeed. Mr Marshall was a "participator" in the Appellant at the time the Appellant acquired the goodwill from him, and nothing in the Share Purchase Agreement or the Option Agreement caused that to be otherwise.

84. The Appellant's second argument looks both to the related nature of the documents entered into on 12 May 2006 and to the way in which paragraph 118(1)(b) should be construed having regard to that relationship. In summary the Appellant argues that in applying that provision we should have regard to its purpose and to the realistic view of the events of 12 May 2006.

85. There is a preliminary question as to whether a taxpayer is entitled to pray in aid a purposive construction of legislation. For obvious reasons it is the Revenue authorities, in the United Kingdom and elsewhere, which normally seek to apply taxing statutes to contrived events or circumstances on the basis of a construction which gives effect to the wider legislative purpose. In so far as that approach can be said to be a rule of statutory construction it must, if the circumstances warrant it being applied at all, apply for a taxpayer's benefit as well as for the benefit of a Revenue authority. We cannot see that there is inherently anything partial in such a rule or approach or in the way it should be applied.

86. A recent statement of the approach a court or tribunal should take in applying a purposive approach to the construction of a statutory provision (and one which both parties cited to us) is found in the judgment of Arden LJ in the *Astall* case, first at [34] and then at [44]:

> "[34] Both *Mawson* and *SPI* [*IRC v Scottish Provident Institution* [2004] UKHL 52] emphasise the need to interpret the statute in question purposively, unless it is clear that is not intended by Parliament. The court has to apply that interpretation to the actual transaction in issue, evaluated as a commercial unity, and not be distracted by any peripheral steps inserted by the actors that are in fact irrelevant to the way the scheme was intended to operate. *SPI* also illustrates another important point, namely that the fact that a real commercial possibility has been injected into a transaction does not mean that it can never be ignored. It can be disregarded if the parties have proceeded on the basis that it should be disregarded."

> "[44] .... In my judgment, applying a purposive interpretation involves two distinct steps: first, identifying the purpose of the relevant provision. In doing this, the court should assume that the provision had some purpose and Parliament did not legislate without a purpose. But the purpose must be discernible from the statute: the court must not infer one without a proper foundation for doing so. The second stage is to consider whether the transaction against the actual facts which occurred fulfils the statutory conditions. This does not, as I see it, entitle the court to treat any transaction as having some nature which in law it did not have but it does entitle the court to assess it by reference to reality and not simply to its form."

87. First, then, we must identify the purpose of paragraph 118(1)(b), seeking to discern that purpose from the statute. That purpose may be discerned from paragraphs 118(1) and (2). Schedule 29 introduced radical changes to the means of computing profits and losses for corporation tax purposes, including permitting a debit or deduction for a charge made in a company's accounts when and to the extent that goodwill is amortised or the value of goodwill is reduced upon an impairment review. Those changes were introduced with effect from 1 April 2002, and Parliament was concerned to ensure that a company did not have the benefit of the relevant provisions where, on that date, it already held the goodwill. That purpose is apparent from paragraphs 117 and 118 which set out commencement and transitional provisions, so that the Schedule 29 provisions apply only where the goodwill is created by, or acquired by, the claimant company on or after that commencement date.

88. Parliament recognised that this simple rule was open to abuse, in that a company could acquire goodwill after the commencement date from a related party where that goodwill had been created or acquired by that related party before the commencement date – the related party was not in a position to take the benefit of the Schedule 29 provisions, and it therefore it should not, by transferring the goodwill to a company to which it was related, provide that company with such a benefit. Paragraphs 118(1)(b) and (c) prevent such an abuse (sub-paragraph (1)(c) is, in effect, expanded by the terms of sub-paragraph (2)).

89. In enacting such provisions Parliament set out clearly who is to be regarded as a "related party" for these purposes (a "participator" in the case of a close company seeking the benefits of Schedule 29) and the point at which the relationship of company to related party is to be determined (at the time of the acquisition of the goodwill).

90. We consider the statutory purpose to be clear from the terms of the statute. The Finance Bill Explanatory Notes produced by the Commissioners add nothing - they speak of "the same economic family" when referring to the company/related party relationship, but that imprecise term can offer no basis for construing the clear language of the statute other than by reference to its own terms – and in any event they cannot be taken to be an expression of what Parliament (as opposed to the executive) intended.

91. The second stage in applying a purposive interpretation "is to consider whether the transaction against the actual facts which occurred fulfils the statutory conditions." In that process the transaction should not be treated as having a different nature in law from that which is its actual nature, but its nature in law should be assessed "by reference to reality and not simply to its form". The statutory purposive interpretation has to be applied "to the actual transaction in issue, evaluated as a commercial unity", disregarding "any peripheral steps inserted by the actors that are in fact irrelevant to the way the scheme was intended to operate."

92. The Appellant says, in effect, that the actual transaction in issue, evaluated as a commercial unity, is that the Appellant acquired the goodwill from Mr Marshall when he had ceased to have any interest in the Appellant. The statutory purpose – which allows a Schedule 29 claim where there is no relationship between transferor and transferee of the goodwill when the goodwill is acquired – applied to the Appellant's transaction evaluated as a commercial unity is achieved.

93. That, in our view, is to stretch matters too far in the Appellant's particular circumstances. It is the fact, as we have already decided, that at the time the Appellant acquired the goodwill from Mr Marshall he, by virtue of his holding of shares in the Appellant, was a related party in relation to the Appellant. We cannot treat the transaction "as having some nature which in law it did not have", and simply ignore this fact. If we are to assess the transaction "by reference to reality and not simply to its form" we have to recognise that an aspect of its reality is that Mr Marshall held shares in the Appellant before, at the time of, and after he transferred the goodwill to the Appellant, and that he held those shares both legally and beneficially.

94. Further, it was no mere accident that this was the case. The transaction was carefully constructed to ensure that this was so. If the Appellant wished to continue using its name, which included the valuable trade name "Marsh & Parsons", Mr Marshall, the Appellant and the Share Purchaser had to ensure that Mr Marshall complied with the restrictions in this regard placed upon him in an earlier transaction. Those restrictions required that he should not cease to be "the registered holder and beneficial owner of not less than 15 per cent of the issued equity shares in the

[Appellant]". All the parties to the various transactions entered into on 12 May 2006 intended that the terms of this restriction should be met. They intended that to be the case whether those transactions were viewed individually and independently (which we judge they should be so viewed) or whether they were viewed (as the Appellant would have us view them) as a single or composite transaction.

95. Reverting to the language of Arden LJ, the arrangements whereby Mr Marshall retained a shareholder interest were not "peripheral steps inserted by the actors that are in fact irrelevant to the way the scheme was intended to operate": they were key to the commercial imperative that, for a certain time after the Appellant came into the ownership of the Share Purchaser, it continued to use its corporate name. We heard no evidence as to the commercial significance of that name, but given that the major business asset acquired by the Appellant was goodwill, and given that a trade name almost invariably comprises a significant part of goodwill, we can understand why the parties went to the lengths they did to comply with the restrictions in this regard placed upon Mr Marshall. In any event, what matters here is not our view as to the likely value of the Appellant's corporate name, but the fact that the parties clearly felt that, for a period (about nine months) from the date the Share Purchaser acquired its majority interest in the Appellant, it should keep its corporate name, and that they structured matters so as to achieve that purpose and effect.

96. Therefore we cannot accept the Appellant's argument that a purposive construction of paragraph 118(1)(b) in accordance with the line of authorities stemming from the *Ramsay* case results in the Appellant being regarded as acquiring the goodwill in question from a person who was not, in the terms of those provisions, a related party in relation to the Appellant.

97. For these reasons we dismiss the Appellant's appeal.

Right to apply for permission to appeal

98. 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.

EDWARD SADLER
TRIBUNAL JUDGE

RELEASE DATE: 8 May 2013

Authorities before the tribunal and not referred to in the decision:

Parway Estates Ltd v CIR (1958) 45 TC 135
Pepper v Hart [1992] STC 898 (HL)
Melluish v BMI (No 3) Ltd [1996] 1 AC 454 (HL)
R (on the application of Westminster City Council) v National Asylum Support Service [2002] UKHL 38
Greenbank Holidays Limited v HMRC [2011] UKUT 155 (TCC)
Whittles (Inspector of Taxes) v Uniholdings Ltd (No 3) [1996] STC 914
Countess Fizwilliam and others v IRC [1993] STC 502
Lynall and another v IRC [1971] 3 All ER 914