Neutral Citation: [2022] UKFTT 173 (TC)

Case Number: TC08500

FIRST-TIER TRIBUNAL
TAX CHAMBER

By remote video hearing

Appeal reference: TC/2019/01559

Capital Gains Tax – entrepreneurs' relief – Taxation of Chargeable Gains Act 1992, sections 169I and 169S – whether or not the appellant held at least 5% of the ordinary share capital of the company and at least 5% of the voting rights by virtue of that holding – no - whether or not shares were held on trust for the appellant – no – appeal dismissed

Heard on: 1–3 March 2022
Judgment date: 31 May 2022

Before

TRIBUNAL JUDGE RICHARD CHAPMAN QC

Between

SEAMUS KAVANAGH

Appellant

and

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Mr Julian Hickey, counsel, instructed by Warrener Stewart Ltd, Chartered Accountants

For the Respondents: Miss Elizabeth Wilson QC, leading counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs

DECISION

INTRODUCTION

1. This appeal is against HMRC's denial of entrepreneurs' relief in respect of Mr Kavanagh's disposal of his shareholding in Badger Group (Holdings) Limited ("the Company"). The Company was a holding company for a group carrying on business as (amongst other things) an estate agency. It is HMRC's position that Mr Kavanagh did not make a qualifying business disposal for the purposes of the Taxation of Chargeable Gains Act 1992 ("TCGA 1992"), Part V, Chapter 3 because he did not (whether as a registered owner or as a beneficial owner) hold at least 5% of the ordinary share capital of the Company and did not hold at least 5% of the voting rights of the Company by virtue of that holding. It is Mr Kavanagh's case that whilst his registered ownership and voting rights were 4.997285706531% ("the Registered Shares"), he was the beneficial owner of the remaining 0.002714293469% of the shares ("the Disputed Shares"), which was very slightly less than one share.

2. The parties agreed that the determinative question in this case is whether or not the Disputed Shares were held on trust for Mr Kavanagh. For the reasons set out in this decision, I find that they were not.

STATUTORY FRAMEWORK

3. The statutory framework was not in dispute and forms the backdrop to the factual and legal issues set out below. It is therefore convenient to set this out at this stage.

4. Entrepreneurs' relief reduces the rate of capital gains tax on a variety of qualifying business disposals. One such qualifying disposal is a material disposal of shares in an individual's personal company.

5. Section 169I of TCGA 1992 sets out the conditions for a material disposal of business assets. The relevant subsections for present purposes provide as follows:

> "169I. Material Disposal of business assets
>
> (1) There is a material disposal of business assets where –
>
> (a) an individual makes a disposal of business assets (see subsection (2)), and
>
> (b) the disposal of business assets is a material disposal (see subsections (3) to (7)).
>
> (2) For the purposes of this Chapter a disposal of business assets is –
>
> …
>
> (c) a disposal of one or more assets consisting of (or of interests in) shares in or securities of a company.
>
> …
>
> (5) A disposal within paragraph (c) of subsection (2) is a material disposal if condition A, B, C or D is met.
>
> (6) Condition A is that, throughout the period of 1 year ending with the date of the disposal –
>
> (a) the company is the individual's personal company and is either a trading company or the holding company of a trading group, and
>
> (b) the individual is an officer or employee of the company or (if the company is a member of a trading group) of one or more companies which are members of the trading group.
>
> …"

6. Section 169S of TCGA 1992 defines a "personal company" as follows:

> "169S. Interpretation of Chapter
>
> …
>
> (3) For the purposes of this Chapter 'personal company', in relation to an individual, menas a company –
>
> (a) at least 5% of the ordinary share capital of which is held by the individual, and
>
> (b) at least 5% of the voting rights in which are exercisable by the individual by virtue of that holding."

7. Section 989 of the Income Tax Act 2007 in the form in force at the relevant time defines "ordinary share capital" as follows:

> "*'ordinary share capital'*, in relation to a company, means all the company's issued share capital (however described), other than capital the holders of which have a right to a dividend at a fixed rate but have no other right to share in the company's profits."

8. Section 60 of TCGA 1992 provides as follows with the effect that property held by a person as nominee or as trustee for another person absolutely entitled as against the trustee is to be treated for these purposes as the same as if the beneficiary was the legal owner:

> "60. Nominees and bare trustees
>
> (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).
>
> (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."

9. For completeness, I was referred to section 68 of TCGA 1992, which defines "settled property" as any property held in trust other than property to which section 60 applies. However, Mr Kavanagh's case is that the other shareholders were trustees for him and that he was absolutely entitled to the Disputed Shares and so, if correct, section 60 would be applicable rather than section 68.

FINDINGS OF FACT

10. I read the witness statements of Mr Kavanagh and his witnesses, Mr Addinall, Mr Gray and Mr Stevens. Each of these witnesses gave oral evidence. Much of the evidence was uncontroversial, although the parties of course make opposing submissions as to its legal effect. Crucially, however, HMRC disputes Mr Kavanagh's factual assertion that all parties to the relevant transactions intended or understood that the other shareholders held the Disputed Shares on trust for him. As such, I separate out below the uncontroversial background from the disputed facts.

The uncontroversial background

11. The following background was not in dispute and I make findings of fact as follows.

12. Mr Kavanagh was a director of Townends (Egham) Limited ("Egham"), which, since February 1999, had carried on business as an estate agency as a joint venture between Mr Kavanagh and Townends Group Limited ("Townends"). Mr Kavanagh and Townends each owned 50% of the shares in Egham. Townends was itself a group of estate agency companies and had three shareholders: Mr Anthony Addinall (who owned 3/7 of Townend's shares), Mr Richard Gray (who also owned 3/7 of Townend's shares), and Mr John Stevens (who owned the remaining 1/7 of Townend's shares).

13. On 31 December 2002, Townends transferred its 50% shareholding in Egham to Mr Addinall, Mr Gray and Mr Stevens in the same proportions as their interests in Townends.

14. The Company was incorporated on 13 June 2005 with the name Townends Group (Holdings) Limited. The Company changed its name to Badger Holdings Limited on 1 February 2006 and then to Badger Group (Holdings) Limited on 15 June 2006. The shareholders of the Company were Mr Addinall, Mr Gray and Mr Stevens, in the same proportions as for Townends. On 25 October 2005, the Company acquired the shares in Townends and so became the parent company of Townends and its group companies.

15. In December 2005, the Company decided to bring Egham into its group by acquiring the shares in Egham from Mr Kavanagh, Mr Addinall, Mr Gray and Mr Stevens in return for shares to be issued in the Company ("the New Shares"). It was agreed by all parties involved that 50% of the New Shares would be allotted to Mr Kavanagh and 50% would be allotted between Mr Addinall, Mr Gray and Mr Stevens in the same ratio as they held their shares in Egham. These would be in addition to the shares which Mr Addinall, Mr Gray and Mr Stevens already held in the Company. In turn, it was agreed that the New Shares would represent 10% of the share capital in the Company. This arose from a valuation of Egham as compared with the value of the Company's group.

16. Mr Peter Warrener of Warrener Stewart acted for the Company, Egham and all shareholders in the transaction. The rationale for the acquisition and the calculation of the number of New Shares is set out in Mr Warrener's file note dated 15 January 2006 as follows:

> "In line with the medium term strategy of maximising the value for the various stakeholders, it is considered to be in the interests of the shareholders of Townends Group (Holdings) Limited and Townends (Egham) Limited to integrate Townends (Egham) into the group.
>
> This could be particularly beneficial given the senior role played by Seamus Kavanagh who is a 50% shareholder and principal director or Townends (Egham) Limited as well as group sales director.
>
> Given the imprecise nature of the inter-company relationship, turnover would seem to be the appropriate measure of the value of the respective entities to the enlarged Group. We would therefore propose to integrate Townends Egham on the basis of the relationship to which its 2005 turnover bears to the enlarged group.
>
> …"

17. The file note attached a schedule setting out a comparison of turnover, a calculation of the number of New Shares to be issued, the respective allotments, the total shareholdings when added to existing shares, and relevant percentages. The schedule includes the following:

> "Townends Group Holdings Limited

Shareholdings

	Shares	%		Step 2	Subtotal	
AAA	14,211	42.86%	42.86%	789	15,000	40.72%
RJG	14,211	42.86%	42.86%	789	15,000	40.72%
JDS	4,736	14.28%	14.28%	264	5,000	13.57%
SK				1,842	1,842	5.0000%
	33,158	100.00%	100.00%	3,684	36,842	100.00%

Merge Egham on the basis of turnover producing 3,684 shares."

18. Heads of terms were then provided which state that they were for discussion purposes only. The key terms were summarised in a letter to HMRC dated 16 March 2006 seeking clearance for reasons other than in respect of entrepreneurs' relief. This letter included the following:

> ""Commercial Background
>
> …
>
> The shareholders of the two companies have decided between themselves that a fair ratio for such an exchange would be to issue such number of shares in the parent company as would recognise Egham as representing 10% of the enlarged group thereby giving S Kavanagh a 5% interest in the group after the share exchange.
>
> Transaction
>
> 1. On or after 30 April 2006 ("the Effective Date") the shareholders of Townends (Egham) Limited will exchange their shares in Townends (Egham) Limited for the number of shares in Badger Holdings Limited as indicated below:

Name	*Number of £1 ordinary shares in Townends (Egham) Limited*	*Number of 1p shares in Badger Holdings Limited*
AA Addinall	214	789
RJ Gray	214	789
JD Stevens	72	264
S Kavanagh	500	1,842

> i.e. such number of shares in Badger Holdings Limited as once issued will represent 10% of the then issued share capital of the company."

19. Clearance from HMRC was obtained on 28 March 2006 and, in due course, the parties resolved to move forward with the transaction. This resulted in a share transfer agreement dated 26 September 2006 ("the Share Transfer Agreement"), which referred to the shareholdings in Egham as "the Target Shares" and the newly issued shares in the Company as "the Consideration Shares". These were in the same numbers as set out in the Heads of Terms and

the clearance request (Mr Kavanagh receiving 1,842 shares (being the Registered Shares), Mr Addinall and Mr Gray receiving 789 shares each, and Mr Stevens receiving 264 shares). The Share Transfer Agreement made no reference to any percentages.

20. The Consideration Shares were duly issued and allotted in the same number as set out in the Share Transfer Agreement. The total number of Consideration Shares therefore amounted to 3,684. The total number of shares in the Company therefore increased to 36,842 of which Mr Addinall and Mr Gray were each registered as owning 15,000, Mr Stevens was registered as owning 5,000, and Mr Kavanagh was registered as owning 1,842. A schedule produced by Warrener Stewart set out these movements and set out percentages of shareholdings next to the numbers of shares. The percentage next to Mr Kavanagh's Registered Shares was 4.997285706531%.

21. On 22 July 2009, all existing shares in the Company were redesignated as "A Ordinary Shares", and a new class of "B Ordinary Shares" created. B Shares were then issued and allotted (including to Mr Kavanagh) on 21 April 2010 and 21 July 2011. The B Ordinary Shares do not give rise to any voting rights and, the parties agree, are not relevant to any of the matters which arise in this appeal as the requisite 5% holding (whether legal or beneficial) must be in respect of the A Ordinary Shares. For completeness, all further references in this decision to "the Shares" relate to the ordinary shares prior to 22 July 2009, all references to the "A Shares" relate to the A Ordinary Shares after 22 July 2009, and all references to the "B Shares" relate to the B Ordinary Shares after 22 July 2009.

22. At the same time as the original redesignation of the shares, the shareholders and the Company entered into a shareholders' agreement dated 22 July 2009 ("the Shareholders' Agreement"). The Shareholders' Agreement included the following:

> "Background
>
> …
>
> (B) Each Shareholder is the registered and beneficial owner of the following ordinary shares of £0.01 each in the Company, for which each Shareholder has paid consideration at par value:
>
> | | | |
> |---|---|---|
> | 1. | Anthony Albert Addinall | 15,000 ordinary shares of £0.01 each |
> | 2. | Richard John Gray | 15,000 ordinary shares of £0.01 each |
> | 3. | John Derek Stevens | 5,000 ordinary shares of £0.01 each |
> | 4. | Seamus Kavanagh | 1,842 ordinary shares |
>
> …
>
> 16. Assignment
>
> 16.1. None of the Shareholders shall assign or transfer or purport to assign or transfer any rights or obstacles hereunder without the prior written consent of other Shareholders.
>
> 16.2. For the avoidance of doubt, the Shareholders acknowledge that they may not transfer, mortgage, charge, assign or otherwise dispose or encumber directly or indirectly any of their shares."

23. Mr Kavanagh continued to manage the Company as Sales Director and subsequently as Managing Director. There was a large degree of consensus and mutual trust between the shareholders, which meant that there was rarely (if ever) a contentious vote in the Company's meetings. In any event, the shareholders all recognised Mr Kavanagh's shareholding (whether just below 5% or at 5%) was insufficient to make a difference on its own if there ever had been a division between the shareholders. All dividends were paid upon the basis of the precise number of A Shares held by each of the shareholders. In Mr Kavanagh's case, this meant that he received the dividends due on his Registered Shares rather than upon the basis of a calculation of 5% of the total dividends. Mr Kavanagh's B Shares were separate to his A Shares and effectively represented a bonus share scheme recognising his (and others') contribution to the running of the Company.

24. On 31 January 2017, all A Shares and B Shares were purchased by Willow Bidco Limited for the total sum of £22,785.253. A schedule prepared by Warrener Stewart for the purposes of the appeal provides that £19,716,792.28 was paid to shareholders in respect of A Shares, and that Mr Kavanagh was paid £985,839.62 in respect of his A Shares. The schedule also (correctly) identified that this was 5% of the total sums paid in respect of the A Shares.

25. On 13 June 2018, HMRC opened an enquiry into Mr Kavanagh's income tax return for the year ending 5 April 2017 in which he (through his accountants) had applied entrepreneurs' relief to his disposal of his A Shares in the Company. This resulted in a closure notice dated 8 November 2018 in which HMRC amended Mr Kavanagh's return to increase the capital gains tax payable from £282,096.10 to £554,847.50.

26. Mr Kavanagh requested a review on 5 December 2018. HMRC upheld the closure notice by a review decision dated 12 February 2019. Mr Kavanagh appealed to the Tribunal by a notice of appeal dated 13 March 2019.

The disputed facts

27. The key disputed facts were as to the agreements or understanding relating to Mr Kavanagh's interest in the A Shares and, in particular, whether or not there was an agreement or understanding that the Disputed Shares would be held by the other shareholders on trust for Mr Kavanagh.

The witness evidence

28. Mr Kavanagh asserted in his witness statement that it was the intention of each of the shareholders that indirect ownership of the Disputed Shares (which he referred to as, "the balance of 0.00028%") would be held for him absolutely. In oral evidence, Mr Kavanagh said that it was very clear that his A Shares would represent a full 5%. 5% was what was discussed at the beginning of the share exchange and this was a recognition of the fact that he contributed 5% of the value to the transaction. There was an imprecise number of shares and the difference was identified by the other shareholders as being held by Mr Kavanagh. It was put to Mr Kavanagh that the calculation that Egham had a turnover of 10% of Townend's turnover upon which the calculation of the additional shares to be issued was based was a sensible and commercial approach rather than exact figures. Mr Kavanagh said that this was the formula used. Indeed, he had thought that the economic value of Egham was closer to between 12% and 13%. It was also put to Mr Kavanagh that the shareholders all knew that the New Shares to be issued would be just under 10% of the total shares in the Company. Mr Kavanagh said that this was correct, but he worked on the principle that they all recognised the imprecision and all recognised that he had 5% of the shares. He said that the other shareholders were holding what he called, "the slither of imperfection" for him when they got to the point of selling the Company. He further said that there was an understanding and an agreement that the

shareholders would hold the equivalent shares to make his interest 5%. Miss Wilson put to Mr Kavanagh that the Shareholders' Agreement was inaccurate on his own case as it said that the shareholders were the beneficial owners of their registered shares. Mr Kavanagh disagreed with this, stating that the formal position was that he owned 1,842 shares but that there was a side agreement that the other shareholders held the difference for him in what he referred to as "an absolute position". The essence was that he was perceived as a 5% shareholder and there would have been a conversation that the other shareholders would hold the missing "slither" for him collectively to bring his interest to 5%. However, on being pressed for the detail of what was said and with whom, Mr Kavanagh frankly and fairly accepted that he could not give any specifics.

29. The witness statements of Mr Addinall, Mr Gray and Mr Stevens were in substance identical. Each of them stated that, in their view, Mr Kavanagh's 5% shareholding in the Company comprised direct ownership of 4.99972% of the shares and indirect ownership of the balance of 0.00028% (which, I note, was itself a rounded up figure) by virtue of the other shareholders holding that percentage on trust for Mr Kavanagh. They each said that they believed that Mr Kavanagh owned 5% of the shares (including voting rights) and that to the extent that he did not do so directly then the balance was held solely for his benefit and at his direction. They also noted that Mr Kavanagh received 5% of the consideration on the sale of the A Shares in 2017.

30. Mr Addinall was asked about the fact that Mr Kavanagh had estimated Egham's value at about 12% to 13% of Townends' value but that this was negotiated and agreed at 10%. Mr Addinall stated that he had left the negotiation to the professional advisers and that the odd 1% or 2% would not have mattered. Mr Addinall accepted that the turnovers and figures involved were rounded rather than exact. He said that he always worked to Mr Kavanagh receiving 5% of the shares and that he did not equate it to the specific allocation. Mr Addinall repeatedly stated that his understanding was that Mr Kavanagh held 5% of the shares and that everybody operated on that basis. Mr Addinall did not remember there being any discussion about Mr Kavanagh only being registered with 4.999% of the shares or as to what would happen to the additional percentage that took him to 5%. Indeed, he said that the shortfall was not something that they knew about at the time as they always worked on the basis that Mr Kavanagh had 5%.

31. Mr Gray said that at the time of the issue of the additional shares he assumed that the additional shares were 10% and would not have noticed that they were slightly less than 10%. He focussed on the percentages, not the actual number of shares. He said that there were no other oral agreements are side agreements as to the shares that Mr Kavanagh would own. Mr Gray accepted that in reaching his view of the percentage shareholdings he was rounding the decimal points on the schedules showing the percentage shares. Mr Gray also accepted that he regarded himself as the full beneficial owner of the shares that were registered in his name, as set out in the Shareholders' Agreement. Further, Mr Gray accepted that he owned each of the 15,000 shares registered in his name and that he was the only owner of those shares.

32. Mr Stevens said that he was the complete owner of his 5,000 A Shares in the fullest sense of legal owner and beneficial owner. He accepted that the respective ownership of the shares was accurately reflected in the transactional documents. Mr Stevens said that he did not consider the rounding up or down of percentage shares. He was always aware of roughly what his shareholding was but did not really look at it until sale. Mr Stevens said that he had not appreciated that Mr Kavanagh's shares had been rounded up or down as, right from the very start, he had thought of him as having 5% of the shares. In the end, he would have been prepared to give Mr Kavanagh funds from his percentage as he deserved it. However, he said that the first time he realised there was a problem with Mr Kavanagh's shareholding was in 2018. He

accepted that until 2018 he was clear that he was the absolute legal and beneficial owner of the shares registered in his name.

Findings

33. It is clear that all the shareholders were working on the assumption that Mr Kavanagh's shares equated to 5% of the total A Shares in the Company. However, I find that this is because the shareholders were treating the number of Mr Kavanagh's Registered Shares as approximating to 5% of the total A Shares. I also find that there was no agreement or understanding that any shares not registered in Mr Kavanagh's name were held by any of the other shareholders on his behalf. I reach these findings for the following reasons.

34. First, the shareholders approached the share exchange on a commercial and approximate basis. The comparison of the turnover between Egham and Townends was not exact and was itself the result of a negotiation. The witness evidence and documents show that the parties were rounding the percentage shareholdings to manageable figures. Indeed, the precise number of decimal points used changes across various documents and in some cases do not add up to 100%. Mr Hickey placed particular reliance in his submissions upon the file note dated 15 January 2006, in which 5% was written next to Mr Kavanagh's proposed 1,842. However, the total percentages on that schedule added to 100.01% and so were inaccurate. Given that it is clear that the other percentages were rounded, it is not clear why Mr Kavanagh's 5% should be honoured whereas the other shareholders' rounded percentages should not.

35. Secondly, in their oral evidence Mr Addinall, Mr Gray and Mr Stevens referred to their understanding that Mr Kavangah held 5% of the A Shares. I take this to mean that they thought his Registered Shares equated to 5% of the A Shares rather there being any suggestion that he did not have legal title to his full complement of shares. The weight of evidence was that the fact that the Registered Shares were less than 5% was not addressed or even appreciated by the parties. Mr Addinall thought in terms of 5% and did not know about any shortfall until this appeal. Mr Gray accepted that he was rounding his percentages. Mr Stevens only thought about his own shareholding in what he called a rough and ready way and so only thought in terms of broad percentages. I further find that there were no discussions as to any "slither" of shares (as Mr Kavanagh called it). Mr Addinall, Mr Gray and Mr Stevens said that there were no side agreements or discussion as to what would happen to the Disputed Shares.

36. I note that this oral evidence was at odds with the witness statements of Mr Addinall, Mr Gray and Mr Stevens. Mr Hickey submitted that I must take into account the fact that they were not able to recall all of the details surrounding the transactions and only able to described what happened in general terms. However, the witness statements were signed in January 2020 and so are not much less affected by the passage of time. Crucially, they are broad assertions of belief as to the beneficial interest, have little detail, and do not match the oral evidence. I prefer the oral evidence of these witnesses as it was more detailed than their witness statements, was given in a credible manner and was couched in terms of definite knowledge that the beneficial interests were not discussed at all rather than attempts at recalling the detail of what was discussed.

37. I also note that this oral evidence was at odds with Mr Kavanagh's evidence that there was a discussion about what would happen to the "slither of imperfection" as he called it; namely, the Disputed Shares. When pressed, Mr Kavanagh was not able to give any detail as to what was said or with whom. Indeed, Mr Kavanagh's assertion was that the other shareholders would hold the beneficial interest in the Disputed Shares for him, but he did not make clear whether he agreed this with each of the other shareholders, with one or more shareholder on behalf of the others, or whether the Disputed Shares would be held equally between them or in proportion to their own shareholdings. This lack of clarity contrasts with

the clarity of the evidence of Mr Addinall, Mr Gray and Mr Stevens. I am satisfied that Mr Kavanagh was not seeking to mislead the Tribunal with his evidence. However, I prefer the evidence of Mr Addinall, Mr Gray and Mr Stevens (who were of course Mr Kavanagh's own witnesses) to the evidence of Mr Kavanagh in this regard and I find that Mr Kavanagh's assertions and belief that there would have been discussions about the beneficial interest in the Disputed Shares were wrong.

38. Thirdly, Mr Addinall, Mr Gray and Mr Stevens were clear that they treated themselves as beneficial owners of the entirety of the shares registered in their names. This is reinforced by the fact that the Shareholders' Agreement states that each of the registered owners are the beneficial owners of their shares. Whilst the Shareholders' Agreement was entered into in July 2009 and so cannot be a factor in considering the agreements and understanding when the New Shares were issued and allotted in 2006, this is still indicative of the understanding of the parties as to how the shares were held in July 2009 and is consistent with the oral evidence of Mr Addinall, Mr Gray and Mr Stevens.

39. Fourthly, and most importantly, the parties clearly intended the New Shares to be divided as to 50% to Mr Kavanagh and as to 50% between Mr Addinall, Mr Gray and Mr Stevens. That is exactly what happened. In the same way that all the shareholders treated Mr Kavanagh's Registered Shares as being 5% of the total number of A Shares, they also treated all the New Shares as 10% of the total number of A Shares. I find from the documents and the witness evidence that the overriding intention was that, however the number of New Shares was to be arrived at, there would be an equal division of those shares between Mr Kavanagh of the one part and the other shareholders of the other in recognition of Mr Kavanagh being a 50% owner of Egham. There was no evidence of any agreement or understanding that Mr Addinall, Mr Gray and Mr Stevens would be receiving fewer New Shares (whether in terms of their legal interest or their beneficial interest) than Mr Kavanagh.

40. Fifthly, the Disputed Shares were not addressed or even relevant to the shareholders until the opening of the tax enquiry. The Disputed Shares could make no difference to the outcome of votes (which in any event rarely happened other than on a consensual basis). Mr Kavanagh did not take issue with dividends being paid upon the basis of his Registered Shares, albeit that any difference would have been minimal and all parties assumed that this equated to 5% of the dividends. Whilst a full 5% of the consideration for the A Shares was paid to Mr Kavanagh, there was no mention of this being because of the Disputed Shares.

ISSUES

41. As set out above, the central question is as to whether or not the Disputed Shares were held on trust for Mr Kavanagh. The following issues arise from Mr Hickey and Miss Wilson's helpful submissions:

(1) Whether or not the Disputed Shares were held on express trust for Mr Kavanagh.

(2) Whether or not the Disputed Shares were held on constructive trust for Mr Kavanagh.

(3) Whether or not the Disputed Shares were held on resulting trust for Mr Kavanagh.

42. Mr Hickey confirmed during his submissions that Mr Kavanagh did not seek to argue that there was an estoppel by convention (or, indeed, any other estoppel) in this case. I also note that it was common ground that any references to "implied trusts" during the written and oral submissions were effectively referring collectively to constructive trusts or resulting trusts.

43. It was common ground that the members' register was only determinative of the legal interest in the shares and not the beneficial interest. It was also common ground that a company's decisions are binding even without the requisite formal resolutions if they are

approved informally by all shareholders pursuant to the *Duomatic* principle (see *Re Duomatic Ltd* [1969] 2 Ch 365).

EXPRESS TRUST

The legal principles

44. Mr Hickey relied upon the well-known case of *Knight v Knight* (1840) 3 Beav 148, in which Lord Langdale MR set out the "three certainties" for the creation of an express trust at 172-173 (albeit in the context of wills trusts but also of general application to express trusts). Miss Wilson did not dispute that these principles were the starting point.

> "But it is not every wish or expectation which a testator may express, nor every act which he may wish his successors to do, that can or ought to be executed or enforced as a trust in this Court; and in the infinite variety of expressions which are employed, and of cases which thereupon arise, there is often the greatest difficulty in determining, whether the act desired or recommended is an act which the testator intended to be executed as a trust, or which this Court ought to deem fit to be, or capable of being enforced as such. In the construction and execution of wills, it is undoubtedly the duty of this Court to give effect to the intention of the testator whenever it can be ascertained; but in cases of this nature and in the examination of the authorities which are to be consulted in relation to them, it is, unfortunately, necessary to make some distinction between the intention of the testator and that which the Court has deemed it to be its duty to perform; for of late years it has frequently been admitted by Judges of great eminence that, by interfering in such cases, the Court has sometimes rather made a will for the testator, than executed the testator's will according to his intention; and the observation shews the necessity of being extremely cautious in admitted any, the least, extension of the principle to be extracted from a long series of authorities, in respect of which such admissions have been made.
>
> As a general rule, it has been laid down, that when property is given absolutely to any person, and the same person is, by the giver who has power to command, recommended, or entreated, or wished, to dispose of that property in favour of another, the recommendation, entreaty, or wish shall be held to create a trust.
>
> First, if the words are so used, that upon the whole, they ought to be construed as imperative;
>
> Secondly, if the subject of this recommendation or wish be certain; and
>
> Thirdly, if the objects or persons intended to have the benefit of the recommendation or wish be also certain."

45. The parties also agreed that (subject to any required formalities, which were not present in this case) express trusts can be created informally and whether by words or by conduct.

46. The significance of the words used is in their substance rather than their form. In *Re Kayford Ltd* [1975] 1 WLR 279, Megarry J stated as follows at 282:

> "There is no doubt about the so-called "three certainties" of a trust. The subject-matter to be held on trust is clear, and so are the beneficial interests therein, as well as the beneficiaries. As for the requisite certainty of words, it is well settled that a trust can be created without using the words "trust" or "confidence" or the like: the question is whether in substance a sufficient intention to create a trust has been manifested."

47. In *Ong v Ping* [2017] EWCA Civ 2069, Sir Colin Rimer highlighted at [58] that an express trust could be created by conduct even without words:

> "[58] In my view, therefore, if he were provided with the correspondence passing between Mr Hyde and Madam Lim up to and including the letter dated 14 April 1986, the reasonable person would have no hesitation in concluding from it that, when she signed the settlement, Madam Lim understood and intended that the house should thereupon become subject to its trusts. No doubt she made no express oral declaration of trust in such terms, nor was there any evidence that she uttered words to like effect. But the utterance of such words is not an essential pre-requisite to the creation of a trust by way of a declaration. In *Paul v. Constance* [1977] 1 WLR 527, at 531, Scarman LJ said that for there to be a clear declaration of trust 'means that there must be clear evidence from what is said or done of an intention to create a trust' (my emphasis). Bridge and Cairns LJJ both agreed with his judgment, although Bridge LJ identified the requirements of a valid declaration of trust without reference to the declarer's conduct."

48. Certainty of subject-matter does not necessarily require the segregation of the property which is the subject of the trust. In the context of trusts over shares, there is no need to identify any particular shares within a shareholding. In *Hunter v Moss* [1994] 1 WLR 452, Dillon LJ stated as follows at 457-458:

> "It is plain that a bequest by the defendant to the plaintiff of 50 of his ordinary shares in M.E.L. would be a valid bequest on the defendant's death which his executors or administrators would be bound to carry into effect. Mr. Hartman sought to dispute that and to say that if, for instance, a shareholder had 200 ordinary shares in I.C.I, and wanted to give them to A, B, C and D equally he could do it by giving 200 shares to A, B, C and D as tenants in common, but he could not validly do it by giving 50 shares to A, 50 shares to B, 50 shares to C and 50 shares to A D, because he has not indicated which of the identical shares A is to have and which B is to have. I do not accept that. That such a testamentary bequest is valid, appears sufficiently from *In re Clifford* [1912] 1 Ch. 29 and *In re Cheadle* [1900] 2 Ch. 620. It seems to me, again, that if a person holds, say, 200 ordinary shares in I.C.I, and he executes a transfer of 50 ordinary shares in I.C.I, either to an individual donee or to trustees, and hands over the certificate for his 200 shares and the transfer to the transferees or to brokers to give effect to the transfer, there is a valid gift to the individual or trustees/transferees of the 50 shares without any further identification of their numbers. It would be a completed gift without waiting for registration of the transfer: see *In re Rose* [1952] Ch. 499. In the ordinary way a new certificate would be issued for the 50 shares to the transferee and the transferor would receive Q a balance certificate in respect of the rest of his holding. I see no uncertainty at all in those circumstances."

49. I was also referred to *Re Harvard Securities Ltd* [1988] BCC 567, *Lehman Bros International (Europe) Ltd* [2011] EWCA Civ 1544 and *Wilkinson v North* [2018] EWCA Civ 161 to similar effect to *Hunter v Moss*.

Submissions

50. Mr Hickey submitted that certainty of intention arose from the parties' understanding that Mr Kavanagh would have 5% of the shares and votes and their evidence that this was the case. He particularly relied upon the percentage shown on the file note of 15 January 2006 and its accompanying schedule, the heads of terms, the clearance letter, and the distribution of the proceeds of sale in 2017. He further submitted that certainty of subject-matter was fulfilled because the shares were all in the Company in the same manner as in *Hunter v Moss*. Certainty of object was of course not in dispute as the Disputed Shares, if held on trust at all, could only be held on trust for Mr Kavanagh.

51. Miss Wilson submitted that there was insufficient evidence to establish certainty of intention. The share transfer and all other documentation all referred to the number of shares being 1,842. She also noted the absence of any reference to any beneficial interest in the Disputed Shares notwithstanding the carefully drawn transactional documentation. She also submitted that there was insufficient certainty of subject matter because it was not clear how the Disputed Shares were to be divided between Mr Addinall, Mr Gray and Mr Stevens.

Discussion

52. I find that there was insufficient (if any) certainty of intention to give rise to an express trust in this case. As I have already found, there was no discussion at all about the Disputed Shares. As such, there is no evidence that Mr Addinall, Mr Gray or Mr Stevens said anything that could constitute a declaration of trust over the Disputed Shares. The various documentary references to a 5% shareholding are wholly insufficient to establish such an intention as, for the reasons set out above, they were no more than the rounded-up percentage equivalents to the shares to be registered. Crucially, the substance of these documentary references said nothing at all about how any shares were to be held other than as registered. At most, any documentary references to 5% and the parties' understanding that Mr Kavanagh was to be registered with 5% of the shares were shorthand for the exact percentages and so were consistent with the numbers of shares to be registered. Crucially, there cannot have been any intention that Mr Addinall, Mr Gray or Mr Stevens would hold any shares on trust for Mr Kavanagh because all parties thought and intended that the number of shares Mr Kavanagh was to receive was exactly the same as the number of shares Mr Addinall, Mr Gray and Mr Stevens were (between them) to obtain. For the same reasons, there was no conduct giving rise to an intention that Mr Addinall, Mr Gray or Mr Stevens would hold any shares on trust for Mr Kavanagh. Indeed, the only conduct relied upon is the transfer of the shares in Egham to Townends. However, this conduct is also wholly consistent with an intention that Mr Kavanagh would receive 1,842 shares and Mr Addinall, Mr Gray and Mr Stevens would receive a further 1,842 shares between them. Again, it is this equality of intended distribution of the New Shares which strongly militates against any intention that any of Mr Addinall, Mr Gray and Mr Stevens' shares should be held on trust for Mr Kavanagh. If Mr Kavanagh is really saying that Mr Addinall, Mr Gray and Mr Stevens were agreeing to hold some of their pre-existing shares on trust for Mr Kavanagh then, again, there is no evidence of any such declaration or intention.

53. Even if I had found that there was sufficient certainty of intention, I would have found that there was insufficient certainty of subject-matter. This is because there is no evidence as to whose shares were to be held on trust for Mr Kavanagh; in particular, whether Mr Addinall, Mr Gray and Mr Stevens were to hold an equal proportion of their own shares for Mr Kavanagh or in proportions consistent with their own shareholdings.

54. For completeness, I agree with the parties that in this context only Mr Kavanagh could have been the object of the trust.

CONSTRUCTIVE TRUST

55. Mr Hickey only relied upon a constructive trust based upon (in his submission) the existence of a common intention between the parties that the Disputed Shares be held on trust for Mr Kavanagh. There was no dispute between the parties as to the legal principles involved.

The legal principles

56. A constructive trust can arise (amongst other circumstances) where there is a common intention between the parties that one or more of them will have a beneficial interest in the relevant property and the claimant of an interest has acted to his detriment in the belief that he was acquiring such a beneficial interest. Robert Walker LJ summarised the position as follows in *Yaxley v Gotts* [2000] Ch 162 at 180:

> "To recapitulate briefly: 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 an "agreement, arrangement or understanding" actually reached between the parties, and relied on an 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. Section 2(5) expressly saves the creation and operation of a constructive trust."

57. The parties agreed that a common intention trust can arise in a commercial context (see *Kahrmann v Harrison-Morgan* [2019] EWCA Civ 2094 *per* Henderson LJ at [99]). However, in such circumstances the agreements between the parties have particular importance. In *Generator Developments v Lidl UK GmbH* [2018] EWCA Civ 396, Lewison LJ referred to the significance of agreements in a common intention constructive trust in a commercial context at [78]:

> "[78] First, this was a case of commercial parties, advised by lawyers, working at arms' length towards the conclusion of an agreement for a purely commercial enterprise the terms of which were never agreed. Indeed, on many of the important terms the parties were far apart. The application of the principles underpinning the *Pallant v Morgan* equity, in so far as they rest on the doctrine of common intention constructive trust, operate quite differently in a commercial context from the way in which they operate in a domestic context. The principles as expounded by Chadwick LJ are firmly based on the supposed congruence between the principles of proprietary estoppel and the doctrine of common intention constructive trust. But we have seen from *Cobbe* that the House of Lords firmly denied the applicability of proprietary estoppel in a commercial case like this one where each party knows that they are not legally bound. In this case, as in *Cobbe*, there can have been no expectation on either side that the parties were legally bound to each other. If the principles underpinning the *Pallant v Morgan* equity are the same as those underpinning proprietary estoppel (as Chadwick LJ considered them to be) it follows logically that if a proprietary estoppel claim cannot succeed, nor can a claim based on the *Pallant v Morgan* equity. Moreover, in this case there was no common intention, because the parties were still in disagreement about the terms of the proposed enterprise."

58. I note that Lewison LJ was considering a *Pallant v Morgan* equity; where two or more people agree to acquire property in one party's name for the purposes of a joint venture, if that joint venturer subsequently seeks to retain the property for his own benefit, the court will regard him as holding it on constructive trust for the other joint venturers. However, as explained by Lewison LJ, the *Pallant v Morgan* equity is treated as being based upon a common intention constructive trust.

59. As with an express trust, a common intention constructive trust requires identifiable trust property (as does a resulting trust). In *Westdeutsche Landesbank v Islington LBC* [1996] AC 669 ("*Westdeutsche*"), Lord Browne-Wilkinson stated as follows at 705:

> "(iii) In order to establish a trust there must be identifiable trust property. The only apparent exception to this rule is a constructive trust imposed on a person who dishonestly assists in a breach of trust who may come under fiduciary duties even if he does not receive identifiable trust property."

Submissions

60. Mr Hickey submitted that a common intention constructive trust exists because it was the unwavering intention of the other shareholders that he owned 5% of the A Shares. It would be unconscionable for him to be denied a full 5% because he owned 50% of Egham and because

the transfer of Egham to the Company was in exchange solely for the issue of 5% of the A Shares, which represented 50% of the 10% value attributable to Egham in recognition of what it contributed to the enlarged group.

61. Miss Wilson submitted that there was no common intention for the same reasons as she set out in respect of express trusts. She also made the point that a constructive trust also requires certainty of subject matter.

Discussion

62. I find that there was no common intention that Mr Addinall, Mr Gray or Mr Stevens held any of their registered shares on trust for Mr Kavanagh. As I have set out above, I find that none of them regarded themselves as anything other than the full owner of their own shares. They did not have any discussions about the beneficial interest in the shares and did not even consider that Mr Kavanagh had been registered with any less than 5%. Crucially, I find that the overriding common intention was that the New Shares would be divided equally as to 50% to Mr Kavanagh and as to 50% between Mr Addinall, Mr Gray and Mr Stevens. This would be wholly inconsistent with any common intention that part of Mr Addinall, Mr Gray and Mr Stevens' 50% should be held on trust for Mr Kavanagh. Again, the absence of any discussion as to how Mr Addinall, Mr Gray and Mr Stevens would hold their own pre-existing shares means that these could not have been the subject of any common intention constructive trust.

63. My findings as to common intention are sufficient to dispose of the argument in respect of constructive trusts. For completeness, however, I find that it was not unconscionable for Mr Addinall, Mr Gray and Mr Stevens to have retained their shares. Again, the basis for the distribution of the New Shares was that of an equal division of 1,842 shares to Mr Kavanagh and 1,842 shares between Mr Addinall, Mr Gray and Mr Stevens. This common intention was reflected in the Registered Shares. Further, for the same reasons as set out above, I also agree that there was insufficient certainty of subject matter to give rise to a constructive trust.

RESULTING TRUST

The legal principles

64. One of the sets of circumstances in which a resulting trust is presumed to arise is where a person makes a payment towards the purchase of a property or other asset which is vested either in the other party's sole name or in joint names. In such circumstances, the presumption is that the property or other asset is held on trust for the joint purchasers in proportion to their contributions. Another set of circumstances is where an express trust does not exhaust the whole of the beneficial interest in the property or asset (although, as set out below, it is only the first set of circumstances which is relevant to the present case).

65. The parties agreed that the relevant principles were as set out by Lord Browne-Wilkinson in *Westdeutsche* at 708:

> "Under existing law a resulting trust arises in two sets of circumstances: (A) where A makes a voluntary payment to B or pays (wholly or in part) for the purchase of property which is vested either in B alone or in the joint names of A and B, there is a presumption that A did not intend to make a gift to B: the money or property is held on trust for A (if he is the sole provider of the money) or in the case of a joint purchase by A and B in shares proportionate to their contributions. It is important to stress that this is only a presumption, which presumption is easily rebutted either by the counter-presumption of advancement or by direct evidence of A's intention to make an outright transfer: see *Underhill and Hayton, Law of Trusts and Trustees*, pp. 317 et seq.; *Vandervell v. Inland Revenue Commissioners* [1967] 2 A.C. 291, 312 et seq.; *In re Vandervell's Trusts (No. 2)* [1974] Ch. 269, 288 et seq. (B) Where A transfers property to B on express trusts, but the trusts declared do not

> exhaust the whole beneficial interest: *ibid*, and *Quistclose Investments Ltd. v. Rolls Razor Ltd (In Liquidation)* [1970] A.C. 567. Both types of resulting trust are traditionally regarded as examples of trusts giving effect to the common intention of the parties. A resulting trust is not imposed by law against the intentions of the trustee (as is a constructive trust) but gives effect to his presumed intention. Megarry J. in *In re Vandervell's Trusts (No. 2)* suggests that a resulting trust of type (B) does not depend on intention but operates automatically. I am not convinced that this is right. If the settlor has expressly, or by necessary implication, abandoned any beneficial interest in the trust property, there is in my view no resulting trust: the undisposed-of equitable interest vests in the Crown as bona vacantia: see *In re West Sussex Constabulary's Widows, Children and Benevolent (1930) Fund Trusts* [1971] Ch. 1."

66. As set out above, a resulting trust also requires identifiable trust property.

Submissions

67. Mr Hickey submitted that a resulting trust arises because Mr Kavanagh owned 50% of Egham and the transfer of the business was solely in exchange for the issue of a 5% interest in the A Shares. Mr Hickey again noted that the reason for this 5% interest was because it represented 50% of the 10% value attributable to Egham in recognition of what it contributed by turnover to the enlarged group. Mr Hickey relied solely on scenario (A) of *Westdeutsche* in this regard.

68. Miss Wilson submitted that any presumption of resulting trust is rebutted by evidence of the actual intention. She relied upon her earlier submissions to the effect that the actual intention was for Mr Kavanagh to be entitled to the same 1,842 shares which comprised his Registered Shares. She also again noted that certainty of subject matter remains a requirement for resulting trusts.

Discussion

69. I agree with Miss Wilson that evidence as to the actual intentions of the parties is sufficient to rebut any presumption of resulting trust. For the reasons set out above, I find that the overriding common intention was that the New Shares would be divided equally as to 50% to Mr Kavanagh (being 1,842 shares) and as to 50% between Mr Addinall, Mr Gray and Mr Stevens (being the other 1,842 shares).

70. Again, my findings as to the intentions of the parties are sufficient to dispose of the argument in respect of resulting trusts. For completeness, however, I note that even without such an actual intention, the Disputed Shares would not be held on resulting trust for Mr Kavanagh pursuant to scenario (A) of *Westdeutsche*. This is because the purchase price of the 3,684 shares in the Company was the transfer of the entirety of the shares in Egham to the Company. Mr Kavanagh provided 50% of these shares in Egham and received 50% of the New Shares in the Company, whilst Mr Addinall, Mr Gray and Mr Stevens between them also provided 50% of these shares in Egham and received 50% of the New Shares in the Company. As such, Mr Kavanagh contributed an equal proportion of the purchase price and received an equal proportion of the shares in the Company. Again, for the same reasons as set out above, I also agree that there was insufficient certainty of subject matter to give rise to a resulting trust.

DISPOSITION

71. It follows that, for the reasons set out above, Mr Kavanagh's only interest in the A Shares was in the Registered Shares and he was not entitled to any further beneficial interest in the Disputed Shares. I therefore dismiss the appeal.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

72. 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.

RICHARD CHAPMAN QC
TRIBUNAL JUDGE

Release date: 31 MAY 2022