[2021] UKUT 0029 (TCC)

Appeal number: UT/2019/0150

CAPITAL GAINS TAX – entrepreneurs' relief – whether beneficiary must be a qualifying beneficiary throughout a period of one year ending not earlier than three years before disposal – yes – appeals allowed

UPPER TRIBUNAL
(TAX AND CHANCERY CHAMBER)

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS — **Appellants**

-and-

(1) THE QUENTIN SKINNER 2005 SETTLEMENT L — **Respondents**
(2) THE QUENTIN SKINNER 2005 SETTLEMENT R
(3) THE QUENTIN SKINNER 2005 SETTLEMENT B

TRIBUNAL: MR JUSTICE MICHAEL GREEN
JUDGE ANDREW SCOTT

Sitting in public by way of video hearing on 4 November 2020 with further written representations made by the parties on 25 November 2020 and 9 December 2020

Mr Thomas Chacko, instructed by the General Counsel and Solicitor for HM Revenue & Customs, for the Appellants

Mr Michael Firth, counsel, for the Respondents

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DECISION

Introduction

1. These appeals, brought with the permission of the First-tier Tribunal (Tax) (the "FTT"), concern a short point of statutory interpretation relevant to the availability of a capital gains tax relief to trustees of an interest in possession trust where the trustees dispose of shares in a company held by the trust. The relief in question is entrepreneurs' relief as provided for by Chapter 3 of Part 5 of the Taxation of Chargeable Gains Act 1992 ("TCGA 1992"). (References below to sections are, unless otherwise stated, to sections of TCGA 1992.)

2. The relief is available only if there is a disposal of trust business assets within the meaning of s.169J. That section requires "the relevant condition" set out in subsection (4) to be met in the case of a disposal of shares in a company. The relevant condition is that, throughout a period of one year ending not earlier than three years before the date of the disposal, the company is "the qualifying beneficiary's personal company" as well as a trading company, and "the qualifying beneficiary is an officer or employee of the company". A company is a personal company of an individual if the individual held at least 5% of the ordinary share capital of the company and at least 5% of the voting rights as a result of that holding (s.169S(3)).

3. A "qualifying beneficiary" is defined by s.169J(3) as an individual with an interest in possession under the trust (otherwise than for a fixed term). The sole issue in this case is whether the qualifying beneficiary has to satisfy that definition throughout the same one-year period that the conditions in s.169J(4) are met or whether it is sufficient for the qualifying beneficiary to have their interest in possession under the trust at the time of the disposal.

4. In its decision, which is reported at [2019] UKFTT 516 (TC) (the "Decision"), the FTT (Judge Brannan) held against HMRC that the qualifying beneficiary only has to hold an interest in possession under the trust at the time of the trustees' disposal of the shares. This was the critical issue in the case because it was common ground that the relevant individual beneficiaries satisfied the conditions in s.169J(4) for the requisite period but they only held interests in possession in their respective settlements for a period of about 4 months up to the date of disposal.

The Facts

5. The material facts were not in dispute and are taken from the Decision:

> (1) on 30 July 2015 Mr Ludovic Skinner, Mr Rollo Skinner and Mr Bruno Skinner were given interests in possession under the L Skinner Settlement, the R Skinner Settlement and the B Skinner Settlement respectively in the whole of the settled property;
>
> (2) on 11 August 2015 Mr Quentin David Skinner gave 55,000 D ordinary shares in DPAS Limited to each of those settlements;

(3) Mr Ludovic Skinner, Mr Rollo Skinner and Mr Bruno Skinner had each held 32,250 C class shares with full voting rights in the company since 2011 (so that DPAS Ltd was a "personal company" of each of them); they were also each officers of DPAS Ltd from at least 2011 onwards; and

(4) on 1 December 2015 the trustees of the settlements disposed of the D Ordinary shares.

From retirement relief to entrepreneurs' relief

6. Before turning to the specific legislation in relation to entrepreneurs' relief, we think it is instructive to look at the history of similar reliefs that were previously available but were ultimately superseded by entrepreneurs' relief. We had no oral submissions on this at the hearing but we invited both parties' Counsel to provide written submissions to us on the history.

7. Relief for disposals of business assets has been a long-standing feature of the capital gains tax code. Since its introduction in 1965, retirement relief sought to alleviate the tax consequences of a disposal by an individual of business assets on retirement. The relief was linked to the age of the person making the disposal (hence its name).

8. Until 1985 the relief was not available to trustees. In a consultation conducted by the then Inland Revenue in March 1984 there was (at [14]) a proposal to change that:

> "The relief does not apply to property held in settlement. However, it can be maintained that, in general, property held in trust should be treated for CGT purposes as far as possible in the same way. There is therefore a case for extending the relief to cover the disposal by trustees of business assets used in a business carried on by a qualifying beneficiary who has more than a discretionary interest."

9. That led to the inclusion in the Finance Act 1985 ("FA 1985") of provisions (s.70 and Sch. 20) which, among other things, conferred a new entitlement to retirement relief on trustees for certain disposals.

10. Section 70 of FA 1985 provided as follows so far as relevant to the disposal by trustees of shares in a company:

> "(3) Relief from capital gains tax shall be given, subject to and in accordance with Schedule 20 to this Act, where—
>
> (a) the trustees of a settlement dispose of—
>
> (i) shares or securities of a company, or [...]
>
> (b) the conditions in subsection (4) […] below are fulfilled with respect to a beneficiary who, under the settlement, has an interest in possession in the whole of the settled property or, as the case may be, in a part of it which consists of or includes the shares or securities or the asset referred to in paragraph (a) above, but excluding, for this purpose, an interest for a fixed

term; and in those subsections that beneficiary is referred to as "the qualifying beneficiary".

(4) In relation to a disposal of shares or securities of a company [..], the conditions referred to in subsection (3)(b) above are—

(a) that, throughout a period of at least one year ending not earlier than the permitted period before the disposal, the company was the qualifying beneficiary's family company and either a trading company or the holding company of a trading group; and

(b) that, throughout a period of at least one year ending as mentioned in paragraph (a) above, the qualifying beneficiary was a full-time working director of the company or, if the company is a member of a group or commercial association of companies, of one or more companies which are members of the group or association; and

(c) that, on the date of the disposal or within the permitted period before that date, the qualifying beneficiary ceased to be a full-time working director as mentioned in paragraph (b) above, having attained the age of 60 or retired on ill-health grounds below that age."

11. Included in Schedule 20 to that Act was paragraph 9, which was in these terms:

"9.-(1) If, in the case of a trustees' disposal, there is, in addition to the qualifying beneficiary, at least one other beneficiary who, at the end of the qualifying period, has an interest in possession in the whole of the settled property or, as the case may be, in a part of it which consists of or includes the shares, securities or asset which is the subject matter of the disposal, only the relevant proportion of the gain which accrues to the trustees on the disposal shall be brought into account under paragraph 6, paragraph 7 or paragraph 8 above (as the case may require) and the balance of the gain shall, accordingly, be a chargeable gain.

(2) For the purposes of sub-paragraph (1) above, the relevant proportion is that which, at the end of the qualifying period, the qualifying beneficiary's interest in the income of the part of the settled property comprising the shares, securities or asset in question bears to the interests in that income of all the beneficiaries (including the qualifying beneficiary) who then have interests in possession in that part.

(3) The reference in sub-paragraph (2) above to the qualifying beneficiary's interest is a reference to the interest by virtue of which he is the qualifying beneficiary and not to any other interest he may hold."

12. Those provisions were subsequently incorporated into TCGA 1992 as s.164(3) to (5) and Sch.6.

13. Retirement relief was abolished by s.140 of the Finance Act 1998 and was phased out by April 2003. Taper relief was introduced instead together with a new rate of capital gains tax for trustees. Taper relief was abolished by Sch. 2 to the Finance Act 2008 ("FA 2008"). Sch.3 to that Act replaced taper relief with entrepreneurs' relief.

14. The structure of entrepreneurs' relief owes a large debt to the structure of retirement relief. So much is evident on the face of the relevant provisions. And the Explanatory Notes to the Finance Bill that became FA 2008 include the following provision at [124]:

> "The rules for entrepreneurs' relief are broadly based on the rules for the former retirement relief. But the rules for entrepreneurs' relief are simpler. For example, the amount of entrepreneurs' relief does not vary with the period of the individual's involvement with the business, and there is no minimum age limit for entrepreneurs' relief. Where the entrepreneurs' relief legislation uses terms that also appeared in the retirement relief provisions (sections 163 and 164 of and Schedule 6 to TCGA), they are intended to have the same meaning unless the entrepreneurs' relief legislation specifically provides a different meaning (as in the case of the definition of a trading company, where the entrepreneurs' relief legislation adopts the definition used for the purposes of taper relief)."

Application of CGT in relation to trustees of interest in possession trusts

15. Before considering the provisions of TCGA 1992 relevant to entrepreneurs' relief, we consider briefly how the Act applies in relation to trustees of interest in possession trusts and the nature of those trusts.

16. Trustees (other than bare trustees or nominees) are different taxable persons from individuals for the purposes of TCGA 1992 (see ss.60 and 69 of that Act). Their disposals are subject to a separate rate of capital gains tax (currently provided for by s.1H(7) and (8)). They have a different annual exempt amount (ordinarily half the amount of the annual exempt amount available to individuals). Unlike other taxes, there is no identification between a beneficiary under an interest in possession trust and the assets of the beneficiary as an individual. The situation can be compared with, for example, s.49 of the Inheritance Tax Act 1984 where there is such an identification.

17. As explained by the House of Lords in *Pearson v IRC* [1980] STC 318, an interest in possession is a right to the income from the settlement as it arises. The proceeds from the disposal of shares are an addition to or replacement of capital. The proceeds are not paid over to the income beneficiary. The income beneficiary also does not bear the costs of that disposal, including any capital gains tax that is chargeable. Accordingly, the liability to capital gains tax does not reduce the income beneficiary's entitlement (see *HMRC v Peter Clay Discretionary Trust* [2009] Ch 296 at [29]).

Relevant legislation relating to entrepreneurs' relief

18. The provisions conferring entrepreneurs' relief are contained in Chapter 3 of Part 5 of TCGA 1992. The opening section of the Chapter contains an introduction setting out how the provisions are structured. At the material time it provided as follows:

> "**169H Introduction**

(1) This Chapter provides for a lower rate of capital gains tax in respect of qualifying business disposals (to be known as “entrepreneurs’ relief”).

(2) The following are qualifying business disposals—

(a) a material disposal of business assets: see section 169I,

(b) a disposal of trust business assets: see section 169J, and

(c) a disposal associated with a relevant material disposal: see section 169K.

(3) […].

(4) Section 169M makes provision requiring the making of a claim for entrepreneurs’ relief.

(5) Sections 169N to 169P make provision as to the amount of entrepreneurs’ relief.

(6) […]

(7) […].”

19. The FTT relied on a comparison with the way the relief operates in relation to disposals by an individual of shares in the individual’s personal company. There are a number of different cases whereby individuals can qualify for entrepreneurs’ relief but the relevant one for these purposes is provided for by s.169I(6). The material provisions of s.169I were therefore 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 –

(a) […]

(b) […]

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

(3) […]

(4) […]

(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.

(7) …"

20. Section 169J is the central focus of these appeals, in particular subsections (3) and (4). For convenience, s.169J is set out in full:

"**169J Disposal of trust business assets**

(1) There is a disposal of trust business assets where—

(a) the trustees of a settlement make a disposal of settlement business assets (see subsection (2)),

(b) there is an individual who is a qualifying beneficiary (see subsection (3)), and

(c) the relevant condition is met (see subsections (4) and (5)).

(2) In this Chapter "settlement business assets" means—

(a) assets consisting of (or of interests in) shares in or securities of a company, or

(b) assets (or interests in assets) used or previously used for the purposes of a business,

which are part of the settled property.

(3) An individual is a qualifying beneficiary if the individual has, under the settlement, an interest in possession (otherwise than for a fixed term) in—

(a) the whole of the settled property, or

(b) a part of it which consists of or includes the settlement business assets disposed of.

(4) In relation to a disposal of settlement business assets within paragraph (a) of subsection (2) the relevant condition is that, throughout a period of 1 year ending not earlier than 3 years before the date of the disposal—

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

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

(5) In relation to a disposal of settlement business assets within paragraph (b) of that subsection, the relevant condition is that—

(a) the settlement business assets are used for the purposes of the business carried on by the qualifying beneficiary throughout

the period of 1 year ending not earlier than 3 years before the date of the disposal, and

(b) the qualifying beneficiary ceases to carry on the business on the date of the disposal or within the period of three years before that date.

(6) In subsection (5)—

(a) the reference to a business carried on by the qualifying beneficiary includes a business carried on by a partnership of which the qualifying beneficiary is a member, and

(b) the reference to the qualifying beneficiary ceasing to carry on the business includes the qualifying beneficiary ceasing to be a member of the partnership or the partnership ceasing to carry on the business."

21. As indicated in the introduction, entrepreneurs' relief requires to be claimed. Section 169M provided as follows:

"**169M Relief to be claimed**

(1) Entrepreneurs' relief is to be given only on the making of a claim.

(2) A claim for entrepreneurs' relief in respect of a qualifying business disposal must be made—

(a) in the case of a disposal of trust business assets, jointly by the trustees and the qualifying beneficiary, and

(b) otherwise, by the individual.

(3) […]

(4) A claim for entrepreneurs' relief in respect of a qualifying business disposal may only be made if the amount resulting under section 169N(1) is a positive amount."

22. The general rule for determining the amount of relief is provided by s.169N, which was in the following terms at the material time:

"**169N Amount of relief: general**

(1) Where a claim is made in respect of a qualifying business disposal—

(a) the relevant gains (see subsection (5)) are to be aggregated, and

(b) any relevant losses (see subsection (6)) are to be aggregated and deducted from the aggregate arrived at under paragraph (a).

(2) The resulting amount is to be treated for the purposes of this Act as a chargeable gain accruing at the time of the disposal to the individual or trustees by whom the claim is made.

(3) The rate of capital gains tax in respect of that gain is 10%, but this is subject to subsections (4) to (4B).

(4) Subsections (4A) and (4B) apply if the aggregate of—

(a) the gain mentioned in subsection (2), and

(b) the total of so much of each amount resulting under subsection (1) by virtue of its operation in relation to earlier relevant qualifying business disposals (if any) as was—

(i) charged at the rate in subsection (3), or

(ii) subject to reduction under subsection (2) of this section as originally enacted,

exceeds £10 million.

(4A) The rate in subsection (3) is to apply only to so much (if any) of the gain mentioned in subsection (2) as (when added to the total mentioned in subsection (4)(b)) does not exceed £10 million.

(4B) Section 4 (rates of capital gains tax) is to apply to so much of the gain mentioned in subsection (2) as is not subject to the rate in subsection (3).

(5) In subsection (1)(a) "relevant gains" means—

(a) if the qualifying business disposal is of (or of interests in) shares in or securities of a company (or both), the gains accruing on the disposal (computed in accordance with the provisions of this Act fixing the amount of chargeable gains), and

(b) otherwise, the gains accruing on the disposal of any relevant business assets comprised in the qualifying business disposal (so computed).

(6) In subsection (1)(b) "relevant losses" means—

(a) if the qualifying business disposal is of (or of interests in) shares in or securities of a company (or both), any losses accruing on the disposal (computed in accordance with the provisions of this Act fixing the amount of allowable losses, on the assumption that notice has been given under section 16(2A) in respect of them), and

(b) otherwise, any losses accruing on the disposal of any relevant business assets comprised in the qualifying business disposal (so computed, on that assumption).

(7) In subsection (4) "earlier relevant qualifying business disposals" means—

(a) where the qualifying business disposal is made by an individual, earlier qualifying business disposals made by the individual and earlier disposals of trust business assets in respect of which the individual is the qualifying beneficiary, and

(b) where the qualifying business disposal is a disposal of trust business assets in respect of which an individual is the qualifying beneficiary, earlier disposals of trust business assets in respect of which that individual is the qualifying beneficiary

and earlier qualifying business disposals made by that individual.

(8) If, on the same day, there is both a disposal of trust business assets in respect of which an individual is the qualifying beneficiary and a qualifying business disposal by the individual, this section applies as if the disposal of trust business assets were later.

(9) Any gain or loss taken into account under subsection (1) is not to be taken into account under this Act as a chargeable gain or an allowable loss."

23. However, in the case of disposals by trustees, s.169N is not the only relevant provision for determination of the amount of relief that is claimable. That section falls to be applied in conjunction with s.169O, which provided:

"**169O Amount of relief: special provisions for certain trust disposals**

(1) This section applies where, on a disposal of trust business assets, there is (in addition to the qualifying beneficiary) at least one other beneficiary who, at the material time, has an interest in possession in—

(a) the whole of the settled property, or

(b) a part of it which consists of or includes the shares or securities (or interests in shares or securities) or assets (or interests in assets) disposed of.

(2) Only the relevant proportion of the amount which would otherwise result under subsection (1) of section 169N is to be treated as so resulting.

(3) And the balance of that amount is accordingly a chargeable gain for the purposes of this Act.

(4) For the purposes of this section "the relevant proportion" of an amount is the same proportion of the amount as that which, at the material time—

(a) the qualifying beneficiary's interest in the income of the part of the settled property comprising the shares or securities (or interests in shares or securities) or assets (or interests in assets) disposed of, bears to

(b) the interests in that income of all the beneficiaries (including the qualifying beneficiary) who then have interests in possession in that part of the settled property.

(5) In subsection (4) "the qualifying beneficiary's interest" means the interest by virtue of which he is the qualifying beneficiary (and not any other interest the qualifying beneficiary may have).

(6) In this section "the material time" means the end of the latest period of 1 year which ends not earlier than 3 years before the date of the disposal and—

(a) in the case of a disposal of settlement business assets within paragraph (*a*) of subsection (2) of section 169J,

> throughout which the conditions in paragraphs (*a*) and (*b*) of subsection (4) of that section are met, and
>
> (b) in the case of a disposal of settlement business assets within paragraph (*b*) of subsection (2) of that section, throughout which the business is carried on by the qualifying beneficiary."

The FTT Decision

24. Having noted at the outset that s.169J(4) should be given its ordinary and natural meaning when read in context and construed purposively (see [43]), the FTT began its analysis by considering the disposal by an individual of shares in a company (see [44]).

25. The FTT referred to s.169I(6) and noted that the relief is available in respect of *any* shares in the company, including shares that had been more recently acquired (owned for six months in the example given by the FTT): see [47]. The FTT referred to the test in s.169I(6)(a) and (b) as the "entrepreneurial connection".

26. The FTT then went on at [48] to accept Mr Firth's submission that the purpose of Parliament in enacting s.169J(4) was, in effect, to extend the "entrepreneurial connection" in s.169I(5) and (6) to a situation in which a qualifying beneficiary owns an interest in possession in shares through a settlement.

27. The FTT acknowledged at [49] that:

> "the qualifying period set out in the introductory words in s.169J(4) is somewhat different from the corresponding provisions in s.169I(5) and (6). For example, the one-year holding period can occur during a three-year window. Nonetheless, Parliament's intention to impose the same type of "entrepreneurial connection" is clear."

28. Before turning to the wording of s.169J(4), the FTT considered the Explanatory Notes to the Finance Bill 2008. It referred to the explanation in [24] of the Notes of what became s.169J(4) drawing particular attention (through the use of italics) to what was said about s.169I(6) and (7):

> "24. Subsection (4) describes the "relevant condition" that must be satisfied if the settlement business assets are shares in or securities of a company, or interests in such shares or securities. *The* condition applies to the qualifying beneficiary the tests that would have applied under section 169I(6) or (7) (see paragraphs 16 and 17 above) if the qualifying beneficiary were an individual making a claim for entrepreneurs' relief in relation to a disposal of the *shares, securities or interests.* So the condition is that throughout a period of one year ending within the three years up to the date of the disposal:
>
> – the company is the qualifying beneficiary's personal company (see paragraph 16 above);
>
> – the company is a trading company or the holding company of a trading group; and

> – the qualifying beneficiary is an officer or employee of the company or of one or more companies that are members of the group."

29. The FTT stated at [52] that the "mischief" at which s.169J(4) was aimed was substantially to extend the "entrepreneurial condition", noting (again) that "this extension was, of course, in a modified form and included what I have referred to as the "three-year window"."

30. The FTT then analysed the terms of s.169J(4) repeating its view that the ordinary and natural meaning of the words of that subsection did not require a qualifying beneficiary to hold an interest in the shares disposed of in the manner contended for by HMRC before concluding at [53]:

> "In my view, it is the status of the qualifying beneficiary's shareholding which constitutes the company as a "personal company" and its status as "either a trading company or the holding company of a trading group" that must exist in the one-year period during the three-year window."

31. The FTT then set out at [57] its understanding of s.169J(4):

> "It seems to me that the natural reading of the reference to "qualifying beneficiary" in subsection 4 (a) is to a person who satisfies the definition in s.169J(3). The focus of s.169J(4) (a) is not on the "qualifying beneficiary" at all but rather on "the company". What that subparagraph is aiming to do is to make it clear that during the specified period (the one-year period ending in the three-year window) the company must be a personal company (as to which see s.169S) as well as being a trading company or a holding company of a trading group. The possessive reference to the "qualifying beneficiary's" is simply identifying whose personal company it is i.e. it must be the personal company of someone who is "a qualifying beneficiary". But it does not follow and in my judgment it is incorrect to conclude that the "qualifying beneficiary" has to have the attributes of a "qualifying beneficiary" for a period of one year during the three-year window. That period and that window refer to the status as a personal company and as a trading company or a holding company of a trading group."

32. The FTT considered at [60] whether, as HMRC had submitted, s.169O was relevant to the construction of s.169J(4). It firmly disagreed with HMRC:

> "In my experience of modern techniques of drafting of tax statutes, I would find it very strange indeed if the meaning of the primary qualifying conditions of a relief from tax were to be found obscurely by reference to an apportionment provision (which is all s.169O amounts to) and which, in any event, did not apply in this case (because in [sic] the qualifying beneficiary in respect of each of [sic]settlement in this appeal owned the entire trust property)."

33. The FTT was also dismissive of the point made on behalf of HMRC that the construction favoured by the taxpayers (and adopted by the FTT) resulted in some rather "oblique unintended consequence". That could not prevail over the clear wording and meaning of s.169J(4): see [62].

34. It appears to us that the reasoning of the FTT in reaching its determination can fairly be summarised as follows:

(1) the "entrepreneurial connection" in s.169I(6) applicable to disposals by individuals should extend to disposals by trustees,

(2) this interpretation was supported by the Explanatory Notes,

(3) the references in s.169J(4) to the "qualifying beneficiary" are merely the means of identifying the individual whose personal company it is, and

(4) s.169O was no more than an "apportionment provision" and the clear meaning of the primary qualifying conditions in s.169J(4) should not be disturbed "obscurely" by reference to it.

Submissions in outline

35. Mr Chacko made the following submissions on behalf of HMRC:

(1) in the case of an interest in possession trust, the proceeds of a share disposal are an addition to or replacement of trust capital in which the income beneficiary has no direct interest, and, consequently, it did not follow that a disposal by the trustees was made for the benefit of the individual beneficiary;

(2) nonetheless, the legislation assumed that the relief was in some way for that individual's benefit because the gain was set against the individual's lifetime limit of £10 million and a claim for the relief was made jointly by the individual and the trustees: the relief was premised on the existence of a substantial, enduring link between the individual's business interests and the interest in possession in the trust;

(3) that link consisted of a requirement for the individual to have an interest in possession in the trust assets throughout the one-year period mentioned in s.169J(4);

(4) by contrast, a requirement for the beneficiary to have such an interest in possession only on disposal would turn the legislation into a tick-box exercise whereby the relief could be accessed when the individual had no substantial connection to the shares disposed of and did not enjoy any income from them;

(5) the way in which s.169J(4) was intended to work was confirmed by the terms of s.169O, which was not an obscure apportionment provision but an integral part of the very limited legislation dealing with trust disposals; and

(6) if the FTT were right, the conditions in s.169J(4)(a) and (b) would not have been expressed in the present tense but would have said instead that the qualifying beneficiary "is or was" an officer or employee of the company.

36. For the taxpayers, Mr Firth considered that the FTT reached the right decision for the right reasons, submitting that:

> (1) the clear and ordinary meaning of s.169J(4) does not require the individual to have been a qualifying beneficiary for one year: that was apparent from the structure of s.169J where the link made in subsections (1)(c) and (4) was between the individual and the company and the references to the "qualifying beneficiary" were merely a means of identifying the individual, a point confirmed by s.169M(2)(a);
>
> (2) the context supported the ordinary meaning: in particular, there was a significant mismatch between a requirement for the individual to be a beneficiary in the trust for a year and the absence of any clear rules in the provisions as to whether the trust needed to own shares in the company throughout the one-year period and whether the relief was only available to shares so held (which, if right, would be contrary to the way in which the relief operated in the case of disposals of shares by individuals);
>
> (3) s.169O was not concerned with the circumstances in which relief is available but with limiting the quantum of relief in certain circumstances and, as there were two time references in the section, it did not assume that the qualifying beneficiary will always have an interest in the trust at the material time; and
>
> (4) the purpose of the code as a whole supported the ordinary meaning: the provisions established the "entrepreneurial connection" by reference to the individual's own shareholding, it was an inherent part of the relief that it could be given in respect of shares held for a day or less and the "entrepreneurial connection" for disposals by trustees was established directly between the individual beneficiary and the company (rather than through the trust).

37. Mr Chacko did not consider that the background leading to the enactment of entrepreneurs' relief in FA 2008 had much bearing on the issue in this appeal whereas Mr Firth submitted that, in so far as it could be considered as a legitimate aid to construction (applying the applicable rules relevant to the construction of consolidations), the predecessor legislation confirmed the view taken by the FTT that the references to the qualifying beneficiary were no more than a means of identifying the individual in question.

Discussion

Relevant principles of statutory interpretation

38. We remind ourselves of the relevant principles of statutory interpretation.

39. The duty of the court is to "ascertain the intention of Parliament as expressed in the words it has chosen" (*R (Quintavalle) v Secretary of State for Health* [2003] UKHL 13, [2003] 2 AC 687, para 38, per Lord Millett).

40. In the same case, Lord Bingham held at [8]:

> "The court's task, within the permissible bounds of interpretation, is to give effect to Parliament's purpose. So the controversial provisions should be read in the context of the statute as a whole, and the statute as a whole should be read in the historical context of the situation which led to its enactment."

41. The reference to the need to read the controversial provisions in the context of the statute as a whole is a long-standing principle, and, as Lord Reid said in *IRC v Hinchy* [1960] AC 748 at 766, "one assumes that in drafting one clause of a Bill the draftsman had in mind the language and substance of the other clauses, and attributes to Parliament a comprehension of the whole Act".

42. The words chosen by Parliament are the primary source from which the intention of Parliament should be inferred. Lord Carnwath put that point in the following terms in *Lambeth LBC v S of S for HCLG* [2019] UKSC 33:

> "…whatever the legal character of the document in question, the starting-point - and usually the end-point - is to find "the natural and ordinary meaning" of the words there used, viewed in their particular context (statutory or otherwise) and in the light of common sense."

43. Ascertaining the statutory context involves the court in a legal determination of the purpose of the Act. It is the court's duty "to favour an interpretation of legislation which gives effect to its purpose rather than defeating it" (*Test Claimants in the Franked Investment Income Group Litigation v Commissioners for Her Majesty's Revenue and Customs* [2020] UKSC 47, para 155, per Lord Reed and Lord Hodge).

44. But that does not relegate the words of the statute to a supporting role. Lord Neuberger put matters as follows in *Williams v Central Bank of Nigeria* [2014] UKSC 10 at [72]:

> "When interpreting a statute, the court's function is to determine the meaning of the words used in the statute. The fact that context and mischief are factors which must be taken into account does not mean that, when performing its interpretive role, the court can take a free-wheeling view of the intention of Parliament looking at all admissible material, and treating the wording of the statute as merely one item. Context and mischief do not represent a licence to judges to ignore the plain meaning of the words that Parliament has used."

45. It has been long established that the context includes a consideration of the law as it stood at the time of enactment of the relevant provisions concerned and how the law was intended to be changed. As is noted by *Bennion, Bailey and Norbury on Statutory Interpretation* (8th edition, October 2020) at [24.7], an Act will often replace or reproduce aspects of earlier legislation without amounting to a consolidation and, so far

as the Act reproduces the old legislation, it may be interpreted in the same way as a consolidation, namely, that if a real doubt arises as to the legal meaning of the new legislation, recourse may be had to the earlier legislation in resolving that doubt.

46. In respect of the last point and as we explain below, we think that the meaning of s.169J(4) is clear when understood in the light of s.169O, a key part of the relevant statutory context. Nonetheless, we have considered whether the predecessor legislation casts doubt on that conclusion. In our view, it does the opposite: it confirms our analysis of the relevant provisions in question.

The structure of Chapter 3 of Part 5 of TCGA 1992

47. We consider that, applying the above principles, we should start with the words of the relevant provisions of Chapter 3 of Part 5 of TCGA 1992, properly understood in the context of TCGA 1992 as those provisions apply to trustees.

48. We start by reminding ourselves of some general points referred to above:

> (1) trustees are separate taxable persons with separate tax rates applicable to their disposals and separate annual exempt amounts,
>
> (2) a beneficiary under an interest in possession trust has a right to the income of the trust as it arises,
>
> (3) the proceeds from the disposal of shares are an addition to or replacement of the capital of the trust and are not paid over to the income beneficiary, and
>
> (4) whether or not a beneficiary under an interest in possession trust benefits from the capital receipts as augmented by a tax relief is, at least to some extent, happenstance: the outcome is contingent on the particular facts.

49. So far as entrepreneurs' relief is concerned, a number of things are clear from the opening section of Chapter 3 of Part 5 of TCGA 1992:

> (1) there is a special category of qualifying business disposal relevant to trustees (s.169J),
>
> (2) that type of disposal (like all others) requires a claim (s.169M), and
>
> (3) the amount of the relief is determined by ss.169N to 169P, and that run of sections includes s.169O, a special rule for trustees, as well as the more general provision provided for by s.169N.

50. As a matter of structure, it is self-evident that, when it comes to provisions relevant to the amount of the relief, Parliament has – conventionally – started with the rule of general application (s.169N) before in the next section dealing with a particular case (s.169O). Indeed, the headings of both sections begin "**Amount of relief:**", with the heading for s.169N saying that it is dealing with "**general**" and the heading for s.169O saying that it is making "**special provisions for certain trust disposals**".

51. It is also self-evident that the provisions of Chapter 3 of Part 5 of TCGA 1992 are concerned with the circumstances in which a claim for entrepreneurs' relief may be made. In the case of trustees making a disposal, the disposal needs to fall within the definition set out in s.169J. That section is, undoubtedly, a key provision but it is, in truth, only part – albeit an important part – of the story.

52. There will be cases where trustees make a disposal of trust business assets within the meaning of s.169J but are unable to make a claim for relief. That will be the case where the calculation under s.169N(1) results in a negative figure. That is expressly dealt with by s.169M(4), which prevents a claim from being made in those circumstances. And that is not the only instance where, despite the tests in s.169J being met, the trustees will be unable to make a claim. There will also be cases where the trustees might have a theoretical right to make a claim but nothing would be achieved by it. That will happen if there is a gain resulting under s.169N(1) but the £10 million limit set out in s.169N(4) has already been exceeded.

53. Before considering how s.169N is intended to operate, it is important to understand the significance of the fact that the trustees do not have an unqualified right to make a claim for entrepreneurs' relief: a claim must be made jointly by both the trustees and the qualifying beneficiary (s.169M(2)(a)).

54. The amount of the relief available to the trustees is linked to the availability of the qualifying beneficiary's own £10 million limit: see, in particular, s.169N(7)(b). This feature of the code is, in our view, intended to reflect the fact that there will be many cases where, in substance, the beneficiary *does* benefit from the disposal of the shares forming part of the trust with the benefit of a tax relief.

55. But that is by no means necessarily the case. It is because the qualifying beneficiary does not necessarily have an economic interest in the disposal that the trustees cannot get any relief at all unless the beneficiary agrees. That is, in our view, the reason why the qualifying beneficiary enjoys the power to veto a claim by the trustees. Otherwise, a valuable tax relief (the use of the £10 million allowance) could be reduced in circumstances in which the qualifying beneficiary does not in fact benefit or only benefits to a limited extent. In cases where the qualifying beneficiary does agree to the making of the claim, the beneficiary is, in effect, agreeing to transfer the benefit of a tax allowance (the limit of £10 million) to the trustees.

56. In the case of trustees, the amount of entrepreneurs' relief is determined by a consideration of <u>both</u> ss.169N and 169O. The two sections operate seamlessly together, something which is made plain by the terms of s.169O(2) and (3). The operative provisions of s.169O are contained in those subsections: only the relevant proportion of "the amount which would otherwise result under subsection (1) of section 169N is to be treated as so resulting" with the balance taken to be a chargeable gain in the normal way.

57. It inevitably follows from this that there will be cases where the amount of the available relief is reduced by the application of s.169O in conjunction with s.169N in ways that are potentially very significant. Take a case where a gain of £10 million

accrued to the trustees on a disposal of trust business assets and that, absent s.169O, the amount under s.169N(1) qualifying for the lower rate of CGT was the whole of that amount. If, under s.169O, the relevant proportion was 1%, the effect would be that only £100,000 of the gain would be treated as qualifying for the 10% CGT rate. In that case, the balance (£9,900,000) would, as per s.169O(3), be taxed at the normal rate.

58. In the light of the above analysis of the way in which the provisions of Chapter 3 of Part 5 of TCGA 1992 are constructed, we consider that what the FTT said at [60] of its judgment about the significance of s.169O was an error of law, as it is not merely an "apportionment provision". In our view, s.169O, being the only other provision dealing specifically with trustee disposals, performs an important function in that context and, applying the ordinary principles of statutory interpretation as set out above, the meaning of ss.169J and s.169O should be consistent and coherent.

Textual analysis of s.169J

59. Having made these preliminary observations, we now consider the terms of s.169J itself. The section contains a definition of a "disposal of trust business assets". The first thing that it does (see subsections (1)(a) and (2)) is provide that the trustees of a settlement must make a disposal of "settlement business assets". That expression is defined in subsection (2) and, in this case, means shares in a company which are part of the settled property.

60. The section then provides (at subsection (1)(b)) that there must be an individual who is a qualifying beneficiary. The closing words of subsection (1)(b) direct us to subsection (3) for the meaning of "a qualifying beneficiary". Subsection (3) provides a *definition* of that expression, and, as we explain below, there is significance in its so doing. The definition of "a qualifying beneficiary" is an individual who has, under the settlement, an interest in possession (otherwise than for a fixed term) in the whole of the settled property or a part of it which consists of or includes the assets disposed of.

61. Subsection (1)(c) then introduces the relevant condition and, in this case, it is the one provided for by subsection (4) that is engaged. The condition is that, throughout a period of 1 year ending not earlier than 3 years before the date of the disposal, the company is "the qualifying beneficiary's personal company" and is a trading company, and "the qualifying beneficiary is an officer or employee of the company".

62. Mr Firth submitted that subsection (1) had a logical structure with each of subsections (1)(a) to (c) dealing with different links between the relevant elements. Thus: subsection (a) is the link between the trust and the company; subsection (b) is the link between the individual and the trust; and subsection (c) is the link between the individual and the company. But that, in our view, is somewhat superficial and places insufficient weight on the deliberate use of a definition of "qualifying beneficiary" and the use of it in both subsections (1)(b) and (c) (when read with subsection (4)). The structure of s.169J is best revealed if the definitions in later parts of the section are transposed into subsection (1) which would then read as follows:

(a) the trustees of a settlement make a disposal of shares in a company which are part of the settled property,

(b) there is an individual who is a qualifying beneficiary, that is to say, an individual who has, under the settlement, an interest in possession (otherwise than for a fixed term) in the whole of the settled property or a part of it which consists of or includes the assets disposed of, and

(c) throughout a period of 1 year ending not earlier than 3 years before the date of the disposal, the company is the qualifying beneficiary's personal company and is a trading company, and the qualifying beneficiary is an officer or employee of the company.

63. The immediate question that arises from this is whether, in referring to the qualifying beneficiary in subsection (4) in those terms (as opposed to the individual), Parliament was intending to import into that subsection the *definition* that it had set out in the immediately preceding subsection. We believe that Parliament did so intend because of the structure that the section adopts.

64. In particular, if subsection (4) was not intended to be read in that way, there would have been no reason for Parliament to have introduced the concept of a "qualifying beneficiary" into the subsection. The FTT considered that there needed to be a "qualifying beneficiary" only at the time of the disposal of the assets in question. If that was Parliament's intention, one might have expected the substance of the definition set out in subsection (3) to have been incorporated directly into subsection (1)(b) so that it simply read as follows:

> "(b) there is an individual who has, under the settlement, an interest in possession (otherwise than for a fixed term) in the whole of the settled property, or a part of it which consists of or includes the settlement business assets disposed of".

65. Having done that, Parliament could have proceeded to replace the references in subsection (4)(a) and (b) to the qualifying beneficiary with references to the individual. Those references would clearly have been references to the individual mentioned in subsection (1)(b) in the same way that the references to the company in subsections (4)(a) and (b) were, without more, references to the company mentioned in subsection (2)(a). Even without incorporating the definition into subsection 1(b), Parliament need only have referred to "the individual" in subsections 4(a) and (b) instead of "the qualifying beneficiary" and that would have been perfectly comprehensible.

66. But that is not what Parliament did. Mr Firth submitted that all that can be said in support of HMRC's interpretation is that s.169J(4) uses the expression "the qualifying beneficiary" as the identifying term (rather than "the individual") and that using the expression "the qualifying beneficiary" is the "clearer" of the two as "unequivocally" referring to the person identified in s.169J(1)(b). But the reverse is the case. A simple reference to the individual would have, plainly, secured the outcome for which Mr Firth contends whereas the references to the qualifying beneficiary, and the deliberate decision by Parliament to define that expression, both require explanation.

67. There are other provisions in Chapter 3 of Part 5 of TCGA 1992 where Parliament was very much alive to the importance of being clear when it was intending to refer to an individual in the capacity of a qualifying beneficiary and when it was intending to refer to an individual otherwise than in that capacity.

68. For instance, in s. 169N(7)(b) reference is made to earlier disposals of trust business assets “in respect of which that individual is the qualifying beneficiary and earlier qualifying business disposals made by that individual”. It was, obviously, not relevant that at the time of the earlier qualifying business disposals the individual was a qualifying beneficiary: hence the second reference to “that individual”. That reference to “that individual” was simply a reference to an individual who was a qualifying beneficiary. If Parliament had referred instead to “that qualifying beneficiary”, that would have strongly (and, in context, wrongly) suggested that the disposals made by the individual had to be those made by the individual at a time when the individual was a qualifying beneficiary. That was not the intended outcome in s.169N(7)(b) but, in our view, it *was* the outcome intended by Parliament in referring to the qualifying beneficiary in s.169J(4)(a) and (b).

69. By contrast, we consider that Mr Firth is wrong to attach significance to the fact that the claim mechanism provided by s.169M(2)(a) refers to the qualifying beneficiary even though HMRC accept that, at the time the claim is made, the individual in question need not be a qualifying beneficiary. Mr Firth suggests that this makes it clear that qualifying beneficiary was being used *merely* to identify the individual in question.

70. We cannot accept that. We think that it would have been distinctly unhelpful if, in the light of the way in which s.169J was drafted, Parliament had referred instead to the individual. It was simply providing that the individual who was the qualifying beneficiary at the time of the disposal that is the subject of the claim had to make the claim jointly with the trustees. It did so in much the most simple way (avoiding the need for a cross-reference to s.169J), and there can be no doubt that this simplicity produces the intended outcome.

71. In our view, the error underpinning the FTT’s analysis was that it assumed the very thing that needed to be established. The FTT simply asserted that it was clear that Parliament was extending the “entrepreneurial connection” in the ordinary individual case (s.169I(5) and (6)) to the trustee disposal case.

72. But the two cases are expressly and inherently different. It was recognised by the FTT that the qualifying period for the relief for trustees was “somewhat different” (see [49] and [52]) but, despite that, the FTT said it was clear or plain that the “entrepreneurial connection” was being extended. So far as its reading of s.169J(4) was concerned, it concluded that the references to the qualifying beneficiary were no more than a means of identifying the individual whose personal company it was. But it requires some explanation as to why that means of identification was chosen. In the FTT’s view, it was because of the extension of the normal “entrepreneurial connection”. By viewing it as an extension of the “entrepreneurial connection” the FTT considered that Parliament did not intend to impose a further condition as to the individual being a qualifying beneficiary for the time they satisfied that entrepreneurial connection. But

the inference that Parliament had intended to do that is not found on an analysis of the provisions of the code relating to trustees.

73. The assumption seems to have been reached by reference to the Explanatory Notes to the bill: see the extract quoted above in the FTT's judgment. Weight was attached to the entirely accurate statement in the notes that the particular conditions applying to the qualifying beneficiary were the same as those in s.169I(6) or (7). It seems to us that the notes were merely pointing out that the tests in the paragraphs of s.169J(4) were in identical form to those in the paragraphs of s.169I(6) or (7). But that tells us nothing about the central issue before us. We think that this notion of an extension of the "entrepreneurial connection" overinfluenced the FTT's construction of the wording in s.169J(4).

74. The detailed textual analysis that we have made of the wording and structure of s.169J would not, of course, have been needed if Parliament had directly addressed the point in terms. It did not do so and simply reproduced the same structure as was adopted in s.70 of FA 1985. To that extent we accept that there might be room for doubt about its meaning. However, in our view, that doubt is removed once we consider s.169O.

Section 169O

75. Subsection (1) of s.169O starts by saying that the section applies where "on a disposal of trust business assets, there is (in addition to the qualifying beneficiary) at least one other beneficiary who, at the material time, has an interest in possession".

76. Mr Firth says that those words import two time references: (1) "on a disposal", and (2) the "material time". He contends that the first question is whether, on the disposal, there were at least two beneficiaries (the qualifying beneficiary and one other). If that is the case, the second question is whether, at the material time, the other beneficiary had an interest in possession in the settled property.

77. We do not agree. It is true that a reference to "on" can, in appropriate contexts, be a reference to time; but it is also the case that "on" can just mean "in the case of" or, in this context, simply be referring to the fact that there is a disposal of trust business assets so as to confine the section to trustee cases.

78. We consider that s.169O(1) cannot, as a matter of ordinary English, be read as a proposition to the effect that the condition has to be met in relation to the other beneficiary at the time of the disposal and *also* at the material time. It would, however, have been easy for Parliament to have constructed a rule that *did* have that effect. It would have said something like:

> "(1) This section applies where-
>
> > (a) at the time of the disposal of trust business assets, there is (in addition to the qualifying beneficiary) at least one other beneficiary who has an interest in possession in [the settled property], and

> (b) at the material time, that other beneficiary also has such an interest".

79. Subsection (1) of s.169O is engaged only in the case of a disposal of trust business assets. So much is to be expected by the heading of the section, and "on a disposal of trust business assets," is doing nothing more than telling the reader that the provisions of the section are relevant to the trust case. The remainder of the subsection proceeds by saying that there is "(in addition to the qualifying beneficiary) at least one other beneficiary who, at the material time, has" the requisite interest. As a normal use of English, it is assumed by the bracketed reference that, at the material time, the qualifying beneficiary must *also* have an interest in possession in the trust.

80. What then is the material time? That concept is directly expressed by reference to the test in s.169J(4). It imports into s.169O the same one-year period rule as is present in s.169J(4). It is not without significance that the section uses the expression "the material time". It is "the material time" because the section is referring to the very condition that entitles the trustees to the relief in the first place: that is why the time *is the material time*. All the definition is then doing is fixing a particular point in time for the section to work and it does so by reference to the end of the period that satisfied the conditions in s.169J(4).

81. It follows from this that s.169O is quite clearly assuming that, at the material time, the qualifying beneficiary *does* have an interest in possession. That time is expressly linked to the condition in s.169J(4). On what we think is the clear meaning of s.169J(4), there is nothing surprising about this. What s.169O is concerned with is a case where there is, in addition to the qualifying beneficiary, another beneficiary who, at the relevant point in the time period by reference to which the qualifying beneficiary meets the conditions in s.169J(4), also has an interest in possession. The section then works in an entirely expected way. It is precisely because it is an important condition of being able to make a claim for the relief that the beneficiary has an interest in possession in the trust throughout the relevant qualifying period (the one-year period in the three years ending not later than the date of the disposal) that the legislation, by reference to that very condition, then seeks to reduce the amount of relief so as to confine it appropriately to the actual stake that the beneficiary had in the trust in that period.

82. By contrast, if the FTT is correct in its view that the only time at which it matters whether or not the qualifying beneficiary enjoys an interest in possession is the time of disposal, then the fraction of the income that the beneficiary was entitled to at that time would have been the obvious method for Parliament to have adopted in s.169O. But that is not the route that Parliament chose.

83. As Mr Chacko submitted, the relief does not, on the FTT's view, otherwise take any interest in whether or not the qualifying beneficiary has an interest in possession at the times provided for by s.169J(4). This difficulty also troubled Mr Firth. Having sought to explain how s.169O worked (on, in our view, a misconceived premise), he set out in his skeleton argument some practical consequences before concluding as follows:

> "It may reasonably be asked why there is a reduction in relief if there is a different person who had an interest in possession at the end of the 1-

> year period but not if there was no such person, even if, for example, there is a person with an interest in possession at the time of the disposal. Frankly, it is difficult to say more than that the legislation adopts a snapshot approach and the inevitable consequence of that will be drawing distinctions between similar sets of facts that are hard to explain purposively."

84. By contrast, and on what we consider to be the only possible meaning of s.169O, there are no such difficulties.

85. We also note that s.169O is, in all material respects, in the same form as the predecessor provision — para.9 of Sch.20 to FA 1985. We have explained above why Mr Firth's contention that s.169O(1) contains two time references is wrong but it would not even have been available by reference to the predecessor provision.

86. Para. 9(1) of Sch.20 to FA 1985 begins: "If**, in the case of a trustees' disposal,** there is, in addition to the qualifying beneficiary, at least one other beneficiary who, at the end of the qualifying period, has an interest in possession in the whole of the settled property …" (our emphasis).

87. There is no possible basis for adopting the two time period approach to that sub-paragraph. In our view, s.169O(1) is to the same effect.

Purpose of provisions: the policy behind entrepreneurs' relief

88. For the reasons given above, we consider that, properly considered in the context of Chapter 3 of Part 5 of TCGA 1992, the meaning of s.169J(4) is clear. We also consider that our reading results in the application of entrepreneurs' relief to trustees in a coherent way.

89. As Mr Chacko noted, relief is given to the trustees despite the fact that the gain on the disposal (a capital receipt) is not the qualifying beneficiary's gain and the fact that it does not follow that any capital gains tax payable will necessarily affect the qualifying beneficiary.

90. Nonetheless, Parliament has provided for a relief to be available to the trustees, and, in so doing, has provided for the amount of the gain arising to the trustees to be set against the qualifying beneficiary's £10 million limit. As explained above, this amounts to an effective transfer of a part of the qualifying beneficiary's lifetime allowance to the trustees. We consider that Parliament intended this "transfer" to be premised on the existence of an enduring link between the qualifying beneficiary's business and the interest in possession in the trust enjoyed by the qualifying beneficiary. Such a link is provided if there is a requirement in s.169J for the beneficiary to be a qualifying beneficiary throughout the one-year period mentioned in subsection (4) of that section.

91. If the FTT is right, it is not clear why Parliament provided a relief for trustees. All that would be required is an entitlement of the beneficiary to the income from the shares on the day on which they are sold. Mr Chacko submitted that this would then render

the relief for trustees to be little more than a tick-box exercise. HMRC gave the example of a family business where some members were involved in the business and some were not. If the FTT is right, a family trust could obtain relief on any shares it disposes of by the simple expedient of appointing an interest in possession for a qualifying beneficiary on the day on which the shares are disposed of and terminating it shortly afterwards.

92. Mr Firth countered that the one-year rule period would not be sufficient to prevent the sort of manipulation contended for by HMRC. As he put it, all that is required is "a little more foresight". We would not regard the one-year period in those terms. HMRC's point, which we accept, is that the FTT's view of s.169J would seem to strip the section of any real content. By contrast, a requirement for the individual to have been a beneficiary in the trust for a year is a very obvious way of preventing simple manipulation as well as connecting in a meaningful way (and not in an ephemeral way) the beneficiaries to the company whose shares are ultimately disposed of and to the trust.

93. Mr Firth submitted that, on HMRC's view of the legislation, the trust need not have any shares in the company during the one-year period or, if there was such a requirement, there would still be a significant departure from the form of the relief for disposals made by individuals. Mr Firth pointed out that, in the case of relief available to an individual on the disposal of shares in a company under s.169I(6), the relief extends to any shares in the company even if the shares are acquired on the day of disposal. We do not consider that there is anything surprising about that particular outcome: after all, the relief extends to securities of a company, and they have no relevance to the question whether a company is a personal company of an individual.

94. In any event, as Mr Chacko submitted, if an individual acquires and then disposes of shares, those events are relevant for the purposes of capital gains tax. In the ordinary case the individual would be taxed on the gain accruing only during the individual's period of ownership. So, while it is true that the relief would apply in this case, it might be expected that, in many cases, the gain would be relatively small. We recognise that, as Mr Firth pointed out, holdover relief is available under s.165 of TCGA 1992 for certain gifts with the result that individuals would be taxed on gains referable to times before their ownership. But that is an exception to the normal rule. By contrast, the creation or termination of an interest in possession is *not* a disposal for the purposes of TCGA 1992. The trustees remain owners of the shares.

95. Although it was no part of the FTT's reasoning, the FTT referred at [37] of its judgment to Mr Firth's submission that the result contended for by HMRC would impose a requirement for the beneficiary to have an interest in possession in the trust for a year during which time the trust may not own any shares in the company. HMRC disputed that relief would be available in a case where the trust did not own any shares in or securities of the company in the one-year period. A question also arises as to whether some or all of the assets disposed of also needed to be held in the trust during the one-year period in question.

96. We agree with HMRC that both of these issues are best left for determination in a case where they are material to the outcome. And even if Mr Firth is right, that would not affect our conclusions.

97. That is principally because we consider that, for all of the reasons given above, the only tenable construction of s.169J(4) when read together (as it must be) with s.169O is that the individual must be a qualifying beneficiary throughout the one-year period at a time when the company is the beneficiary's personal company.

98. In addition, we consider that the view that we have adopted of the code would still require a meaningful link between: (1) the trust, (2) the beneficiary of the trust while the beneficiary is working in the business, and (3) the disposal of the shares in the company. There is, of course, no difficulty in cases where the trust owns shares in the company during the one-year period and those shares are disposed of. Similarly, because of the way in which s.104 of TCGA 1992 works, there is no difficulty if shares of the same class are acquired or disposed of: those shares are regarded as indistinguishable parts of a single asset growing or diminishing as shares are acquired or disposed of. A concern about the impossibility of knowing how to deal with a case where one or two shares held in the one-year period become a hundred or more shares by the time of disposal falls away, at least in a case where the shares are of the same class.

99. The principal difficulty is if the trust is established with a nominal holding of assets or, at any rate, with assets other than shares in the company and the beneficiary has an interest in possession in the trust at those times when the company is a personal company but not at later times when the trust actually owns shares in the company. Although that is no doubt a possible case, it is merely one case among many and we do wonder how common it would be. And, even in that case, there would still have to be a meaningful link between the various components albeit at different times.

100.This, though, assumes that Mr Firth is correct. However, we consider that it is at the very least arguable that HMRC are right that the trust must own some shares in or securities of the company during the one-year period. We offer the following provisional observations as to why that might be so:

> (1) it seems to us that, in a case where a beneficiary has an interest in a part of the settled property which includes the shares disposed of (see s.169J(3)(b)), no difficulty necessarily arises: that paragraph fixes the interest of the beneficiary to the shares in question, and that part of the definition in s.169J(3) would naturally flow into s.169J(4);
>
> (2) in a non-shares case falling within s.169J(2)(b), there does not appear to be a difficulty either: that provision refers to assets used or previously used for the purposes of a business and s.169J(5)(a) then refers to those assets (the settlement business assets) as being used for the purposes of the business carried on by the qualifying beneficiary throughout the one-year period, which seems to assume that at least some of the assets in question were being used for the

purposes of the business at a time when the individual carrying on the business was a qualifying beneficiary; and

(3) the case where the language of s.169J is less apt is where, in the case of a disposal of shares, the beneficiary has an interest in the *whole* of the settled property: there is nothing express in the section referring to the need for the property of the trust in the one-year period to include at least some shares of or securities in the company. Compared to the case of a partial interest in the trust property, that would be a decidedly odd outcome, and it is, accordingly, very much open to question as to whether Parliament would have truly intended that; but, even if it did, it would lead to a sub-optimal outcome in one particular case.

Disposition

101. We consider that section 169J(4) of TCGA 1992 does require a beneficiary to have been a qualifying beneficiary throughout the period of one year ending not earlier than three years before the disposal. The FTT made an error of law in holding otherwise. Accordingly, the appeals must be allowed.

MR JUSTICE MICHAEL GREEN
JUDGE ANDREW SCOTT

Signed on Original

RELEASE DATE: 11 February 2021