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Case No: CA-2021-0007111
A3/2021/1394

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL (TAX AND CHANCERY CHAMBER)
MR JUSTICE MICHAEL GREEN AND
UPPER TRIBUNAL JUDGE ANDREW SCOTT
[2020] UKUT 29 (TCC)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16 September 2022

Before:

LORD JUSTICE LEWISON
LORD JUSTICE SNOWDEN
and
SIR LAUNCELOT HENDERSON

- -

Between:

THE QUENTIN SKINNER 2015 SETTLEMENT L	
THE QUENTIN SKINNER 2015 SETTLEMENT R	
THE QUENTIN SKINNER 2015 SETTLEMENT B	**Appellants**
- and -	
THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS	**Respondents**

- -
- -

Michael Firth (instructed by **Direct Access**) for the **Appellants**
Akash Nawbatt KC and **Michael Ripley** (instructed by the **General Counsel and Solicitor for HMRC**) for the **Respondents**

Hearing date: 7 July 2022

- -

Approved Judgment

This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 10:30am on 16 September 2022.

Sir Launcelot Henderson:

INTRODUCTION

1. This appeal raises a short point on the construction of the provisions relating to entrepreneurs' relief contained in Chapter 3 of Part V of the Taxation of Chargeable Gains Act 1992 ("TCGA 1992"), as they applied to certain disposals of trust business assets made by the trustees of three related family settlements ("the Trustees") on 1 December 2015 (and thus during the 2015/16 tax year).

FACTS

2. The three settlements were made on 30 July 2015 between Quentin David Skinner as settlor, and himself and Barnabas Paul Clevely as the Trustees. The principal beneficiary of each settlement was one of the settlor's three sons, Rollo Skinner, Ludovic Skinner and Bruno Skinner, defined in each case as "the Life Tenant". Apart from the identity of the Life Tenant, each settlement was in materially the same form. Subject to an overriding power of appointment in favour of a wider class of discretionary beneficiaries, the Trustees were directed to "hold the Trust Fund upon trust to pay the income to the Life Tenant during his lifetime", with remainder to such of his children as should attain the age of 25 during a specified Trust Period, and with an ultimate default trust in favour of charity. The Trustees were also given a wide power to pay or apply for the benefit of the Life Tenant the whole or any part of the Trust Fund "in which the Life Tenant is then entitled to an interest in possession".

3. The initial settled property was in each case £10, but on 11 August 2015, by three separate deeds of gift, the settlor gave 55,000 D ordinary shares in a company called DPAS Ltd ("DPAS") to the Trustees of each settlement. We were informed that the business of DPAS involved the administration of insurance services for dentists. It is common ground that the 55,000 D shares given to each settlement thereupon became part of the Trust Fund, and that the Life Tenant was beneficially entitled to an interest in possession in the settled shares by virtue of his life interest. In the absence of any exercise of the overriding power of appointment, each Life Tenant had a present right of present enjoyment of the income of the D shares as and when it arose: see Pearson v Inland Revenue Commissioners [1981] AC 753, which was a decision on the meaning of "interest in possession" for the purposes of capital transfer tax (later inheritance tax), but nobody has suggested that the expression has a different meaning for the purposes of capital gains tax ("CGT").

4. Each settlement's holding of D shares in DPAS was then sold by the Trustees, as I have said, on 1 December 2015. These were the disposals in respect of which claims to entrepreneurs' relief were in due course made on 31 January 2017. The claims were made jointly by the Trustees and the respective Life Tenants, as required by section 169M of TCGA 1992. However, the claims were eventually refused by HMRC, following the opening of enquiries into the relevant settlement tax returns, on the basis that each Life Tenant "had not held an interest in possession in the shares held by the trust for the requisite 12 month period". If that was indeed a requirement of the legislation, it was clearly not satisfied: the Trustees had acquired the D shares by way of gift on 11 August 2015, and they then sold them less than four months later, on 1 December 2015. Accordingly, the interest in possession of each Life Tenant in the shares subsisted for much less than one year before the date of disposal.

5. If, however, it was not a requirement of the legislation, properly construed, that the Life Tenant's interest in possession in the shares had to subsist for a minimum period of 12 months, but only that such an interest should subsist at the date of disposal, then it is common ground that the relief was validly claimed. This is the short point which divides the parties, and which has led to different outcomes before the two tribunals below. The First-tier Tribunal ("FTT"), in a decision released by Tribunal Judge Guy Brannan on 6 August 2019 ("the FTT Decision"), allowed the Trustees' appeals against the relevant closure notices: see [2019] UKFTT 516 (TC), [2019] SFTD 1331. This decision was in turn reversed by the Tax and Chancery Chamber of the Upper Tribunal (Mr Justice Michael Green and Judge Andrew Scott), in a decision released on 11 February 2021 ("the UT Decision"): see [2021] UKUT 29 (TCC), [2021] STC 412. The Trustees now appeal to this court, with permission for a second appeal granted by the Upper Tribunal. The amount of tax at stake, depending on the outcome of the appeal, is approximately £1.75 million.

6. Before coming to the legislation, there are some further important facts which it is convenient to mention at this stage. Apart from his interest in possession in 55,000 D shares in DPAS under the relevant settlement, each Life Tenant had also owned 32,250 C shares in the company, in his own right, since 2011. The C shares conferred full voting rights, and it is common ground that this holding was sufficient to constitute DPAS the "personal company" of the Life Tenant within the meaning of section 169S(3) of TCGA 1992, which provides that:

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

7. It is also common ground (see the FTT Decision at [18]) that each Life Tenant was an officer of DPAS, and that DPAS was a trading company.

LEGISLATION

Background

8. Chapter 3 of Part V of TCGA 1992 was inserted into the 1992 Act by way of amendment in 2008: see section 9 of, and Schedule 3 to, the Finance Act 2008. TCGA 1992 was itself a consolidation Act, described in its long title as "an Act to consolidate certain enactments relating to the taxation of chargeable gains".

9. Part V of TCGA 1992 was headed "Transfer of Business Assets". As originally enacted, it contained two Chapters. Chapter I consisted of general provisions, dealing with roll-over relief for replacement of business assets, appropriations to and from stock in trade, roll-over relief on the transfer of business to a company, and (in sections 163 and 164) "retirement relief". Chapter II was headed "Gifts of Business Assets". It provided for matters such as hold-over relief on gifts or other non-arm's

length disposals of such assets made by individuals, including gifts to the trustees of a settlement.

10. The provisions relating to "retirement relief" in the original sections 163 and 164 of TCGA 1992, as supplemented by Schedule 6, were in many respects recognisable precursors of what was later to become entrepreneurs' relief. They included, for example, provisions relating to certain disposals by trustees, which may be traced back to their first introduction in the Finance Act 1985. But these provisions were all repealed in 1998, with effect for disposals in 2003/04 and later years, and replaced with taper relief for disposals of business assets, which then itself held the field until its repeal in 2008.

11. Apart from the abolition of taper relief, the new regime enacted by the Finance Act 2008 introduced a single rate of CGT of 18%. It also introduced entrepreneurs' relief. We were shown the Explanatory Notes to the relevant provisions of the Finance Bill 2008, which HMRC made available in response to a request by the Upper Tribunal for assistance on the legislative history of entrepreneurs' relief. Paragraph 124 of the Explanatory Notes stated that:

> "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 provision (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)."

12. In my view, the assistance which we can derive from this Explanatory Note is very limited. While it may provide some insight into the drafting process of the entrepreneurs' relief provisions contained in the new Chapter 3 of Part V of TCGA 1992, our primary task must be to construe those provisions as a self-contained new statutory scheme in the wider context of the consolidation Act of which it now forms an integral part. As the Note itself recognises, the new rules for entrepreneurs' relief are only "broadly based" on the previous rules for retirement relief. Any implicit invitation to have regard to the use of similar terms in the previous retirement relief regime, as part of the initial contextual process of construction of the entrepreneurs' relief provisions, must in my view be firmly resisted.

13. The correctness of this approach is reinforced, to my mind, by the fact that the new code of entrepreneurs' relief is drafted in the modern style associated with the Tax Law Rewrite Project. Mr Michael Firth, who has appeared for the Trustees at all three hearings, opened his oral submissions to us by helpfully reminding us of what Lord Carnwath JSC said in relation to the Tax Law Rewrite Project in <u>R (on the application of Derry) v Revenue and Customs Commissioners</u> [2019] UKSC 19, [2019] 1 WLR 2754, at [7] to [10]. Lord Carnwath quoted from the explanation of

the drafting approach for the project given by the then Financial Secretary to the Treasury in 2009, at [8]:

> "The project now has a well-established approach to rewriting legislation, developed with the help of people whom it has consulted over a number of years. It restructures legislation to bring related provisions together and to provide more logical ordering. It also helps users by providing navigational aids, such as signposts, to make relevant parts of the legislation easier to find, and it has introductory provisions to set the scene. It unpacks dense source legislation by using shorter sentences and, where possible, it harmonises definitions. It uses modern language and helps the reader with aids such as formulae, tables and method statements, when appropriate."

14. Lord Carnwath also quoted from, and endorsed, the guidance given by Sales J (as he then was) in Eclipse Film Partners (No.35) LLP v Revenue and Customs Commissioners [2014] STC 1114 at [96], where he "likened the correct approach to statutory interpretation to that appropriate to a consolidation statute (as explained by the House of Lords in *Farrell v Alexander* [1977] AC 59)":

> "When construing a consolidating statute, which is intended to operate as a coherent code or scheme governing some subject matter, the principal inference as to the intention of Parliament is that it should be construed as a single integrated body of law, without any need for reference back to the same provisions as they appeared in earlier legislative versions … An important part of the objective of a consolidating statute or a project like the Tax Law Rewrite Project is to gather disparate provisions into a single, easily accessible code. That objective would be undermined if, in order to interpret the consolidating legislation, there was a constant need to refer back to the previous disparate provisions and construe them."

15. Although the entrepreneurs' relief code did not, as I understand it, form part of the Tax Law Rewrite Project as such, the fact that it was drafted in the modern style to which the Financial Secretary referred in 2009, and the fact that it was inserted into a consolidation statute, mean in my judgment that we should be guided by similar principles when construing it. We should also remember that, as Lord Carnwath put it in Derry at [10]:

> "… the resulting statutes are intended to be relatively easy to use, not just by professionals but also by the reasonably informed taxpayer, and that the signposts are there for a purpose, in particular to give clear pointers to each stage of the taxpayer's journey to fiscal enlightenment."

Entrepreneurs' Relief

16. The new Chapter 3 is contained in sections 169H to 169S of TCGA 1992. In what follows I quote the relevant provisions as they stood and were in force in the 2015/16 tax year.

17. The code is introduced by section 169H**:**

> "**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) But in the case of certain qualifying business disposals, entrepreneurs' relief is given only in respect of disposals of relevant business assets comprised in the qualifying business disposal: see sections 169L and 169LA.
>
> (4) Section 169M makes provision requiring the making of a claim for entrepreneurs' relief.
>
> (5) Sections 169M to 169P make provision as to the amount of entrepreneurs' relief.
>
> (6) Section 169Q and 169R make provision about reorganisations.
>
> (7) Section 169S contains interpretative provisions for the purposes of this Chapter."

18. I comment that this is patently an introduction in the modern drafting style, giving a clear statement of what the Chapter sets out to do, and introducing the key concept of "qualifying business disposals" which are to be eligible for the new relief in the form of a lower rate of CGT. Signposts are provided to the three sections which deal with the three types of qualifying business disposals. We are directly concerned with the second type, namely a disposal of trust business assets, but as will become apparent section 169J needs to be read in the light of section 169I, which deals with the first type of qualifying business disposals, namely a material disposal of business assets made by an individual. The remainder of section 169H then provides helpful signposts to the structure and content of the remainder of the Chapter. For present purposes, the relevant pointers are to section 169M (which requires the making of a

claim for entrepreneurs' relief), to sections 169N to 169P (which make provision as to the amount of the relief), and to section 169S (which contains interpretative provisions, including the important definition of what is meant by an individual's "personal company").

19. Section 169I then explains what is meant by a "material disposal of business assets":

> "**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) a disposal of the whole or part of a business,
>
> (b) a disposal of (or of interests in) one or more assets in use, at the time at which a business ceases to be carried on, for the purposes of the business, or
>
> (c) a disposal of one or more assets consisting of (or of interests in) shares in or securities of a company.
>
> (3) A disposal within paragraph (a) of subsection (2) is a material disposal if the business is owned by the individual throughout the period of 1 year ending with the date of the disposal.
>
> (4) A disposal within paragraph (b) of that subsection is a material disposal if –
>
> (a) the business is owned by the individual throughout the period of 1 year ending with the date on which the business ceases to be carried on, and
>
> (b) that date is within the period of 3 years ending with the date of the disposal.
>
> (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) Condition B is that the conditions in paragraphs (a) and (b) of subsection (6) are met throughout the period of 1 year ending with the date on which the company –
>
> (a) ceases to be a trading company without continuing to be or becoming a member of a trading group, or
>
> (b) ceases to be a member of a trading group without continuing to be or becoming a trading company,
>
> and that date is within the period of 3 years ending with the date of the disposal."

Conditions C and D relate to disposals of "relevant EMI shares", and they may for present purposes be ignored. EMI shares, broadly speaking, are shares acquired through the exercise of enterprise management incentives, within the meaning of the EMI code contained in Chapter 9 of Part 7 of the Income Tax (Earnings and Pensions) Act 2003. Finally, section 169I(8) contains provisions relating to partnerships of which the individual who makes the disposal is a member. Again, those provisions have no application to the present case.

20. The most important thing to note about section 169I is that it deals with the standard case where an individual taxpayer makes a material disposal of business assets. The requirements which must be satisfied for such a disposal are then broken down, on a step-by-step basis. Subsection (2) explains what is meant by a disposal of business assets. There are three types of disposal which qualify, including (most relevantly for present purposes) "(c) a disposal of one or more assets consisting of … shares in … a company". Subsections (3), (4) and (5) then set out the further conditions which must be satisfied, in relation to each type of disposal of business assets, if the disposal in question is to qualify as a "material" disposal. In relation to a disposal of shares in a company within subsection (2)(c), the relevant subsection is (5) which requires one of conditions A, B, C or D to be met. Condition A, contained in subsection (6), is that throughout the period of one year ending with the date of the disposal, the company is the individual's personal company, within the meaning of section 169S(3), and is either a trading company or the holding company of a trading group, and the individual is an officer or employee of the company (or of one or more companies which are members of the trading group). It can be seen, therefore, that condition A focuses on the relationship between the individual and the company concerned, and it lays down cumulative conditions which have to be satisfied throughout the period of one year ending with the date of the disposal. If those conditions are duly satisfied, there then exists what (for convenience) one might call the necessary entrepreneurial connection between the individual and his personal company.

21. Importantly, however, there is no minimum period of ownership of the relevant shares which the individual must satisfy. Provided that the necessary entrepreneurial connection has existed between the individual and the company for the year ending with the date of the disposal, it does not matter if the shares disposed of were acquired immediately before, and in contemplation of, the disposal. This means, for example, that a considerable degree of latitude is permitted to an individual making a disposal of shares in his personal company to assemble the shareholding for the purposes of the disposal in whatever is the most advantageous way, and without any minimum period of ownership being required. What matters, for the purposes of obtaining relief, is simply that the requirements of condition A have been satisfied throughout the period of one year ending with the date of the disposal.

22. It is also worth noting that these are the conditions which would have had to be satisfied if, in the present case, the Life Tenants had made disposals of their individual shareholdings in DPAS at the same time as the Trustees disposed of their holdings of D Shares. We do not know if that is what actually happened, but the possibility certainly cannot be discounted. Indeed, as a matter of commercial common sense, it will often be the case that an individual wishes to dispose of his personal shareholding at the same time as settled shares in which he has a life interest are disposed of.

23. I come now to section 169J, which explains when there is a disposal of trust business assets:

> “**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 3 years before that date.

(6) …"

24. As in the sections which I have already examined, we see here a step-by-step analysis of what constitutes a disposal of trust business assets, with liberal use of internal signposts to keep the reader on track. Subsection (1) sets out the three conditions which must be satisfied for there to be a disposal of trust business assets. First, the trustees of a settlement must make a disposal of "settlement business assets", with a signpost to subsection (2) where that expression is defined. Relevantly for present purposes, the definition includes, in paragraph (a), "assets consisting of … shares in … a company", provided that they form part of the settled property. Clearly, in the present case, the Trustees' holdings of D ordinary shares in DPAS were "settlement business assets" at the date when the Trustees disposed of them on 1 December 2015.

25. Secondly, there must be an individual who is "a qualifying beneficiary", with a signpost to subsection (3), which tells us that an individual is a qualifying beneficiary if he has, under the settlement, "an interest in possession (otherwise than for a fixed term) in (a) the whole of the settled property …" Again, there can be no doubt but that this condition was satisfied by each of the Life Tenants. It is common ground that under each of the three settlements the Life Tenant has an interest in possession in the whole of the settled property "during his lifetime". Although there is no definition of what is meant by an interest in possession "otherwise than for a fixed term", nobody

has suggested, or in my view plausibly could suggest, that the inherently uncertain duration of a person's lifetime amounts to a "fixed term" for these purposes.

26. The third requirement is that "the relevant condition is met", with signposts to subsections (4) and (5) depending on which type of "settlement business assets" is being disposed of. Since we are concerned with a disposal of shares in a company within paragraph (a) of subsection (2), the relevant condition is the one set out in subsection (4), namely 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 and is either a trading company or the holding company of a trading group, and the qualifying beneficiary is an officer or employee of the company, etc. It will be noted that the conditions which have to be satisfied by the qualifying beneficiary in relation to the company are in substance identical to those which have to be satisfied under condition A in section 169I(6) in relation to a disposal of shares, except that references to the individual are now replaced with references to the qualifying beneficiary, and the period for which the condition has to be satisfied is also different: instead of the period of one year ending with the date of the disposal, which is what condition A requires for an individual disponor, the period for which the qualifying beneficiary has to satisfy the relevant condition is "a period of 1 year ending not earlier than 3 years before the date of the disposal". In other words, although it would still suffice for the qualifying beneficiary to satisfy the condition throughout the period of one year ending with the date of the disposal, it will also suffice if he can point to any continuous period of one year during the period of four years before the date of the disposal when the conditions were satisfied.

27. I will need to return to the relevant condition set out in subsection (4), which lies at the heart of the present dispute. At this stage, I wish to emphasise the clear and logical way in which section 169J is structured. It invites the reader to begin at the beginning, and to proceed step by step. Thus, the first step requires one to identify a disposal of settlement business assets by the trustees of a settlement. The second step requires one to identify an individual who is a qualifying beneficiary in relation to that settlement. It is only if those first two steps are satisfied that the reader needs to proceed to see whether the "relevant condition" in subsection (4) or subsection (5) is also met. In those subsections, the references to "the qualifying beneficiary" are in my opinion most naturally read as simply a reference back to the individual who has already been identified as a qualifying beneficiary at step 2. The purpose of step 2 is to identify a beneficiary who has the necessary trust relationship with the settlement whose trustees are making the disposal of settlement business assets. That trust relationship is established if there is an individual beneficiary who has an interest in possession of the specified nature and extent under the settlement at the date of the disposal. If so, that individual is "a qualifying beneficiary", and once he has been identified as such, the reader can move on to see whether step 3 is also satisfied.

28. At that stage, the focus switches to establishing the necessary entrepreneurial connection between the qualifying beneficiary (who has already been identified) and the relevant company. The conditions set out in subsections (4) and (5) are exclusively concerned with the relationship between the qualifying beneficiary and the company, and the period during which that relationship must be shown to subsist. There is nothing in the wording of either subsection which expressly requires the qualifying beneficiary to have had an interest in possession under the settlement

throughout the one-year period during which the step 3 relevant condition has to be satisfied.

29. Section 169K deals with the third type of qualifying business disposals, namely a disposal associated with a relevant material disposal. It is not suggested that these provisions throw any light on the question which we now have to consider. Nor are we directly concerned with section 169L, which applies if a qualifying business disposal is one which does *not* consist of the disposal of (or of interests in) shares in or securities of a company. In such cases, entrepreneurs' relief "is given only in respect of the disposal of relevant business assets comprised in the qualifying business disposal": see section 169L(1).

30. The next section of relevance is section 169M, which requires relief to be claimed:

> "**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) A claim for entrepreneurs' relief in respect of a qualifying business disposal must be made on or before the first anniversary of the 31 January following the tax year in which the qualifying business disposal is made.
>
> (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."

31. The main reason why a claim for entrepreneurs' relief needs to be made jointly by the trustees and the qualifying beneficiary, in the case of a disposal of trust business assets, lies in the cap on the amount of chargeable gains which can qualify for the lower 10% rate of CGT. The amount of the cap was £1 million when the relief was first enacted in 2008, but it had increased to £10 million by the tax year 2015/16. For the purposes of calculating the cap, disposals made by trustees were in effect treated as disposals made by the qualifying beneficiary. Since this would not always be advantageous for the beneficiary concerned, and since an interest in possession in settled property differs both in legal form and in economic substance from absolute beneficial ownership of the settled property, it was clearly appropriate to provide for a joint claim in such cases. The material point for present purposes, however, is that section 169M provides for the relief to be claimed by "the qualifying beneficiary", even though he will not necessarily still have an interest in possession in the settled property by the time when the claim comes to be made. In the present case, for example, the claims for relief were made on 31 January 2017, which was more than

one year after the date of the disposals. The reference to "the qualifying beneficiary" in section 169M(2) therefore lends some support to the argument that the term is simply meant to identify the individual who was the qualifying beneficiary at the date of the disposal, whether or not the relevant trust relationship which made him the qualifying beneficiary still subsisted when the claim came to be made.

32. Section 169N contains general provisions about the amount of relief. Again, we see the step-by-step drafting technique, and use of internal signposts, which are so characteristic of this legislation. The main relevant provisions of the section are as follows:

> "**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).
>
> …
>
> (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."

33. The provisions of section 169N emphasise the self-contained nature of the reduced rate of CGT chargeable when entrepreneurs' relief is claimed, as well as the aggregation (for the purposes of the £10 million cap) of qualifying business disposals made by individuals with those made by trustees, to which I have already drawn attention: see, in particular, the definition of "earlier relevant qualifying business disposals" in subsection (7). In relation to the wording of that subsection, it again seems to me material to note that the references to "the qualifying beneficiary" simply use that term to identify the individual who was the qualifying beneficiary at the date of the relevant disposal of trust business assets.

34. I come now to section 169O, which contains special provisions for computing the amount of relief in respect of certain trust disposals:

> **"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."

35. On any view, this is a section of considerable obscurity. It is no criticism to say that neither side was able to provide us with a fully coherent explanation of how the section is meant to operate, or of the policy which it is designed to promote.

Nevertheless, I consider that a number of points may safely be made about the section.

36. In the first place, the section applies only in cases where there is a disposal of trust business assets within the meaning of section 169J(1). This must be the import of the opening words of section 169O(1), which states that the section applies "where, on a disposal of trust business assets …" Accordingly, the section can only come into play if: (a) there is a disposal by the trustees of a settlement of "settlement business assets", consisting either of shares or of assets used for the purposes of a business; (b) there is an individual who is a qualifying beneficiary (as defined) at the date of the disposal; and (c) the "relevant condition" in section 169J(4) or (5), as the case may be, is met.

37. Secondly, the effect of section 169O, where it apples, is to apportion the amount of the net gains accruing to the trustees as a result of the calculation in subsection (1) of section 169N, so that only "the relevant proportion" of that amount qualifies in principle for the reduced 10% rate of CGT, while the balance is a chargeable gain subject to the standard rate of tax: see section 169O (2) and (3).

38. Thirdly, the further set of circumstances which triggers the operation of the section is that, in addition to the qualifying beneficiary who, *ex hypothesi,* has an interest in possession under the settlement at the date of the disposal, there is "at least one other beneficiary who *at the material time* has an interest in possession" in either the whole of the settled property, or in a part of it which includes the shares or other assets disposed of: this is the import of the remainder of subsection (1).

39. Fourthly, "*the material time*" is defined in subsection (6) as "the end of the latest period of 1 year which ends not earlier than 3 years before the date of the disposal" and throughout which the conditions set out in paragraphs (a) and (b) of that subsection are met. It is important to note that those conditions refer to "the qualifying beneficiary", either expressly (in paragraph (b)) or by reference to section 169J(4) (in paragraph (a)). In other words, the "material time" has to be ascertained by reference to the end of the most recent one-year period throughout which the individual already identified as the qualifying beneficiary has satisfied the "entrepreneurial connection" test in section 169J(4) (where the disposal is of shares), or throughout which that individual has carried on the business (where the disposal is of business assets). The definition does *not* require one to examine the relationship of any other beneficiary who has an interest in possession under the settlement with the personal company of the qualifying beneficiary, or indeed with any other company. It further follows that in a simple case like ours, where the disposal is of shares, and the qualifying beneficiary satisfies the entrepreneurial connection throughout the year preceding the date of disposal, the material time and the date of disposal will coincide.

40. Fifthly, once the material time has been ascertained, it is then a question of trust law whether, at that time, there is any other beneficiary who has an interest in possession of the specified description. This requires, in my view, no more than a "snapshot" examination of the trusts of the settlement on the relevant day. There is not even a requirement, as there is in section 169J(3), that the interest in possession should be "otherwise than for a fixed term". If there is such a beneficiary, section 169O will be triggered, and the apportionment mandated by subsection (4) will inexorably follow.

Conversely, if there is no other beneficiary with an interest in possession on the relevant day, there will be no apportionment, and it would make no difference if (for example) an interest in possession were irrevocably appointed to another beneficiary on the next day, or if an interest in possession in favour of another beneficiary had been terminated on the previous day.

41. Sixthly, the wording of the apportionment formula in subsection (4) merits careful attention. It is focused on the interests in possession which subsist in the settled property "at the material time", ascertained in the way I have described. Importantly, however, the wording does on a natural reading appear to presuppose that the qualifying beneficiary will have had an interest in possession at the material time, even if the material time is earlier than the date of the disposal. This is a potentially crucial point, upon which HMRC in their submissions, and the Upper Tribunal in the UT Decision, understandably place emphasis. The wording also presupposes that there is at least one other beneficiary who has an interest in possession in the relevant part of the settled property. That, in itself, is unsurprising, since (as we have seen) the application of the section is premised on the existence of at least one such other beneficiary; but there remains an oddity, in that subsection (4) refers only to interests in "the part" of the settled property "comprising" the shares or assets disposed of, whereas subsection (1) refers to the existence of interests in possession in *either* the whole of the settled property *or* a part of it which "consists of or includes" the shares or assets disposed of. Presumably, the part of the settled property referred to in subsection (4) can, where appropriate, include the whole, and the point of the difference in wording is to confine the operation of the apportionment formula to interests in possession which subsist, as at the material time, in the actual shares or assets disposed of.

42. Finally, it is worth noting subsection (5) which tells us that "the qualifying beneficiary's interest" in subsection (4) means "the interest by virtue of which he is the qualifying beneficiary (and not any other interest the qualifying beneficiary may have)." So, for example, if the qualifying beneficiary is also a discretionary beneficiary under the settlement, or if he has a fixed term interest in possession in part of the settled property in addition to the interest in possession which makes him a qualifying beneficiary, those other interests are to be ignored for the purposes of the apportionment exercise. Again, however, the potentially significant point is that the statutory wording seems to envisage that the qualifying beneficiary will, at the material time, have the same interest in possession as that by virtue of which he is the qualifying beneficiary on the date of disposal.

DISCUSSION

43. The question which needs to be answered is whether the individual who is a qualifying beneficiary at the date of disposal, by virtue of satisfying the definition in section 169J(3), must also satisfy the requirements of that definition throughout the period of one year during which the "relevant condition" in subsection (4) or (5) of section 169J has to be met if there is to be a disposal of trust business assets within the meaning of the section.

44. As I have already indicated, both the logical structure and the drafting technique of section 169J seem to me to point strongly towards a negative answer to that question. The structure of the section requires the reader to consider in turn whether the three

ingredients of a disposal of trust business assets are present. Those ingredients are clearly set out in subsection (1), together with signposts to the subsections which will tell the reader whether (a) there is a disposal of "settlement business assets", (b) there is an individual who is "a qualifying beneficiary" under the settlement, and (c) the "relevant condition" is met. Each ingredient must of course be present, as the conjunction "and" between paragraphs (b) and (c) of subsection (1) makes clear. It also follows from this structure that the question whether the third ingredient is present arises only if a qualifying beneficiary who satisfies the definition in subsection (3) has already been identified.

45. The identification of a qualifying beneficiary depends on an examination of the trusts of the settlement as at the date of the disposal. There is no requirement in subsection (3) that the individual should have had the interest in possession for any minimum period, but only that the interest should exist at the time of the disposal, and (negatively) that it should not be an interest in possession "for a fixed term". The references which then follow, in subsections (4) and (5), to "the qualifying beneficiary" can in my judgment only be to the individual who has been identified as such pursuant to subsection (3). When considering whether "the relevant condition" is met, the focus has shifted to whether there is a sufficient connection between the qualifying beneficiary and the shares or business assets which form the subject matter of the disposal. The necessary connection must be established throughout a one-year period ending not earlier than three years before the date of the disposal.

46. It is no part of either "relevant condition" that the qualifying beneficiary should have had the interest in possession, by virtue of which he is the qualifying beneficiary, throughout the one-year period referred to. On the contrary, the focus is on the nature and duration of the relationship between the qualifying beneficiary as an individual, and the company or the business assets, as the case may be. Thus, where the disposal is of shares, the company must be the qualifying beneficiary's personal company, it must be either a trading company or the holding company of a trading group, and the qualifying beneficiary must be an officer or employee of the specified description throughout the one-year period. It would in my judgment be wholly foreign to this carefully delineated statutory scheme if the reader then had to extract from subsections (4) and (5) a further condition, nowhere expressly articulated and conspicuously absent from subsection (3) itself, to the effect that the qualifying beneficiary's interest in possession must subsist not only on the date of disposal, but also throughout the one-year period when the "relevant condition" is met.

47. If that had indeed been the statutory intention, one would expect the additional requirement to have been expressly included in the definition of a qualifying beneficiary. Furthermore, it would have been necessary for the drafter to address the question whether the interest in possession had to subsist in the whole of the settlement business assets disposed of throughout the relevant one-year period. It certainly cannot be assumed that this must have been Parliament's intention, bearing in mind the absence of any minimum period of ownership for material disposals of business assets made by individuals within section 169I, and the close similarity between the wording of the "entrepreneurial connection" in subsections 169I(6) and 169J(4). To my mind, it is implausible in the extreme that Parliament would have enacted in section 169J(3) an incomplete definition of a qualifying beneficiary, which then had to be supplemented by implication from the use of the incompletely defined

term in two subsections which, on the face of it, are dealing with an entirely different, and separately signposted, requirement of a disposal of trust business assets. As Mr Firth rightly submitted for the appellants, this would introduce a critical element of circularity into the definition of a qualifying beneficiary, and it would also cut across the clear logical structure of the section.

48. I also accept Mr Firth's further submissions that support for what I would anyway regard as the clear and natural meaning of section 169J is provided by the subsequent references to the qualifying beneficiary in section 169M(2)(a) and in section 169N(7). In each context, it seems clear to me that the references to "the qualifying beneficiary" are simply to the individual who has been identified as such by application of the test in section 169J(3). As within section 169J itself, once a beneficiary has been identified who satisfies the test of being "a qualifying beneficiary", subsequent references to "the qualifying beneficiary" (with the definite article) can only sensibly be read, in my view, as references back to the individual who has been so identified. The point is made with particular clarity by section 169N(8), which for convenience I will set out again:

> "(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."

This wording reflects the logical structure which I have sought to explain, and it also recognises the need to cater for the probably not infrequent case where a qualifying business disposal by an individual is made in tandem with a disposal of trust business assets in respect of which that individual is the qualifying beneficiary.

49. In respectful agreement with the FTT, I would endorse its identification of the purpose of Parliament in enacting the "relevant condition" in section 169J(4) as being, in effect, to extend the "entrepreneurial connection" required in the ordinary case of a qualifying business disposal by an individual to a situation in which a qualifying beneficiary owns an interest in possession in shares through a settlement: see the FTT Decision at [48]. As Judge Brannan went on to say:

> "49. It is clear to me that Parliament was intending to extend the one-year holding period in relation to an interest in possession under a settlement so that the requirement that the taxpayer should hold shares in a "personal company" and that the shares be in a trading company or a holding company of a trading group should apply to that shareholding. That is what Mr Firth describes as the "entrepreneurial connection". I accept 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."

50. To similar effect, Judge Brannan said at [57]:

> "It seems to me that the natural reading of the reference to a "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 sub-paragraph 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."

51. The Upper Tribunal disagreed. It regarded Mr Firth's analysis of the logical structure of section 169J as "somewhat superficial", and thought it placed insufficient weight on the deliberate use of a definition of "qualifying beneficiary" which it said was also used in subsection (4): see the UT Decision at [62]. The Upper Tribunal considered that, if Parliament had wished to produce the result for which Mr Firth contended, it would in subsection (4) have referred to "the individual" rather than "the qualifying beneficiary". It went on to say, at [66]:

> "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."

52. I am unable to accept this reasoning. In my view, the Upper Tribunal's approach makes insufficient allowance for the drafting techniques of legislation modelled on the principles of the Tax Law Rewrite Project, and the way in which a defined term is used simply as an unambiguous means of reference back to the definition. The purpose of section 169J(3) is to explain when an individual is a qualifying beneficiary, and thus whether the second ingredient of a disposal of trust business assets is present. Once a qualifying beneficiary has been identified, it is entirely natural to use the term "the qualifying beneficiary" in order to refer back to the individual who has been so identified. Contrary to the view of the Upper Tribunal, what would require explanation is why, on HMRC's approach, Parliament should have used an incomplete definition in subsection (3), and then left the incomplete definition to be supplemented in an indirect and circular manner by use of the term "the qualifying beneficiary" in subsections (4) and (5).

53. For the reasons which I have already given, I would be most reluctant to conclude that this was indeed Parliament's intention. Not only would it subvert the logical structure and drafting technique of the section, but it would introduce a further requirement for

disposals of trust business assets which has no parallel in the case of qualifying business disposals made by individuals.

54. It remains to consider, however, whether the court should nevertheless be driven to conclude that this was indeed Parliament's intention, because of inferences that can be drawn from section 169O. As I have already noted, section 169O is a provision of considerable obscurity, but its basic object is to apportion the net gains which qualify for the reduced rate of CGT in cases where, at the material time, there is more than one interest in possession in the settled property. In the great majority of cases, including those with which we are concerned, there can be no question of section 169O applying, because the qualifying beneficiary at the date of the disposal is the only beneficiary who has an interest in possession in the settled property at that date, or (if different) at an earlier date which is the "material time" as defined. However, the problem remains that section 169O does appear to have been drafted on the assumption that the qualifying beneficiary must have had the interest in possession by virtue of which he is the qualifying beneficiary at the material time, even if the material time predated the date of disposal.

55. That is a puzzle to which I can offer no answer, but it is in my judgment important to keep it in perspective. The problem, such as it is, is one which will arise only in the probably infrequent cases where the material time does not coincide with the date of disposal, and where the qualifying beneficiary's interest in possession did not subsist at the earlier date. There is no indication in the material before us that this relatively remote possibility has in practice given rise to any difficulty in the 14 years since entrepreneurs' relief was first enacted in its modern form, or indeed in relation to the predecessor provisions which can be traced back to the Finance Act 1985. I appreciate, of course, that this is not necessarily an answer to inferences which can legitimately be drawn from the way in which the section is drafted; and in his able submissions for HMRC, Mr Nawbatt KC, who did not appear below, was at pains to emphasise that he was not relying on section 169O as itself being the source of a further requirement which the qualifying beneficiary has to satisfy, but rather as an integral part of the overall statutory scheme which must be taken into account when construing the requirements of section 169J.

56. I fully accept that the statutory code must be construed as a whole, and that section 169O cannot be ignored, particularly as it is exclusively concerned with disposals of trust business assets. I would also accept that the FTT was arguably too quick to dismiss the relevance of section 169O, when Judge Brannan said at [60]:

> "I am unpersuaded by HMRC's reliance on s.169O. 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 ..."

57. Nevertheless, while acknowledging that the point is not an easy one, I find myself in agreement with what Judge Brannan went on to say at [62] of the FTT Decision:

> "I accept, of course, s.169O is part of the statutory context but it seems to me that, even if Mr Vallis is correct, this rather oblique unintended consequence for which HMRC argue simply cannot prevail over what in my judgment is the clear wording and meaning of s.169(4)."

58. Judge Brannan then added, at [63]:

> "In this case, both Mr Firth and Mr Vallis referred to the unintended or absurd consequences of [each other's] preferred interpretations. I shall not rehearse all those lengthy arguments. It seems to me that to decide this appeal on what is effectively *reductio ad absurdum* arguments is an unsatisfactory approach where the wording of the statute is, in my judgment, clear."

59. The Upper Tribunal was impressed by the point that section 169O "is quite clearly assuming that, at the material time, the qualifying beneficiary *does* have an interest in possession": see the UT Decision at [81]. However, the Upper Tribunal's approach to section 169O must be evaluated in the context of its prior conclusion that the natural reading of section 169J was that for which HMRC contend.

60. On that basis, the Upper Tribunal took the view that any doubt was removed by consideration of section 169O: see the UT Decision at [74]. In my view, however, the Upper Tribunal erred in its construction of section 169J, and the real question is whether the apparent drafting assumption in section 169O is a factor of such weight as to require HMRC's construction of section 169J itself to be accepted. In my view, such a conclusion would afford unwarranted weight to what is, after all, only an apportionment provision, which comes into play, if at all, only after a disposal of trust business assets within section 169J has been identified. It would in my judgment be a classic instance of letting the tail wag the dog if an inference drawn from the obscure wording of a section of very limited application were to override what I consider to be the clear, logical and unambiguous wording of section 169J itself.

61. A further pointer to the same conclusion is that since section 169O applies only where there is more than one beneficiary with an interest in possession, it is most unlikely that Parliament would have intended an assumption which underlies the drafting of the section to govern a case in which section 169O can have no application at all, because there is only one beneficiary who has ever had an interest in possession. If this is the underlying point which the FTT was making at [60] of the FTT Decision, quoted above, I agree with it.

62. For these reasons, while paying tribute to the great care with which the Upper Tribunal considered the question, I respectfully consider that it came to the wrong conclusion, and that the decision of the FTT should be restored.

63. I would therefore allow the appeal.

Lord Justice Snowden

64. I agree.

Lord Justice Lewison

65. I also agree.