

CAPITAL GAINS TAX - disposal of land - after contract and before completion vendors assigned half of their beneficial interests in some of the land to the trustee of overseas settlements - whether disposal by the vendors was of all their beneficial interests as at the date of the contract - yes - whether disposal by the vendors was only of the beneficial interests to which they were still entitled at the date of completion - no - appeal dismissed - CGTA 1979 Ss 27(1) and 46(1)

THE SPECIAL COMMISSIONERS

MICHAEL JEROME

Appellant

- and -

H J KELLY

(H M INSPECTOR OF TAXES) Respondent

SPECIAL COMMISSIONER: DR NUALA BRICE

Sitting in London on 17 May 2001

Robert Venables QC, instructed by Messrs Stokes Solicitors,
for the Appellant

Launcelot Henderson QC, instructed by the Solicitor of
Inland Revenue, for the Respondent

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DECISION

The appeal

1. Mr Michael Jerome (the Appellant) appeals against an assessment to capital gains tax for the year ending on 5 April 1988. The assessment was dated 14 February 1992 and was in the sum of £195,148.50.
2. The assessment was raised because the Inland Revenue

were of the view that on 16 April 1987, which was the date of the contract for the sale of certain land, the Appellant and his wife were deemed to have disposed of all their interests in the land as at the date of the contract notwithstanding that, between the date of the contract and the date of completion, the Appellant and his wife had assigned part of their beneficial interests in the land to the trustee of overseas settlements.

The legislation

3. At the relevant time the relevant legislation was contained in sections 27(1) and 46(1) of the Capital Gains Tax Act 1979 (the 1979 Act). The relevant part of section 27 provided:

"Time of disposal and acquisition where asset disposed of under contract

27(1) Where an asset is disposed of and acquired under a contract the time at which the disposal and acquisition is made is the time the contract is made (and not, if different, the time at which the asset is conveyed or transferred)."

4. The relevant part of section 46 provided:

"Trustees, nominees and personal representatives

46(1) In relation to assets held by a person as nominee for another person, or as trustee for another person absolutely entitled as against the trustee, ... this Act shall apply as if the property were vested in, and the acts of the nominee or trustee in relation to the assets were the acts of, the person or person for whom he is the nominee or trustee (acquisitions from or disposals to him by that person or persons being disregarded accordingly).

5. Section 45(1) of the 1979 Act provided that the amount of capital gains tax on chargeable gains accruing to a married woman should be assessed and charged on her husband.

The issue

6. The Appellant and his wife (with the Appellant's brother) entered into a contract on 16 April 1987 for the sale of three plots of land. On that date the Appellant and his brother were the trustees for sale of two plots and part of the third which they held on trust for the Appellant, his brother and his wife as tenants in common in unequal shares. The Appellant and his wife were given the remainder of the third plot on 1 May 1987 which they held as trustees for sale for themselves as beneficial joint tenants. On 28 December 1988 the Appellant and his wife created two overseas settlements and on 15 December

1989 they entered into six assignments under which they assigned to the trustee of the overseas settlements one-half of their beneficial interests in the three plots. Completion of the contract for the sale of the three plots took place on three dates between November 1990 and December 1992.

7. The Inland Revenue argued that the Appellant and his wife disposed of the property they then owned on the date of the contract (16 April 1987) and of the remainder of the third plot on 1 May 1987. The Appellant argued that he and his wife made disposals on 16 April 1987 and 1 May 1987 only of the one-half of the beneficial interests which they still owned at the date of completion.

8. Thus the issue for determination in the appeal was whether the Appellant and his wife made disposals on 16 April 1987 and 1 May 1987 of the whole of their beneficial interests in the property comprised in the contract (as argued by the Respondent) or of the remaining one-half of their beneficial interests which had not been assigned to the trustee of the overseas settlements (as argued by the Appellant).

9. The parties requested a decision in principle on the issue for determination in the appeal leaving the amount of the assessment to be determined at a later date.

The evidence

10. The parties put in a statement of agreed facts. A blue agreed bundle of documents was produced.

The facts

11. From the evidence before me I find the following facts.

1981 to 1987 - The events before the contract

12. On 10 April 1981 Mrs Ethel May Philbrow (Mrs Philbrow) entered into a deed of gift under which she conveyed to her two sons, the Appellant and Mr Oliver St. Clair Jerome (Oliver) 29.14 acres of agricultural land at Bridge Farm in Hampshire (the Property) as beneficial tenants in common in equal shares.

13. Thus after this deed of gift the legal title to the Property was vested in the Appellant and Oliver as trustees for sale and the beneficial interests were held by the Appellant and Oliver as tenants in common in equal shares, namely as to:

Oliver: one-half

The Appellant: one-half.

14. On 26 March 1984 the Appellant assigned to his wife, Mrs Mary Edith Jerome (Mrs Jerome), one third of his half share of the beneficial interest in the Property.

15. Thus after this assignment the legal title to the Property remained vested in the Appellant and Oliver as trustees for sale but the beneficial interests were held as to:

Oliver: three-sixths or one half

The Appellant: two-sixths or one third

Mrs Jerome: one-sixth.

16. On 31 March 1987 the Appellant assigned to his wife, in consideration of the sum of £55,000, a further one-sixth of his original half share of the beneficial interest in the Property (i.e. one-twelfth).

17. Thus after this assignment the legal title to the Property remained vested in the Appellant and Oliver as trustees for sale but the beneficial interests were held as to:

Oliver: six-twelfths or one half

The Appellant: three-twelfths or one quarter

Mrs Jerome: three-twelfths or one quarter.

1987 - The contract and the Additional Property

18. On 16 April 1987 Oliver, the Appellant and his wife as vendors entered into a contract (the contract) with Conder Developments Limited (Conder). Under the contract the vendors contracted to sell to Conder three plots of land (the three plots). The area of each plot and its price was:

Plot 1 7.387 acres £2,319,518

Plot 2 1.25 acres £ 392,500

Plot 3 4.565 acres. £1,278,200

19. Plots 2 and 3, and all but 0.9 acres of Plot 1, were part of the Property comprised in the deed of gift of 10 April 1981. At the date of the contract the remaining 0.9 acres of Plot 1 was owned by Mrs Philbrow. However, on 1 May 1987 Mrs Philbrow executed another deed of gift under which she gave to the Appellant and his wife the remaining 0.9 acres of Plot 1 (the Additional Property) as beneficial joint tenants. Thus on 1 May 1987 the Appellant and his wife held both the legal title and the beneficial interests in

the 0.9 acres.

20. Thus, under the contract, the vendors of that part of the three plots which was originally comprised in the Property (that is, Plots 2 and 3 and all but 0.9 acres of Plot 1) were the Appellant and Oliver as trustees for sale and the vendors of the Additional Property were the Appellant and his wife as trustees for sale.

21. Clause 9 of the contract provided:

"The Jeromes sell as Trustees but nevertheless shall in the Conveyance or Transfer enter into the same covenants as would be implied if they were selling as Beneficial Owners."

22. The contract provided that, in addition to the stated price, there should be an uplift if completion occurred after 31 December 1988. The contract also provided that completion was to be thirty days after 16 April 1994 or earlier if stipulated by Conder. There could be different completion dates for different plots. The contract further provided that Conder would apply for outline planning permission and that, if this were granted before 16 April 1994, then alternative completion dates for all the plots would apply.

23. On 11 November 1987 Conder assigned its benefit in the contract to Crest Estates Limited (Crest).

1988 and 1989 - the settlements and the assignments

24. On 28 December 1988 the Appellant and his wife jointly established two Bermudian settlements.

25. The first settlement was an interest in possession settlement. The Appellant and his wife appointed Codan Trust Company Limited to be the trustee and transferred to the trustee the sum of one hundred pounds. The settlement declared that the trustee should stand possessed of the trust funds upon trust to pay the income to the Settlor (defined as the Appellant and his wife) during the lifetime of the Settlor; then to pay the income to the widow of the Settlor during her lifetime; and thereafter on trust for the children of the Settlor equally; in default the trust fund was to be held on trust for remoter issue of grandparents of the Settlor.

26. The second settlement was an accumulation and maintenance settlement. The Appellant and his wife jointly appointed Codan Trust Company Limited to be the trustee and transferred to the trustee the sum of one hundred pounds. The settlement declared that the trustee should stand possessed of the trust fund for the children of the Settlor on attaining the age of twenty-five years.

27. On 15 December 1989 six deeds of assignment were executed, two by the Appellant, two by his wife and two by the Appellant and his wife jointly. Under each assignment property was assigned to the trustee of the overseas settlements. The six assignments may be summarised as:

(1) the Appellant assigned one-eighth of his original half share in the Property on the trusts of the accumulation and maintenance settlement;

(2) the Appellant assigned one-eighth of his original half share in the Property on the trusts of the interest in possession settlement;

(3) Mrs Jerome assigned one quarter of her one quarter share in the Property on the trusts of the accumulation and maintenance settlement;

(4) Mrs Jerome assigned one quarter of her one quarter share in the Property on the trusts of the interest in possession settlement;

(5) the Appellant and Mrs Jerome assigned a quarter of the net proceeds of sale and the net rents and profits until sale of the Additional Property on the trusts of the accumulation and maintenance settlement; and

(6) the Appellant and his wife assigned one quarter of the net proceeds of sale and the net rent and profits until sale of the Additional Property on the trusts of the interest in possession settlement.

28. The operative clause in each assignment read:

"ALL THAT [the appropriate fraction] of the net proceeds of sale and the net rents and profits until sale of and in [the Property or the Additional Property] TO HOLD the same to the Trustee absolutely."

29. The effect of the six assignments was that the Appellant and his wife each assigned one quarter of their beneficial interests in the Property and the Additional Property to the trustee to hold on the trusts of the interest in possession settlement and also assigned one quarter of their beneficial interests in the Property and the Additional Property to the trustee to hold on the trusts of the accumulation and maintenance settlement. The assignments were in respect of the whole of the Property and not just the three plots.

30. After the execution of the assignments the beneficial interests in the Property were held as to:

Oliver: twelve twenty-fourths or one half

The Appellant: three twenty-fourths or one-eighth

Mrs Jerome; three twenty-fourths or one eighth

Trustee of interest in possession settlement: one eighth

Trustee of accumulation and maintenance settlement: one eighth

31. Also after the execution of the assignments the interests in the Additional Property were held as to:

The Appellant: one quarter

Mrs Jerome: one quarter

Trustee of interest in possession settlement: one quarter

Trustee of accumulation and maintenance settlement: one quarter

32. The trustee of both the overseas settlements is referred to in this Decision as the Trustee.

1990-1992 - planning permission and completion

33. On 22 February 1990 outline planning permission was obtained. Thereafter completion of the sale of the three plots to Crest took place. The dates of completion of the sales of the plots and the consideration paid were:

Plot 1 1 November 1990 £2,743,386

Plot 2 23 December 1991 £ 509,282

Plot 3 7 December 1992 £1,780,375

34. On 14 February 1992 the Respondent issued the assessment which is the subject of this appeal.

The arguments of the Appellant

35. For the Appellant Mr Venables argued that the Appellant was not liable to pay capital gains tax in respect of disposal of the one-half of the equitable interests of himself and his wife which had been assigned to the trustee of the settlements but he accepted that the Appellant should pay capital gains tax in respect of the disposal of the other half of the equitable interests which had been retained until completion of the contract.

36. Mr Venables went on to argue that, as a result of section 46, the acts of the trustees in relation to both the Property and the Additional Property were the acts of the

beneficiaries. By virtue of the assignments of 15 December 1989, the Appellant and Mrs Jerome had disposed of one half of their equitable interests in both the Property and the Additional Property with the result that, when the contract was completed by the sale of the three plots in 1990, 1991 and 1992, all that the Appellant and his wife could then dispose of was the remaining one-half of their equitable interests in the Property and the Additional Property and they only received the consideration for that half. The consideration for the interests which had been assigned to the trustee of the settlements was paid to the trustee.

37. Mr Venables further argued that the doctrine of the estate contract was ignored for the purposes of capital gains tax. Normally, on the signature of a contract, a purchaser would get an equitable interest in the land and the vendor's title would then be subject to that interest. The reasoning was that equity would decree specific performance of the contract. However, the result of section 27 was that, until the price had been paid and the purchaser had performed the other obligations under the contract, the purchaser did not obtain a full equitable interest. Section 27 proceeded on the basis that a mere contract was to be ignored and a disposal took place only on actual completion.

38. Finally, Mr Venables argued that section 27 was limited to identifying the time of the disposal and not the person who made the disposal; that was clear from the use of the word "time" in both the heading to the section and in section 27(1) itself. The section did not require the asset to be disposed of by anyone other than the person who actually disposed of it. He relied upon *Marshall v Kerr* [1992] STC 360 CA at 365 as authority for the view that, in construing a deeming provision, the application of the statutory fiction should be limited to that which was needed to avoid injustice or absurdity.

The arguments of the Respondent

39. For the Respondent Mr Henderson accepted that, as the Appellant and Mrs Jerome did not own the Additional Property at the date of the contract, their disposal of it could not take place earlier than the date on which they did own it, namely on 1 May 1987.

40. Mr Henderson went on to argue that section 27 required the asset to be identified and that was plots 1, 2 and 3. The section then provided that the time of the disposal was the date of the contract and that was 16 April 1987. From that it followed that the disposal was made by the persons who were then the owners of the relevant assets and who had contracted to sell them. He also argued that the contract was binding and capable of specific performance. Accordingly, after the contract, Conder and then Crest were the owners of a beneficial interest in the

land. He referred to The Law of Real Property (2000) by Megarry and Wade at pages 676 to 678 (paragraphs 12-051, 12-052 and 12-054) as authority for the view that a purchaser under a contract obtained an immediate equitable interest which was a proprietary interest enforceable against third parties. Although after the date of the contract the vendor was a trustee for the purchaser, he could occupy the land and retain the rents and profits until sale.

Reasons for decision

41. In considering the arguments of the parties it is convenient to first consider the inter-relation of the law of property with the legislation relating to capital gains tax; then the effect of section 46; and finally the effect of section 27.

42. The law of property proceeds on the basis that, where property is held in trust, the legal title is conveyed by the trustees. A purchaser is not concerned with the beneficial interests and can rely on the fact that the trustees can give a good receipt for the purchase money. Of course, the holders of the beneficial interests can look to the trustees to apply the purchase money in accordance with the terms of the trust but the beneficiaries are solely concerned with the proceeds of sale. Thus, on the facts of this appeal, Crest acquired the title to the three plots comprised in the Property from Oliver and the Appellant as trustees for sale and Crest acquired title to the Additional Property from the Appellant and his wife as trustees for sale. These provisions cannot be affected by the provisions of the capital gains tax legislation which applies deeming provisions only for the purposes of that legislation.

43. The first relevant deeming provision is in section 46 which provides that, where assets are held by a trustee for another person or persons who is or are absolutely entitled as against the trustee, the property is treated as vested in the beneficiary and the acts of the trustee are treated as the acts of the beneficiary; all gains, losses and liability concern the beneficiary and not the trustee.

44. Within the context of this appeal section 46 had relevance to the Property. After the deed of gift of 10 April 1981 the Property was an asset held by trustees (Oliver and the Appellant) for Oliver and the Appellant as tenants in common in equal shares. Thus Oliver and the Appellant were absolutely entitled as against the trustees. Accordingly, the Property (for capital gains tax purposes) was not then treated as settled but as vested in the beneficiaries (Oliver and the Appellant) and any acts of the trustees would have been treated as the acts of the beneficiaries; all gains, losses and liability would have concerned Oliver and the Appellant as beneficiaries and not

as trustees.

45. After the two assignments of 26 March 1984 and 31 March 1987 Oliver and the Appellant remained the trustees for sale of the Property but Oliver, the Appellant and Mrs Jerome were then entitled as tenants in common in unequal shares. Nevertheless, Oliver, the Appellant and Mrs Jerome together were absolutely entitled as against the trustees. Accordingly, the Property (for capital gains tax purposes) was not then treated as settled but as vested in Oliver, the Appellant and Mrs Jerome in unequal shares and the acts of the trustees (Oliver and the Appellant) were treated as the acts of the beneficiaries with the result that gains, losses and liability were the concern of Oliver, the Appellant and Mrs Jerome as beneficiaries and not of Oliver and the Appellant as trustees.

46. Mr Venables' argument was that, after the assignments of 15 December 1989 to the Trustee of the overseas settlements, Oliver and the Appellant remained the trustees for sale of the Property but Oliver, the Appellant, Mrs Jerome and the Trustee were then entitled as tenants in common in unequal shares. Thus, Oliver, the Appellant, Mrs Jerome and the Trustee were together absolutely entitled as against the trustees of the Property. Accordingly, the Property (for capital gains tax purposes) was not then treated as settled but as vested in Oliver, the Appellant, Mrs Jerome and the Trustee as beneficiaries and the acts of the trustees (Oliver and the Appellant) were treated as the acts of the beneficiaries with the result that gains, losses and liability were the concern of Oliver, the Appellant, Mrs Jerome and the Trustee as beneficiaries and not of Oliver and the Appellant as trustees. It was thus Mr Venables' argument that, when completion of the contract took place, the gains and liability for tax were the concern of Oliver, the Appellant, Mrs Jerome and the Trustee in the proportions to which they were then entitled to the beneficial interests in the property.

47. Section 46 also has relevance to the Additional Property. On 1 May 1987 the Appellant and Mrs Jerome held the Additional Property as trustees for themselves as beneficial joint tenants. Thus the Appellant and Mrs Jerome were absolutely entitled as against themselves as trustees. Accordingly, the Additional Property (for capital gains tax purposes) was not then treated as settled but as vested in the Appellant and Mrs Jerome as beneficiaries and any acts of the trustees would have been treated as the acts of the beneficiaries and all gains, losses and liability would have concerned Oliver and Mrs Jerome as beneficiaries and not as trustees.

48. Mr Venables' argument was that, after the assignments of 15 December 1989 to the Trustee, the Appellant and Mrs Jerome remained the trustees for sale of the Additional Property but the Appellant, Mrs Jerome and the Trustee

were then beneficially entitled to it. (This must mean that the joint tenancy created by the deed of gift of 1 May 1987 was severed by the assignments so that the Appellant, Mrs Jerome and the Trustee became beneficially entitled as tenants in common in unequal shares). Thus, Mr Venables argued that the Appellant, Mrs Jerome and the Trustee were together absolutely entitled as against the trustees of the Additional Property. Accordingly, the Additional Property (for capital gains tax purposes) was not then treated as settled but as vested in the Appellant, Mrs Jerome and the Trustee as beneficiaries and the acts of the trustees (the Appellant and Mrs Jerome) were treated as the acts of the beneficiaries with the result that gains, losses and liability were the concern of the Appellant, Mrs Jerome and the Trustee as beneficiaries and not of the Appellant and Mrs Jerome as trustees for sale. It was thus Mr Venables' argument that, when completion of the contract took place, the gains and liability for tax were the concern of the Appellant, Mrs Jerome and the Trustee in the proportions to which they were then entitled to the beneficial interests in the property.

49. That analysis of the effect of section 46 identifies the deemed vendors for capital gains tax purposes but does not decide whether the deemed vendors were those who were deemed to own the three plots before the six assignments of 15 December 1989 or after. Here the deeming provisions in section 27 are relevant. Section 27 is in very clear terms and it is not difficult to apply it to the facts of this appeal. Plots 1, 2 and 3 were disposed of under the contract of 16 April 1987. Accordingly, the section provides that that was the time at which the disposal was made. It follows that that was the date which identified the disposal including the parties to the disposal and their interests in the property the subject of the disposal. The fact that, after the date of the contract and before completion, the Appellant and Mrs Jerome assigned parts of their beneficial interests to the Trustee cannot alter that analysis.

50. Thus, at the date of the contract, the deemed owners of the Property (who are liable for capital gains tax on the gains) were Oliver, the Appellant and Mrs Jerome in the following proportions:

Oliver: six-twelfths or one half

The Appellant: three-twelfths or one quarter

Mrs Jerome: three-twelfths or one quarter.

51. Also, at the date of the contract the deemed owners of the Additional Property (who are liable for capital gains tax on the gains) are the Appellant and Mrs Jerome jointly.

Decision

52. The decision on the issue for determination in the appeal is that the Appellant and his wife made disposals on 16 April 1987 and 1 May 1987 of the whole of their interests in the land comprised in the contract irrespective of the fact that, after the date of the contract and before completion, they assigned one-half of their beneficial interests to the Trustee of the overseas settlements.

53. This is a decision in principle on the issue for determination in the appeal. Either party has liberty to apply for a further hearing for the amount of the assessment to be determined.

DR NUALA BRICE

SPECIAL COMMISSIONER

RELEASE DATE: 19th July 2001

SC 3110/1999