INCOME TAX – out of time assessments - whether loss of tax attributable to fraudulent or negligent conduct of Appellant – yes – appeal dismissed – TMA 1970 s 36(1)

THE SPECIAL COMMISSIONERS

CHARTERED ACCOUNTANT - Appellant
- and -
(HM INSPECTOR OF TAXES) - Respondent

SPECIAL COMMISSIONERS: DR NUALA BRICE
JOHN CLARK

Sitting in London on 27 to 30 May 2002

Michael Sherry of Counsel, instructed by Messrs Stephenson Harwood Solicitors, for the Appellant

David Ewart of Counsel, instructed by the Solicitor of Inland Revenue, for the Respondent

ANONYMISED DECISION

The appeal

1. A Chartered Accountant (the Appellant) appeals against assessments to income tax issued on 4 September 2000 for the years 1988/89 to 1992/93 inclusive. The assessments were raised to disallow loan interest relief and were in the following amounts:

Year ended	**Amount**
5 April 1989	£28,333.20
5 April 1990	£63,730.00
5 April 1991	£49,132.00
5 April 1992	£23,903.60

5 April 1993 £14,204.80

The legislation

2. At the relevant time section 34 of the Taxes Management Act 1970 (the 1970 Act) contained the ordinary time limit for the making of assessments and provided that an assessment to tax might be made at any time not later than six years after the end of the chargeable period to which the assessment related. However, section 36 of the 1970 Act provided:

> **"36(1) An assessment on any person (in this section referred to as "the person in default") for the purpose of making good to the Crown a loss of tax attributable to his fraudulent or negligent conduct … may be made at any time not later than 20 years after the end of the chargeable period to which the assessment relates."**

The issue

3. It was common ground that the assessments at issue in the appeal had not been made within the ordinary time limit. Also, there was no dispute as to the amount of the assessments. Thus, the main issue for determination in the appeal was whether, in the years 1988/89 to 1992/93 inclusive there had been a loss of income tax attributable to the fraudulent or negligent conduct of the Appellant.

4. Specifically, the appeal related to interest claimed by the Appellant in his personal tax returns which interest was payable on loans made to a company called Nomco Limited (Nomco). The Appellant argued that Nomco acted as a nominee for him and A; that he had paid the interest; and that accordingly he was entitled to claim the relief. The Inland Revenue argued that Nomco did not act as a nominee for the Appellant; that the Appellant did not believe that Nomco so acted; that the Appellant claimed interest relief when he knew that he was not entitled to it; and that that there was thus a loss of tax attributable to the fraudulent or negligent conduct of the Appellant.

The evidence

5. A statement of agreed facts and five agreed bundles of documents were produced. Oral evidence was given by the Appellant on his own behalf. The Appellant had signed a statement of his evidence. Oral evidence was given on behalf of the Respondent by the Bank Manager of Bank Plc (the Bank). The Bank Manager had signed a written statement of his evidence. Oral evidence was also given on behalf of the Respondent by the Solicitor who was a partner in a firm of solicitors. The Solicitor acted in connection with the purchase of the property the subject of the appeal.

6. Prior to the hearing of the appeal the Special Commissioners, on the application of the Respondent, had issued witness summonses under the provisions of regulation 5(1) of the Special Commissioners (Jurisdiction and Procedure) Regulations 1994 SI 1994 No. 1811 (the 1994 regulations) to the Bank Manager and the Solicitor requiring their attendance at the hearing of the appeal to give evidence and to produce stated documents. A witness summons had also been issued by the Special Commissioners, on the application of the Appellant, requiring the attendance of A. However, the witness summons was not served on A by the Appellant as required by regulation 5(2) and so he did not attend to give oral evidence at the hearing of the appeal.

The facts

7. From the evidence before us we find the following facts.

The persons concerned in the events the subject of the appeal

8. *The Appellant* is a Fellow of the Institute of Chartered Accountants in England and Wales having qualified as a chartered accountant in the 1950s. At the relevant time he was the senior partner of his firm which was an accountancy practice. The Appellant told us in evidence that, although he was also an auditor, his main specialisation was income tax and corporation tax.

9. *Nomco* was incorporated in the 1960s as a company limited by shares. The authorised share capital of the company was £1,000 divided into 1,000 shares of £1 each. On incorporation two shares were issued to the subscribers to the Memorandum of Association. The Memorandum of Association provided that, among the objects for which the company was established, was to hold in trust as trustees or as nominees real or personal property of any kind. The registered address of Nomco is the same address as the Appellant's firm. At all relevant times the Appellant and his wife were the shareholders in, and the directors of, Nomco and the Appellant's wife was the company secretary. In 1973, 1976 and 1984, in response to requests for information, the Appellant's firm informed the Inland Revenue that the nature of the activity carried on by the company was that of a nominee company and that the company was not then trading.

10. For a number of years prior to 1988 the Appellant's firm acted as accountants and financial advisers to *A*. The Appellant's firm also acted as the auditors of B Limited *(B)* (which was incorporated in 1979) and of B (Construction) Limited *(Construction)* (which was incorporated in 1986) of which companies A was a director and shareholder. The firm also rendered payroll services and gave advice on tax matters to A and his companies. Although the registered office of B was also at the same address as the Appellant's firm, A corresponded as director of B from his personal address. From about 1979 A was involved in property developments in London. At no time did A hold any shares in Nomco nor was he ever a director or company secretary of Nomco.

11. *The Bank Manager* had known the Appellant since 1984 and had an exceptionally strong business relationship with him. The Bank also knew A but the Bank Manager could not recall details of the Bank's relationship with A nor did the Bank Manager know the full details of the relationship between the Appellant and A in respect of the project at issue in the appeal. A normally banked with another Bank but had some arrangement with the Bank between 1988 and 1990.

12. Prior to the purchase of the property the subject of this appeal t*he Solicitor* had acted as the solicitor of A and of B on two or three occasions but had not previously acted either for the Appellant or for Nomco.

1988 – the acquisition of the property

13. In early 1988 A identified a property (the property) as suitable for re-development. The property was being sold with a new 125 year lease. A consulted architects about the proposed conversion of the house into flats and on 11 March 1988 wrote to the estate agents, in his capacity as a director of B, and confirmed an offer to purchase the property for £778,000 subject to contract. On 16 March 1988 the chartered surveyors acting for the vendors of the property

wrote to the Appellant's firm asking for confirmation that B was able to finance the development and the firm, as auditors of B, gave that confirmation.

14. On 25 March 1988 A telephoned the Solicitor and instructed him to act on behalf of B in connection with the conveyancing of the property. The Solicitor made a number of manuscript notes one of which was "Funding from Chartered Accountant". On 11 April 1988 the Solicitor wrote fully to A at B with a copy of the draft lease for the property and with a number of comments on the draft lease. At that stage the lessee shown on the draft lease was B.

15. On 4 May 1988 A received from his own chartered surveyors their opinion about the proposed sale prices of the development. Six flats were to be converted from the house and a maisonette was to be newly built at the rear. (In the event it does not appear that the new maisonette at the rear was built.) Values of each of the seven units were given. A then made some calculations of the costs of the redevelopment and estimated that a profit of £308,325.00 would be made if the proposed sale prices mentioned by his chartered surveyors were realised. A sent these calculations to the Appellant addressing him by his first name.

May 1988 - the Merchant Bank and the Bank loans

16. Both A and the Appellant then made enquiries about sources of finance for the development. A approached an acquaintance of his at a Merchant Bank (the Merchant Bank) and made enquiries on the basis that the purchase would be by B.

17. The Appellant, however, made enquiries on the basis that the purchase was to be by Nomco. He approached the Bank Manager and they met on 20 May 1988. The Bank Manager wrote to the Appellant on the same day to say that he had agreed to place a fresh facility at the disposal of Nomco. The facility was a loan of £250,000 to assist with the acquisition of the property. Repayment was expected within twelve months and it was understood that repayment would be made from the profit to be gained from the development plus the proceeds of £150,000 from the sale of the Appellant's London flat. The interest charges would be debited to Nomco's current account. Security for the loan was to consist of a first charge on the Appellant's London flat, a charge on some endowment policies, and a joint and several guarantee from the Appellant and his wife, supported by an existing charge over their country home. These terms were accepted by the Appellant in a letter with the heading "Nomco Limited".

18. On the same day (20 May 1988) the Bank Manager prepared some internal notes recording his understanding of the project. These were headed "Nomco Limited" and noted that, in conjunction with A, the Appellant had the opportunity of acquiring the leasehold of the property for £778,000. The purchase price of the property would be funded as to 70% by a loan from the Merchant Bank who had also agreed to fund the building works. The Appellant intended to occupy the top flat after the conversion. The repayment of the £250,000 to be lent by the Bank was to come from the sale of the Appellant's London flat and from the profit "the company will acquire" from the overall proposition. The notes also stated that the Appellant's "stake is being raised through the Company, for tax reasons, rather than in his own name".

19. Meanwhile A's approach to the Merchant Bank had also been successful and on 26 May 1988 the Merchant Bank wrote to the directors of B offering a loan facility of a maximum of £886,000. This was to be made up as: £544,000, or 70% of the valuation whichever was the lower sum, to purchase the 125 year

lease of the property; £281,000 towards costs of £402,500 (that is 70% of such costs) to convert the property into six flats and a maisonette; and £61,000 towards professional fees of £87,000 associated with the development. The amounts towards the costs of conversion and professional fees were to be drawn down as the conversion progressed upon production at each stage of an architect's certificate. The security for the loan was to consist of a first legal charge over the property; a floating charge over the assets of B; and the guarantee of A to the full amount of the facility. The offer was subject to the solicitors for the Merchant Bank investigating and approving legal title to the property.

20. At about this time the issued share capital of Nomco was increased.

21. Meanwhile the Solicitor corresponded with the solicitors for the vendor and also with the solicitors for the Merchant Bank on the basis that the property was to be acquired by B. However, the conveyancing was delayed because squatters had occupied the property and had to be evicted.

June 1988 – Nomco becomes the purchaser

22 The first record of the fact that A knew that the purchaser was not to be B but Nomco is dated 15 June 1988. On that date A wrote to his acquaintance at the Merchant Bank and asked for the loan facility to be re-issued to Nomco as the property was to be purchased by Nomco. A gave his personal address as the address of Nomco. He also asked whether, as Nomco had neither assets nor liabilities, the provision about taking a floating charge over its assets could be deleted. He also stated that guarantees for the full amount of the facility would be given by himself and the Appellant whom he described as his "joint venture partner". Finally he mentioned that the building contractors were to be his own building company, Construction.

23. At about the same time A must also have instructed the Solicitor of the change in the identity of the purchaser because the Solicitor wrote to the vendor's solicitors on 15 June 1988 and asked if there would be any objection to the purchase being taken in the name of Nomco.

24. On 16 June 1988 the Merchant Bank wrote to A at his address addressing him as "A, Nomco Limited". A revised loan offer letter was enclosed which was exactly the same as the previous loan offer letter of 26 May 1988 except that it was addressed to the directors of Nomco and required the guarantees of both A and the Appellant. The offer letter was agreed and accepted for Nomco by the signatures of the Appellant and his wife. A sent a copy of the revised offer to the Solicitor and told him of the registered address of Nomco. On 24 June 1988 the Merchant Bank wrote to the Bank asking for an opinion as to the financial standing of Nomco and the Bank replied on 29 June to say that Nomco was a respectably constituted private limited company which should prove good for the figures and purpose stated.

25. On 14 July 1988 the Solicitor wrote to the solicitors for the Merchant Bank confirming that the matter was intended to proceed "in the name of Nomco Limited". He said that exchange of contracts was delayed pending the eviction of the squatters. On the same day the Solicitor wrote to the vendor's solicitors and his letter contained the sentence: "We regret, however, that our client did ask us some little while ago to raise with you his desire to take the purchase in the name of Nomco Limited [of the same address]and we would be grateful if you would confirm that this is in order."

26. On 18 July 1988 Nomco opened an account with the Merchant Bank and on 19 July the Solicitor wrote to the Appellant to report on the proposed exchange of contracts by Nomco for the acquisition of the property. This was a lengthy letter which contained detailed advice about matters relating to the title to the property. In the letter the Solicitor said that he would "not go into the details of the Lease in length since these have already been discussed with A on behalf of your Company".

July 1988 – the exchange of contracts

27. On 20 July 1988 contracts for the 125 year lease were exchanged, the purchaser being Nomco. Exchange took place at the property and the Solicitor and the Appellant were there and the Appellant signed the contract on behalf of Nomco. On 21 July the Solicitor wrote to the solicitors for the Merchant Bank saying that they were aware that the matter was proceeding "in the name of Nomco Limited". On 2 August the Merchant Bank wrote again to the Bank this time asking for their opinion of the financial standing of the Appellant. The Bank replied on 3 August to say that the Appellant was a highly respectable and trustworthy individual who was known to be a man of substance and who would not enter into any commitment he could not see his way to fulfil.

28. The Solicitor then left for his holiday and on 2 August his firm wrote to the Appellant to say that the solicitors for the Merchant Bank were concerned that no shares in Nomco had been issued. The Appellant replied to say that on 31 May 1,000 shares had been issued to himself and his wife. On 8 August the solicitors for the Merchant Bank sent a facsimile message to the Solicitor's firm which said that they had received the details of the shareholdings of the company but were not sure that they understood it. They asked:

> "Is Nomco a Nominee or Trustee for others and if so who are the beneficiaries and have they consented to the proposed charge over [the property]?"

29. On 9 August the Solicitor returned from his holiday and he wrote to the Appellant sending six documents which required attention. His letter was delivered by hand. The enclosures were: the counterpart lease; the legal charge in favour of the Merchant Bank; the debenture (floating charge) in favour of the Merchant Bank; the joint and several guarantee in favour of the Merchant Bank; the forms for registering the charges; and a draft of minutes of a board meeting of Nomco with a borrowing resolution. The Solicitor's letter raised some outstanding matters and said:

> "One particular matter which has just been raised is the position of Nomco Limited and whether it is in fact a Trustee or Nominee for others and if so who are the beneficiaries. It was my understanding that the Company was beneficially owned by yourself and your wife and that the company has simply entered into a joint development agreement with A, but perhaps you would kindly confirm the position in order that I can satisfy the Merchant Bank."

30. On 9 August 1988 there was a board meeting of Nomco agreeing to the acquisition of the property and the facility agreement with the Merchant Bank. The minutes were in accordance with the draft supplied; they were detailed and stated that the purpose of the charges to the Merchant Bank was to finance the company's purchase of the lease of the property and to provide finance to

redevelop the same. The minutes contained no mention of the fact that Nomco was acting as a nominee or trustee.

31. The Appellant received the Solicitor's letter of 9 August and had a telephone conversation with the Solicitor on 10 August. He then executed the documents which he sent to A for his signature and onward transmission to the Solicitor. On 10 August 1988 the Solicitor wrote to the solicitors for the Merchant Bank about a number of matters and the letter concluded with the following paragraph:

> "Finally, with regard to the status of Nomco Limited itself our clients have confirmed that the company is beneficially owned by the Appellant and his wife and that they do not hold as Nominees for any other party. As your clients are aware the Company does have a joint development arrangement with A, but the Company is in no sense a Nominee. We trust that this is sufficient reassurance for your clients."

August 1988 - completion

32. On 12 August completion was effected with the loans from the Merchant Bank and the Bank. The loan from the Merchant Bank was secured by a legal charge on the property made between Nomco as mortgagor and the Merchant Bank as mortgagee. It recorded that, as security for the payment and discharge of the monies loaned by the Merchant Bank to Nomco, Nomco, as beneficial owner, charged the property to the Merchant Bank by way of legal mortgage. The loan from the Merchant Bank was also secured by a debenture executed by Nomco under which Nomco as beneficial owner charged by way of a first floating charge all the undertaking and assets of Nomco. Finally the loan from the Merchant Bank was also secured by a joint and several guarantee signed by both A and the Appellant under which, in consideration of the Merchant Bank giving credit to Nomco, they both personally guaranteed the repayment of the loan.

33. On 15 August the Solicitor wrote to the Appellant and reported that completion had taken place and he enclosed a note of his firm's fees addressed to Nomco. On the same day the Solicitor wrote to A about the insurance policy on the property. We saw a copy of an insurance policy for the year ending 10 November 1991 issued by Sun Alliance in the name of Nomco Limited.

34. Nomco had accounts with both the Merchant Bank and the Bank and, after completion, both the Merchant Bank and the Bank debited Nomco's accounts with them with the amounts of interest due in September, December, March and June in each year until the loans were repaid.

Early 1989 – the building works begin

35. On 20 January 1989 the Appellant visited the Bank Manager to bring him up to date with the development. The Bank Manager's note referred to "the property development being undertaken by Nomco Limited". The Bank Manager agreed to lend the Appellant an additional £50,000 for another project.

36. In March 1989 A corresponded with the occupier of the property about certain matters connected with the building works relating to the conversion of the property. He wrote on the printed notepaper of B which had been amended in type so as to read "B/Nomco Ltd". A signed his name as "Director". The next day the Solicitor wrote to the neighbour's solicitors in the following way:

> "B Limited
>
> We thank you for your letter of 22 March with regard to our above clients although we would mention that the property is owned by their associated company Nomco Limited. We do however understand that your client will have received a full response from A of our client company and we trust that matters are satisfactorily resolved."

37. On 28 April 1989 the Appellant submitted his return of income for the year ended on 5 April 1989. It contained no claim for interest relief in respect of either the Merchant Bank or the Bank loan.

38. On 8 June 1989 the Merchant Bank wrote to "The Directors, Nomco Limited" at A's address to renew the loan facility in the amount of £866,000. (By that time some advances had been made towards the costs of the conversion of the house into flats.) On 8 June 1989 the Bank Manager visited the property with the Appellant and A. The Bank Manager prepared a contemporaneous note recording that the building work, which had begun in April 1989, was on schedule.

Mid 1989 – statements to the Inland Revenue and Customs and Excise

39. On 15 June 1989 the Inland Revenue wrote to the Appellant's firm asking for information about Nomco for the period from June 1985 to 31 May 1989; the information was requested on form CT 46D(2)(A). On 27 June 1989 the Appellant replied to say that the company had commenced trading in August 1988 and that accounts would be made up for the periods ending on 31 December 1988 and would be submitted by 31 December 1989. The additional information required if the company had not traded was marked by the Appellant as "N/A" (not applicable).

40. In June 1989 the Appellant's firm applied to Customs and Excise for Nomco to be registered for value added tax. The covering letter said that the company was refurbishing a listed building for residential purposes; that the property had been purchased in August 1988; and that it was expected that the flats would be available for sale in the coming autumn. The Form VAT 1 which was enclosed with the letter stated that the business activity of Nomco was that of "property developers – buildings" with trade classification 5001 and that the date of the first taxable supply was 1 September 1989. The form asked for registration from 1 July 1988. (In fact it appears that the effective date of registration was 8 December 1989.)

Late 1989 – the first difficulties appear

41. It was in September 1989 that the first difficulties in connection with the development appeared. On 27 September 1989 A wrote to the Appellant to say that Construction had paid £221,443.13 in respect of the building works and fees and he was seriously embarrassed in his cash flow. He appreciated that the Bank and the Merchant Bank loans had funded most of the purchase and building works but Construction had met the additional 30% costs, namely £66,432.00. (It will be recalled that the Merchant Bank loan facility funded 70% of the construction costs.) A asked if Nomco could make a contribution towards the costs he had met. We were not informed about the response to this request.

42. On 2 November 1989 A wrote to the Solicitor about the sale of Flat 6 which was the first flat to be sold. His letter was on the printed notepaper of B which

had been amended to read "B/Nomco Ltd". He gave the Solicitor full instructions about the sale and referred to the Appellant as "my partner in this venture". The tenure of the flat was to be 120 years. The Solicitor replied to A and copied his letter to the Appellant.

December 1989 – the sale of Flat 6

43. The sale of Flat 6 was completed in December 1989 for a price of £325,000 which was £25,000 less than the May 1988 valuation. The sale of all the flats was, of course, by Nomco for whom the Solicitor continued to act.

44. Meanwhile, A's financial situation was deteriorating. On 19 December 1989 A wrote to the Appellant and sent him a list of payments made by Nomco; a list of payments made by Construction on behalf of Nomco; and a list of payments which needed to be made urgently to various contractors. He said that Construction could not meet these latter payments and suggested that Nomco should let him have a "round figure sum". We saw the list of payments made by Construction on behalf of Nomco and these were for supplies between 7 June 1988 and 9 December 1989 and were for such matters as planning fees; valuation fees; tools; water; kitchen appliances; tiles, mirrors, light fittings; door furniture etc etc. They amounted to £245,421.18. We also saw a note of two supplies paid by Nomco in January and February 1989 for fees and electrical work respectively and these amounted in total to £7,477.27.

45. On 28 December 1989 another letter was sent to the Appellant by B which said that fireplaces were due to be installed in three of the flats in January but 50% of the total invoice had to be paid in advance. As Construction did not have the money the letter asked if Nomco would pay this amount.

Early 1990 – value added tax

46. On 4 April 1990 an Officer of HM Customs and Excise visited Nomco and prepared a summary of its trading activities. The main business activity of the company was noted as "property developer"; its principal inputs as professional fees and construction costs; and its principal outputs as "sale of flats". The officer made some notes which included the following:

> "Chartered Accountant and A … decided to enter into a joint venture to purchase [the property] … convert it into 5 flats and one maisonette to sell on a long lease. … The company has a 125 year lease on the property … . It was decided to use this company as a vehicle for the enterprise and it therefore applied for VAT registration. All the building work is sub-contracted and the development has been funded mainly by bank loan. There are no employees or assets (apart from the leasehold) owned by the company. Accounts are maintained @ ppb [principal place of business], day to day running of project @ [A's address] but all decisions are made by Chartered Accountant and A."

47. The report went on to state that the records were not extensive and that the Appellant was responsible for the VAT returns.

48. Meanwhile Nomco tried to claim credit for input tax in respect of the amount paid in August 1988 as fees to the solicitors for the Merchant Bank in respect of the Merchant Bank loan. In April 1990 the Appellant wrote to the Solicitor and asked if the solicitors for the Merchant Bank could be asked to supply a VAT

invoice addressed to Nomco so that the amount of value added tax could be recovered. The Solicitor made such a request and received a reply that Nomco was not entitled to recover value added tax on the fees because the services were rendered to the Merchant Bank and not to Nomco. The Solicitor sent a copy of this letter to the Appellant who replied to say that he accepted the statement as correct but that "it was worth a try".

Mid 1990 – the relationship deteriorates and Flats 5, 3 and 2 are sold

49. By June 1990 the tension between the Appellant and A became more marked. On 14 June 1990 A wrote to the Appellant on his personal notepaper to say that he was annoyed because the action of the Appellant in refusing to agree on the division of a garden had "lost a sale" and he gave notice that he wished "to withdraw from this project". He asked if he could be repaid the monies which he had put into it which he calculated amounted to £78,000 although he did not know if that included monies which he had paid direct. He also said that he had sold Flat 5.

50. In June 1990 Flat 5 was sold at a price below the May 1988 valuation. That was the second flat to be sold.

51. On 21 August 1990 A wrote to the Bank Manager about a loan for a third project which had proved "something of a disaster" and where he had had to reduce the price by one million pounds in order to make a sale. He referred to the development of the property in respect of which the Appellant was his "equity partner" and said that those flats were selling, albeit slowly.

52. On 22 August 1990 the Appellant wrote to A asking for repayment of a personal loan of £30,000 with interest which loan he had made to him in February 1989. He sent copies of schedules prepared in respect of the property showing the position as at 31 January 1990. These indicated that A owed the Appellant £86,382.28. The letter went on to say that the proceeds of sale of the remaining flats would not be sufficient to discharge the loans from the Merchant Bank and the Bank and so there would be no reimbursement of the expenditure they had made. As he had borrowed money from the Bank he would be looking to A to pay his share.

53. There were six schedules enclosed with the letter. The first was headed "Nomco" and listed amounts totalling £1,110,754 owed at 31 January 1990 to the Merchant Bank, the Bank, the Appellant's firm and B. Four of the other schedules contained details of each of these amounts. The amount owed to the Merchant Bank included £233,499 paid to B, no doubt for the costs of conversion, and £56,352 paid to Nomco. The amount owed to the Appellant's firm included moneys paid to the Bank and the Merchant Bank as well as to a firm of contactors. The amount owed to B included interest payments to the Merchant Bank and payments to contractors and gave credit for the payments by the Merchant Bank to B. The final schedule was an account of the personal loan to A.

54. On 13 September 1990 A wrote to the Appellant to say that he had not had a reply to his letter of 14 June when he asked to withdraw from the project. His letter contained the following paragraph:

> "Further to the C/Nomco situation, I am sorry neither of us put agreements in writing to each other. You advised me to buy out [a third party]and I certainly understood at the time that we would run [the property] in tandem, i.e. profits (and losses!) to be

> shared. Left to my own devices I would definitely have allowed [the third party] to buy me out."

55. We did not receive sufficient evidence to allow us to find any facts relating to C, the third party, or any property other than the property.

56. In September 1990 Flat 3 was sold at a price less than the May 1988 valuation. That was the third flat to be sold.

57. By October 1990 A was clearly losing patience with the Appellant and on 25 October he wrote to him about the fact that the Appellant had recently turned down a cash offer for Flat 2. The letter contained the following paragraphs:

> "I have put a good deal of unrewarded time and effort into this development and as I said to you in my letter of June 14th 1990 ... I wish to withdraw from the project. I want a return of the substantial monies I have invested (approaching £100,000.00). I would appreciate an acknowledgement and a reply to my letters."

58. On 21 November 1990 Flat 2 was sold for £175,000 which was less than the May 1988 valuation.

59. Thus by December 1990 four of the six flats had been sold for approximately £785,000; about £207,000 remained owing on the Merchant Bank loan; and about £300,000 remained owing on the Bank loan.

Early 1991- B goes into liquidation

60. On 2 January 1991 the Appellant wrote to A to say that he was aware of his wish to withdraw from the project and would be prepared to accept the transfer of his personal obligations if they could agree a value for the remaining flats and if he would pay his 50% share of the losses incurred on the development. The Appellant went on to say that he would shortly let A have a statement showing the amount of expenditure to date and the amount he owed him. (These schedules were sent on 11 February 1991.)

61. Also on 2 January 1991 the Merchant Bank first wrote to Nomco through the Appellant rather than through A.

62. On 30 January 1991 A wrote to the Appellant "with regard to the position of Nomco" and remarked that he had written a number of letters since the previous June and had not received any reply. His letter contained the following paragraph:

> "Neither I nor any of my companies are in any form of joint venture with you on any property development via Nomco and at no time has a Joint Venture Agreement been sent to me, discussed with me, or put into being."

63. The letter went on to state that A did not know how the Appellant had funded the works on the property but that he was aware that Construction had paid very considerable expenses on behalf of Nomco; although some had been refunded substantial money was still owed to Construction. Neither A nor his current accountants nor his legal advisers believed that there was any form of joint venture agreement between the Appellant and A and he was looking to the

Appellant to repay the full amount due to Construction. A went on to say that he had had meetings with insolvency practitioners with a view to putting Construction into liquidation and suggested that, because of the active part taken by the Appellant in the day to day management of A's various businesses, it was probable that he would be considered as a shadow director of Construction. A also stated that he felt that he had been very badly let down by the Appellant not only in the work he had done but also in what he had failed to do.

64. On 11 February 1991 the Appellant sent six schedules to A showing the income and expenditure incurred in connection with the property to 31 December 1990. He said that these showed that his contribution had been £251,436.03 and that the contribution of A had been £66,968.39. He asked for the amount owed to him of £92,233.82. The schedules attached to that letter analysed the movements on the accounts with the Merchant Bank and the Bank and mentioned that monies had been paid by "The Appellant" and "A".

65. In April 1991 both B and Construction went into insolvent liquidation. The statement of affairs of B did not refer to the property or to Nomco or to any joint venture and did not acknowledge any liability to the Merchant Bank or the Bank. The statement of affairs of Construction asserted that the company had undertaken work for Nomco and that Nomco had employed it to carry out the refurbishment of the property.

66. On 30 May 1991 solicitors for Nomco and the Appellant wrote to the liquidator of Construction and denied that there had been any contract between Nomco and Construction; there had been a joint venture between the Appellant personally and A personally in respect of the property and they (the solicitors) had been instructed in relation to court proceedings against A. (Those proceedings were subsequently discontinued). On 12 June the liquidator replied and said that A had named Nomco Limited as a debtor to Construction. However, the liquidator did not seek to recover any amount from Nomco.

67. On 4 June 1991 A wrote to the owners of the flats to say that he had withdrawn from the project and that a firm of managing agents had been appointed by the Appellant of Nomco Limited.

68. On 21 June 1991 Companies House reminded the Appellant that Nomco's accounts for the periods ending on 31 December 1988 and 31 December 1989 were overdue.

Mid 1991 – Flat 4 is sold; the first claim for interest relief; the The Merchant Bank loan is repaid

69. On 19 August 1991 the fifth flat (Flat 4) was sold at a price of £150,000 which was only slightly more than half of the 1988 valuation.

70. On 22 August 1991 the Appellant submitted his personal income tax returns for the years 1990/91 and 1991/92. These included his share of the profits of his professional practice. The return for 1990/91 contained the claims for outgoings to 5 April 1990. There was a part of the return in which to claim interest for the purchase or improvement of property but no entry was made in this part of the return. There was another part of the return in which to claim "interest on other loans" and here the Appellant claimed relief for interest on two loans in connection with his practice. He also claimed relief for the interest paid on both the Merchant Bank loan and the Bank loan for the two years 1988/89 and 1989/90 as:

The Merchant Bank 1988/89 £48,475 The Bank 1988/89 £22,359

1989/90 £108,655 1989/90 £50,710

71. The return for 1991/92 contained the claims for outgoings to 5 April 1991. Again, there was a part of the return in which to claim interest for the purchase or improvement of property but no entry was made in this part of the return. There was another part of the return in which to claim "interest on other loans" and here the Appellant claimed relief for interest paid on the two loans in connection with his practice and also claimed relief for the interest paid on both the Merchant Bank loan and the Bank loan for one year being the Merchant Bank: £47,000 and the Bank: £53,033.

72. The Appellant wrote a covering letter to the Inland Revenue on the same day (22 August 1991) which letter contained the following:

> "You will observe that these returns include the taxed and untaxed interest that arises from my interest in [my firm]. I would also draw your attention to the interest paid to the Merchant Bank and the Bank. This interest relates to loans arranged in August 1988 in connection with the purchase and conversion into flats of the property. The project made a substantial loss, and I will let you have a copy of the accounts when the last flat has been sold."

73. There was no mention of Nomco in this letter.

74. On 27 November 1991 the Merchant Bank signed three certificates of bank interest paid. These were in respect of the years ending on 5 April 1989, 1990 and 1991. The certificates were addressed to Nomco.

75. In December 1991 the Bank agreed to increase its advance by about £70,000 to enable the Merchant Bank loan to be repaid. The Merchant Bank mortgage was redeemed on 24 December 1991 after which no further interest payments were made to the Merchant Bank. The title to the property remained vested in Nomco and a new first fixed charge was created in favour of the Bank.

Early 1992 – correspondence with the Inland Revenue

76. On 6 January 1992 the Appellant wrote to the Inland Revenue again and that letter contained the following paragraphs:

> "In my letter to you of 12 August last, I drew your attention to the fact that my returns of income showed substantial amounts of interest paid to the Merchant Bank and the Bank in connection with the purchase and conversion into flats of the property. For purposes of convenience, the property was held in the name of Nomco Limited, a nominee company controlled by myself which has never traded. I enclose certificates of interest paid to the Merchant Bank for the years 1988/89, 1989/90 and 1990/91 and I should be grateful if relief for these amounts could be given in my firm's assessments. Certificates in respect of interest paid to the Bank will be forwarded to you shortly.

> One of the converted flats at the property remains unsold, but immediately this flat is sold accounts will be prepared which will show a substantial loss on the development."

77. The letter enclosed the certificates which had been signed by the Merchant Bank on 27 November 1991. The certificates from the Bank were sent to the Inland Revenue on 24 February 1992.

78. Meanwhile, on 10 February 1992 the Inland Revenue wrote to the Appellant to say that it understood that Nomco had commenced trading in August 1988. The letter asked for copies of all outstanding accounts. The Appellant replied on 24 February to say that Nomco had never traded. The letter contained the following paragraph:

> "In July/August 1988 the Appellant and A purchased the property for the purpose of converting it into self-contained flats. It was agreed that for convenience the property would be held in the name of Nomco Limited and the loans arranged to purchase the property and to finance the development had also to be arranged in the name of the company. Unfortunately due to other financial commitments A was unable to find his share of the cost and the whole of the interest was paid by the Appellant. One flat remains to be sold but the project was unsuccessful and a substantial loss incurred."

79. With the letter of 24 February 1992 was enclosed the accounts for Nomco for the years ending on 31 December 1988, 1989, 1990 and 1991 all dated 31 January 1992. The accounts consisted of a directors' report and a composite balance sheet for all four years. The balance sheet for the period ending on 31 December 1988 showed assets (called debtors) of £814,821 and liabilities of £813,821 being the Merchant Bank and the Bank loans. In evidence the Appellant explained that the amount of debtors was the amount due to Nomco "from the joint venture partners". The directors' report, which was signed by the Appellant and his wife, stated:

> "The company did not trade during the period covered by the accounts and, therefore, was not in receipt of any income. The company was incorporated to hold property in trust as trustees or as nominees. The company had no beneficial interest in any property held in its name during the period covered by the accounts."
>
> The loans from the Merchant Bank and the Bank were secured on property held by the company in trust. The company had no beneficial interest in this property."

80. The balance sheet entries for the three years ending on 31 December 1989, 1990 and 1991 were in very similar form except that by December 1991 the Merchant Bank loan had been repaid.

81. The Inland Revenue replied on 12 March 1992 allowing the interest relief for 1988/89 and 1989/90. On 27 April 1992 the Appellant's firm sent a copy of the firm's accounts for the year ending on 30 September 1989. These contained no reference to Nomco.

82. Also on 24 February 1992 the statutory accounts of Nomco were sent to Companies house.

Mid 1992 – Flat 1 is transferred to the Appellant

83. On 19 May 1992 the Appellant wrote to the Solicitor and instructed him that he, the Appellant, would take a transfer of the remaining flat (Flat 1) from Nomco into his own name for the price of £175,000. The Bank consented to the transfer and the Appellant entered into a legal charge of the flat to the Bank. On 13 August 1992 the Appellant completed his purchase of a 120 year lease of Flat 1 at a price of £175,000.

1993 and 1994 – the Appellant's firm's accounts

84. In March 1993 the Appellant's firm prepared a balance sheet for itself as at 30 September 1990. This showed under "current assets" the name of Nomco and the amount of £225,069. Under the column comparing the 1989 figures was the amount of £151,916 although no such entry had in fact appeared in the balance sheet as at 30 September 1989. In evidence the Appellant said that the accounts showed a loan to Nomco because this was a loan from the practice to the "joint venture partners".

85. On 10 June 1994 the Appellant sent to the Inland Revenue a certified copy of his firm's accounts for the year ending on 30 September 1991. Again, under "current assets" was shown the name of Nomco and the amount of £238,871 which compared with the amount of £225,069 for 1990.

86. On 14 July 1994 the Inland Revenue wrote to the Appellant and asked for further information about Nomco and the loan interest relief claim. The Appellant replied on 13 October 1994 and that letter included the following paragraphs:

> "NOMCO LIMITED The amount shown in my firm's balance sheet as at 30 September 1991 as owed by Nomco related to the accumulated amount at that date withdrawn by me from my firm to pay the interest charges on the facilities arranged for the development of the property. The amount showed as owed could have been shown as drawings but for purposes of presentation to the bank it was decided to show Nomco Limited as a separate item. There is no prospect of the amount being repaid to my firm and when the development accounts have been prepared the amount then outstanding will be debited to my Capital Account.
>
> The amount of the drawings from my firm in respect of the development was not shown on the Balance Sheet of Nomco Limited as the figure was not relevant, Nomco Limited being a nominee company has no beneficial interest in the property and the amounts shown on the Balance Sheet of that company are the amount borrowed on behalf of the nominee and the corresponding amount owed by the nominee to that company for the debt incurred. The nominee in this case is myself. If the amount of the loan had been shown on the Balance Sheet of Nomco Limited there would have necessitated a corresponding item of my indebtedness to that company and for the reason stated these entries would have achieved no purpose."

87. In oral evidence the Appellant accepted that, if the amount had been shown as drawings, then the assets of the business would not have been so substantial.

1995 – the sale of the headlease and the repayment of the Bank loan

88 In August 1995 the headlease was disposed of at a price of £10,000. At the same time the Bank loan was repaid after which no further interest payments were made on the Bank loan.

Summary

89. The final cost of the acquisition and refurbishment of the property (excluding interest) was approximately £1,217,000 and the net proceeds of sale after legal and other expenses for the six flats and the headlease was approximately £1,120,000. The aggregate proceeds of sale fell short of the aggregate costs of buying, refurbishing, financing and selling the flats by approximately £100,000 before allowing for interest.

90. As mentioned above the interest and charges on the Merchant Bank and the Bank loans were debited to the accounts of Nomco. Money was paid into the accounts of Nomco by the Appellant's firm and the firm's accounts showed a loan to Nomco. As the flats were sold the principal amounts owing on the Merchant Bank and the Bank loans were reduced.

91. The amounts of interest in respect of which relief was claimed by the Appellant were:

Tax year Amount

1988/89 £ 70,833

1989/90 £159,325

1990/91 £122,830

1991/92 £ 59,759

1992/93 £ 35,512

92. In 1999 the Appellant was interviewed by Officers of the Inland Revenue Special Compliance Office in the presence of his solicitor. The interview was tape-recorded and a transcript was provided to us. On 16 February 2000 the Appellant was informed that the Inland Revenue did not intend to issue criminal proceedings against him. On 4 September 2000 the assessments were made which are the subject of this appeal.

The case for the Respondent

93 The case for the Respondent was that Nomco acted as principal and not as nominee and that the Appellant knew that at all material times. All the contemporaneous documents supported the view that Nomco was not a nominee. The argument that Nomco was a nominee was first made only after 1991 when it became clear that the development of the property would result in a loss. The only evidence in support of the argument that Nomco was a nominee was the bare assertions of the Appellant.

The case for the Appellant

94. The case for the Appellant was that the development of the property was a joint venture partnership between the Appellant and A; that the legal title to the property had been vested in Nomco as nominee for the Appellant and A; that the borrowings therefore also had to be in the name of Nomco; that all dealings with the property by Nomco were on behalf of the Appellant and A; and that, as the Appellant had discharged the interest on the borrowings, he was entitled to claim the relief.

Reasons for decision

95. In approaching our decision we first recall the burden and standard of proof. We then consider a point made on behalf of the Appellant about the particularity of the allegations. We then consider each of nine specific allegations made by the Respondent followed by each of five arguments put forward on behalf of the Appellant and we weigh the evidence, and consider the arguments, in connection with each. We then consider a number of other factors which concern the consistency of the Appellant's case and which are relevant to our views about the reliability of the evidence of the Appellant. Finally, we stand back and look at the picture as a whole before deciding whether the Inland Revenue has proved that there was a loss of tax attributable to the fraudulent or negligent conduct of the Appellant.

Four preliminary matters

96. First, however, we mention four preliminary matters.

97. The first concerns the use throughout the appeal of the words "nominee" and "joint venture". These were the words used by the Appellant. At first we found the use of the word "nominee" unusual because normally one would use the word trustee when referring to land and nominee when referring to, say, shares and securities. The Appellant used the word nominee to mean a person who held any property without being the beneficial owner. That meaning therefore equates to the position of a bare trustee where the trustee holds the legal title and where the beneficiary has power to direct the trustee as to the trust property. That is the sense in which we use the word "nominee" in our reasons. Another phrase used by the Appellant was "joint venture". He said that in his view a joint venture was not a partnership within the Partnership Act but could be a partnership for a specific project - it was "a partnership to a limited extent" under which either of the "joint venture partners" would have joint and several liability for that project. We found the Appellant's somewhat imprecise use of terms to be unusual in a chartered accountant.

98. The second preliminary matter concerns the legality of the claim for interest. The whole issue in this appeal concerns a claim for interest relief made by the Appellant, a chartered accountant, in his personal income tax return which he rendered on 22 August 1991. We wished to understand the exact nature of the claim and so we asked to be informed of the specific statutory authority under which it was made. Mr Sherry referred us to sections 353 and 362 of the Income and Corporation Taxes Act 1988. However, later, in oral evidence, the Appellant accepted that there was no statutory basis for the claim and said that in fact he was claiming a trading loss and, as the loss on the project could only be ascertained after the project had been completed, the interest which had been paid was the ascertained loss for that period. We mention this point at the outset because the basis of the claim for interest relief puzzled us. However, because

the Inland Revenue did not base any of their allegations on the fact that the claim for interest had no statutory basis we have not taken it into account in reaching a decision on the issue in the appeal.

99. The third preliminary matter is our view of the witnesses. As much in this appeal depends upon the view we take of the oral evidence we have to state how we found the witnesses. We found the Solicitor to be a consistent witness and we find his evidence to be both reliable and credible. We found the Bank Manager to be a good, firm, consistent and precise witness and we find his evidence to be reliable and credible. We formed the view that the Bank Manager was not only a good banker but also had a very good grasp of the commercial context within which he took credit decisions. He always dictated his notes on the same day as an interview and we regard the Bank Manager's contemporaneous notes as a reliable record of what the Bank Manager was told by the Appellant. We consider later a number of factors which concern the consistency of the Appellant's evidence but here we record that we did not find the Appellant to be a reliable witness. His evidence was successfully challenged in cross-examination. Although the Appellant had a very good memory, and although he thought very carefully about his answers, he did not always answer questions directly but rather made statements in a declaratory manner. Also, many of the contemporaneous documents were not consistent with his case.

100. The fourth and final preliminary matter concerns the documentary evidence to the extent that it concerned the involvement of A. For the Respondent Mr Ewart argued that the evidence in the documents about the involvement of A was hearsay evidence only. He accepted that, as a result of regulation 17(6) of the 1994 Regulations, and of the Civil Evidence Act 1995, such evidence could be considered but argued that, in estimating the weight to be given to such evidence, regard should be had to the fact that the Appellant could have called A to give evidence as a witness but did not do so.

101. Regulation 17(6) provides that we may receive evidence of any fact which appears to us to be relevant notwithstanding that such evidence would be inadmissible in proceedings before a court of law. Section 1(1) of the Civil Evidence Act 1995 (the 1995 Act) provides that in civil proceedings evidence shall not be excluded on the grounds that it is hearsay. Thus hearsay evidence is admissible in a court of law and is also admissible in proceedings before us. Section 4 of the 1995 Act provides that, in estimating the weight (if any) to be given to hearsay evidence in civil proceedings the court should have regard to any circumstances from which any inference can reasonably be drawn as to the reliability of such evidence and, in particular, regard might be had to a number of factors including whether it would have been practicable for the party by whom the evidence was adduced to have produced the maker of the original statement as a witness and whether the original statement was made contemporaneously with the occurrence of the matters stated.

102. We accept that the oral evidence of A would have been the best evidence of the relationships between the Appellant, A, Nomco and B. As we have mentioned, at the request of the Appellant a witness summons had been issued requiring the attendance of A at the hearing of the appeal. However, the Appellant had chosen not to serve the witness summons on A as A had given an indication that his evidence was likely to be hostile to the Appellant's case. We have therefore approached the documentary evidence about the statements of A with some caution but, in estimating the weight to be given to such evidence, we bear in mind that many of his statements in the documents were made contemporaneously with the occurrence of the matters stated.

The burden and standard of proof

103. Having disposed of those preliminary matters we turn to consider the burden and standard of proof.

104. For the Respondent Mr Ewart accepted that the burden of proof was on the Respondent to establish fraudulent or negligent conduct. He argued that the standard of proof was the balance of probabilities and he cited *Fen Farming Co Ltd v Dunsford* (1974) 49 TC 246 at 270D. He accepted that the cogency of the evidence required to meet the standard of proof depended upon the seriousness of the allegations and he relied upon *Hornal v Neuberger Products Ltd* (1957) 1 QB 247 at 258 and 260.

105. For the Appellant Mr Sherry accepted that the standard of proof was the balance of probabilities but argued that a relevant consideration was the seriousness of the allegations. An allegation of dishonesty was grave and improbable especially when made against a professional person of many years' standing. The evidence had to be of sufficient strength to outweigh the inherent improbability of the assertion. He cited *R v Home Secretary ex parte Khawaja* [1984] AC 74 at 112C- 113B as authority for the principle that a charge of fraud would require a higher degree of probability than a charge of negligence.

106. In *Hornal v Neuberger* at 263-264 Hodson LJ said:

> " … in civil cases, the case must be proved by a preponderance of probability, but there may be degrees of probability within that standard. The degree depends upon the subject-matter. A civil court, when considering a charge of fraud, will naturally require for itself a higher degree of probability than that which it would require when asking if negligence is established. It does not adopt so high a degree as a criminal court, even when it is considering a charge of a criminal nature; but it does still require a degree of probability which is commensurate with the occasion."

107. That case concerned an alleged fraudulent misrepresentation. The present appeal is concerned with allegations of a loss of tax attributable to fraudulent or negligent conduct. The cogency of the evidence required to meet the standard of proof depends upon the seriousness of the allegations. Fraud is a very serious allegation; negligence somewhat less so. We have approached this case on the basis of determining whether the facts as found, and any reasonable inferences, drive us to the probable conclusion that the Appellant's conduct was fraudulent or negligent. Mere speculation, or even strong suspicion, that the Appellant's conduct was fraudulent is insufficient for the Respondent to succeed.

The particularity of the allegations

108. We now turn to consider a point made by the Appellant about the particularity of the allegations made against him.

109. For the Appellant Mr Sherry argued that the allegation in the Respondent's statement of case, that the Appellant either knew or ought to have known that Nomco had acted beneficially and not as a nominee, was not clearly an allegation of fraud and lacked the particularity required by the authorities. He cited *Belmont Finance Corporation Limited v Williams Furniture Limited and others* [1979] Ch 250 at 268B as authority for the principle that allegations of dishonesty had to be made clearly and with particularity. He cited *Rolled Steel Products (Holdings)*

Limited v British Steel Corporation and others [1986] CH 246 at 309F as authority for the view that a person was entitled to know what claims were being made against him so that all necessary evidence could be led. He cited *Lipkin Gorman v Karpnale Limited and another* [1989] 1 WLR 1340 at 1350H as authority for the view that an allegation that someone should have known that an act was dishonest was not the same as an allegation of dishonesty. For the Respondent Mr Ewart cited *Regina v Special Commissioners of Income Tax ex parte Martin* (1971) 48 TC 1 as authority for the view that the Special Commissioners were not subject to the rules of the higher courts about pleadings and that there was no need to give particulars of fraud at the outset; it was sufficient if it appeared from the evidence. The only thing that was necessary was that the taxpayer should have a fair opportunity of knowing the case against him and then answering it. Mr Ewart also referred to the former RSC O.18, r.7 to support the principle that it was facts, and not evidence, which had to be pleaded.

110. Prior to the hearing of this appeal the Respondent had prepared a statement of case which set out eight specific allegations upon which he would principally rely to support his case. (The ninth allegation, which arose out of evidence which came to light at a later stage, was included in the Respondent's skeleton argument.) The statement of case concluded with the following paragraph:

> "When he made the claims for interest relief, the Appellant either knew or ought to have known that Nomco had acted beneficially and not as nominee. As an experienced chartered accountant, he therefore either knew or ought to have known that he was not entitled to claim relief in respect of the interest in question. As a result, the Appellant acted either fraudulently or negligently in claiming the interest relief … It follows that the assessments were validly made under TMA 1970 section 36."

111. In considering this matter we start with section 36. That requires the Respondent to show that there has been a loss of tax attributable to the fraudulent *or* negligent conduct of the Appellant. Negligent conduct is an alternative to fraudulent conduct. In our view the statement of case alleges dishonesty or negligence clearly and with particularity and the Appellant knew the claims which were being made against him and that they were being made in the alternative under section 36. The allegation that the Appellant "knew, or ought to have known" was clearly an allegation that there had been either fraudulent or negligent conduct on the part of the Appellant. We accept that the Respondent presented his case on the ground that there had been fraudulent conduct but section 36 contains the alternative of negligent conduct. We are satisfied that the Appellant did have a fair opportunity of knowing the case against him and then answering it.

The specific allegations of the Respondent

112. We now turn to consider the nine specific allegations made by the Respondent.

113. The Respondent's case was that, before the Appellant made his first claim for interest relief in August 1991, all the evidence supported the view that Nomco was acting beneficially and not as nominee and that after that date there was no evidence that Nomco was acting as nominee other than the bare assertions of the Appellant. Nine specific allegations were made which we consider in chronological order, namely: (1) that on 20 May 1988 the Appellant did not inform the Bank Manager that Nomco was acting as nominee; (2) that on 9 August 1988 at the

meeting of the board of directors of Nomco no mention was made that Nomco was acting as nominee; (3) that on 10 August 1988 the solicitors acting for Nomco stated that Nomco was acting as beneficial owner; (4) that on 12 August 1988 the legal charge and debenture to the Merchant Bank stated that Nomco charged the property as beneficial owner; (5) that on 28 April 1989 the Appellant rendered his personal tax return which contained no claim for interest relief and which did not mention any trading source; (6) that in June 1989 the Appellant told the Inland Revenue that Nomco was trading; (7) that before August 1991 no statutory accounts were prepared for Nomco and that it was not until January 1992 that accounts for four years were prepared; (8) that in the practice accounts of the Appellant prepared in March 1993 there was recorded a loan to Nomco; and (9) that all the evidence after 1991 was bare assertion by the Appellant unsupported by any other evidence.

114. We consider each of these allegations separately.

115. The first allegation was that that on 20 May 1988 the Appellant did not inform the Bank Manager that Nomco was acting as nominee. The documentary evidence of the meeting on 20 May 1988 was the letter which the Bank Manager wrote to the Appellant that day and the internal note prepared by the Bank Manager also on the same day. Neither referred to the fact that Nomco was acting as nominee. The Bank Manager's internal note stated that repayment of the loan was to come from the profit "the company will acquire" and that the Appellant's stake was being raised through Nomco for tax reasons. The Appellant stated that he did not say that to the Bank Manager and also accepted that there would be no tax advantages if Nomco were acting as a nominee. We accept the evidence of the Bank Manager who said that he could not recall the Appellant telling him at the time of the transaction that Nomco was acting as a nominee for the Appellant. The Bank Manager always dictated his notes on the same day as an interview and we regard the Bank Manager's contemporaneous notes, and his letter to the Appellant, as a reliable record of what the Bank Manager was told by the Appellant. Those documents are consistent with the conclusion that the Bank Manager understood that Nomco would act as principal and not as nominee. We also accept the evidence of the Bank Manager that the loan was not a property advance as far as the Bank was concerned; the real basis of the advance was to the Appellant and he (the Bank Manager) was happy to advance the money to the Appellant as the Appellant was creditworthy and the bank had "lots of security". In the light of the evidence before us, therefore, we conclude that the first allegation is substantiated.

116. The second allegation was that, on 9 August 1988, at the meeting of the board of directors of Nomco, no mention was made that Nomco was acting as nominee. We have already found as a fact that the minutes did not mention that Nomco was acting as a nominee. Mr Sherry argued that the minutes did not say that the company was not acting as nominee; he accepted the evidence of the Solicitor, that the minutes had been drafted by the Merchant Bank and sent to the Appellant by the Solicitor, but argued that by 9 August 1988 there was some urgency in getting all the documents executed before completion. In our view the solicitors for the Merchant Bank were no doubt concerned to ensure that the Merchant Bank received valid security for its considerable loans to Nomco. The solicitors for the Merchant Bank had, on 8 August 1988, raised the question as to whether Nomco was a nominee or trustee for others and had been told on 10 August 1988 that Nomco did not hold as nominee. It is for that reason there would have been no mention in the minutes that Nomco was not a nominee because the Merchant Bank had been told that Nomco was charging the property

as beneficial owner. We therefore find the second allegation substantiated by the evidence.

117. The third allegation was that, on 10 August 1988, the solicitors acting for Nomco stated that Nomco was not acting as nominee. We have already found as a fact that the Solicitor, on behalf of Nomco, had made such a statement in his letter of 10 August 1988. Mr Sherry accepted that the Solicitor had written the letter of 10 August 1988 but also argued that the Solicitor had acted without any instructions from the Appellant. He also argued that in the correspondence the Solicitor had repeatedly referred to the conveyance being "in the name of" Nomco and that was evidence that the Solicitor knew that Nomco was purchasing as a nominee. The evidence of the Appellant was that he told the Solicitor that there was a joint venture between himself and A and that Nomco was to hold the property in trust for them both. In particular, he did not give instructions to the Solicitor that Nomco was not a nominee. He had only met the Solicitor once, when contracts were exchanged in July 1988, when he had told the Solicitor that Nomco was a nominee. The Appellant accepted that he had spoken to the Solicitor on the telephone on 10 August 1988, after receiving by hand the Solicitor's letter of 9 August, but said that he did not then answer the question in the letter of 9 August about the status of Nomco. The evidence of the Solicitor was that he had no recollection of being told that Nomco was a nominee (although he did point out that the events had occurred fourteen years previously). We accept the evidence of the Solicitor that he told the solicitors for the Merchant Bank that Nomco was not a nominee on the specific instructions of the Appellant. The Solicitor said that his use, in his letter of 10 August 1988, of the phrase "our clients have confirmed" indicated that he would not have made a statement in the terms of that letter without having instructions to make it. If he had wanted to "fob off" the solicitors for the Merchant Bank he would not have used that phrase. In evidence which we accept the Solicitor stated that he was told that, as far as the relationship between A and the Appellant was concerned, "there was going to be a joint venture of some sort"; the relationship between A and the Appellant was not within the terms of his instructions; however, although he knew that A and the Appellant had a joint venture arrangement he did not think that this amounted to a partnership.

118. Here we prefer the evidence of the Solicitor. The context within which this evidence must be considered is that the revised loan offer from the Merchant Bank was addressed to Nomco and was on the basis that the solicitors for the Merchant Bank should approve title to the property. The solicitors for the Merchant Bank were clearly concerned to ensure that Nomco was not a nominee and it was a matter which was specifically raised by the Solicitor in his letter of 9 August 1988 to the Appellant. We find it most probable that the Solicitor did ask the Appellant, during the telephone conversation of 10 August, about the status of Nomco and in the light of the information he then obtained wrote to the solicitors for the Merchant Bank In our view the Solicitor acted in accordance with his instructions and not, as the Appellant claimed, contrary to those instructions. We also accept the evidence of the Solicitor that his use of the phrase "in the name of Nomco" in his correspondence had no particular significance and did not mean that Nomco was acting as a nominee. We therefore find the third allegation substantiated by the evidence.

119. The fourth allegation was that on 12 August 1988 the legal charge and debenture to the Merchant Bank stated that Nomco charged the property as beneficial owner. We have already found as a fact that, in the legal charge and the debenture, Nomco charged the property as beneficial owner. Mr Sherry argued that the legal charge and debenture to the Merchant Bank were in a pre-

printed standard form and that the words beneficial owner had no significance. We accept that the legal charge and the debenture were in a standard form with additions but they had been prepared by the solicitors for the Merchant Bank who, from the enquiries they had made, must have been concerned about the security to be given to their clients. In 1988 the covenants for title given by a beneficial owner were greater than those given by a trustee. The solicitors for the Merchant Bank had made a specific inquiry about the status of Nomco and so clearly it was a matter which concerned them. We therefore find this allegation substantiated by the evidence.

120. The fifth allegation was that on 28 April 1989 the Appellant rendered his personal tax return for the year ending on 5 April 1989 and the return contained no claim for interest relief and did not mention any trading source. We have already found this as a fact. Mr Sherry argued that by April 1989 no profit or loss had been realised as there had been no sales and that in any event there was no requirement to return a loss. However, both the the Merchant Bank and the Bank loans had been completed in August 1988 and interest had been paid since that date. If the Appellant had considered that he was entitled to claim the relief for interest then a claim could have been made in the 1989 return. In evidence the Appellant said that this return did not indicate a trading source as he "was not sure at that date that the project would be profitable" and he did not then think that the project would be a source of income. However, as the Bank Manager noted on 8 June 1989 the building work had begun in April 1989 and in June 1989 was completely on schedule. In our view the fact that no claim was made in the return for the year ending on 5 April 1989 is consistent with the view that at that time the Appellant did not consider that he was entitled to make the claim. Accordingly, we find this allegation substantiated by the evidence.

121. The sixth allegation was that in June 1989 the Appellant told the Inland Revenue that Nomco was trading. Specifically it was alleged that the form CT 46D(2)(A) issued by the Inland Revenue on 15 June 1989 was returned by the Appellant stating that Nomco had commenced trading in August 1988 and that pervious returns had indicated that Nomco was dormant. We have found as a fact that the Appellant's firm informed the Inland Revenue on 27 June 1989 that the company had commenced trading and that the additional information required if the company had not traded was marked by the Appellant as "N/A" (not applicable). Mr Sherry argued that the statement that Nomco had commenced trading was consistent with its having commenced to carry on the business of a nominee after being dormant for some time. However, the fact is that no payment was ever made to Nomco for acting as nominee and Nomco never made any charge for so acting. In evidence the Appellant said that the statement that Nomco was trading was consistent with the fact that in August 1988 Nomco had started to act or operate as a nominee company and the words "act" and "operate" were interchangeable with the word "trade"; it was possible for a company to operate without receiving any income. We do not find this evidence to be convincing. A chartered accountant who specialises in income tax and corporation tax knows what the Inland Revenue means by the word "trading". We accordingly find this allegation substantiated by the evidence.

122. The seventh allegation was that before August 1991 no statutory accounts were prepared for Nomco and that it was not until January 1992 that accounts for four years were prepared. We have found as a fact that the accounts for four years were rendered to Companies House on 24 February 1992. Mr Sherry argued that the statutory accounts were prepared in response to a reminder from Companies House. However, the reminder from Companies House was sent on 21 June 1991 and the accounts were dated 31 January 1992. There had been a

request from the Inland Revenue on 10 February 1992 for the accounts and they were sent to the Inland Revenue on 24 February 1992. It seems likely, therefore, that the accounts were prepared after receiving the request of the Inland Revenue. We therefore find this allegation substantiated by the evidence.

123. The eighth allegation was that in the practice accounts of the Appellant there was recorded a loan to Nomco. We have found as a fact that in March 1993 the Appellant's firm prepared a balance sheet for itself as at 30 September 1990. This showed under "current assets" the name of Nomco and the amount of £225,069. Under the column comparing the 1989 figures was the amount of £151,916 although no such entry had in fact appeared in the balance sheet as at 30 September 1989. Again, we find this allegation substantiated by the evidence.

124. The ninth allegation was that all the evidence after 1991, that Nomco acted as nominee, was bare assertion by the Appellant. That leads us to a consideration of the specific arguments of the Appellant.

The specific arguments of the Appellant

125. In support of his argument that there was evidence before 1991, when the claim for interest was made, that Nomco was acting as nominee Mr Sherry relied upon: (1) the name of Nomco and the fact that its Memorandum of Association clearly indicated that it was a nominee company; (2) the letters from A referring to himself and the Appellant as being joint venture partners; (3) the evidence of the Appellant that there was a joint venture between himself and A; (4) the terms of the correspondence by the Solicitor which referred to the purchase being "in the name of" Nomco and referring to his client as A and/or the Appellant rather than as B or Nomco; and (5) the fact that the Appellant declared his intention to claim the interest and forwarded the certificates from the Merchant Bank and the Bank to the Inland Revenue at about the same time.

126. We consider each of these arguments separately.

127. The first of the Appellant's arguments was that the name of Nomco, and the fact that its Memorandum of Association clearly indicated that it was a nominee company, was evidence that Nomco had been a nominee. Mr Sherry also relied upon other clauses in the objects clause in the Memorandum and Articles of Association of Nomco. The relevant sub-clauses in the objects clause were:

> "(A) To hold in trust as trustees or as nominees real or personal property of any kind and in particular shares, stocks, debentures, bonds, mortgages, charges, and securities generally and for this purpose to accept transfer of and to transfer and deal with such property, to exercise any rights and benefits including voting rights attributable thereto, and generally to do whatever may be necessary or incidental to the fulfilment of such objects.
>
> (B) To carry on any other business whatsoever which can in the opinion of the directors be advantageously or conveniently carried on by the company by way of extension of or in connection with any business which the company is authorised to carry on or is calculated directly or indirectly to develop any business which the company is authorised to carry on or to increase the value of or turn to account any of the company's assets property or rights. …

(F) To purchase take on lease exchange hire or otherwise acquire for any estate or interest any real or personal property and any rights and privileges for any purposes in connection with any business which the company is authorised to carry on. …

(H) To build construct maintain alter enlarge pull down remove or replace any buildings works plant and machinery for any purposes in connection with any business which the company is authorised to carry on. …

(I) To receive money on deposit or loan with or without allowance of interest thereon and to borrow raise or secure the payment of money by mortgage charge or lien or by the issue of debentures or debenture stock perpetual or otherwise or in any other manner either with or without security and to charge all or any of the property or assets of the company whether present or future including its uncalled capital to support any obligation of the company or any other company or person and collaterally or further to secure any securities of the company by a trust deed or other assurance.

(Z) To do all such other things as the directors may think incidental or conducive to the above objects or any of them.

The objects set forth in any sub-clause shall not be restrictively construed but the widest interpretation shall be given thereto, and they shall not be in any was limited to or restricted by reference to or inference from any other object or objects set forth in such sub-clause or form the terms of any other sub-clause or by the name of the company. None of such sub-clauses or the object or objects therein specified or the powers thereby conferred shall be deemed subsidiary or ancillary to the objects or powers mentioned in any other sub-clause but the company shall have full power to exercise all or any of the powers and to achieve or endeavour to achieve all or any of the objects conferred by and provided in any one or mare of any of the sub-clauses."

128. Mr Sherry argued that the main object of the company was to hold property in trust as trustee or nominee and that defined the business which the company was authorised to carry on. All the other objects were subsidiary to that main object. He referred to *Company Law by John H Farrar* Butterworths 1985 at pages 81 to 85 under the heading "The main objects rule of construction and *Cotman v Brougham* clauses" as evidence of the principles likely to be in the mind of the Appellant in 1988. Mr Ewart for the Respondent argued that sub-clause (B) authorised the company to carry on any business calculated to increase the value of or turn to account any of the company's assets, property or rights. He relied upon *Gore-Brown on Companies,* 44th Edition Supplement 25 at 3.2.1 as authority for the principle that the memorandum of association must be read as a whole and that later clauses might be intended to include powers beyond those in the earlier clauses and that the sub-clause after (Z) was effective.

129. We do not consider that we have to decide whether what Nomco did was authorised by its objects clause. The question we have to decide is not what Nomco was authorised to do but whether the Appellant thought that Nomco was acting as a nominee at the time he made the claim for interest. In evidence the Appellant claimed that, when Nomco purchased the property and took out the

Merchant Bank and the Bank loans, he was aware of the objects clause in the Memorandum of Association and thought that sub-clause (A) was the primary objects clause and he considered that all the other sub-clauses were subject to that sub-clause and that the company had no power to do anything other than act as a nominee company. However, the question is not what the Appellant thought that Nomco was authorised to do but whether the Appellant thought that in fact Nomco was acting as nominee at the time he made the claim for interest. Accordingly, we have not found the objects clause to be of great assistance in resolving the issue in this appeal.

130. The second of the Appellant's arguments was that the letters from A referring to himself and the Appellant as being joint venture partners also indicated that Nomco was a nominee. We accept that in writing informally to others A referred to the Appellant as his "partner in the venture" his "joint venture partner", his "equity partner" etc but when writing to the Appellant he always referred to Nomco (see his letters of 27 September 1989, 19 December 1989 and 28 December 1989). Also, the documents prepared by A which were in evidence before us point to the conclusion that A was of the view that the joint venture was between Nomco and B. He amended the notepaper of B so that it read "B /Nomco" and his correspondence with the Appellant about financial matters proceeded on the basis that it was Nomco who was financially involved and not the Appellant. A's letter to the Appellant of 13 September 1990, when he said that his understanding was that all profits and losses should be shared, indicates a joint venture between B and Nomco. This is consistent with the Inland Revenue's case that Nomco was acting beneficially (in a joint venture with B) and is inconsistent with the Appellant's case that Nomco was a nominee for the Appellant and A personally. By January 1991 A was anxious to "withdraw from the project" and so we have read his letter of January 1991 in that light.

131 The third of the Appellant's arguments was that there was a joint venture between himself and A. However, the Appellant was unable to produce any contemporaneous documents to support that view. We regard it as surprising, in view of the fact that the Appellant is a chartered accountant and was an adviser to A, that there was no written record of the alleged joint venture. The first documents prepared by the Appellant which contained figures in connection with the project were the six schedules enclosed with his letter of 22 August 1990 to A and these mentioned the position of Nomco and B. They did not mention the personal position of the Appellant and the only personal matter mentioned in connection with A was a personal loan made to him. These documents are not consistent with the suggestion that there was a joint venture between the Appellant and A but are consistent with the conclusion that Nomco was trading and that Nomco may have had some profit sharing arrangement with B. We accept that the figures prepared by the Appellant on 11 February 1991 mentioned the Appellant and A personally but by that time the difficulties had emerged and A had, on 30 January 1991, disclaimed any form of joint venture and had also mentioned that he might put Construction into liquidation.

132 The fourth of the Appellant's arguments was that the terms of the correspondence by the Solicitor, which referred to the purchase being "in the name of" Nomco, and referring to his client as A and/or the Appellant rather than as B or Nomco, pointed to the conclusion that Nomco was acting as a nominee. We have accepted the evidence of the Solicitor that his use of the phrase "in the name of Nomco" in his correspondence had no particular significance and did not mean that Nomco was acting as a nominee. As far as the Solicitor's correspondence was concerned this reflects the general confusion at that time about the identity of the purchaser of the property. Originally this was to be B

(which was A's company) and only later was it changed to Nomco (which was the Appellant's company). The Merchant Bank corresponded with Nomco through A at his personal address. We accept that in the correspondence the Solicitor sometimes wrote to the Appellant or A on behalf of their companies but do not agree that this points to the conclusion that Nomco was acting as a nominee. We prefer the evidence of the Solicitor that he was instructed that Nomco was not a nominee.

133. The fifth of the Appellant's arguments was that the Appellant had declared his intention to claim the interest and forwarded the certificates from the Merchant Bank and the Bank to the Inland Revenue at about the same time. We have found that the Appellant wrote to the Inland Revenue on 22 August 1991 but that letter made no mention of Nomco. The certificates were only received from the Merchant Bank on 27 November 1991 and they were in the name of Nomco. The Appellant sent them to the Inland Revenue on 6 January 1992 and of course then had to mention Nomco because the certificates were in the name of Nomco.

Factors relating to consistency and reliability

133. At this stage we consider some other matters which were not mentioned as specific allegations in the Respondent's statement of case but were developed in evidence before us. These matters concern the consistency of the Appellant's evidence and his case and we consider them in order to form a view of the reliability of the Appellant's evidence as a whole.

134. The first point of consistency concerns an argument of the Respondent that the claim for interest relief was inconsistent with the Appellant's current case; if, as he claimed, he was personally carrying on a trade as a joint venture with A, then his claim ought to have been for his share of trading losses and not for interest relief. Mr Sherry argued that he had no notice of this point, which had not appeared in the Respondent's statement of case, but if the Inland Revenue were arguing that the Appellant was entitled to half of the losses of the joint venture that raised a question of quantum. As we understand this argument it does not seem to us that the Inland Revenue were saying that the Appellant was entitled to claim one half of the losses of the joint venture; what they were saying was that the Appellant's case was inherently inconsistent because, even if Nomco had been a nominee for the Appellant and A, then the claim for interest relief would still have been incorrectly made.

135. We agree that the claim for interest relief was inconsistent with the Appellant's current case. A claim for the full amount of interest paid is not the same as a claim for losses. If, as the Appellant said, the claim was really for trading losses, then, on his view of the facts, A personally would have been entitled to claim part of the losses. Also, if the claim was for trading losses then trading accounts should have been prepared and the claim should not have been made in the tax return in the part of the return marked "interest on other loans". The Appellant was a chartered accountant who specialised in tax matters and would have known about such things. In evidence the Appellant sought to explain his claim by saying that he could have returned it (the claim for interest) as a loss but that would not have meant anything because he could not quantify the loss but he made the claim on the basis of what he could quantify at that moment. He said that he claimed it as interest relief because in his view the interest was part of the loss that was being incurred. We do not find this explanation to be convincing. It confirms our view that, at the time he made the claim, the Appellant knew that he was not entitled to make it.

136. The second point of consistency concerns the amount of interest claimed. It was the Appellant's case that, as he had paid the interest, he was entitled to the relief. However, in evidence he accepted that the amount he claimed included amounts paid by A.

137. The third point of consistency concerns the lack of documentation about the trusts on which Nomco was supposed to hold the property. If, as the Appellant claimed, Nomco held the property as nominee (or bare trustee) for himself and A then we would expect to see some written declaration of the trusts upon which Nomco held the property. We put this point to the Appellant at the hearing and he replied that Nomco knew what it was holding because it knew through its directors and he was one of its directors. However, A was not a director and, if Nomco did hold the property as trustee, then it is unusual that there was no written document evidencing those trusts.

138. The fourth point of consistency concerns the value added tax registration forms which were completed by the Appellant and which stated that the business activity of Nomco was that of property developers – builders. Such a statement was not consistent with the argument that Nomco did not trade. In evidence the Appellant stated that the form did not state the business activity of the company but the business activity on which a claim could be formulated to recover the value added tax. He also stated that, although Nomco did not make any supplies, the flats were sold in the name of Nomco "as nominee for the joint venture partners" and all the invoices were addressed to Nomco and so Nomco had to be registered for value added tax; however, what was being registered was the joint venture through Nomco. We find these explanations unconvincing and find that the completion of the value added tax registration form was inconsistent with the Appellant's case that Nomco was not trading in relation to the sale of the property.

139. The final point of consistency concerns the lack of accounts for the "joint venture partnership". The evidence of the Appellant was that no accounts for the joint venture were drawn up until the last flat was sold. In view of the facts that the Appellant was a chartered accountant, and that A was his client, we find this unusual. If the Appellant and A were trading together, as he claimed, we would have expected accounts to be prepared on an annual basis.

The picture as a whole

140. Having considered each of the allegations of the Respondent and each of the arguments for the Appellant we now stand back and consider the picture as a whole. Taken as a whole the evidence supports the conclusion that Nomco did not act as a nominee and that the Appellant did not think that it was acting as nominee. In our view all the evidence is consistent with a finding that Nomco itself was trading and that there was some sort of joint venture arrangement that the trading profits or losses of Nomco were to be shared with B, Construction, or, possibly, with A.

141. We now return to consider the issue in the appeal which is whether, for the relevant years, there was a loss of tax attributable to the fraudulent or negligent conduct of the Appellant. On the evidence before us we conclude that the Inland Revenue has discharged the burden of proving that the Appellant made the claims for interest relief in his personal tax return when he knew he was not entitled to do so. In our view that is fraudulent conduct as it involved dishonesty and the Appellant knew what he was doing. It is also negligent conduct.

Decision

142. Our decision on the issue for determination in the appeal is that, in the years 1988/89 to 1992/93 inclusive, there was a loss of income tax attributable to the fraudulent or negligent conduct of the Appellant.

143. The appeal is, therefore, dismissed.

DR NUALA BRICE

JOHN CLARK

SPECIAL COMMISSIONERS

Sc 3046/01

Anonymised 21.01.03