TC03182

Appeal number: TC/2012/05340

CAPITAL LOSS – relief – shares becoming of negligible value – shares subscribed by another on terms that they would be transferred to the taxpayer on the other being reimbursed the subscription money – whether relief against income available – whether shares issued to the taxpayer – appeal allowed

FIRST-TIER TRIBUNAL
TAX CHAMBER

MR NEIL McLOCKLIN **Appellant**

- and -

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS **Respondents**

TRIBUNAL: JUDGE MALCOLM GAMMIE CBE QC
MRS CAROL DEBELL

Sitting in public at Bedford Square, London WC1 on 9 January 2013

The Appellant appeared in person

Mr Peter Massey, advocate, HMRC Local Compliance Appeals and Reviews, for the Respondents

DECISION

Introduction

1. This is an appeal by Mr McLocklin against an amendment to his amended self-assessment return for the year 2008/09. The amendment disallows his claim for "share loss relief" in the amount of £46,000. The amount in question was paid for shares acquired in Great Portland (August 2008) Limited (formerly Corpra Limited) ("the Company"), which had become of negligible value.

2. HMRC do not dispute that Mr McLocklin acquired 18 shares in the Company for which he paid £46,000. They also do not dispute that the shares were qualifying shares (in that they were shares in a qualifying trading company) and that the shares became of negligible value in the year 2008/09. The sole issue for our determination is whether Mr McLocklin acquired those shares by subscription on issue or subsequently by purchase from another shareholder, Mr Paul Winter.

3. We had before us the documents produced by the parties and we heard evidence from Mr McLocklin, who was cross-examined by Mr Massey. We set out below the facts of this matter as we find them based on the documents before us and Mr McLocklin's evidence, which we accept.

The Facts

4. The Company was incorporated under the Companies Act 1985 on 10 October 1996 with an authorised share capital of £1,000 divided into 1,000 ordinary shares of £1 each. At the time at which the shares with which we are concerned were subscribed Paul Winter was the registered holder of the only two issued shares of the Company. On 16 November 2005 an agreement ("the Shareholders' Agreement") was entered into between the Company, Mr Winter, Richard Taylor and Jonathan Strong. Messrs Winter, Taylor and Strong are referred to in the Shareholders' Agreement as "the Shareholders".

5. Clause 1.2 of the Shareholders' Agreement provides that immediately after its execution, the parties shall subscribe in cash a specified number of £1 ordinary shares in the Company. These were 128 shares by Mr Winter, 45 shares by Mr Taylor and 25 shares by Mr Strong. Notwithstanding the different number of shares to be issued to each of them the price to be paid by each was £75,000.

6. Clause 1.3 then provides that prior to the second anniversary of the Shareholders' Agreement, Mr Winter shall be entitled to sell 18 of his Shares to Mr McLocklin upon Mr McLocklin entering into a Deed of Adhesion (which is defined as a deed whereby a Shareholder who is not a party to the Shareholders' Agreement agrees to be subject to it and be bound by it). Clause 1.3 also provides that the parties to the Shareholders' Agreement waive all and any rights they may have in relation to the transfer of 18 shares by Mr Winter to Mr McLocklin under the Company's articles of association or the Shareholders' Agreement. We were not shown the articles of association but we infer that they contained the standard provisions restricting the transfer of shares in a private unlisted company. Clause 4 of the Shareholders' Agreement prohibited any of

the Shareholders from disposing of or charging their shares without the consent of the others except as provided for by Clause 1.3 and by the provisions of Clause 4.

7. On 18 July 2006 Mr McLocklin entered into a Deed of Adhesion. This records that Mr McLocklin had taken a transfer of shares in the Company from Mr Winter and was entering into the deed pursuant to the Shareholders' Agreement.

8. Based on the correspondence and Mr McLocklin's evidence we also find as follows:

(1) Paul Winter incorporated a company called Corporate Property Limited ("CPL") in the mid-1990s. Mr McLocklin suggested in correspondence that CPL was registered offshore but had traded in the UK as Corpra. In evidence he said that CPL's shares were held offshore by Mr Winter in Jersey. From the documents that we saw, however, it appears that CPL is the Company and was therefore a company registered in England and Wales (with the number 3261543). Mr Winter owned all the shares in CPL but between 1999 and 2001 he recruited Messrs Taylor, Strong and McLocklin to work for CPL as directors.

(2) Mr McLocklin told us that each of his, Mr Taylor's and Mr Strong's contract of employment provided that they should be allocated shares in CPL, although the percentage of shares each would receive varied. Mr McLocklin was unable to produce his employment contract (or that of Mr Taylor or Mr Strong) because it had evidently been provided to another person for unspecified purposes and had never been returned. However, he did produce two letters from Mr Winter, the first offering him employment and setting out the basic terms and the second dealing with his share entitlement.

(3) The first letter refers to participation in a Capital Enterprise Management Initiative Share Option Scheme at an anticipated starting rate of around 5 per cent of total equity. No further details were available. The second letter also refers to share options and a target allocation of 5 per cent. Whatever the detail of this arrangement we cannot infer that it conferred an entitlement on Mr McLocklin to subscribe shares in the Company in 2005. On the other hand, for the reasons set out below, we have concluded that there was an agreement between the Shareholders and Mr McLocklin regarding the subscription of shares that occurred on 16 November 2005.

(4) Mr McLocklin referred to the Company being formed in 2005 to take over the goodwill of CPL and as the vehicle for all concerned to contribute capital on the terms of a shareholders' agreement. As we noted in (1) above, CPL and the Company appear to be the same entity. What may have confused Mr McLocklin is that CPL (having traded as Corpra) may have changed its name to Corpra Limited in 2005. The Shareholders' Agreement indicates that the Company was incorporated in 1996 and the Company's registration number is the same as CPL's.

(5) In 2005 the Company lost a major client and was encountering short term cash flow issues. We saw correspondence from the Royal Bank of

Scotland regarding the Company's overdraft facility which refers to its accounts from 2002 to 2004. An RBS letter of 14 September 2005 (to Mr Taylor) refers to "the director's [*sic*] injection of capital (£225k mooted at our last meeting)", which we take to relate to the amount subscribed on the Company's issue of shares in November 2005. The letter makes clear that RBS wished to see this capital introduced into the Company by the end of September. A letter of 16 November 2011 from Mr Strong to RBS indicated that "the Directors decided to recapitalise the Company with the injection of new equity totalling £225,000 with Richard Taylor, Neil McLocklin and I becoming shareholders. The three of us also agreed to provide personal guarantees for the unsecured part of the overdraft facility namely £50,000."

(6) Mr McLocklin indicated that:

> "The allocation of shares in [the Company] was complex but included the commitment under the employment contracts, personal bank guarantee commitments and the amount of money being invested – so you will note that Jonathan Strong invested £75,000 for 12.5% of the company, Paul Winter invested £29,000 (NET) for 55%, Richard Taylor £75,000 for 22.5% and I invested £46,000 for 9% of the company. Paul Winter has a Personal Bank Guarantee for £100k, and the rest of us for £50k."

The amount stated as invested by Mr Winter is net of the £46,000 that Mr McLocklin says that he had agreed to pay for the 18 shares issued initially to Mr Winter.

(7) Leaving aside the share issue, Mr McLocklin was treated in every other way the same as Mr Taylor and Mr Strong in that he was formally appointed a director of the Company and gave a personal bank guarantee of £50,000. It appears that the Company had had an overdraft facility of £150,000 at least since 2003 backed by a personal guarantee from Mr Winter. Given the Company's trading situation RBS was seeking additional security to maintain the overdraft facility and sought personal guarantees of £50,000 each from Messrs Taylor, Strong and McLocklin. Subsequently there was a dispute with RBS as to whether the personal guarantees that they had given related to the first £100,000 of the £150,000 overdraft or only to the top slice of £50,000.

(8) The reason why 18 shares were not issued directly to Mr McLocklin on 16 November 2005 was because he was in the process of divorce and, as he put it, "I did not have control of my assets" because they had been 'frozen' in the divorce proceedings. In what way and on what terms they were 'frozen' was not revealed to us. However, his 18 shares were issued to Mr Winter on the basis that they would be transferred (to use a neutral expression) to Mr McLocklin once Mr McLocklin had sorted out his personal affairs and had access to his funds again. Mr Winter paid for the shares on issue and Mr McLocklin paid Mr Winter when his personal circumstances permitted. The Company's board minutes indicate that 11 shares were transferred from Mr Winter to Mr McLocklin on 18 July 2006 and a further 7 were transferred on 31 July 2006. Mr McLocklin's bank

statements show that he paid £26,000 to Mr Winter on 19 July 2006 and £16,000 on 26 July 2006. It is unclear from the bank statements when Mr McLocklin paid the balance of £4,000 but HMRC did not dispute that he had paid £46,000.

The Legislation

9. At the time of the November 2005 subscription the relevant legislation providing income tax relief for losses on disposals of shares was contained in Chapter VI of Part XIII to the Income and Corporation Taxes Act 1988. This was rewritten in the same terms (as far as relevant) as Chapter 6 of Part 4 to the Income Tax Act 2007 ("the 2007 Act"). As previously noted, HMRC do not dispute that all the conditions for relief are satisfied, save that HMRC say that Mr McLocklin acquired his 18 shares by purchase from Mr Winter rather than by subscription. In this regard, section 131 of the 2007 Act provides in relation to share loss relief that—

> "(2) Shares are qualifying shares for the purposes of this Chapter if—
> (a) EIS relief is attributable to them, or
> (b) If EIS is not attributable to them, they are shares in a qualifying trading company which have been subscribed for by the individual."

10. The shares in question did not qualify for EIS relief. In relation to other shares, section 135(1) and (2) of the 2007 Act provides as follows—

> "(1) This section has effect in relation to shares to which EIS relief is not attributable.
> (2) An individual subscribes for shares in a company if they are issued to the individual by the company in consideration of money or money's worth."

11. It will also be necessary to refer to certain provisions of the Taxation of Chargeable Gains Act 1992 in reaching our decision. We set these out later.

The parties' submissions

12. Shortly stated, Mr Massey for HMRC said that sections 131(2) and 135(2) required that Mr McLocklin should have subscribed his shares and not purchased them. The shares in question were issued to Mr Winter under an arrangement that allowed Mr McLocklin to acquire them at a later date. The Shareholders' Agreement made specific provision for that arrangement. Furthermore, Mr Winter had to finance the subscription because Mr McLocklin's assets were 'frozen' at the time due to his divorce. This indicated that Mr McLocklin could not have subscribed his shares in consideration of money or money's worth because the funds to do so were necessarily provided by Mr Winter.

13. Mr Massey drew our attention to *National Westminster Bank plc v IRC* (1994) 67 TC 1 dealing with the meaning and timing of "issue" in connection with shares and to *Joyce and Wingfield v HMRC* [2010] UKFTT 566 in which the taxpayers had been unable to establish that they had subscribed rather than purchased shares.

14. Mr McLocklin's case, shortly stated, was that the nature of his agreement with Mr Winter was such that Mr Winter should be regarded as subscribing the shares as nominee or agent for Mr McLocklin. On that basis he said that he satisfied the requirements of sections 131 and 135 of the Act.

Our decision

15. It is not disputed that on 16 November 2005 Mr Winter subscribed, paid for and was registered as the holder of 128 shares in the Company and that he eventually transferred 18 of those shares to Mr McLocklin. Based on Mr McLocklin's evidence, which we accept, the agreement between Messrs Winter, Taylor, Strong and McLocklin at the time was that they would each subscribe a given number of shares in the Company for a stated price, namely—

(1) Paul Winter – 110 shares for £29,000

(2) Richard Taylor – 45 shares for £75,000

(3) Jonathan Strong – 25 shares for £75,000

(4) Neil McLocklin – 18 shares for £46,000

16. The number of shares and the price paid by each of them differed, reflecting their past involvement with, contribution to and employment terms with the Company. We have no reason to believe that this was not a properly negotiated arrangement between four individuals acting at arm's length. In particular, Mr Winter was until then the sole shareholder in the Company and the larger issue of shares to him for a lower subscription price per share would be consistent with his prior ownership of the Company. In addition, each of them gave personal guarantees – Winter effectively extending his existing guarantee covering the first £100,000 of the company's £150,000 overdraft and Taylor, Strong and McLocklin each providing a new guarantee covering the next £50,000 of the overdraft.

17. If that agreement had proceeded as planned, there would be no question that Mr McLocklin would be entitled to relief. However, he did not have the available resources to pay for his shares at that time given his divorce. The share issue could not be delayed given the RBS' requirement for further shareholder funds. To meet that situation, Mr Winter agreed to subscribe and pay for Mr McLocklin's 18 shares on the basis that Mr Winter would transfer them to Mr McLocklin at the agreed price of £46,000 when he had the available resources to reimburse Mr Winter but in any event within 2 years. It does not appear that there was a specific reason for choosing 2 years other than to ensure that the arrangement had some time limit and one within which Mr McLocklin could be expected to have resolved his divorce.

18. The question that we have to answer is whether that agreement between Mr McLocklin and Mr Winter satisfies the statutory requirements for relief. On the face of it Mr McLocklin cannot satisfy those requirements because, as he acknowledged, Mr Winter subscribed the 18 shares that had been agreed to be allocated to Mr McLocklin.

19. In this respect HMRC's contention is, effectively, that Mr Winter subscribed 128 shares on 16 November 2005 on his own account but the Shareholders' Agreement

permitted Mr Winter to sell 18 shares to Mr McLocklin within two years. We do not, however, consider that that is an accurate or complete representation of the agreement between the parties. The agreement between the parties does not appear to have been recorded in writing but, as Mr McLocklin contended and we accept, he would not have entered into a personal guarantee of the Company's overdraft together with Messrs Taylor and Strong except on the basis that he was entitled to 18 of the shares issued to Mr Winter on 16 November 2005. There is nothing in the materials we have seen to cast doubt on the existence of an agreement relating to the 18 shares or of an intention by the parties that Mr McLocklin should become a shareholder at the outset but for the circumstances of his divorce. The question is what precisely were the terms of that agreement and the nature of the rights and obligations to which it gave rise and, therefore, its effect on Mr McLocklin's claim for share loss relief?

20. In this respect, HMRC acknowledged that if Mr Winter had subscribed for the shares as Mr McLocklin's nominee so that Mr McLocklin was the beneficial owner of the shares from the outset, he would have been entitled to relief as claimed. Accordingly, it appears that HMRC accept that an individual is in appropriate circumstances entitled to relief as having subscribed shares within the meaning of the legislation without shares actually having been issued to (in the sense of being registered in the name of) that individual.

21. Share loss relief is available where an individual incurs an allowable loss for capital gains tax purposes on the disposal of any shares in a year (see section 131(1)(a) ITA 2007). As this indicates, at the time at which shares are subscribed, the relevant legislation is the Taxation of Chargeable Gains Act 1992 ("TCGA"). Under section 60(1) TCGA property held by a person as nominee for another is treated as vested in that other and as if the acts of the nominee were the acts of the person for whom he is the nominee. Thus, a subscription of shares by a nominee would be treated for capital gains tax purposes as a subscription by the beneficial owner.

22. Section 60(1) regulates the position of both nominees and 'bare trustees'. In the case of a bare trustee, property is treated as vested in the person 'absolutely entitled' to the property as against the trustee. The expression 'bare trustee' (which only appears in the title to section 60) must be understood in this light of section 60(2). This provides that a person is 'absolutely entitled' to property where he has "the exclusive right, subject only to satisfying any outstanding charge, lien or other right of the trustees to resort to the asset for payment of duty, taxes, costs or other outgoings to direct how the property shall be dealt with."

23. HMRC concluded that Mr Winter was not Mr McLocklin's nominee for two specific reasons: first, the Shareholders' Agreement only stated that Messrs Winter, Taylor and Strong were subscribers and that Mr Winter had the right to sell 18 shares to Mr McLocklin within two years; second, the price at which Mr Winter subscribed 128 shares and the price at which he sold Mr McLocklin 18 shares secured a substantial profit for Mr Winter.

24. Neither of these reasons appears to us to be good reasons for concluding that Mr Winter was not Mr McLocklin's nominee. The Shareholders' Agreement necessarily reflects what happened at the time; in other words, in the circumstances that occurred, only Messrs Winter, Taylor and Strong actually subscribed shares and were registered

as shareholders. But that does not necessarily dictate the basis on which Mr Winter had subscribed 18 shares for Mr McLocklin.

25. Furthermore, while clause 1.3 of the Shareholders' Agreement states that Mr Winter shall be entitled to 'sell' 18 shares to Mr McLocklin, we do not consider that that is conclusive against Mr McLocklin. The Shareholders' Agreement regulates the position as between the Company and Messrs Winter, Taylor and Strong as the currently registered shareholders. It allows Mr Winter to 'sell' 18 shares to Mr McLocklin and allows Mr McLocklin to be registered as a shareholder on entering into a Deed of Adhesion. While we necessarily have had regard to clause 1.3, the fact remains that Mr McLocklin is not a party to the Shareholders' Agreement and that Agreement does not dictate the nature of the relationship that existed between Mr Winter and Mr McLocklin given the agreement that we have found to exist between them in relation to the 18 shares that Mr Winter had subscribed for Mr McLocklin.

26. Apart from anything else, we do not think that the nature of the arrangement between Mr Winter and Mr McLocklin was such that Mr Winter was only "entitled to sell" 18 shares. If Mr McLocklin tendered £46,000 at any time within two years, we think that Mr Winter would have been obliged to transfer those shares to give effect to the parties' agreement at the outset and the Company and Messrs Taylor and Strong could not have prevented Mr McLocklin's registration as holder of those shares. Furthermore, if Mr Winter (and the other parties concerned) had sought at any time within those two years to deal with those 18 shares in some way that was inconsistent with his agreement with Mr McLocklin, we think that Mr McLocklin would have been entitled to take action to restrain him from doing so. The Shareholders' Agreement made obvious provision for the eventuality expected by all concerned that Mr McLocklin would be registered as a shareholder within 2 years. It provided the guarantee that effect would be given to the arrangement that had been agreed between all concerned at the outset and that Mr McLocklin would be registered as a shareholder on that event. In that sense the Shareholders' Agreement underpins Mr McLocklin's claim that the parties always envisaged that he was entitled to 18 shares issued to Mr Winter.

27. We also think that HMRC are wrong to say that Mr Winter would have made a significant profit on transferring 18 shares to Mr McLocklin for £46,000. Section 104 TCGA provides that any number of securities of the same class acquired by the same person in the same capacity shall be regarded as indistinguishable parts of a single asset growing or diminishing on the occasion on which additional securities of the same class are acquired or disposed of. In the ordinary course, the usual part disposal rules relating to such an asset would therefore have operated to average Mr Winter's base cost over his entire holding and as a result a disposal of only 18 shares for £46,000 would have created a significant gain.

28. We do not know what Mr Winter may have paid for his initial shareholding of two shares and we note that there are rules to deal with the identification of a holding qualifying for share loss relief where some shares are purchased and others are subscribed in particular circumstances. However, Mr Winter subscribed 128 for £75,000 and if that represented his entire base cost the gain would have been significant. It is apparent, however, that the actual arrangement between the parties

was that Mr Winter was allowing Messrs Taylor, Strong and McLocklin to acquire a 44 per cent stake in the Company at an initially agreed price for each of them.

29. HMRC would presumably know whether in fact Mr Winter had returned a gain on transferring 18 shares to Mr McLocklin or whether they had taken steps to assess capital gains tax on that basis. We assume that taxpayer confidentiality prevents them from revealing any details of Mr Winter's tax affairs but Mr McLocklin told us that Mr Winter had been allowed share loss relief of £29,000 (i.e. his net investment on 16 November 2005). We have no way of verifying this statement but, if it is correct, it does not appear consistent with HMRC's suggestion that the disposal of 18 shares to Mr McLocklin for £46,000 was treated as giving rise to a significant capital gain.

30. More to the point, it seems to us that HMRC's suggestion could only be on a basis that ignores the parties' initial agreement. We have concluded on Mr McLocklin's evidence that the agreement between the parties at the outset was that each would subscribe a given number of shares for an agreed price, which differed for each person. The 18 shares that Mr Winter acquired for Mr McLocklin at the price that had been agreed in his case were on this basis distinguishable from the 110 shares that Mr Winter subscribed on his own account. Section 42(4) TCGA dealing with part disposals provides that the usual base cost apportionment provisions do not apply where, on the facts, expenditure is wholly attributable to what is disposed of. Furthermore, HMRC's contention depends upon Mr Winter's subscription of 128 shares being "in the same capacity", which is essentially the question that we must determine.

31. In this respect, it is clear that Mr Winter was not an ordinary nominee for Mr McLocklin because a nominee does not usually put up the money needed to subscribe shares. Mr McLocklin said that he had agreed with Mr Winter that Mr Winter would put up the necessary money for Mr McLocklin, which he did. This was not, however, formally documented as a loan by Mr Winter to Mr McLocklin on particular terms. If that had been the case Mr McLocklin would have been able to subscribe 18 shares in his own name and, with the agreement of all concerned, could have charged them in favour of Mr Winter as security for the loan.

32. It is possible that a subscription of shares by Mr McLocklin financed by a loan from Mr Winter would have raised issues in Mr McLocklin's divorce and have been affected by the 'freezing' of his assets pending its resolution. It seems reasonable to suppose that Messrs Winter, Taylor and Strong would not have wanted Mr McLocklin's divorce proceedings to impact in any way upon the Company or ownership of any of its shares.

33. Accordingly, a better description of Mr Winter's action might be that he agreed to provide some form of 'temporary accommodation' to Mr McLocklin by financing the subscription of Mr McLocklin's agreed share allocation pending resolution of Mr McLocklin's financial position, on the basis that the shares in question were issued to Mr Winter in the first instance but that he would transfer them to Mr McLocklin on being reimbursed the agreed subscription price within two years.

34. It is unclear what would have happened if Mr McLocklin's divorce had taken more than two years to resolve or if it had left him with insufficient assets to pay Mr

Winter. In the former case the parties could easily have agreed to extend the time allowed to Mr McLocklin to reimburse Mr Winter. In the latter case Mr Winter would presumably have retained the 18 shares or, possibly, have agreed to transfer a smaller number depending on what Mr McLocklin was able to pay. In this respect the arrangement might perhaps be regarded as having some facets of a 'non-recourse' loan, under which Mr Winter could only look to 18 shares as reimbursement of the amount that he had put up to subscribe Mr McLocklin's 18 shares.

35. It is unnecessary to speculate further on this because the situation did not arise. Mr McLocklin paid Mr Winter £46,000 within a year. The agreement that we have concluded was reached between Mr Winter and Mr McLocklin obliged Mr Winter to transfer 18 shares to Mr McLocklin on Mr McLocklin tendering £46,000 within that time. There seems no reason why Mr Winter could not also have required Mr McLocklin to pay £46,000 if within that period Mr McLocklin's divorce had been resolved and his assets were 'unfrozen'. Mr Winter in fact had the greater imperative to enforce their agreement. His payment of £75,000 on 16 November 2005 was necessitated by RBS' demand that the Company raise £225,000 from its shareholders immediately but under the parties' agreement (as we have found it) Mr McLocklin had agreed to contribute £46,000 of this amount for 9 per cent of the Company's equity. Mr Winter therefore had very good reason to enforce the agreement with Mr McLocklin if Mr McLocklin's financial circumstances allowed.

36. Based on this agreement we think that Mr McLocklin plainly had an interest in or entitlement to 18 shares on issue. In this respect, the fact that Mr Winter subscribed 128 shares and that 18 were an indistinguishable part of that larger holding does not appear to affect the parties' rights and obligations in respect of 110 and 18 shares respectively. Mr Winter was to hold 18 shares to the order of Mr McLocklin subject to and pending his reimbursement of the £46,000 paid by Mr Winter.

37. It is nevertheless difficult to say (subject to further consideration below) that their agreement constituted Mr Winter a nominee of Mr McLocklin in the usual sense of that term. Nor do we think that Mr Winter was technically acting as an agent of Mr McLocklin. It is perhaps possible that Mr Winter should be regarded as trustee and Mr McLocklin as a person absolutely entitled against Mr Winter as trustee. Their relationship, however, was one arising under a contract supported both by Mr McLocklin's obligation to reimburse Mr Winter and by his entering into a personal guarantee of the Company's overdraft. (In passing we should note that Mr McLocklin suggested in correspondence that the personal guarantees should be regarded as part of the consideration given for subscribing the shares. While his personal guarantee may have provided consideration for the agreement relating to the subscription of 18 shares, there is in our view no basis for including the amount of the personal guarantee as part of the subscription price.)

38. Although the contractual basis for the relationship does not preclude the existence of a trust (such as that arising from the situation of an unpaid vendor of property), we doubt that Mr Winter was a 'bare trustee'. Mr McLocklin could prevent Mr Winter from dealing with 18 shares but would only be absolutely entitled to them in the sense of being able to direct how 18 shares were dealt with when he had reimbursed Mr Winter £46,000. In this respect, Mr McLocklin's obligation to pay £46,000 within 2

years does not seem to us necessarily to fall within the language of section 60(2) as "other outgoings", given the overall context of those words.

39. Mr McLocklin suggested, however, that Mr Winter had effectively acquired the 18 shares by way of security for Mr McLocklin's obligation to reimburse him the £46,000 that he had paid on issue. In relation to assets dealt with by way of security section 26 TCGA provides as follows—

> "(1) The conveyance or transfer by way of security of an asset or of an interest or right in or over it, or transfer of a subsisting interest or right by way of security in or over an asset (including a retransfer on redemption of the security), shall not be treated for the purposes of this Act as involving any acquisition or disposal of the asset.
>
> (2) Where a person entitled to an asset by way of security or to the benefit of a charge or incumbrance on an asset deals with the asset for the purpose of enforcing or giving effect to the security, charge or incumbrance, his dealings with it shall be treated for the purposes of this Act as if they were done through him as nominee by the person entitled to it subject to the security, charge or incumbrance; and this subsection shall apply to the dealings of any person appointed to enforce or give effect to the security, charge or incumbrance as receiver and manager or judicial factor as it applies to the dealings of the person entitled as aforesaid.
>
> (3)An asset shall be treated as having been acquired free of any interest or right by way of security subsisting at the time of any acquisition of it, and as being disposed of free of any such interest or right subsisting at the time of the disposal; and where an asset is acquired subject to any such interest or right the full amount of the liability thereby assumed by the person acquiring the asset shall form part of the consideration for the acquisition and disposal in addition to any other consideration.

40. The scheme of the 1992 Act, therefore, is to 'ignore' arrangements under which assets are charged as security for particular obligations. Thus, under sub-section (1) the transfer and re-transfer of shares as security is ignored; under sub-section (2) the sale of shares to enforce the security for a particular obligation is treated as a disposal by the person who has charged the shares; and under sub-section (3) shares are treated as acquired "free of any interest or right by way of security subsisting at the time of any acquisition".

41. If Mr Winter had formally lent Mr McLocklin £46,000 and 18 shares had been issued to Mr Winter as security for that loan, Mr Winter's security interest would have been ignored and the shares would have been treated as issued to Mr McLocklin on the basis that Mr Winter was (on the assumptions of section 26) Mr McLocklin's nominee or a bare trustee for Mr McLocklin (as would certainly be the case following Mr McLocklin's reimbursement of the subscription monies).

42. The arrangement was undocumented and differs in various respects from a straightforward loan of £46,000. At the same time the fact of the initial agreement between all concerned that Messrs Taylor, Strong and McLocklin would subscribe a

certain number of shares at an agreed price also indicates that this was not a straightforward arrangement under which Mr Winter acquire 128 shares and Mr McLocklin was given, in effect, an option to acquire 18 shares at a particular price within two years with Mr Winter having permission to sell those 18 shares if Mr McLocklin exercised his option.

43. The 18 shares that Mr Winter acquired pursuant to this arrangement by paying £46,000 for Mr McLocklin were security for the obligation that Mr McLocklin had undertaken to reimburse £46,000 once his divorce was finalised and his assets were unfrozen. Mr Winter would effectively be holding 18 shares to Mr McLocklin's order and as security for his obligation to pay that sum. The ability of Mr Winter to recover £46,000 from Mr McLocklin was necessarily conditional or contingent to some extent on the resolution of his divorce and the unfreezing of his assets. Nevertheless, Mr Winter would have every incentive to recover £46,000 from Mr McLocklin if there was any scope for recovery.

44. Does that suffice for Mr McLocklin to say that he subscribed shares in the Company for share loss relief purposes? Under section 135(2) of the 2007 Act an individual subscribes for shares if shares are issued to him by the company in consideration of money or money's worth. There is no doubt that the shares in the Company were issued in consideration of money, being £225,000 that Messrs Winter, Taylor and Strong paid on issue. The Company being a qualifying company for the purposes of share loss relief and the shares having become of negligible value that amount is potentially available for relief. Mr McLocklin informed us that Messrs Winter, Taylor and Strong had each been accepted as qualifying for share loss relief in respect of their investment in the Company (in Mr Winter's case, as already noted, by reference to £29,000).

45. Parliament has decided that relief should not be available where an individual acquires existing shares in a company (rather than subscribing new shares) notwithstanding that the money paid for the shares is subsequently lost. One reason for this may be because what an individual pays in those circumstances flows to an existing shareholder who is reducing his investment in the company to that extent and reflects the current value of the company. The price paid in those circumstances does not necessarily represent money that has flowed into the company itself and which is lost in its trade. The agreement between all concerned in the present case, however, is not akin to that situation, in which a fourth party – Mr McLocklin – has agreed to acquire shares at a later date. Mr McLocklin was present at the outset and agreed to participate from the outset. Mr Winter effectively lent him the money to fulfil his agreement given his financial situation at the time.

46. The agreement between Mr Winter and Mr McLocklin was not documented as a straightforward loan but having regard to the circumstances surrounding the arrangement, the nature of the obligations to which their agreement gave rise was in our view substantially similar to a loan under which 18 shares were issued to Mr Winter as security pending reimbursement of the subscription monies agreed to be paid by Mr McLocklin. HMRC acknowledge that shares subscribed by a nominee satisfy the requirements of the section 135(2) and we think that this must extend to a case in which money is advanced to an individual to permit subscription but the shares are issued to another as security for the advance. The fact that the shares are

issued to the person making the advance rather than to the person for whose benefit the shares are issued does not alter the nature of the arrangement or deny relief in respect of the subscription monies which in Mr McLocklin's case were reimbursed within a matter of months.

47. Judge Bishopp's conclusion in *Joyce and Wingfield v HMRC* [2010] UKFTT 566 at [12] indicated that he had considerable sympathy with the taxpayers but, as he noted in dismissing their appeal, the requirements of section 135(2) are strict. In that case, however, the taxpayers had been unable to produce satisfactory evidence to show that the shares in respect of which they had incurred their loss were newly issued rather than in existence and purchased by them. In Mr McLocklin's case it is undisputed that the shares were newly issued and we are satisfied having regard to his evidence as to the arrangement under which those shares were issued. The essential difficulty has been to conclude on the nature of Mr McLocklin's agreement with Mr Winter and how Mr Winter's subscription of 18 shares falls to be treated under the 1992 Act in the light of that agreement.

48. For the reasons we have given, we have concluded that Mr Winter is to be treated as subscribing 18 shares for Mr McLocklin, with Mr McLocklin subsequently reimbursing Mr Winter for the subscription monies, and that on that basis Mr McLocklin qualifies for share loss relief. We accordingly allow his appeal.

49. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

MALCOLM GAMMIE CBE QC
TRIBUNAL JUDGE

RELEASE DATE: 6 January 2014