Ref: 12TACD2017

BETWEEN/

NAME REDACTED 1, NAME REDACTED 2

NAME REDACTED 3, NAME REDACTED 4

Appellants

V

REVENUE COMMISSIONERS

Respondent

DETERMINATION

Introduction

1. This is an appeal by each of the Appellants against capital gains tax assessments in respect of the tax year of assessment 2003 regarding the disposal of shares in an unquoted company. The appeal relates to the valuation of the shareholding for the purposes of ascertaining the base cost of the shares as at 23 September 1997 in accordance with sections 547 and 548 of the Taxes Consolidation Act 1997, as amended ('TCA 1997'). The assessments were raised in October 2007 and the balance of tax due per each of the assessments is €47,568. The Appellants disputed the Respondent's valuation and notices of appeal were filed in November 2007.

Facts

2. By Will dated **[DATE REDACTED]** 1983 and codicil dated **[DATE REDACTED]** 1989, Mr **[NAME REDACTED]**, father of the Appellants, bequeathed all of his property to the family Trust (hereafter 'the Trust'). On his death on **[DATE REDACTED]** 1993, his entire shareholding in Company A Limited was transferred to the Trust.

3. Company A Limited was a holding company with two subsidiaries, Company B Holdings and Company A Holdings. Company A Holdings was a non-trading company which held 93 acres of land at [**LOCATION REDACTED**]. Company B Holdings was a property holding company, holding 150 acres of agricultural land with potential for residential development.

4. On 23 September 1997, the Trustees transferred the issued share capital of Company A Limited (hereafter 'the Company') to the Appellants, each acquiring a 25% shareholding in the Company. At the time in 1997, the entire shareholding in the Company was valued at £1,855,796 (€2,356,375). The Trustees paid capital gains tax on the disposal of the shares in 1997 based on this valuation of the shares.

5. On 1 December 2003, the Appellants disposed of their shareholdings in Company A Limited for a total sum of circa €20m. The Respondent took the view that for capital gains tax purposes, each of the Appellants' share disposals must be regarded as a separate disposal of a minority shareholding. As a result, the value of the shares, at the date of acquisition, was discounted to reflect the lack of control and marketability. The discount factor applied was 40% initially, reduced to 35% in recognition of the impact on valuation of the possibility of a special purchaser.

Legislation

<u>Section 547 TCA 1997 – Disposals and acquisitions treated as made at market value</u>

<u>*s. 547(1)*</u>

Subject to the Capital Gains Tax Acts, a person's acquisition of an asset shall for the purposes of those Acts be deemed to be for a consideration equal to the market value of the asset where—

> *(a) the person acquires the asset otherwise than by means of a bargain made at arm's length (including in particular where the person acquires it by means of a gift)…*

<u>*s. 547(4)*</u>

(4) (a) Subject to the Capital Gains Tax Acts, a person's disposal of an asset shall for the purposes of those Acts be deemed to be for a consideration equal to the market value of the asset where—

> *(i) the person disposes of the asset otherwise than by means of a bargain made at arm's length (including in particular where the person disposes of it by means of a gift)…*

<u>Section 548 TCA 1997 – Valuation of assets</u>

(1) Subject to this section, in the Capital Gains Tax Act, "market value ' in relation to any assets, means the price which those assets might reasonably be expected to fetch on a sale in the open market.

(2) In estimating the market value of any assets, no reduction shall be made in the estimate on account of the estimate being made on the assumption that the whole of the assets is to be placed on the market at the same time.

………..

(4) Where shares and securities are not quoted on a stock exchange at the time at which their market value is to be determined by virtue of subsection (1), it shall be assumed for the purposes of such determination that in the open market which is postulated for the purposes of subsection (1) there is available to any prospective purchaser of the asset in question all the information which a

prudent prospective purchaser of the asset might reasonably require if such prospective purchaser were proposing to purchase it from a willing vendor by private treaty and at arm's length.

Section 549 TCA 1997 – Transactions between connected persons

(1) This section shall apply for the purposes of the Capital Gains Tax Acts where a person acquires an asset and the person making the disposal is connected with the person acquiring the asset.
(2) Without prejudice to the generality of section 547, the person acquiring the asset and the person making the disposal shall be treated as parties to a transaction otherwise than by means of a bargain made at arm's length.

Submissions

6. It was not in dispute as between the parties that the Trustees were connected with the Appellants in their capacities as beneficiaries of the Trust in accordance with s.10(4) TCA 1997 and that the shares were acquired otherwise than by means of a bargain at arm's length for the purposes of s.547 and s.548 TCA 1997.

Statutory Interpretation

7. The Appellants contended that there was no distinction to be drawn in terms of value, between that which the Trust disposed of and that which the Appellants acquired. The Appellants submitted that the Trust did not dispose of a single shareholding of 100% of the share capital in the company rather, it disposed of four shareholdings of 25%. The Appellants submitted that the market value of the assets which the Trust disposed of equalled 100% of the value of the shares in the Company. The Appellants submitted that as a matter of statutory interpretation, the asset disposed of and acquired must be the same and the market value to be ascribed to the disposal of the asset pursuant to section 547(4) must be equal to the market value on acquisition pursuant to section 547(1). The Appellants submitted that even if this were not the

consequence on a clear literal interpretation of subsections (1) and (4) of section 547, the structure of the tax would require that such an interpretation be adopted.

8. The Respondent contended that there was no basis for linking s.547(1) to s.547(4). The Respondent submitted that the Trust disposed of a single asset, that being a 100% shareholding in the Company and that the Appellants each received an asset of 25% of the shares in the company and that s.547(1) and s.548 were the relevant provisions in relation to the valuation of shares in unquoted companies.

The statutory hypothesis, the minority discount, the special purchaser and the rate of discount to be applied.

9. The Appellants contended that no discount should be applied or, in the alternative, a much lesser discount should be applied than that imposed by the Respondent. The Appellants also contended for a substantial adjustment to the discount on the basis of the presence of a special purchaser.

Evidence

The First Appellant.

10. The first Appellant, gave evidence in relation to the factual background of the relevant transaction, the Company and the acquisition of the shares by the Appellants. On the issue of shareholder buy outs, he stated that if one of the family members (i.e. the Appellants) wished to buy the other out, that family member would pay full price to the other family member and would not seek a discount. He stated that no family member would sell their share to a non-family member. The first Appellant accepted under cross examination that once the shares had been appointed to him and his siblings, they registered the shareholdings in four separate registrations on the company register.

<u>Mr. G. of Davy, expert witness on behalf of the Appellants.</u>

11. In his evidence Mr. G referred to his valuation report dated April 2016 which was submitted in evidence. In his report Mr. G agreed with expert for the Respondent, Mr. H., that ordinarily, a discount would apply in calculating the value of a minority shareholding in a company on the basis of lack of control and lack of marketability. Mr. G. concluded in his report that, he did not believe that a material discount should apply but that if such a discount were to apply, it could be between zero and 10%.

12. In direct examination, Mr. G. accepted the ranges set out per the practitioner valuation tables in the relevant textbooks, namely; '*Valuation of Shares in Unlisted Companies for Tax purposes*' by Denis Cremins, published by the Irish Taxation Institute and '*The Valuation of Businesses and Shares: A Practitioner's Perspective*' by Des Peelo, published by Chartered Accountants Ireland. He stated that as a general rule of thumb, most practitioners would be of the view that for a shareholding between 25%-49%, a 40% discount would be appropriate.

13. Mr. G. at paragraph 33 of his report stated '*In the absence of special purchasers on the basis of these facts we do not believe that there would be rational buyers of a minority interest in the Company save for at a low price*.' The Respondent submitted that this statement supported the analysis undertaken by the Respondent's expert. Under cross-examination on this point, Mr. G. stated that a rational buyer might purchase the shareholding at a discount of between 15 and 20%.

14. Mr. G. disagreed with the manner in which Mr. H. assessed the relevance of the special purchaser in this case. Mr. G. stated that a shareholder who can obtain control by acquiring the shareholding of another will be prepared to pay a higher price for those shares.

15. Mr. G. stated that the other siblings were the obvious buyers of the shares but under cross-examination he accepted that while the concept of the hypothetical purchaser would include siblings, it would not exclude third parties.

Mr. H. of Moore Stephens, expert witness on behalf of the Respondent.

16. In his evidence, Mr. H. referred to his valuation report dated 19 December 2014, submitted in evidence.

17. Mr. H. stated that in purchasing shares, a purchaser will seek economic value and will try to obtain the best price possible for the shares. He stated that the value of a share is generally determined by the income flow a shareholder can reasonably expect to receive from its ownership in the future.

18. Mr. H. gave evidence in support of the 35% discount applied by the Respondent. In his view, the discount reflected two separate and distinct principles that are described in his report as follows:

'The core principle underpinning a discount for lack of control reflects the limitations of the minority shareholder in controlling the future conduct of the company. This therefore impacts on the income flows that a minority shareholder can reasonably expect to receive from ownership of the share. This in turn impacts on the value of the share.

The core principle underpinning a discount for lack of marketability reflects the limitations of the minority shareholder in disposing of his/her private shareholding as there is no readily available market upon which to trade (unlike a publicly quoted company). This therefore impacts on the income flows that a minority shareholder can reasonably expect to receive from ownership of the share. This in turn impacts on the value of the share.'

19. In considering the value of a 25% shareholding in the Company he adopted the perspective of the hypothetical purchaser in 1997.

20. He cited practitioner discount tables estimating the ranges of discount for lack of control and marketability in minority shareholdings, namely '*Valuation of Shares in Unlisted Companies for Tax purposes*' by Denis Cremins, published by the Irish Taxation Institute and '*The Valuation of Businesses and Shares: A Practitioner's Perspective*' by Des Peelo, published by Chartered Accountants Ireland, the first of which recommends a discount in the region of 40% for shareholdings of 25% to 49%

and the latter, which recommends a discount of 50% to 70% for shareholdings in the region of 25% and less, and a discount of 35% to 40% for shareholdings over 25% but less than 50%.

21. Based on these tables Mr. H. commenced his valuation analysis with a discount factor of 50% and then reviewed all relevant factors which would increase or reduce that discount before settling on an adjusted discount in the range of 35%-40%.

22. The relevant extract of the report of Mr. H. provides as follows;

'4.2.5 I would then look at the particular facts of the case to establish if there are any particular circumstances that would increase or decrease the level of discount. In doing this, I would adopt the perspective of the hypothetical purchaser in 1997. It is my opinion that the relevant facts as they would present themselves to a hypothetical purchaser in 1997 would be as follows:

- *The hypothetical purchaser would first and foremost assess the rights and powers attaching to a 25% shareholding under Irish Company Law and note the limitations that a 25% shareholding carries in the following key governance matters:*
  - *Control the direction of the company*
  - *Wind up/ prevent winding up*
  - *Appoint directors*
  - *Propose dividends*

- *The hypothetical purchaser would note that the company was at that point. sitting on a substantial gain. The book value of the of the first subsidiary, Company A Holdings, at 31 December 1996 was IR£357,407. The market value of that property at 25 June 1997 was £1,100,000. The book value of the property in the second subsidiary, Company B Holdings, at 31 December 1996 was IR£829,057. The market value of that property at 25 June 1997 was £1.440,000. The hypothetical purchaser would note that the auctioneer reports indicate significant potential for rezoning/residential development.*

- *The hypothetical purchaser would at that point, be unaware of the Irish property boom that was to follow, and could be minded in two different ways;*
  - *the value of the property had reached a high and now was the time to self, or:*
  - *There was potential for further appreciation*

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- *The hypothetical purchaser would however note that as a 25% minority shareholder, he/she would have limited control to influence the company on critical business decisions:*
    - *When to sell the property*
    - *Decisions to acquire other strategic property*
    - *Decisions to rent the property*
    - *Strategies in enhancing the property by zoning etc.*

- *The hypothetical purchaser would note that this lack of control/ influence would be exacerbated by the fact that the company has no recent history of charging rents/ or paying dividends. The key means to convert the shareholding into cash would be by two large "single event" property sales at an indeterminate point in the future. The minority shareholder, with a 25% share, would be unable to control the destiny of the company alone, or direct decisions of utmost business criticality, alone.*

- *The hypothetical purchaser would note that the company has a significant degree of concentration of business risk in property development potential in a relatively close geographic spread*

- *The hypothetical purchaser would note that the nature of the land dealing conducted by the company was largely passive. It did not hold a large portfolio of individual diversified properties with frequent transactions' rents resulting in regular income and/ or risk diversification.*

- *The hypothetical purchaser would note that the company did not have any apparent management structure. It would appear based on the accounts that by virtue of the limited management costs incurred. that the shareholders must influence the business decisions being made.*

- *The hypothetical purchaser would note that the remaining Shareholders are blocks of 25%. That may alleviate some of the concerns of the hypothetical purchaser. Dealing with three shareholders of 25% spreads the decision making risk amongst three entities. rather than one shareholder of 75%. There is a different dynamic in* *decision making thalis spread amongst four entities rather than two. This may somewhat mitigate the concerns of the hypothetical purchaser*

- *If the hypothetical purchaser was aware that the remaining three shareholders were siblings, it may influence the hypothetical purchaser in different ways:*
  - *The presence of three family members may mean that there may be an increased potential for a dominant shareholder amongst the family member*
  - *Conversely, the hypothetical purchaser may be concerned by the risks of family dispute intruding on a business objective*

- *However, I would feel that these conditions would be present in any company and are speculative. Any group of shareholders can act in concert, family or strangers. Any group of shareholders can fall into dispute, family or strangers. These are inherent conditions in any corporate structure which is owned by a group of individuals.*

4.2.6 Based on careful consideration of the above factors that the hypothetical purchaser could reasonably be expected to take into account, I would arrive at a range of discount for lack of control and lack of marketability. I would be of the opinion that the facts of the case would support the existence of the core nature of discount for the lack of control and lack of marketability, which as set out above, would default to 50%. I would however view that the fact that all other shareholding were in blocks of 25%, and the passive nature of the company, to be key mitigating factors. For this reason I would reduce the discount to reflect these factors, and conclude on a range of discounts from 35% to 40%.'

23. On the matter of the special purchaser, Mr. H. stated that the special purchaser is somebody who will pay more than market value for the shares for some strategic reason. His evidence was that the special purchaser must be known to the market and must be willing and able to purchase the asset. He stated that he would not rule out the existence of a special purchaser but that the special purchaser will only pay as much as is needed to acquire the shares.

24. While the report of Mr. H. did not propose a discount to account for a potential special purchaser, by letter dated 16 April 2007, the Respondent reduced the 40% discount to 35%, to reflect the possibility of same.

Analysis and findings

Statutory Interpretation

25. The Appellants contended that there was no distinction to be drawn in terms of value, between that which the Trust disposed of and that which the Appellants acquired. The Appellants submitted that the Trust did not dispose of a single shareholding of 100% of the share capital in the company rather, it disposed of four tranches of 25% of the shareholding. The Appellants submitted that the market value of the assets which the Trust disposed of equalled 100% of the value of the shares in the Company. The Appellants submitted that as a matter of statutory interpretation, the asset disposed of and acquired must be the same and the market value to be ascribed to the disposal of the asset pursuant to section 547(4) must be equal to the market value on acquisition pursuant to section 547(1). The Appellants submitted that even if this were not the consequence on a clear literal interpretation of subsections (1) and (4) of section 547, the structure of the tax would require that such an interpretation be adopted.

26. The asset acquired by each Appellant in this case was a 25% shareholding in an unquoted company. This is '*the asset*' referred to in section 547, for which the base cost must be ascertained. Section 547(1) TCA 1997 provides;

> *(1) Subject to the Capital Gains Tax Acts, <u>a person's acquisition of</u> <u>an asset</u> shall for the purposes of those Acts be deemed to be for a consideration equal to the market value of the asset where—*
>
> *(a) the person acquires <u>the asset</u> otherwise than by means of a bargain made at arm's length (including in particular where the person acquires it by means of a gift)…*

[emphasis added]

27. Section 547(1) TCA 1997 is a deeming provision which deems the value of the shareholding acquired to be '*for a consideration equal to market value*' in circumstances where the person acquires the asset otherwise than by means of a bargain made at arm's length, a position undisputed in this appeal.

28. While the Appellants submitted that ambiguity arose in relation to these provisions, taking into consideration section 547(4) which relates to disposals of an asset, the Respondent contended that there was no basis for linking s.547(1) to s.547(4). The Respondent stated that s.547(1) and s.548 were the relevant provisions in relation to the valuation of shares in unquoted companies. The Respondent submitted that the Appellants each received 25% of the shares in the company but that the asset disposed of by the Trustees was different as it was 100% of the shares in the company. The Respondent stated that this was reflected in the Deed of Appointment dated 23 September 1997 which dealt with the appointment of 100% of the shares in the Company. The Respondent questioned whether Counsel for the Appellants was seeking to treat the Appellants as one person in terms of value. The Respondent submitted that each sibling was a separate taxpayer with each taxpayer acquiring a separate asset. The Respondent stated that it was the nature of the asset which was the subject of consideration in terms of determining the base cost of that asset, not the value of the company as a whole, disposed of by the Trustees.

29. The Appellants submitted, that as a matter of statutory interpretation, the asset which is disposed of and acquired must be the same and that the market value to be ascribed to the disposal of the asset pursuant to section 547(4) must be the same as that applicable to the acquisition pursuant to section 547(1). The Appellants submitted that the structure of the tax would require that such an interpretation be adopted even if a literal interpretation of the provisions did not accord with this submission on the basis that the legislation was '*conjuring up gains where no gains exist*'.

30. I do not agree with the Appellants' submission in this regard. Section 547 seeks to value '*a person's acquisition of an asset'* not a disposal by another body, in this case, the Trust. I accept the submission of the Respondent, that the Trust disposed of one asset, that being 100% of the shares in the company. In my view, there is no ambiguity arising in relation sections 547 and 548 and thus a literal interpretation of the statutory wording is appropriate in the circumstances. Based on a plain and literal reading of the provisions, the interpretation contended for by the Appellants simply does not arise. In determining the base cost of an asset comprising 25% of the shares of the company, the relevant provisions are s.547(1) TCA 1997 and s. 548 TCA 1997 and '*the asset'* for which a value must be determined as at 23 September 1997, is the 25% shareholding acquired by each of the Appellants on that date.

31. This appeal necessitates a determination of the appropriate base cost for capital gains tax purposes of the respective shareholdings acquired by the Appellants as at the date of acquisition on 23 Sept 1997 and thus the law on valuation of shares in unquoted companies will now be considered.

The Statutory Hypothesis

32. I have determined that in this appeal, the '*asset*' referred to in section 547 TCA 1997 is the 25% shareholding acquired by each Appellant in the Company on 23 September 1997. In terms of valuing that asset s.548(4) provides; *'Where shares and securities are not quoted on a stock exchange at the time at which their market value is to be determined by virtue of subsection (1), it shall be assumed for the purposes of such determination that in the open market which is postulated for the purposes of subsection (1) there is available to any prospective purchaser of the asset in question all the information which a prudent prospective purchaser of the asset might reasonably require if such prospective purchaser were proposing to purchase it from a willing vendor by private treaty and at arm 's length.'*

33. Therefore, in accordance with s.548(4), it is necessary to assume the value that a shareholding would fetch in a hypothetical sale on the open market. One must assess what a hypothetical purchaser would have paid for shares in the Company at the valuation date i.e. 23 September 1997, based on all relevant information being known.

34. In this regard, I note the case of *Lynall –v Commissioners of lnland Revenue* [1971] 47 TC 375 where the principle was summarised as follows on page 377:

'*it is common ground that the shares must be valued on the basis of a hypothetical sale in a hypothetical open market between a hypothetical willing vendor (who would not necessarily be a director) and a hypothetical willing purchaser on the hypothesis that no one is excluded from buying and that the purchaser would be registered as the holder of his shares but would then hold them subject to the articles of association of the company, including the restrictions on transfer*'

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35. The case of *IRC -v- Gray* [1994] STC 360 also contains an authoritative statement on the point. In that case, on pages 371 and 372, Hoffman LJ stated:

'The property must be assumed to have been capable of sale in the open market, even if in fact it was inherently unassignable or held subject to restrictions on sale. The question is what a purchaser in the open market would have paid to enjoy whatever rights attached to the property at the relevant date .... the theme which runs through the authorities is that one assumes that the hypothetical vendor and purchaser did whatever reasonable people buying and selling such property would be likely to have done in real life. The hypothetical vendor is an anonymous but reasonable vendor, who goes about the sale as a prudent man of business, negotiating seriously without giving the impression of being either over-anxious or unduly reluctant. The hypothetical buyer is slightly less anonymous. He too is assumed to have behaved reasonably, making proper inquiries about the property and not appearing too eager to buy. But he also reflects reality in that he embodies whatever was actually the demand for that property at the relevant time. It cannot be too strongly emphasised that although the sale is hypothetical, there is nothing hypothetical about the open market in which it is supposed to have taken place. The concept of the open market involves assuming that the whole world was free to bid, and then forming a view about what in those circumstances would in real life have been the best price reasonably obtainable. The practical nature of this exercise will usually mean that although in principle no one is excluded from consideration, most of the world will usually play no part in the calculation. The inquiry will often focus on what a relatively small number of people would be likely to have paid. It may have to arrive at a figure within a range of prices which the evidence shows that various people would have been likely to pay, reflecting, for example, the fact that one person had a particular reason for paying a higher price than others, but taking into account, if appropriate, the possibility that through accident or whim he might not actually have bought. The valuation is thus a retrospective exercise in probabilities, wholly derived from the real world but rarely committed to the proposition that a sale to a particular purchaser would definitely have happened.

It is often said that the hypothetical vendor and purchaser must be assumed to have been 'willing', but I doubt whether this adds anything to the assumption that they must have behaved as one would reasonably expect of prudent parties who had in fact agreed a sale on the relevant date. It certainly does not mean that having calculated the price which the property might reasonably have been expected to fetch in the way I have described, one then asks whether the hypothetical parties would have been pleased or *disappointed with the result; for example, by reference to what the property might have been worth at a different time or in different circumstances. Such considerations are irrelevant.'*

36. The Respondent submitted that what must be envisaged is that the sale is possible, the parties to it are willing but not forced to sell and buy and that an incoming purchaser would stand in the shoes of the vendor and be subject to the restrictions, degree of influence and risk that the actual shareholder is bound by in the real world.

37. In short, the asset to be valued is a 25% shareholding in the company, the valuation date of that shareholding is 23 September 1997 and the shares must be valued on the basis of the statutory hypothesis i.e. on the basis of a hypothetical sale in a hypothetical open market in accordance with the relevant jurisprudence including *inter alia*, the cases of *Re Lynall Deceased* and *IRC v Gray.* The expert evidence on valuation forms an essential part of this analysis and is considered further below.

The Minority Discount

38. The Appellants accepted that the general rule was that a discount applies to the disposal of minority shareholdings to reflect lack of control and marketability however the Appellants contended that no discount should apply in this case or, in the alternative, a much lesser discount should apply.

39. The Appellants contended that the market value of the shares acquired by the Appellants must be the same as the market value on a pro rata basis, of the shares disposed of by the Trustees. However, this is not what the legislation provides. The legislation provides that shares in unquoted companies are to be valued in accordance with s.548(4). The market value rules in section 548 apply separately in in respect of disposals and acquisitions and this is borne out by the fact that s.547(1) refers to acquisitions while s.547(4) refers to disposals. The Respondent contended that there is nothing to prevent the market value on a disposal from being different to the market value on an acquisition and I agree entirely with the Respondent on this point.

40. Both experts in this case agreed in principle that when valuing minority shareholdings in unquoted companies, a discount is applied to reflect lack of control and marketability and this is supported by the relevant case law, see *Cash and Carry -v- Inspector of Taxes* [1998] STC (SCD) 46. In that case the taxpayer held a 24%

shareholding in an unquoted company and the rest of the shares were held by other members of his family. The Capital Taxes Division had discounted the value of the taxpayer's shareholding by 66.66% but this was reduced by the Special Commissioners to 55% on appeal.

41. The analysis required in this appeal necessitates a consideration of the price a purchaser would have paid in the open market for a 25% shareholding in the Company on 23 September 1997. Because the shareholding is a minority shareholding a discount will apply in accordance with valuation practice and procedure. The discount for lack of control reflects the limitations of a minority shareholder in controlling the future conduct of the company which in turn impacts on the income flows that a minority shareholder can reasonably expect to receive from ownership of the share. The discount for lack of marketability reflects the limitations of the minority shareholder in disposing of his/her private shareholding as there is no readily available market upon which to trade.

42. I am persuaded by the analysis put forward by Mr. H. in relation to the discount applied where he sets out his methodology in clear and coherent terms. First, he adopts the perspective of the hypothetical purchaser in 1997 in purchasing a 25% shareholding in the company and second, he applies a discount factor of 50% based on an established range of discounts for lack of control and marketability in minority shareholdings as set out in the relevant practitioner textbooks, namely; '*Valuation of Shares in Unlisted Companies for Tax purposes*' by Denis Cremins, published by the Irish Taxation Institute and '*The Valuation of Businesses and Shares: A Practitioner's Perspective*' by Des Peelo, published by Chartered Accountants Ireland. The first mentioned textbook recommends a discount in the region of 40% for shareholdings of 25% to 49% and the latter recommends a discount of 50% to 70% for shareholdings in the region of 25% and less and a discount of 35% to 40% for shareholdings over 25% but less than 50%. Mr. H. then reviews all relevant factors which would either increase or decrease that discount (these factors are contained at paragraphs 4.2.5 to 4.2.6 of his report and set out in the summary of his evidence above) before settling on an adjusted discount in the range of 35%-40%.

43. Mr. G., expert for the Appellants, at paragraph 33 of his report stated '*In the absence of special purchasers on the basis of these facts we do not believe that there would be rational buyers of a minority interest in the Company save for at a low price*' albeit in oral evidence he suggested that such a discount might be in the region of 15% to 20%.

44. The Appellants submitted that no discount should apply because they, as siblings, acted in concert at all times, taking joint decisions and working in unison. The Appellants submitted that together they received 100% of the shareholding in 1997 and that they sold 100% of the shareholding in 2003. The H. report differs on this point where it is stated that '*If the point being made is that the shareholders were siblings and hence they were more likely to act in concert, I would feel that this is not consistent with the principle of the hypothetical purchaser. It is speculative and is not consistent with empirical data that suggests family run businesses are also prone to shareholder disputes.*'

45. The submission by the Appellants that at a date post 23 September 1997 they acted in concert to secure rezoning of the land, is a relevant consideration only if it is established that such an outcome was reasonably foreseeable as at 23 September 1997.

46. The law on valuations as regards this aspect is set out in the case of *Erdal v HMRC* [2011] UKFTT 87 TC, where Tribunal Judge Reid stated, at page 3, paragraph 9: '*It is also an accepted principle of valuation that the valuer stands at the valuation date looking forward into the future with reasonable foresight rather than looking back today with hindsight at the valuation date. However, regard may be had to later events for the purpose only of deciding what forecasts could reasonably have been made on 31 March 1982. The question of reasonable foresight is of particular importance in this appeal when coupled with the statutory direction to assume that the prospective purchaser has all the information which a prudent prospective purchaser might reasonably require if he were proposing to buy from a willing seller by private bargain at arm's length.*'

47. The valuation date of the shareholdings is 23 September 1997 and the exercise to be carried out is to assess the price a hypothetical purchaser would have paid for shares in the Company as at the valuation date based on all relevant information being known on that date. As regards the Appellants' submission that the four separate shareholdings should be valued in aggregate, no legal authority was identified in support of this proposition nor was it supported by a plain reading of the legislation.

The Special Purchaser

48. A special purchaser is based on the concept that a particular purchaser may have a strategic reason or special interest in the company that is being valued. The special purchaser must be known to the market and the special purchaser must be willing and able to purchase the asset. The Appellants submitted that any one of the Appellants and/or the Company could be considered special purchasers in this case.

49. While the valuation report of Mr. H. was prepared in advance of the reduction of the 40% discount to 35% in recognition of the possibility that one of the Appellants could have been a special purchaser, the valuation report of Mr. H. nonetheless contains some relevant commentary. See paragraph 3.2.19 which provides: '*If the argument being presented is that a 25% shareholding was worth more to another shareholder as it would provide the other shareholder with more control of the company, to me, that would prove the existence of a premium for control, and the corollary of this would be that there must be a discount for the lack of control.*'

50. The Appellants submitted that the three other siblings and the Company were the only people who would be interested in buying the shares. The Respondent pointed out that this was not the exercise to be undertaken. The Respondent stated that the exercise to be undertaken in accordance with the statutory hypothesis and the relevant case law was to value the shares on the basis of the existence of a hypothetical third party purchaser.

51. In terms of how the special purchaser interacts with the discount, the Respondent submitted that it was only after the application of the minority discount that it would be appropriate to consider whether there was a special purchaser in the market and, if so, whether and to what extent the discount might be mitigated on this basis. This form of methodology is supported by the case of *Hawkins-Bypass v Sasson* [1996] STC (STD) 319.

52. The Respondent also opened a passage from Cremins on Valuation of Share in Unlisted Companies for Tax Purposes, page 31, which provides:

'*The above cases show that purchasers are affected by the presence of a special purchaser. In order to ascertain the effect on the price paid, it is necessary to first* *calculate the open market value in the usual manner and increase this by the maximum excess over and above what an ordinary purchaser would be willing to pay. This in effect will give the price leaving an ordinary purchaser with a minimum acceptable profit on the transaction, once the property is sold on. If other purchasers do not know the existence of a special purchaser, obviously that factor will not affect the market value. Similarly if the excess price that the special purchaser is willing to pay cannot be reasonably estimated on 'genuine grounds' then the market value will not be increased. A special purchaser, therefore, must be included as a potential purchaser but it is not to be assumed that the subject matter of the sale will necessarily be sold to a special purchaser.'*

53. The Respondent submitted that while the existence of a special purchaser was a factor to be taken into account in the valuation process, the price to be offered for a 25% share would be only fractionally greater than that which would be offered by a third party purchaser. This accords with the evidence of Mr. H. that a special purchaser will pay the lowest amount that it can economically pay, to acquire the 25% shareholding. As a result, the Respondent submitted that this had been adequately reflected in the Respondent's reduction of the minority discount from 40% to 35% on foot of correspondence from the Respondent dated 16 April 2007.

Rate of discount to be applied

54. As set out above, Mr. H., valuation expert for the Respondent, advocated a minority discount in the region of 35% to 40% while Mr. G., valuation expert on behalf of the Appellants, advocated a discount of less than 10% in his written report which he revised to 15%-20% in oral evidence. The discount percentages proposed by Mr. G. purported to account for the existence of a special purchaser. Mr. H. proposed a minority discount of 35%-40% which did not account for the existence of a special purchaser (see paragraphs 4.6.1-4.6.3 of the report of Mr. H.).

55. Based on the facts of this appeal, the legislation, case law and the evidence lead, I determine the minority discount of 40% to be reasonable and adequate. Further I determine the 5% adjustment to that discount to account for a potential special purchaser, to be reasonable and adequate in the circumstances.

56. In accordance with the recent Supreme Court case of *Donegal Investment Group plc v Danbywiske* [2017] IESC 14 on the matter of cases involving expert testimony, I consider it necessary to set out clearly, my reasons for concluding in favour of the Respondent in this regard and they are summarised as follows;

a. The experts agreed that ordinarily, a discount would apply in calculating the value of a minority shareholding on the basis of lack of control and lack of marketability.

b. I am persuaded by the coherent analysis put forward by Mr. H. in relation to the discount applied where he sets out his methodology in that firstly he adopts the perspective of the hypothetical purchaser in 1997 in purchasing a 25% shareholding in the Company and secondly he applies a discount factor of 50% based on the established ranges of discount for lack of control and marketability in minority shareholdings. The relevant tables are contained in '*Valuation of Shares in Unlisted Companies for Tax purposes'* by Denis Cremins, published by the Irish Taxation Institute and '*The Valuation of Businesses and Shares: A Practitioner's Perspective'* by Des Peelo, published by Chartered Accountants Ireland. The first mentioned text recommends a discount in the region of 40% for shareholdings of 25% to 49% and the latter text recommends a discount of 50% to 70% for shareholdings in the region of 25% and less and a discount of 35% to 40% for shareholdings over 25% but less than 50%. Mr. H. then considers a list of relevant factors which would either increase or decrease that discount (these factors are contained at paragraphs 4.2.5 to 4.2.6 of his report and set out in the summary of evidence above). He notes the fact of all shareholdings being in blocks of 25% and the passive nature of the company to be key mitigating factors before settling on an adjusted discount in the range of 35%-40%. I am encouraged by the clinical nature of this analysis and in particular, the range of objective factors (some favourable to the Appellants and others unfavourable) which were taken into account in ultimately reducing the standard discount of 50% to a 35%-40%, in favour of the Appellants. The starting point of 50% as extrapolated from the established practitioner valuation tables as adjusted by the range of factors at paragraphs 4.2.5 to 4.2.6 of the report, advance specified and material grounds in support of the conclusion that a minority shareholder discount of 35%-40% should apply to the 25% shareholding acquired by each Appellant.

c. In direct examination, Mr. G. accepted the ranges set out per Mr. Cremins and Mr Peelo's practitioner valuation tables.

d. Mr. G. at paragraph 33 of his report stated '*In the absence of special purchasers on the basis of these facts we do not believe that there would be rational buyers of a minority interest in the Company save for at a low price*.' The Respondent submitted that this statement supported Mr. H.' analysis. Under cross-examination on this point, Mr. G. was willing to adjust his opinion and stated that a rational buyer might purchase the shareholding at a discount of between 15 and 20%.

e. In terms of how the special purchaser interacts with the discount, the Respondent submitted that it was only after the application of the minority discount that it would be appropriate to consider the existence of a potential special purchaser and, if so, whether to mitigate the discount applied to reflect the impact on the share value of the existence of the special purchaser. This form of methodology is supported by *Hawkins-Bypass v Sasson* [1996] STC (STD) 319.

f. Expert testimony and legal authorities cited were insufficient to justify the extent to which the Appellant contended for mitigation of the minority discount on the basis of the existence of a special purchaser.

g. The Respondent submitted that the price to be offered by a special purchaser, for a 25% share in the Company would be only fractionally greater than that which would be offered by a third party purchaser. This accords with the evidence of Mr. H. that a special purchaser will pay the lowest amount that it can economically pay, to acquire the 25% shareholding. As a result, the Respondent submitted that this had been adequately reflected in the Respondent's reduction of the minority discount from 40% to 35% on foot of correspondence dated 16 April 2007.

Conclusion

57. In appeals before the Tax Appeals Commission, the burden of proof rests on the Appellants who must prove on the balance of probabilities that the assessments are incorrect. In the High Court case of *Menolly Homes Ltd v Appeal Commissioners and another,* [2010] IEHC 49, at para. 22, Charleton J. stated: *'The burden of proof in this appeal process is, as in all taxation appeals, on the taxpayer. This is not a plenary civil hearing. It is an enquiry by the Appeal Commissioners as to whether the taxpayer has shown that the relevant tax is not payable.'*

58. In this case the burden of proof rests on the Appellants to show that a discount factor of 35% should not be applied to the shares acquired by them on 23 September 1997 in terms of calculating the base cost for CGT purposes. Having considered the expert reports and expert evidence, the relevant legislation and related case law, I determine that the Appellants have not discharged the burden of proof and thus I determine that the assessments raised in October 2007, on each Appellant in the sum of €47,568 in respect of the capital gains tax year of assessment 2003, shall stand.

59. This appeal is hereby determined in accordance with s.949AK TCA 1997.

APPEAL COMMISSIONER

August, 2017.