10TACD2021

APPELLANT'S NAME REDACTED

Appellant

V

REVENUE COMMISSIONERS

Respondent

DETERMINATION

Introduction

1. The issue in the appeal is to determine whether the Appellant is liable to capital gains tax on the disposal of the property at Property address redacted (the Property) which was sold for €4,500,000 on the Date Redacted. The Appellant submitted that by indenture of conveyance dated Date Redacted (Indenture), Father's name redacted, the Appellant's father (Father), created a settlement and therefore the Appellant was not the beneficial owner of the property and therefore did not make the disposal of the property in Date Redacted and as a consequence was not liable for the capital gains tax arising on the disposal.

2. The Respondent asserted that there was no evidence that the Property was held under any kind of settlement or trust. The title documents showed that the entire legal and equitable interest in the Property was in fact held by the Appellant pursuant to the Indenture and subject only to the various rights reserved by her Father under that Indenture. As such, on 22nd December 2011, the Respondent raised an assessment on the Appellant in the amount of €431,230.60 and that assessment was appealed by the Appellant accordingly.

Material Findings of Fact

3. The following are my material findings of fact:

   (a) The death of the Appellant's mother in Date Redacted and her Father's intention to remarry approximately 2 years later prompted her Father to provide for the Appellant. As such by an Indenture made between her Father (as Grantor) of the one part and the Appellant (as Grantee) of the other part, transferred the Property to the Appellant. The relevant extracts of the Indenture are below:

"This INDENTURE made the first day of October Date Redacted *between Father of* Property Address Redacted, *.... (hereinafter called the Grantor) of the One Part and Appellant of* Property Address Redacted, *..... and lawful daughter of the Grantor (hereinafter called the grantee) of the Other Parts WHEREAS:*

1. *.....*

2. *....*

8. *The Grantor in consideration of natural love and affection which he bears for the Grantee has agreed to convey the said property described in the First and Second Schedules hereto to the Grantee in fee simple free from incumbrances save as hereafter appears.*

NOW THIS DEED WITNESSETH that in consideration of the natural love and affection which the Grantor bears for the Grantee, the Grantor, as beneficial owner DOTH HEREBY GRANT AND CONVEY UNTO the Grantee all those ALL THAT AND THOSE the hereditaments and premises described in the First and Second Schedules hereto TO HAVE AND TO HOLD the same UNTO and to the use of the Grantee her heirs and assigns in Fee Simple EXCEPTING AND RESERVING UNTO the Grantor during his lifetime full right of residence in and occupation of together with the right to rents and profits in and of the said property described in the First and Second Schedule hereto

It is hereby certified by the parties hereto that the grantor and grantee are interrelated as father and lawful daughter."

(b) In Date Redacted, the Appellant moved to the United Kingdom and remained resident there until Date Redacted.

(c) On the Date Redacted the Appellant granted a full and general power of attorney to her Father with the authority:

"to act for me in every respect as fully and effectually as I could act in person concerning all my present and future affairs and all my present and future property rights and interests real personal and whether sole or joint all of which I place in the unfettered control and discretion of my Attorney with authority to bind me in relation thereto in any manner whatsoever including (without prejudice to the generality of the foregoing authority) full power to buy, take on lease or otherwise acquire and to sell, less or otherwise dispose of creating mortgages and charges on real and personal property .... to settle or compromise claims by or against me..... to pay all liabilities incurred

by me or him in my name, to appoint remunerate and dismiss servants or agents ….

AND I HEREBY DECLARE that these presents shall be irrevocable and shall be at all times be conclusively binding on me and my Personal Representatives in favour of Third Parties…. "

(d) A Contract for Sale of the Property was entered into on the Date Redacted. The Contract was made between the Father and the Appellant as vendors and Purchaser's Name Redacted (in trust) as purchaser. The purchase price recorded in the Contract for Sale was €4,500,000.

(e) Special Conditions No. 7 and No. 8 of the Contract for Sale provided as follows:

"7. The said Father's name redacted *will join for the purpose of releasing his right of residence and his reservation of the rents and profits as contained in the Indenture of Conveyance described at item numbered 7 of the Documents Schedule.*

8. Father's name redacted *joins these presents and in any Deed of Subsale or Collateral Mortgage for the purpose of agreeing to release his right of residence and his reservation of the aforesaid rents and profits"*

(f) On the Date Redacted a Form CG50 was submitted to the Respondent by Solicitor's Name Redacted, the solicitor who was acting on behalf of vendors. The Form CG50 disclosed that the vendors were the Appellant and her Father. In the covering letter under which the Form CG50 was furnished, Solicitor's Name Redacted explained as follows:

*"*Father's name redacted *is not strictly speaking a disponer as he joins the contract for the purpose of conformity with it as he held certain rights over the property which he requires to release for the purpose of finalising the sale. We have included him in the CG50 because the contract describes him as a "vendor" and the purchaser's solicitor will require him to appear on your certificate for CGT purposes."*

(g) The sale of the Property completed and the purchase monies paid over although no conveyance or other deed was produced by the Appellant.

(h) From the bank statements produced, €2,514,826.91 was lodged on the 29th January 2007 to the account 'Father's name redacted and Appellant Bridging Term Loan' to clear an outstanding loan and a further €1,877,623.41 was lodged into the account of 'Father's name redacted on the same day.

(i) No capital gains tax was paid in Date Redacted when the Indenture was created or on the disposal of the Property in Date Redacted. Correspondingly the Appellant did not pay any capital acquisitions tax in Date Redacted or indeed in Date Redacted.

(j) The assessment raised by the Respondent allowed principal private residence equivalent to 50% of the gain but the basis for such an apportionment was not explained.

(k) Notwithstanding the Appellant's assertion that she did not receive any of the proceeds of sale until her father's death 3 years later, there is a payment shown on her Father's bank statement to "Name Redacted" of €100,000 on 31st January 2007 while the remaining contents of that statement have been redacted.

(l) The Appellant in her evidence said that 60% of the property was in use as the principal private residence comprising 5 bedrooms, 2 sitting rooms, kitchen, dining room and 2 bathrooms.

(m) The remaining 40% of the floor area consisted of two commercial units comprising 25% of the square footage with the remaining 15% as office space at the back of the 1st floor.

Statutory Provisions

4. The following statutory definitions of "*settled property*" and "*settlement*" are contained in TCA, sections 5 and 10 respectively:

> *"settled property" means any property held in trust other than property to which section 567 applies, but does not include any property held by a trustee or assignee in bankruptcy or under a deed of arrangement;"*
>
> *"settlement" includes any disposition, trust, covenant, agreement or arrangement, and any transfer of money or other property or of any right to money or other property;"*

5. Where a settlor settles property on trustees, there is deemed to be a disposal of the entire property pursuant to TCA, section 575 which states:

> *"A gift in settlement, whether revocable or irrevocable, shall be a disposal of the entire property thereby becoming settled property notwithstanding that the donor has some interest as a beneficiary under the settlement and notwithstanding that the donor is a trustee or the sole trustee of the settlement"*

6. TCA, section 576(1) deems a disposal of assets by the trustees when a person becomes absolutely entitled as against the trustees in relation to those assets and provides;

> *"On the occasion when a person becomes absolutely entitled to any settled property as against the trustee, all the assets forming part of the settled property to which the person becomes so entitled shall be deemed for the purposes of the Capital Gains Tax Acts to have been disposed of by the trustee, and immediately reacquired by the trustee in the trustee's capacity as a trustee within section 567(2), for a consideration equal to their market value."*

Appellant's Submissions

7. The philosophy underpinning the settled property tax legislation is that, for capital gains tax, the gain in value of the property from the date it became settled property to the date it is sold and/or ceases to be settled property arises to the trustee.

8. There was a disposal by the Father of the Property in Date Redacted into settled property. There was a deemed disposal for capital gains tax purpose, and that was the base cost with reference to that date. Consequently the Appellant did not make a disposal for capital gains tax purposes.

9. This is reinforced by the wording in TCA, section 613(4) which excludes the person with a life interest under the settlement having a capital gains tax exposure on the sale of settled property – again reflecting the fact that the capital gains tax exposure falls on the trustee(s).

10. The term "*full right of residence in and occupation of*" stipulated in the Indenture means the only person entitled to exercise the said rights was the Father who had the exclusive right of residence in and occupation of the premises for his life. The term "*full right*" is defined by the legal dictionary Law Insider as follows :

"means that the person being granted the right(s) described therein shall be the only person that is entitled to exercise such right(s) so long as the agreement is in effect and that no other person shall be authorized, by the grantor of such rights, to exercise such rights(s) or be granted such right(s)"

11. The Indenture was therefore a settlement for capital gains tax purposes with the Father having a life interest in the said property. Consequently the specific capital gains tax provisions relating to a settlement applied namely TCA, section 577A and TCA, section 604(10).

12. Apart altogether from the above, the Property was the subject of commercial lettings, carrying on of an accountancy practice as well as residential use, a fact reflected by the wording "*full right of residence in and occupation of together with the rights to the rents and profits in and of the said property*". This is a very different situation to the facts in the various legal cases cited by the Respondent where the property at issue was a sole dwelling house and indeed where one of the judgements (the O'Donnell case) was given some 10 years after the sale of the property.

13. The Northern Ireland cases cited by the Respondent centred also on the specific issue of right of residence in a farmhouse and the specific social and historical nuances relating to same. The position in this appeal includes not only full right of residence in, but also full right of occupation of together with the right to the rents and profits in and of the premises given its multi different use and occupation and not a mere right of personal residence in a house.

14. In addition, these cited cases do not relate to specific taxation provisions which can have their own specific definitions such as a definition of "*life interest*" and the "*gift in settlement*" scenario as set out in TCA, section 575. It is also noted that in *Walker*, Girvan J. stated specifically that he was not prepared to follow the reasoning of the Irish Supreme Court in *National Bank –v- Keegan* [1931] 1 IR 344 and goes on to state on page 91, that it was "*a decision which is not binding upon this court*" . It is also noted that even in the *Walker,* there was acknowledgement that there was "*authority for the proposition that a person who had merely a right of residence in property for his own life had the powers of a tenant for life under the Settled Land Act 1882*"

15. Under the Indenture, the Father had a life tenancy interest in the Property, an interest which would have ceased on his death and created a Settled Land Act Trust, which is settlement for capital gains tax purposes. This conclusion is reinforced by having regard to the background to the Indenture which was the Appellant's upcoming remarriage. It was to ensure that the property passed to the Appellant and /or her heirs on his demise

while in the meantime retaining the exclusive use and occupation of the premises together with the rights to the rents and profits in and of the said premises.

16. The above conclusion is fortified having regard to the broad definitions of settlement and tenant for life in section 2 of The Settled Land Act 1882 enacted at a time when tenancy and occupation rights, particularly for social, economic and historical reasons, were to the fore in Ireland. Section 2(5) of that act states:

> *"The person who is for the time being, under a settlement, beneficially entitled to possession of settled land, for his life, is for purposes of this Act the tenant for life of that land, and the tenant for life under that settlement."*

17. Furthermore the Power of Attorney gave the Father full control over the Property and as a consequence recourse must be made to section 16 of the Settled Land Act 1890 which states:

> *"Where there are for the time being no trustees of the settlement within the meaning and for the purposes of the Act of 1882, then the following persons shall, for the purposes of the Settled Land Acts, 1882 to 1890, be trustees of the settlement; namely,*
>
> *(i) The persons (if any) who are for the time being under the settlement trustees, with power of or upon trust for sale of any other land comprised in the settlement and subject to the same limitations as the land to be sold, or with power of consent to or approval of the exercise of such a power of sale, or, if there be no such persons, then*
>
> *(ii) The persons (if any) who are for the time being under the settlement trustees with future power of sale, or under a future trust for sale of the land to be sold, or with power of consent to or approval of the exercise of such a future power of sale, and whether the power or trust takes effect in all events or not."*

18. It is noted that the Respondent referred to the Land and Conveyancing Reform Act 2009 given that its commencement date was 1 December 2009 when the events at issue here pre–date this commencement date.

19. The definition of life interest in Capital Acquisitions Tax Act 2003 (CATCA) is not as widely drawn as the definition of life interest in TCA, section 577 as set out above. "Life interest as defined in CATA, section 2 as:

"an interest (other than a leasehold interest) for the duration of a life or lives for a period certain or any other interest which is not an absolute interest"

20. In published guidance notes, the Respondent confirmed that an exclusive right to live in a property is a life interest for capital acquisition tax purposes.

21. Furthermore the Power of Attorney confirmed that the Father had total control of the Property and that he was trustee of the settlement.

22. Finally and as espoused by Lord Wilberforce in *IRC v Plummer* at p.43 that

"The courts which, inevitably, have had to face this problem, have selected the element of "bounty" as a necessary common characteristic of all the "settlements" which Parliament has in mind."

23. The transfer of the interest in fee simple in the Property in consideration of natural love and affection involved "bounty" and therefore a settlement was created.

Conclusion

24. There are compelling reasons for concluding that the Property became settled property for capital gains tax purposes on Date Redacted and ceased to be settled property on its sale in Date Redacted which resulted in a termination of the life interest and the person "*becoming absolutely entitled*" to it . This reflects the fundamental principle behind the specific capital gains tax legislation namely the gain in value from the date it became settled property in Date Redacted to the date it is sold or ceases to be settled property (other than on death) arises to the trustees and by extension the capital gains tax liability falls on the trustee(s) - a liability, where applicable, is calculated by taking into account capital gains tax Principal Private residence and/or capital gains tax retirement relief under TCA, sections 604(10) and 577A respectively.

25. It was submitted that the Appellant did not dispose of the Property and on that basis the capital gains tax assessment should be discharged or alternatively reduced to nil.

Respondents' Submissions

26. A "settlement" of land was originally defined by section 2(1) of the Settled Land Act 1882 in the following terms:

"Any deed, will, agreement for a settlement or other agreement, covenant to surrender, copy of court roll, Act of Parliament, or other instrument, or any number of instruments, whether made or passed before or after, or partly before and partly after, the commencement of this Act, under or by virtue of which instrument or instruments any land, or any estate or interest in land, stands for the time being limited to or in trust for any persons by way of succession, creates or is for the purposes of this Act a settlement and is in this Act referred to as a settlement . . ."

27. The provisions of the Settled Land Act are not taxing provisions. Therefore in order to be a settlement, the deed or will must create a succession of interests. However in this appeal no such succession of interest arises as the land in this case was transferred or conveyed to the Appellant in its totality, subject only to the rights reserved out of the land by her father.

28. The 1882 Act was repealed by the Land and Conveyancing Law Reform Act 2009. The provisions of section 2(1) in the 1882 Act were re-stated in the enactment of section 18(1) of the 2009 Act. This section provides as follows:

". . . where land is (a) for the time being limited by an instrument whenever executed to persons by way of succession without the interposition of a trust (in this Part referred to as a "strict settlement") . . . there is a trust of land for the purposes of this Part"

29. Thus it may be seen that the existence of a settlement of land depends fundamentally upon the land being granted or conveyed to persons who are intended to hold the land in succession. There must be a succession of interests created in the land in order for the grant or conveyance itself to qualify as a settlement. Of significance in confirming this proposition are the provisions of section 18(2)(a) of the 2009 Act which states:

"For the purposes of subsection (1)(a) a strict settlement exists where an estate or interest in reversion or remainder is not disposed of and reverts to the settlor or to the testator's successors in title but it does not exist where a person owns a fee simple in possession"

30. It is clear that the Indenture was not a settlement as it did not create or give rise to a succession of interests in the lands in question. The effect of the Indenture of Date Redacted was simply to vest in the Appellant, the fee simple interest in the lands in possession. The reservation of a general right of residence and other rights for the lifetime of the Father did not give rise to a settlement or a trust.

31. In the case of *In re Walker's Application for Judicial Review* [1999] NI 84, the Court was asked to consider a deed in which a retiring farmer had gifted the entire of his farm to his son subject to him reserving an exclusive right of residence in the farmhouse in favour of himself and his wife for their respective lives. The farmer sought a grant from the housing executive to carry out repairs to the farmhouse on the basis that he was a life tenant of the lands. Girvan J. did not agree with this proposition. In his judgment starting at page 91, he stated as follows:

> *"Where a person grants or reserves an exclusive right of residence the right by definition is intended to be restricted to the very purpose of the grant or reservation. The grantee will fully appreciate that the right of residence does not, for example, envisage a right to use the premises for some non-residential purpose. Nor would the parties envisage the sale, letting or exchange of the property. If the third party was to attempt to interfere with the property by way of a trespass, then the owner of the property, rather than the person entitled to reside therein, would be regarded as the party having possession of the property for the purpose of any necessary proceedings, (although it may be that the person entitled to the right of residence has separate rights to protect his own residential rights)."*
>
> *….*
>
> *"There is another additional technical reason why the Appellant cannot succeed in his argument. The deed of the 28th May 1997 does not effect the grant of a life estate to the grantee, Robert Walker. He purports to reserve an exclusive right of residence to himself and his wife but he does not purport to grant either himself or his wife, or both of them, an estate for life. Moreover, the wife is not a party to the deed. Reserving a right to reside in the premises, "even if such a reservation could be considered as a grant back) does not purport to convey or transfer a full interest in the premises for the life of the grantor. At common law accordingly the deed did not create a freehold life interest. The conveyance or creation of a life interest lies in grant (the ancient concept of delivery of seisin being obsolete) and requires either express words granting an estate for life or a conveyance of an apparently complete interest (which would be deemed to be a life estate since the words of limitation for fee simple would be absent)."*

32. Therefore in *Walker*, the Court concluded that from a technical conveyancing point of view, it is not possible to have a life interest out of a reservation as it is necessary that there are specific words of granting the deed. If an estate is granted without the words

of 'in fee simple', the conveyancing rules dictate that that becomes a life estate by default effectively.

33. As such the Court found that as Mr. Walker had an exclusive right of residence but that interest was not a life interest and not an interest in the property.

34. While Walker confirmed that a person with an exclusive right of residence may enjoy some of the same powers of a tenant for life under a trust or settlement, he or she is not in fact a tenant for life as such. A person who has merely a right of residence does not have any freehold estate or interest vested in him. Also the deed before the Court did not contain any appropriate words of grant or limitation to confer any estate or interest in the lands upon the donor.

35. So, there is a case in the 1930s*, National Bank v. Keegan*, in which the Court, Supreme Court in Ireland found that a right, an exclusive right of residence was equivalent to a life estate. However in modern cases there is doubt whether this is a correct reflection of the law.

36. In the case of *Jones v Jones* [2001] NI 244 Girvan J. confirmed that a general right of residence as opposed to an exclusive right over a specific part of a property is on its proper construction a type of contractual licence but it is not a trust and a person who is entitled to a right of residence is not in the same position as a beneficiary of or a life tenant under a settlement.

> "*The right of residence favourable to the Deceased and the Plaintiff reserved by the agreement can fairly be viewed as a form of contractual licence reserved by and granted back to the Plaintiff and her husband. In reality it was an integral part of the agreement for the transfer of the land to William by the Deceased, and during the lifetime of the Deceased and Plaintiff it was an irrevocable contractual licence to reside in the premises which the Court would protect by an injunction or specific performance, if appropriate, and no issue arises in this case as to whether the right was binding on successors in title.*"

37. Therefore the Father had an irrevocable contractual licence to do certain things in the property, i.e. reside there, occupy and collect the income. However the Indenture did not confer upon him an interest as such in property that was capable of being sold, leased or assigned or anything like that.

38. The nature of a general right of residence was given some consideration more recently in this jurisdiction by O'Donnell J. in giving judgment on behalf of the Court of Appeal in the case of *Bank of Ireland v O'Donnell* [2016] 2 ILRM 441. In that case a question arose as to whether a right of residence held by Mr and Mrs O'Donnell was capable of being vested in the Official Assignee following their bankruptcy. At paragraph 45 of his judgment, O'Donnell J. discussed the nature of a general right of residence in the following passage:

> *"A general right of residence as understood in Irish law has features pointing in different directions. It is true to say that it is personal in the sense it cannot be assigned by the person entitled to it. This might suggest that it does not vest on adjudication since assignment is one test of whether it can be held to vest in a person who is after all described as the Official Assignee. On the other hand, property becomes vested in the official Assignee not by assignment but rather by operation of law."*
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> *In a judgement in AA, Judge Laffoy referred to Milman and says, "The asset test seems to be whether a right was assignable, and if so is it capable of being brought within the boundaries of the estate?" However, Laffoy J. observed the authorities discussed by Milman leading to that conclusion involved an assessment of whether the relevant personal right had economic value so as to vest in the trustee and bankruptcy.*
>
> *A general right of residence is undoubtedly a right touching on or concerning property and perhaps more importantly has an economic value. However, it is not possible to conceive of the Official Assignee being able to assert a right that is concededly personal to the bankrupt, and not assignable by them. The grantor of the right or his or her successor would not be obliged to permit the Official Assignee to reside in the property. If so it follows that the Official Assignee cannot assert the economic value of the right, or that the right be converted into money, since it has no such value in his hands. He cannot assert or enforce the right for his own benefit and accordingly there is nothing to convert into monetary value. The right is on its own terms both personal and non-assignable"*
>
> *While I consider the correct approach is to treat the general rule as a statutory vested of all causes of action and adjudication and the Court should be slow to enlarge that."*
>
> *"In the case of a right of residence on which analysis I consider is a personal right and which does not vest on adjudication."*

39. Therefore O'Donnell J. concluded that a right of residence is personal and non-assignable and as such it does not create an interest in land. It was submitted that the Father enjoyed a personal right which he can enforce against the owner of the property, being the Appellant. However that right is not the same as a life interest which would be capable of being assigned or being sold or being leased or being mortgaged.

40. As such, the Indenture did not create either a settlement or a trust but granted and conveyed the fee simple interest in the property to the Appellant. The rights reserved by the Grantor created merely a contractual licence personal to the Grantor which gave him certain specific rights, in particular to reside on and occupy the lands and to collect and retain rents and profits arising out of the lands during his lifetime. The rights in question were personal to the Grantor and were not capable of being granted or conveyed to a prospective purchaser.

41. The Indenture was also not a settlement because it did not create a succession of interests or estates. Nor was it a settlement in so far as it had the plain effect of vesting in the Appellant, the fee simple interest in possession and was therefore excluded from the definition of a settlement by section 18(2)(a) of the 2009 Act.

42. Furthermore, there are no words used by the Grantor in the Indenture of Date Redacted that would suggest he had any intention to create a trust and the Indenture does not contain any appropriate words of grant or limitation that would have had the effect of conferring any estate or interest in the lands upon the Grantor or reserving any such estate or interest. Under the terms of the Indenture the Grantor appears to have fully disposed of his estate and interest in the property.

43. The power of attorney granted by the Appellant to her Father in Date Redacted did not alter the situation in any way or give rise to any settlement or trust of the land and has no relevance to the Appellant. In any event, the Appellant executed the Contract for Sale in Date Redacted in her own name and not by the power of attorney.

44. The foregoing analysis is consistent with the Special Conditions contained in the Contract for Sale which confirm that the Appellant's father had joined in the Contract merely to release the rights reserved to him under the Indenture. There is no suggestion in the Special Conditions that the Appellant's father had any beneficial or other interest in the property that had to be conveyed or assured to the purchaser.

45. It is also consistent with the explanation offered by Solicitor's Name Redacted, Solicitor to the Revenue Commissioners in his correspondence in Date Redacted that the Father

was not really a "disponer" as such but that he had joined in the Contract for Sale merely to release the rights he held over the land. It is significant that the Father was merely "releasing" rights and not taking any positive step to convey, grant or assure any estate or interest to the prospective purchaser.

46. The effect of the Indenture was not to vest the property in the joint names of herself and her Father. Its effect was to vest the fee simple interest in the property in the Appellant in her sole name subject only to the various rights reserved by her Father.

47. There was no evidence that the Property was held under any kind of settlement or trust. The title documents show very clearly that the entire legal and equitable interest in the Property was in fact held by the Appellant pursuant to the Indenture and subject only to the various rights reserved by the Father under that Indenture. Although the Contract for Sale in Date Redacted specified both the Appellant and her Father as the vendors, in reality the legal and beneficial interest in the Property was disposed of entirely and exclusively by the Appellant subject only to the release by the Father of the rights that had been reserved by him out of the Indenture of Date Redacted.

48. The charge to capital gains tax pursuant to TCA, section 28 imposes a charge in respect of chargeable gains "*accruing to a person on the disposal of assets*". TCA, section 29(2) provides that a person shall be chargeable to capital gains tax in respect of chargeable gains accruing to that person in a year of assessment for which he or she is ordinarily resident in the State.

49. TCA, section 598 contains the relevant provisions regarding retirement relief against capital gains tax. The section provides that where an individual who is over 55 years of age disposes of a chargeable business asset that they have owned for the previous ten years then he or she may be entitled to relief against the charge to capital gains tax that would arise in the normal course, subject to certain monetary thresholds.

50. It is submitted that the provisions of section 598 TCA 1997 do not apply in the instant case as the property the subject of the assessment was disposed of by the Appellant and not by her Father. Furthermore, it was not property that had been in his ownership for the ten years preceding its disposal in Date Redacted; it had in fact been in the sole ownership of the Appellant. Accordingly, retirement relief is not available to the Appellant to offset the capital gains tax for which she is liable on the disposal by her of the Property.

51. It is accepted that the definition of a "*settlement*" in TCA, section 10 is a wide. However in *IRC v Plummer 54 TC,* the House of Lords has considered the meaning of the word

"settlement". In the speech given by Lord Wilberforce at paragraph 13 of his judgment he stated that:

> *"The applicable definition of a "settlement" is to be found in section 454(3): it is "any disposition, trust, covenant, agreement or arrangement" . . . But it still becomes necessary to enquire what is the scope of the words "settlement" and "settlor" and of the words which are included in "settlement" in the context in which they appear. If it appears, on the one hand, that a completely literal reading of the relevant words would so widely extend the reach of the section that no agreement of whatever character fell outside it, but that, on the other hand, a legislative purpose can be discerned, of a more limited character, which Parliament can reasonably be supposed to have intended, and that the words used fairly admit of such a meaning as to give effect to that purpose, it would be legitimate, indeed necessary, for the courts to adopt such a meaning.*

52. At 43 he then went on to explain the following:

> *"The courts which, inevitably, have had to face this problem, have selected the element of "bounty" as a necessary common characteristic of all the "settlements" which Parliament has in mind. The decisions are tentative, but all point in this direction. The first clear indication of this was given by Lord Macmillan in Chamberlain v. I.R.C. [1943] 2 All E.R. 200. Dealing with a case arising under the predecessor of section 447 of the Act of 1970 he said that he agreed that the settlement or arrangement "must be one whereby the settlor charges certain property of his with rights in favour of others; it must confer the income of the comprised property on others, for it is this income so given to others that is to be treated as, nevertheless, the income of the settlor.*
>
> *"Well this raises a question of some difficulty and general importance. Any words of the definition should be given the full unrestricted meaning which apparently they have or is some limitation to be read into them, if so what limitation? If given the full unrestricted meaning, then the section would clearly cover the present agreement and would also cover a large number of ordinary commercial transactions.*
>
> *My Lords, it seems to me clear that it is not possible to read into the definition in exception in favour of commercial transactions whether with or without the epithet ordinary or bona fide to do so would be legislation and not interpretation. If Parliament intended such an exception, it should or could and must have expressed it. But it still becomes necessary to enquire what is the scope of the word*

'settlement' and 'settlor' and of the words which are included in settlement and in the context in which they appear.

If it appears on the one hand a completely literal reading of the relevant words would so widely extend the reach of the section that no agreement of whatever character fell outside it, but that on the other hand a legislative purpose can be discerned of a more limited character which Parliament can reasonably be supposed to have intended, and the words used fairly admitted such a meaning as to give effect to that purpose, it would be legitimate, indeed necessary for the Courts to adopt such a meaning."

53. The definition seems to be entirely open ended and surely Parliament could not have intended the settlement to be anything, so it must have some meaning. In order to discern that meaning, one must look at the purpose for which it was set out in the legislation.

54. In the case of the Indenture, it is clear that the Father conveyed his entire legal and beneficial interest in the property to the Appellant, reserving only a right of residence in his favour and a right to the rents and income from the Property.

55. As such, the Indenture did not create a joint tenancy in the Property between father and daughter, as has been suggested by the Appellant, because the Appellant was the Grantee in her sole name.

56. Furthermore, the Indenture did not create or give rise to a trust since both the entire legal and beneficial interest in the property was conveyed to the Appellant and she held that interest thereafter subject only to the rights reserved therein by her father.

57. The Appellant has invoked the provisions of TCA, section 577(1)(a) to suggest that the rights reserved by the Father amounted to a "life interest" in the property. However, it is clear that the definition of a *"life interest*" in section 577(1)(a) applies to the provisions of that section only. In so far as they all deal with a situation in which the life interest has terminated on the death of the person entitled to it, the provisions of section 577 do not apply in the instant case.

58. The Appellant also relies on the provision of TCA, section 577A. That section appears to deal with a situation in which a person entitled to a life interest has relinquished that interest on a disposal by the trustee but those provisions apply only in a case in which the person entitled to the life interest:

> *"had become absolutely entitled to the assets as against the trustee at the commencement of the life interest and had continued to be so entitled throughout the period . . . that the life interest subsisted*".

59. The Father was never "*absolutely entitled*" to the Property that he conveyed to his daughter by the Indenture. What he enjoyed was a right to reside in and occupy the property and a right to collect the income from the Property. However, he never enjoyed any of the other rights that would accrue to a person holding a life interest, for example, the right to lease the property or the right to mortgage the property or even the right to alter the use of the property. This is consistent with the dicta of Girvan J in the cases of *In re Walker's Application for Judicial Review* [1999] NI 84 and *Jones v Jones* [2001] NI 244.

60. An exclusive right of residence may be equated with a life interest in the property in question for tax purposes but only for the purposes of valuing the right. There is no statutory or judicial authority to suggest that an exclusive right of residence and a right to collect income from the property amounts to or constitutes a life interest as such.

61. It is clear that under the Indenture, the entire legal and beneficial interest in the Property was granted and conveyed to the Appellant. That is what is expressly stated by the operative words of the Indenture. There is nothing in the Indenture to suggest that it was intended that the Appellant would hold the property in trust.

62. Furthermore the disposal of the Property in Date Redacted was effected by the Appellant alone. The Appellant was the sole disponer and her Father was included in the contractual documents as a "vendor" merely for the purpose of releasing his rights over the property. That is consistent with the explanation offered by the solicitor who acted on behalf of the Appellant in the transaction in his letter dated the Date Redacted.

63. It was noted that the Appellant did not produce a copy of the deed or conveyance whereby the disposal of the property was effected in Date Redacted but it appears from the stamp duty return filed by the Appellant that the date of the conveyance was the Date Redacted and that the vendor was the Appellant alone.

64. In the context of the within appeal it is submitted that the burden of proof lies with the Appellant. In the case of *Menolly Homes Limited v Appeal Commissioners and another* [2010] IEHC 49 Charlton J. stated that:

> *"This reversal of the burden of proof onto the taxpayer is common to all forms of taxation appeals in Ireland . . . the burden of proof in this appeal process as in all*

taxation appeals, is 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."

65. It was submitted that the Appellant failed to establish that the Indenture created or gave rise to a trust; she has failed to establish that her Father held a life interest in the property rather than merely a right of residence and a right to the income derived out of the property and she has failed to establish that in Date Redacted she alone disposed of the entire legal and beneficial interest in the property. In the circumstances it was submitted that the Appellant has failed to discharge the burden of proving that tax assessed against her on account of the disposal of the Property.

66. A settlement can be anything on the face of it, but settled property has to be held in trust. Therefore for the Appellant to succeed it must be shown that the Property was in fact settled property and that there was a trust here, even though a settlement on its own is something very open ended.

Respondent's Conclusion

67. As the Appellant has failed to demonstrate the existence of a trust, the within appeal is misconceived both in fact and in law and it falls to be dismissed.

Overview

68. The charge to capital gains tax pursuant to TCA, section 28 arises:

> *"in respect of capital gains, that is, in respect of chargeable gains computed in accordance with those Acts and accruing to a person on the disposal of assets."*

69. TCA, section 29(2) provides that:

> *"a person shall be chargeable to capital gains tax in respect of chargeable gains accruing to such person in a year of assessment for which such person is resident or ordinarily resident in the State."*

70. The Appellant relied on the section 2(1) of the Settled Land Act 1882 to argue that the Indenture created a "*settlement*" and that the Father by reserving the right of residence, had in effect created a life interest in the property. Furthermore while subject to academic criticism, the judgement in *National Bank v Keegan* [1931] 1 IR 344 remains the authority for the proposition that an exclusive or particular right of residence over a portion of unregistered land created an equitable life estate. While the law relating to rights of residence in the case of unregistered land was changed by the Land and Conveyancing Law Reform Act 2009 to deprive the right of residence of its previous character as a life estate, that act, as noted by the Appellant, was introduced 3 years after the Property was sold and therefore holds no significance.

71. The Appellant argued that the Indenture was as a settlement as defined by TCA, section 10 as a "*disposition … agreement or arrangement … transfer of … property or of any right to …property*". Thereafter the Appellant relied on TCA, section 575 to assert that the Indenture, as a transfer of an asset in consideration of natural love and affection, became a "*gift in settlement"* and that there was "*a disposal of the entire property thereby becoming settled property".* As a consequence, there was an acquisition by the trustee, the Father, of the Property at its market value in Date Redacted. That disposal exposed the Father to a potential charge to capital gains tax in Date Redacted but as confirmed by the Appellant's agent at the hearing, no capital gains tax was paid at that time.

72. As such, the Appellant submitted that the Father, before the sale of the Property in Date Redacted, relinquished his right of residence and entitlement to the income and therefore the Appellant became absolutely entitled to the Property "*as against the trustee*." Therefore pursuant to TCA, section 576(1) *"all the assets forming part of the settled property to which the person becomes so entitled shall be deemed for the*

purposes of the Capital Gains Tax Acts to have been disposed of by the trustee, and immediately reacquired by the trustee in the trustee's capacity as a trustee within section 567(2), for a consideration equal to their market value." It was thereafter submitted that such an event crystallised a capital gains tax liability for the Father, the trustee, based on a value of €4.5 million. Therefore in accordance with TCA, section 576, the Appellant acquired the Property at that value and having immediately disposed of the Property, made no gain on the disposal.

73. As such, it was the Appellant's contention that the Respondent is pursuing the wrong person for the assessment and collection of the capital gains tax, as the Father, as trustee, had the obligation to discharge the tax when the Appellant became "*beneficially entitled to the property as against the trustee*" at the time when his right of residence and entitlement to the income from the Property were relinquished prior to the sale of the Property in Date Redacted.

Analysis

74. In resolving this appeal, it is necessary to establish whether the creation of the Indenture by the Father in Date Redacted was a "*gift in settlement*" thereby becoming "*settled property*".

75. As acknowledged by the parties, the definition of "*settlement*" that "*includes any disposition, trust, covenant, agreement or arrangement, and any transfer of money or other property"* is broad enough to cover most disposals and transactions. As such, a considerable amount of transactions, according to the Appellant, would become "*settled property*".

76. It is therefore not surprising that the difficulty in ascribing a meaning to "*settlement*" was addressed in *IRC v Plummer* 54 TC 1 when considering the same definition in the Income and Corporation Taxes Act 1970, section 459. At page 42, Lord Wilberforce opined:

> *"If it appears on the one hand a completely literal reading of the relevant words would so widely extend the reach of the section that no agreement of whatever character fell outside it, but that on the other hand a legislative purpose can be discerned of a more limited character which Parliament can reasonably be supposed to have intended, and the words used fairly admitted such a meaning as to give effect to that purpose, it would be legitimate, indeed necessary for the Courts to adopt such a meaning."*

77. In light of such jurisprudence, I agree with the Respondent that in determining whether the Indenture was "*settled property*" recourse must be made to the definition contained in TCA, section 5 where it is defined as "*any property held in trust"* and that the word "*settlement"* must therefore be read in context and within the confines of TCA, Part 19, Chapter 3 dealing with '*Assets held in a fiduciary or representative capacity, inheritances and settlements*'.

Existence of a Trust

78. There is no statutory definition of a trust in the TCA. In Equity and the Law of Trusts in Ireland, 3rd Edition, Bloomsbury Professional, Keane makes the following observations:

> *"6.02*
>
> *Many definitions of a trust have been attempted – by text-book writers rather than judges – but perhaps the most satisfactory is that of Underhill with the gloss added by Pettit:*
>
> > *'A trust is an equitable obligation, binding a person (called a trustee) to deal with property owned by him as a separate fund distinct from his own private property (called the trust property) either for the benefit of persons (who are called the beneficiaries or in old cases cestuis que trust) of whom he may himself be one, and anyone of whom may enforce the obligation, ……*
>
> *A trust most characteristically arises because the owner of property disposes of it by will, or by an instrument intended to take effect in his lifetime, ie, a disposition inter vivos. In the former case, the creator of the trust is called 'the testator', in the latter 'the settlor'….*
>
> *6.03*
>
> *The most obvious occasion for a trust to arise is because the owner of property wishes it to be enjoyed by persons in succession to one another. Thus, a testator may leave property to, or in trust for, his or her spouse for life and afterwards to his or her children. The legal ownership of the property will then be vested in the trustee who will pay the income to the spouse for his or her life after which the children will be entitled to both capital and income. Or a settlor may effect a similar object by deed.*
> *…*

6.04

It will be seen that the vesting of property in a trustee for the benefit of others is the distinguishing feature of the trust as a legal concept…..

6.19

A trust may arise because it is expressly created by the settlor or testator or because the law presumes it to have been created. In the first case, it is known as an 'express trust'. Such trusts may be created either by instruments inter vivos or by wills, in which latter case, of course, they only become effective on the death of the testator. They may involve three sets of parties – the settlor or testator, the trustee and the beneficiary – or two, as where the settlor declares that he holds property in trust for the beneficiary and thus constitutes himself his own trustee."

79. From such commentary it is possible to discern that a trust is the relationship which arises wherever a person, a trustee, holds property, whether real or personal, and whether by legal or equitable title, for the benefit of some person in such a way that the real benefit accrues, not to the trustee, but to the beneficiaries or other objects of the trust.

80. In considering whether the Indenture created a trust, it is necessary to consider the operative part of the Indenture which provided:

> *"…. that in consideration of the natural love and affection which the Grantor bears for the Grantee, the Grantor, as beneficial owner DOTH HEREBY GRANT AND CONVEY UNTO the Grantee all those ALL THAT AND THOSE the hereditaments and premises described in the First and Second Schedules hereto TO HAVE AND TO HOLD the same UNTO and to the use of the Grantee her heirs and assigns in Fee Simple EXCEPTING AND RESERVING UNTO the Grantor during his lifetime full right of residence in and occupation of together with the right to rents and profits in and of the said property described in the First and Second Schedule hereto"*

81. As such and notwithstanding the Father's rights, the Appellant acquired the legal and equitable interest in the Property which is also confirmed in the Contract for Sale of the Property dated Date Redacted by the inclusion of the following Special Conditions:

> *"7. The said* Father's name redacted *will join for the purpose of releasing his right of residence and his reservation of the rents and profits as contained in the*

Indenture of Conveyance described at item numbered 7 of the Documents Schedule.

8. Father's name redacted *joins these presents and in any Deed of Subsale or Collateral Mortgage for the purpose of agreeing to release his right of residence and his reservation of the aforesaid rents and profits"*

82. It is also relevant that Appellant's solicitor Solicitor's Name Redacted, wrote to the Respondent by letter dated Date Redacted to explain that:

> "Father's name redacted *is not strictly speaking a disponer as he joins the contract for the purpose of conformity with it as he held certain rights over the property which he requires to release for the purpose of finalising the sale. We have included him in the CG50 because the contract describes him as a "vendor" and the purchaser's solicitor will require him to appear on your certificate for CGT purposes."*

83. Solicitor's Name Redacted's letter therefore confirms that the Father released his rights over the land in order to facilitate the sale. As such, the Indenture did not create a trust but a disposal of the fee simple interest in the Property to the Appellant with the rights of residence and income entitlement retained by the Father.

84. Furthermore, the Power of Attorney executed by the Appellant in Date Redacted did not affect any transmission of interests but instead granted the authority to the Father "*to act for me in every respect as fully and effectually as I could act in person concerning all my present and future affairs and all my present and future property rights and interests real personal*". As such, there was no conveyance or grant of interest in the Power of Attorney and it did not obviate the need for the Appellant to sign the contract.

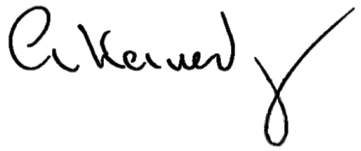
85. The Father transferred the fee simple interest in the Property but carved out a right of residence and the entitlement to income from the Property for the remainder of his life. As such, the distinguishing characteristic of a trust that involves the vesting of property in a trustee for the benefit of others is absent. No person held the Property for the benefit of another person in such a way that the real benefit accrued, not to the trustee, but to the beneficiaries or other objects of the trust. On the contrary, the Appellant directly held the fee simple. Correspondingly her Father held the direct right of residence and income to the property.

86. Therefore, having considered all of the evidence and the submissions of the parties, I am satisfied that the Appellant acquired the legal and equitable interest in the Property in Date Redacted subject to the burden of her Father's right of residence and income

entitlement. Furthermore the Property was not "*settled property*" as the essential characteristics of a trust arrangement were absent. Therefore as the Appellant was resident in the State when she disposed of the Property in Date Redacted on which a chargeable gain accrued, she is accountable for the capital gains tax pursuant to TCA, section 29(2).

87. In coming to my determination it is noted that the assessment raised by the Respondent allowed principal private residence relief equivalent to 50% of the gain. While no representative of the Respondent gave evidence as to how such an apportionment was made, the Appellant in her evidence explained that 60% of the property was in use as the principal private residence and consisted of 5 bedrooms, 2 sitting rooms, kitchen, dining room and 2 bathrooms. As such, I am satisfied with the Appellant's uncontested evidence and therefore she is entitled to reduce the gain with reference to the principal private residence relief afforded by TCA, section 604 by €2,588,908 representing a 60% reduction of the gain.

88. Therefore pursuant to TCA, section 949AK, the assessment to capital gains tax for the years Date Redacted raised on the Appellant be amended to reflect a gain of €4,314,847 and principal private residence relief of €2,588,908 and that tax be calculated accordingly.



Conor Kennedy
Appeal Commissioner
1st December 2020

The Tax Appeals Commission has been requested to state and sign a case for the opinion of the High Court in respect of this determination, pursuant to the provisions of Chapter 6 of Part 40A of the Taxes Consolidation Act 1997.