15TACD2021

[NAMES REDACTED]

Appellants

V

REVENUE COMMISSIONERS

Respondent

DETERMINATION

A. Matters under Appeal

1. This Determination concerns appeals by **[TWO]** Appellants against assessments to Capital Acquisitions Tax (hereinafter "**CAT**") assessments for the following periods and amounts:-

[FIRST APPELLANT'S NAME REDACTED]

- 1 September 2011 to 31 August 2012-€120,676.04
- 1 September 2012 to 31 August 2013-€74,815.64
- 1 September 2013 to 31 August 2014-€47,658.08

[SECOND APPELLANT'S NAME REDACTED]

- 1 September 2011 to 31 August 2012-€38,176.62
- 1 September 2012 to 31 August 2013-€74,815.64
- 1 September 2013 to 31 August 2014-€47,658.08

2. The Respondent raised assessments to CAT on 26 May 2016 which the Appellants appealed by Notices of Appeal dated 22 June 2016. At the request of the Appellants, and with the consent of the Respondent, I directed that the appeals of both Appellants would be heard and determined together.

3. The core issue for determination in these appeals is whether sums lodged to the Appellants' bank accounts during the years under appeal constituted gifts from the Appellants' father for CAT purposes, or were instead held by the Appellants on trust for their father.

B. Facts relevant to the Appeal

4. The following facts were common case between the parties, and were confirmed by the evidence given before me at the hearing of these appeals.

5. The Appellants are sisters. Their father is **[FATHER'S NAME REDACTED]** and their uncle is **[UNCLE'S NAME REDACTED]**.

6. As a result of aspect queries raised on 10 December 2015, the Respondent became aware that the Appellants were in receipt of deposit income for the years 2012, 2013 and 2014.

7. The Respondent raised CAT assessments in respect of lodgements to an account held in **[NAME OF FINANCIAL INSTITUTION 1 REDACTED]** in the joint names of the Appellants and lodgements to a **[NAME OF FINANCIAL INSTITUTION 2 REDACTED]** account in the sole name of the first-named Appellant.

8. The assessments were raised on the basis that the lodgements to the accounts in question were gifts to the Appellants from their father.

9. The Appellants initially informed the Respondent that the monies received by them were held on trust for their father. They subsequently clarified that some of the funds were beneficially owned by their uncle, **[UNCLE'S NAME REDACTED]**.

10. **[THE APPELLANTS' FATHER]** stated that the source of the monies entrusted to his daughters was the sale proceeds of a number of **[NAME OF FOREIGN COUNTRY REDACTED]** properties initially purchased by bank borrowings in the amount of €945,000 from **[NAME OF FINANCIAL INSTITUTION 3 REDACTED]** (hereinafter "**[REDACTED]**"). He stated that the sale proceeds were settled on his daughters by way of an oral declaration of trust in his favour.

11. In 2010, the first-named Appellant purchased 2 apartments, namely **[ADDRESS OF TWO APARTMENTS REDACTED]**, with funds provided by her father. The total purchase price of the two apartments was €320,000.

12. On 28 April 2016, written Declarations of Trust dated 16 and 21 April 2016 were furnished by the Appellants' solicitors to the Respondent, which recorded that the Appellants held the funds and apartments in trust for their father. A further Declaration of Trust executed by the Appellants' father recorded that some of the funds which his daughters held in trust for him were in turn held by him in trust for his brother, **[UNCLE'S NAME REDACTED]**.

C. Legislation

13. Section 2 of the Capital Acquisitions Tax Consolidation Act 2003 (hereinafter "**CATCA2003"**) defines "*entitled in possession*" as meaning:-

> *"…having a present right to the enjoyment of property as opposed to having a future such right, and without prejudice to the generality of the foregoing a person is also, for the purposes of this Act, deemed to be entitled in possession to an interest or share in a partnership, joint tenancy or estate of a deceased person, in which that person is a partner, joint tenant or beneficiary, as the case may be, but that person is not deemed to be entitled in possession to an interest in expectancy until an event happens whereby this interest ceases to be an interest in expectancy."*

14. Section 3 of CATCA2003 provides that:-

> "*A capital acquisitions tax, to be called gift tax and to be computed in accordance with this Act shall, subject to this Act and any regulations made under the Act, be charged, levied and paid on the taxable value of every taxable gift taken by a donee."*

15. Section 5 of the Act concerns when a gift is deemed to be taken, and provides as follows:-

> *"For the purposes of this Act, a person is deemed to take a gift, where a person becomes beneficially entitled in possession, otherwise than on a death, to any benefit (whether or not the person becoming so entitled already has any interest in the property in which such person takes such benefit), otherwise than for full consideration in money or money's worth paid by such person."*

D. <u>Evidence</u>

16. The following witnesses gave evidence before me at the hearing of these appeals and their evidence is summarised below.

*Witness – **[NAME OF APPELLANTS' FATHER REDACTED]***

17. [NAME REDACTED] confirmed that he was the father of the Appellants. He gave evidence that at the age of **[AGE REDACTED]** he had suffered a severe accident which led to **[DETAILS OF INJURIES REDACTED]**. He stated that as a result of this traumatic and life-threatening event, he had concerns about what would happen to his family should his condition degenerate in the future.

18. [THE APPELLANTS' FATHER] further confirmed that he had a brother, **[NAME REDACTED]**, with whom he had a very close relationship. He stated that in 2003 they discussed borrowing to invest in property in **[NAME OF FOREIGN COUNTRY REDACTED]**, using their respective family homes as security. He confirmed that he borrowed €945,000 to fund property acquisitions. His borrowings were on an interest-only basis, with capital repayment due in 2023. He stated that the borrowings had been used to purchase a number of properties in **[NAME OF FOREIGN COUNTRY REDACTED]**. **[THE APPELLANTS' FATHER]** gave evidence that the loan was in the joint names of his wife and himself, and that their family home was also jointly owned by them.

19. [THE APPELLANTS' FATHER] explained that the rationale for the investments was to provide for his family in the future. He said he anticipated that he might have to retire early due to his condition. He confirmed that his brother had sourced and inspected the properties and had liaised with the property agents in **[NAME OF FOREIGN COUNTRY REDACTED]**. He said that he had never seen the properties personally. He testified that he took responsibility for the accounts, records and rentals pertaining to the properties.

20. **[THE APPELLANTS' FATHER]** further gave evidence that in 2009 he underwent a medical procedure in **[NAME OF HOSPITAL REDACTED]** to **[NATURE OF SURGERY REDACTED]**. As a result of complications following that surgery, he spent significant time in intensive care, in the course of which his wife was informed that his survival was in the balance. He had to undergo several further operations to resolve the complications suffered, and his recuperation was long and arduous.

21. **[THE APPELLANTS' FATHER]** said that the trauma he underwent during his time in hospital changed his perspective on life. He said that in the course of discussions with his wife in respect of the investment properties, she had indicated that she did not want to deal with the properties. He said that his wife had expressed a preference for the first-named Appellant to deal with them in the event of anything untoward happening to **[THE APPELLANTS' FATHER]**.

22. **[THE APPELLANTS' FATHER]** said that in addition to the said conversation with his wife, he had discussions with his brother **[NAME REDACTED]**, as a result of which they decided to sell the **[NAME OF FOREIGN COUNTRY REDACTED]** properties. They sold the properties in 2012 and they lodged the sale proceeds to bank accounts in **[THE FIRST-NAMED APPELLANT'S]** name. He indicated that he would not have been able to deal with the accounts if he became incapacitated and hence his name was not put on the accounts. He accepted that **[THE FIRST-NAMED APPELLANT]** could have done whatever she wanted to do with the accounts, but he said he trusted her not do so and she did not do so. **[THE APPELLANTS' FATHER]** stated that he had absolute trust in **[THE FIRST-NAMED APPELLANT]** and therefore did not see the need to record or finalise arrangements in writing.

23. **[THE APPELLANTS' FATHER]** gave evidence that the monies in the accounts included both his own funds and funds belonging to **[UNCLE'S NAME**

REDACTED]. He said that this was done to consolidate the funds transferred. He confirmed that **[THE FIRST-NAMED APPELLANT]** had also at one time put some of her own money in an account with a view to getting a better interest rate. He stated that he and **[UNCLE'S NAME REDACTED]** moved the accounts from time to time to avail of preferable interest rates, and that **[THE FIRST-NAMED APPELLANT]** had acted on their instructions in this regard.

24. Due to the level of trust **[UNCLE'S NAME REDACTED]** had in his brother and the Appellants, **[THE APPELLANTS' FATHER]** confirmed that **[UNCLE'S NAME REDACTED]**'s name was not put on the bank accounts. He cited several instances where **[UNCLE'S NAME REDACTED]** had requested and had received funds from the accounts, both on his own behalf and to make loans to his son and his son's company, **[NAME OF COMPANY REDACTED]**. **[THE APPELLANTS' FATHER]** said that **[UNCLE'S NAME REDACTED]** had never requested that his son, **[NAME REDACTED]**'s, name be added to the accounts. He stated that **[UNCLE'S NAME REDACTED]** had absolute trust in **[THE APPELLANTS]**.

25. **[THE APPELLANTS' FATHER]** said that, on **[UNCLE'S NAME REDACTED]**'s instruction, **[UNCLE'S NAME REDACTED]**'s loan was repaid when it matured in 2015. He stated that the reason the loan was not repaid earlier was due to the fact that it was more profitable to keep the money in the bank accounts. He said that the repayment was made from funds in the accounts, topped up with a loan he had given his brother. He indicated that this loan was subsequently repaid.

26. **[THE APPELLANTS' FATHER]** confirmed that his brother was diagnosed with Alzheimer's disease in 2015 and that the disease had reached an advanced stage as of the date of the hearing.

27. In relation to the loans to his nephew, **[THE APPELLANTS' FATHER]** gave evidence that the loans to **[NEPHEW'S NAME REDACTED]**'s company had been

repaid in full. He confirmed that a loan agreement had been drawn up in relation to one such loan but he could not explain why a written loan agreement was not put in place in respect of earlier loans.

28. With regard to the addition of **[THE SECOND-NAMED RESPONDENT]**'s name to the accounts on **[DATE REDACTED]** 2012, **[THE APPELLANTS' FATHER]** gave evidence that this was done at a time when he was scheduled for a further medical procedure and when **[THE FIRST-NAMED APPELLANT]** had contracted pleurisy. He stated that **[THE SECOND-NAMED APPELLANT]** was added to the account to deal with a worst-case scenario, where neither he nor **[THE FIRST-NAMED APPELLANT]** could deal with the account.

29. [THE APPELLANTS' FATHER] stated that his daughters never withdrew funds from the accounts and confirmed that all monies due to him from the **[FINANCIAL INSTITUTION 1]** and **[FINANCIAL INSTITUTION 2]** accounts had been paid to him.

30. [THE APPELLANTS' FATHER] confirmed that when he was in hospital in 2010, he and **[UNCLE'S NAME REDACTED]** purchased three apartments in **[ADDRESS OF APARTMENTS REDACTED]**. He said that the apartments were put in **[THE FIRST-NAMED APPELLANT]**'s name to alleviate any administrative burden for his wife. He confirmed that the apartments were purchased as an investment to fund the future repayment of the **[FINANCIAL INSTITUTION 3]** loan, given that his resources would otherwise fall short of repaying the loan. He testified that the source of the funds to acquire the apartments in **[ADDRESS REDACTED]** was from the balance of his **[FINANCIAL INSTITUTION 3]** borrowings and his accumulated savings.

31. [THE APPELLANTS' FATHER] confirmed that **[THE FIRST-NAMED APPELLANT]** was the legal owner of the apartments. He stated that he trusted

[THE FIRST-NAMED APPELLANT] implicitly and that he was confident she would only sell the apartments to repay the **[FINANCIAL INSTITUTION 3]** debt. He testified that the rental income which was deposited to **[THE FIRST-NAMED APPELLANT]**'s bank account was mixed with her own funds. He said that a reconciliation exercise was done every December and the amount owed to him in terms of net rent was paid to him.

32. With regard to the rental income from the apartments, **[THE APPELLANTS' FATHER]** gave evidence that **[THE FIRST-NAMED APPELLANT]** had made the requisite tax returns. He conceded that he would have paid less tax on the rents had he returned same in his personal name. **[THE APPELLANTS' FATHER]** confirmed there were no outstanding tax issues with the rental properties subsequent to the Revenue audit, other than the CAT liability the subject matter of the instant appeals.

33. **[THE APPELLANTS' FATHER]** confirmed that the apartments were currently subject to a written declaration of trust. He said the written declarations of trust were preceded by oral declarations of trust to the effect that **[THE FIRST-NAMED APPELLANT]** held the apartments on trust for him. He stated that **[THE FIRST-NAMED APPELLANT]** understood that she could not independently deal with the properties.

34. **[THE APPELLANTS' FATHER]** conceded that, with the benefit of hindsight, his affairs could have been structured differently. However, in relation to the arrangement he put in place with **[THE FIRST-NAMED APPELLANT]**, he said he was satisfied at the time that this arrangement was in the best interests of his family. He said that notwithstanding that there were two apartments in **[THE FIRST-NAMED APPELLANT]**'s sole name, he had implicit trust that she would clear the **[FINANCIAL INSTITUTION 3]** loan with the sale proceeds, if this was required.

*Witness – **[NAME OF FIRST-NAMED APPELLANT REDACTED]***

35. **[THE FIRST-NAMED APPELLANT]** explained that when her father became unwell in 2009, she got a phone call from her sister, **[THE SECOND-NAMED APPELLANT]**, who asked her to return home to spend time with her father during his stay in hospital and subsequent to his discharge.

36. In relation to the opening of accounts in her name in 2009, **[THE FIRST-NAMED APPELLANT]** confirmed that this was done while her father was in hospital. She indicated that her father had been concerned about her mother's welfare, as her mother had been his primary carer for 24 years. She said her father did not wish to burden her mother with additional responsibilities, as the family had been through considerable stress.

37. **[THE FIRST-NAMED APPELLANT]** gave evidence that she had opened accounts with **[FINANCIAL INSTITUTION 4]** and **[FINANCIAL INSTITUTION 1]** to receive the sale proceeds coming from **[NAME OF FOREIGN COUNTRY REDACTED]**. **[THE FIRST-NAMED APPELLANT]** confirmed she fully understood the monies placed in her name were not hers. She was told by her parents that the monies belonged to them and she could only use the funds to repay the **[FINANCIAL INSTITUTION 3]** loan. She confirmed she had never withdrawn funds from the accounts for her personal use or benefit.

38. **[THE FIRST-NAMED APPELLANT]** confirmed that her sister, **[THE SECOND-NAMED APPELLANT]**, was added to the accounts in 2012 to deal with the accounts while **[THE FIRST-NAMED APPELLANT]** and her father were ill.

39. In cross-examination, **[THE FIRST-NAMED APPELLANT]** stated that she was selected as the sole account name on the bank accounts opened because her older

sister was married, her younger sister was in college and her brother was unsuitable for personal reasons. She confirmed that her father did not put his own name on the account as he had full confidence in her that she would look after the funds and repay **[FINANCIAL INSTITUTION 3]**. She said that there were no written records to the effect that the monies belonged to her father and her uncle.

40. **[THE FIRST-NAMED APPELLANT]** confirmed that the **[ADDRESS REDACTED]** apartments were put in her name at the request of her parents. She agreed that she was the legal owner of the **[ADDRESS REDACTED]** apartments. She testified that she would only sell the apartments in accordance with her father's instructions.

41. **[THE FIRST-NAMED APPELLANT]** further stated that her father only had online access to one of the accounts in which the funds were held. She confirmed that a yearly reconciliation of the rental account was made, with the net payment being made to her father.

42. With regard to the rental income for the apartments, **[THE FIRST-NAMED APPELLANT]** confirmed she returned the income in her name, as she considered that as legal owner she was the appropriate person to do so. In relation to the rental returns for the years 2011 and 2012, **[THE FIRST-NAMED APPELLANT]** said she had mistakenly believed that her father had returned the rents on the apartments with the rental income from **[NAME OF FOREIGN COUNTRY REDACTED]**. Accordingly, the rental returns for the apartments for these years were not filed until 2016 when she first became aware of the oversight.

43. **[THE FIRST-NAMED APPELLANT]** indicated that she temporarily lived in **[APARTMENT ADDRESS REDACTED]** for a period in excess of two years. She confirmed that she did not file a CAT return in respect of her rent-free

accommodation in the apartment, as she paid the mortgage interest on the apartment during this period.

Witness – ***[NAME OF SECOND-NAMED APPELLANT REDACTED]***

44. **[THE SECOND-NAMED APPELLANT]** gave evidence that she was approached by her father in 2012 in relation to her being added to the accounts, at a time when her sister **[THE FIRST-NAMED APPELLANT]** was recovering from pleurisy. She stated that her father explained that she should only use the funds to discharge the **[FINANCIAL INSTITUTION 3]** loan in the event that something happened to him. She said her father made it clear that the monies did not belong to her.

45. **[THE SECOND-NAMED APPELLANT]** stated that she spent time in **[NAME OF FOREIGN COUNTRY REDACTED]** in 2014. She said that when her temporary visa expired in April 2014, she had to vacate her apartment and return home until her visa position was regularised. She indicated that it would have been her strong preference to remain in **[NAME OF FOREIGN COUNTRY REDACTED]**. **[THE SECOND-NAMED APPELLANT]** said that there were only two options available to her to apply for a permanent visa in October 2015. The first option was to sign a declaration confirming she had funds in excess of €15,500 and the second option was to obtain a year's experience in **[NAME OF FOREIGN COUNTRY REDACTED]** in her field of expertise. **[THE SECOND-NAMED APPELLANT]** gave evidence that she had signed a declaration that she did not have the requisite funds, and accordingly she had to wait until March 2016, by which time she had one year's experience, to apply for a permanent **[NAME OF FOREIGN COUNTRY REDACTED]** visa.

46. In cross-examination, **[THE SECOND-NAMED APPELLANT]** gave evidence that she did not return the deposit interest on the accounts for tax purposes, as this was done by **[THE FIRST-NAMED APPELLANT]**.

*Witness – **[NAME OF THE APPELLANTS' FIRST COUSIN REDACTED]***

47. **[NAME REDACTED]** gave evidence that his father was very close to his brother, **[THE APPELLANTS' FATHER]**. He stated that they had worked together on various investment projects. **[NAME REDACTED]** confirmed that his father was in the later stages of Alzheimer's disease.

48. **[NAME REDACTED]** further gave evidence that he was aware of the **[NAME OF FOREIGN COUNTRY REDACTED]** investment properties from conversations with his father and his uncle. He confirmed there was a high degree of trust between the brothers. He said he never asked why his father was not named as account holder on the accounts. **[NAME REDACTED]** stated he was aware that the Appellants' names were on the accounts. He said that he was never given an indication why his name was not on the accounts. **[NAME REDACTED]** confirmed that his father had never gifted funds to the Appellants.

49. **[NAME REDACTED]** further confirmed that he trusted the Appellants. He stated there were no arrangements in place to deal with the accounts should something happen to his father. He confirmed that it was simply a matter of trust that the Appellants would pay his father the monies held on trust, and that this subsequently occurred.

50. **[NAME REDACTED]** gave evidence that he obtained a loan from his father and his uncle when he got into difficulty in relation to a property deal. He stated that he had repaid the loan from his father and his uncle. He confirmed there were no written agreements in respect of the loans to **[NAME OF COMPANY REDACTED]**.

*E. **Submissions of the Appellant***

Beneficial ownership of the accounts

51. Counsel for the Appellants submitted that at no stage between 1 September 2011 and 31 August 2014 did they become "*beneficially entitled in possession"* to benefits from **[THEIR FATHER]** or **[THEIR UNCLE]**. He referred to section 4 of CATCA 2003, which provides that CAT must be paid on the taxable value of every taxable gift taken by a donee, and section 5 which provides that a gift is deemed to be taken where:

> *"…a person becomes **beneficially entitled in possession**, otherwise than on a death, to any benefit (whether or not the person becoming so entitled already has any interest in the property in which such person takes such benefit), otherwise than for full consideration in money or money's worth paid by such person."* [Emphasis added]

52. Counsel for the Appellants pointed out that the term *"beneficially entitled in possession"* is not defined by CATCA 2003. He referred to section 2 which defines the term "*entitled in possession*" as "*having a present right to the enjoyment of property as opposed to having a future such right*". In light of this definition, Counsel for the Appellants submitted that in order for a charge to CAT to arise on the Appellants, they must have had a present right to enjoy the money entrusted to them by way of the bare trust.

The creation of an oral bare trust

53. Counsel for the Appellants stated that **[THE APPELLANTS' FATHER]** and **[THE APPELLANTS' UNCLE]** settled the funds comprising the sales proceeds of their **[NAME OF FOREIGN COUNTRY REDACTED]** properties in a trust by way of an oral declaration, as a result of which the Appellants held the funds on behalf of

[THEIR FATHER AND THEIR UNCLE]. He stated the oral bare trusts were later evidenced in writing by way of Declarations of Trust executed on 16 and 21 April 2016.

54. In relation to the requirements necessary to establish a valid trust, Counsel for the Appellants submitted that there had to be certainty of subject matter, object and intention. In the context of the instant appeals, he submitted that the subject matter of the trust was the funds deposited and the object of the trust was the settlors themselves, namely **[THE APPELLANTS' FATHER AND THEIR UNCLE]**. In relation to the requisite intention, Counsel for the Appellants submitted that **[THE APPELLANTS' FATHER AND UNCLE]** had at all times intended to place the funds on trust only; they had never intended (nor indeed effected) an absolute and irrevocable gift to the Appellants.

55. Counsel for the Appellants further submitted that there is no need for the word "*trust*" to be used to prove intention. He submitted that the pertinent question is whether, in substance, a sufficient intention to create a trust has been established. In this regard, he submitted that declarations by word of mouth, or inferences from conduct, can verify the establishment of a trust. Furthermore, he submitted that there is no need for the settlor to have understood that his words have created a trust. He argued that while it is often expressed to be desirable to have written evidence of a trust, it was well established that there is no requirement for written evidence of trusts of pure personalty. In this regard, Counsel for the Appellants contended that an oral trust is no less valid than a trust evidenced in writing at the time the trust was made.

56. In support of his position as outlined above, Counsel for the Appellants relied upon the decision in ***Peckham –v- Taylor* 31 BEAV 250**, where the Master of the Rolls stated:-

"There is no difference between a parol and a written declaration of trust of personalty. (As to realty, see 29 Car. 2, c. 3, s. 7.) The declaration is perfectly good, whether it be in writing or oral. The defect which arises in the case of an oral declaration of trust is, the chance of there being an uncertainty in the evidence as to the trust, but if there be no doubt about it, the Court will give effect to the trust as readily as if it were in writing."

57. Counsel for the Appellants further referred to the case of ***Maguire –v- Dodd*** **1859 9 IR Ch R 452**. Therein, having considered a number of authorities regarding the making of an oral trust, the Lord Chancellor stated:-

"It may be conceded that a trust of this kind can be created by a parol declaration; but it is at least as clear that it ought to be established by very satisfactory evidence… I find however in another case, namely Patterson v Murphy, the Vice-Chancellor says:- 'It may be doubtful whether the Court would hold that a voluntary trust could be created by merely oral expression, so much might depend on a correct report of the words*', and after suggesting various common forms of verbal communications as likely to be used on such occasions, he adds:-* 'In such a case, I can well imagine that the Court would require extremely strong evidence before it would say that an irrevocable trust was created.' *The expression of intention may in reality amount to a mere promise or purpose of executory or contingent bounty; and, by the paraphrase of interested desire, or of design, it may be readily turned into a formal declaration of an irrevocable trust".*

58. Counsel for the Appellants further relied on the decision in ***Dipple –v- Corles*** **5 Hare 183**. In that case, one child of nine inherited all of his father's estate and promised his siblings at their father's funeral that he would share the inheritance with them. He did share the estate with some of his siblings but not with others, and those who didn't receive any of the estate sought to have the declaration made

at the funeral confirmed as a declaration of trust in their favour. Wood V.C. stated as follows:-

> *"With regard to personal estate, it is not even necessary that the intention* [to create a trust] *should be expressed in writing, but a trust may be created by parol. If, however, the case be one of doubt or difficulty upon the words which are supposed to have been used, the Court will give weight to the consideration that the words, not being committed to writing in any definite and unquestionable form, may not be deliberately expressed sentiments of the party… Lord Eldon, in Ex parte Pye, adverts especially to the fact that the testator had in that case* 'committed to writing' *what he thought a sufficient declaration that he held that part of the estate in trust for the annuitant."*

59. Counsel for the Appellants submitted that in many of the reported cases, the parties struggled to adduce evidence of a parol trust in circumstances where the donor had died. He pointed out that no such difficulties were present in relation to the instant appeals, as **[THE APPELLANTS' FATHER]** had given testimony as to his intentions when making the relevant lodgements. In this regard, he submitted that the oral evidence of **[THE APPELLANTS' COUSIN]**, **[THE APPELLANTS' FATHER]** and the Appellants established that an oral bare trust was in fact created, which was later evidenced in writing by the parties.

What is the effect of a bare trust?

60. Counsel for the Appellants further submitted that in a bare trust, the trustees merely hold the property on trust for another person and that person retains the right to insist that that property can be returned to him at any stage, and can also direct how the property is to be dealt with. Otherwise, the trustee has no duties of management or other obligations to perform. Counsel for the Appellants contended that in a bare trust, the beneficiary is deemed to be absolutely entitled to the trust property as against the trustee. Therefore, he submitted that in a bare

trust, the trustees are not entitled to the present use of the property, the subject of the trust.

61. Counsel for the Appellants cited an extract from Keogan, Mee and Wylie on *The Law and Taxation of Trusts* which, at 25.001, describes a bare trust as follows:-

> *"A bare trust is akin to a nomineeship where, for particular reasons (legal or convenience), assets are held by persons who do not own those assets beneficially. It is also often called an absolute trust. Where a person holds assets as nominee for another person, he is usually not given specific powers under which he can act. In the case of a bare trust, sometimes the settlor appoints trustees to act as trustees for another and gives administrative powers to the trustees to effectively deal with the assets in the trust. A bare trust document is, therefore, usually more detailed than a nomineeship. For tax purposes, however, they are treated the same.*
>
> *Typical examples of such trusts are as follows:*
>
> *(a) where a bank deposit account is in the joint names of two people, where only one of those actually contributed the money to the bank account and where there is no question of advancement or gift…"*

62. Counsel for the Appellants stated that **[THE APPELLANTS' FATHER]** and **[THE APPELLANTS' UNCLE]** retained control over the funds which they gave in trust to the Appellants. He submitted that the Appellants merely held the legal title to the funds. He gave the following examples of how **[THE APPELLANTS' FATHER]** and **[THE APPELLANTS' UNCLE]** retained the present right to enjoy these Funds, namely:-

- **[THE APPELLANTS' FATHER]** received €168,700 on 28 August 2012 from the Appellants' account, at his request;

- **[THE APPELLANTS' FATHER]** received €155,500 on 8 August 2013 from the Appellants' account, at his request;
- The funds in the Appellants' account were used to meet **[THE APPELLANTS' UNCLE]**'s own loan obligations in the sum of €500,202 at his request; and,
- **[THE APPELLANTS' FATHER]** and **[THE APPELLANTS' UNCLE]** directed the bank accounts into which the funds were placed.

63. In light of the control retained by **[THE APPELLANTS' FATHER]** and **[THE APPELLANTS' UNCLE]**, Counsel for the Appellants submitted that the Appellants did not become beneficially entitled in possession to the trust funds as they never had *"a present right to enjoyment of the property"* within the meaning of section 2 of CATCA 2003.

64. Counsel for the Appellants further contended that it was never put to the Appellants that the monies they received were to help them on in life, and argued that it followed therefrom that there were no advancements to the Appellants.

What are the CAT consequences of placing an asset in a bare trust?

65. Counsel for the Appellants submitted that a bare trust is tax transparent for CAT purposes. As the trustee of a bare trust is at no stage "*beneficially entitled in possession*" to the assets in the trust, Counsel for the Appellants submitted that no charge to CAT can arise on the trustee. He further submitted that where a person transfers an asset to trustees to hold in bare trust for himself personally as beneficiary, there is no transfer of beneficial ownership.

66. In this regard, Counsel for the Appellants made reference to the following extract from Keogan, Mee and Wylie at 25.005 which states:

"If a person transfers his assets to a person to hold the assets on his behalf merely as nominee, there is deemed to be no transfer of assets because the nominee does not take those assets beneficially. There is no gift taken and no capital acquisitions tax (CAT) arises.

When a bare trust is set up by a settlor settling assets on trust for a person absolutely, whether by gift or inheritance, the beneficiary becomes beneficially entitled in possession to the assets even if the beneficiary is prevented by legal incapacity (e.g. age, insanity) from calling on the trustee or nominee to transfer the assets to them. Any restrictions on the beneficiary's access to the assets should be considered carefully to ensure there is no doubt that the beneficiary has taken the assets absolutely.

The term 'beneficially entitled in possession' is a fundamental term in gift and inheritance tax. It means a present right to the present enjoyment of an asset, as opposed to a future right or interest in expectancy to an asset. As a beneficiary is entitled in an absolute trust to call on the trustees to hand over the assets in the trust to him absolutely, he is beneficially entitled in possession to the assets in the trust. This also applies where persons with no legal capacity, such as minors or insane persons, hold under a bare trust because the only legal impediment to them is the fact of their minority or insanity."

67. Therefore, Counsel for the Appellants submitted that **[THE APPELLANTS' FATHER]** and **[THE APPELLANTS' UNCLE]** remained beneficially entitled to the funds placed in the bare trust and the Appellants were not beneficially entitled to the Funds. He submitted that it was clear that the Appellants were never in receipt of gifts from their father. As such, he submitted the Appellants were not accountable persons for the purposes of CAT and a charge to CAT could not arise.

Credibility of the Appellants

68. Counsel for the Appellants further argued that the instant appeals turned on the question of credibility and/or lack of ambiguity as to the creation of an oral trust. In this regard, he submitted that the creation of the trust was prompted by the health problems of **[THE APPELLANTS' FATHER]** and his wish not to overburden his wife with additional responsibilities.

69. Counsel for the Appellants argued that the Respondent did not fully engage with the concept of a bare trust; instead, emphasis was placed by the Respondent on the alleged unorthodoxy of the **[FAMILY NAME REDACTED]** family arrangements. Counsel for the Appellants submitted that the evidence proffered by the **[FAMILY NAME REDACTED]** family had not been damaged in cross-examination by the Respondent.

70. In relation to the submission of rental returns by **[THE FIRST-NAMED APPELLANT]**, Counsel for the Appellant denied that this was inconsistent with the argument that she was a trustee. He submitted that it instead reflected **[THE FIRST-NAMED APPELLANT]**'s assumption of the typical responsibilities of a trustee, and this accorded with her evidence on the matter.

71. Counsel for the Appellants submitted that the reason **[THE APPELLANTS' UNCLE]** did not give evidence was due to his medical condition, rather than being attributable to any reluctance on his part to provide evidence.

72. Counsel for the Appellants accepted that there were alternatives open to **[THE APPELLANTS' FATHER]** to the creation of an oral trust. However, he submitted that **[THE APPELLANTS' FATHER]**'s decision to create the trust seemed at the

time a pragmatic way to safeguard the welfare of his family, in circumstances where there was a long history and strong ties of family loyalty.

73. Counsel for the Appellants rejected the Respondent's position that it was inconsistent for a man who argued that he was concerned as to his future affairs not to execute a will. Counsel for the Appellants submitted that **[THE APPELLANTS' FATHER]**'s failure to execute a will stemmed from the high level of trust which he had in his daughters to act on his instructions. He contended that the issue in the appeals turned on the degree of trust which existed between **[THE APPELLANTS' FATHER]** and his daughters, and that the relevant test was not whether the Respondent had the same level of trust.

F. <u>Submissions of the Respondent</u>

74. Counsel for the Respondent submitted that in the context of tax appeals the burden of proof rests with the taxpayer. She submitted that this accords with the general law in civil cases that the burden of proof falls on he who asserts. She stated that this onus may be justified on the basis that only the taxpayer has access to the full facts relating to his personal tax situation. She cited in support of this proposition the decision in ***Menolly Homes Ltd. v Appeal Commissioners & Revenue Commissioners*** **(2010) IEHC 49**, where Charleton J. stated**:-**

> *"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."

75. She further cited the decision in ***TJ v Criminal Assets Bureau*** **[2008] IEHC 168**, where Gilligan J**.** stated:-

"The whole basis of the Irish taxation system is developed on the premise of self-assessment. In this case, as in any case, the applicant is entitled to professional advice, which he has availed of, and he is the person who is best placed to prepare a computation required for self-assessment on the basis of any income and/or gains that arose within the relevant tax period."

76. Counsel for the Respondent submitted that, in the instant appeals, the burden of proof falls on the Appellants to show that on the balance of probabilities the sums in question did not constitute gifts for CAT purposes. She submitted that the sums lodged to the Appellants' deposit account were in fact gifts for CAT purposes.

77. Counsel for the Respondent denied that an oral trust could exist simply because someone said there was one. She submitted that there was never any intention to create an oral trust and that the Declarations of Trust made in 2016 were made because of the Respondent's investigations into the matter. She pointed out that the Declarations of Trust were only made in April 2016, some five years after the initial lodgements were made. She argued that as the Declarations of Trust were not contemporaneous with the opening of the accounts and the lodgements, they could not provide evidence regarding the donors' intentions at that time.

78. Counsel for the Respondent further submitted that for the valid creation of an express trust, there needed to be certainty of subject matter, of object and of intention. The question was whether in substance a sufficient intention to create a trust had been manifested. She submitted that, as was clear from the case law,

extremely strong evidence was required to establish that an irrevocable oral trust had been created. In this regard, she relied upon the decision in ***Dipple v Corles*** where it was stated;

> *"If, however, the case be one of doubt or difficulty upon the words which are supposed to have been used, the Court will give weight to the consideration that the words, not being committed to writing in any definite and unquestionable form, may not be the deliberately expressed sentiments of the party."*

79. Counsel for the Respondent accepted that a trust could be created by way of an oral declaration. However, she submitted that while the Courts might in previous years have taken a somewhat relaxed approach to the question of the existence of an oral trust, a stricter approach should now be adopted, particularly in a taxation context.

80. Counsel for the Respondent noted that the bank accounts in question were in the sole names of the Appellants. She stated that their father's name was never added to the accounts, nor was any note added to the accounts to indicate that the funds were not beneficially owned by the Appellants. Counsel for the Appellant further noted that the apartments purchased by the first-named Appellant with funds provided by her father were in her sole name. Counsel for the Respondent contended that it could have been expected that **[THE APPELLANTS' FATHER]**'s name would have been added to the accounts and that he would have been named as joint owner of the properties, given that the funds/properties were to be subject to a trust in his favour.

81. Counsel for the Respondent referred to the example of a bare trust given in Keogan, Mee and Wylie's *The Law and Taxation of Trusts* and pointed out that the example referred to a bank deposit account which is *"in the joint names of two people, where only one of those actually contributed the money to the bank*

account and <u>where there is no question of advancement or gift</u>" [emphasis added]. She submitted that this example was manifestly different to the facts of the instant appeals.

82. Counsel for the Respondent further pointed out that the accounts were not held in joint names. In addition, she submitted that the presumption of advancement applied as the funds were transferred to the children of the transferor. She submitted that the effect of the presumption of advancement, where it applies, is that the transferor is presumed to be making a gift to his child. She cited in this regard the decision in ***Shepherd v Cartwright*** **(1955) AC 431**, where the Court stated:-

> *"The law is clear that on the one hand where a man purchases shares and they are registered in the name of a stranger, there is a resulting trust in favour of the purchaser; on the other hand, if they are registered in the name of a child or one to whom the purchaser then stood in loco parentis, there is no such resulting trust, but a presumption of advancement."*

83. With regard to the apartments purchased by the first-named Appellant in 2010 with funds provided by her father, Counsel for the Respondent submitted that the funds in question also constituted gifts. These gifts had the effect of reducing the class threshold available for set off against the gift to the first-named Appellant in 2011.

84. Counsel for the Respondent pointed to the fact that **[THE APPELLANTS' FATHER]** did not have online access to all his accounts as an indication he did not own all of the accounts, and in particular the account containing the trust funds.

85. Counsel for the Respondent also questioned the orthodoxy and credibility of the arrangements put in place by the **[NAME OF FAMILY REDACTED]** family and

denied that there was sufficient evidence to establish their authenticity. She submitted that it was simply not plausible that monies amounting to some €1.5 million would be settled by way of oral trust.

86. Reliance was placed by Counsel for the Respondent on the fact that the rental income from properties was returned for tax purposes by the first-named Appellant as an indication that beneficial ownership rested with the Appellants.

87. Counsel for the Respondent further submitted that if the Appellants' position was accepted, i.e. that a gift was made on the understanding it would revert to the donor, that this would undermine the efficacy of CAT legalisation, as the same argument could be made in the context of all gifts.

88. In closing, Counsel for the Respondent submitted that the Appellants had become beneficially entitled in possession to the funds in question, and that the CAT assessments should be upheld.

G. Findings and Analysis

89. Having considered the facts of this appeal, the relevant legislation and the submissions made by both parties, I am satisfied that there was sufficient certainty as to the subject matter, object and intention to create a valid oral trust in relation to the funds entrusted to the Appellants. I am satisfied and find as a material fact that such a trust was created by **[THE APPELLANTS' FATHER]** and that his daughters were bare trustees.

90. I do not agree with the Respondent's submission that the Appellants did not meet the requisite standard of proof for tax appeals as laid down in the case of

Mennolly Homes. In this regard, I have carefully considered the evidence given by the various members of the **[NAME OF FAMILY REDACTED]** family, which evidence I found to be credible, consistent and compelling. I am satisfied that the only reason **[THE APPELLANTS' UNCLE]** did not give evidence was due to his illness, as verified by his son and his brother.

91. I find that the Appellants have established on the balance of probabilities that **[THE APPELLANTS' FATHER]** created an oral bare trust in his own favour in respect of the trust funds settled on the Appellants. I further find that the Appellants never had "*a present right to enjoy*" the trust property, and therefore never became beneficially entitled in possession to the trust funds.

92. I have noted that the Respondent did not offer evidence to counter the evidence given by the Appellants. While I understand the position taken by the Respondent in relation to the alleged unorthodoxy of the **[FAMILY NAME REDACTED]** family arrangements, I am satisfied that such a seemingly unusual method was adopted in the context of the strong family ties between the **[FAMILY NAME REDACTED]** family members. I accept as correct **[THE APPELLANTS' FATHER]**'s evidence that the arrangements he put in place were intended to safeguard his family in the best way he saw fit, in light of the challenges his family encountered.

93. I am satisfied that the authorities opened to me clearly demonstrate that an oral trust may be created in relation to personalty. In this regard, I have considered the evidence given by the **[FAMILY NAME REDACTED]** family and I am satisfied the evidence presented meets the "*very satisfactory evidence*" test contained in the ***Peckham v Taylor*** decision.

94. The Respondent quite properly accepts that an oral trust may be created in respect of personalty. I accept the Appellants' submission that a settlor may

create a bare trust without using the word "*trust*", and without understanding that his words or conduct may have created a trust. In this regard, I am persuaded by **[THE APPELLANTS' FATHER]**'s evidence that in the interest of safeguarding his family interests and protecting his wife, he ceded control of his bank accounts to his daughters to deal with in event of his incapacity. I accept as correct his evidence that he never relinquished ownership of the accounts.

95. I accept the Appellants' position that an oral trust is no less valid than a trust evidenced in writing at the time the trust was made. I am not convinced by the Respondent's argument that the lapse of time from the creation of the parol trust to the time it was reduced in writing in 2016 in any way negates the fact that an oral trust was in existence from 2012 onwards.

96. I do not accept the Respondent's submission that in a taxation content, stronger evidence is required to establish a valid parol trust in respect of personalty. I note that when I queried the Respondent's position on this issue, no authorities were produced to support the contention.

97. I am satisfied on the evidence that **[THE APPELLANTS' FATHER]** and **[THE APPELLANTS' UNCLE]** continued to exercise control over the funds they gave in trust to the Appellants. Examples were given in evidence of withdrawals made from the accounts at the behest of **[THE APPELLANTS' FATHER]** and **[THE APPELLANTS' UNCLE]**, and of transfers of funds made at their direction to attract higher interest rates. I have also noted that, consistent with **[THE APPELLANTS' FATHER]**'s evidence, the Appellants testified they had never made withdrawals from the accounts. Indeed, **[THE SECOND-NAMED APPELLANT]**'s evidence in relation to her attempts to obtain a **[NAME OF FOREIGN COUNTRY REDACTED]** visa was that she had signed a declaration that she did not have funds and that this had delayed her re-entry to **[NAME**

OF FOREIGN COUNTRY REDACTED]. This is, in my view, inconsistent and irreconcilable with the Respondent's case that she was the beneficial owner of funds in the accounts.

98. I accept the evidence of **[THE FIRST-NAMED APPELLANT]** that the rental returns filed by her in relation to the apartments were done so in her capacity as a trustee of the trust. I am satisfied that the filing of the returns in her name did not signify her ownership of the underlying properties. I have noted that had the returns been made in **[HER FATHER'S]** name, a lesser tax liability would have arisen than the tax liability **[THE FIRST-NAMED APPELLANT]** paid.

99. The Respondent is of course correct in its submission that the legal presumption of advancement can apply where a settlor opens a bank account in the name of a child. However, I agree with the Appellants' position that none of the evidence tendered at the hearing of these appeals supports the argument that **[THE APPELLANTS' FATHER]** wanted to set up or establish his daughters in life. In fact, the evidence tendered was that **[THE APPELLANTS]** did not benefit from the trust funds. I find the evidence presented rebuts the presumption of advancement.

100. I do not accept the Respondent's submission that my finding in favour of the Appellants would undermine the efficacy of the CAT legislation. Any submission that an oral trust was created will have to be grounded upon very satisfactory evidence, such as that adduced in the instant case. Even were there some weight to the Respondent's concerns in this regard, I do not believe it appropriate in the exercise of the jurisdiction conferred on the Tax Appeals Commission to have regard to the potential impact of the outcome of an appeal on legislation which has been duly enacted by the Oireachtas.

101. In light of my findings above, I find that the Appellants did not receive gifts of the trust funds. I further find that the first-named Appellant did not receive a gift of the funds used to purchase the **[ADDRESS REDACTED]** apartments or of the apartments themselves.

H. Determination

102. For the reasons outlined above, I determine that the sums lodged to the Appellants' bank accounts did not constitute gifts for CAT purposes, as the sums in question were held by the Appellants on trust for **[THEIR FATHER]**. I determine the Respondent has therefore incorrectly assessed the Appellants to CAT.

103. Accordingly, I will allow the Appellants' appeals and I determine in accordance with section 949AK(1) of the Taxes Consolidation Act, 1997 as amended, that the Notices of Assessment dated 26 May 2016 be reduced accordingly.

Dated the 28th day of October 2020

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MARK O'MAHONY
Appeal Commissioner