TC04273

Appeal number: TC/2011/01784

CORPORATION TAX – deductions for amortisation of goodwill - Schedule 29 FA 2002 – whether goodwill purchased on a transfer of trade in September 2004 or whether a migration of trade – market value of goodwill – principles for determining market value of goodwill on transfer of trade – whether a transfer of trading losses to the appellant under section 343 ICTA 1988 – whether quantum of trading losses can be disputed – effect of undertaking given by HMRC to the Court of Session in other proceedings- construction and effect of the undertaking – Contracts (Third Parties) Act 1999 – whether valid consequential amendment to return to 2008 return under paragraph 34 Schedule 18 FA 1998 – whether valid claims for relief for the purposes of paragraph 51 Schedule 18 FA 1998 –appeals dismissed in relation to deductions for amortisation of goodwill - issue of quantum of losses under section 343 ICTA 1988 adjourned pending outcome of separate appeal by predecessor company

FIRST-TIER TRIBUNAL
TAX CHAMBER

SPRING CAPITAL LTD	**Appellant**
- and -	
THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS	**First Respondents**
-and –	**Second**
RODERICK THOMAS	**Respondent**
- and -	**Third**
STUART THOMAS	**Respondent**
- and –	**Fourth**
SPRING SALMON & SEAFOODS LIMITED	**Respondent**

TRIBUNAL: JUDGE GUY BRANNAN

Sitting in public at Bedford Square London WC1 on 19 – 22 May 2014, closing submissions 15 and 16 October 2014 and subsequent written submissions

Mr Roderick Thomas for the Appellant

Ms Harry Jones for the Respondents

DECISION

Introduction

1. Spring Capital Limited ("the appellant") appeals against several decisions of HMRC in respect of accounting periods ended 9 March 2005 to (and including) 30 April 2009.

2. As we shall see, the main dispute in respect of a number of these periods relates to whether the appellant is entitled to a deduction under Schedule 29 Finance Act 2002 ("**FA 2002**") in respect of the purchase of goodwill. In addition, the appellant claims that it is entitled to carried forward losses under section 343 ICTA 1988. There are also issues for determination relating to: the effect of an undertaking given to the Court of Session in Scotland in relation to other proceedings on 19 May 2010 ("**the Undertaking**"), whether a consequential amendment to the appellant's return for the accounting period ended 30 April 2008 was a valid amendment and, finally, whether the appellant made valid claims for amortisation relief in respect of goodwill in relation to periods ended the 30 April 2005, 2006, 2007 and 2008.

3. In these consolidated appeals, the appellant was represented by Mr Roderick Thomas. Mr Roderick Thomas was a shareholder and (from 12 February 2007) the company secretary of the appellant. He became a director of the appellant in 2010. His brother, Mr Stuart Thomas, was a director of the appellant from its incorporation and in all periods material to these appeals. I shall, for clarity, refer in this decision to Mr Roderick Thomas as "Mr Thomas" and to his brother as "Mr Stuart Thomas". Where I refer to Mr Thomas and Mr Stuart Thomas jointly I do so as "Messrs Thomas."

4. In addition, I will refer to an associated company of the appellant, Spring Salmon & Seafood Limited, as "SSS".

Procedural and other matters

5. As will become clear, there have been numerous decisions of tax tribunals dating from at least 2005 involving Messrs Thomas, their family members and associated companies (particularly SSS). Many of these appeals, both decided and pending, are helpfully listed in an appendix to the decision of this Tribunal in *Spring Salmon & Seafood Limited v HMRC* [2014] UKFTT 877.

6. By directions dated 1 November 2013, Judge Barbara Mosedale joined Mr Thomas, Mr Stuart Thomas and SSS as, respectively, second, third and fourth respondents. Judge Mosedale made this joinder direction in order that these three additional parties should be bound by findings of fact made by this Tribunal in this appeal insofar as they were relevant to other appeals, particularly (TC/2011/06273, TC/2013/4703 and TC/2013/5891). Moreover, Judge Mosedale was concerned that Messrs Thomas should be bound in relation to any findings of this Tribunal in relation to the ownership relationship between Messrs Thomas on the one hand and SSS and

the appellant on the other. In the event, very little evidence has been given by the parties in relation to this relationship with the result that I have not determined this issue.

The evidence

7. Evidence was given for the appellant by:

(1) Mr Thomas, and

(2) Mr Michael Taub, who appeared as an expert witness in relation to valuation matters.

8. Both Mr Thomas and Mr Taub gave witness statements and were cross-examined by Ms Jones, who appeared for the Respondents ("HMRC").

9. Evidence was given for HMRC by

(1) Mrs Maureen Gridley, who appeared as an expert witness in relation to valuation matters, and

(2) Mr Nicholas Spargo, who appeared as an expert witness in relation to accounting matters.

10. Mrs Gridley and Mr Spargo gave witness statements and were cross-examined by Mr Thomas. As we shall see, the independence of Mrs Gridley's evidence was called into question by Mr Thomas.

11. Mrs Gridley and Mr Taub also produced a joint statement dated 19 May 2014 which identified the differences in their respective approaches to the valuation of goodwill.

12. In addition, the Tribunal was supplied with three ring-binders of papers which included correspondence, accounts and various related documents.

The facts

Preliminary comments

13. Understanding the background to the various disputes between the parties and the affairs of Messrs Thomas and their associated companies has been challenging. In this respect and for the same reasons, I note and echo the comments made by Judge Reid QC in *Spring Salmon & Seafood Limited v HMRC* [2014] UKFTT 887 at [25]. I further endorse the comments of Judge Reid QC at [26] that it would have made this Tribunal's task much simpler and less onerous if a statement of agreed facts had been concluded between the parties. There are undoubtedly many facts which were not in dispute. A statement of agreed facts would have considerably shortened the hearing, which could then have focused on the factual issues that were in dispute, and the time taken in the preparation of this decision. Moreover the parties often referred to facts in submissions (rather than evidence), eg the ownership relationship between Messrs

Thomas and SSS, in a way which was incomplete and imprecise. As Judge Reid QC put it at [26]:

> "The same background facts are canvassed but many matters while aired, remain obscure and unresolved."

14. I hope the parties will take heed of the comments of Judge Reid QC, with which I fully agree, and in future appeals present their cases in a way which is more efficient in the use of the Tribunal's and their own time.

Background

15. The appellant was incorporated as Spring Seafoods Limited and began trading in March 2004. It changed its name to Spring Capital Ltd on or about 23 February 2010. As already noted, Mr Thomas is or was, in the periods material to this appeal, a shareholder of the appellant. From 12 February 2007 he was also the appellant's company secretary. He became a director in 2010. Mr Stuart Thomas was a director and a shareholder of the appellant at all times material to this appeal. Mr Stuart Thomas took the lead in the day-to-day running of the business. Messrs Thomas were the shareholders in the accounting periods under appeal.

16. For all periods material to this appeal the business of the appellant concerned the purchase and distribution of seafood. Essentially, the appellant acted as a "middle man" in purchasing and selling seafood. It did not directly supply major retailers (e.g. supermarkets) but was involved higher up the supply chain. At some stage in the accounting period ending 30 April 2007, the appellant also commenced a business of lending money.

17. As we shall see, however, it was Mr Thomas who principally conducted the correspondence with HMRC in relation to the appellant's tax affairs and has represented the appellant before this Tribunal.

18. The appellant began to carry on the seafood trade previously carried on by SSS. The date and manner on which this transfer or migration of the trade occurred is the subject of dispute. I should, however, add a few words of explanation about SSS.

19. SSS was incorporated in Scotland on 13 March 1998. SSS's financial year ended on 31 July in each year save 2005. SSS carried on the business of suppliers, distributors and processors of seafood between 1998 and about 31 January 2005 when it declared that it had ceased trading. Mr Thomas was a director of SSS throughout.

20. In the tax year 2004/05, SSS's issued share capital was wholly owned by Bala Ltd ("**Bala**"), a company incorporated in the British Virgin Islands. Bala was owned by the MacLennan Trust, which was a Guernsey-based discretionary trust settled by Mr Thomas' brother-in-law. Mr Thomas was one of the potential beneficiaries of the MacLennan Trust. Bala was wound up in 2007 and the MacLennan Trust was wound up towards the end of 2009.

The goodwill claims and the correspondence – summary of the dispute

21. As I have said, the manner in which the seafood trade moved from SSS to the appellant is disputed. In a nutshell, the appellant argues that on 22 September 2004 SSS transferred its seafood business to Messrs Thomas. Then, on the same day, Messrs Thomas are said by the appellant to have transferred the seafood business to the appellant for consideration equal to market value – the agreement being evidenced, according to the appellant's evidence, by a minute of agreement dated 22 September 2004 ("**the Minute**"). In this decision I have referred these transactions as the "**tripartite transaction**".

22. HMRC, on the other hand, say that there is no evidence that the tripartite transaction described in the preceding paragraph took place. HMRC say that there was no written agreement evidencing the transfer by SSS to Messrs Thomas and there was no sale agreement evidencing the transfer from Messrs Thomas to the appellant. The accounts of the appellant for 2005 and 2006 make no mention of the appellant having acquired the goodwill attaching to the seafood trade. Furthermore, HMRC say that there was extensive correspondence between the parties in which, if the tripartite transaction had taken place as described, it would naturally have been mentioned. Instead, it was not until a letter from Mr Thomas on 8 April 2011 that the nature of these transactions was first mentioned. HMRC does not dispute that the seafood trade originally carried on by SSS started to be carried on by the appellant at some stage in 2005, but do not accept that the appellant purchased the goodwill attached to the business for market value nor that the appellant bought the business from Messrs Thomas (nor, for that matter, that SSS sold its trade to Messrs Thomas).

23. I set out below details of the correspondence between Mr Thomas, writing on behalf of the appellant, and HMRC. I go into more detail about this correspondence than would usually be the case because the correspondence is an important part of the factual background in this case and because it shows how the claims in respect of deductions for the purchase of goodwill came to be made.

24. We shall also see that the value attributable to the seafood trade's goodwill is the subject of dispute and I shall deal with this issue later in this decision.

The accounting periods ended 9 March 2005, 30 April 2005 and 30 April 2006 - the correspondence and corporation tax returns

25. On 9 January 2006 the appellant submitted its corporation tax self-assessment returns for the two accounting periods from 10 March 2004 to 9 March 2005 and 10 March 2005 to 30 April 2005("**the 2005 returns**"). The letter accompanying those returns also included unaudited accounts of the appellant for the period 10 March 2004 to 30 April 2005.

26. No enquiry was opened by HMRC in relation to the returns for these two periods.

27. The appellant's returns disclosed taxable profits of £326,862 for the period ended 9 March 2005 and £48,527 for the period ended 30 April 2005. The returns stated that the corporation tax chargeable for those two periods was, respectively, £65,797.30

and £10,015.98. Neither return contained any claim for a deduction in respect of the purchase of goodwill and made no reference to the acquisition of the seafood trade by the appellant. The only amount in respect of depreciation related to tangible fixed assets (£5,515).

28. The unaudited accounts of the appellant for the period ended 30 April 2005 stated that the principal activity of the company was "the purchase and distribution of seafood." Mr Stuart Thomas was a sole director and Mrs R Thomas signed the accounts.

29. The appellant's turnover was stated to be £1,517 837 with a gross profit of £458,736 and a profit on ordinary activities before taxation of £384,760. The balance sheet showed, as fixed assets, tangible assets of £16,871 and net current assets of £385,962 and a total for net assets (after provisions) of £400,010. The appellant's called up share capital was £100,000 and, with reserves of £310,000, total equity shareholders' funds equal to £410,000. The balance sheet contained no reference to intangible assets or to goodwill. The accounts were prepared by a chartered accountant, Mr David Norris, on information supplied to him by Messrs Thomas.

30. On 5 March 2007, Mr Stuart Thomas wrote to HMRC as follows:

> "AMENDMENTS TO CTSAs FOR PERIODS ENDED 9/3/2005 and 30/4/2005 [Reference number]
>
> We refer to our Self-Assessment for the period ended 9 March 2005.
>
> During the period the company took over and began carrying on the trade previously carried on by [SSS]. Under the provisions of Section 343 ICTA 1988 the company is now amending its Self-Assessment to reflect the losses of that trade in its Return. Accordingly box 37 of the Return (Profits chargeable to corporation tax) is amended to a loss of £2,156,915.00. Box 86 (tax payable) is amended to nil.
>
> Please confirm receipt of these amendments and make repayment of the tax overpaid as soon as possible."

31. This is the first mention, so far as I am aware, of the loss carry-forward claim under section 343 ("**the section 343 claim**"). By way of explanation, in very broad terms, section 343 allows the loss of one company to be carried forward against the profits of the same trade of another company where, within certain limitations, the other company has begun to carry on the same trade as the first company and where the two companies are in substantially the same ownership.

32. The only earlier correspondence between the parties which was relevant to any transfer of the seafood trade to the appellant to which I was referred came in an e-mail from Mr Stuart Thomas to HMRC (Mr Read) on 16 March 2005. The e-mail was apparently in response to a letter dated 10 March 2005 from Mr Read which was not supplied to me. The e-mail read as follows:

> "I am in receipt of your letter date 10 March 2005. I refer to paragraph "C" of your letter. You have stated that I indicated to you on various occasions that I do not believe that [SSS] will continue to trade. For the

record I have never stated this on any occasion. As you well know I am neither a shareholder or a director of this company and nor am I an employee. I have no influence whatsoever over what the Company will do in future. I never stated that my company, [the appellant], was set up to take over the trade of [SSS]. I formed my company a year ago to exploit new opportunities that I had personally identified and I have provided almost all the funding for this company. I made my position very clear to you during our telephone conversation in December.

In any event I will remind you that as part of the settlement negotiations you expressly indicated that the Revenue wished to see any business in which either my brother or myself were involved brought under our direct control and ownership in the UK. I have sought to comply with your request so as to avoid disputes in the future. I have told you many times, including today, that I want to run my business affairs in a simple and straightforward manner.

I have no contractual or fiduciary obligations to [SSS] whatsoever. However, I do agree with Mr RC Thomas that the jeopardy amendments are completely unjustified and would appear to be yet another example of your abuse of power.

It has already been demonstrated that you are prepared to mislead the General Commissioners. In future please do not distort what I have said to you in meetings or telephone conversations.

Best regards,

Stuart"

33. Apart from the combative tone of the e-mail (which will be repeated in subsequent correspondence between Mr Thomas and Mr Read's successor, Mr Stewart), I note that there is no reference in this e-mail to the tripartite transaction which the appellant says took place on 22 September 2004.

34. On 30 March 2007, HMRC (Mr Stewart, who had now taken over from Mr Read) responded to the letter of 5 March 2007 stating that he could not reconcile the loss figure of £2,156,915 available for carry forward from SSS. Mr Stewart, however, confirmed that, in his view, the common ownership test under section 343 in relation to SSS and the appellant had been met. In a subsequent letter dated 27 April 2007, Mr Stewart noted that he had been in correspondence as regards the losses reflected in the corporation tax computations submitted on behalf of SSS and stated that he could not agree that there was any loss to be transferred. Mr Stewart requested that matters should await the determination of the SSS loss.

35. On 27 April 2007, the appellant submitted its corporation tax self-assessment return and its unaudited accounts for the accounting period ended 30 April 2006 ("**the 2006 period**"). The return indicated that the appellant's profits chargeable to corporation tax were £370,298, reduced to nil by virtue of a claim for relief in the same amount in respect of losses carried forward under section 343 ICTA 1988. The accompanying corporation tax computation showed losses brought forward under section 343 in the amount of £2,108,388, losses utilised in the accounting period to 30

April 2006 in the amount of £370,298 and a balance of losses to be carried forward to future periods of £1,738,090.

36. The accounts for the 2006 period noted that Mr Thomas had been appointed the company secretary on 12 February 2007. The accounts were again prepared by Mr Norris. The principal activity of the appellant was described as the "purchase and distribution of seafood." Mr Stuart Thomas was the only director. In the accountant's report, Mr Norris made clear that he had not verified the accuracy or completeness of the accounting records or information and explanations that the appellant had given him.

37. In the profit and loss account, the appellant's turnover had risen to £2,421,274 resulting in a gross profit of £966,805, an operating profit of £346,848 and a profit on ordinary activities before taxation of £365,610.

38. The balance sheet showed, under the heading Fixed Assets, Tangible assets of £14,193. Called up share capital remained at £100,000 and the Equity Shareholders Funds amounted to £849,946. The balance sheet (and the notes to the accounts) made no mention of goodwill or intangible assets. Depreciation in respect of tangible fixed assets for the year was £4,638.

39. By letters dated 19 March 2008, Mr Stewart opened enquiries in respect of the appellant's corporation tax returns for the periods ended 9 March 2005, 30 April 2005 (both returns as amended by Mr Stuart Thomas's letter of 5 March 2007) and the 2006 period. Essentially, Mr Stewart was enquiring into the availability of the section 343 carried forward loss claims in those (amended) returns. Mr Stewart asked for further information in respect of the section 343 claims. In addition, in relation to the accounts for 2006 period, Mr Stewart raised an issue in relation to a certain pension contributions – a topic to which I shall return later and which is no longer the subject of dispute between the parties.

40. On 29 May 2008, Mr Stewart issued notices under paragraph 27 Schedule 18 Finance Act 1998 ("**FA 1998**") requiring the information previously requested of the appellant in relation to the section 343 claim. These notices were given in respect of the periods ending 9 March 2005, 30 April 2005 and the 2006 period. This information notice asked the appellant to inform HMRC:

> (1) of the basis on which the common ownership test contained in section 343 was satisfied;
>
> (2) how the section 343 claim could be reconciled with the e-mail from Mr Stuart Thomas of 16 March 2005; and
>
> (3) whether the appellant agreed that there was no loss to be carried forward from SSS.

41. On 11 July 2008 Mr Thomas wrote to Mr Stewart, in response to the information notices, as follows:

> "…

> 2) It is a matter of fact that there is no difference between the seafood trade previously carried on by [SSS] and [the appellant]. Stuart Thomas's intentions when he formed this company have no bearing on the facts at the time that the trade was taken over from the predecessor. *The facts overwhelmingly pointed to the transfer of the trade from [SSS] to this company*. Your argument that there is a difference between the trade of "seafood suppliers" and the trade of "the purchase and distribution of seafood" is frankly absurd. What is the substantive difference between the act of "supplying" and "distributing"? Is it not wholly obvious that a "seafood supplier" must in the normal course of its business engage, as well, in "the purchase of seafood"? Regardless of the exact wording both companies described their respective trades in their returns to Companies House in identical terms under the SIC code 1520. For the avoidance of doubt we do not accept, *and the facts do not support your argument that there was no transfer of trade from [SSS] to this company*."[My emphasis]

42. It seems to me that the final sentence of Mr Thomas' letter was an odd thing to say if what, in fact, had happened was that there had been a tripartite transaction. The implication of Mr Thomas' words is that there was a transfer of the seafood trade from SSS to the appellant.

43. The appellant applied to the General Commissioners on 18 August 2008 for closure notices in respect of the periods ending 9 March 2005, 30 April 2005 and 30 April 2006. Following a hearing on 8 October 2008, the General Commissioners directed HMRC to issue closure notices on or before 30 November 2008. In the course of the proceedings before the General Commissioners, Mr Thomas conceded that both he and Mr Stuart Thomas were beneficiaries under the MacLennan Trust but denied that they were settlors of that Trust.

44. In a fax dated 14 October 2008 Mr Thomas wrote to Mr Stewart as follows:

> "Further to our meeting prior to the hearing in Wokingham at 10 AM Wednesday, 8 October 2008 [presumably the hearing before the General Commissioners] we write to record the terms of our agreement as regards the beneficial ownership of the two companies [SSS] (dissolved) and [the appellant]: that, for the purposes of ss 343 and 344 ICTA 1988, we and HMRC have agreed that both companies were beneficially owned by RC Thomas [Mr Thomas] and Stuart Thomas at the time of the transfer of the trade and that the common ownership test was accordingly met."

45. Mr Stewart replied on 15 October 2008 querying exactly what had been said before the General Commissioners about the ownership of SSS and the appellant. In the final paragraph of his letter Mr Stewart referred to the fact that Mr Stuart Thomas had provided him with some copy sales invoices for both the appellant and SSS immediately after the hearing by way of evidencing that the two companies carried on the same trade. Mr Stewart's letter read as follows:

> "Invoice number 03500 dated 21 September 2004 seems to have been the first [appellant] invoice. If that is so, I am all the more confused as

> to how [Mr Stuart Thomas] could have been so unequivocal in his e-mail of 16 March 2005 (six months later) to Read. Was number 03500 the first invoice? Will you for the record let me know the precise date on which the trade of [SSS] was transferred to [the appellant]?"

46. It will be noted that the invoice dated 21 September 2004 predates, by one day, the date on which the appellant claims the transfer of the seafood trade took place under the tripartite transaction.

47. HMRC duly issued closure notices to the appellant in respect of 9 March 2005, 30 April 2005 and 30 April 2006 on 28 November 2008, in accordance with the directions of the General Commissioners. Essentially, the closure letters stated that Mr Stewart was not satisfied as a result of his enquiries that there was a loss available to be carried forward from SSS and, moreover, Mr Stewart was not satisfied that the common ownership test contained in section 343 and 344 ICTA 1988 had been satisfied. The final paragraph of each closure notice stated: "I invite the company to amend the return that has been the subject of enquiry."

48. Mr Thomas replied on 1 December 2008 disagreeing with Mr Stewart's conclusions and declining to make the amendments to the appellant's returns that Mr Stewart suggested.

49. Pausing at this point, the dispute in this correspondence between the Appellant and Mr Stewart related almost entirely to the section 343 claim (apart from the point in relation to the 2006 period in relation to pensions). At no point did the question of any claim for deductions in respect of the purchase of goodwill by the Appellant arise.

50. In Mr Thomas' witness statement Mr Thomas explained that the reason why the appellant had failed to claim a deduction in respect of the amortisation of goodwill in its first returns was because it was unaware that it could make such a claim. Mr Thomas further stated that even when the appellant did become aware, it was reluctant to claim for intangibles relief:

> "…until the related party issue had been agreed or determined. After a long enquiry, HMRC did eventually agree that Stuart and I were not related parties of SSS on 31/10/2007, even if we were to be treated as settlors and/or beneficiaries of the MacLennan Trust."

51. Accordingly, HMRC issued amendments to the returns, for the periods ended 9 March 2005, 30 April 2005 and 30 April 2006, on 5 January 2009.

52. The appellant appealed to the General Commissioners, and, after discussion, it was decided that the appeals would be transferred to the Special Commissioners.

The accounting period ended 30 April 2007- he correspondence and corporation tax returns

53. In the meantime, the appellant had filed its corporation tax self-assessment return, accounts and tax computation for the period ended 30 April 2007 ("**the 2007 period**") on 28 April 2008.

54. The corporation tax return and the tax computation contained a section 343 carry forward loss claim in the amount of £742,880, reflecting losses which the appellant claimed had been brought forward from SSS.

55. The un-audited accounts for the period ended 30 April 2007 again showed Mr Stuart Thomas as the director and Mr Thomas as the company secretary. The accounts were, as in previous years, prepared by Mr Norris. The appellant's activities were described as "the purchase and distribution of seafood and moneylending as a trade." Thus, it is clear that in the year to 30 April 2007 the appellant had begun a new activity involving moneylending. I know very little about this activity and make no finding as to whether it constituted a trade, although to the extent that it did constitute a trade, I assume it would be a separate trade from the seafood trade.

56. The profit and loss account showed a turnover of £2,338,437 and a gross profit of £1,015,948. The operating profit was £629,864 and the profit before taxation was £580,628. In Note 4 there was a charge to "Depreciation and amortisation: Goodwill" of £222,570 (with no corresponding entry under that head for the year to 30 April 2006). In addition, further amounts in respect of depreciation and amortisation included 17,367 in respect of tangible assets, bringing the total amount of depreciation and amortisation to £239,937.

57. The Balance Sheet, under the heading Fixed Assets, showed "intangible assets" of £1,335,421. Note 8 was headed "Intangible Fixed Assets" and read as follows:

	Goodwill **£**
Cost	
Additions	1,557,991
	1,557,991
Depreciation	
For the year	222,570
At 30 April 2007	222,570
Net Book Amounts	
At 30 April 2007	£1,335,421

58. Underneath these figures, in Note 8, the accounts stated: "The Director has elected to write off goodwill over 7 years in equal instalments."

59. Note 13 to the accounts under the heading "Other creditors" included an amount of £1,756,484 as a liability (increased from the corresponding figure for 2006 of £187,395 i.e. a net increase of 1,569,089).

60. The accompanying tax computation for the year ended 30 April 2007 showed an amount of £239,937 as "Depreciation" set against the profits of the seafood trade, of which £17,367 was added back. In other words, reading the tax computation together with the accounts, £222,570 was deducted from the appellant's profits chargeable to corporation tax in respect of depreciation/amortisation of goodwill.

61. This, then, was the first mention in relation to the appellant of its claim to have acquired goodwill. It is to be noted, however, that there is no mention of goodwill being purchased in September 2004.

62. Not surprisingly, perhaps, Mr Stewart wrote on 12 December 2008 notifying the appellant that he intended to enquire into its return for the period ended 30 April 2007. Mr Stewart noted that the amount of £1,557,991 referred to in Note 8 to the appellant's accounts was exactly the same as that shown in Note 11 to the SSS accounts to be outstanding in respect of "directors current accounts (including related parties)" at 31 January 2005. Mr Stewart requested information and documentary evidence in support of the claim to relief for the acquisition of goodwill for £1,557,991.

63. No information or documentary evidence having been forthcoming from the appellant, Mr Stewart issued an information notice under paragraph 27 Schedule 18 FA 1998 on 26 January 2009. This notice, *inter alia*, required the appellant to give information in relation to the claim for an amortisation deduction in respect of the purchase of goodwill, including the circumstances in which goodwill was valued at £1,557,991 at some point in the 2007 period (whilst noting that SSS's goodwill had been valued at nil as at 31 January 2005). Mr Stewart also asked for an analysis of the "Other creditors" in Note 13 amounting to £1,756,484.

64. The appellant appealed against this information notice on the basis that it required the appellant to provide opinions rather than information and noted that, in its opinion, HMRC was acting oppressively.

65. Mr Stewart then issued what is known as a "precursor" notice (section 20 B (1) TMA 1970) to Mr Norris, the accountant who had prepared the appellant's accounts, seeking information in respect of the appellant's accounts for the period ended 30 April 2007. Mr Norris, by this time, was no longer acting for the appellant.

66. On 3 April 2009 Mr Norris sent Mr Stewart his working schedules in relation to the 2007 accounts. A manuscript working paper entitled "Schedule 6" read as follows:

"Write off over 7 years (assumption	
companies not related for depreciation)	1,557,991
Depreciation charge 2007	222,570

Book Value 30/04/07	1,335,421

> Treat transferred from [SSS] to [the appellant] together with the liability of the directors loan amounting to £1,557,991. The goodwill is the balancing entry in the accounts."

67. This note suggests to me that Mr Norris had been informed that the seafood trade had been transferred directly from SSS to the appellant. It also suggests to me that Mr Norris had been informed that the transfer of the seafood trade had taken place sometime in the 2007 period and that the assumption of the director's loan account liability was part of the consideration.

68. On another manuscript working paper entitled "Schedule 9" Mr Norris had written:

"Directors current account	
Mr [Stuart] Thomas	1,741,798.96
Salaries 2005/06	14,685.00
	1,756,483.96

> Includes liability transferred from [SSS] of £1,557,991 on transfer of the trade to [the appellant]"

69. Mr Stewart questioned Mr Norris in a letter dated 2 June 2009 about a statement he had made in a letter dated 28 May 2009 in which Mr Norris had suggested that, although he did not know the exact date, the goodwill may have been purchased on 27 April 2007, when SSS was officially dissolved, even though SSS had ceased to trade two years before that date. Mr Norris had said that: "The figure was provided by Mr Rod Thomas based on his calculation of the amount outstanding to the director."

70. In a letter dated 15 July 2009 Mr Norris, after confirming he had not seen any sale documentation relating to the transfer of the trade, replied:

> ""I understood that the tax losses in [SSS] were not finalised before 2007 hence the delay in reflecting these transactions in [the appellant's] accounts.
>
> …
>
> The question of the director's loan transferred from [SSS] was discussed before our meeting on 18 February 2008 in particular how this transaction should be reflected in the accounts of [the appellant]. My recollection is that the transaction was only confirmed at the meeting on 18 February 2008."

71. Mr Stewart pressed Mr Norris for further information about the meeting of 18 February 2008. Mr Norris replied in a letter dated 2 September 2009:

> "The question of the director's loan and the corresponding book entries was only discussed hypothetically before our meeting on 18 February 2008 and therefore I did not make any notes of our discussion."

72. In response to further questions from Mr Stewart, Mr Norris stated in a letter dated 29 September 2009 as follows:

> "I was informed that [the appellant] had purchased the business and trade of [SSS] and that the loan transferred with the business was £1,557,991. The only "asset" transferred was the tax losses which in my view is an intangible asset. This all as set out in Mr SJ Thomas's letter to HMRC dated 5 March 2007. The goodwill reflects the tax losses in the accounts of [the appellant] and as an amount equal to the loans transferred."

73. In a subsequent letter dated 25 December 2009, Mr Norris suggested that the reason why the appellant may have paid for tax losses (to which it was already entitled by virtue of the operation of section 343 ICTA 1988) was because SSS was controlled by trustees. Mr Norris also confirmed:

> "The amount of the goodwill is equal to the directors loan transferred to [the appellant] and as far as I am aware was not the subject of a valuation."

74. In a further letter dated 4 March 2010 Mr Norris stated:

> "The question of the transfer of loans arose when the 2007 accounts were being finalised and was not raised as an issue before then. Again I believe that the reason was the final position of [SSS] was not settled until that time."

75. Having completed his enquiries of Mr Norris, and apparently having received no further information from the appellant, Mr Stewart issued a closure notice under paragraph 32 Schedule 18 FA 1998 in respect of the 2007 period on 18 June 2010. The closure notice concluded that the appellant's return as regards the calculation of taxable profits had to be adjusted in two respects. First, Mr Stewart disallowed the claim to loss relief under section 343 in the amount of £742,880. Mr Stewart did not consider that there was a loss available for relief at the cessation of the trade of SSS. Moreover, Mr Stewart did not consider that the appellant's submissions had established that all the conditions of section 343 ICTA 1988 had been met; in particular, Mr Stewart was not satisfied that the common ownership test was satisfied. Secondly, Mr Stewart also disallowed the intangibles relief claim of £220,570. As regards the intangibles relief claim, Mr Stewart said:

> "Secondly, the company accounts for the period ended 30 April 2007 reflect the acquisition of goodwill costing £1,557,991 in that period. The company has claimed relief of £220,572 goodwill purchased written off; effectively intangibles relief, for this claimed acquisition. I conclude that there is no valid claim to intangibles relief and that the £220,570 falls to be disallowed."

76. Having set out his conclusions in the closure notice letter, Mr Stewart amended the return for the period ended 30 April 2007 and a copy of the amended return was attached to the closure notice of 18 June 2010.

77. In drafting the closure notice letter, Mr Stewart used earlier closure notices as a template. He stated his conclusion in the following words:

> "I therefore conclude that the corporation tax profits for the period ended 30 April are £965,450 in accordance with the enclosed copy of assessment. The trade profits are £948,364, being the £725,794 reflected in the return (not now covered by the section 343 relief), plus £220,570, being the amortisation charge disallowed."

78. In the next sentence – the final paragraph of the letter – Mr Stewart wrote: "I invite the company to amend the return that has been the subject of enquiry." This was a mistake, as HMRC freely admitted in its Statement of Case, because paragraph 32 Schedule 18 FA 1998 had been amended from 1 April 2010, from which time there was no requirement to ask a company to amend its return – the return had already been amended on 18 June 2010.

79. What came next was no doubt a bit of a surprise to Mr Stewart. Mr Thomas, on behalf of the appellant, wrote to Mr Stewart on 23 June 2010. The heading of the letter indicated that it was an appeal against both the information notice issued under paragraph 27 Schedule 18 FA 1998 and against the closure notice issued under paragraph 32 Schedule 18 FA 1998 in respect of the accounting period ended 30 April 2007. There is no need for me to consider the dispute about the information notice. As regards the closure notice of 18 June 2010, the letter stated:

> "[W]e do not agree with your arbitrary conclusions and hereby give notice of appeal against your closure notice on the grounds that the company is entitled to utilise the losses in respect of the trade of [SSS] (dissolved) and is entitled to relief in respect of the amortisation of goodwill acquired.
>
> However, in view of your final paragraph this is academic. We accept your invitation to amend return and the return is amended as follows: we are increasing the amortisation figure in respect of the annual write-off of goodwill by £1,777,340 to reflect the market value of the goodwill acquired. Accordingly we are reminding our return for the period ended 30/4/07 as follows: Box 3 as amended to a loss of (£1,051,636); box 4 is amended to nil; our CTSA of tax payable in box 86 is un-amended at nil. We are treating the appeal is settled in accordance with these amendments and pursuant to your invitation."

80. No calculations or supporting documentation was put forward by Mr Thomas to support the increased annual amount for depreciation of goodwill. Thus the amortisation in respect of goodwill claimed in the 2007 period was increased by £1,777,340 from the original amount of £239,937 to a total amount of £2,017,377.

81. Mr Stewart replied on 23 July 2010 that he had "self-evidently" been inviting the appellant to amend its return in accordance with his conclusions as set out in his closure notice of 18 June 2010.

82. On 26 July 2010 Mr Thomas replied to Mr Stewart and the following terms:

> "Your invitation for us to amend our returns for both periods was not made pursuant to any current statutory power. Without prejudice to the invalid terms of your notice in respect of p/e 30/4/08, it might have been appropriate to have made such an invitation pursuant to the terms of the rules that obtained prior to 1/4/10 but under the powers in force at the time you issued your closure notices there was no requirement for you to "invite" the company to amend its returns (see FA 2008 s 119 (3) and SI 2009/405). Accordingly your invitation was not made pursuant, or subject, to the statutory provisions of any part of the Taxes Acts and is not subject to the conditions of para 15. We have made our amendments pursuant to your extra-statutory invitation and they stand. We will leave you to explain why you tendered the invitation and we will argue that you are bound by our amendments in any future proceedings."

83. In the event, the appellant has not pursued the argument that HMRC were in some way bound by some kind of extra-statutory invitation to amend its return in whatever way the appellant saw fit. I have no doubt that the appellant was correct not to pursue this point, one which seemed to me to be absurd. The invitation extended by Mr Stewart in the closure notices of 18 June 2010 was clearly intended as an invitation to amend the relevant returns in accordance with the conclusions set out in a letter.

84. Nonetheless, the appellant maintained its claim to an annual amortisation deduction of approximately £2 million (based on an approximate valuation of goodwill allegedly purchased by the appellant of £20 million) throughout the hearing, and only abandoned this valuation in the course of closing submissions when Mr Thomas adopted Mr Taub's more conservative valuation of £6.39 million.

85. The appellant submitted its notice of appeal to the Tribunal, in respect of the closure notice relating to the period ended 30 April 2007, on 6 April 2011. I shall come back to this Notice of Appeal, because it contained the first intimation of the alleged tripartite transaction whereby SSS is said to have transferred its seafood trade and related goodwill to Messrs Thomas, who then on-sold sold it to the appellant for a market value consideration (the goodwill being valued in the Notice of Appeal at £20 million). The Notice of Appeal read as follows:

> "The company is entitled to loss relief under section 343 ICTA 1988 on the grounds that the common ownership test has been met.
>
> The company is entitled to claim intangibles relief of £2m per annum in respect of the goodwill relating to the trade of [SSS] acquired in 2004 from Messrs RC & SJ Thomas for "market value". The company estimates the market value of the goodwill at £20m."

86. This Notice of Appeal was, of course, sent to the Tribunal and not to HMRC.

87. HMRC first learnt about the alleged tripartite transaction in a letter from Mr Thomas to Mr Stewart dated 8 April 2011. In that letter Mr Thomas wrote:

> You have asked [apparently in a letter dated 1 April 2011 from Mr Stewart which was not provided to me] 'what happened between the end of July 2002 and 31 January 2005 that made you beneficiaries.' In accordance with our without prejudice agreement with HMRC to break up the trust structure and to bring the trade into UK ownership, the trade and stock of [SSS] was transferred to Messrs RC & SJ Thomas on 22 September 2004. On the same day the trade was purchased from us by [the appellant]. The price for the goodwill was fixed at "market value" as determined in the first instance by agreement with the Inland Revenue, or an appeal to the General Commissioners (now the Tax Tribunal) or, failing which, as determined by a suitably qualified accountant appointed by agreement between the parties. Accordingly we became beneficiaries on 22/9/04….

88. Mr Stewart replied on 9 May 2011, so far as material, as follows:

> "I have read again the correspondence, to include notes of meetings, in the six months or so leading to the contract agreement of 24 May 2004 and conclude that the side letters to the contract reflect the issues raised and discussed by both sides. Moving forward, you wrote to me on 11 January 2007 to say that "the trustees have agreed to close down Bala Ltd and to distribute its assets to the beneficiaries, which include the shares held in [SSS]. We are content to accept this appointment and take possession of the valueless shares in [SSS], for the practical purpose of cleaning matters up." You then wrote to me on 2 April 2007 saying that "the trustees did agree to close down Bala Ltd and transfer the shares in [SSS] to Stuart and I in equal proportion on 14/02/07 (I attach a copy of the relevant transfer document in relation to myself). My understanding is that Bala held no assets other than the shares". As said on a number of occasions; the [SSS] shares were transferred to you for NIL consideration on 14 February 2007. This was in keeping with the terms of the side letter albeit after the date of 31 December 2004 referred to in that letter.
>
> Whilst I can see that you are using your own form of words in referring to an "agreement with HMRC to break up the trust structure", there is no reference at any time in the correspondence or meetings to "and bring the trade into UK ownership". The [SSS] accounts to the date of cessation of trade on 31 January 2005 make no reference to the transfer of trade to you and Mr SJ Thomas on 22 September 2004. "

89. On 26 May 2011 Mr Thomas wrote to Mr Stewart, as far as material, as follows:

> "….
>
> I think that Mr Norris has a poor grip on the statutory provisions and the background to the transfer of the trade. He was not under an obligation to carry out an audit of the company's accounts and, by his own admission, he is not a tax expert. Furthermore, given that he quoted only £500 to prepare the accounts I suppose, in retrospect, he could not really afford to devote that much time to the task.

> Nonetheless, he should have allowed for deductions for intangibles relief in the tax computations of the company in the first CT return for the period ended 9/3/2005 and four ensuing periods. He did not. As you know, Mr Norris no longer acts for us. Fortunately, the relevant periods are still open and the matter can be determined by the FTT or by agreement under s54.
>
> ….
>
> …[O]n the basis that [the appellant] took over the trade and assets on 22/9/04 we wish to claim relief of £2,393,541 in respect of our return for P/E 9/3/05. We wish to amend our grounds of appeal for P/E 9/3/05 to reflect this and will seek a determination from the FTT that we are entitled to such relief."

90. Thus, Mr Thomas sought to put the blame for the failure to claim intangibles relief on Mr Norris. However, as we have seen from correspondence between Mr Stewart and Mr Norris it appears that Mr Norris was only informed by Mr Thomas of a transaction involving the acquisition of goodwill by the appellant when the 2007 accounts came to be prepared.

The accounting period ended 30 April 2008- the correspondence and corporation tax returns

91. Meanwhile, the appellant had submitted its self-assessment corporation tax returns and accounts for the period ended 30 April 2008 ("**the 2008 period**") to HMRC on 3 April 2009.

92. The return contained a claim for a carried forward loss of £685,769 under section 343 ICTA 1988. In addition the appellant's accounts contained a deduction for "goodwill purchased written off" of £222,570. It will be recalled that this was before the increase in the goodwill amortisation claim signalled by Mr Thomas' letter of 23 June 2010 (paragraph 78 above).

93. The tax computations in respect of the seafood trade for the 2008 period and disclosed a turnover of £1,698,221, gross profit of £784,123 and a net profit before tax (after deducting depreciation, including the £222,570 in respect of goodwill) of 544,276. To be precise, the depreciation figure was £240,887 which, in addition to the depreciation for goodwill, included depreciation of various tangible fixed assets amounting to £18,317. The depreciation of £18,317 was added back in calculating the taxable profits. The taxable profits of the seafood trade were calculated to be £562,843 which were offset by carried forward losses (the section 343 claim), leaving taxable profits of nil.

94. On 8 April 2010, Mr Stewart issued an enquiry notice to the appellant under paragraph 24 Schedule 18 FA 1998 in respect of the 2008 period. The enquiry notice queried the section 343 claim as well as the deduction in respect of the relief claimed in respect of amortisation of purchased goodwill. However, as we shall see, HMRC now accept that this enquiry notice was never received by the appellant.

95. On 18 June 2010 (the same date as the closure notice for the accounting period ended 30 April 2007), Mr Stewart wrote to the appellant informing it that he had completed his enquiry for 2008 period. This closure notice noted that no reply had been received to Mr Stewart's letter of 8 April 2010. The letter noted that the issues raised were, in effect, the same as those for the period ended 30 April 2007. First, HMRC challenged the validity of the section 343 claim to a brought forward loss of £685,769. Secondly, HMRC disputed the validity of the claim to intangibles relief for amortisation in respect of goodwill written off of £222,570. The closure notice therefore disallowed both claims to relief.

96. In a letter dated 21 June 2010, Mr Thomas replied by fax to Mr Stewart's closure notice of 18 June 2010 stating that the appellant had not received the enquiry notice of 8 April 2010. Mr Stewart sent the 8 April 2010 enquiry notice to the appellant by fax on 21 June 2010. In a letter dated 22 June 2010 the appellant appealed against the closure notice on the grounds that HMRC had failed to notify the appellant within the time limits prescribed under paragraph 24 Schedule 18 FA 1998 – the relevant corporation tax return was posted on 3 March 2010 and therefore the enquiry window in respect of that return had closed.

97. In a letter dated 24 June 2010, Mr Thomas wrote to Mr Stewart. In the final paragraph of that letter Mr Thomas referred to the closure notice issued by Mr Stewart on 18 June 2010 in respect of the 2008 period. Mirroring Mr Thomas's letter of 23 June 2010 as regards the 2007 period, the letter stated:

> "[I]n accordance with your invitation set out in your final paragraph we are amending our return for the p/e 30/4/08 as follows: we are increasing the amortisation figure in respect of the annual write-off of goodwill by £1,777,340; Box 3 is amended to a loss of (£1,091,571); box 4 is amended to nil; our CTSA of tax payable stated in box 86 is amended to nil."

98. In a letter dated 22 July 2010, Mr Stewart accepted that the correct test was whether the enquiry notice of 8 April 2010 had been delivered to the appellant. Although Mr Stewart was satisfied that the letter had been issued by HMRC on 8 April 2010, he accepted that because the appellant had not received the enquiry notice before the end of the enquiry window before 30 April 2010, the enquiry window had closed.

99. At the hearing it was common ground that, because the enquiry notice dated 8 April 2010 had not been delivered to the appellant, the closure notice in respect of the 2008 period was not valid.

100. On 10 December 2010 HMRC issued a consequential amendment of the appellant's return for the 2008 period amending the return by virtue of the two matters (i.e. the carried forward loss claim and the intangibles deduction for goodwill) that were the subject of the amendment of the return for the period ended 30 April 2007. The material part Mr Stewart's letter reads as follows:

> "The closure notice of 18 June in relation to period ended 30 April 2008 is to be totally disregarded…. I wrote on 22 July accepting that in the circumstances the company did not receive the notice within the enquiry window. I repeat though that I have been advised that the closure notice of 18 June for the period ended 30 April 2007 meets the terms of paragraphs 32 Schedule 18. The notice for the period ended 30 April 2008 is precisely the same but is to be disregarded for the reason given above. The notice for period ended 30 April 2007 informs the company that I have completed my enquiry. It refers to the matters that were the subject of enquiry and says my conclusions. I amended the return to give effective my conclusions. The notice meets the terms of paragraph 32. You wrote to me again on 24 June referring to the earlier appeals against the closure notices for periods ended 30 April 2007 and 30 April 2008. You referred to in the final paragraph of that letter to an amendment to the return for the period ended 30 April 2008 but I informed you in a second letter of 22 July that the company was out of time to amend the return for the period ended 30 April 2008.

101. Mr Stewart explained why he was disallowing the claim for a loss carry-forward under section 343 ICTA 1988 and the claim to a deduction of £222,570 in respect of "goodwill purchased written off". Mr Stewart explained that, as regards the section 343 claim, he did not accept that SSS had a loss at the cessation of its trade. As regards the deduction in respect of goodwill totalling £222,570 in the 2007 period and for the same amount in the 2008 period, Mr Stewart further explained that he did not consider that the appellant was entitled to the relief claimed in the 2007 period and therefore it was not entitled to the same relief in the 2008 period. Therefore, in Mr Stewart's view, there was a consequential amendment for the period ended 30 April 2008. As a result of the consequential amendment for the 2008 period, the appellant's taxable profits for corporation tax were revised to a figure of £804,562.

102. On 8 January 2011, the appellant appealed against HMRC's decision to amend the appellant's corporation tax return for the 2008 period on the basis that the appellant had been advised that the amendment was invalid. The letter stated that HMRC was not entitled to make an amendment because the enquiry window had expired by virtue of the failure by HMRC to give notice of enquiry on 8 April 2010.

103. On 28 February 2011, the appellant filed a Notice of Appeal with the Tribunal in respect of the 2008 period.

The accounting period ended 30 April 2009- the correspondence and corporation tax returns

104. The appellant submitted its corporation tax return, tax computations and accounts for the accounting period ended 30 April 2009 ("**the 2009 period**") to HMRC on 28 April 2010. The 2009 period is the last accounting period under appeal.

105. As before, Mr Stuart Thomas was the director and Mr Thomas was the company secretary of the appellant. The principal business of the company was recorded as the purchase and distribution of seafood and moneylending.

106. The tax computations recorded the turnover (as per the accounts) of the company as being £1,819,477. There was no apportionment between the seafood trade and moneylending trade. The tax computation merely gave global amounts. The gross profit and operating profit (as per the accounts) was recorded as £915,952 and £601,996 respectively. Net profit before tax was recorded as £591,749. From the net profit figure was deducted an amount of £445,140 which was labelled as "amortisation which should have been charged in previous periods (2005 & 2006)". After other deductions, the taxable profit was stated as £164,996 which was offset by the utilisation of brought forward losses of the same amount. After the offset of these losses the tax computations noted that a further amount of losses totalling £267,371 were available to be carried forward to later periods at 30 April 2009.

107. The appellant wrote to Mr Stewart on 28 July 2010 referring to its corporation tax return for the 2009 period. The appellant sought to amend its return for that period to reflect the write-down of the market value of goodwill which it said had been acquired by the company. Accordingly, in the same way as with the claim for the 2008 period, the appellant increased its claim to a deduction for intangibles relief in respect of goodwill to £2 million for the 2009 period. The letter was six lines long and gave no further details as to the underlying basis for the claim. In particular, there was no reference to the alleged tripartite transaction. It will be recalled that the tripartite transaction was not mentioned to Mr Stewart by Mr Thomas until Mr Thomas wrote to Mr Stewart on 8 April 2011.

108. Mr Stewart opened an enquiry into the return for the 2009 period by a letter dated 6 September 2010 querying the section 343 claim and the intangibles amortisation deduction for that year.

109. It is worth pointing out that in separate proceedings before the Court of Session in Scotland in relation to the restoration of SSS to the Register of Companies, HMRC gave an undertaking on 19 March 2010. I shall address the Undertaking in more detail later in this decision but it is worth noting the point in the chronology at which it was given.

110. Mr Stewart then issued a closure notice for the 2009 period to the appellant on 10 August 2011. In short, Mr Stewart amended the return by disallowing the section 343 claim and the deduction for intangibles relief of £2 million for that year.

111. The appellant appealed to HMRC on 5 September 2011 giving as its grounds for appeal the terms of the Undertaking which, the appellant argued, prevented HMRC from raising any further enquiries in relation to the trade of SSS.

112. Mr Stewart replied to the appellant on 29 September 2011 expressing his view that the Undertaking had no application to the appellant.

113. There followed further correspondence between Mr Thomas and Mr Stewart but, except as set out below, I do not propose to summarise it because for the most part it merely rehearses the arguments of the parties, particularly as regards the Undertaking, and does not add to an understanding of the underlying facts.

114. I should, however, refer to the involvement of RSM Tenon. On 30 March 2012, Mr Thomas wrote to Mr Stewart informing him that the appellant had instructed Mr Barnard of RSM Tenon to act for it in relation to agreeing a market value of the seafood trade.

115. On 29 July 2013, the appellant's advisers, RSM Tenon, sent a memorandum to HMRC attaching what was described as a minute of a board meeting of the appellant held in Reading on 22 September 2004 ("the Minute"). The Minute reads as follows:

> "Present: Stuart Thomas (Director); Roderick Thomas (Company Secretary)
>
> The company resolved to purchase the trade and stock of [SSS] from Messrs. RC & SJ Thomas on 22/9/04. The stock is to be purchased at the purchase price or cost of production. The price for the goodwill in the trade has been agreed at "market value" as determined in the first instance by the Inland Revenue (or General Commissioners) failing which, as determined by a suitably qualified Chartered Accountant by agreement between the parties.
>
> It is understood that Messrs. RC & SJ Thomas have acquired the trade of [SSS] today as part of the agreement with the Inland Revenue dated 24/5/04 to distribute all the assets (to them and their respective wives) held in the MacLennan Trust structure."

116. The Minute was signed by Mr Thomas as company secretary.

117. Apart from the Minute, RSM Tenon acknowledged that there was no formal agreement documenting the transfer of the trade from Messrs Thomas to the appellant.

Invoices and other evidence of a transfer of trade

118. RSM Tenon's memorandum of 29 July 2013 also attached a variety of documents which, they submitted, indicated that SSS's trade had been transferred to the appellant.

119. First, the accounts of SSS for the 18 months ended 31 January 2005 recorded that the company had ceased to trade on 31 January 2005.

120. Secondly, there were e-mails from Mr Stuart Thomas in December 2004 and January 2005 notifying trading partners of a change in company details and supplying contact details for the appellant. There were also e-mails dated 3 January 2005 to various business partners giving the new details of the appellant (address, telephone and fax numbers, e-mail addresses, company registration number, VAT number and bank account details) which were expressed be "effective 1.1.05."

121. Thirdly, there was an e-mail dated 18 July 2013 from Mr Thomas to Mr Barnard enclosing "e-mails regarding the advice the changing payment/bank details sent to various customers attesting to the transfer of the trade from [SSS] to [the appellant]." I noted that there was no mention in this e-mail of a transfer from SSS to Messrs

Thomas and by Messrs Thomas to the appellant, but this may have been a shorthand way of referring to the tripartite transaction.

122. The e-mail dated 18 July 2013 also enclosed an e-mail from Stuart Thomas dated 4 January 2005 to trading partners enclosing final statements for SSS and new statements for the appellant. The e-mail requested that payments to the appellant should go to the correct bank account.

123. Fourthly, there were a number of invoices from SSS and from the appellant to customers, although it was apparent that I had not been provided with a complete set of invoices for either SSS or the appellant. The last invoice from SSS was dated 29 July 2004 and the first invoice from the appellant was dated 24 September 2004. The invoices were very similar in content and dealt with the supply of different quantities and types of fish. Many of the customers were common to both SSS and the appellant.

124. There was also a letter from HMRC dated 12 January 2005 to the appellant indicating that the business had been recently registered for VAT. In addition, there was a VAT return submitted by the appellant for the three month VAT period ended 04/05 showing total sales of £681,643 which was dated 19 May 2005. Also, there was a letter dated 8 April 2005 from HMRC to the appellant in respect of the first return period ending 31 January 2005 reducing the net amount repayable to the appellant in respect of its first VAT return. The first VAT return for this period (i.e. 01/05) disclosed sales of £836,194.

125. Finally, there were a number of bank statements for SSS and the appellant. The last bank statement for SSS went up to 24 March 2005 and there was activity on the account in January and February 2005. The appellant had a different bank account from SSS. This account appeared to have been active from 24 October 2004 with significant trading activity in November 2004.

126. It seemed to me that these documents indicated that the seafood trade carried on by SSS ceased at some stage between September 2004 and February 2005 and during that period came to be carried on by the appellant. The impression created by the documents was, however, that there was a gradual migration of the trade rather than an outright transfer of the trade at a specific date. I was, however, satisfied that the trade which the appellant began to carry on was the same trade as that previously carried on by SSS.

The Undertaking

127. I have referred above to the Undertaking which was given in connection with a petition by HMRC for the restoration of SSS to the Register of Companies.

128. SSS was struck off the Register of Companies under section 652(5) of the Companies Act 1985 on 8 August 2007 and was finally dissolved on 17 August 2007. On 22 July 2008, HMRC presented a petition in the Court of Session in Edinburgh for restoration. The background to HMRC's petition was that HMRC considered that SSS had certain outstanding liabilities to PAYE and National

Insurance Contributions. Mr Thomas resisted HMRC's petition but the Court of Session allowed HMRC's petition and SSS was restored to the Register of Companies on 16 March 2011.

129. In the course of the proceedings before the Court of Session HMRC gave the following undertaking on 19 May 2010:

> " That upon the restoration of the Company to the Register HMRC will forthwith (that is to say as soon as is practicable within the requirements of the Taxes Acts and applicable regulations and procedures) issue closure notices and assessments in respect of the outstanding enquiries into the Company's liabilities. The Revenue will a) make no further demands of the Company's officers or any other person in relation to the said outstanding enquiries, and b) raise no further enquiries into the Company's trade to the date that ceased namely 31 January 2005. The Company may appeal any assessments made on the issue of the said closure notices, if so advised. Apart from assessments made on the closure of the said enquiries the Revenue will have no power to, and will not, raise any assessments on the Company in relation to the said trade to the said date save on the discovery of fraudulent or negligent conduct on the part of the taxpayer within the meaning of s. 29 of the Taxes Management Act 1970, and has no present reason to anticipate making any such discovery or discovery assessment."

130. As we shall see, there is a dispute about the meaning of the Undertaking. In his closing submissions Mr Thomas accepted (having previously argued for a wider meaning, which would have restricted HMRC's ability to question the appellant's deductions in relation to the amortisation of goodwill), that the scope of the Undertaking should be narrower, viz that it restricted HMRC's ability to enquire into the quantum of losses to be carried forward under section 343 ICTA 1988.

The valuation of goodwill

131. The appellant contends that the effect of the Minute (22 September 2004) was that the appellant agreed to buy the seafood trade from Messrs Thomas for an amount equal to its market value. Accordingly, I heard expert evidence in relation to the market value of the seafood trade and, in particular, in relation to the market value of the goodwill attached to that trade.

(a) The evidence of Mr Taub

132. Mr Michael Taub is a partner in the accounting firm Baker Tilly. He is a Fellow of the Institute of Chartered Accountants in England and Wales and is a practising member of the Expert Witness Institute and the Academy of Experts.

133. Mr Taub gave expert evidence on the instructions of the appellant. He had been retained by the appellant to prepare a valuation of the goodwill of SSS as at 22 September 2004.

134. Mr Taub summarised the profit and loss accounts of SSS for the three years to 31 July 2003 and the 18 months to 31 January 2005 as follows:

	Y/E 31/07/01 £000	Y/E 31/07/02 £000	Y/E 31/07/03 £000	18 months to 31 January 2005 £000
Turnover	3,231	3,781	1,341	2,534
Cost of sales	(2,388)	(2,471)	(1,653)	(1,729)
Subtotal	**843**	**1,310**	**1,312**	**805**
Other income	42	60	29	12
Subtotal	**885**	**1,370**	**1,341**	**816**
Directors' remuneration	(4)	(7)	(3)	(9)
R & D	(270)			
Management charges		(200)	(203)	
Provision released			500	
Depreciation	(7)	(12)	(405)	(2,440)
Finance costs	(12)	0	0	5
Other expenses	(152)	(202)	(184)	(318)
Net Profit/(loss)	**441**	**949**	**1,046**	**1946**

135. The profit and loss accounts of the appellant for the period to 30 April 2005 and the year to 30 April 2006 (i.e. the period subsequent to the alleged transfer on 22 September 2004) were summarised as follows:

	The period 22/09/2004 to 30/04/2005	The year ended 30/04/06
Turnover	1,518	2,421
Cost of sales	(1,059)	(1,454)
Subtotal	**459**	**986**
Other income	0	19
Subtotal	**459**	**986**
Directors' remuneration		(5)
Staff pension contributions		(482)
Depreciation	(6)	(5)
Finance costs	(1)	(1)
Other expenses	(68)	(127)
Net profit/(loss)	**385**	**366**

136. Mr Taub summarised the net assets of SSS as at 31 July 2003 as follows:

	£000
Intangible assets	2,395
Tangible fixed assets	42
Cash	936
Owed by director	424
Other current assets	518
Subtotal	**4,315**
Owed to director	(875)
Other liabilities	(1,165)
Total net assets	**2,275**

137. Mr Taub confirmed that he had not seen any contracts of employment in place between Mr Thomas or Mr Stuart Thomas, on the one hand, and the appellant on the other. SSS had no written contracts with any of its customers at 22 September 2004.

138. Mr Taub considered that the appropriate method of valuation of the seafood trade as at 22 September 2004, from which the valuation of goodwill could be derived, was to calculate the maintainable profit multiplied by a price earnings ratio applicable to the relevant business sector.

139. Mr Taub's evidence was that maintainable profits would normally derived by reference to the historical track record of the company concerned, as recorded in the accounts, but adjusted for material items that reflected non-arms' length dealing or which were not expected to recur. In his view, one of the most common items requiring adjustment in the case of a private company concerned directors' remuneration.

140. In calculating the appropriate price-earnings ratio account was normally taken of the number of factors, including the following

> (1) the risk associated with the business (the greater the risk the lower the multiple);
>
> (2) the "BDO PCPI" (a document issued quarterly on private company valuations). This document provided an average price-earnings ratio for private company transactions on a quarterly basis. It might, however, require adjustment insofar as the PCPI was not sector specific or may relate to very substantial private companies that would attract higher price-earnings ratios than smaller ones;
>
> (3) the price-earnings ratios applicable to equivalent listed companies. This would require adjustment as listed companies generally attracted higher price-earnings ratios than smaller private companies; and
>
> (4) the price-earnings ratios applicable to any comparable real transactions that occurred at approximately the time of the valuation.

141. Mr Taub concluded that the appropriate method of valuation of the seafood trade was to determine the maintainable profit multiplied by a price-earnings ratio. On this basis Mr Taub's valuation of goodwill was as follows:

Maintainable pre-tax profit (£000)	852
P/E ratio	7.5
Capitalised value of earnings (£000)	6,390
Surplus assets (£000)	0
Value of company (£000)	6,390

Book value of net assets (£000)	0
Value of goodwill (£000)	**6,390**

142. Mr Taub's assessment of maintainable profit was as follows:

Maintainable turnover (£000)	2,750
Gross profit (%)	40%
Gross profit (£000)	1,100
Overhead expenditure (£000)	(248)
Maintainable profit (£000)	**852**

143. Taking account of the information available to him, Mr Taub considered it reasonable to assume that as at 22 September 2004, a prospective purchaser would have assumed that turnover would have increased to above the level for the 12 months to 31 July 2004 but not necessarily to the level of the three preceding years. As regards gross profit percentage, for the three years to 31 July 2004 these were as follows: 2002 = 26.1%, 2002 = 34.6% and 2003 = 44.2%. On the basis of the information available to him Mr Taub considered that a 40% gross profit percentage was appropriate.

144. As regards directors' remuneration, Mr Taub was informed by Mr Thomas that the most likely buyer would be an existing seafood supplier. Such a purchaser would be required to pay an arm's length remuneration to a manager/director to perform the part-time role of Mr Thomas and the full-time role of Mr Stuart Thomas. Accordingly, Mr Taub assumed that figure for directors' remuneration of £120,000, which compared with the remuneration of the highest-paid director of £234,000 in respect of a comparator company called Seachill Ltd. Because Seachill Ltd was a much larger company, Mr Taub considered a lower figure for directors' remuneration to be appropriate. Mr Taub was informed by Mr Thomas that he and his brother would have been prepared to enter into service contracts and non-competition covenants with the appellant in the event of the sale of the seafood trade to a purchaser.

145. In relation to the price-earnings ratio the BDO PCPI for the third quarter of 2004 was 14.0, which was equivalent to a pre-tax price-earnings ratio of 9.4. Because this multiple was not industry or sector specific and tended to be focused primarily on larger private companies, Mr Taub considered that a lower ratio was appropriate. Having taken into account information available in relation to broadly comparable companies, Mr Taub considered that a pre-tax price earnings ratio of 7.0 – 8.0 was appropriate and settled on a ratio of 7.5.

146. Accordingly, taking all of the above into account, Mr Taub valued goodwill at £6,390,000.

147. It will, of course, be noted that Mr Taub's valuation was lower than that previously placed by Mr Thomas on the market value of the goodwill acquired by the appellant in correspondence with HMRC, which he estimated to be worth £20 million. In the course of his closing submissions Mr Thomas accepted that the valuation of the goodwill acquired by the appellant was not £20 million and he submitted that the correct valuation was that put forward by Mr Taub i.e. £6,390,000.

(b) The evidence of Mrs Gridley

148. Mrs Gridley gave expert evidence on the instructions of HMRC. Mrs Gridley works for HMRC in their Shares and Assets Valuation ("SAV") office in Nottingham. She is a Registered Business Valuer and a member of the Royal Institution of Chartered Surveyors.

149. At the outset, Mr Thomas challenged the evidence of Mrs Gridley. He argued that Mrs Gridley was not an independent expert witness as required by the directions of Judge Barbara Mosedale issued on 1 November 2013. Mrs Gridley was not, argued Mr Thomas, independent because she was employed by HMRC. Moreover, Mrs Gridley had not appended to her report a copy of her letter of instruction, as required by Judge Mosedale's directions.

150. Mr Thomas further drew attention to the exchange of e-mails by which Mrs Gridley was instructed. In particular, in an e-mail dated 23 December 2013 Mr Stewart sent an e-mail to a colleague of Mrs Gridley's in SAV stating "a witness statement from you would assist our case." The task of compiling a valuation report was then later assigned to Mrs Gridley. This, Mr Thomas argued, showed that the report that Mrs Gridley produced was designed to further HMRC's case and was not an independent report.

151. I shall discuss questions of the admissibility of and/or weight to be attributed to Mrs Gridley's evidence later in this decision.

152. Mrs Gridley considered that the correct approach to valuing the goodwill of a company such as SSS was to determine the value of the whole business and then deduct from that value the net tangible and identifiable intangible assets. Mrs Gridley noted, however, that in every distribution/supply company the ability to keep its customers was paramount and the company would be more valuable if it had contracts that would ensure the continuing business of those customers.

153. Mrs Gridley approached her valuation on the basis that she was required to suppose a sale of goodwill in the open market at the valuation date between a hypothetical vendor and purchaser. She noted that the sale and the parties to it were hypothetical, but otherwise all elements of the business and the market at the time of the sale were real.

154. Mrs Gridley also noted that throughout its existence SSS traded with Credenza, an associated company of the appellant in which she understood Messrs Thomas had an interest. In considering Mr Taub's gross profit percentage of 40%, Mrs Gridley considered that a hypothetical purchaser would not be able to guarantee that the relationship with any associated company would continue on the same terms after the sale.

155. She understood that neither Mr Thomas nor Mr Stuart Thomas had a service contract with SSS. Consequently as there were no contracts of employment at 22 September 2004 a purchaser of the business would be concerned that the level of turnover and thus maintainable profit seemed to depend to a great extent on the personal efforts and expertise of Messrs Thomas. Furthermore, Mrs Gridley noted that SSS did not have written contracts with its customers, although it did have loyal customers accounting for 76.8% of the company's total sales between August 2003 in July 2004.

156. Mrs Gridley also doubted whether a number of the comparable businesses relied on by Mr Taub provided any benchmark in valuing SSS and its goodwill. She considered that each of the companies concerned had a greater turnover, assets and number of employees than SSS. They were also involved fully in seafood processing. Of the three companies which were considered to be broadly comparable, the average percentage of goodwill to turnover was 6.08%.

157. Mrs Gridley concluded that the business of SSS had little value on a stand-alone basis without the services of its directors. Although a purchaser might be interested in buying the business simply to eliminate competition and enlarge its potential customer base, there would be no certainty that the purchaser would acquire the customers of the business because those customers could simply follow Messrs Thomas.

158. Mrs Gridley concluded that the value of the business of SSS was £126,000 (6.08% × £2,072,900). The figure of £2,072,900 was the total sales of SSS from August 2003 to July 2004. However she concluded that the value of SSS was worth very little on a stand-alone basis as at 22 September 2004 so that the goodwill of the business should be valued at nil.

(c) Joint Statement of Mr Taub and Mrs Gridley

159. Mr Taub and Mrs Gridley met on 14 May 2014. They then prepared a joint statement ("the Joint Statement") which summarised those matters in which they agreed and disagreed.

160. Both experts agreed that the value of goodwill should be reached by valuing the business and deducting from that value the net tangible assets of the business. However, they recognised that they had taken fundamentally different approaches to the valuation of the business of SSS and, therefore, the valuation of goodwill at 22 September 2004. The rest of the Joint Statement proceeded to identify the differences

between their approaches. It is worth setting out verbatim the words of the Joint Statement as follows:

> "Mr Taub considers the goodwill of the business to comprise effectively:
>
> - the databases, intellectual property and all other information and intangible assets used in the business; and
> - the knowledge and expertise of Mr Rod Thomas and Mr Stuart Thomas.
>
> Conversely, Mrs Gridley considers the goodwill can only be that which attaches to the business irrespective of the presence of the Messrs Thomas.
>
> She considers that the fundamental disagreement relates to whether it can be assumed that the Messrs Thomas will stay with the business once it is purchased in the hypothetical sale by an anonymous prudent purchaser.
>
> In support of his approach Mr Taub notes following:
>
> - The asset actually transferred on 22 September 2004 was both elements of goodwill as defined by Mr Taub;
> - Both Mr Rod Thomas and Mr Stuart Thomas had been with the business for some 20 years as at 22 September 2004;
> - Although Mr Rod Thomas and Mr Stuart Thomas did not have service contracts they have both confirmed to Mr Taub that they would have been prepared to provide service contracts in the event of an external sale;
> - Mr Taub considers that it would have been logical for them to have provided service contracts in order to effectuate a sale;
> - In Mr Taub's experience it is common in the case of family businesses for the family members not to have service contracts (as there is no external relationship that is required to be formalised). However, in the real world this does not diminish the value of goodwill;
>
> In support of her approach Mrs Gridley notes the following:
>
> - It is established fiscal valuation case-law that the asset can only be valued as it stood at the date of valuation
> - Nothing can be taken into account that did not in fact exist in the asset at the date of valuation
> - The purchaser stands in the vendor's shoes and takes the business as he finds it which is with the Messrs Thomas generating the profits for the business through their knowledge and expertise but without any service agreement or contract of employment with the business. They are at liberty to leave and this would affect the value that the purchaser would be prepared to pay

- The purchaser would also know that there is no restrictive covenant on the Messrs Thomas to prevent them from setting up business in competition and that Mr Stuart Thomas was at this time the director of a company with a similar name to the business in question that appeared to be in the same line of business. Again this would concern a potential purchaser

- Notes the previous agreements referred to but she was not involved in these agreements and was unaware of the facts surrounding them so she could not comment as to their relevance

The experts did not reach agreement on other specific issues but Mrs Gridley agreed that if Mr Taub is right and it is to be assumed that the presence of the Messrs Thomas after the hypothetical sale would continue then she might have to revise her value upwards. Mr Taub agreed that if Mrs Gridley was right that it must be assumed that the Messrs Thomas would leave the business subsequent to a sale, he would have to revise his value downwards. Mr Taub asked whether Mrs Gridley could agree, if his approach was indeed the correct one, but his value was not unreasonable. Mrs Gridley could not agree and outlined various conclusions in his report that she was uncomfortable with.

Mr Taub considers that the approach adopted by Mrs Gridley of valuing goodwill as a percentage of turnover is fundamentally incorrect."

161. The reference to "previous agreements" was to earlier valuations of the seafood trade, several years before the periods currently under appeal. I found those valuations of little or no assistance in the current appeal.

162. In my view, the Joint Statement correctly identifies the nub of the disagreement between Mrs Gridley and Mr Taub. In effect, the key element of disagreement was whether the amount that a hypothetical purchaser would be prepared to pay for the goodwill attaching to the seafood trade would be affected by the fact that there were no service agreements in place and no non-competition covenants in relation to Messrs Thomas. It was common ground that such value as existed in relation to goodwill was fundamentally dependent upon the presence of Messrs Thomas in the business.

(d) The evidence of Mr Spargo

163. Mr Spargo gave expert accounting evidence for HMRC.

164. Mr Spargo is a chartered accountant employed by HMRC.

165. Essentially, Mr Spargo's evidence was not in dispute. Mr Spargo stated that under UK GAAP when an entity acquires a business, the accountants preparing its financial statements should consider whether that business combination should be accounted for under the merger or acquisition accounting rules. If the business combination satisfied the conditions in FRS 6 and the Companies Act 1985, the

business combination must be accounted for under merger accounting. Under merger accounting the acquired assets and liabilities are not adjusted to their fair value and no purchased goodwill is recognised.

166. If, however, the business combination was not accounted for under merger accounting, Mr Spargo's evidence was that it should be accounted for under acquisition accounting. Under acquisition accounting the acquirer will recognise the acquired identifiable assets and liabilities at their fair values; with any difference between those values and the fair value of the purchase consideration being recognised as purchased goodwill. As a result purchased goodwill only arises on the acquisition of a business accounted for under acquisition accounting.

167. Mr Spargo's evidence was that if the appellant did not acquire the business of SSS goodwill should not be recognised in the appellant's accounts. Consequently, there would be no purchased goodwill to be amortised.

168. If, on the other hand, the appellant did acquire the business of SSS on 22 September 2004 in the way described in the Minute the business combination was, in Mr Spargo's view, the acquisition of one business by another. It was not, therefore, a merger and the conditions for merger accounting were not satisfied. Under acquisition accounting the appellant should have recognised the fair value of all identifiable assets and liabilities acquired; with any difference between those fair values and the fair value of the purchase consideration recognised as purchased goodwill in the 30 April 2005 balance sheet.

169. In preparing his evidence Mr Spargo had been asked to make the following assumptions:

(1) it was possible to estimate a business valuation of £1,557,991 at 30 April 2005

(2) the undocumented director's loan was repayable on demand;

(3) the appellant could support the initial useful economic life of seven years for purchased goodwill; and

(4) the fair value of any assets and liabilities transferred was not material.

170. On the basis of these assumptions Mr Spargo considered that, if the appellant acquired the business of SSS on 22 September 2004, purchased goodwill of £1,557,991 should have been recognised in the appellant's balance sheet for the year ended 30 April 2005.

171. In Mr Spargo's opinion the purchased goodwill amortisation expense which should have been recognised in the profit and loss account, on a straight-line basis, was:

- Period ended 30 April 2005 £129,833
- Years ended 30 April 2006 – 2011 £222,570 per annum
- Year ended 30 April 2012 £92,738

172. The credit entry of any purchase consideration due to Mr Stuart Thomas should, in Mr Spargo's view, have been recognised in his director's loan account; with the credit entries for the amount due to Mr Thomas being recognised as a separate creditor.

173. Mr Spargo's evidence was that by law the appellant's accounts for the 2007 period should have been audited because the gross assets of the appellant exceeded £2.8 million. However, Mr Spargo noted that the appellant's accounts of this period had not been audited.

Mr Thomas' Evidence

174. Mr Thomas said that SSS had transferred its trade (including stock) on 22 September 2004 to himself and his brother and that, on the same day, they transferred the trade to the appellant as recorded in the Minute. Mr Thomas said that the transfer was a natural consequence of the agreement to facilitate the breakup of the MacLennan Trust Structure. Both sides, he said, wished to put an end to the endless dispute regarding the trust and to bring the ownership of all the assets held directly or indirectly into the ownership of UK resident beneficiaries. In exchange for Messrs Thomas agreeing to do this and the payment of £525,000 in tax, HMRC had agreed that no person or company would be liable for UK taxation arising from the distribution of the trust assets. Mr Thomas said that this explained was why there was no reference to the transaction in the tax returns of SSS for the period ending 31 January 2005 or in the personal tax returns of Messrs Thomas.

175. In the course of his evidence, Mr Thomas produced a copy of the documents constituting the agreement between *inter alia* Messrs Thomas, Mr Hans Lindh, Mrs Stephanie Thomas and Mrs Rebecca Thomas (described in a letter from HMRC dated 24 May 2004 as "the beneficiaries"). Messrs Thomas and Mr Hans Lindh were described in the letter as "settlors" of the MacLennan Trust. In the letter of 24 May 2004, HMRC gave certain assurances to the beneficiaries in the event that certain steps were taken by 31 December 2004. These steps, set out in a letter from Messrs Thomas to HMRC also dated 24 May 2004, were as follows:

> 1. "Mr Thomas would require the current trustee of the MacLennan trust to resign and appoint new trustees resident in the UK;
> 2. Messrs Thomas would request that the new trustees cause the transfer of all the assets held by Bala Ltd, including its holding in [SSS], to the trust;
> 3. Thereafter, we will request that the new trustees distribute all the assets to Roderick and Sarah Thomas, and, Stuart and Rebecca Thomas, in equal proportions by 31 December 2004."

176. The assurances given by HMRC were as follows:

> 1. "No liability to income tax or capital gains tax will crystallise on the settlors or on the beneficiaries at the time that the

MacLennan Trust becomes UK resident by virtue of the appointment of one or more UK resident trustees.

2. No liability to income tax or capital gains tax will arise on the settlors or the beneficiaries on the event of the distribution in specie of the assets of Bala Ltd to the trustees of the MacLennan Trust (whether or not the MacLennan Trust is UK resident at the time of the distribution), in consequence of the winding up of that company.

3. No further liability to income tax, capital gains tax or inheritance tax will arise on the settlors or the beneficiaries in respect of the distribution of the entire assets of the MacLennan Trust by the trustees subsequent to the MacLennan Trust becoming a UK resident trust.

4. Assets previously owned by the MacLennan Trust or by Bala Ltd will be treated, for future capital gains purposes, as if they were required by the relevant beneficiary, on the date the asset was first acquired by the trustees of the MacLennan Trust or the directors of Bala Ltd on behalf the company."

177. It will be seen from HMRC's letter of 24 May 2004, that it was envisaged that the MacLennan Trust would become a UK resident trust, Bala would be wound up and that consequently its assets (which included the share capital of SSS) would be distributed to the trustees of the MacLennan Trust. The assets of the MacLennan Trust (which by then would include the share capital of SSS) would then be distributed to the beneficiaries once the MacLennan Trust had become UK resident.

178. On this basis, I do not consider that Mr Thomas' explanation concerning the reason why SSS was alleged to have transferred its trade to Messrs Thomas and who then transferred the trade to the appellant, was consistent with the agreement reach with HMRC. The letter of 24 May 2004 envisaged the share capital of SSS being distributed by Bala to the trustees of the MacLennan Trust which would then distribute the share capital of SSS to the beneficiaries. At no stage did the letter contemplate two transfers of the trade of SSS i.e. the tripartite transaction.

179. Mr Thomas confirmed that if he and his brother had received an acceptable offer to buy SSS’s seafood trade he would have been prepared to enter into a service contract (containing a non-competition covenant) to ensure that they continued to work in the business.

180. Mr Thomas stated that the appellant had started to trade in March 2004 and carried out three seafood trades before the transfer of the trade to the appellant in September 2004. In that same period SSS had carried out approximately 150 seafood trade transactions.

181. Mr Thomas confirmed that Mr Stuart Thomas spent the bulk of his time between March and September 2004 working in the trade of SSS but a *de minimus* amount of time working in the appellant's business. After the 2004 transfer of the trade, Mr Stuart Thomas was a full-time employee of the appellant. Although a full-time employee, Mr Stuart Thomas also had to spend approximately 20% of his time

dealing with HMRC enquiries, although these were mainly handled by Mr Thomas himself.

182. Mr Thomas informed us that the appellant did not sell directly to major retailers but supplied a number of manufacturers who themselves supplied large retailers.

183. Mr Thomas regarded SSS's business as highly profitable. He noted that Mr Barnard had valued the business at £20 million. Mr Barnard knew the trade intimately and had been involved with the business for more than 20 years.

184. In the food business, according to Mr Thomas, the industry custom was that there were no fixed supply contracts. Mr Thomas described the seafood trade as that of distributors and processors of seafood products. The processing of fish products was carried out by an associated company, Credenza. It did not matter whether a company sub-contracted processing or did it itself. The appellant supplied processed products.

185. Mr Thomas said that the appellant had made no claim for a deduction for the amortisation of goodwill in its "first returns" because it was unaware that it could make such a claim. Further, even when it did become aware, the appellant was reluctant to make any claim for intangibles relief until the related party issue (i.e. whether Mr Thomas and Mr Stuart Thomas were related parties as regards SSS) had been agreed or determined. I was informed by Mr Thomas that this issue was eventually settled in October 2007 on the basis that Messrs Thomas were not related parties to SSS.

186. In cross-examination, Mr Thomas accepted that he was an experienced businessman and was aware of the responsibility of a company's accounts to give a true and fair view of the affairs of the company. Mr Thomas stated, however, that the appellant's business was a small family-run business and that, at the time, the accounts held no interest for him. He relied on the accountant, Mr Norris, to get the accounts right. In his view, the main purpose of the accounts was for the appellant's corporation tax return. He accepted that he should have gone through the accounts in detail and checked them. Mr Thomas also accepted that the accounts of the appellant should have correctly stated the turnover and creditors of the business.

187. Mr Thomas said that he had relied on Mr Norris to get the appellant's accounts correct. He felt that his reliance had been misplaced. When questioned by Ms Jones, Mr Thomas accepted that the appellant had produced no evidence of the instructions given to Mr Norris or about the information supplied to Mr Norris by the appellant.

188. Mr Thomas accepted that intangibles relief had been claimed by SSS (in relation to the acquisition of the seafood trade from Messrs Thomas) in its 2003 return filed in 2004. It seemed to me that this contradicted the claim made by Mr Thomas in his witness statement that the appellant made no claim for a deduction for the amortisation of goodwill in its first returns because it was unaware that it could make such a claim.

189. Mr Thomas also said that because HMRC had been arguing that he and Mr Stuart Thomas were related parties of SSS, no claim could be made under Schedule 29 FA 2002. It was not until HMRC had issued a closure notice in respect of Messrs Thomas' personal returns that HMRC accepted that they were not related persons as regards SSS. For that reason it would not have been, in Mr Thomas's words, a good idea to make an intangibles claim. In cross-examination, however, Mr Thomas accepted that this did not provide a reason why the appellant's accounts did not present a true and fair view of the appellant's affairs and the accounts for the two periods ending in 2005 made no reference to the alleged tripartite transaction or to the purchase of goodwill.

190. In response to a question from Ms Jones, Mr Thomas also accepted that no attempt had been made by the appellant in 2004 to obtain a valuation as would seem to be required by the Minute.

191. It was also put to Mr Thomas that according to the Minute, Messrs Thomas had committed the appellant to buy a multi-million pound business without knowing how much it would have to pay and that this was not credible. Mr Thomas responded by saying that the Minute set out a formula which was ascertainable. Mr Thomas said that the Minute had to be seen against the background of extended and intense discussions with HMRC in respect of SSS's 2003 corporation tax return and his own personal tax returns, particularly as regards the sale of Mr Thomas' share of his partnership interest in the seafood business to SSS in 2002. HMRC had not accepted the valuation put forward. After having experienced this dispute regarding valuation, Mr Thomas said that he wanted to be careful about the nature of the agreement made by the appellant and it was for this reason that he had resolved that the alleged disposal to the appellant of the seafood trade should be at market value as determined by HMRC, failing which by the General Commissioners.

192. It was also put to Mr Thomas that it was not credible that SSS would just give away a valuable business to Messrs Thomas. Mr Thomas replied by noting that the disposal of the seafood trade by SSS was part of the agreement with HMRC to break-up the MacLennan Trust.

193. Ms Jones also asked Mr Thomas about his letter to HMRC (Mr Stewart) dated 11 July 2008 (see paragraph 40 above). She asked why Mr Thomas had not referred to the Minute and the date of the transfer as being 22 September 2004. Mr Thomas replied that he had answered the question put to him, no more and no less. Mr Thomas considered that HMRC had never complied with any agreement he had made with them. He considered that there was a big problem with HMRC as an organisation and that there was no goodwill left between him HMRC. He would simply comply with his duties. He accepted, however, that in his letter of 11 July 2008, he had not informed Mr Stewart about the Minute or its contents.

194. Mr Thomas accepted that his letter to Mr Stewart of 8 April 2011 was the first time that the appellant mentioned the alleged 22 September 2004 transfer (the tripartite transaction) to HMRC.

195. Ms Jones asked Mr Thomas about notifications to suppliers from Mr Stuart Thomas, which indicated that from 1 January 2005 SSS would trade as Spring Seafoods Ltd (an earlier name of the appellant). Mr Thomas stated that this was simply a facilitation of the transfer of the business on 22 September 2004. It took time to sort matters out and there had to be a period to give effect to the transfer. SSS had continued to purchase fish for the appellant.

196. Ms Jones also asked Mr Thomas whether the value in the business really resided in the skill and expertise of Messrs Thomas. Mr Thomas accepted that it did, as well as residing in the name "Spring", but considered that on a sale of the business, he and his brother could have acted as consultants over a period of six months, during which time the necessary relationships involved in running the appellant's business could have been transferred to new personnel.

Pensions contributions

197. Originally, one of the issues under appeal was whether the appellant was entitled to a corporation tax deduction in its accounting 2006 period of £430,000 in respect of pension contributions to Mrs Rebecca and Mrs Sarah Thomas.

198. In the course of the hearing of this appeal in May 2014 it was agreed between the parties that a deduction of £305,000 should be allowed and that £125,000 should be disallowed as a deduction.

Arguments of the parties and discussion

Burden of proof

199. Both parties accepted that the burden of proof lay upon the appellant in respect of this appeal. I should only add that the burden of proof remains upon the appellant even in cases where HMRC allege fraud or dishonesty. In this case, in relation to the claims for a deduction in respect of purchased goodwill, HMRC are arguing that the evidence put forward by the appellant in relation to the tripartite transaction is not credible. They are, therefore, effectively pleading dishonesty. Except in penalty cases, it is established law that in challenging an assessment (including a closure notice or indeed a consequential amendment), even where HMRC make allegations of dishonesty, the burden of proof lies upon the appellant (*Brady (Inspector of Taxes) v Group Lotus Cars plc* [1987] 3 All ER 1050, [1987] STC 635).

Effect of the "Edinburgh Appeal"

200. On 11 September 2014 this Tribunal sitting in Edinburgh (Judge Gordon Reid QC and Dr Heidi Poon) handed down a decision in an appeal by SSS in relation to two Notices of Determinations made in April and September 2014 (relating to PAYE) and two Notices of Decision (relating to National Insurance Contributions) issued on the same dates. The decision is reported as *Spring Salmon & Seafood Ltd v HMRC* [2014] UKFTT 887 (TC) and I shall refer to it as the "Edinburgh Appeal".

201. In the Edinburgh Appeal, the Tribunal summarised various background matters which bear on the facts underlying this appeal. The Tribunal said:

> "52. On 28 July 2002, the Company [SSS] purchased as a going concern the business and certain assets of S&R Thomas Partnership (an English partnership of which Mr Thomas and his brother Stuart were the partners) for the sum of £2,800,000 for the goodwill and £35,000 for the stock. This was paid for by a credit to the director's loan account in the books of the Company. This transaction, recorded in a Minute of Agreement dated 24 July 2002 between S&R Thomas (the Partnership) and the Company has been the subject of much controversy. A similar transaction occurred[8] in 2004 (discussed below). The commercial purpose, if any, of these transactions (other than to secure tax advantages for the Thomas family, and companies and businesses controlled by members of that family) was not discussed before the Tribunal and is therefore unknown.
>
> …
>
> 57. On 22 September 2004, the assets and business of the Company were transferred to the Partnership. On the same day, those assets and business were transferred to Spring Seafoods Ltd (now known as Spring Capital Ltd [the appellant]; we shall refer to this company as Spring Seafoods/Capital). The value of the goodwill so transferred is the subject of a tax appeal pending before the First-tier Tribunal in London. This transfer of assets is not disclosed in the accounts of the Company discussed below. No documentation in relation to either transfer has been produced. However, for the purposes of this appeal, HMRC accept that the transfers occurred.
>
> …
>
> 62. The accounts of Spring Seafoods/Capital for the year ended 30 April 2007 disclose turnover of £2,338,437. It appears that the business of the Company had been transferred to Spring Seafoods/Capital, together with the liability of the Company for the director's current account amounting to £1,557,991. No documents have ever been produced to support these entries.
>
> 63. The acquisition appears to consist of the purchase by Spring Seafoods/Capital of goodwill at the price of £1,557,991. This sum is paid for by crediting the same sum (£1,557,991) to the director's current account with Spring Seafoods/Capital. It is unclear, to say the least, how this figure was arrived at. The Company had already transferred its business (which would include goodwill, whether or not formally identified or valued) to the Partnership in September 2004 who immediately transferred it to Spring Seafoods/Capital.
>
> …
>
> 69. We note in passing that as the Company ceased to trade at the end of January 2005, and had already transferred its business to a or the Thomas partnership in September 2004, it is difficult to understand what goodwill it had in 2006 or 2007 to transfer to Spring

> Seafoods/Capital who already had and presumably were carrying on the business formerly carried on by the Company.
>
> …
>
> 149. HMRC in the Spring Seafoods/Capital appeals say that the claims for intangibles relief are not valid, and some are out of time. More fundamentally, HMRC say that there was no business acquisition in September 2004, and therefore no entitlement to intangibles relief. This is essentially based on the lack of documentation and the fact that the transaction is not properly accounted for in any business accounts and records.
>
> …
>
> 255. Mr Artis [advocate for HMRC] also submitted that the accounts were misleading and did not represent a true and fair view. They failed to disclose the asserted transfer of the business to the Thomas Partnership in September 2004.
>
> Footnote
>
> [8] HMRC accepted that this transaction occurred, but only for the purposes of the appeal we are considering."

202. In this appeal, the appellant submits that as regards itself and SSS (the Fourth Respondent) HMRC must be bound by the submissions that it made in the Edinburgh Appeal and by the findings of the Tribunal in that case.

203. In my view, when the Tribunal made reference to the alleged transfer by SSS to Messrs Thomas and by Messrs Thomas to the appellant on 22 September 2004, it was sketching out part of the factual background in that appeal. It was not, in my view, a determination of the essential facts necessary for the Tribunal to reach its decision in that case. The Tribunal acknowledged that the background in relation to the appellant was only indirectly relevant to the appeal it was hearing and was fully aware that in this appeal the question whether the tripartite transaction actually occurred was a central disputed issue which fell to be determined.

204. In *Crown Estate Commissioners v Dorset County Council* [1990] 1 All ER 19, Millett J (as he then was) stated (at 23):

> "Res judicata is a special form of estoppel. It gives effect to the policy of the law that the parties to a judicial decision should not afterwards be allowed to relitigate the same question, even though the decision may be wrong. If it is wrong, it must be challenged by way of appeal or not at all. As between themselves, the parties are bound by the decision, and may neither relitigate the same cause of action nor reopen *any issue which was an essential part of the decision*. These two types of res judicata are nowadays distinguished by calling them "cause of action estoppel" and "issue estoppel" respectively." [Emphasis added]

205. Also, in *Kirin-Amgen Inc v Boehringer Mannheim GmbH* [1997] F.S.R. 289 at 303 Aldous LJ:

> "... It cannot be right to bind a party to a finding of fact by a court when there was no need to that party to produce evidence to the contrary in that court".

206. As *Phipson On Evidence* (17th edition) states at paragraph 43 – 31:

> "A useful distinction is thus often drawn between matters necessarily decided and facts which came merely collaterally in question, or were incidentally cognisable."

207. Using Millet J's wording, it seems to me that the Tribunal's references quoted above to the alleged tripartite transaction were references which were not an essential part of the decision – they were incidental or collateral findings of fact.

208. Furthermore, the doctrine of res judicata has a very limited application in tax appeals. In *Barnett v Brabyn (Inspector of Taxes)* [1996] STC 716 the taxpayer was assessed to tax on the basis that he was self-employed. His appeals for 1988/89, 1989/90 and 1990/91 were compromised under s 54 TMA on that basis. Additional assessments, on the same basis, were then made for the two latter years. It was argued that it was not open to the taxpayer to challenge the new assessments on a ground that had been implicitly decided in favour of the Revenue. Lightman J held that it was open to the taxpayer to do so. After noting that the effect of a s 54 agreement, namely that it had the same effect for res judicata and issue estoppel purposes as a determination on appeal of (at that time) the Commissioners, Lightman J said (at p 723c):

> "Prior to the enactment of the Income Tax Management Act 1964 (the 1964 Act), the function of the tax commissioners was to make assessments and to hear appeals. It was well established during the period of that regime that they were not deciding a 'lis inter partes' and accordingly their decision in respect of one year's assessment could not create any form of res judicata or issue estoppel in respect of a later year's assessment (see *IRC v Sneath* [1932] 2 KB 362, 17 TC 149; *Caffoor and others (Trustees of the Abdul Gaffoor Trust) v Comr of Income Tax, Colombo* [1961] AC 584 at 598–589 and Spencer Bower and Turner *Res Judicata* (2nd edn, 1969) pp 260–266). The 1964 Act removed from the commissioners the function of making assessments. I do not think that this changes the position that (for present purposes) their decision on an appeal is not a decision on a 'lis inter partes'. This view accords with that expressed in the text books (see eg *Whiteman on Income Tax* (3rd edn, 1988) para 30.02 and *Phipson on Evidence* (14th edn, 1990) para 33.48). Accordingly a determination of an appeal by the commissioners or a s 54 agreement cannot any more since 1964 than before 1964 afford scope for application of the doctrine of res judicata or issue estoppel in respect of assessments in succeeding years or additional assessments in the same year."

209. In my view there can be no question of res judicata as regards the findings of fact by this Tribunal in one appeal relating to different statutory provisions in relation to a different appeal involving (with the exception of the Fourth Respondent) different parties.

210. Moreover, the Tribunal in the Edinburgh Appeal made it clear that HMRC accepted that the alleged two transfers of the trade had taken place only for the purposes of that appeal. I assume that this was because the point was not necessary for a decision in that appeal. The Tribunal appears to have been content to proceed on this basis and, indeed, it noted twice that HMRC's acceptance of the factual position in relation to the two transfers of trade "for the purposes of the appeal." I also note that in paragraph 149 the Tribunal observes that in the present appeal HMRC intended to argue that there was no business acquisition in September 2004. Plainly, therefore, the point was still in dispute between the parties as regards this appeal and the Tribunal was fully aware of this.

211. It seems to me, therefore, that any finding of fact in the Edinburgh Appeal in relation to whether the tripartite transaction occurred is not binding upon me.

212. Finally, I would also point out that the appellant, the Second and Third Respondents were parties to the Edinburgh Appeal and would not, in any event, be bound by findings of fact in the Edinburgh Appeal.

Effect of the "London Decision"

213. In *Roderick Thomas and Stuart Thomas v Revenue & Customs* [2013] UKFTT 203 (TC) ("the London Decision") Judge Berner dealt with a number of issues in relation to Mr Thomas' and Mr Stuart Thomas' personal tax returns for the tax years ended 2002/03 and 2004/05. At [14] Judge Berner said:

> "In the course of the hearing it became apparent that there was no outstanding issue in relation to tax year 2004/05. Mr Stewart confirmed that the only issues were those of the income of the trust assessable under s 660A ICTA and the capital gains of the trust assessable under s 86 TCGA. In light of that we took the view that there was no purpose in our making any determination whether the letter of 30 May 2012 constituted a s 54 TMA agreement for this purpose."

214. Mr Thomas submitted that HMRC's statement in respect of his return for 2004/2005 should be taken as meaning that HMRC had accepted his disclosure made on 8 April 2011 that SSS had transferred its trade to Messrs Thomas and that they did not intend to challenge the value attributed to the business.

215. In my view, the statement quoted above does not have the meaning which Mr Thomas attributed to it. It seems to me that the statement was made in relation to the 2004/05 personal tax return of Mr Thomas. It did not relate to a transaction or alleged transaction between SSS and Messrs Thomas or to a transaction or alleged transaction between Messrs Thomas and the appellant.

Deductions in respect of goodwill

216. The main question in this appeal relates to the entitlement of the appellant to claim deductions in respect of the amortisation of goodwill for all periods under appeal.

217. Ms Jones for HMRC argued that SSS's trade (and therefore any goodwill attaching to the trade) was transferred directly to the appellant and that it was not transferred by SSS to Messrs Thomas and Messrs Thomas did not then transfer the trade to the appellant. Instead, Ms Jones argued that the facts were consistent with a gradual migration of the trade from SSS to the appellant in the final few months of 2004, with the trade of SSS ceasing by 31 January 2005. There was, therefore, no purchase of goodwill and no amortisation deduction. The Minute was not an authentic record of what actually happened.

218. Mr Thomas in claimed that on 22 September 2004 SSS transferred its seafood trade to Messrs Thomas and that on the same day Messrs Thomas transferred the trade to the appellant for an amount equal to the market value of the trade – which I have referred to as the "tripartite transaction". I have carefully considered Mr Thomas' evidence, which was challenged in cross-examination, in relation to these two alleged transactions but I regret to say that I do not find it credible. Consequently, I have reached the conclusion that the appellant is not entitled to deductions in respect of a purchase of goodwill. I have reached this conclusion for the following reasons.

219. The first mention to HMRC of the tripartite transaction came in a letter from Mr Thomas to Mr Stewart dated 8 April 2011 (two days after it was referred to in the appellant's Notice of Appeal), almost 6 1/2 years after it was alleged to have taken place on 22 September 2004. There were many opportunities in the correspondence, which I have set out at some length earlier in this decision, when such a tripartite transaction would naturally have been mentioned by Mr Thomas to HMRC had it occurred on 22 September 2004. Mr Stewart repeatedly requested details concerning the appellant's claim to have purchased goodwill, but this information was not forthcoming. Even allowing for the strained relationship between Messrs Thomas and Mr Stewart, it beggars belief that a taxpayer seeking to claim a very substantial amount of tax relief would not have supplied HMRC with details of the relevant transaction at the earliest opportunity. I do not accept Mr Thomas' suggestion that he merely answered the questions put to him by Mr Stewart: “no more, no less”. In many instances Mr Thomas did not do even that. Mr Thomas's replies to Mr Stewart's enquiries indicate to me that the tripartite transaction was the product of *ex post facto* imagination rather than a genuine transaction that took place on 22 September 2004.

220. Furthermore, as I understand it, the Minute was first produced to HMRC by the appellant's advisers RMS Tenon on 29 July 2013. Certainly, it was not produced before 8 April 2011. If I am correct, the only allegedly contemporaneous document explicitly evidencing the second leg of the tripartite agreement was first produced just short of nine years after the transaction occurred which it purported to evidence. If the Minute was indeed contemporaneous with the transfer on 22 September 2004, then for many years thereafter Mr Thomas conducted a lengthy correspondence with HMRC that can only be described as an elaborate game of "hide the ball". I do not

find that in the least bit credible. I do not accept the Minute as being contemporaneous evidence of the tripartite transaction and, indeed, do not accept it as genuine record of any transaction that took place.

221. For good measure, the e-mails, invoices and notifications to suppliers and customers noting changes of details of the ownership of the trade and bank statements etc supplied under cover of RSM Tenon's memorandum of 29 July 2013 seemed to me merely to evidence of fact that the trade previously carried on by SSS was now being carried on by the appellant. There was no mention in those documents of the tripartite transaction. In my view those documents provided no support for Mr Thomas' arguments that the tripartite transaction had taken place. Instead, as I have already indicated, they seem to indicate that the trade had migrated from SSS to the appellant over a period of a few months before the trade, as regards SSS, finally ceased on 31 January 2005.

222. Moreover, in my judgment the other documentary evidence in this case is inconsistent with the tripartite transaction, as described by Mr Thomas, occurring on 22 September 2004.

223. The tax returns of the appellant for the 2005 and 2006 periods do not record any such transaction. Mr Thomas claimed that this was because the appellant was unaware that it could make such a claim. Mr Thomas' claim is clearly false. As was pointed out to Mr Thomas in cross-examination (and Mr Thomas accepted), SSS had made a claim for amortisation of goodwill in its 2003 return which was filed in 2004: see also *Spring Salmon & Seafood Ltd v Revenue & Customs* [2013] UKFTT 320 (TC). Mr Thomas was, therefore, perfectly well aware of the ability of a company to claim an amortisation deduction in respect of the purchase of goodwill under Schedule 29 FA 2002.

224. Mr Thomas further claimed that the reason why the appellant did not initially claim amortisation in respect of the purchase of goodwill, once it was aware that it could do so, was because there had been a dispute with HMRC as to whether Messrs Thomas were related to SSS. That does not explain, however, why the appellant did not lodge a provisional claim for relief pending the outcome of the related parties dispute.

225. Moreover, and in my view importantly, the 2005 (two sets of accounts) and 2006 accounts of the appellant did not record any purchase by the appellant of goodwill in September 2004. The related parties issue was irrelevant to the correct accounting for this alleged purchase and cannot be used as an excuse for this accounting failure. Evidently, in my view, Mr Norris was not informed by Messrs Thomas of the alleged acquisition. I cannot accept Mr Thomas' rather bald assertion that the accounts of the small private company were of no interest. I found this assertion wholly unconvincing. Mr Thomas is an experienced businessman and he would know the importance of proper accounting, particularly as regards third parties. Mr Thomas himself acknowledged the importance of the accounts in relation to the appellant's tax computations; indeed, he considered this to be the main point in having accounts for a small private company. Yet he and his brother allowed the accounts to

be drawn up on the basis which, if his version of the facts was to be believed, did not reflect anything approaching a true and fair view of the appellant's affairs.

226. In fact, as I have indicated, I do not believe Mr Thomas' version of events in relation to the tripartite transaction. In my view the far more likely explanation for why the 2005 and 2006 accounts made no mention of the appellant having purchased goodwill was that it did not happen: it was simply an invention.

227. In addition, the appellant made no effort to obtain a valuation of the business in 2005 and 2006. If the Minute recording the alleged transaction of 22 September 2004 had been genuine I would have expected Messrs Thomas either promptly to have instructed a valuer or to have approached HMRC to agree a value, but they did not do so.

228. I should also observe that it was hard to understand how Mr Thomas' evidence about the tripartite transaction could be consistent with his letter of 11 July 2008 Mr Stewart in which he claimed:

> "The facts overwhelmingly pointed to the transfer of the trade from [SSS] to this company."

229. For these reasons, I am unable to accept that the appellant purchased goodwill from Messrs Thomas as recorded in the Minute. I further find, for the same reasons, that the tripartite transaction did not occur.

230. Instead, it seems to me that the evidence was consistent with the seafood trade of SSS being wound down during the autumn of 2004 and ceasing on 31 January 2005. During that period the appellant began to carry on that trade: see my comments at paragraph 125 above.

231. Finally, the 2007 accounts appear to indicate that in that year the appellant purchased goodwill in the amount of £1,557,991, being the sum credited to the director's loan account. Not only is this inconsistent with the various valuations of goodwill put forward by Mr Thomas (£20 million and latterly £6.39 million) it seems inexplicable that in the 2007 period the appellant would pay anything for the goodwill of a business which was transferred to it almost two years beforehand. I therefore do not consider this entry in the 2007 accounts to indicate that the appellant purchased goodwill in 2004 or indeed at any other time.

232. In my judgment, therefore, (save as regards the issue of the validity of the consequential amendment to the 2008 return: see below) the appellant was not entitled to any deduction in respect of the amortisation of goodwill.

Valuation of goodwill

233. In the light of my conclusion that the appellant did not purchase goodwill from Messrs Thomas on 22 September 2004 or at any other time, it is not strictly necessary to consider the evidence in relation to the market value of goodwill. Nonetheless,

because much time at the hearing was spent considering valuation evidence, I shall summarise my main conclusions below.

234. First, I should address the question raised by Mr Thomas concerning the admissibility of and weight that I should give to the evidence of Mrs Gridley.

235. Mrs Gridley is an employee of HMRC. It is true that the instructions to Mrs Gridley were less than satisfactory and did not comply with the directions of Judge Mosedale. HMRC's failure to comply with these directions fell below the conduct to be expected of a government department. Nonetheless, my view of Mrs Gridley's evidence was that, although an employee of HMRC, she endeavoured to give her evidence as a professional valuer and not in any partisan manner. Moreover, I am satisfied that she had the requisite expertise in the area of business valuation. I therefore consider that I should give the same weight to Mrs Gridley's evidence as I give to that of Mr Taub, whose independence and expertise was not questioned.

236. Essentially, the key difference between the valuations of Mr Taub and Mrs Gridley related to the question whether in making the valuation it should be assumed that Messrs Thomas would remain with the business or whether they would leave. This concerned the fact that neither Mr Thomas nor Mr Stuart Thomas had a service contract with the appellant on 22 September 2004 and had not entered into any non-competition covenant (which in my experience would usually be contained in the contract of employment). Mrs Gridley's valuation was based on the proposition that a business had to be valued as it stood at the date of valuation, without alteration. Mr Taub, by contrast, took account of the fact that Messrs Thomas had worked in the business for more than 20 years, would have been willing to enter into service contracts with a purchaser and that it on a business sale the provision of service contracts was usual.

237. Mrs Gridley's approach to valuation was based on a decision of the House of Lords in *The Duke of Buccleuch v IRC* [1967] 1 All ER 129. This case concerned the valuation of an estate for the purposes of estate duty. The statutory provision (section 7 (5) Finance Act 1894) required that the estate be valued at the price the property would fetch if sold in the open market at the date of the deceased's death. The issue, in short, was whether the estate should be valued as a whole or divided into separate lots. The value of the estate as a whole was lower than the value of the estate divided up and sold as separate lots. It was accepted that the manner in which the estate had been divided into separate lots by the Commissioners was reasonable and not artificial. The House of Lords held that the Commissioners had been correct to value the estate by dividing it into separate "natural" units and that the decision to charge estate duty on the higher amount was, therefore, correct.

238. In the course of delivering their opinions, their Lordships gave the following guidance on how an open market valuation should be reached. Lord Reid said [at 133]:

> "We must take the estate as it was when the deceased died; often the price which a piece of property would fetch would be considerably enhanced by small expense in minor repair or cleaning, which would

> make the property more attractive to the eye of the buyer. Admittedly that cannot be supposed to have been done; and I can see no more justification for requiring the supposition that natural units have been subdivided. This subsection applies to all kinds of property. A library was instanced by Winn LJ. Generally there would be little difficulty, delay or expense in getting someone knowledgeable to pick out valuable books for separate valuation, and I would therefore regard such books as natural units. Suppose, however, that the deceased had bought a miscellaneous and mixed lot of surplus stores intending to sort out and arrange them in saleable lots. That might involve a great deal of work, time and expense, and I see no justification for requiring the supposition that that had been done and then valuing the saleable lots that would have emerged.
>
> It is sometimes said that the estate must be supposed to have been realised in such a way that the best possible prices were obtained for its parts. But that cannot be a universal rule. Suppose that the owner of a wholesale business dies possessed of a large quantity of hardware or clothing or whatever he deals in. It would have been possible by extensive advertising to obtain offers for small lots at something near retail prices. So it would have been possible to realise the stock at much more than wholesale prices. It would not have been reasonable and it would not have been economic, but it would have been possible. Counsel for the commissioners did not contend that that would be a proper method of valuation; but that necessarily amounts to an admission that there is no universal rule that the best possible prices at the date of death must be taken."

239. Thus, the general rule, according to Lord Reid, was:

- that property should be valued as it was at the date of death (valuation at the date of death was a statutory requirement); and

- there is no universal rule that it must be supposed to property is realised in such a way that the best possible prices were obtained for its parts, particularly if the steps taken to achieve this objective would not be reasonable or economic.

240. Lord Reid noted that, in the Court of Appeal, Lord Denning MR had relied on a passage in a decision of Sankey J in *Earl of Ellesmere v IRC* [1918] 2 KBE 735 and 119 LT 568. Lord Reid observed that in the Law Times report of that decision Sankey J was reported as having said that it must be envisaged that preliminary arrangements had been made so that the property can be sold:

> "in such a manner and subject to such conditions as might reasonably be calculated to obtain for the vendor the best price for the property."

241. In the Law Reports version of Sankey J's decision this passage did not appear. Lord Reid considered it likely that Sankey J had revised his judgment as reported in the Law Times report and that the revised version appeared in the Law Reports. Lord Reid considered that the original passage quoted above went too far and thought that Sankey J had been wise to have omitted it from the final version of his judgment.

242. Lord Morris of Borth -y- Gest [at 139] considered that dividing the estate into separate lots did not offend against the principle that the valuation ought to be made on the basis of taking the property as it was at the time of death and not on some altered basis. Lord Morris continued:

> "The stipulation that an estimate must be made of the value which a property would fetch if sold in the open market does not, in my view, require an assumption that the highest possible price will be realised. It involves certain estimate should be made of the price which would be realised under reasonable, competitive conditions of an open market on a particular date."

243. Lord Wilberforce said [at 145]:

> "When, as is usually the case, the estate consists of an aggregate of items of property, each item must be separately valued, and it is not difficult to see that problems may arise as to the manner in which the separate units of valuation are to be ascertained or in which individual items are to be grouped into units of valuation. These problems must necessarily be resolved, as they are in practice, in a commonsense way. The estate is to be taken as it is found: it is not to be supposed, in order to obtain higher figures of valuation, that any substantial expense is to be incurred or work done in organising the estate into units: on the other hand, some practical grouping or classification, such as can reasonably be carried out without undue expenditure of time or effort, by a prudent man concerned to obtain the most favourable price, may be supposed."

244. The Court of Appeal considered the *Duke of Buccleuch* in *IRC v Gray (surviving executor of Lady Fox deceased)* [1994] STC 360. The *Gray* case involved the valuation for capital transfer tax of the deceased's freehold reversion in land let to a farming partnership in which the deceased had a 92.5% share. The question was whether the freehold reversion and partnership shares should be treated as a single unit of property for the purposes of valuation.

245. Hoffman LJ (as he then was), delivering the judgement of the court, said:

> "In *Duke of Buccleuch v IRC* [1967] 1 AC 506 the House of Lords applied what I might call the reality principle to the question at issue in this case, namely, whether it should be assumed that items of property in an estate were sold separately or together.
>
> …
>
> *Buccleuch* was a case about splitting up the estate and the remarks about 'natural units' as the basic particles of valuation, which cannot be further split, must be read in that context. *A-G of Ceylon v Mackie* [1952] 2 All ER 775 was a case about putting things together. The deceased was a shareholder in a company with an issued share capital of Rs 1,000,000 divided into 19,800 Rs 50 preference shares and 5,000 Rs 2 management shares. The articles gave the holders of 90% of the share capital the right compulsorily to acquire the remaining shares. The deceased held all the management shares (which

constituted 1% of the share capital) and 9,201 preference shares. Lord Reid said (at 777):

'It was admitted for the appellant that no purchaser would have paid anything like Rs 250 per share for the management shares in face of the company's articles unless he could buy at the same time a large block of the preference shares and so have a majority of votes. But the appellant contends that the respondents must be supposed to have taken the course which would get the largest price for the combined holding of management and preference shares and to have offered for sale together with the management shares the whole or at least the greater part of the preference shares owned by the deceased. In their Lordships' judgment this contention is correct.'

This shows that whether one is taking apart or putting together, the principle is that the vendor must be supposed to have 'taken the course which would get the largest price for the combined holding', subject to the caveat in Buccleuch that it does not entail 'undue expenditure of time and effort'." [Emphasis added]

246. The final paragraph in the judgment of Hoffman LJ seems to me to embody the correct approach to the question of determining open market value.

247. In this case, I consider that Mr Taub was correct when he considered that the goodwill attaching to the seafood trade comprised:

- the databases, intellectual property and all other information and intangible assets used in the business; and
- the knowledge and expertise of Mr Rod Thomas and Mr Stuart Thomas.

248. Mr Taub attached greater significance to the second of these two aspects. Mrs Gridley considered that the goodwill of the trade attached only to the second aspect.

249. Mr Thomas confirmed that he and his brother would have been prepared to sign employment contracts with a purchaser of the trade and to have entered into any required non-competition covenants. Mr Thomas and his brother had worked in the business for many years.

250. The question, therefore, is whether on 22 September 2004 the trade should be valued on the basis that a prudent purchaser would heavily discount the value of the business because there were no contracts of employment and no non-competition covenants binding Messrs Thomas into the business or whether it should be valued on the basis that Messrs Thomas would remain with the business and that employment contracts and non-competition covenants would have been entered into.

251. Mr Taub thought it reasonable to assume that the business should be valued on the latter basis. I agree with him. It seems to me that this method of valuation gives effect to what Hoffman LJ described as the "reality principle" to be derived from *Buccleuch*. In other words, it must be supposed that Messrs Thomas would take the

necessary reasonable steps to sell the trade for the highest price. As regards the caveat in *Buccleuch* that this must not entail 'undue expenditure of time and effort', it seems to me that entering into employment contracts and non-competition covenants would not have involved undue time and effort, or, indeed, expense.

252. Accordingly, had it been necessary to decide the point, I would have accepted Mr Taub's valuation of goodwill at £6,390,000 and I would not have accepted Mrs Gridley's valuation.

253. In my view a valuation of this amount produces a sensible and realistic conclusion. The trade of SSS was producing (in the years ended 31 July 2002 and 2003) profits on ordinary activities before taxation of approximately £1 million. It seems counter-intuitive to accept that a business generating these profits would only be valued at £126,000 or nil (according to Mrs Gridley's valuation).

Validity of consequential amendment to the 2008 return

254. As already explained, it was common ground that the closure notice in respect of the return for the 2008 period was not valid because the relevant enquiry notice had not been delivered to the appellant.

255. Instead, HMRC issued a consequential amendment on 10 December 2010. This explained that in consequence of the disallowance of the claimed carry-forward of losses under section 343 ICTA 1988 and the deduction in respect of the amortisation of goodwill in the closure notice in respect of the accounting period ended 30 April 2007, a consequential amendment making similar disallowances in respect of the accounting period ended 30 April 2008 was being made.

256. Mr Thomas argued that the 2007 closure notice did not include any conclusion which required the 2008 return to be amended "to give effect to the conclusion stated in the [2007] closure notice". It was, he said, implicit in the scheme of the closure notice and amendment provisions that any consequential amendment could be made only in and by the relevant closure notice but also had to be made at the same time as the relevant closure notice was issued. Mr Thomas submitted that if HMRC wanted to make an amendment to the 2008 return, in consequence of the conclusion stated in its 2007 closure notice, they should have stated such a conclusion and made the requisite amendment to the 2008 return at the same time that they issued the 2007 closure notice. It could not have been Parliament's intention that a consequential amendment could then subsequently be made (without time limit). If HMRC wish to challenge the appellant's claim for relief in respect of deductions for amortisation of goodwill and the carry-forward of losses under section 343 ICTA 1988, it should have opened an enquiry into the 2008 return within the prescribed time limits or it should have made a discovery assessment.

257. Paragraph 34 Schedule 18 Finance Act 1998, so far as material, provides:

> (1) This paragraph applies where a closure notice is given to a company by an officer.

(2) The closure notice must—

(a) state that, in the officer's opinion, no amendment is required of the return that was the subject of the enquiry, or

(b) make the amendments of that return that are required—

(i) to give effect to the conclusions stated in the notice, and

(ii) in the case of a return for the wrong period, to make it a return appropriate to the designated period.

(2A) The officer may by further notice to the company make any amendments of other company tax returns delivered by the company that are required to give effect to the conclusions stated in the closure notice.

(3) An appeal may be brought against an amendment of a company's return under sub-paragraph (2) or (2A).

258. The first question, it seems to me, is whether the consequential amendment made by Mr Stewart on 10 December 2010 in respect of the accounting period ended 30 April 2008 was "required to give effect to the conclusions stated in the closure notice." The closure notice in question was the one given on 18 June 2010 in respect of the accounting period ended 30 April 2007.

259. The conclusions stated in the 2007 closure notice were that, in Mr Stewart's view, the appellant was not entitled to relief for losses under section 343 ICTA 1988 or to relief for a deduction in respect of the amortisation of purchased goodwill in the accounting period ended 30 April 2007. Mr Stewart's objections went to the fundamental entitlement to the relief – it was not an objection which related to that year only. Exactly the same circumstances gave rise to a claim for these same reliefs in the 2008 return. It follows, therefore, that all other things being equal, the same conclusion (i.e. that the appellant was not entitled to either relief) must apply to the 2008 period. Accordingly, it seems to me clear that the amendment was consequential upon the conclusion reached by Mr Stewart in respect of the 2007 return. If there was no entitlement to a carry-forward of losses under section 343 in the 2007 return either because SSS had no losses which could be carried forward by the appellant or because the common ownership test was not met, the same conclusion must apply to the 2008 return. Similarly, if there was no entitlement to a deduction of £222,570 in respect of the amortisation of the purchase of goodwill in the 2007 return, the same conclusion must apply to the claim for the deduction of the same amount in the 2008 return. The conclusions in the 2007 closure notice in respect of the section 343 losses and the claim for amortisation of goodwill, as I have said, related to the fundamental entitlement to relief in both cases. In that sense, the conclusion expressed in the 2007 closure notice was equally applicable in relation to the 2008 period. Therefore, in my view, the consequential amendment as regards the 2008 period was necessary to give effect to the conclusions on the entitlement to the two reliefs expressed in the 2007 closure notice.

260. As for Mr Thomas' second argument that a consequential amendment had to be issued at the same time as the closure notice (in respect of which the amendment was treated as being consequential), I see no justification in the statutory language for

reaching such a conclusion. The only limit on the power to make a consequential amendment is that contained in paragraph 34 (2A), viz that the amendment is required to give effect to the conclusions stated in the relevant closure notice. No time limit is specified on the exercise of this power and I see no reason for reading one into the legislation.

261. In my view, therefore, HMRC's consequential amendment in respect of the 2008 return was valid. I should, however, make it clear that my decision goes only to the question whether HMRC were entitled to issue a consequential amendment. As we shall see, the question of the quantum of losses available to be carried forward from SSS remains to be determined at a subsequent hearing.

Whether valid claims for amortisation relief were made by the appellant under paragraph 51 Schedule 18 FA 1998

262. In the light of my conclusion that the appellant is not entitled to a deduction in respect of the amortisation of goodwill, I do not consider it necessary to discuss in any detail the arguments put forward regarding whether the various claims submitted by the appellant constituted valid claims within the meaning of paragraph 51 Schedule 18 FA 1998. Nonetheless, because the points were argued at some length before me I shall set out in outline my conclusions.

263. In my view, the claims for a deduction in respect of the amortisation of goodwill in respect of the 2005 and 2006 periods were plainly out of time. Paragraph 15(4)(a) Schedule 18 FA 1998 imposes a requirement that any amendment by a company to its company tax return must be made no more than 12 months after the filing date for the return. Moreover, paragraph 51B Schedule 18 FA 1998 provides that the no claim under paragraph 51 (relief for overpayment of tax) may be made more than four years after the end of the relevant accounting period. The claim for amortisation of goodwill in respect of the 2005 period was made, as far as I can tell, in a letter dated 26 May 2011 to HMRC from Mr Thomas. It is not clear when the claim for relief in respect of the 2006 period was made, but it was evidently not made before that date. It is, therefore, apparent that these claims were not made in time.

264. In respect of the appellant's arguments that the letters of 23 and 24 June 2010 and 8 April 2011 (relating to the periods 207, 2008 and 2009) were claims within the meaning of paragraph 51 (1) Schedule 18 FA 1998, I have concluded that these claims did not satisfy the statutory requirements. Paragraph 51 Schedule 18 FA 1998 provides:

> (1) This paragraph applies where—
>
> (a) a person has paid an amount by way of tax but believes that the tax was not due, or
>
> (b) a person has been assessed as liable to pay an amount by way of tax, or there has been a determination or direction to that effect, but the person believes that the tax is not due.

(2) The person may make a claim to the Commissioners for Her Majesty's Revenue and Customs for repayment or discharge of the amount.

(3) Paragraph 51A makes provision about cases in which the Commissioners for Her Majesty's Revenue and Customs are not liable to give effect to a claim under this paragraph.

(4) The following make further provision about making and giving effect to claims under this paragraph—

(a) …

(b) Schedule 1A to the Taxes Management Act 1970 (which is applied by that Part).

(5) …

(6) The Commissioners for Her Majesty's Revenue and Customs are not liable to give relief in respect of a case described in sub-paragraph (1)(a) or (b) except as provided—

(a) by this Schedule and Schedule 1A to the Taxes Management Act 1970 (following a claim under this paragraph), or

(b) by or under another provision of the Corporation Tax Acts.

(7) …

265. Paragraph 51B Schedule 18 FA 1998 provides:

(1) A claim under paragraph 51 may not be made more than 4 years after the end of the relevant accounting period.

(2) In relation to a claim made in reliance on paragraph 51(1)(a), the relevant accounting period is—

(a) where the amount paid, or liable to be paid, is excessive by reason of a mistake in a company tax return or returns, the accounting period to which the return (or, if more than one, the first return) relates, and

(b) otherwise, the accounting period in respect of which the amount was paid.

(3) In relation to a claim made in reliance on paragraph 51(1)(b), the relevant accounting period—

(a) where the amount liable to be paid is excessive by reason of a mistake in a company tax return or returns, the accounting period to which the return (or, if more than one, the first return) relates, and

(b) otherwise, is the accounting period to which the assessment, determination or direction relates.

(4) A claim under paragraph 51 may not be made by being included in a company tax return.

266. Paragraph 2 Schedule 1A Taxes Management Act 1970 provides:

> (1) Subject to any provision in the Taxes Acts for a claim to be made to the Board, every claim shall be made to an officer of the Board.
>
> (2) No claim requiring the repayment of tax shall be made unless the claimant has documentary proof that the tax has been paid by deduction or otherwise.
>
> (3) A claim shall be made in such form as the Board may determine.
>
> (4) The form of claim shall provide for a declaration to the effect that all the particulars given in the form are correctly stated to the best of the information and belief of the person making the claim.
>
> (5) The form of claim may require—
>
> (a) a statement of the amount of tax which will be required to be discharged or repaid in order to give effect to the claim;
>
> (b) such information as is reasonably required for the purpose of determining whether and, if so, the extent to which the claim is correct; and
>
> (bb) the delivery with the claim of such accounts, statements and documents, relating to information contained in the claim, as are reasonably required for the purpose mentioned in paragraph (b) above;

267. Thus, a claim under paragraph 51 must be made "in such form as HMRC may determine". In Revenue & Customs Brief 22/10, the form of overpayment relief claims was set out as follows:

> "Claims must be made in writing and:
>
> - Stated that the person is making a claim for overpayment relief under Schedule 1 A TMA 1970 (paragraph 51 Schedule 18 Finance Act 1998 for corporation tax claims).
> - Identify the … accounting period for which the overpayment or excess of assessment has been made.
> - State the grounds on which the person considers that the overpayment or excess of assessment has occurred.
> - State whether the person has previously made an appeal in connection with the payment for the assessment. If the claim is for repayment of tax, include documentary proof of the tax deducted or the tax being suffered in some other way.
> - Include a declaration signed by the claimant stating that the particulars given in the claim are correct and complete to the best of their knowledge and belief."

268. However, a provision in HMRC's company tax manual (COM 52030) indicated and relate can to Schedule 1A TMA 1970 that:

> "in practice, the Board does not normally determine forms for CT claims and the statutory requirement for the claimant contain a declaration is not normally insisted upon."

269. It seems to me, however, that HMRC had prescribed a particular form for claims made under paragraph 51 Schedule 18 FA 1998 in Revenue & Customs Brief 22/10. It is plain that the claims alleged by the appellant to be paragraph 51 claims do not satisfy these requirements. I also note that the requirement that the form should contain a declaration is a statutory requirement and is not a requirement that HMRC can dispense with (paragraph 2 (4) Schedule 1A TMA 1970).

270. I do not attach any significance to the fact that Mr Stewart in correspondence referred to the alleged paragraph 51 claims as "claims". There was no suggestion that Mr Stewart was considering whether these applications for relief constituted valid claims within the meaning of paragraph 51. Equally, however, I attach no significance to the fact that the alleged claims were included in a letter which also served as an appeal against various closure notices. It seems to me that, if the formal requirements for a paragraph 51 claim was satisfied, the fact that the claim happen to be included in a letter which gave notice of appeal does not make it an invalid claim.

271. Accordingly, I find that to the extent that the appellant argues that it made claims under paragraph 51, those claims were not validly made in the correct form.

The Undertaking

272. As I have described, the Undertaking was given in relation to proceedings in Edinburgh in which HMRC sought to have SSS restored to the register of companies (SSS having previously been struck off the register) in order to enforce liabilities to PAYE and national insurance contributions. The subsequent appeal in respect of these liabilities resulted in the Edinburgh Decision (see above).

273. The appellant's primary submission was that the Undertaking precluded HMRC thereafter from making enquiries into the quantum of the SSS losses carried forward and utilised by the appellant, pursuant to section 343 ICTA 1988 for periods 2005 onwards. In essence, Mr Thomas submitted that the Undertaking had the effect of preserving the appellant's right to utilise the losses that existed in SSS on the day the Undertaking was given i.e. 19 May 2010.

274. It is perhaps convenient to repeat the terms of the Undertaking, as follows:

> " That upon the restoration of the Company to the Register HMRC will forthwith (that is to say as soon as is practicable within the requirements of the Taxes Acts and applicable regulations and procedures) issue closure notices and assessments in respect of the outstanding enquiries into the Company's liabilities. The Revenue will a) make no further demands of the Company's officers or any other person in relation to the said outstanding enquiries, and b) raise no further enquiries into the Company's trade to the date that ceased namely 31 January 2005. The Company may appeal any assessments made on the issue of the said closure notices, if so advised. Apart from assessments made on the closure of the said enquiries the Revenue will have no power to, and will not, raise any assessments on the Company in relation to the said trade to the said date save on the discovery of

> fraudulent or negligent conduct on the part of the taxpayer within the meaning of s. 29 of the Taxes Management Act 1970, and has no present reason to anticipate making any such discovery or discovery assessment."

275. At a case management hearing in July 2014, the parties agreed that the Undertaking should be treated as governed by English law.

276. The Contracts (Third Parties) Act 1999 ("the 1999 Act") provides:

> "**1 Right of third party to enforce contractual term**
>
> (1) Subject to the provisions of this Act, a person who is not a party to a contract (a "third party") may in his own right enforce a term of the contract if–
>
> (a) the contract expressly provides that he may, or
>
> (b) subject to subsection (2), the term purports to confer a benefit on him.
>
> (2) Subsection (1) (b) does not apply if on a proper construction of the contract it appears that the parties did not intend the term to be enforceable by the third party.

277. In *Dolphin Maritime & Aviation Services Ltd v Sveriges Angartygs Assurans Forening* [2009] EWHC 716 (Comm) Christopher Clark J at [74] analysed section 1 of the 1999 Act as follows:

> "A contract does not purport to confer a benefit on a third party simply because the position of that third party will be improved if the contract is performed. The reference in the section to the term purporting to "*confer*" a benefit seems to me to connote that the language used by the parties shows that one of the purposes of their bargain (rather than one of its incidental effects if performed) was to benefit the third party."

278. Both parties accepted that section 1(2) created a rebuttable presumption. The point was explained by Colman J *Nisshin Shipping Co Ltd. v Cleaves & Company Ltd. & Ors* [2003] EWHC 2602 (Comm) at [23] as follows:

> "It is to be noted that section 1(2) of the 1999 Act does not provide that subsection 1(b) is disapplied unless on a proper construction of the contract it appears that the parties intended that the benefit term should be enforceable by the third party. Rather it provides that sub-section 1(b) is disapplied if, on a proper construction, it appears that the parties did not intend third party enforcement. In other words, if the contract is neutral on this question, sub-section (2) does not disapply sub-section 1(b). Whether the contract does express a mutual intention that the third party should not be entitled to enforce the benefit conferred on him or is merely neutral is a matter of construction having regard to all relevant circumstances. The purpose and background of the Law Commission's recommendations in relation to sub-section (2) are

> explained in a paper by Professor Andrew Burrows who, as a member of the Law Commission, made a major contribution to the drafting of the bill as enacted. He wrote at [2000] LMCLQ 540 at 544:
>
> 'The second test therefore uses a rebuttable presumption of intention. In doing so, it copies the New Zealand Contracts (Privity) Act 1982, s4, which has used the same approach. It is this rebuttable presumption that provides the essential balance between sufficient certainty for contracting parties and the flexibility required for the reform to deal fairly with a huge range of different situations. The presumption is based on the idea that, if you ask yourself, "When is it that parties are likely to have intended to confer rights on a third party to enforce a term, albeit that they have not expressly conferred that right", the answer will be: "Where the term purports to confer a benefit on an expressly identified third party". That then sets up the presumption. But the presumption can be rebutted if, as a matter of ordinary contractual interpretation, there is something else indicating that the parties did not intend such a right to be given.' "

279. It is clear to me that the Undertaking confers no rights on the appellant. The Undertaking was given in relation to proceedings to restore SSS to the register. The appellant was not a party to those proceedings. The whole tenor of the wording of the Undertaking reflects the context in which it was given i.e. outstanding enquiries into the tax affairs of SSS.

280. Paragraph a) of the Undertaking effectively provides that Mr Stewart (HMRC) will not make further demands of SSS, Messrs Thomas and third parties in relation to the "outstanding enquiries" relating to the trade of SSS. I do not think that this means that HMRC are prohibited from limiting the appellant to the quantum of losses existing in the appellant which are available for carry forward under section 343 ICTA 1988 at the date at which the appellant ceased to carry on its trade. The outstanding enquiries in question, as I understand it, related to terminal loss relief claimed by SSS and to PAYE and national insurance contributions. This part of the Undertaking simply prevents Mr Stewart from making enquiries ("demands") in respect of any other persons in respect of those matters. I cannot see how this part of the Undertaking has been breached in this case.

281. Paragraph b) of the Undertaking seems to me to relate entirely to SSS's trade. It does not purport to confer any benefit on the appellant. There is nothing which says or implies that HMRC is prohibited from enquiring into the tax affairs of the appellant and nothing which indicates that the appellant was intended to benefit from this paragraph.

282. Accordingly, I reject the appellant's submission that HMRC are precluded by the Undertaking from enquiring into the quantum of losses available for carry-forward under section 343 ICTA 1988 in all the accounting periods under appeal.

Losses available under section 343 ICTA 1988

283. HMRC accepted that the appellant had a *prima facie* entitlement to carry forward losses under section 343 ICTA 1988 (subsequently re-written in the Corporation Tax Act 2010) to the extent that there were losses available for carry-forward in SSS at the date of the cessation of its trade.

284. HMRC accepted that the common ownership test for the purposes of section 343 ICTA 1988 was satisfied. I have to say that it is as well that the parties were agreed on this point because from the deficient way that evidence was presented it would have been hard to determine this issue one way or the other.

285. Section 343 speaks of a company [SSS] ceasing to carry on a trade and another company [the appellant] beginning to carry it on. Although I have decided that the tripartite transaction did not take place, it seems to me clear from the evidence that SSS ceased to carry on the seafood trade and within two years (in fact a much shorter time, as we have seen earlier) the appellant commenced to carry on the same trade.

286. It therefore seems to me that *prima facie* the appellant is entitled to carry forward losses of SSS under section 343.

287. The question of what losses were available for carry forward at the date of the cessation of SSS's trade is the subject of another appeal to this Tribunal under reference TC/2011/06273.

288. Essentially, that appeal, as I understand it, concerns the effect of certain loss carry-back claims made by SSS on its losses available for carry-forward. In other words, HMRC contend that some or all of the losses which are being claimed under section 343 have already been utilised by SSS when it made carry-back claims.

289. The parties agreed, however, that the issue of the quantum of losses to be carried forward under section 343 should await the outcome of the appeal under reference TC/2011/06273. Any such losses would, of course, only be available to be offset against profits of the same trade.

290. I should make it clear that all matters relating to quantum in respect of any losses carried forward under section 343 are to be reserved for a further hearing. This will include the questionwhether there is any restriction of the losses, not just in relation to any carry-back of losses by SSS, but also by virtue of section 343 (4) i.e. the "relevant assets" and" relevant liabilities" tests. The adjourned hearing would also need to consider the application and effect of section 343 (8) in relation to the facts of this case.

291. Accordingly, I direct that this appeal be adjourned on this point until after the decision in the appeal reference TC/2011/06273 has been finally determined.

Deduction for director's remuneration in the 2007 period

292. In the accounts to 30 April 2007, a liability of £1,557,991 appears to have been assumed by the appellant to Mr Stuart Thomas. It is not clear on what basis any such assumption of this liability occurred, if indeed it did occur.

293. At the hearing, HMRC agreed that they would not tax this amount as income of Mr Stuart Thomas on the basis that the appellant would not claim a corporation tax deduction for the same amount.

Concluding observations

294. Finally, I should note that many harsh words have been used by Mr Thomas both at the hearing and in correspondence to describe the conduct of Mr Stewart. It is obvious that the relationship between Mr Thomas and Mr Stewart is poor or, as Judge Reid QC put it in the Edinburgh Appeal, "strained". I cannot comment on events and matters outside the evidence presented to me. Nonetheless, with that caveat, I see nothing in the correspondence and evidence before me that would justify the sometimes extravagant and hyperbolic criticism of Mr Stewart made by Mr Thomas.

Summary of decision

295. In relation to:

(1) the issue of loss relief under section 343 ICTA 1988 in respect of the periods ending 9 March 2005, 30 April 2005 – 2009, I have concluded that the appellant is *prima facie* entitled to such loss relief but that the question of quantum (and other matters referred to above in this connection) are adjourned for a further hearing after the final determination of the appeal under reference TC/2011/06273;

(2) the Undertaking does not preclude HMRC from enquiring into the quantum of losses available for carry-forward under section 343 ICTA 1988 in all the accounting periods under appeal;

(3) the 2008 period, the consequential amendment in respect of the 2008 period was validly made; and

(4) as regards the issue of deductions in respect of the amortisation of purchased goodwill under Schedule 29 FA 2002 and/or Part 8 CTA 2009, the appeals for all periods are dismissed.

Appeal rights

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

GUY BRANNAN
TRIBUNAL JUDGE

RELEASE DATE: 10 February 2015