HIGH COURT OF JUSTICE (CHANCERY DIVISION)—16 AND 17 JUNE 1993

Pepper (H.M. Inspector of Taxes) *v.* Daffurn[1]

Capital gains tax—Retirement relief—Sale of part of farm—Whether disposal of part of a business—Finance Act 1985, *s* 69.

D owned a 113 acre farm on which he kept beef cattle and sheep. The cattle side of his business consisted of buying and rearing young calves, keeping them for 2–2½ years prior to sale and over-wintering them in a covered yard.

In 1986 D sold 83 acres of the farm, including the farmhouse, and the disposal attracted retirement relief for the purposes of capital gains tax under s 69 Finance Act 1985. From late 1985 or early 1986 the cattle herd was run down: no calves were purchased after 1985. Planning permission for development of the covered yard was refused in 1986, but granted in 1987, and the yard was sold in 1988 for £250,000. D continued to farm on a reduced scale, grazing cattle, rather than rearing them: without a covered yard, rearing cattle would have been impossible.

Allowing an appeal by D against an assessment to capital gains tax for 1988–89, and the related refusal by the Inspector of Taxes of further retirement relief under s 69, the General Commissioners held that the sale of the covered yard constituted "a disposal of ... part of a business" within s 69(2)(a). The Crown appealed.

Held, in the Chancery Division, allowing the Crown's appeal, that with a view to sale of the covered yard D had changed the nature of his business, from rearing cattle to grazing cattle, so that he no longer required the covered yard for the purposes of that business; the yard was no longer necessary to enable him to carry on his business in the form which that business took at the date of the sale; the disposal was not therefore "a disposal of ... part of a business".

McGregor v. *Adcock* 51 TC 692 and *Atkinson* v. *Dancer* and *Mannion* v. *Johnston* 61 TC 598 considered.

CASE

Stated under s 56 Taxes Management Act 1970 by the Commissioners for the General Purposes of the Income Tax for the Division of Evesham in the County of Hereford and Worcester for the opinion of the High Court of Justice.

1. At a meeting of the said Commissioners held on 12 February 1992 at Evesham Town Hall, Gilbert Henry Daffurn (the taxpayer) of Princes Farm, Aston Somerville, Broadway, Worcestershire, appealed against the refusal by

[1] Reported [1993] STC 466.

H.M. Inspector of Taxes (the Inspector) to grant relief under s 69 Finance Act 1985 (retirement relief) for the year of assessment 1988–89.

2. Shortly stated the question for determination was whether the sale of 0.622 acres comprising a covered cattle yard (hereinafter referred to as "the property") at Princes Farm, Aston Somerville, on 27 September 1988 constituted the disposal of the whole or part of the taxpayer's business within s 69(2)(a) Finance Act 1985.

3. Mr. Derek John Pepper the District Inspector of Taxes at Evesham appeared on behalf of the Crown. The taxpayer who gave oral evidence before us was represented by Mr. Alun James of Counsel.

4. The following documents which were proved or admitted before us are available for inspection by the Court if required.

(1) Outline plan of Princes Farm marked A1.

(2) Rough sketch map showing the 0.622 acre site marked A2.

(3) Capital gains tax computation 1988–89, marked appendix B.

(4) Capital gains tax computation 1986–87; marked appendix C.

(5) Animal movements, appendices D1, D2 and D3.

(6) Trading account summaries, appendix D4.

(7) Copy letter 10 February 1992, H.M. Inspector of Taxes to the taxpayer's accountants Allchurch Bailey & Co.

(8) Statement of facts agreed between the parties.

(9) Written submissions on behalf of the taxpayer.

(10) Contentions on behalf of the Inland Revenue.

5. As a result of the evidence both oral and documentary adduced before us we find the following facts proved or admitted:

(1) The taxpayer who was born on 20 March 1921 had been a farmer for many years.

(2) He farmed 113 acres at Princes Farm, Aston Somerville, until September 1986. He has kept beef cattle and sheep since 1975.

(3) In September 1986 the taxpayer sold 83 acres including the farmhouse. Relief under s 69 Finance Act 1985 was granted in respect of the gain which arose on this disposal. The taxpayer retained 30 acres which included 7 outbuildings.

(4) The outbuildings included 0.622 acres of land upon which stood a covered cattle yard which was considered to have development potential.

(5) In September 1986 the taxpayer's first request for planning permission in respect of the property was refused.

(6) The cattle side of the business had consisted of buying and rearing young calves, keeping them for 2–2½ years prior to sale overwintering in the covered cattle yard. A disposal of the covered cattle yard would have made it impossible to winter young calves. The last

year in which significant numbers of young calves were purchased was during the autumn of 1985. Only three were purchased in July 1986. Sales were made in 1986 and 1987 but replacements were not made as the herd was being run down in anticipation of receipt of planning permission. During this period the taxpayer began to purchase older animals aged about 18 months which could be wintered outside. Those animals were sold after approximately one year.

(7) Planning permission was granted in September 1987 in respect of the property.

(8) Following the grant of planning permission the taxpayer disposed of the property on 27 September 1988.

(9) The taxpayer was over the age of sixty at the time of the relevant disposal.

(10) The taxpayer still farms but on a much reduced scale by fattening cattle, partly as a hobby and because it is his way of life and to provide sufficient income for the land to pay for itself.

6. It was contended on behalf of the taxpayer that:

(1) The change from rearing to grazing is fundamental and a totally different operation.

(2) Such a change had been caused by the sale of the property.

(3) The 1988 sale was not linked to the earlier 1986 sale.

(4) The taxpayer had satisfied both limbs of the interference test as set out in the letter dated 10 February 1992 from the Inspector to the taxpayer' s accountants and the 1988 sale had been a disposal of part of the taxpayer's business rather than the disposal of a business asset.

7. It was contended on behalf of the Crown that:

(1) Land is a chargeable business asset within para 12 of Sch 20 Finance Act 1985.

(2) In order to qualify for relief the taxpayer had to show that the sale of the property in September 1988 was a disposal of the whole or part of his farming business.

(3) Following the sale of the property the taxpayer's farming business had continued, consequently the taxpayer was not within the provisions of s 69(2)(b) Finance Act 1992.

(4) The taxpayer did not satisfy the requirements of s 69(2)(a) Finance Act 1985 insofar as he failed to establish that the sale of the covered cattle yard had so interfered with the conduct of his farming business that consequently it was fundamentally different from that which he had carried on prior to the sale.

8. The following cases were referred to in argument before us:

McGregor v. *Adcock*(1) 51 TC 692; *Atkinson* v. *Dancer*(2) 61 TC 598; *Mannion* v. *Johnston*(2) 61 TC 598.

(1) [1977] 1 WLR 864. (2) [1988] STC 758.

A 9. We the Commissioners who heard the appeal decided that:—

(i) Following the agreed statements of facts clearly setting out the taxpayer's farming activities prior to the 1988 disposal, that the farming activities before the sale and after the sale of the property were fundamentally different.

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(ii) The rearing of calves followed by fattening and wintering out was in our view totally different to merely fattening 18 month old beasts until ready for sale.

(iii) We were satisfied that the 1988 sale caused this fundamental change in the activities and assets of the taxpayer's business and thus he had satisfied the interference test set out in the Inland Revenue's letter of 10 February 1992.

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10. We accordingly allowed the taxpayer's appeal and determined the assessment in the sum of £74,639.00.

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11. Immediately after the determination of the appeal the Inspector expressed his dissatisfaction therewith as being erroneous in point of law and has requested us to state a Case for the opinion of the High Court pursuant to s 56 Taxes Management Act 1970, which Case we have stated and do sign accordingly.

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12. The question of law for the opinion of the High Court is whether on the facts found as hereinbefore set forth there was evidence upon which we could properly arrive at our decision in principle insofar as it was a question of fact and whether on the facts found that decision is correct in law.

F 14 August 1992

The case was heard in the Chancery Division before Jonathan Parker J. G on 16 June 1993 when judgment was reserved. On 17 June 1993 judgment was given in favour of the Crown, with costs.

Timothy Brennan for the Crown.

H *Alun James* for the taxpayer.

The following case was cited in argument in addition to the cases referred to in the judgment:—*Graham* v. *Green* 9 TC 309; [1925] 2 KB 37.

I

Jonathan Parker J.:—This is an appeal by the Crown from a decision of the General Commissioners at a meeting on 12 February 1992 allowing an appeal by the taxpayer, Mr. Gilbert Henry Daffurn, and confirming his entitlement to relief from capital gains tax in respect of the sale by him on 27 September 1988 of a covered cattle yard extending to just over half an acre at Princes Farm, Aston Somerville, Broadway, Worcestershire.

I turn first to the relevant statutory provisions, which are to be found in s 69 and Sch 20 of the Finance Act 1985. Section 69(1) of the 1985 Act provides, *inter alia*:

> "Relief from capital gains tax shall be given, subject to and in accordance with Schedule 20 to this Act, in any case where a material disposal of business assets is made by an individual who, at the time of the disposal (*a*) has attained the age of 60..."

The taxpayer in this case was born on 20 March 1921 and so was 67 years of age at the date of the disposal in question, that is to say, 27 September 1988.

Section 69(2) of the Act provides as follows:

> "For the purposes of this section and Schedule 20 to this Act, a disposal of business assets is (*a*) a disposal of the whole or part of a business, or (*b*) a disposal of one or more assets which, at the time at which a business ceased to be carried on, were in use for the purposes of that business, or (*c*) a disposal of shares or securities of a company (including a disposal of an interest in shares which a person is treated as making by virtue of section 72 of the Capital Gains Tax Act 1979—capital distributions), and the question whether such a disposal is a material disposal shall be determined in accordance with the following provisions of this section."

It is common ground that paras (b) and (c) of the subsection do not apply in this case and that the sole question at issue is whether the disposition amounted to "a disposal of ... part of a business" for the purposes of para (a) of the subsection.

The meaning of the word "material" in the expression "a material disposal of business assets" in s 69(1) is dealt with in s 69(3), and it is common ground that the disposition in question was a material disposal for the purposes of the section. The operation of the relief granted by s 69 is governed by Part II of Sch 20 to the Act. I need not however read any of the operative provisions of the Schedule since no issue arises in relation to them.

The salient primary facts as they appear from the agreed statement of facts and other material placed before the Commissioners, and from the Case Stated, are as follows. Prior to September 1986 the taxpayer had for many years farmed 113 acres at Princes Farm, Aston Somerville. The farm included a farmhouse and a number of outbuildings including the covered yard to which I have referred, the disposal of which in September 1988 gives rise to the issue on this appeal. Since about 1975 the taxpayer had kept beef cattle and sheep. The cattle side of the business consisted of buying and rearing young calves, keeping them for some two to two and a half years prior to sale and over-wintering them in the covered yard.

In September 1986 the taxpayer sold 83 acres of the farm, including the farmhouse, and relief was granted under s 69 of the Act in respect of that disposal. He retained some 30 acres of the farm including the covered yard. The covered yard was considered by the taxpayer to have development potential and some time prior to September 1986 application was made for planning permission for development. In September 1986 that application was refused. A further application was in due course made.

A According to the agreed statement of facts, from about the end of 1985 or early 1986 the cattle herd was run down "...in anticipation of receiving the planning permission which was granted in September 1987".

The last year in which calves were purchased was 1985. Three animals were purchased in July 1986 but, contrary to what is set out in the Stated B Case, they were not calves but store cattle, that is to say, older beasts. Sales were made during 1986 and 1987 but the cattle sold were not replaced. The farm records before the Commissioners showed that whereas the herd consisted of 46 beasts as at 5 April 1986, by 5 April 1989 it had run down to nil, although the taxpayer subsequently purchased older animals aged about 18 months which could be wintered outside. Those animals were sold after C approximately one year.

Planning permission for development of the covered yard was granted in September 1987 and on 27 September 1988 the covered yard was sold for £250,000. The taxpayer continues to farm on what he has retained of Princes Farm but on a much reduced scale, grazing cattle rather than rearing them. D He does this partly as a hobby, partly because it is his way of life and partly to provide sufficient income for the land to pay for itself.

It is common ground that without a covered yard it would be impossible for the taxpayer to carry on the business of rearing cattle as opposed to grazing them since young calves must be kept in a covered yard during the winter months. E

On those primary facts the Commissioners found: (i) that the taxpayer's farming activities before and after the sale of the covered yard were fundamentally different; (ii) that the rearing of calves followed by fattening and wintering-out was in their view totally different from merely fattening 18-month-old beasts until ready for sale; and (iii) that the sale of the covered F yard caused the change (which they described as fundamental) and that the taxpayer had satisfied the "interference test" said to have been propounded by Fox J. in *McGregor* v. *Adcock*(1) reported in 51 TC 692, at page 696.

Accordingly, they allowed the taxpayer's appeal and granted relief under s 69 of the Act on the footing that the sale of the covered yard was a disposal G of part of the taxpayer's farming business for the purposes of subs (2)(a) of that section.

In *McGregor* v. *Adcock* Fox J. had to consider the effect of similar relieving provisions in s 34 of the Finance Act 1965, in particular the question whether a sale by a farmer of part of his farm land amounted on the H facts of that case to a sale of part of his farm business. It was contended by the taxpayer in that case that the trade of farming consisted simply of the occupation of land with a view to making a profit out of it, and that consequently every sale of farm land necessarily amounted to a sale of part of the farming business.

I Fox J. rejected that submission. In so doing he said (at page 696, just below F)(2):

> "As regards the proposition that the statutory trade of farming is the occupation of land with a view to making a profit out of it, I do not

(1) [1977] 1 WLR 864. (2) *Ibid*, at page 867.

think that this really assists the resolution of the matter. The fact is that there was here a business. A business involves activity by the person conducting it. Mere occupation of land is not enough. The business of mixed farming comprises varied activities and involves the use of many things. It must be a question of fact in each case whether there has been such an interference with the whole complex of activities and assets as can be said to amount to a disposal of the business or a part of the business." A B

Thus, in finding that the sale of the covered yard satisfied what they described as "the interference test", the Commissioners were finding that by reason of the sale there had been such an interference with the whole complex of the taxpayer's activities and assets as amounted to a disposal of part of his farming business. C

Against that background, and bearing in mind the principles set out by Lord Radcliffe in the well-known passage from his speech in *Edwards* v. *Bairstow & Harrison*[1] 36 TC 207 and following, to which reference has been made in the course of argument by both Mr. Brennan for the Revenue and Mr. James for the taxpayer, I return to s 69(2) of the Finance Act 1985. D Before turning to the precise words of the subsection, however, I must first return to the so-called interference test said to have been propounded by Fox J. in *McGregor* v. *Adcock*. It seems to me that there are potential dangers inherent in attempting to restate, rephrase or paraphrase a statutory provision, one of them being that the resulting restatement may itself be treated as if it were a statutory provision in substitution for the terms of the statute. E This danger was expressly recognised by Peter Gibson J. (as he then was) in *Atkinson* v. *Dancer* and *Mannion* v. *Johnston*[2] (in which a single judgment was given) 61 TC 598. Thus, at page 608H of the report Peter Gibson J. said[3]:

"... but, with respect, I doubt whether it is particularly helpful or illuminating to rephrase the simple and clear test posed by the wording of s 124(1)(a) [of the Capital Gains Tax Act 1979] by a test in terms of interference with the whole complex of activities and assets." F

However, since counsel on both sides in that case were agreed that that was the appropriate test for the learned Judge to apply he went ahead and G applied it, leaving it to a higher court if it thought fit to (as he put it) lay down some other test.

I respectfully echo Peter Gibson J.'s concerns about applying what is in effect a substitute test. Moreover, it seems to me that in the instant case the danger which I mentioned a moment ago has materialised in that the H Commissioners have effectively elevated the so-called interference test and given it the status of a statute. In any event, I respectfully doubt whether, when he gave judgment in *McGregor* v. *Adcock*, Fox J. intended to lay down any test at all. As I read the relevant passage of his judgment, all he was doing was rejecting the proposition put by counsel for the taxpayer in that case that the sale of farm land necessarily involved the sale of part of the I farmer's farming business, and stressing that whether it did so or not must be a question of fact in every case. At all events, for my part I am not prepared to read into that passage from the judgment of Fox J. anything more than that.

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(1) [1956] AC 14. (2) [1988] STC 758. (3) *Ibid*, at page 765f.

A I return, then, to the wording of s 69(2). In the first place, reading para (a) of the subsection in the context of the provision as a whole, in particular in the context of para (b), it is plain that a distinction is drawn between a disposal of a business or part of it on the one hand and the disposal of a business asset on the other. The disposal of a business asset qualifies for relief under para (b) only if there has been a cessation. In the second place, the B reference to the disposal of part of a business necessarily connotes that there was immediately before the disposal a further part of the business which was not included in the disposal. Subject to that, there is, so far as I can see, no guidance to be gleaned from the statutory context as to the meaning of the expression "disposal of part of a business".

C At first sight one might have been excused for thinking that para (a) was intended to relate to disposals of a business or part of it as a going concern, whereas para (b) was intended to deal with the break-up of a business following cessation, but neither counsel was disposed to accept such a construction. Moreover, I recognise the force of the point that had Parliament intended para (a) to relate to disposals of going concerns it could easily have said so in D terms. Accordingly, I am content to proceed on the footing that para (a) is not limited to the sale of a business or part of it as a going concern.

On that footing, the question for present purposes is whether the sale of a particular business asset—in this case, the covered yard—amounted on the facts to the sale by the taxpayer of part of his farming business. The E Commissioners found that the sale of the covered yard caused a fundamental change in the taxpayer's business represented by a change from rearing cattle, for which the covered yard was required, to grazing cattle, for which it was not. But since on the facts that change predated the sale of the covered yard, in my judgment the Commissioners clearly misdirected themselves in treating the subsequent disposal as the cause of a change in the taxpayer's business F which had occurred previously. It appears clearly from the agreed statement of facts that the cause of the change was not the disposal of the covered yard, which had not yet happened *and which might never happen*, but the prospect of planning permission for development being granted (as it was in fact granted in September 1987).

G Mr. James for the taxpayer submitted that the Commissioners were not merely entitled but right to find that the sale of the covered yard caused the change from rearing to grazing notwithstanding that that change had already taken place before the sale. He submitted with force that what was happening was a continuing process of running down the herd on the one hand and applying for planning permission in respect of the covered yard on the other, H which process was completed by the sale of the yard. He submitted that only at that point did the change become irreversible and final and that it would have been unrealistic and uncommercial to expect the taxpayer to carry on with his herd at full strength right up to the moment of sale, thus leaving himself with calves which he would have to dispose of by means of a forced sale.

I However, in my judgment what happened in this case on the agreed facts was that the taxpayer had in mind to sell part of his land at an advantageous price and with a view to that sale he changed the nature of his business so that he no longer required the land in question for the purposes of that business. Having done that, and having obtained the necessary planning permission, he sold the land. To categorise the sale of the land in those circumstances as the sale of part of his business seems to me, with all respect

to the Commissioners, to be the antithesis of the true position. By reason of the change that the taxpayer had made the land in question was no longer required for the purpose of his business when he sold it. That is not to say that he may not have used the covered yard from time to time after the change from rearing to grazing. That aspect of the matter is not specifically dealt with in the agreed statement of facts. But the point is that by reason of the change which he made the yard was no longer necessary to enable him to carry on his business in the form which that business took at the date of sale.

For the Revenue Mr. Brennan submitted that the change from rearing to grazing was not in any event a fundamental change in the taxpayer's business. I see no basis for interfering with that finding of the Commissioners, but since the change predated the sale and was not caused by it, its fundamental nature does not affect what I regard (to use the words of Lord Radcliffe in *Edwards* v. *Bairstow*) as "the true and only reasonable conclusion" on the facts of the case, namely, that the sale of the covered yard was not a sale of part of the taxpayer's business within the meaning and for the purposes of s 69(2)(a) of the Finance Act 1985. Since no other paragraph of the subsection is applicable, relief is not available to the taxpayer under the provisions of s 69(1). Accordingly, I allow the Crown's appeal.

Before parting with the case I should like to add a postscript which has nothing to do with the decision in this particular case. In the course of his speech in *Edwards* v. *Bairstow*[1] (at page 228 of the report) Lord Radcliffe included a classical quotation. Having referred to the decision of Rowlatt J. at first instance in the case of *Cooper* v. *Stubbs*[2], he continued[3]:

> "In the Court of Appeal the majority did not agree with him, holding, in effect, that it would not have been right to give such a direction to the jury on the facts as found. We are not rehearing the case of *Cooper* v. *Stubbs*, though one can say, at any rate, *'sed victa Catoni'*."

In case the sense of that allusion is lost on anyone—and it was certainly lost on me until my usher, who is a very learned man in these matters, enlightened me—I should like to pass on what I have learnt. The words in question are part of a line from Lucan's *Pharsalia*, book I, line 128. The full line, which will be instantly recognised as a dactylic hexameter, is as follows: "*Victrix causa deis placuit, sed victa Catoni*". Literally translated, it means: "The victorious cause pleased the gods but the defeated one pleased Cato".

This reference is to Cato the younger, who had espoused the cause of Pompey against Caesar. In other words, as I understand it, Lord Radcliffe is implying that he has a degree of sympathy with the approach of Rowlatt J. at first instance and of Pollock M.R. in the Court of Appeal.

Appeal allowed, with costs.

[Solicitors:—Solicitor of Inland Revenue; Messrs. Cox & Hodgetts.]

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(1) 36 TC 207. (2) 10 TC 29. (3) [1956] AC 14, at page 34.