HIGH COURT OF JUSTICE (CHANCERY DIVISION)—
6, 7 AND 10 JULY 1978 A

COURT OF APPEAL—14 MAY 1979

HOUSE OF LORDS—18, 19 AND 20 JUNE AND 24 JULY 1980

B

Marren (H.M. Inspector of Taxes) *v*. Ingles
Marren (H.M. Inspector of Taxes) *v*. Linnell
Gordon (H.M. Inspector of Taxes) *v*. Winton[1]

Capital gains tax—Disposal of shares—Whether rights to receive deferred payments constituted "incorporeal property"—Whether a disposal of such property on such payments being made—Finance Act 1965 (*c* 25), *ss* 22(1) *and* 22(3). C

Meaning of "debt" in Finance Act 1965 (*c* 25), *Sch* 7, *para* 11(1)—*Whether exemption provided by Sch* 7, *para* 11(1), *available.*

On 15 September 1970 the three taxpayers entered into a written agreement with ICFC Ltd. whereby the taxpayers agreed to sell and ICFC Ltd. to purchase, *inter alia*, 60 shares in JI(H) Ltd. ("the shareholdings") at a price of £750 each D plus "Half of the profit" as defined by the agreement. By clause 1(E) of the agreement "Half of the profit" was defined to mean "one half of the amount by which 'the Sale Price' . . . exceeds £750" and by clause 1(C)(ii) thereof "the Sale Price" was defined to mean "the price which would be payable in respect of each sixtieth part of the shareholdings were they sold at a price equal to the Middle Market Price . . . quoted on the first day of dealings after Flotation". E Flotation took place on 29 November 1972 and the first day of dealing thereafter was 5 December 1972.

The taxpayers appealed to the Special Commissioners against assessments to capital gains tax for the year 1972–73 made on the basis that their respective rights to receive "Half of the profit" ("the deferred payments") were new assets which they acquired on 15 September 1970 and which they disposed of on F 5 December 1972. The Special Commissioners allowed the appeals in principle and the Crown appealed.

The Chancery Division, dismissing the Crown's appeals, held (1) that on the conclusion of the agreement each of the taxpayers acquired a new "asset" namely, a chose in action which constituted "incorporeal property" within the meaning of s 22(1)(*a*), Finance Act 1965; (2) that s 22(3) of the 1965 Act did not G give rise to a deemed disposal of the relevant choses in action, namely, the rights to receive the deferred payments on 5 December 1972 since (*a*) the operation of s 22(3) is confined exclusively to cases where no asset is acquired by the person paying the capital sum (*Commissioners of Inland Revenue* v. *Montgomery* 49

(1) Reported (ChD) [1979] 1 WLR 1131; [1979] STC 58; 122 SJ 594; (CA) [1979] 1 WLR 1131; [1979] STC 637; 123 SJ 373; (HL) [1980] 1 WLR 983; [1980] 3 All ER 95; [1980] STC 500; 124 SJ 562.

A TC 679; [1975] Ch 266 followed), and (*b*) the person paying the capital sums, namely ICFC Ltd., did acquire assets in the shape of the shareholdings, the payment of the capital sums being part of the consideration paid therefor under the agreement, despite the fact that the acquisition of legal and beneficial title thereto preceded the payment; (3) that if a liability is at any point of time to amount to a "debt" within the meaning of para 11(1), Sch 7 to the 1965 Act it B must be at very least a liability to pay a sum which is, at such point of time, ascertained or capable of ascertainment; (4) that the exemption contained in para 11(1), Sch 7, is only applicable where a deemed disposal takes place by virtue of para 11(2) of that Schedule. The Crown appealed.

The Court of Appeal, unanimously allowing the Crown's appeals, held (1) that s 22(3) gave rise to deemed disposals of the relevant choses in action C since capital sums were derived therefrom and ICFC Ltd. did not acquire any assets in consideration thereof; (2) that para 11, Sch 7, did not apply since, in addition to the reasons given by Slade J., the object thereof in the present case was to ensure that an ordinary simple debt on which a holder cannot make a gain but may make a loss shall not be brought within the ambit of the capital gains tax legislation. The taxpayers appealed.

D The House of Lords, dismissing the taxpayer I's appeal, *held* that (1) the obligation to pay the deferred consideration was a chose in action and by virtue of s 22(3) there was a disposal of an asset (namely that chose in action); (2) the words in s 22(3) "notwithstanding that no asset is acquired" are words of extension not of limitation so that s 22(3) applied whether or not ICFC Ltd. acquired an asset in 1972 (observations to the contrary of Walton J. in *Com-* E *missioners of Inland Revenue* v. *Montgomery* 49 TC 679, at pages 687E–8, disapproved); (3) a possible liability (in 1970) to pay an unascertained sum on an unknown date is not a debt within the meaning of para 11(1), Sch 7; (4) the sum quantified in 1972 was not a debt within the meaning of para 11(1) since if it were it would follow that no charge would ever arise under s 22 where the person making the disposal did not recover immediate payment.

F

CASE

Stated under the Taxes Management Act 1970, s 56, by the Commissioners for the Special Purposes of the Income Tax Acts for the opinion of the High Court of Justice.

1. At a meeting of the Commissioners for the Special Purposes of the G Income Tax Acts held on 29 July 1976 James Leslie Ingles (hereinafter called "Mr. Ingles") appealed against the following assessments to capital gains tax:

	£
1970–71	119,124
1972–73	21,000.

2. Shortly stated the question for our decision was whether in computing H capital gains tax payable on the sale of shares for an immediate payment of £750 a share, plus a further deferred payment, the right to receive such deferred consideration was a separate asset which was disposed of when such deferred consideration became due and payable, giving rise to a charge to capital gains tax in respect of such disposal.

3. An agreement made 15 September 1970 between Mr. Ingles, Mr. M. R. Linnell and Mr. C. D. Winton of the one part and the Industrial and Commercial Finance Corporation Ltd. of the other part ("the agreement") was admitted in evidence before us. A copy of such agreement is annexed hereto as exhibit 1 and forms part of this Case([1]).

A

4. The following facts were admitted between the parties:

(*a*) By the agreement Mr. Ingles, Mr. M. R. Linnell and Mr. C. D. Winton ("the vendors") agreed to sell to Industrial and Commercial Finance Corporation Ltd. ("the purchaser") a total of 167 "A" ordinary shares in a company then called J. L. Ingles (Holdings) Ltd. ("the company").

B

(*b*) By clause 2 of the agreement the vendors agreed (*inter alia*) to sell a total of 60 "A" ordinary shares (being part of the total of 167 such shares and described therein as the "shareholdings") at a price per share of £750 plus "half of the profit".

C

(*c*) The expression "half of the profit" was defined by clause 1E of the agreement thus:

"(E) 'Half of the Profit' shall mean one half of the amount by which 'the Sale Price' or 'the Share Value' (as the case may be) exceeds £750 and shall be payable in respect of each sixtieth part of the Shareholdings. In the event of a sale of less than a sixtieth part of the Shareholdings for the purpose of this Clause 'the Sale Price' and the figure £750 shall be reduced proportionately. If the value of less than a sixtieth part of the Shareholdings shall fall to be determined under Clause 1(D) for the purpose of this Clause 'the Share Value' and the figure £750 shall be reduced proportionately."

D

(*d*) By clause 1(C)(ii) of the agreement "the sale price" was defined as

E

"the price which would be payable in respect of each sixtieth part of the Shareholdings if all the Shareholdings were sold at a price per share equal to the Middle Market Price (as hereinafter defined) quoted on the first day of dealings after Flotation so that such price shall have effect for the purpose of calculating Half of the Profit under Clause 1(E) hereof both in respect of shares comprised in the Shareholdings which may be offered to the Public on Flotation and shares comprised in the Shareholdings which shall be sold at a later date."

F

(*e*) By clause 1(F) of the agreement the middle market price was defined as the lower of the two prices shown in the quotation for the shares of the company in the Stock Exchange Official Daily List on the relevant date (i.e. the first day of dealings after flotation) plus one-half of the difference between those two figures.

G

(*f*) The cost of the "A" shares of £1 each in the company (the name of which was changed to Rosgill Holdings Ltd. on 7 November 1972) which comprised the "shareholdings", as defined in clause 1(A) of the agreement was £1 per share.

(*g*) Between 15 September 1970 and 5 December 1972 the "A" shares referred to above were sub-divided into "A" shares of 10p. each, redesignated as ordinary shares and then sub-divided into shares of 5p. each. Subsequent to the second sub-division a scrip issue of 399 for one was made with the result that on 5 December 1972 the "shareholdings" as defined above, comprised 480,000 shares of 5p. each in the company.

H

([1]) Not included in the present print.

A (*h*) The flotation referred to in clause 1(C)(ii) of the agreement took place on 5 December 1972 and the first day of dealings in shares in the company's shares after flotation was also 5 December 1972. The "sale price", as defined in clause 1(C)(ii) was 80p. per share. ["Half of the profit", based on 80p. per share, is hereafter referred to as "the deferred consideration".]

5. It was contended on behalf of Mr. Ingles that:

B (*a*) the deferred consideration was a debt created by the agreement. Such debt was not a debt on a security, but was a debt to which para 11, Sch 7, Finance Act 1965 applied. Mr. Ingles was the original creditor and accordingly the satisfaction of that debt was deemed not to be a disposal for capital gains tax purposes;

(*b*) the deferred consideration did not fall to be included in the computation C of the gain upon the sale of the shares in question, although the value on 15 September 1970 of the right to receive the deferred consideration, being part of the consideration for which Mr. Ingles then disposed of the relevant shares does fall to be included in such computation.

6. It was contended on behalf of the Inspector of Taxes that:

(*a*) the deferred consideration was not a "debt" within the said para 11, D Sch 7, Finance Act 1965, since to constitute a "debt" there must be a sum which is ascertained, or which is ascertainable by calculation or by making up an account, and the value of the right to receive the deferred consideration was not ascertained or so ascertainable until 5 December 1972;

(*b*) the right to receive the deferred consideration was itself, for the purposes of capital gains tax, an asset which Mr. Ingles (a) acquired on 15 September E 1970 for a sum equal to its value on that date, and (b) disposed of on 5 December 1972, for a consideration equal to the amount of the deferred consideration which then became actually due and payable to him under the said agreement;

(*c*) accordingly capital gains tax became chargeable in respect of such disposal on the amount by which the consideration (less expenses) exceeded the acquisition costs.

F 7. The following authorities were referred to:—*Inland Revenue Commissioners* v. *Bagnall, Ltd.* [1944] 1 All ER 204; *Mortimore* v. *Commissioners of Inland Revenue* (1864) 2 H & C 836; *O'Driscoll* v. *Manchester Society* [1915] 2 KB 499; *Underground Electric Railways Co. of London Ltd.* v. *Commissioners of Inland Revenue* [1905] 1 KB 174; [1906] AC 21; *Ogdens Ltd.* v. *Weinberg* (1906) 95 LT 568; *Randall* v. *Plumb* 50 TC 392; [1975] 1 WLR 633; *Commis-* G *sioners of Inland Revenue* v. *Montgomery* 49 TC 679; [1975] 2 WLR 326.

8. We, the Commissioners who heard the appeal, took time to consider our decision and gave it in writing on 5 August 1976 as follows:

These appeals relate to gains arising on the sale of shares which were sold partly for cash payable on the date of completion (which was 15 September 1970, the date of the contract of sale) and partly for a cash consideration of H which both the quantification and the payment were deferred, ("the deferred consideration"). The contract of sale created a liability in respect of the deferred consideration which in the event was quantified and became due on 5 December 1972. The Crown contended that such liability was a chose in action (but not a debt) which constituted a separate asset, acquired on 15 September 1970 and disposed of on 5 December 1972. For the Appellants it was said that such

liability is a debt within para 11, Sch 7, Finance Act 1965. The authorities show that "debt" where it occurs in a statute, may or may not be an ascertained or quantified sum, according to the context. A

The context of para 11 affords some guidance. The paragraph does not apply to debts "on a security" (as defined in para 5) which are of their nature usually quantified. But it does not follow that the debts to which para 11 applies must be quantified. All that the paragraph requires in terms is that they be disposed of or satisfied, which could apply equally to any debts quantified or not. The immediate context of para 11 is that it is in a group of three paragraphs headed "debts and interests in settled property". All three paragraphs exclude matters from the charge to capital gains tax and they apply, *inter alia*, to superannuation payments (para 12) and interests under settlements (para 13). There are thus grouped together rights which are in themselves assets (by virtue of the wide meaning of assets in s 22) yet are not chargeable assets. The feature they have in common is that, although they are capable of being bought and sold, they ordinarily come to fruition or maturity or expire. It would be a legitimate conclusion that para 11 does not fall to be construed in the limited manner contended for by the Crown, but we prefer a different approach to the problem. B C D

A debt which arises incidentally as a by-product, so to speak, of a sale has a quality different from the above. Property may be, and frequently is, sold for a consideration not immediately payable. Completion may be weeks or months after the date of the contract. The contract itself may create a new asset, for example, a covenant as is mentioned in para 15. Such matters may be reflected in the price and the gain is computed in accordance with the 1965 Act, in particular, Part I of Sch 6, para 4 of which regulates deductions. Paragraph 14, Sch 6, assumes that consideration payable by instalments is not a debt; otherwise it would specifically exclude para 11. Paragraph 8, Sch 6, assumes that assets may be derived from other assets and yet the requisite adjustments required by that paragraph are merely proportionate deductions under para 4. The capital sum which is derived from assets under s 22 is defined by s 22(9) by reference to Part I of Sch 6, which, by para 1 thereof, has effect for computing the gain on the disposal of an asset. E F

These considerations lead us to the conclusion that where an asset is sold for a deferred payment the Act does not treat such consideration as a separate asset and that such consideration is not a debt within para 11.

We hold that the gain falls to be computed on each share by adding the fixed consideration (£750) to the value of the deferred consideration at the date of the contract and deducting therefrom the acquisition cost of £1 and the expenses of disposal. G

We adjourn the appeal for the agreement of figures on this basis.

9. The Inspector of Taxes, immediately after the determination of the appeal, declared to us his dissatisfaction therewith as being erroneous in point of law and required us to state a Case for the opinion of the High Court pursuant to the Taxes Management Act 1970, s 56, which Case we have stated and do sign accordingly. H

10. Having regard to three marks of Rowlatt J. in *MacLaine & Co.* v. *Eccott*(1) 10 TC 481 at page 550 we have considered it desirable to state this Case on a question of principle only at the request of the Inspector of Taxes I

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(1) [1926] AC 424.

A and with the concurrence of the Respondent in order to avoid the delay occasioned by waiting for an agreement of the figures of assessment in accordance with our decision set out in para 8 hereof. When the High Court has decided the question of principle in dispute, the Case will require to be remitted to the Special Commissioners in order that the assessment for the year 1972–73 may be adjusted in accordance with the judgment of the Court.

B 11. The question of law for the opinion of the Court is whether our decision set out in para 8 above is correct in law.

J. B. Hodgson
R. A. Furtado
{Commissioners for the Special Purposes of the Income Tax Acts

Turnstile House
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29 June 1977

The cases came before Slade J. in the Chancery Division on 6 and 7 July 1978 when judgment was reserved. On 10 July 1978 judgment was given against the Crown, with costs.

D *Michael Nolan Q.C.* and *Brian Davenport* for the Crown.

Leolin Price Q.C. and *D. J. Ritchie* for the taxpayers.

The cases cited in argument are referred to in the judgment.

Slade J.—These are appeals by the Crown from three decisions of the Special Commissioners relating to capital gains tax. The Respondents to the E three appeals are, respectively, Mr. James Leslie Ingles, Mr. Maurice Richard Linnell and Mr. Charles Donald Winton. The major question of principle in issue in the appeals is an interesting one. If a contract for the sale of property, completed the same day, provides for the payment of the purchase consideration in the form partly of a stated sum payable at once and partly of a further sum as yet unascertained, but payable on a defined future contingency by F reference to a specified formula, does the payment of the deferred consideration, if and when it becomes payable, give rise to a second disposal for capital gains tax purposes, in addition to the disposal which occurs at the time of the contract? The Crown contends that it does: the Respondents contend to the contrary.

On 15 September 1970 the three Respondents entered into a written agreement with Industrial and Commercial Finance Corporation Ltd. ("the G purchaser"), under which they agreed to sell and the purchaser agreed to buy a total of 167 "A" ordinary shares of £1 each in a company then known as J. L. Ingles (Holdings) Ltd. ("the company"). Under clause 2 of the agreement 107 of these shares were to be sold at a price of £1,500 per share and no problem arises in this context. Under the same clause the remaining 60, of which 28 were owned by Mr. Ingles, 16 by Mr. Linnell and 16 by Mr. Winton, were to be sold

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at a price of £750 each plus "Half of the Profit" as defined by the agreement. Clause 1 of the agreement contained a number of definitions. Clause 1(A) provided: A

> " 'The Shareholdings' shall mean (as the case may be): (i) the 60 shares hereby agreed to be sold at a price per share of £750 plus Half of the Profit (as hereinafter defined) or (ii) the said 60 shares plus all bonus shares which shall be allotted to the holders thereof on a capitalisation of reserves or (iii) such shares or other securities as may represent the said 60 shares and all bonus shares as aforesaid or be allotted to the holders or allottees thereof on a sub-division or reorganisation of capital." B

Clause 1(B) defined "flotation" as meaning: "the grant of permission to deal in and quotation for the Ordinary Shares of the Company on a recognised Stock Exchange in the United Kingdom". Clause 1(C)(ii) provided: C

> "If Flotation shall take place 'the Sale Price' shall mean the price which would be payable in respect of each sixtieth part of the Shareholdings if all the Shareholdings were sold at a price per share equal to the Middle Market Price (as hereinafter defined) quoted on the first day of dealings after Flotation so that such price shall have effect for the purpose of calculating Half of the Profit under Clause 1(E) hereof both in respect of shares comprised in the Shareholdings which may be offered to the Public on Flotation and shares comprised in the Shareholdings which shall be sold at a later date." D

Clause 1(D) contained a definition of "the Share Value" which is irrelevant in the events which happened. Clause 1(E), so far as material in the events which happened, provided as follows: E

> " 'Half of the Profit' shall mean one half of the amount by which 'the Sale Price' or 'the Share Value' (as the case may be) exceeds £750 and shall be payable in respect of each sixtieth part of the Shareholdings". Clause 1(F) defined "the Middle Market Price" as meaning: "the lower of the two prices shown in the quotations for the shares of the Company in the Stock Exchange Official Daily List on the relevant date plus one half of the difference between those two figures." F

Clause 3(A) provided: "The sums of £1,500 and £750 referred to in Clause 2 hereof shall be paid on completion". Clause 3(B) provided:

> "A sum equal to Half of the Profit shall be paid in respect of each sixtieth part of the Shareholdings forthwith upon the sale thereof by the Purchaser or Flotation or completion of a winding-up or as soon as 'the Share Value' shall be determined in accordance with the provisions of Clause 1(D) hereof." G

Clause 4 provided:

> "Completion shall take place on the 15th day of September 1970"—that is to say, the date of the agreement itself—"when the Vendors shall deliver to the Purchaser duly executed transfers in favour of the Purchaser in respect of all the shares hereby agreed to be sold together with the relative Share Certificates and in exchange the Purchaser shall pay to the Vendors the respective amounts due to be paid to them on completion under the provisions hereof." H

The acquisition cost of the "A" ordinary shares of £1 each in the company for capital gains tax purposes was £1 per share. Between 15 September 1970 and 5 December 1972 the "A" shares already referred to were subdivided into I

A "A" shares of 10p. each, redesignated as ordinary shares and then subdivided into shares of 5p. each. After the second subdivision, a scrip issue of 399 for 1 was made. The result was that by 5 December 1972 the shareholdings, as defined by the agreement, comprised 480,000 ordinary shares of 5p. each. It is common ground that the flotation of the company, referred to in clause 1(C)(ii) of the agreement, in the event took place on 29 November 1972 (though the Case B Stated in relation to Mr Ingles's assessment gives 5 December 1972 as the date of flotation). The first day of dealings, for the purpose of clause 1(C)(ii) of the agreement, was 5 December 1972. The relevant price per share for the purpose of that sub-clause was 80p. per share. Accordingly, the "Sale Price", as defined in that sub-clause, was £6,400 and "Half of the Profit", as defined by clause 1(E), amounted to £2,825, that is, one half of the excess of £6,400 over £750. This C additional sum became payable to the three Respondents in respect of each sixtieth part of the "Shareholdings", as defined by the agreement, which they had respectively sold.

It has been common ground before me, as it was before the Special Commissioners, that the agreement gave rise to immediate disposals of the 60 relevant "A" shares for capital gains tax purposes on 15 September 1970 and D that, in computing the gain made by each Respondent on such disposal, the value as at the date of the agreement of his contingent right to receive "Half of the Profit" fell to be added on the credit side to the sum of £750. I am told that the question which divides the parties in this particular context is the manner in which the last-mentioned value should be calculated. This question is not before me and has yet to be determined by the Commissioners. I shall, however, E mention one or two points in this context because they may be considered relevant background to the questions directly in issue on these appeals.

First, Sch 6 to the Finance Act 1965 ("the Act") contains a number of provisions for computing the amount of a gain accruing on the disposal of an asset. Paragraph 14(1), (2), (3) and (4) of that Schedule in its original form (which has now been amended and partially repealed by the Finance Act 1972 with effect F from 11 April 1972), contained provisions designed to cover the case where the consideration taken into account in the computation under the Schedule was payable by instalments over a period beginning not earlier than the time when the disposal was made, being a period exceeding 18 months. The effect of these provisions was that the chargeable gain (or allowable loss) accruing on the disposal was to be regarded as accruing in proportionate parts in the year of G assessment in which the disposal was made and in each of the subsequent years of assessment down to and including the year of assessment in which the last instalment was payable; and the proportionate parts to be regarded as accruing in the respective years of assessment were to correspond to the proportions of the amounts of the instalments of consideration payable in those respective years of assessment. It seems clear, however, that sub-paras (1) to (4) of para H 14 of Sch 6 are unworkable and cannot apply in a case such as the present, where, at the time when the relevant disposals took place in 1970, any additional consideration which might become payable was not quantifiable and the date when it might become payable, if at all, could not be ascertained.

Secondly, it would appear that the amount of the relevant consideration, for the purpose of computing the gains arising on the 1970 disposals, would fall to be I calculated in the first instance without regard to the fact that the deferred consideration, representing "Half of the Profit", might not be payable for several years, if at all. The express provisions of para 14(5) of Sch 6 seem to make it

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clear that for this purpose such consideration would fall to be brought into account without any discount for postponement of the right to receive the deferred consideration and, in the first instance, without regard to any part of this deferred consideration being irrecoverable or the right to receive it being contingent. Under para 14(5), if any part of the deferred consideration brought into account was subsequently shown to the satisfaction of the Inspector of Taxes to be irrecoverable, such adjustment, whether by way of discharge or repayment of tax or otherwise, would fall to be made as was required in consequence. A B

Thirdly, as is pointed out by the learned editors of Whiteman and Wheatcroft's Capital Gains Tax, 2nd edn, at page 294, Note 12, the difficult problem in practice is how para 14(5) of Sch 6 is to be operated in a case where the consideration is contingent and not quantifiable initially because, for example, it depends on market values at a subsequent time. They suggest that "in such cases, the provision, although applicable in theory, cannot actually be applied, and in practice a wait-and-see principle will be applied". Mr. Nolan, however, on behalf of the Crown, suggested in argument that a "wait-and-see" principle could not be justified by reference to the Act. He mentioned briefly that one possible alternative line of approach to the whole problem at present under discussion might be to treat the contingent rights to the deferred payments as representing property "derived from" the 60 shares remaining "undisposed of" by the 1970 disposals within the meaning of para 7(1) of Sch 6 to the Act. This line of approach, if correct, he suggested, would give rise to two disposals, one at the date of the original sale and another at the date when the right to receive the deferred payments matured and would thus eliminate the difficult problems which may otherwise arise in attempting to apply the statutory provisions for the purpose of computing the gains on the disposals which indubitably occurred in 1970. In the present cases, however, the Crown has never previously relied on the provisions in the Act relating to "part disposals" and Mr. Nolan, while reserving the right to raise the point in a higher Court, did not seek to pursue it before me. C D E F

Fourthly, the possibility may exist that, on the particular facts, the exercise of valuing as at 15 September 1970 the right to receive the deferred payments may be an exercise which even professional valuers cannot carry out, because of the many imponderable factors upon which such a valuation may be said to depend. If this were to be the case, it would appear that s 22(4)(*b*) of the Act may cause the disposal of the relevant "A" shares in 1970 to be deemed to have been for a consideration equal to their market value: (compare *Randall* v. *Plumb*(1) 50 TC 392, at page 402). It may further be reasonable to infer from the provisions of the agreement relating to the 107 shares that such market value was not less than £1,500. G

These four considerations sufficiently illustrate that the computation of the gains accruing on the 1970 disposals may raise difficult matters of law, as well as valuation. They also illustrate, however, that, subject to the reserved point to which I have referred, the Crown will be entitled to pray in aid the Respondents' contingent rights, as at 15 September 1970, to receive the deferred payments, for the purpose of increasing their liability for capital gains tax resulting from the 1970 disposals. The Crown, however, is not content to let the matter rest there, on the basis of only one set of disposals for capital gains tax H I

(1) [1975] 1 WLR 633.

A purposes having occurred—that is, in 1970. It has claimed, and still claims, in effect, that (*a*) the respective rights to receive the deferred payments were themselves new and separate assets for capital gains tax purposes, which the Respondents acquired on 15 September 1970; (*b*) such respective assets were, by virtue of s 22(3) of the Act, the subject of deemed disposals for capital gains tax purposes on 5 December 1972 for a consideration equal to the amount of B the deferred payments which became actually due and payable to each of the Respondents on that date; and (*c*) such latter disposals gave rise to charges for capital gains tax quite separate from the charges accruing from the 1970 disposals. Assessments to capital gains tax were accordingly made against Mr. Ingles for the fiscal year 1970–71 in the sum of £119,124 and for the fiscal year 1972–73 in the sum of £21,000. Assessments were made against Mr. Linnell for C the fiscal year 1970–71 in the sum of £74,459 and for the fiscal year 1972–73 in the sum of £12,000. Assessments were made against Mr. Winton for the fiscal year 1970–71 in the sum of £74,459 and for the fiscal year 1972–73 in the sum of £12,000. The Respondents all appealed against these assessments. The Special Commissioners gave a written decision on 5 August 1976 in which they rejected the argument of the Crown that disposals took place during the fiscal D year 1972–73. Though they gave more detailed reasons for their conclusion, they summarised them by saying that in their view "where an asset is sold for a deferred payment the Act does not treat such consideration as a separate asset and that such consideration is not a debt within para 11" of Sch 7 to the Act. They held that the gains on the 1970 disposals fell to be computed on each share by adding the fixed consideration, £750, to the value of the deferred E consideration at the date of the agreement and deducting therefrom the acquisition cost of £1 and the expenses of disposal. They adjourned the appeal for the agreement of figures on this basis. The Crown now appeals from these decisions, in the case of all three Respondents, by way of Cases Stated.

Before amplifying the Crown's contentions, it will be convenient to refer to those statutory provisions which are principally relevant to its claim. Under F s 19(1) of the Act, tax falls to be charged in accordance with the Act in respect of chargeable gains computed in accordance with the Act and "accruing to a person on the disposal of assets". Section 22(1) contains a definition of "assets" in the following terms:

> "All forms of property shall be assets for the purposes of this Part of this Act, whether situated in the United Kingdom or not, including—(*a*) G options, debts and incorporeal property generally, and (*b*) any currency other than sterling, and (*c*) any form of property created by the person disposing of it, or otherwise coming to be owned without being acquired."

Section 22(2) provides:

> "For the purposes of this Part of this Act—(*a*) references to a disposal of an asset include, except where the context otherwise requires, references H to a part disposal of an asset, and (*b*) there is a part disposal of an asset where an interest or right in or over the asset is created by the disposal as well as where it subsists before the disposal, and generally, there is a part disposal of an asset where, on a person making a disposal, any description of property derived from the asset remains undisposed of."

Section 22(3) provides:

> I "Subject to subsection (6) of this section, and to the exceptions in this Part of this Act, there is for the purposes of this Part of this Act a disposal of assets by their owner where any capital sum is derived from assets notwithstanding that no asset is acquired by the person paying the capital sum,

(Slade J.)

> and this subsection applies in particular to—(*a*) capital sums received by way of compensation for any kind of damage or injury to assets or for the loss, destruction or dissipation of assets or for any depreciation or risk of depreciation of an asset, (*b*) capital sums received under a policy of insurance of the risk of any kind of damage or injury to, or the loss or depreciation of, assets, (*c*) capital sums received in return for forfeiture or surrender of rights, or for refraining from exercising rights, and (*d*) capital sums received as consideration for use or exploitation of assets."

A B

Section 22(6), referred to in s 22(3), has no relevance in the present context. Section 22(9), however, defines "capital sum" for the purposes of the section as meaning "any money or money's worth which is not excluded from the consideration taken into account in the computation under the said Part I of Schedule 6 to this Act". It further provides: "The amount of the gains accruing on the disposal of assets shall be computed in accordance with Part I of Schedule 6 to this Act, and subject to the further provisions in Schedules 7 and 8 to this Act."

C

The Crown in effect claims that when the agreement was concluded in 1970 a chose in action was thereby created in favour of each of the Respondents, being the right to receive the deferred payment, and that this chose in action was "incorporeal property", within the meaning of s 22(1)(*a*) of the Act, and thus an "asset" for the purposes of Part III of the Act. It claims that, when the right to receive the deferred payment matured, a "capital sum [was] derived from" such asset, within the meaning of s 22(3) so as to give rise to a deemed disposal under that subsection.

D

There are two further relevant statutory provisions. On the ordinary meaning of words one would expect a capital sum to be treated as being "derived from" a debt at the point of time when the debt is satisfied. This conclusion is confirmed and amplified by para 11(2) of Sch 7 to the Act, which provides:

E

> "Subject to the provisions of paragraphs 5 and 6 of this Schedule (and subject to the foregoing sub-paragraph) the satisfaction of a debt or part of it (including a debt on a security as defined in paragraph 5 of this Schedule) shall be treated as a disposal of the debt or of that part by the creditor made at the time when the debt or that part is satisfied."

F

Paragraphs 5 and 6 of Sch 7, which are referred to in para 11(2), have no relevance on the present facts. The foregoing para 11(1), however, contains an exemption which has been much canvassed in the present case. As amended by the Finance Act 1968 it reads:

G

> "Where a person incurs a debt to another, whether in sterling or in some other currency, no chargeable gain shall accrue to that (that is the original) creditor or his personal representative or legatee on a disposal of the debt, except in the case of the debt on a security (as defined in paragraph 5 of this Schedule)."

The exception relating to the case of "the debt on a security" has no relevance on the present facts. The Respondents claim that even if, contrary to their main contention, s 22(3) is capable of giving rise to deemed disposals in 1972, on the facts of the present case such disposals gave rise to no chargeable gain because of the exemption contained in para 11(1).

H

A I make four observations at this point. First, no actual disposal of the relevant chose in action of each Respondent, consisting of the right to receive the deferred payments, occurred on any footing, either before or at the date of its maturity. The Crown relies solely on an alleged deemed disposal. Secondly, Mr. Nolan, on its behalf, specifically accepted that s 22(3) of the Act is the only statutory provision relied on as giving rise to such deemed disposal. Thirdly, B while not accepting that such chose in action constituted a debt before 5 December 1972, he accepted that it did constitute a debt as from that date, when the amounts of the relevant liabilities of the purchaser to the Respondents were ascertained or capable of ascertainment. Fourthly, if the Crown is to rely successfully on s 22(3), it has in each case to satisfy the Court, *inter alia*, that the relevant capital sum—that is to say, the deferred consideration actually paid C in the events which happened—has been "derived from assets" within the meaning of the subsection. It therefore has to point to relevant assets from which the capital sum has been derived. It does not, however, point to the shares themselves as being such relevant assets. This is hardly surprising since, if it were to do so, it would in effect be claiming that a capital sum, in the shape of the deferred consideration, had been derived from the shares in addition to the D Respondents' right to receive the deferred payments, which is part of the consideration on which it relies so as to increase its claim to tax on the disposal of the shares which indisputably took place in 1970. Nor does the Crown point to the debt itself, which indisputably arose on 5 December 1972 even if not before, as being the asset from which the capital sum was derived. There might have been plausible grounds for alleging, on this basis, that a disposal E took place on 5 December 1972 bearing in mind that a debt is expressed to be an "asset" within s 22(1)(*a*) of the Act and that para 11(2) of Sch 7 contains the general rule that the satisfaction of a debt shall be treated as a disposal of the debt made at the time when the debt is satisfied. Here again, however, it is easy to understand why no reliance has been placed on para 11(2), since an immediate and obvious answer would have been open to the Respondents, to the effect F that since they were the original creditors no chargeable gain would accrue to them on any disposal of any such debt, having regard to the exemption contained in para 11(1).

In short, therefore, the Crown's claim is that s 22(3) applies on the grounds that in December 1972 a capital sum was derived by each of the Respondents from "assets" in the shape, not of the shares themselves nor of the debt, which G on any footing arose on 5 December 1972 if it had not arisen before, but in the shape of the chose in action, representing the right to receive the deferred payments, which arose on the conclusion of the agreement and remained, according to the Crown's case, something less than a debt up to 5 December 1972. The Crown's argument is thus a highly technical one, but not necessarily ill-founded for that reason alone.

H The contentions of the parties give rise to two principal questions: (A) Did s 22(3) of the Act given rise to a deemed disposal of the relevant choses in action in December 1972? (B) If the answer to question (A) is "Yes", does para 11(1) of Sch 7 to the Act (which I shall henceforth call "para 11(1)") apply, so as to prevent any chargeable gain from accruing on such disposal? As to question (A), though this was not apparently the view of the Special Commissioners, the I Crown is in my judgment correct in its contention that, on the conclusion of the agreement, each of the Respondents acquired a new "asset", within the meaning of s 22(1), in the shape of a contingent right to receive the deferred payments. Such asset was one created by the agreement and had no existence

prior to and independently of the agreement. This, however, seems to me irrelevant: for capital gains tax purposes it is common to see an acquisition of an asset without a contemporaneous disposal thereof. Each of the rights in question represented a chose in action which was immediately marketable and in my view constituted "incorporeal property" within the meaning of s 22(1)(*a*) even if it was not a debt within such meaning. I will revert to the latter question hereafter. The Crown thus surmounts this hurdle. Mr. Price, however, on behalf of the Respondents, submits that even on this footing s 22(3) cannot bite on the facts of the present case. I have come to the conclusion that this submission is correct, for the following reasons. I begin with a passage from the judgment of Walton J. in *Commissioners of Inland Revenue* v. *Montgomery*(1) 49 TC 679, at page 687 A to D:

> "Looking closely at s. 22 and its various subsections, it appears to me that the true application of s. 22(3) is confined to cases where no asset is acquired by the person paying the capital sum. One must look first at s. 22(1) to see the extreme width of the conception of what are assets for the purpose of capital gains tax. From this definition it is quite clear that, if the person paying the capital sum to the disponor receives anything at all in exchange therefore which can be said to be a form of property, the simple and universal rule applies that there is here a disposal of assets for some consideration, and capital gains tax is exigible accordingly. Then s. 22(2)(*a*) makes it quite clear that 'disposal' includes 'part disposal', and this is defined, as it has to be, very widely indeed. Down to the end of this subsection it appears to me that all cases where the person paying the capital sum has received anything at all which could possibly be regarded as an asset have been covered. Hence, as I view the scheme of the section, when one moves on to subs. (3) one is moving on to a case where the person paying the capital sum receives no asset, for whatever reason, but nevertheless the capital sum is to be taken into account for the purposes of capital gains tax. This appears to me quite plain from the words 'notwithstanding that no asset is acquired by the person paying the capital sum'. There would be no conceivable necessity for enacting that there is a disposal of assets by their owner where any capital sum is derived from assets in a case where an asset is acquired by the person paying the capital sum. This is already covered in the preceding two subsections read together."

Walton J. in the same judgment, went on to give further reasons for concluding that it was not permissible to read the word "notwithstanding" in s 22(3) as meaning "whether or not". He continued, at page 687 H:

> "However, I think that the examples given of matters to which the subsection applies in particular in paras. (*a*) to (*d*) thereof all, with one single conceivable exception, show conclusively that the draftsman was thinking of capital sums which did not attract corresponding assets. The sole exception is the word 'surrender' in para .(*c*) which, if it stood alone, could very well apply to cases where a person effected a surrender by way of assignment of a right which then merged in some other right, so that the person paying the capital sum actually received the right surrendered. Having regard to the examples as a whole and its direct connection with the word 'forfeiture', I do not consider that the word is here used in that sense. It is, I think, used in the sense in which, for example, a tenant

(1) [1975] Ch 266.

A protected under Part II of the Landlord and Tenant Act 1954 may agree to surrender his rights to his landlord in exchange for a sum of cash. The landlord acquires no asset as a result, merely an enhancement of the value of his existing asset."

I respectfully agree with both the conclusion of Walton J. that the operation of s 22(3) is confined exclusively to cases where no asset is acquired by the person B paying the capital sum and the reasons which led him to this conclusion, to which I cannot usefully add. If this conclusion be right, it seems to me to be fatal to the Crown's present case. An asset was acquired by the person paying the relevant capital sum—that is the purchaser—in the shape of the relevant shares in the company. It is true, as Mr. Nolan pointed out, that, at the date when the purchaser became obliged to pay the sum, the legal and beneficial C ownership in the shares had already long since become vested in the purchaser. In my judgment, however, this is immaterial. The payment of the deferred consideration represented part of the consideration which the purchaser had under the agreement contracted to give for the acquisition of the shares. In my judgment, on the true construction of s 22(3), it cannot properly be said that "no asset is acquired by the person paying the capital sum" if, as here, the D capital sum is in fact paid as consideration or part consideration for the acquisition of an asset; and for this purpose, in my view, it makes no difference whether in point of time the acquisition, in the sense of the acquisition of legal and beneficial title, precedes the payment or *vice versa*. In answer to question (A) above, though I reach the same conclusion as the Special Commissioners by a rather different route, I therefore conclude that s 22(3) of the Act gave rise E to no deemed disposal of the relevant choses in action in December 1972, on the grounds that that subsection cannot apply in a case such as the present where the relevant capital sums are paid by way of consideration or part consideration for the acquisition of an asset. The subsection is in my judgment inappropriate to cover such a case and it matters not whether the relevant capital sums are paid by way of immediate or deferred payments. This conclusion F is fortified by the reflection that para 14(1) to (4) of Sch 6 to the Act, to which I have already referred, does not contemplate that, at least in a case covered by those sub-paragraphs, where a purchase consideration is payable by instalments the payment of a deferred instalment will itself give rise to a new disposal for capital gains tax purposes.

In case my conclusion so far is wrong, however, I turn to consider question G (B) above, in deference to the full and careful argument which has been presented on this question. If a deemed disposal did occur in December 1972, would para 11(1) prevent any chargeable gain from accruing on such disposal? The words of para 11(1) relevant for present purposes read as follows: "Where a person incurs a debt to another . . . no chargeable gain shall accrue to that (that is the original) creditor . . . on a disposal of the debt." Mr. Nolan, on H behalf of the Crown, pointed out that this exemption, according to its terms, applies only where a person incurs a debt to another and the subject-matter of the relevant disposal is such debt. While he of course accepts that the agreement created a contingent liability on the purchaser to pay the deferred consideration, he submitted that this liability did not constitute a "debt" within the relevant sense. As he pointed out, at the date of the agreement, and indeed I until flotation took place, there was no certainty that any additional sums would ever become payable to the Respondents; still less was there any certainty as to what the sums would be and when, if at all, they would be payable. Mr. Nolan referred to the decision in *Ogdens Ltd.* v. *Weinberg* (1906) 95 LT 567, where the

(Slade J.)

House of Lords had to consider the effect of an assignment by the trustee in bankruptcy of a trader of "all the book and other debts, securities, credits, effects, contracts and engagements belonging" to a business of the bankrupt. The question on the appeal was whether this assignment by the trustee to the respondent was operative to convey to him a right to damages for breach of a contract for the supply of goods which the bankrupt would have had but for his bankruptcy. The House of Lords held that it did, on the grounds that the right passed under the word "contracts". Lord Davey, however, at page 567, while concurring in this conclusion, specifically stated:

> "... in my opinion the word 'debts', no doubt, means something recoverable by an action for debt, and nothing can be recovered in an action for debt except what is ascertained or can be ascertained. A claim for an amount which is uncertain, and cannot be adjusted in an account, cannot, I think, be justly called 'a debt'."

Lord Davey, at least, therefore, plainly did not regard the relevant asset in that case, the claim to damages, as passing under the word "debts". Mr. Nolan also referred to *Inland Revenue Commissioners* v. *Bagnall, Ltd.* [1944] 1 All ER 204, where Macnaghten J. held that the word "debt" in the Finance (No. 2) Act 1939, Sch VII (relating to excess profits tax), did not include a liability to pay a sum which had not yet been ascertained and quantified. He also cited *Seabrook Estate Co. Ltd.* v. *Ford* [1949] 2 All ER 94, in which Hallett J. held that the phrase "debt owing or accruing" in the then R.S.C. Ord. 45, r. 1, did not include a liability of a receiver to a company, when, at the relevant time, the payment might have been deferred and its amount might have been incapable of calculation.

Mr. Price, on behalf of the Respondents, submitted that the word "debt" in para 11(1) is readily capable of including a contingent liability such as that in the present case and should be so construed. He relied on the decision in *The Aldora*(1) [1975] 2 All ER 69, in which Brandon J. held that claims for salvage are "proceedings ... for the recovery of any debt" within the meaning of s 3(1) of the Law Reform (Miscellaneous Provisions) Act 1934. As Brandon J. said(2): "Those words are, as it seems to me, apt to cover sums, whether liquidated or unliquidated, which a person is obliged to pay either under a contract, express or implied, or under a statute." Mr. Price also referred me to the decision of the Exchequer Division in *Mortimore* v. *Commissioners of Inland Revenue* (1864) 159 ER 347, in which it was held that the word "debt" in the context of the Stamp Act 1853, 16 & 17 Vict., c 59, s 10, included the liability to pay a sum of £38,000 in the event of a stated person dying without leaving male issue. Baron Martin said, at page 354: "The term contingent debt, or debt payable upon a contingency, has long been in common use." Though the particular case before him concerned a liability to pay a specified sum, he clearly regarded the relevant contingent debt as being a "debt" within the meaning of the section. These five last-mentioned decisions, together with *O'Driscoll* v. *Manchester Insurance Committee* [1915] 3 KB 499, which was also cited, illustrate the wide variety of meanings which may be attributed to the word "debt" in different contexts. On balance, however, I think that the Crown is correct in its contention that the word "debt" in the context of para 11(1), particularly when read in conjunction with the attendant reference to the incurring of a debt and to the satisfaction thereof, is not apt to include a mere contingent liability which may never ripen into a present debt. If a liability is at any point of time to amount to

(1) [1975] QB 748. (2) [1975] 2 All ER 69, at p 72.

A a debt within the sub-paragraph, it must, in my judgment, be at very least a liability to pay a sum which is, at such point of time, ascertained or capable of ascertainment. I leave open the question whether it also has to be a present liability. As at the date of the agreement, and indeed until the first day of dealings after flotation, the amount of the deferred consideration which the purchaser was or might become liable to pay the Respondents was neither B ascertained nor capable of ascertainment and there was no certainty that it would ever have to pay anything at all. Accordingly, in my judgment, no "debt" within the meaning of para 11(1) arose until the first day of dealings after flotation, 5 December 1972.

This is not quite the end of the matter so far as question (B) above is concerned. As from 5 December 1972 a "debt" within the meaning of para 11(1) C was undeniably owned to each of the Respondents. The deemed disposal, if any, which occurred in December 1972 under s 22(3) would not, on any footing, have occurred until the capital sum was derived from the purchaser. It would have been the very derivation that, according to the terms of the subsection, gave rise to the disposal. In these circumstances I think it arguable that the subject-matter from which any relevant derivation took place could only properly D be regarded as having been the "debt" which had already arisen at the time when any deemed disposal took place and could not properly be regarded as having been the chose in action represented by the contingent right of each Respondent to be paid the deferred consideration. On this footing, there would be grounds for contending that the exemption contained in para 11(1) fairly and squarely applied to any such deemed disposal. On balance, however, I E would think such contention unsustainable, on the grounds that the relevant exemption is applicable only in a case where a deemed disposal takes place by virtue of para 11(2). I can see no sufficient grounds for concluding that the exemption in para 11(1) is applicable in a case where the Revenue is in a position to invoke a deemed disposal by reference to the wording of s 23(1) and (3), quite independently of para 11(2). An example given by Mr. Nolan F supports this conclusion. He referred me to the wording of sub-paras (*a*) to (*d*) of s 23(3) and pointed out that, in many instances covered by them, the actual receipt of the capital sum will be preceded by the emergence of a debt to which the capital sum is referable. If, for example, A tortiously damages a tangible asset of B, the actual payment of a capital sum by A to B by way of compensation may well be preceded by a judgment or a settlement which gives rise to a G debt owed by A to B for the relevant amount. Section 22(3)(*a*), read in conjunction with s 45(5) of the Act, clearly contemplates that in such a case there will be a deemed disposal at the time when the compensation is actually received, capable of giving rise to a chargeable gain. It seems unlikely that the Legislature intended that the Revenue should be unable in such a case to assert the existence of any disposal giving rise to a chargeable gain by reference to H s 22(3) and independently of para 11(2) of Sch 7, merely because the derivation of the capital sum could be said in one sense to represent the satisfaction of a debt within para 11(1). For these reasons, I conclude that if, contrary to my view, deemed disposals had occurred in December 1972 by virtue of s 22(3), the exemption conferred by para 11(1) would not have operated to prevent chargeable gains from arising. However, since in my judgment no deemed I disposals did occur on that date the Respondents do not need to invoke the exemption.

It is possible that other routes may exist which may enable the Revenue effectively to claim tax on the substantial gains in respect of the relevant shares which, in the events which have happened, the Respondents actually made as a

(Slade J.)

result of the ultimate payment of the deferred considerations provided for by the agreement. The amount of the gains accruing on the disposal of the shares which indisputably occurred in 1970 has yet to be quantified. Furthermore, there is the possible point relating to "part disposals", to which I have already referred but which has not been argued before me. In my judgment, however, s 22(3) is not one of the routes available to the Crown since, as I have concluded, it has no application where the relevant capital sum was paid by way of consideration or part consideration for the acquisition of an asset and it makes no difference in this context whether such payment is of an immediate or deferred nature. In the result, I must dismiss these appeals. A B

Appeals dismissed, with costs.

The Crown's appeal came before the Court of Appeal (Templeman L.J., Sir David Cairns and Ormrod L.J.) on 14 May 1979, when judgment was given in favour of the Crown and, by agreement, no order for costs. The cases were remitted to the Special Commissioners. The orders for costs in the High Court were set aside. Leave to appeal was granted by the Appellate Committee of the House of Lords. C

Michael Nolan Q.C. and *C. H. McCall* for the Crown. D

Leolin Price Q.C. and *D. J. Ritchie* for the taxpayers.

The following cases were cited in argument:—*Commissioners of Inland Revenue* v. *Montgomery* 49 TC 679; [1975] Ch 266; *O'Brien* v. *Benson's Hosiery (Holdings) Ltd.* 53 TC 241; [1978] 3 WLR 609; *The Aldora* [1975] QB 748.

Templeman L.J.—This is a Revenue appeal from a decision of Slade J. On 15 September 1970 the taxpayer vendors sold shares for £750 per share plus the right, to which I shall refer as the right to a future sum, to receive in certain unpredictable events an unquantifiable sum on an unascertainable date. In the event, the right to a future sum proved to be £2,825 per share, that being one half of the amount by which the value of the shares exceeded £750 on 5 December 1972. It is common ground that the vendor taxpayers made a chargeable gain on 15 September 1970 if the price they paid originally to acquire the shares was less than the value they received for the disposition of the shares on 15 September 1970. The value they then received was the cash sum of £750 per share plus the market value on 15 September 1970 of the right to a future sum. The shares were probably worth about £1,500 in 1970 and the right to a future sum was then probably worth £750 but the exact values remain to be elucidated by the Commissioners, and nothing I say by way of illustration can have any effect on the task they will discharge of deciding what were the 1970 values. E F G

On 15 September 1970 the vendors received an asset. That asset was the right to a future sum and the nature of that asset was that it was incorporeal property. Section 19(1) of the Finance Act 1965 provides: "Tax shall be charged in accordance with this Act in respect of capital gains, that is to say chargeable gains computed in accordance with this Act and accruing to a person on the disposal of assets." Section 20(1) provides: ". . . a person shall be chargeable to capital gains tax in respect of chargeable gains accruing to him in a year of assessment . . ." Section 22(1) provides: "All forms of property shall be assets for the purposes of this Part of this Act, whether situated in the United Kingdom H I

A or not, including—(a) options, debts and incorporeal property generally." In these circumstances the vendors could at any time after 15 September 1970 have sold and assigned the right to a future sum, and if they had done so, and if for example they had sold the right for £1,000 per share, they would have made a chargeable gain in the tax year of the sale of some £250 per share, being the difference between £750, the value of the right they acquired on 15 September B 1970, and the price which they received on the disposition of that right, namely, £1,000. The vendors did not, in fact, sell the right to a future sum, but eventually received from the purchasers, when the right matured, the sum of £2,825 per share. The vendors therefore made a capital gain of £2,075 per share, being, the difference between £750, the 1970 value of the right, and the eventual sum of £2,825 they received. As I have indicated, there was no actual disposition of C the right, but a chargeable gain may arise even though an asset is not the subject of a disposition such as a sale. That results from s 22(3) which, so far as material, provides that: "... there is for the purposes of this Part of this Act a disposal of assets by their owner where any capital sum is derived from assets notwithstanding that no asset is acquired by the person paying the capital sum ..."

In the present case the capital sum of £2,825 was derived in 1972 from the D right to a future sum which had been given to the vendors in 1970. No asset was acquired by the purchasers who paid that capital sum of £2,825 per share in 1972. The purchasers acquired no asset in 1972. What they did was to extinguish a liability. It follows, in my judgment, that when the right to a future sum matured and the sum of £2,825 was paid the asset, namely, the incorporeal property, which was the right to a future sum, was disposed of, thanks to s 22(3), E and a chargeable gain arose. Slade J. held that s 22(3) did not apply because the purchasers who paid the capital sum of £2,825 in 1972 acquired an asset, namely, the shares, which were the subject of the 1970 agreement. In my judgment, however, the shares were acquired in 1970 and not in 1972, and they were acquired in consideration for the cash which was paid and for the creation of the incorporeal property which was the right to a future sum. The purchasers F acquired no asset in 1972; they extinguished a liability, but that is another matter and is an event which brings within the ambit of capital gains tax the sum which was received in 1972 by the vendors. The vendors made a chargeable gain in the year 1970–71 computed by reference to the then value of the consideration received for the shares. They made a further chargeable gain in the year 1972–73 by reference to the increased value of the right to a future sum. The G result, as I am glad to say, is not, as happens occasionally with capital gains tax, to produce any unfairness to the Revenue or to the taxpayer. If the right to a future sum had been translated, as it could have been in 1970, into the terms of issue of redeemable preference shares, no one would have doubted that the redemption of the shares in 1972 resulted in a chargeable gain. The situation is really exactly the same, except that the asset which was created was incorporeal H property, eventually extinguished or redeemed in circumstances which produced a capital gain and made the vendor taxpayers liable for a chargeable gain by reason of s 22(3).

Mr. Price, who appeared for the taxpayers, argued in the alternative that the right to a future sum and the moneys received in respect of it were not liable to charge because of the provisions of para 11 of Sch 7 to the Finance Act 1965. I Sub-paragraph (1), so far as material, provides that:

"Where a person incurs a debt to another whether in sterling or in some other currency, no chargeable gain shall accrue to that (that is the

(Templeman L.J.)

original) creditor or his legatee on a disposal of the debt, except in the case of the debt on a security . . ." A

Mr. Price cited to the learned Judge and reiterated to this Court that the meaning of the word "debt" depends on its context. With that I am in full agreement. In the present case, the object of excluding as a chargeable gain a debt in the hands of the original creditor can only be to ensure that the ordinary simple debt on which a holder cannot make a gain but may make a loss shall not be B brought within the ambit of capital gains tax legislation, the object of which is to set off chargeable losses against chargeable gains to produce a liability to tax. Moreover, whatever the context in which "debt" is to be construed, I cannot believe that it applies to the present case to what was, as I have said, a possible liability to pay an unidentifiable sum at an unascertainable date. The learned Judge took that view and, for the reasons which he gave and for those C which I have advanced, it does not seem to me that para 11 rescues the taxpayer from the tax which would otherwise be payable. Mr. Price finally took the point that, although the right to a future sum may have begun as incorporeal property, it ended up as a true debt once the money was quantified, and at that stage slid neatly under the protection of para 11 of the Finance Act 1965. For the reasons which Slade J. gave, I do not think that could be right because it would effect D a complete loss of capital gains tax as soon as any purchase price became payable.

Although I agree with the learned Judge on his construction of para 11, I am unable to agree with his application of s 22(3) in the events which happened in the present case, and I would allow this appeal accordingly.

Sir David Cairns—I agree that the appeal should be allowed for the reasons E given by Templeman L.J.

Ormrod L.J.—I also agree.

Appeals allowed and, by agreement, no order for costs. Cases remitted to Special Commissioners. Orders for costs in High Court set aside. Leave to appeal granted by Appellate Committee of House of Lords.

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One of the taxpayers' appeals (the other two were stayed) came before the House of Lords (Lord Wilberforce, Viscount Dilhorne, Lords Salmon, Fraser of Tullybelton and Russell of Killowen) on 18, 19 and 20 June 1980 when judgment was reserved. On 24 July 1980 judgment was given in favour of the Crown, with costs.

Michael Nolan Q.C. and *C. H. McCall* for the Crown. G

Leolin Price Q.C. and *D. J. Ritchie* for the taxpayers.

The following cases were cited in argument in addition to those referred to in the speeches:—*Ogdens Ltd.* v. *Weinberg* (1906) 95 LT 567; *Inland Revenue Commissioners* v. *Bagnall, Ltd.* [1944] 1 All ER 204; *Seabrook Estate Co., Ltd.* v. *Ford* [1949] 2 All ER 94; *W. T. Ramsay Ltd.* v. *Commissioners of Inland Revenue* TC Leaflet 2730; [1979] 1 WLR 974. H

Lord Wilberforce—My Lords, in this appeal Mr. J. L. Ingles is contesting an assessment to capital gains tax which arises out of a contract made in September 1970. He succeeded before the Special Commissioners and in the

A High Court (Slade J.) but lost in the Court of Appeal. The transaction giving rise to the claim for tax is comparatively simple, not so the relevant provisions of the Finance Act 1965. By a contract of 15 September 1970 Mr. Ingles, as one of several vendors, agreed to sell to the Industrial and Commercial Finance Corporation Ltd. (ICFC) 69 shares in J. L. Ingles (Holdings) Ltd. For 41 of these shares ICFC agreed to pay a cash price of £1,500 per share. For the B remaining 28 shares ICFC agreed to pay an immediate cash price of £750 per share plus a sum to be paid at a future date defined as "half of the profit". This was to be one half of the amount by which the sale price should exceed £750. The sale price was, broadly, to represent the middle market price on the first day of dealings after a flotation of the company, if a flotation should occur. Thus, for the 28 shares in question, there was a consideration consisting of (i) C an immediate ascertained cash sum (ii) a conditional and unquantified amount payable at an unascertained future date. In fact there was a flotation in November 1972 and dealings commenced on 5 December 1972. On that date (allowing for a sub-division which had occurred of the shares) the "half of the profit" amounted to £2,825 per (original) share. The question is whether, on that date, or when the money was paid, a charge to capital gains tax arose by reference to the sum D receivable by the taxpayer. The exact amount of the tax (if any) remains to be fixed.

The contentions are as follows. The taxpayer focusses attention on 15 September 1970, the date of the agreement. He accepts that there was on that date a "disposal" of all 69 shares, and agrees that a charge to capital gains tax then arose. As regards the 28 shares, this tax, he contends (and I do not E understand the Crown to differ) should be based upon the cash sum of £750, plus the value, to be assessed as on that date, of his contingent right to receive the deferred price, less, of course, the cost of the shares, apparently £1 per share. This, he says, represents the totality of his liability in respect of the 28 shares. The Crown, on the other hand, while claiming tax for the year 1970–71 on the basis already described, makes an additional claim for 1972–73 based on F the deferred consideration received in that year. They base this claim upon s 22(3) of the Finance Act 1965, the relevant part of which reads: "there is for the purposes of this Part of this Act a disposal of assets by their owner where any capital sum is derived from assets notwithstanding that no asset is acquired by the person paying the capital sum . . ." The taxpayer contends that this subsection does not apply, briefly because an asset was acquired by ICFC— G namely the shares. In the alternative, if the subsection is capable of applying, he says that he is taken out of it by para 11(1) of Sch 7. "Where a person incurs a debt to another . . . no chargeable gain shall accrue to that (that is the original) creditor . . . on a disposal of the debt, except in the case of the (*sic*) debt on a security . . ."

The first question, that concerning s 22(3), involves consideration of the H words "notwithstanding that no asset is acquired . . .", for the rest of the paragraph gives rise to no difficulty. There was an asset in the form of the obligation (a chose in action) to pay the deferred consideration. The deferred consideration when it was paid, in 1972, was, it is difficulty to deny, a capital sum derived from that asset. Section 22(1)(*a*) of the Act expressly provides that incorporeal property, of which a chose in action is an undoubted example, I is an asset for the purposes of the tax. I do not think that there is any doubt or problem up to this point. But the question remains whether the taxpayer can succeed in the contention that the words "notwithstanding that no asset is acquired" introduce a condition of a limiting character, with the result if

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an asset *is acquired* the subsection does not apply. For the purposes of this argument I shall assume that an asset was acquired by the payer of the capital sum (viz., ICFC), though there is much to be said for the contrary view and indeed the Court of Appeal accepted it. Support for the taxpayer's contention is given by a passage from the judgment of Walton J. in *Commissioners of Inland Revenue* v. *Montgomery*(1) [1975] Ch 266, at pages 271–2, which was followed and applied by Slade J. and which led him to accept the taxpayer's contention. But I regret that I am unable to agree. Section 22(3), after the provision which I have quoted, goes on to provide some examples, to which in particular the subsection is stated to apply. These are: A B

> "(*a*) capital sums received by way of compensation for any kind of damage or injury to assets or for the loss, destruction or dissipation of assets or for any depreciation or risk of depreciation of an asset, (*b*) capital sums received under a policy of insurance of the risk of any kind of damage or injury to, or the loss or depreciation of, assets, (*c*) capital sums received in return for forfeiture or surrender of rights, or for refraining from exercising rights, and, (*d*) capital sums received as consideration for use or exploitation of assets." C

Now it is obvious that in some, if not most of these examples there is the possibility that an asset *may* be acquired by the person paying the capital sum. The clearest of these is (*d*), if the sum is paid for the grant of a licence or a profit: but also under (*b*), if the payer of the sum acquires rights by subrogation, or under (*a*) if after payment of damages the property in respect of which they were paid vests in the payer. The observations of Walton J. in *Commissioners of Inland Revenue* v. *Montgomery* do not take account of these possibilities (to which others could be added) and to that extent must be too wide. But apart from this, I cannot read the words in question ("notwithstanding . . ." etc.) as pointing in the direction desired by the taxpayer. In my understanding they are evidently words not of limitation, but of extension, the purpose of which is to apply the subsection (so as to establish a "disposal"), to cases to which it would not otherwise apply and in which a "disposal" would not naturally be thought to exist. In other words they mean, in my opinion, "Whether or not an asset is acquired". With this meaning, the examples given under (*a*)–(*d*) easily fit. I, therefore, consider that, in the absence of a contrary or exempting provision, s 22(3) applies to the case. D E F

Then is the taxpayer exempted by para 11(1) of Sch 7? This is a provision of notable obscurity, the purpose and philosophy of which it is difficult to detect. It has to be examined at two points in time. First, was there a debt in September 1970? In my opinion there was not. No case was cited, and I should be surprised if one could be found, in which a contingent right (which might never be realised) to receive an unascertainable amount of money at an unknown date has been considered to be a debt—and no meaning, however untechnical, of that word could, to my satisfaction, include such a right. The legislation does, of course, make provision for debts not immediately payable; it does so by the draconian method of charging them, when a charge arises, without any allowance for deferral (Sch 6, para 14(5)): and I would, for the purpose of argument, be prepared to agree that a contingent debt might come within the paragraph. In *Mortimore* v. *Commissioners of Inland Revenue* (1864) 2 H & C 838—a case concerned with stamp duty—Martin B. so held. But from this it would be a large step to hold to be included an unascertainable sum payable, G H I

(1) 49 TC 679, at p 687.

A if a contingency happens, at an unascertainable date, a step which I am unable to take. I adopt in this part of the case—as did the Court of Appeal—the reasoning of the learned Judge. Then, secondly, was there a debt on 5 December 1972 when the contingency arrived, the date became fixed and the amount became ascertained? I think there was, though I am not so sure that a debt was then "incurred". But it remains the fact that the amount of the debt was B derived from the asset (the chose in action) created in 1972[1] and is sought to be charged on that basis—under s 22(3). I cannot accept that the exemption in para 11(1) applies in such a case. If it were otherwise, and if the taxpayers' contention were correct, no charge under s 22 could arise in any case where the person making the disposal did not receive immediate payment. That would largely nullify the section. Whatever para 11(1) does mean, it cannot have C been intended to have so wide an effect. I think that the Crown is correct in analysing this transaction into an acquisition of an asset (viz., a chose in action) in 1970 from which a capital sum arose in 1972 and that there is no question of a debt being disposed of at any time.

I would dismiss the appeal.

Viscount Dilhorne—My Lords, as I agree with all that my noble and D learned friend, Lord Wilberforce, has said in his speech which I have seen in draft, there is no point in my writing a speech to the same effect. For the reasons he gives this appeal should be dismissed.

Lord Salmon—My Lords, I have had the advantage of reading in draft the speech of my noble and learned friend Lord Wilberforce with which I entirely agree. I would therefore dismiss the appeal.

E **Lord Fraser of Tullybelton**—My Lords, this appeal raises questions of construction of the capital gains tax provisions in Part III of the Finance Act 1965. They arise out of an agreement made on 15 September 1970 between the appellant taxpayer and two other persons ("the vendors") on one side and ICFC ("the purchaser") on the other. All three vendors were parties to the proceedings in the Courts below, but in order to save costs it has been agreed F that this appeal will govern all three cases. Nevertheless, I find it convenient to refer to the vendors collectively and to the total number of their shares.

By the agreement the vendors agreed to sell and the purchaser agreed to purchase 167 "A" ordinary shares of £1 each in a private company, J. L. Ingles (Holdings) Ltd. Completion took place on 15 September 1970. As to 107 of the shares the price was £1,500 per share. It was duly paid and no question G arises about it. As to the remaining 60 shares, of which 28 belonged to the Appellant, the price was agreed at £750 plus "half of the profit". The £750 was paid in cash on completion. The expression "half of the profit" was defined as meaning one half of the amount by which "the sale price" exceeded £750. "The sale price" was elaborately defined according to various possible future events, one of which was flotation of the company by the grant of permission H to deal in its shares on a recognised Stock Exchange in the United Kingdom before 31 December 1975. Flotation did take place on 29 November 1972 and the definition of the sale price which came into effect in consequence of that event was the middle-market price of the shares on the first day of dealings

(1) This should be 1970: editor.

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after flotation, namely, 5 December 1972. By that date the original shares had been sub-divided and a scrip issue had been made, with the result that the original "A" ordinary shares had come to be represented by 480,000 shares of 5p. each in the company. The middle-market price on 5 December 1972 was equivalent to a price of £6,400 for each of the original shares. "Half of the profit" therefore was £2,825, being one half of the amount by which £6,400 exceeds £750. The figures are not in dispute. The agreement gave rise to immediate disposals of all 167 shares, within the meaning of the capital gains tax provisions of the Finance Act 1965. The cost of acquisition by the vendors had been £1 per share. Accordingly, the vendors were assessed to capital gains tax on the 107 shares sold at £1,500 each on a chargeable gain of £1,499 per share. As to that there is no dispute. The dispute arises in connection with the other 60 shares (referred to in the agreement and hereinafter as "the shareholdings"). It is agreed that, in respect of the shareholdings, the vendors ought to have been assessed on the footing that in the fiscal year 1970–71 they had made a chargeable gain of the difference between the cost price of £1 and the consideration received for each share, made up to £750 in cash plus the value on 15 September 1970 of their contingent right to half of the profit. The value of that right on 15 September 1970 has not yet been assessed; indeed, there is a suggestion that it may be impossible to assess, and nothing that I say is intended to indicate any opinion on the valuation of the right as at 15 September 1970.

Capital gains tax was imposed by s 19(1) of the Finance Act 1965 on chargeable gains accruing to a person "on the disposal of assets". Section 22(1) of the Act provides *inter alia* as follows: "22(1) All forms of property shall be assets for the purposes of this Part of this Act . . . including—(*a*) options, debts and incorporeal property generally . . ." Section 22(3) is the provision on which the Crown's claim is directly based. The relevant part of it has been quoted by my noble and learned friend Lord Wilberforce.

The Crown has made assessments for the fiscal year 1972–73 in respect of the receipt by the vendors of the capital sum equivalent to £2,825 per original share. The assessment was made on the basis that on 5 December 1972 the vendors made a disposal of a separate asset consisting of the right to receive that sum. The claim by the Crown was negatived by the Special Commissioners and, on appeal by Stated Case, by Slade J., but the Court of Appeal (Templeman and Ormrod L.JJ. and Sir David Cairns) reversed that decision and upheld the claim.

The first question is whether the right to half of the profit is properly to be regarded as a separate asset, or simply as a deferred part of the price of the shareholdings. In my opinion, the former view is correct. "Asset" is defined in s 22(1) in the widest terms, to mean all forms of property and it has been construed accordingly—see *O'Brien* v. *Benson's Hosiery* (*Holdings*) *Ltd.*(1) [1979] 3 WLR 572, at page 575—by my noble and learned friend Lord Russell of Killowen. It is therefore apt to include the incorporeal right to money's worth which was part of the consideration given for the shareholdings in 1970. The vendors could have disposed of the right at any time after 15 September 1970 by selling it or giving it away and assigning it. If they had done so, there would have been an actual disposal of an asset and the vendors would have been liable for capital gains tax on the amount, if any, by which the price or value of the asset at the date of disposal exceeded its value on 15 September 1970. Of course, if

(1) 53 TC 241, at p 270.

A the price or value had been less than the value on 15 September 1970, they would have made a chargeable loss which they could have set off against gains in the same or future fiscal years. So there is nothing unfair in treating it as an asset. In fact, they did not dispose of the right but they held it until it matured on 5 December 1972. If the right was an "asset", then the sum which the vendors received on that date was "derived from" the asset. There was therefore, B by virtue of s 22(3), a disposal of the asset, notwithstanding that no asset was acquired by the "person paying the capital sum", the purchaser. The sum was paid to satisfy or extinguish the right and not as any part of the consideration for the shareholdings; full consideration for them had already been given on 15 September 1970. The capital sum is therefore not in any relevant sense derived from the shareholdings, and the Appellant's complaint that he was C being assessed to capital gains tax twice over on the price is misconceived. The position is no different in principle from what it would have been if the vendors had received new shares in another company as part of the consideration for the shareholdings and had later disposed of the new shares. In my opinion, Slade J. was mistaken in treating the receipt of the shareholding by the purchasers as relevant for the purposes of s 22(3). The reference there to no asset being D "acquired by" the person paying the capital sum must be to an asset acquired in exchange for the capital sum, and the shareholdings were not acquired by the purchaser in exchange for the capital sum paid in December 1972. The material question is not whether acquisition of the asset and payment of the capital sum were contemporaneous or not, but whether one was consideration for the other. Moreover Slade J., following a decision of Walton J. in *Com-* E *missioners of Inland Revenue* v. *Montgomery*(1) [1975] Ch 266, at page 271, held that the words "notwithstanding that no asset is acquired by the person paying the capital sum" in s 22(3) meant that the application of the subsection was confined to cases where no asset was acquired. I am unable to agree. The ordinary meaning of the word "notwithstanding" according to the Shorter English Dictionary is "despite, in spite of". One might perhaps suggest also F "whether or not". It is a word of extension, not of limitation, and I see no reason to read it here in a limiting sense. The comprehensive provisions of s 22(1) and (2) may render it not strictly necessary for s 22(3) to apply to cases where an asset is acquired by the person paying the capital sum, but even if there is some overlapping, that is not uncommon in fiscal legislation, in order to avoid leaving a loophole. In my opinion s 22(3) applies whether or not an G asset is acquired by the person paying the capital sum. That construction is, if anything, fortified by reference to the examples given in paras (*a*) to (*d*) of s 22(3), some of which are of cases where payment of the capital sum might well attract corresponding assets. Thus, looking at para (*b*), where a capital sum is paid under a policy of insurance the insurers will often acquire by subrogation an asset consisting of the assured's right of action against a wrongdoer. Accord- H ingly, I consider that the decision in *Montgomery* on this point was erroneous.

There remains the second question in the case: was the vendor's right to "half of the profit" a debt in the sense of para 11 of Sch 7 to the Finance Act 1965, which provides as follows:

> "11.—(1) Where a person incurs a debt to another, whether in sterling or in some other currency, no chargeable gain shall accrue to that (that I is the original) creditor or his legatee on a disposal of the debt, except in the case of the debt on a security ... (2) Subject to the provisions of

(1) 49 TC 679, at p 687.

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> paragraphs 5 and 6 of this Schedule (and subject to the foregoing sub- A paragraph) the satisfaction of a debt or part of it . . . shall be treated as a disposal of the debt or of that part by the creditor made at the time when the debt or that part is satisfied."

If this asset was a "debt" the vendors were the original creditors and sub-para (1) would therefore apply, so that no chargeable gain would accrue to them. The meaning of the word debt depends very much on its context. It is B capable of including a contingent debt which may never become payable—*Mortimore* v. *Commissioners of Inland Revenue* (1864) 2 H & C 838. It is also capable of including a sum of which the amount is not ascertained—*O'Driscoll* v. *Manchester Insurance Committee* [1915] 3 KB 499. But I agree with Slade J. and with Templeman L.J., both of whom held that the word debt in para 11 does not apply to the obligation of the purchaser under this agreement, which C was described by Templeman L.J. as(1) "a *possible* liability to pay an *unidentifiable* sum at an *unascertainable* date". The words to which I have added emphasis bring out the three factors of this obligation which cumulatively prevents its being a debt in the sense of para 11. Further, the reference to a person who "incurs" a debt "whether in sterling or in some other currency" points, in my opinion, towards the debt being definite, or at least ascertainable, in amount. D Similarly, para 14 of Sch 6 to the Act of 1965, dealing with consideration payable by instalments which, by para 14(5), is to be brought into account initially without regard to *inter alia* "a risk of any part of the consideration being irrecoverable", seems clearly to be referring to consideration of an ascertained amount. It is appropriate for dealing with a debt which cannot increase in value, but may decrease if it proves to be partly irrecoverable. E Both para 11 of Sch 7 and para 14 of Sch 6 are to be contrasted with s 22(3) which applies to an asset which might either rise or fall in value.

Finally, it was suggested that even if the right to receive half of the profits was not a debt at first, it became one when it was quantified and became immediately payable on 5 December 1972. I agree with Slade J. and Templeman L.J. that that cannot be right because it would lead to absurd results. Every F obligation that is ultimately discharged by a money payment must be quantified before payment, and on this argument, capital gains tax would always be excluded when a definite price became payable. In my opinion, para 11 of Sch 7 only applies to an obligation which has been a debt from the time it came into existence, or at least from the time when it was acquired by the taxpayer. G

I would refuse the appeal.

Lord Russell of Killowen—My Lords, I have had the advantage of reading in draft the speech delivered by my noble and learned friend Lord Fraser of Tullybelton. I agree with it and with the conclusion that this appeal should be dismissed.

Appeal dismissed, with costs. H

[Solicitors:—Solicitor of Inland Revenue; Hancock & Willis, for Wragge & Co., Birmingham.]

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(1) Page 94 *ante*; [1979] 1 WLR 1131.

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