THE HIGH COURT

[2015 No. 272 R]

IN THE MATTER OF A CASE STATED PURSUANT TO SECTION 941 TAXES CONSOLIDATION ACT 1997 AS AMENDED

BETWEEN

REVENUE COMMISSIONERS

APPELLANT

AND

NIALL O'FARRELL

RESPONDENT

JUDGMENT of Ms. Justice Murphy delivered on the 1st day of March, 2018.

1. This appeal comes before the Court by way of case stated pursuant to s. 941 of the Taxes Consolidation Act 1997. The Revenue Commissioners are appealing the decision of the Appeal Commissioner to allow the respondent's appeal against amended assessments for income tax. The matter was heard by this Court on 7th June, 2016. The questions posed by the Appeal Commissioner for the determination of the Court are as follows:-

> *"(i) Was I correct in determining that, insofar as concerns 28 Shrewsbury Road, the activity of the taxpayer was on the trading side (being land development) rather than the capital side?*
>
> *(ii) Was I correct in determining that, insofar as concerns 28 Shrewsbury Road, the taxpayer commenced a trade of land development on 21 February 2005, thereby being entitled to claim losses from that date?"*

Background

2. The respondent in this case was the owner of the "Black Tie" chain of formal wear shops. He also owned a substantial portfolio of investment properties and received more than €1 million per annum in rental income from those properties. On 21st February, 2005, the respondent entered into an agreement to purchase number 28 Shrewsbury Road, Ballsbridge, Dublin 4 for the sum of €7,600,000.

3. In his decision dated 4th December, 2015, the Appeal Commissioner set out the facts of the matter as determined by him. He found that the respondent's intention in purchasing this property was to redevelop the site by replacing the existing property with two houses; that the respondent never intended to live in the property and that the respondent rented the property for a short time to a neighbour. He also found that three loans totalling €11 million were secured by the respondent from Allied Irish Banks plc. in relation to the purchase and development of the property. The sanction letter from the bank dated 14th February, 2005 stated that the facilities were to be repaid out of the sale of the two properties within two years of the date of the loan. The Appeal Commissioner further found that the respondent made three attempts to obtain planning permission to develop the Shrewsbury Road site and that the only successful application was the final one in 2009 which was an application to build a single house on the site. Finally, the Appeal Commissioner found that no physical development works ever took place at the site from the date of its acquisition by the respondent.

4. The respondent claimed that he had incurred losses in his trade of land development in respect of the Shrewsbury Road property and claimed those losses against income from other sources between 2004 and 2009. The Revenue Commissioners claimed that his purchase of the property was an investment or capital matter and not a trade or revenue matter. Alternatively, the Revenue Commissioners claimed that if the respondent's activities were deemed to be on the trading side, then the respondent had never in fact commenced the trade of land development.

5. The Appeal Commissioner granted the respondent's appeal and determined that the respondent was a land developer and that the activity was on the trading side rather than the capital side. The Appeal Commissioner distinguished the instant case from that of *Spa Estates Ltd. v. O hArgain* (Unreported, High Court, Kenny J., 20th June, 1975) upon which the Revenue relied extensively. In his determination at para. 7.(vi) he stated as follows:-

> *"The decision in Spa Estates Ltd. v. O hArgain was given before the introduction of capital gains tax and the assessment concerned property dealing rather than building; furthermore the company, Spa Estates, never commenced to carry on the trade of developing land, building houses on them and selling the lands, nor did it commence the business of dealing in land. The decision in Spa Estates was focused on the particular trade that Moy Construction Company was involved in previously. In the Spa case the primary business was selling houses – that was the trade involved. The present appeal involved a different set of circumstances. The taxpayer in this case did intend from the beginning to develop 28 Shrewsbury Road."*

The Appeal Commissioner went on to state that each case turns on its own facts. He further held at para. 7.(vii) that:-

> *"One has to look at the entire venture in order to put the transactions into a proper perspective. In the present case the venture was to a large extent the property itself that was acquired. That was the essential material with which the activity was concerned. In financial terms, the most important part of the outlay had already been incurred on purchase of the property."*

He held that the respondent was engaged in the trade of land development and that the trade had commenced on the date of the agreement to purchase the property on 21st February, 2005 and that accordingly, losses arising from that date were allowable against income tax.

The Appellant's Submissions

6. It is the Revenue's case that the Appeal Commissioner erred in law as he did not understand the legal principles relevant to the existence and commencement of the trade at issue in this case. The appellant contends that the Appeal Commissioner erred in deciding in favour of the respondent that there was a trade in land and in his decision that a simple purchase of the property was

sufficient to show the necessary level of operational activity to constitute the commencement of trade.

7. The appellant submits that there is an important distinction to be made between the set up of a trade and the commencement of a trade as set out in *Mansell v. Revenue and Customs Commissioners* [2006] S.T.C. (S.C.D.) 605, where it was held at p. 621 that trade could be deemed to have commenced when:-

> *"the taxpayer, having a specific idea in mind of his intended profit making activities, and having set up his business, begins operational activities – and by operational activities I mean dealings with third parties immediately and directly related to the supplies to be made which it is hoped will give rise to the expected profits, and which involve the trader putting money at risk".*

8. The appellant relies almost exclusively on *Spa Estates v. O hArgain* (Unreported, High Court, Kenny J., 20th June, 1975), one of the few Irish decisions in this area. It is their case that the Appeal Commissioner did not correctly interpret or understand the principles established in that case, in which the taxpayer claimed that the company had not commenced trading, a proposition with which Kenny J. agreed. The Revenue position is that the *Spa Estates* case is on all fours with the instant case, that the material facts are the same and that there are no distinguishing features. It is submitted that if *Spa Estates* had been properly interpreted and applied to the facts of this case the conclusion that there was no trade was inescapable. The appellant submits that the Appeal Commissioner misunderstood the circumstances and relevance of the related company in Spa Estates and incorrectly attached some relevance to the broader taxation context. The appellant submits that it was precisely the lack of activity in relation to building works that persuaded Kenny J. that the company in that case, had not commenced trading. The appellant seeks to rely on the absence of building works in the present case as indicative of a trade not having commenced.

9. The appellant argues that the mere purchase of the property by the respondent and applications for planning permission are not sufficient to constitute trade. They rely on the statement of Kenny J. in Spa Estates at p.11:-

> *"The purchase of the lands and the applications for planning permission seem to me to have been acts preparatory to the carrying on of a trade and not to be evidence that a trade was being carried on."*

10. The appellant submits in addition to the foregoing that there was insufficient evidence of the alleged trade because the property was let from 2006 to 2008. It is the appellant's position that an application for planning permission is merely a preparatory step. Counsel for the appellants in oral submissions stated that the appellant would require actual building works on the site before they would consider trading to have commenced.

11. It is the appellant's case that the Appeal Commissioner placed too much significance on the purchase of the property and the statements of intention of the respondent. The appellant also refers to a number of other cases including *Commissioners of Inland Revenue v. Reinhold* (1953) 34 TC 389 and *C.I.R. v. Hyndland Investments Company* (1929) 14 TC 694 in which the purchasing and selling of lands was deemed not to amount to trading. The appellant sought to distinguish a number of cases cited by the respondent and cited in particular the definition in Canada of the commencement of trading in the cases of *Gartry v. The Queen* (1994) D.T.C. 1947 (T.C.C.) and *Miller v. The Queen* (2001) D.T.C. 136 (T.C.C.) as follows:-

> *"Each case turns on its own facts, but where a taxpayer has taken significant and essential steps that are necessary to the carrying on of the business it is fair to conclude that the business has started."*

Counsel for the appellant submits that the respondent in the instant case did not take such significant and essential steps that could amount to the commencement of trade.

The Respondent's Submissions

12. It is the respondent's case that this appeal is misconceived as the issue before the Appeal Commissioner was primarily one of fact, not law and that there is no legal question for the Court to answer. The respondent submits that it is only if the Court considers that the conclusion made could not reasonably have been arrived at from the primary finding of fact that the decision can be overturned. It is submitted that there was ample evidence upon which the Appeal Commissioner based his decision and his findings of fact support the conclusions reached and therefore should not be set aside. It is also stressed on the respondent's behalf that the Appeal Commissioner found the evidence of the respondent to be accurate, truthful, consistent and given without hesitation.

13. The respondent submits that there was a specific purpose for the purchase of the property, being for development and resale, and that the tenant who moved into the property after the first planning application was rejected, did not have any impact on this purpose as they were only in situ while their own, neighbouring property was being refurbished. Counsel for the respondent adverted to the fact that the land remained in the respondent's possession for an extended period of time due to the property crash in 2008 and that the length of time which the property was in his possession does not change the intended use of the land. It is the respondent's case that it is evident from Special Condition 12 of the contract for sale, which set out that the vendors may return to the property to remove fixtures and fittings when the respondent no longer wants to let the property and before he demolishes it, that it was always intended development works would be carried out on the land. It is also submitted that, as the respondent already owns his own home on Shrewsbury Road, he had neither need nor desire to reside in number 28 Shrewsbury Road.

14. The respondent states that the Court only has jurisdiction to hear the appeal from the Appeal Commissioner by way of case stated on a point of law and that the primary findings of fact of the decision maker should not be set aside unless there is no evidence to support them, following the decision of Kenny J. in *Mara (Inspector of Taxes) v. Hummingbird Limited* [1982] I.L.R.M. 421. This decision was approved in *O'Culachain v. McMullan Brothers Limited* [1995] 2 I.R. 217, which was later quoted with approval by Fennelly J. in *D.A. MacCarthaigh (Inspector of Taxes) v. Cablelink Limited* [2003] 4 I.R. 510. The following principles can according to the respondent, be extracted:-

> *"(1) Findings of primary fact by the judge should not be disturbed unless there is no evidence to support them.*
>
> *(2) Inferences from primary facts are mixed questions of fact and law.*
>
> *(3) If the judge's conclusions show that he has adopted a wrong view of the law, they should be set aside.*
>
> *(4) If his conclusions are not based on a mistaken view of the law, they should not be set aside unless the inferences which he drew were ones which no reasonable judge could draw.*
>
> *(5) Some evidence will point to one conclusion, other evidence to the opposite: these are essentially matters of degree*

and the judge's conclusions should not be disturbed (even if the court does not agree with them, for we are not retrying the case) unless they are such that a reasonable judge could not have arrived at them or they are based on a mistaken view of the law."

The respondent submitted that this Court should apply these principles and find that it cannot interfere with the decision of the Appeals Commissioner.

15. On the core issues of the nature/commencement of trade, Counsel for the respondent challenges the appellants' reliance on the case of *Spa Estates*. She suggested that the two cases are different, not only because of the length of time that has passed since *Spa Estates* was decided but also because of the different facts of that decision. The Appeal Commissioner in his decision of 4th December, 2015 found that reliance on the *Spa Estates* decision was misplaced because that decision was given under a different tax regime, before the introduction of capital gains tax, and the tax assessment concerned property rather than building. The Appeal Commissioner noted that the primary trade involved in the *Spa Estates* case was selling houses rather than land development and that accordingly the instant case has different circumstances.

16. Counsel for the respondent emphasised the distinctions between *Spa Estates* and the instant case in oral submissions. She submitted that there have been significant changes in the interpretation of what land development might involve since the 1970s. An example given was that the concept of "flipping" properties was unknown in the 1970's. Counsel for the respondent also pointed to the chronology in the *Spa Estates* case and to the fact that Spa Estates was incorporated in the midst of the purchase of the lands, apparently for tax purposes, and that *Spa Estates* itself had done little in terms of the building trade. The respondent submitted that *Spa Estates* should be confined to its own particular facts and is not an authority for the proposition that an application for planning permission can never form part of the commencement of trade.

17. Counsel for the respondent argued that the relevant test for the commencement of trade is that set out in the case of Mansell v. Revenue and Customs Commissioners [2006] S.T.C. (S.C.D.) 605 and is as follows:-

"89. (…) First, before trade can be said to commence, there must be a fairly specific concept of the type of activity to be carried on.

90. Second: an activity which consists merely of a review of the possibilities in the expectation or hope that information will be obtained to justify going into a business of some kind is not the carrying on of a trade.

91. Third: it is not always necessary that a sale is made or a service supplied before a trade can be said to be commenced."

The Appeal Commissioner found that the respondent had commenced trading activities in accordance with the *Mansell v. Revenue* definition of 'commencing trade,' on the date of the purchase of the property at 28 Shrewsbury Road, on 21st February, 2005 ,and that therefore losses arising from that commencement date were allowable against income tax. The respondent submits that there was ample evidence underpinning and justifying the Appeal Commissioner's decision, including the sanction letter from AIB in which it is stated that the facilities were to be repaid out of the sale of the two proposed properties within two years of the date of the loan, and the three planning applications which had been made in respect of the property. It is further submitted that the respondent had more than a mere intention to commence a trade at some future time and that this is evidenced by the significant financial commitment undertaken by the respondent and the specific terms on which finance was advanced to him by the bank. This, taken together with the multiple applications for planning permission, it is submitted was more than merely preparatory steps, but rather were operational and material steps in the commencement of the trade of land development.

18. The respondent argues that the existence of a "*trade*" is dependent on context. Counsel for the respondent relied on *Shadford v. Fairweather* (1966) 43 T.C. 291 and *Johnston v. Heath* [1970] 1 W.L.R. 1567 in support of that proposition. In those cases, the purchase and sale of land were deemed trading transactions. The respondent rejects the appellant's submissions, based on the decision in *Spa Estates* and *Birmingham and District Cattle By-Products Company Limited v. C.I.R.* (1919) 12 T.C. 92, that the expenses incurred by him in purchasing the property, were merely pre-trading expenses. It is submitted that reliance on those decisions by the appellant is misplaced having regard to the passage of time, the different factual circumstances, and the change in the tax regime since those decisions were given, in particular, the introduction of capital gains tax.

19. The respondent submits that *Miller v. The Queen* [2001] Can LII 593 (T.C.C.) is a more apposite authority. In that case the test as to whether a business existed was stated at para. 28 as follows; *"[t]o have a business, a taxpayer must have a reasonable expectation of profit"* In that case it was also held that a business can only be deemed to have commenced once actual work commenced and that it could not be deemed to have commenced when one was only "*reviewing possibilities with a hope of finding a financially viable venture*" (para. 35). The respondent argues that on the facts he meets this test, in that his trade or business as a land developer commenced when he purchased the property with finance secured from A.I.B. which finance included not merely the purchase price, but also the cost of the intended development.

20. The respondent also relied on a case involving similar facts, namely, *Khan v. Miah* [2001] 1 All E.R. 282, In that case the purchase of a property and an application for planning permission were deemed activities sufficient to be the carrying on of trade.

21. The fact that the respondent never actually developed the property does not alter the nature of the enterprise, according to counsel for the respondent. She pointed to the decision in *Kirk and Randall v. Dunn* (1924) 8 T.C. 663, in which little activity on the part of a company did not deprive it of its status as a trade. In that case it was held that a failure to obtain contracts for a six year period did not necessarily amount to a discontinuance of trade

22. It is the respondent's case that the test in *Mansell v. Revenue and Customs Commissioners* applies and that he should be deemed to have commenced trading on the date of his purchase of the property, as he had a specific concept in mind and had begun operational activities. The respondent submits that this Court should answer the questions in the case stated in the affirmative.

Issues for determination

23. The questions that arise for decision are:

1. Whether the appeal by way of case stated is misconceived as the questions posed are matters of fact not law?

2. Was the appeal commissioner correct in determining that the activity of the respondent was trading? The appellant has argued that this activity was an investment or capital matter and not a trade or revenue matter.

3. Even if the respondent's activity could be considered an adventure in the nature of trade, had the trade actually commenced so as to entitle him to set off trading losses against other tax liabilities?

The second and third issues are inextricably linked and fall to be determined together. The appellant has not challenged the findings of fact made by the Appeal Commissioner but rather argue that those findings do not establish as a matter of law that the respondent was engaged in a trading activity or alternatively, if deemed to be trading, that such trading activity had not in fact commenced.

Issue 1. Misconceived Appeal.
24. It is submitted by the respondent that the appeal by way of case stated is misconceived because the questions posed by the Appeal Commissioner are ones of fact not law. The questions posed by the Appeal Commissioner are set out at page 1 and are;

> *"(i) Was I correct in determining that, insofar as concerns 28 Shrewsbury Road, the activity of the taxpayer was on the trading side (being land development) rather than the capital side?*
>
> *(ii) Was I correct in determining that, insofar as concerns 28 Shrewsbury Road, the taxpayer commenced a trade of land development on 21 February 2005, thereby being entitled to claim losses from that date?"*

While at first glance, these may appear to raise questions of fact, the court is quite satisfied that what is sought by the Appeal Commissioner is the opinion of the High Court on questions of law. The case stated makes that clear. Having made his findings of fact which are set out at Para 3.1 to 3.12 of the case stated and which have not been disputed, he sets out the legal submissions of the parties at paragraphs 4 and 5 of the case stated, in which the current respondent argued that he was involved in the trade of land development and the current appellant argued that he was acting as an investor or alternatively, if trading treatment, were deemed more appropriate, then since trading had not in fact commenced any losses incurred were not allowable. In the further alternative, the current appellant submitted that if there was a trade which had commenced, the restricting provisions of section 82 of the Taxes Consolidation Act applied, depending on the date, trade was deemed to have commenced.

25. Having set out the facts and the law the Appeal Commissioner set out his determination at paragraph 7 (i) to (viii) , in which he held as a matter of fact and law that the current respondent was engaged as a developer and that the activity was on the trading side rather than the capital side. He further determined that the trade of property development commenced on the 21 February 2005, the date on which the current respondent purchased the property. In reaching his determination the Appeal Commissioner specifically distinguished *Spa Estates v O'hArgain* and declined to follow it.

26. The case stated records that upon notification of the Appeal Commissioner's determination, the relevant inspector of taxes immediately expressed dissatisfaction and requested that the Appeal Commissioner state and sign a case for the opinion of the High Court. In formulating his questions, the Appeal Commissioner describes them as questions of law. He clearly and specifically asks whether he was right in law in determining the issues as he did. (emphasis added)

27. On this issue, the Court is satisfied that it is the submission of the respondent that is misconceived and that the case stated formulated by the Appeal Commissioner raises proper and legitimate questions of law upon which he seeks the opinion of this court.

Issues 2 and 3 Trading Activity and the Commencement of Trading Activity.
28. "*Trade*" is defined in the interpretation section of the Taxes Consolidation Act 1997 as including "*every trade, manufacture, adventure or concern in the nature of trade*". Section 82 of the 1997 Act sets out the relief available for pre trading expenditure which the appellant advanced as a second alternative position at the hearing before the Appeal Commissioner but which did not feature in any material way on the hearing of this appeal..

29. Section 381 of the 1997 Act provides;

> *Subject to this section, where in any year of assessment any person has sustained a loss in any trade, profession or employment carried on by that person either solely or in partnership, that person shall be entitled, on making a claim in that behalf, to such repayment of income tax as is necessary to secure that the aggregate amount of income tax for the year ultimately borne by that person will not exceed the amount which would have been borne by that person if the income of that person had been reduced by the amount of the loss.*

In order to bring himself within the ambit of the section the respondent must establish that his '*adventure*' in purchasing 28 Shrewsbury Road in February 2005 was '*an adventure or concern in the nature of trade.*' so as to entitle him to set off his losses on the venture against income tax for the relevant period. Having failed to persuade the inspector of taxes of the merit of his claim, he successfully appealed to the Appeal Commissioner, who held that at the material time he was engaged in the trade of land development. In arguing that the Appeal Commissioner was wrong in law in determining that the respondent was engaged in trading activity, the appellant relied virtually exclusively, on the unreported decision of Kenny J. in *Spa Estates v O'hArgain* delivered 20th June 1975. The appellant contends that the facts of that case are on all fours with this case and that the Appeal Commissioner was bound by that precedent. In general terms counsel for the respondent argues that a wider definition of what constitutes trade and its commencement has developed in the period since the decision in *Spa Estates* and furthermore argues that the tax regime too has significantly altered, particularly by the introduction of capital gains tax. However before coming to that it is worth considering in some more detail the actual decision of Kenny J. in *Spa Estates*.

30. Spa Estates was a complex case, at the core of which were schemes and arrangements devised for the purpose of tax avoidance. The predecessor in title of Spa Estates was a company called Moy Construction Ltd. That company was incorporated in the State in September 1955 to carry on the business of builders. In conducting its business it did not purchase lands. It contracted with the owners of lands for licences to enter and build and for the grant of a lease to the ultimate purchaser of the houses built by it. For ten years from 1955 Moy Construction operated in this manner. In January 1964 Moy Construction for the first time contracted to buy land on which it intended to build houses. It purchased approximately 21 acres of lands in Lucan which lands already had planning for 100 houses for a price of £30,000 pounds. Having contracted to buy the lands the directors of Moy decided that Moy would cease trading and that a new company would be formed to take the conveyance of the lands in Lucan. The director's aim in doing so was to get tax advantages which would attach to a cessation of trade by Moy Construction. Essentially therefore the business of Moy Construction was now going to be carried on by a new company, the difference being that the new company actually owned the land on which it proposed to build houses. The directors and shareholders of the new company were the directors and shareholders of Moy Construction Ltd.

31. The lands at Lucan were conveyed to Spa Estates the new company on the 11th May, 1965 in consideration of a payment of £30,000 pounds. Interestingly, at the time of the conveyance Spa Estates had not yet been incorporated. It was incorporated on the

25th May, 1965. This fact necessitated the execution of a supplemental deed confirming the conveyance to Spa Estates on the 25th July, 1965. On the 21st May, 1965 prior to the incorporation of Spa Estates, application was made for more extensive planning which apparently was granted. Kenny J. cited the material objects in the Spa Estates memo and articles of association which all related to land development and construction. In other words the new company was to carry on the same business as Moy Construction Ltd. Before any development occurred the directors had a falling out and decided to go their separate ways. They decided to dispose of the lands at Lucan as it was not practicable to divide them. They had been advised that if they sold the lands directly, there was a risk of tax liability on any profits they made and so on advice they proposed instead to sell the shares of the company. They ultimately agreed a sale of the shares to a company called McKone Ltd. As stated by Kenny J. at p. 5 of his judgment *"In order to avoid the risk of liability to tax Mr. Owens (financial adviser to McKone) evolved a most ingenious scheme for the transfer of the lands"*. In his judgment Kenny J. sets out in detail the process by which that was achieved. Following the implementation of the "ingenious scheme" the company was voluntarily wound up and a liquidator was appointed on the 28th January, 1967. In the course of the liquidation in April 1967 the liquidator agreed the sale of the lands and they were assigned to the purchaser for £200,000 pounds on the 2nd November, 1967. The Revenue treated Spa as having ceased to trade on the date of its liquidation being the 28th January, 1967. It assessed the company's liability for income tax for the financial year ending on the 5th April, 1967. Its assessment was that £170,000 pounds being the difference between purchase and sale price of the Lucan lands were profits from property dealing and as such were taxable. Kenny J. commented

> *"it is of considerable importance in this case that Spa were not assessed in respect of profits from the trade of builders but on those from property dealing".*

The matter came before the High Court by way of a case stated from the Circuit Court. The revenue's position was that Spa was carrying on the trade of dealing in land and if they were not, the purchase of the lands at Lucan was on adventure in the nature of trade. The tax payer's response was that they had never carried on a trade of dealing in land, that they were house builders and that nothing had been done by them to develop the lands or to build houses on them. They contended that the purchase of the lands and the making of applications for planning permission were steps of preparation for carrying on the trade of house building. The court agreed that the trade which the directors of Spa intended to carry on was that of developing lands, building houses on them and selling the houses. Kenny J. stated

> *"the purchase of the lands and the applications for planning permission seem to me to have been acts preparatory to the carrying on of a trade and not to be evidence that a trade was being carried on."*

In coming to that conclusion, he relied on the decision of Rowlatt J. in the case of *Birmingham and District Cattle By Products Ltd v. the Commissioners of Inland Revenue* (1919) 12 TC 92. That was an *ex tempore* decision of Rowlatt J. which turned on the date of commencement of a business. In that case the tax payers were incorporated on the 20th June, 1913. Between that date and the 6th October, 1913 the directors arranged for the erection of works and the purchase of plant and machinery. They also entered into agreements relating to the purchase of products to be used in the business and to the sale of finished products. On the 6th October, 1913 the installation of plant and machinery had been completed and the company began to receive raw materials for the purpose of manufacture. For the purpose of excise profit duty the date of commencement of trade was important. The Revenue contended that the tax payer had begun to trade on the 6th October, 1913 when raw materials for manufacture first arrived on the premises, while the tax payer argued that it began on the 20th June, 1913. Rollatt J. held that the tax payers had commenced to trade on the 6th October, 1913. In the course of his brief judgment he said:

> *"The directors at the expense of the company …went about and looked at places of business of a similar character in various parts of the country. That was an admirable thing to do preparatory to commencing business but it was certainly not commencing business…when they entered into a contract for the erection of works which works were duly erected in July 1913. That again is preparatory. The company were occupying themselves with activities within their powers of course; they were living their life; but they had not yet begun to conduct their trade or business. Then they purchased machinery and plant for carrying on the business. That was getting ready. I am bound to say that I think the case is extremely clear and the Commissioners having taken the view that they had not commenced business till then, and I do not see the slightest sign of any error in law in the Commissioners having taken that view. It seems to me that it is the only view both in law and in fact if I may say so that they could take."*

32. Interestingly, in the later case of *Kirk and Randall Ltd v Dunn (Inspector of Taxes)* 1924 T.C. discussed in Mansell at page 614 and 615, Rowlatt J. appears to have resiled at least to some extent from that view. He is quoted as saying;

> *"Now several cases came before me, and I took a rather narrow view of those words which define the sort of company. I did not pay much attention to the internal activities of the company – its functional activities in carrying on its own life, and I laid some stress on "carrying on" and on "business", but the Court of Appeal have taken a freer view of the words than I did, and they have certainly taken into consideration the circumstances that the was performing its internal functions, that is to say holding its meetings and so on, as indicative, if not alone sufficient, to establish the fact that it was carrying on a business."*

Rowlatt J is reported to have gone on to say that perhaps he had been taking too narrow a view of the word'business'.

33. That case does not appear to have been opened to Kenny J. who went on hold that:

> *"the fact that the company had power under its objects clause in the memorandum of association to carry on a trade does not involve the conclusion that the company is carrying on the trade which it is empowered to carry on".*

While finding that the existence of the power in the objects clause is undoubtedly relevant to the decision Kenny J. held that it was not conclusive of this question.

34. In dealing with the revenue submission that Spa Estates was trading in land because it acquired the lands with the intention of selling it to the purchasers of houses and that that necessarily involved the conclusion that they were trading in land from the date of purchase of the lands at Lucan, which was the basis on which the revenue had succeeded in the Circuit Court, Kenny J. stated:

> *"it is true that houses cannot be sold without selling the lands on which the houses are situate. But when no development has been done and no houses have been built, the purchase of the land for the purpose of building does not involve the consequence that the taxpayer was dealing in land. In my view the only possible conclusion on the facts in this case was that Spa never commenced to carry on the trade of developing lands, building houses on them and selling the houses nor did they commence the business of dealing in land. The purpose of the acquisition of the lands was to*

use them as sites for houses which would be sold by Spa as builders and land developers but not as dealers in property and they never commenced any trade."

35. As to the contention by the Revenue that that purchase of the lands was an adventure in the way of trade Kenny J. held that the fact that the purchase was the only transaction carried out by Spa did not prevent the transaction from being an adventure in the nature of trade because an isolated transaction may be an adventure in the nature of trade. He held that the question whether or not a transaction is an adventure in the nature of trade is in his opinion a question of law on the facts found. He adopted the test set out in *Commissioners of Inland Revenue v. Livingstone* (1927) S.C. 251: 11 TC 538 and he quoted as follows from that decision:

> *"I think the profits of an isolated venture, such as that in which the respondents engage, may be taxable under Schedule D provided the venture is "in the nature of trade'" I say "maybe" because in my view regard must be had to the character and circumstances of the particular venture. If the venture was one consisting simply in an isolated purchase of some article against an expected rise in price and a subsequent sale it might be impossible to say that the venture was "in the nature of trade" because the only trade in the nature of which it could participate would be the trade of a dealer in such articles and a single transaction falls as far short of constituting a dealer's trade as the appearance of a single swallow does of making a summer. The trade of a dealer necessarily consists of a course of dealing, either actually engaged in or at any rate contemplated and intended to continue. But this principle is difficult to apply to ventures of a more complex character such as that with which the present case is concerned. I think the test, which must be used to determine whether a venture such as we are now considering is or is not "in the nature of trade" is whether the operations involved in it are of the same kind and carried on in the same way as those which are characteristic of ordinary trading in the line of business in which the venture was made. If they are, I do not see why the venture should not be regarded as "in the nature of trade" merely because it was a single venture which only took three months to complete".*

36. Kenny J. went on to point out that the Revenue assessment in the Spa case was on profits made from property dealing and found that one transaction,,a purchase and a sale could not in his view be evidence of dealing. He held that the fact that the property is purchased with a view to resale does not of itself establish that the transaction is an adventure in the nature of trade. He referenced in his decision *Commissioners of Inland Revenue v. Reinhold* [1953] S.C. 49 34 TC 389 and *Taylor v. Goode* [1974] 1 All Eng. Reports 1137. He went on to hold that the purchase and sale of land might be an adventure in the nature of trade for a company which had commenced the business of building or for a building company which bought the land with the intention of selling it at a profit. But an isolated purchase of land by a company which had not commenced any trade or business and which did not buy the land with the intention of selling it as undeveloped land is not evidence from which it can be inferred that the purchase was an adventure in the nature of trade. On the basis of those findings Kenny J. discharged the assessments to income tax.

37. The appellants contend that the unreported judgment delivered by Kenny J. on the 20th June, 1975, 42 years ago is the law and that the Appeal Commissioner erred in law in failing to apply it to the facts of this case and that had he done so the revenue assessments would have been upheld.

38. The respondent argued that the Commissioner's findings that the *Spa Estate* case was a finding of its time and taxation system were valid. They argued that in the intervening 42 years the taxation system has changed. The decision predates the introduction of capital gains tax. Furthermore they argue that the concept of an adventure in the nature of trade has evolved considerably in the intervening years. . A wider definition of the commencement of trade has been adopted in more recent cases, although not in this jurisdiction, including the definition proffered in *Mansell v. Revenue and Customs Commissioners*, where having a specific idea in mind and having set up his business, beginning operational activities was sufficient to be deemed to have commenced trade. A similarly wide interpretation was adopted in *Shadford v. Fairweather* and *Johnston v. Heath* where the purchase and sale of land were trading transactions. In *Miller v. The Queen* a conservative definition of trade was adopted but one that is still wide enough to encompass the respondent's activities as trade, because the purchase of the site and applications for planning permission can be seen as the commencement of actual work and not speculation or prospective work. An important point made in *Gartry v. The Queen* was that each case turns on its own facts and there must be evidence of "*significant and essential steps that are necessary to the carrying on of the business*" in order to conclude that a business trade has commenced.

Decision

39. In coming to its decision the court found the case of *Mansell v. Revenue and Customs Commissioners* [2006] STC (Sed) 605 to be of most assistance because the case report contains a review of earlier case law and traces the evolution of the concept of an adventure in the nature of trade from the 1919 decision of Rowlatt J. in *Birmingham and District Cattle By-Products Company Limited v C.I.R* (1919) 12 T.C. 92 , upon which Kenny J. based his decision in *Spa Estates*, up to 2006, being the date of the Mansell decision. The decision contains a review of U.K Canadian, Australian decisions as to what constitutes a business/trade and when trade/business can be said to have commenced. The facts in Mansell are also of interest and relevance to the instant case. During late 1992 and 1993, Mr Mansell the taxpayer invested significant time and energy in becoming an expert on the development of motorway service stations. This followed a U.K government decision in August 1992, that there would be greater private sector involvement in and less central regulation of, motorway service areas. In particular, responsibility for identifying new motorway service area sites, seeking planning permission, acquiring the land and developing the sites was to pass to the private sector. Mr Mansell became interested in identifying and promoting the possibility of additional motorway service areas and/or introducing such possibilities to third parties. He familiarised himself with the onerous requirements of the Department of Transport and of local and planning authorities. He looked at potential sites on the M25, the M1 and M6 before focussing on the area of Bolsover. The area had been a coal mining area in which there was substantial unemployment. A motorway service area would provide 300 jobs and so the local authority was enthusiastic about the project. He discovered that when the motorway had been built provision for a service area had made at a place called Tipshelf. He approached the Highway Authority who owned the land but they declined to dispose of it because it was earmarked for road widening. Mr Mansell looked for a new site in the same area. In December 1993 and January 1994 he had discussions with farmers who had land adjoining the motorway. In late January 1994 heads of agreement for an option to purchase the relevant lands were drawn up and sent to the parties' respective solicitors. On the basis of the heads of agreement Mr. Mansell commissioned an expert feasibility study and also contacted operators and oil companies who would have the necessary expertise and resources to bring the proposal to fruition. Mr Mansell might have opted to seek an introductory fee from an operator or oil company for the site however the Commissioner held that as of January 1994 his aim was to sell an interest in the land rather than an introduction to it. The option agreement was concluded on 15th April 1994. Ultimately, Mr Mansell turned a profit of £300,000 on the venture.

28. Interestingly, unlike the instant case, it was not disputed by the U.K. Revenue Commissioners that the purchase of the options to buy the land for development as a motorway service station was an adventure in the nature of trade, the issue in the case was the date when that trade commenced. Under the relevant tax provisions in the U.K., if the trade had commenced prior to 6th April 1994, Mr Mansell would have been entitled to more favourable tax treatment. It was argued on behalf of Mr Mansell that the trade

commenced in December 1993 when he identified the relevant lands and began negotiations to acquire an option to purchase them, or at the latest in January 1994 when he concluded heads of agreement for the purchase of the options. Revenue argued successfully that there was no operational activity in relation to the trade until an enforceable option agreement was made on the 15th April 1994. It was held:

> *"that operations did not begin with the agreeing of the heads of terms because nothing was acquired, nothing was expended or risked, nothing was ventured and nothing won until at the earliest, the time the option agreements were made."*

The commencement of trade was accordingly held to have commenced after the 6th April 1994.

40. As already stated, having reviewed the law on the nature/commencement of trade in various jurisdictions since 1919, the special Commissioner identified a number of principles to be applied in the determination of these issues. They are set out at paragraphs 89 to 94 of the decision:

> *89……..First before the trade can be said to commence, there must be a fairly specific concept of the type of activity to be carried on.*
>
> *90. Second: an activity which consists merely of a review of the possibilities in the expectation or hope that information will be obtained to justify going into a business of some kind is not the carrying on of a trade.*
>
> *91. Third: it is notalways necessary that a sale is made or a service supplied before a trade can be said to be commenced. It is tempting to say that a trade commences only when the first sale is made. In normal everyday usage one would say that a person starts trading when he becomes entitled to money from his first customer. But, for the following reasons, it does not seem to me that making the first sale is necessarily the earliest time when a' trade is…..commenced' ….*
>
> > *(a) there is a small but fine distinction between 'trading starting' and a trade being commenced, which may make everyday usage a pilot slightly out of its home waters;*
> >
> > *(b) the comments made by Lord Millet in Khan v Miah [2001] 1 All ER (Comm) 282 [2001] 1 All ER 20 tend to suggest that selling the first meal is not the earliest time when trading starts; and*
> >
> > *(c) for these purposes the extended definition of trade affects the question. The question becomes; when did the trade, manufacture, adventure or concern in the nature of trade start? In normal usage, an adventure in trade might start before the 'trading' started. An adventure normally starts when the adventurer leaves home, or the merchant first charters his ship rather than when the first monster is killed or the cargo is brought back home and sold.*
>
> *92. I note that it is possible that for the linguistic reasons noted in para (c) above, there may be somewhat different considerations relevant to when a trade such as buying and selling flowers commences from those relevant to when an adventure in the nature of a trade may commence.*
>
> *93. It seems to me that a trade commences when the taxpayer, having a specific idea in mind of his intended profit making activities, and having set up his business, begins operational activities – and by operational activities I mean dealings with third parties immediately and directly related to the supplies to be made which it is hoped will give rise to the expected profits, and which involve the trader putting money at risk: the acquisition of the goods to sell or to turn into items to be sold, the provision of services, or the entering into a contract to provide goods or services; the kind of activities which contribute to the gross (rather than the net) profit of the enterprise. The restaurant which has bought food which is in its kitchen and opens its doors, the speculator who contracts to sell what he has not bought, the service provider who has started to provide services under an agreement so to do, have all engaged in operational activities in which they have incurred a financial risk, and I would say that all have started to trade.*
>
> *94. It does not seem to me that carrying on negotiations to enter into the contracts which, when formed will constitute operational activities is sufficient. At that stage no operational risk has been undertaken; no obligation has been assumed which directly relates to the supplies to be made. Not until those negotiations culminate in such obligations or assets, and give rise to a real possibility of loss or gain has an operational activity taken place. Until then, those negotiations may be part of setting up the trade but they do not to my mind betoken its commencement.'*

These principles were subsequently approved and adopted by the Chancery division of the UK High Court in 2009, in the case of *Revenue and Customs Commissioners v Micro Fusion* (STC) 2009 1741 at page 1778. At Para. 99 of his judgment Davis J. states:

> *"Neither of the parties made submissions as to what is required in order that a trade may be regarded as having commenced, but we were referred by Mr. Peacock to the decision of the special commissioner (Charles Hellier) in the case of Mansell v Revenue and Customs Comrs [2006] STC (SCD) 605,paras 88 to 94, where there are set out the principles on this question which he derives from the cases. We are happy to adopt those principles and to apply them in the present case"*

41. This Court too is happy to adopt those principles as a fair summary of the law as it has evolved over the past century and to apply those principles to the present case. The respondent like Mr Mansell had a specific idea in mind of his intended profit making activities. Mr. Mansell acquired options to purchase lands which had the potential to be developed into a motorway service area. The respondent purchased 28 Shrewsbury Road with the intention of demolishing the existing dwelling and developing two new dwellings on the site. Having secured finance from the bank both for the purchase of the property and for the cost of development, the respondent put his specific idea in train by purchasing 28 Shrewsbury Road. On the Mansell principles that was an operational activity being *"dealings with third parties immediately and directly related to the supplies to be made which it is hoped will give rise to the expected profits, and which involve the trader putting money at risk."(. Mansell Para 93)* On the facts and the principles applied in *Mansell*, the respondent was engaged in the trade of land development and began his trade of land development on the day he purchased the property with a clear development plan and the financing to develop same. On that date he ventured in the hope of gain and with the risk of loss, from the development of the land.

42. The position of the appellant that the nature and commencement of trade in the development of land was forever fixed by a decision given 42 years ago, on a very complex and different set of facts, during a different tax regime, is simply untenable. The Court is reminded of the observations of Thomas Jefferson on the immutability of law:

> *"I am not an advocate for frequent changes in laws and Constitutions. But laws and institutions must go hand in hand with the progress of the human mind. As that becomes more developed, more enlightened, as new discoveries are made, new truths discovered and manners and opinions change, with the change of circumstances, institutions must advance also to keep pace with the times. We might as well require a man to wear still the coat which fitted him when a boy as civilized society to remain ever under the regimen of their barbarous ancestors ."*

43. The nature and variety of enterprises which could be described as '*adventures in the nature of trade*' has developed considerably in the past 42 years. The advent of the internet and all of the spin off enterprises which it has generated illustrates the point. Even in the much narrower field of construction the manner in which business is conducted has altered dramatically. If one described someone as a *'developer*' in 1975 the term would probably have conjured up an image of an employee of Kodak whose job it was to develop pictures from film. Today, certainly in Ireland, the term is instantly recognizable as describing a person who purchases land for development and sale. Some developers may be builders, others are not. Some developments are large scale, some are small scale. Either way, land development is an adventure in the nature of trade and the adventure begins when the developer purchases the land for the purpose of development.

44. As it happens, there is in any event, some support for the Appeal Commissioner's determinations in the *Spa Estates* case. Kenny J. in considering the Revenue argument that the purchase of land by Spa Estates was an adventure in the nature of trade held that the fact that the purchase was the only transaction carried out by Spa did not prevent the transaction from being an adventure in the nature of trade, because an isolated transaction may be an adventure in the nature of trade. He held that the question whether or not a transaction is an adventure in the nature of trade is a question of law on the facts found. (Para 28 supra). He adopted the test set out in *Commissioners of Inland Revenue v Livingstone* (1927) S.C. 251. The full quote is set out at para 28? above. The operative part of the test of whether a single transaction is an adventure in the nature of trade is:

> *"….the test which must be used to determine whether a venture such as we are now considering is or is not "in the nature of trade" is whether the operations in it are of the same kind and carried on in the same way as those which are characteristic of ordinary trading in the line of business in which the venture was made. If they are, I do not see why the venture should not be regarded as "in the nature of trade" merely because it was a single venture which only took three months to complete"*

Applying that legal test to the facts of this case as opposed to the Spa Estates case, it is difficult to escape the conclusion that the respondent's operations are of the same kind and were carried on in the same way as those which are characteristic of ordinary trading in land development. The difference between the respondent's operation and that of the major land developers is merely one of scale. They are all in the business of identifying, purchasing and developing sites. The Court ventures to suggest therefore that were Kenny J. confronted with these facts in the current construction environment, he too would conclude that at all material times the respondent was engaged in the trade of land development.

45. The Court for all of the foregoing reasons answers the questions posed in the case stated as follows:

> a. Was I correct in determining that, insofar as concerns 28 Shrewsbury Road, the activity of the taxpayer was on the trading side (being land development) rather than the capital side?
>
> Answer: Yes
>
> b. Was I correct in determining that, insofar as concerns 28 Shrewsbury Road, the taxpayer commenced a trade of land development on 21 February 2005, thereby being entitled to claim losses from that date?"
>
> Answer: Yes