THE COURT OF APPEAL

Record Number: 2022/73

Neutral Citation Number [2024] IECA 113

Donnelly J.

Faherty J.

Butler J.

BETWEEN/

DERMOT HANRAHAN

RESPONDENT

- AND -

THE REVENUE COMMISSIONERS

APPELLANT

JUDGMENT of Ms. Justice Donnelly and Ms. Justice Butler delivered on the 15th day of May, 2024

Introduction

1. It is possible, quite legally, to avoid paying tax on an income or gain. Avoidance of tax occurs where provisions of the tax code are exploited to the fullest extent permitted by their terms to ensure that a taxpayer pays either no tax or the least possible amount of tax. Skilful tax practitioners spend considerable energy setting up elaborate schemes for the purpose of reducing, in a legally compliant manner, the tax a taxpayer will ultimately have to pay. The

State, through the tax code, has sought to reduce tax avoidance by use of either specific tax avoidance sections or, by introducing, for the first time by way of s. 86 of the Finance Act, 1989 (the "1989 Act"), a general tax avoidance provision. This judgment concerns the successor to s. 86, namely s. 811 of the Taxes Consolidation Act, 1997 ("TCA"). O'Donnell J. (as he then was) described the predecessor to s. 811 as "a provision of mind-numbing complexity" (*Revenue Commissioners v O'Flynn Construction Limited* [2013] 3 IR 533 ("*O'Flynn Construction*") at para 40). Nonetheless, his judgment gives clarity to the interpretation of the section and will be discussed in detail below.

2. The substantive issue in these proceedings is whether an elaborate set of financial transactions, for which the taxpayer never provided any evidence of a commercial or business purpose and which were entered into for the purpose of ensuring the taxpayer gained maximum relief from Capital Gains Tax ("CGT"), is a *tax avoidance transaction* within the meaning of s. 811 TCA. If it is a tax avoidance transaction, the overall amount of CGT that the taxpayer must pay will increase. This issue turns upon the interpretation of the relevant legal provisions. A separate issue arises as to whether the Revenue Commissioners ("Revenue") acted within the time allowed to pursue this taxpayer for the purported tax avoidance. The Revenue did so by a Notice of Opinion of a nominated officer dated 23 December 2009 issued pursuant to s. 811(6) TCA. The final issue is whether that Notice of Opinion is invalidated by a misdescription of one of the steps in the transaction at issue.

3. This appeal arises from the Order and judgments of the High Court (*Hanrahan v The Revenue Commissioners* [2022] IEHC 43 and *Hanrahan v The Revenue Commissioners (No. 2)* [2022] IEHC 102). The matter came before the High Court as an appeal by way of case stated against the decision of the Appeal Commissioner who had ruled against the taxpayer in his appeal against the assessment to tax made pursuant to the Notice of Opinion.

4. The High Court found in favour of Revenue in respect of the procedural issue and on the invalidity point, but in favour of the taxpayer in respect of the substantive issue. Revenue appealed against the substantive findings and the taxpayer cross-appealed against the time limit findings. When considering the High Court judgment, it might usefully be borne in mind that the taxpayer, having failed before the Appeal Commissioner, was the appellant in that Court but, having succeeded before the High Court, is the respondent to this appeal but has also brought a cross appeal to which the Revenue is the respondent. For ease of reference, we will use the terms "Revenue" and "taxpayer" in this judgment.

The Transaction

5. The taxpayer made capital gains on the sale of shares in 2004 and 2005. In order to reduce the CGT on those disposals, the taxpayer entered into a complex series of financial transactions (hereinafter known collectively as "the Transaction"), involving "connected persons" and "associated companies" (as defined and applied in s. 10, s. 432, s. 547(1) and s. 549(1) and (2) TCA), to create a substantial artificial loss to be offset against the capital gains thus giving him a tax saving of €531,471.

6. At para 6 of the High Court judgment, the material findings of fact from the case stated of the Appeals Commissioner were identified as follows:

> "The tax avoidance transaction as so identified consisted of the following component parts:
>
> a) The beneficial interests in the issued share capital in CapPartners ("CapPartners") were held by CapPartners Tax Advisors and CapPartners Holdings Limited.
>
> b) The beneficial interest in the issued share capital in CapPartners Securitisation ("Securitisation") was held by CapPartners Tax Advisors.

c) CapPartners and Securitisation were commonly owned and therefore connected pursuant to TCA, section 10 and section 432.

d) CapPartners Parnell Investments Limited ("Parnell") was formed on 2 June 2004 with CapPartners holding the single share entitling it to all voting rights. As a consequence, CapPartners, Securitisation and Parnell were connected pursuant to TCA, section 10 and section 432.

e) On 25 August 2004, the Appellant acquired 30,000 non-voting non-cumulative preference shares of €1 each in Parnell. The Appellant was therefore connected with Parnell again pursuant to TCA, section 10 and section 432.

f) On 7 October 2004, Parnell purchased a German Government Bond ("Bond") with a nominal value of €2,939,466 for €2,977,466 from Davy Stockbrokers.

g) By Call Option Agreement dated 7 October 2004 for a premium of €2,677,000, Parnell granted a call option to Securitisation with the entitlement to purchase the Bond having a nominal value of €2,939,466.

h) By Bond Purchase Agreement dated 7 October 2004 between Parnell, Securitisation and the Appellant, whereby Parnell undertook to sell the Bond having a nominal value of €2,939,466 to the Appellant for €578,529.00 subject to the Call Option Agreement between Parnell and Securitisation dated 7 October 2001 (*sic*). At Clause 5 of that agreement, Securitisation granted a put option to the Appellant to sell the Bond to Securitisation on the same terms as set out in the Call Option Agreement between Parnell and Securitisation dated 7 October 2004.

i) On 7 October 2004, the Appellant acquired the Bond with a nominal value of €2,939,466 from Parnell for €578,529 financed by an interest free loan of €280,000 provided by Parnell and €298,529 from his own resources.

j) Pursuant to Clause 5 of the Bond Purchase Agreement, the Appellant, by letter dated 22 October 2004, notified the directors of Securitisation of his intention to exercise his put option requiring Securitisation to acquire the Bond from him.

k) On 22 October 2004, Securitisation issued a Confirmation Note confirming the purchase of the Bond with a nominal value of €2,939,466 from the Appellant for €319,938."

7. The tax consequences of the aggregate arrangements were found by the Appeal Commissioner, and noted in the case stated, as follows:

"a) The sale of the Bond by Parnell to the Appellant was a transaction between connected persons otherwise than by means of a bargain made at arm's length.

b) The acquisition of the Bond by the Appellant was deemed to be for a consideration equal to €2,977,446, as Parnell and Securitisation were connected persons. As a consequence, the market value of the Bond was calculated as if the option did not exist notwithstanding that the Appellant only paid €578,529 to Parnell for the Bond.

c) Having acquired the Bond from Parnell for €578,529 which he sold to Securitisation for €319,938, the Appellant made an actual loss of €258,591. However, the Appellant asserted that in accordance with the combined effect of TCA, sections 31, 547 and 549, the disposal of the Bond gave rise to a capital gains tax loss calculated as follows:

Market Value of Bond on date of Disposal	€2,977,446
Consideration Received by the Appellant	€319,938
Capital Loss Claimed	€2,657,508

8. Of importance to the substantive issue, the trial judge observed:

> "It should be noted that the two key provisions which resulted in the deemed loss to the appellant are s. 31 and s. 549 TCA, as the deductible loss under s. 31(a) resulted from the operation of s. 549, which, when read in conjunction with s. 547(1), deemed the appellant to have paid full market value for the Bond, because he and Parnell were "connected persons" and required the option which had been created so as to reduce the actual value of the Bond by over 90%, to be ignored." (para 8).

9. The shorthand names used in the High Court judgment for the relevant companies will be continued in this judgment.

The Questions of Law in the Case Stated

10. The Appeal Commissioner stated eight questions of law for the opinion of the High Court. He asked if he was correct in:

> "(a) holding that the Notice of Opinion was not void;
>
> (b) determining that he was judicially constrained from departing from the statutory wording in TCA section 811 (5A) and therefore precluded from considering the impact of the Supreme Court decision in Revenue Commissioners v. Hans Droog [2016] IESC 55;
>
> (c) his interpretation and application of TCA, section 549;
>
> (d) determining that the Transaction was a tax avoidance transaction as statutorily defined;
>
> (e) holding that the appellants were required to discharge a "positive burden" in the interpretation and application of TCA, section 811 (3)(a)(ii);

(f) holding that the intention of the Oireachtas, as discerned from the wording of TCA, section 31, is to provide relief to ameliorate actual financial hardship correlating to actual monetary loss;

(g) holding that there was a misuse of TCA, section 31, and

(h) determining that the capital gains tax actual loss be restricted to €258,591." (para 142)

11. The trial judge conveniently grouped those questions into three general issues as follows:

"1. Question (b): whether the Notice of Opinion is prohibited as being out of time by reason of s. 955 (2) TCA;

2. Questions (c), (d), (e), (f), (g) and (h): whether the Appeal Commissioner was correct to find that the Transaction was a "tax avoidance transaction" within the meaning of s. 811 TCA, such that the appellant should be restricted to deducting his actual loss of €258,591 rather than the much greater loss arising from the operation of the deeming provisions in s. 549;

3. Question (a): whether the Notice of Opinion was void by reason of an error in the description of the component parts of the Transaction." (para 19)

<u>Section 811 – Tax Avoidance Transactions</u>

12. The central, substantive issue in this case concerns the tax treatment of the losses deemed to have arisen by reason of ascribing market value to the price paid for the purchase of the Bond by the taxpayer from Parnell, an entity to which he was "connected" within the meaning of the TCA. For the purpose of this substantive issue, it is sufficient to highlight the most relevant subsections of s. 811, which has been described as a general anti-avoidance provision, namely subsections 2 and 3.

Section 811(2) TCA defines a "tax avoidance transaction" as follows:

"(2) For the purposes of this section and subject to subsection (3), a transaction shall be a "tax avoidance transaction" if having regard to any one or more of the following—

> (a) the results of the transaction,
>
> (b) its use as a means of achieving those results, and
>
> (c) any other means by which the results or any part of the results could have been achieved,
>
> the Revenue Commissioners form the opinion that—
>
> > (i) the transaction gives rise to, or but for this section would give rise to, a tax advantage, and
> >
> > (ii) the transaction was not undertaken or arranged primarily for purposes other than to give rise to a tax advantage,
>
> and references in this section to the Revenue Commissioners forming an opinion that a transaction is a tax avoidance transaction shall be construed as references to the Revenue Commissioners forming an opinion with regard to the transaction in accordance with this subsection."

Section 811(3) TCA then provides for the situation where Revenue shall not regard the transaction as being a tax avoidance transaction as follows:

> "(3) (a) Without prejudice to the generality of subsection (2), in forming an opinion in accordance with that subsection and subsection (4) as to whether or not a transaction is a tax avoidance transaction, the Revenue Commissioners shall not regard the transaction as being a tax avoidance transaction if they are satisfied that—
>
> > (i) notwithstanding that the purpose or purposes of the transaction could have been achieved by some other transaction which would have given rise to a greater amount of tax being payable by the person, the transaction—

(I) was undertaken or arranged by a person with a view, directly or indirectly, to the realisation of profits in the course of the business activities of a business carried on by the person, and

(II) was not undertaken or arranged primarily to give rise to a tax advantage,

or

(ii) the transaction was undertaken or arranged for the purpose of obtaining the benefit of any relief, allowance or other abatement provided by any provision of the Acts and that the transaction would not result directly or indirectly in a misuse of the provision or an abuse of the provision having regard to the purposes for which it was provided.

(b) In forming an opinion referred to in paragraph (a) in relation to any transaction, the Revenue Commissioners shall have regard to—

(i) the form of that transaction,

(ii) the substance of that transaction,

(iii) the substance of any other transaction or transactions which that transaction may reasonably be regarded as being directly or indirectly related to or connected with, and

(iv) the final outcome and result of that transaction and any combination of those other transactions which are so related or connected."

We will return in due course to those parts of s. 811 which are relevant to the procedural issue (namely sub-sections 4, 5 and 5A) along with s. 955(2).

Capital Gains Provisions

13. Section 31 TCA provides that CGT is to be charged after deducting allowable losses from chargeable gains as follows:

"31. — Capital gains tax shall be charged on the total amount of chargeable gains accruing to the person chargeable in the year of assessment, after deducting—

> (a) any allowable losses accruing to that person in that year of assessment, and
>
> (b) in so far as they have not been allowed as a deduction from chargeable gains accruing in any previous year of assessment, any allowable losses accruing to that person in any previous year of assessment (not earlier than the year 1974-75)."

14. There are special provisions in Chapter 2 of Part 19 TCA dealing with 'Computation of chargeable gains and allowable losses'. The phrase "allowable loss" is not defined but may be inferred from the manner in which losses are to be calculated and treated. Of relevance are the following provisions:

Section 546 which deals with 'Allowable losses' provides as follows:

> 546.— (1) Where under the Capital Gains Tax Acts an asset is not a chargeable asset, no allowable loss shall accrue on its disposal.
>
> (2) Except where otherwise expressly provided, the amount of a loss accruing on a disposal of an asset shall be computed in the same way as the amount of a gain accruing on a disposal is computed.
>
> (3) Except where otherwise expressly provided, the provisions of the Capital Gains Tax Acts which distinguish gains which are chargeable gains from those which are not, or which make part of a gain a chargeable gain and part not, shall apply also to distinguish losses which are allowable losses from those which are not, and to make part of a loss an allowable loss and part not, and references in the Capital Gains Tax Acts to an allowable loss shall be construed accordingly.
>
> (4) A loss accruing to a person in a year of assessment for which the person is neither resident nor ordinarily resident in the State shall not be an allowable loss for the

purposes of the Capital Gains Tax Acts unless under section 29 (3) the person would be chargeable to capital gains tax in respect of a chargeable gain if there had been a gain instead of a loss on that occasion.

(5) Except where provided by section 573, an allowable loss accruing in a year of assessment shall not be allowable as a deduction from chargeable gains in any earlier year of assessment, and relief shall not be given under the Capital Gains Tax Acts—

(a) more than once in respect of any loss or part of a loss, and

(b) if and in so far as relief has been or may be given in respect of that loss or part of a loss under the Income Tax Acts.

(6) For the purposes of section 31, where, on the assumption that there were no allowable losses to be deducted under that section, a person would be chargeable under the Capital Gains Tax Acts at more than one rate of tax for a year of assessment, any allowable losses to be deducted under that section shall be deducted—

(a) if the person would be so chargeable at 2 different rates, from the chargeable gains which would be so chargeable at the higher of those rates and, in so far as they cannot be so deducted, from the chargeable gains which would be so chargeable at the lower of those rates, and

(b) if the person would be so chargeable at 3 or more rates, from the chargeable gains which would be so chargeable at the highest of those rates and, in so far as they cannot be so deducted, from the chargeable gains which would be so chargeable at the next highest of those rates, and so on.

Section 547 TCA is entitled 'Disposals and acquisitions treated as made at market value' and provides at s. 547(1):

> "…[A] person's acquisition of an asset shall for the purposes of those Acts be deemed to be for a consideration equal to the market value of the asset where—
>
> > (a) the person acquires the asset otherwise than by means of a bargain made at arm's length (including in particular where the person acquires it by means of a gift)".

Section 549 TCA is entitled 'Transactions between connected persons' and in so far as relevant provides:

> "(1) This section shall apply for the purposes of the Capital Gains Tax Acts where a person acquires an asset and the person making the disposal is connected with the person acquiring the asset.
>
> (2) Without prejudice to the generality of section 547, the person acquiring the asset and the person making the disposal shall be treated as parties to a transaction otherwise than by means of a bargain made at arm's length.
>
> (…)
>
> (6) Where the asset mentioned in subsection (1) is subject to any right or restriction enforceable by the person making the disposal or by a person connected with that person, then (where the amount of the consideration for the acquisition is in accordance with subsection (2) deemed to be equal to the market value of the asset), that market value shall be what its market value would be if not subject to the right or restriction, reduced by the lesser of—
>
> > (a) the market value of the right or restriction, and
> >
> > (b) the amount by which its extinction would enhance the value of the asset to its owner.

(7) Where the right or restriction referred to in subsection (6)—

(a) is of such a nature that its enforcement would or might effectively destroy or substantially impair the value of the asset without bringing any countervailing advantage either to the person making the disposal or a person connected with that person,

(b) is an option or other right to acquire the asset, or

(c) in the case of incorporeal property, is a right to extinguish the asset in the hands of the person giving the consideration by forfeiture or merger or otherwise,

then, the market value of the asset shall be determined, and the amount of the gain accruing on the disposal shall be computed, as if the right or restriction did not exist.

(8) (a) Where a person disposes of an asset to another person in such circumstances that—

(i) subsection (7) would but for this subsection apply in determining the market value of the asset, and

(ii) the person is not chargeable to capital gains tax under section 29 or 30 in respect of any gain accruing on the person's disposal of the asset,

then, as respects any subsequent disposal of the asset by the other person, that other person's acquisition of the asset shall for the purposes of the Capital Gains Tax Acts be deemed to be for an amount equal to the market value of the asset determined as if subsection (7) had not been enacted.

(b) This subsection shall apply—

(i) to disposals made on or after the 25th day of January, 1989, and

(ii) for the purposes of the determination of any deduction to be made from a chargeable gain accruing on or after the 25th day of January, 1989, in respect of an allowable loss, notwithstanding that the loss accrued or but for this section would have accrued on a disposal made before that day.

Provisions Relevant to the Time Issue

15. In addition to the substantive issue, the case stated raises an important procedural issue as regards the applicable time limit within which Revenue may pursue an assessment or amended assessment on foot of a Notice of Opinion resulting in a liability on the part of the taxpayer to pay CGT. The generally applicable time limit is to be found in s. 955(2) which is contained within Part 41 of the TCA dealing with self-assessment. Under s. 955(1) power is conferred on inspectors to amend an assessment on a chargeable person "at any time" notwithstanding that tax may have already been paid or repaid on foot of the original assessment. That power is then subject to a limitation, presumably to provide some legal certainty, in circumstances where a self-assessed taxpayer has made a return in which he has made a full and true disclosure in respect of a chargeable period. Section 955(2) and the relevant portions of s. 955(3) provide as follows:

> "955. — (2)(a) Where a chargeable person has delivered a return for a chargeable period and has made in the return a full and true disclosure of all material facts necessary for the making of an assessment for the chargeable period, an assessment for that period or an amendment of such an assessment shall not be made on the chargeable person after the end of 4 years commencing at the end of the chargeable period in which the return is delivered and
>
> (i) No additional tax shall be payable by the chargeable person after the end of that period of 4 years, and

(ii) No tax shall be repaid after the end of a period of 4 years commencing at the end of the chargeable period for which the return is delivered,

by reason of any matter contained in the return.

— (3) Nothing in this subsection shall prevent the amendment of an assessment –

(i) Where a relevant return does not contain a full and true disclosure of the facts referred to in paragraph (a),…

and tax shall be paid or repaid as appropriate in accordance with any such amendment…"

16. As will be seen below, much of the argument in the High Court concerned whether the taxpayer had made a full and true disclosure in each of his returns for the chargeable periods 2004 and 2005. On the assumption that the time limit in s. 955(2) was capable of applying in principle (i.e., that the taxpayer had made what Clarke J. (as he then was) in *Revenue Commissioners v Hans Droog* [2016] IESC 55 ("*Droog*") described as a "fully compliant return" (para 6.5)), the High Court then looked at the potentially relevant parts of s. 811, which as noted is a general anti-avoidance provision. These were initially as follows:

"811. — (4) Subject to this section, the Revenue Commissioners as respects any transaction may at any time –

(a) form the opinion that the transaction is a tax avoidance transaction,

(b) calculate the tax advantage which they consider arises, or which but for this section would arise, from the transaction,

(c) determine the tax consequences which they consider would arise in respect of the transaction of their opinion were to become final and conclusive in accordance with subsection (5)(e), and

(d) calculate the amount of any relief from double taxation which they would propose to give to any person in accordance with subsection (5)(c).

811. — (5) (a) Where the opinion of the Revenue Commissioners that a transaction is a tax avoidance transaction becomes final and conclusive, they may, notwithstanding any other provision of the Acts, make all such adjustments and do all such acts as are just and reasonable (insofar as those adjustments and acts have been specified or described in a notice of opinion given under subsection (6) and subject to the manner in which any appeal made under subsection (7) against any matter specified or described in the notice of opinion has been finally determined, including any adjustments and acts not so specified or described in the notice of opinion but which form part of the final determination of any such appeal) in order that the tax advantage resulting from a tax avoidance transaction shall be withdrawn from or denied to the person concerned.

(b) Subject to but without prejudice to the generality of paragraph a), the Revenue Commissioners may –

> (i) allow or disallow in whole or in part any deduction or other amount which is relevant in computing tax payable, or any part of such deduction or other amount…

(c) ...

(d) …

(e) For the purposes of this subsection, an opinion of the Revenue Commissioners that a transaction is a tax avoidance transaction shall be final and conclusive –

> (i) if within the time limited no appeal is made under subsection (7) against any matter or matters specified or described in a notice or notices of opinion given pursuant to that opinion, or

> (ii) as and when all appeals made under subsection (7) against any such matter or matters have been finally determined and none of the appeals has been so determined by an order directing that the opinion of the Revenue Commissioners to the effect that the transaction is a tax avoidance transaction is void."

17. These provisions were the subject of analysis by the Supreme Court in *Droog* in which Clarke J., delivering judgment for the Court, concluded that the time limits in s. 955(2) applied in the case of s. 811 and made the raising of an opinion whose only end could be the requirement to pay additional tax which was prevented by s. 955(2) impermissible. Subsequent to the High Court decision in *Droog* [2011] IEHC 142, which was to similar effect, the Oireachtas enacted s. 130(1) of the Finance Act 2012 which inserted a new subsection (5A) into s. 811. This subsection (excluding subparagraph (a) which deals with the interpretation of various terms) provides as follows:

> "811. — (5A)(b) Where the opinion of the Revenue Commissioners, that a transaction is a tax avoidance transaction, becomes final and conclusive, then for the purposes of giving effect to this section, any time limit provided for by Part 41, or by any other provision of the Acts, on the making or amendment of an assessment or on the requirement or liability of a person to pay tax or to pay additional tax
>
> (i) shall not apply, and
>
> (ii) shall not affect the collection and recovery of any amount of tax or additional tax that becomes due and payable."

18. Section 130(2) of the Finance Act, 2012, set out the temporal application of the newly inserted s. 811(5A) TCA. Section 130(2)(a) provides as follows:

> "Subsection (1) applies to any assessment to tax or any amendment of any assessment to tax which is made, on or after 28 February 2012, so that the tax advantage resulting from a tax avoidance transaction, in respect of which a notice of opinion has become final and conclusive, is withdrawn from or denied to any person concerned."

19. Thus, the general scheme of the TCA regarding the power of Revenue to amend an assessment of CGT in respect of which a taxpayer has made a return was that this must be done within 4 years from the end of the chargeable period to which the return relates. The taxpayer could not become liable for the payment of additional tax after that date. The judgments in *Droog* confirmed that, notwithstanding the ostensibly broad powers conferred on Revenue under s. 811(4) and (5) to form the opinion that a transaction is a tax avoidance transaction and to issue notice of that opinion which, when final and conclusive, can operate so as to withdraw the benefit of the tax avoidance transaction from the taxpayer, the 4 year time limit continued to apply to any assessment or amendment of an assessment issued pursuant to those provisions.

20. This scheme is subject to two important provisos. The first is that in its terms the time limit in s. 955(2) only applies where the taxpayer has made a "full and true disclosure of all material facts necessary for the making of an assessment". If the return on which the taxpayer relies does not make such a full and true disclosure, then it appears that there is no time limit applicable to the amendment of that assessment by Revenue pursuant to s. 811. The second is that, regardless of whether the taxpayer has made a full and true disclosure, the time limit in s. 955(2) is disapplied to any assessment or amendment to an assessment regarding a tax avoidance transaction made after 28 February 2012.

<u>The High Court Findings</u>

21. The trial judge commenced her analysis by looking at the procedural issues raised in the case stated, the resolution of which had the potential to make the argument on the substantive issue moot. The Appeal Commissioner had rejected the taxpayer's argument that the Notice of Opinion issued by Revenue on 23 November 2009 was out of time on the basis that s. 811(5A) operated to disapply the time limit that would otherwise have applied under s. 955(2). The trial judge took a somewhat more nuanced view. She accepted that, in principle, the 4 year time period under s. 955(2) (running from the end of the chargeable period to which the taxpayer's return related) had expired as regards his 2004 return as the Notice of Opinion could not have become final and conclusive before the end of that period. She reached the same conclusion as regards the 2005 return, albeit on a somewhat different basis. Following the decision of the Supreme Court in *Droog* she held that even though the Notice of Opinion was capable of becoming final and conclusive within the relevant period, the time limit actually applied to the raising of an assessment and the payment of tax on foot of such assessment rather than the Notice of Opinion itself and neither of these things had been done within time.

22. However, the finding that s. 955(2) was in principle capable of applying to the 2005 return was not determinative of the issue as the applicability of the section in the particular case was dependant on the taxpayer having made "a full and true disclosure of all material facts necessary for the making of an assessment". The trial judge held that the taxpayer had not made a full and true disclosure of all material facts in his 2004 return as he had not checked the boxes in his online return which would have indicated that he and Parnell were connected persons and that by virtue of that relationship, market value had been substituted for the actual cost of acquisition of the Bond. She regarded the 2005 return differently. She noted that s. 955(2) focused on full and true disclosure in the return for the relevant chargeable period and did not contemplate what had occurred here, namely a subsequent chargeable period which might be affected by non-disclosure in the return for an earlier period. Consequently, she held that the qualification in s. 955(2) as regards full and true disclosure did not affect the operation of the time limit insofar as the chargeable period covered by the 2005 return was concerned.

23. Because the trial judge held that the taxpayer was entitled to the benefit of the time limit as regards the 2005 return, she then had to consider whether the Appeal Commissioner had been correct to hold that s. 811(5A) applied to disapply this time limit. Section 811(5A) was inserted into the TCA by s. 130 of the Finance Act 2012 and provided that where an Opinion of Revenue that a transaction is a tax avoidance transaction becomes final and conclusive, any time limit provided by Part 41 of the TCA (which includes s. 955(2)) shall not apply to the making or amendment of an assessment or the collection of tax. Section 130(2) went on to provide that the tax advantage resulting from a tax avoidance transaction would be withdrawn as regards any assessment or amended assessment made after 28 February 2012.

24. The taxpayer argued that if s. 811(5A) were applied to his case it would amount to retrospective legislation since the provision was not in existence at the time of the tax returns, the subject of the Notice of Opinion, or even as of the date of his appeal to the Appeal Commissioner. The trial judge accepted that the expiration of the time limit in s. 955(2) could amount to a vested right but held that the taxpayer could not rely on the alleged infringement of his constitutionally protected rights to challenges. 811(5A) in a case stated. As there was no ambiguity in s. 811(5A) to which the presumption against retrospective legislation might apply, she held that the sub-section applied so as to deprive the taxpayer of the benefit of s. 955(2) and to prevent him relying on s. 955(2) to argue that the Notice of Opinion was unlawful. Thus, the trial judge upheld the finding of the Appeal Commissioner that the time limits in s. 955(2) did not apply to the Notice of Opinion or any part of it by reason of s. 811(5A) and answered "yes" to question (b). In circumstances where the time limits relied on by the taxpayer did not apply, she proceeded to consider the substantive issue.

25. The trial judge referred to the submission she received from the taxpayer concerning *McGrath v McDermott* [1988] IR 258 which had rejected the approach taken in the United Kingdom of "*fiscal nullity*". The predecessor to s. 811 (s. 86 of the Finance Act, 1989) was enacted in its aftermath. That section, and the purposive approach to it, was interpreted and applied by the Supreme Court in *O'Flynn Construction*. More recently, the Supreme Court gave judgment in *Bookfinders Ltd v Revenue Commissioners* [2020] IESC 60 ("*Bookfinders*") which clarified some of what was said in *O'Flynn Construction*. Having referred to these and other relevant cases, the trial judge stated that in interpreting taxation statutes generally, context and purpose are relevant. Neither party now contends that the trial judge took the wrong approach to statutory interpretation in general, but they disagree on the correctness of her application of those principles to the provisions at issue.

26. The trial judge accepted Revenue's contention that s. 811(3)(a)(ii) required her to consider the purpose for which s. 31 was enacted with a view to considering if there had been a misuse or abuse of that provision. Revenue appears to have contended also for a broader interpretation of the word "purpose" as it is stated in s. 811, but the trial judge said she would deal with those arguments in their context. She identified the key question as: how does a court identify the purpose of the relieving provision?

27. Having applied the principles, the trial judge concluded that the Appeal Commissioner did not err in finding that the Transaction was wholly artificial, that it gave rise to a tax advantage (the sheltering of capital gains) and was not arranged for any purpose other than to give rise to a tax advantage. She noted that in the appeal before the Appeal Commissioner, the taxpayer had accepted that the Transaction was a "tax avoidance transaction" within the meaning of s. 811(2) unless it could be saved by s. 811(3)(a)(ii). In the High Court, the latter subsection was the focus, as it is in this appeal.

28. Revenue's submission that s. 31 only applied to "real" or "monetary" losses remained, according to the trial judge, at a general level. She was not directed to other provisions of TCA or surrounding context for the purposes of identifying the purpose of s. 31 which would justify reading into it those words. While she accepted that s. 811 may justify a purposive approach, she said that no such words were included in s. 31 when it was enacted some years later.

29. The trial judge said that the Appeal Commissioner accepted the submission of Revenue as to real or monetary losses being at issue and she noted that the Appeal Commissioner said he was fortified in this by the fact that s. 556 restricted indexation relief to prevent turning an actual loss into a gain, increasing an actual loss or converting an actual gain into a loss. The trial judge said this section was not opened to her and that she found it hard to accept that s. 556 is concerned with anything other than the taking into account of inflation.

30. The trial judge then focussed on the submission by the taxpayer that the principles of statutory interpretation operated to identify the limits of s. 811. The trial judge referred to the fact that s. 549 is an anti-avoidance provision, designed to remove from consideration impairments on value (such as options) created by connected persons. In so far as it was a provision which appears to have been designed to counteract the creation of artificial losses by transactions between connected persons, it might be best regarded as a limitation on the relief available under s. 31. She said its relevance lies in identifying those artificial losses which will not be recognised by the TCA.

31. According to the trial judge, the fact that s. 31 had its own anti-avoidance provisions, namely s. 549, seems to raise different issues from the relief in *O'Flynn Construction*. She said, at para 207, that the majority and minority viewed "the absence of any express restriction on the effective transfer of tax relief so as to allow shareholders of non-exporting companies to avoid paying income tax on dividends" differently. The situation in the present case was, she said, somewhat different as the deemed acquisition cost results from express statutory provisions (s. 549, read in conjunction with ss. 546 and 547) which operated to create a very significant artificial loss. She also said this arises because of the operation of the anti-avoidance provisions themselves.

32. The effect, the trial judge held, of the Notice of Opinion and subsequent determination was to disapply s. 549 on the basis that this is not the purpose for which it was introduced. The Appeal Commissioner had said that the loss actually suffered and, it would appear, deliberately created by the appellant, must be allowed pursuant to s. 31(a) TCA. She said that the difficulty with that finding was, in her view, that s. 549 was quite clear on its face and was directed to the question of how artificial losses created by transactions between connected persons are to be dealt with for CGT purposes.

33. The trial judge identified the question as whether s. 811(3)(a)(ii) permits her to disapply s. 549. She cited para 77 from *O'Flynn Construction* where O'Donnell J. identified the limits of statutory power to set aside the tax advantage of an otherwise lawful transaction. She identified the delineation of the limits of the operation of s. 811 TCA as:

> "- [W]here the gap was neglected, or where the scheme was not foreseen,
>
> - [W]here a provision is so technical and detailed that no broad or more general purpose can be detected,
>
> - [W]here there is already an applicable, specific anti-avoidance provision" (para 213).

34. She said that in *O'Flynn Construction*, both the majority and minority rejected the argument of the taxpayers that a very specific anti-avoidance provision, s. 54 of the Finance Act, 1974, prevented the operation of s. 86 of the 1989 Act. The minority held, for example, that it was "confined and specific and does not cover a scheme, the nature of which is under review in this case" (para 214). She said however, that the implication of both judgments was that *where there is a specific anti-avoidance provision in place which governs the transaction under consideration*, a general anti-avoidance provision such as s. 811 does not apply as this would exceed the proper constitutional role of the courts.

35. The trial judge held that the limitations identified in *O'Flynn Construction* were applicable in this instance. There were specific anti-avoidance provisions, including s. 549, applicable in this instance. There was a gap or anomaly flowing from it which the legislature neglected to address. Allied to that she held that the plain meaning of s. 811(3)(a)(ii) required her to look at the purpose for which the relieving provision, s. 31, was introduced. She rejected the contention of Revenue that s. 31 should be interpreted in the light of s. 549 TCA. In those circumstances, the taxpayer could legitimately rely on s. 811(3)(a)(ii) for the purpose of demonstrating that the Transaction was not a "*tax avoidance transaction*."

36. The trial judge held that the Oireachtas did not foresee or, more correctly, failed to address the scheme drawn up on behalf of the taxpayer. It had specifically legislated for tax avoidance schemes drawn up by connected persons for the purposes of avoiding capital gains liability and, even more specifically, addressed its mind to the creation of artificial losses by transactions between connected persons. The taxpayer had avoided the anti-tax avoidance provisions and in fact took advantage of them for his own purposes to create the very artificial loss which they are designed to avoid.

37. The trial judge answered Questions (d) and (g) by finding that the Commissioner erred in law in determining that the Transaction was a tax avoidance transaction as statutorily defined and in holding that there was a misuse of s. 31 TCA. Answering Question (c) she found that the Commissioner did not err in his interpretation of s. 549 TCA but erred in his application of it. With respect to Question (e) on the burden of proof, she held that the Commissioner erred in finding that the appellant was required to discharge a "positive burden" on him as to the interpretation and application of s. 811(3)(a)(ii) as the questions in issue in this particular appeal were questions of law. She said that she did not need to answer Question (f).

38. With respect to the validity of the Notice of Opinion, this argument was based upon an error in the description of the Transaction in the Notice of Opinion at the point underlined below:

> "I … have formed the opinion that the following transaction, that is to say,

- investment of €30,000 on 25 August 2004, by way of purchase of 30,000 nonpunitive non-voting preference shares of 1 euro each in Parnell
- the purchase by Parnell on 7 October 2004 of [the Bond] with a nominal value of Euro 2,939,466 for Euro 2,977,446.27
- the grant of options, on 7 October 2004 by [Parnell] and [Securitisation], a connected company, under the following terms:
  - in consideration of [Securitisation] paying an option premium of Euro 2,677, 000, [Securitisation] was granted the call option to purchase the bond from [Parnell] at an option price,
  - <u>in consideration of the grant by [Parnell] to [Securitisation] of the call option, [Securitisation] granted to [Parnell] a put option, to sell the bond at the option price</u>
- your agreement on 7 October 2004 to purchase for a consideration of Euro 570,529, from [Parnell], the [Bond] with a nominal value of Euro 2,939,466 subject to the options outlined above
- the arrangement whereby this purchase was partially funded by a loan of Euro 280,000 from [Parnell]
- the disposal by you, on 22 October 2004, of the bond to [Securitisation] for Euro 319,938 (the option price) is a tax avoidance transaction (sic) within the meaning of Section 811 Taxes Consolidation Act 1997." (<u>Emphasis</u> added).

39. The underlined section is in error because the put option was granted by Securitisation to the taxpayer directly and not to Parnell. This error was repeated in all four notices of appeal governed by the judgment.

40. The taxpayer contended that this inaccurate description meant that the Notice of Opinion was fatally flawed and of no effect. Relying on *McNamee v Revenue Commissioner* [2016] IESC 33, the taxpayer said that there had been a failure to consider the transaction in detail in the exercise of the nominated officer's functions under s. 811(1) TCA. Revenue submitted that the taxpayer had been notified in an earlier letter that Revenue might consider the Transaction as a tax avoidance one and that letter contained an accurate description of the transaction. Thus, the taxpayer could be in no doubt as to what had occurred. Revenue also argued that the put option was a minor component of the Transaction which did not require to be identified in the Notice.

41. The trial judge did find that the creation of the put option was a material element. She held however that the Appeal Commissioner had found in favour of Revenue and was satisfied that the nominated officer correctly understood the essential fundamental of the Transaction, and that, in any event, the issue was academic as he (the Appeal Commissioner) had formed his own view that the Transaction constituted a "tax avoidance transaction" from which the taxpayer was able to procure the tax advantage. This Transaction was described correctly and was therefore "a slightly amended version of the description of the transaction in the Notice of Opinion" (at para 240).

42. She answered the question of whether the Appeal Commissioner was required to formally amend the Notice so as to correct the misdescription and she referred to the provisions of s. 811(9) which says that the Appeal Commissioner may "consider that, subject to such amendment or addition thereto as the Appeal Commissioners or the majority of them deem necessary and as they shall specify or describe, the transaction, or any part of it, specified or described in the Notice of Opinion, is a tax avoidance transaction, that the transaction or that part of it be so amended or added to and that, subject to the amendment or addition, the opinion or the opinion in so far as it relates to that part is to stand…" (para 242).

43. The trial judge held that the key issue was that the Determination itself sets out an accurate and therefore slightly amended description of the Transaction which the Commissioner views as a "tax avoidance transaction". That was sufficient for the court to deal with the matter and in view of her conclusions on that issue, it was not necessary to consider whether the Notice ought to be formally amended and whether, as submitted by Revenue, the Court should now amend it. She left over for a suitable case any determination of the issues relating to the power of the Appeal Commissioners to amend and whether that requires to be done formally by reference to the Notice of Opinion as opposed to in the body of the determination.

The Time Issue

44. The taxpayer's contention that the Revenue Commissioner's Notice of Opinion was out of time was unsuccessful before both the Appeal Commissioner and the High Court. The Revenue, naturally enough, excluded the trial judge's findings on the time issue, i.e., Question (b), from the scope of its appeal. However, the taxpayer included a cross appeal on this issue in his Respondent's Notice. Specifically, he contended that the High Court had erred in finding that the taxpayer's return for 2004 was subject to material non-disclosure either because the information to be supplied in the boxes he had not checked in the online return was not material or because it was not necessary for the making of an assessment as a return had been made and the assessment based on that return had not been amended by Revenue. He also contended that the trial judge had erred in holding that s. 811(5A) was applicable in the circumstances so as to deprive the taxpayer of the benefit of s. 955(2) and failed to have regard to the Supreme Court decision in *Revenue Commissioners v Droog*.

45. The High Court approached the time issue in a chronologically logical sequence. The trial judge looked firstly at whether s. 955(2) applied *in principle* and found that it did not as regard the 2004 return but that it did apply as regards the 2005 return. In making this finding she looked in some detail at the Supreme Court decision in *Droog* and accepted its conclusion that, notwithstanding the tax-avoidance provisions of s. 811, the time limit in s. 955(2) applied to the making of an assessment or an amended assessment on foot of a notice of opinion and to the taxpayer's potential liability to pay tax on foot of such assessment or amended assessment. This conclusion was of course subject to the precondition that the taxpayer had made full and true disclosure (which she found he had not in relation to the 2004 return) and to the potential applicability of s. 811(5A). She then went on to consider the applicability of s. 811(5A) and whether it operated so as to disapply s. 955(2) insofar as the taxpayer could rely on it as regards the 2005 return.

46. It is perhaps useful to bear in mind that although the trial judge accepted that the Appeal Commissioner had been fundamentally correct as regards the applicability of s. 811(5A), in her analysis of the issue, she distinguished between matters flowing from the 2004 return and the 2005 return even though they were both the subject of a single Notice of Opinion. On the basis of this analysis, no time limit applied to the assessment of the taxpayer's liability to CGT in respect of 2004 as he had not made a full and true disclosure and therefore the question of whether s. 811(5A) disapplied the time limit in s. 955(2) was moot as regards 2004. It was of course of relevance to 2005 in respect of which, based on the trial judge's analysis, full and true disclosure had been made and which therefore did benefit from the time limit. Because she held that s. 811(5A) did apply, the trial judge did not have to consider how a bifurcated finding in relation to two different years of assessment might operate as regards a single Notice of Opinion and the assessment or assessments that might flow therefrom.

47. In looking at this issue for the purposes of the appeal it seems that if the trial judge was incorrect in holding that the taxpayer's return for 2005 made the requisite full and true disclosure then it may not be necessary to consider the application of s. 811(5A) at all. This is because the s. 599(2) time limit only applies if a fully compliant return has been made (to paraphrase Clarke J in *Droog*) and consequently there is no need to rely on s. 811(5A) to disapply a time limit which does not actually apply. Conversely if s. 811(5A) applies so as to disapply the time limit in s. 955(2) as regards the making of an assessment on foot of a notice of opinion or the consequent liability for tax due, it is strictly speaking unnecessary to determine whether the returns for either 2004 or 2005 (or both) were fully compliant as the time limit would not apply either way.

48. In light of this, it seems appropriate to first consider the narrower question of whether the returns made by the taxpayer were fully compliant. The taxpayer contends that the trial judge was incorrect in treating the 2004 return as not being fully compliant merely because two boxes on the standard form had not been checked. On the other hand, Revenue contends that she should also have treated the 2005 return as not being fully compliant in part because the loss carried forward to the 2005 return was founded on the 2004 return in respect of which incomplete information had been provided as regards that very loss. In addition, Revenue relied on the Appeal Commissioner's finding as a material fact that the returns for both years "failed to record that part of the arrangement associated with the Transactions were between connected parties and that therefore the [Revenue] had no means of appreciating the particular significance of the transaction specifically in light of the [taxpayer's] reliance on market value rules between connected parties to generate the capital loss claimed" (para 62).

49. Looking firstly at the 2004 return, in the form completed by (or on behalf of) the taxpayer boxes enquiring as to whether a disclosed disposal of assets concerned an asset which had been acquired from a connected person (which the Bond had been) and whether market value had been substituted for the cost of acquisition (which again it had been) remained unchecked. Based on this NIL return, no assessment was raised by Revenue. Although counsel sought to characterise this as simply a mistake, it is very difficult to see how such characterisation is warranted. We agree with the trial judge that it is telling that a number of other taxpayers involved in identical schemes and whose cases await the outcome of this one, all allegedly made the exact same 'mistake' in completing their returns. It is a clear failure to answer a direct question, the answer to which would have put Revenue on notice of the nature of the transaction which gave rise to the losses claimed. The materiality and importance of the information is evident from the fact that questions pertaining to it were asked in a standard-form return. This of course should not be taken as implying that information which is not expressly requested in the return can never be material.

50. Armed with this information Revenue might well have enquired further or raised an assessment much earlier than eventually occurred. It seems to us that this type of situation is precisely why the 4 year time limit provided under s. 955(2) is confined to circumstances where a full and true disclosure of all material facts necessary for the making of an assessment has been made by the taxpayer. Therefore, we would uphold the findings of both the Appeal Commissioner and the High Court as regards the inadequacy of the 2004 return.

51. The trial judge's findings as regards the 2005 return are premised on the fact that the taxpayer did not declare a disposal for the relevant period; rather he carried forward the loss which had been declared for the 2004 period, but which had exceeded the gains available to him in 2004 for the purposes of set-off. The 2005 return was made by way of completion online of a digital form. That form did not make any express enquiry as to the nature or source of losses carried forward from preceding years. Consequently, the trial judge held that there was no material non-disclosure on the face of the form itself. Looking more generally as to whether the taxpayer was obliged to disclose that the disposed of asset had been acquired from a connected person even if the form did not specifically request that information, she held that the applicability of the time limit in s. 955(2) was linked to full and true disclosure in a return for a chargeable period and did not contemplate assessments for a subsequent chargeable period being affected by non-disclosure in a return made for an earlier chargeable period. It seems to us that this analysis is not correct. It is premised in part on the assumption that everything that is potentially material can be provided in response to direct questions on a standard form and that anything that is not expressly raised in that form cannot be considered material. Whilst it can reasonably be inferred that every question that is on the form is potentially material, the converse is not the case. It is very difficult to understand how information relating to the source of a disposed asset can be accepted as material in the year of its disposal but be treated as not being material thereafter when the losses generated through the disposal of that asset continue to have an impact on the taxpayer's liability for CGT. If the source of the asset, the disposal of which gave rise to the loss being carried forward, was material in 2004, it remained material in 2005 as the losses continued to be relied on by the taxpayer. The fact that information relating to its source could not be readily supplied by means of checking boxes on the digital form did not preclude the taxpayer from providing that information to Revenue through other means.

52. Insofar as the trial judge held that s. 955(2) assumes that matters in a tax return will only relate to tax payable in the chargeable period to which the return relates and does not contemplate that assessments for a subsequent chargeable period will be affected by non-disclosure in an earlier period, this seems to us to be incorrect – or at the very least, her assumption that the disclosure of information relating to the source of the disposed asset did not relate to the tax payable in 2005 is incorrect. Section 955(2) requires that a full and true disclosure be made of all material facts necessary for the making of an assessment for the chargeable period to which the return relates. A key element of the return made by the taxpayer for 2005 was the carrying forward of part of the loss initially claimed in 2004. The deduction of those losses from the gains generated by him in 2005 was crucial to the assessment of his tax liability for the 2005 chargeable period. Therefore, full and true disclosure was required of the source of those losses, albeit that they were incurred in 2004, as this was a material fact necessary for the making of an assessment for 2005.

53. The suggestion made by the taxpayer that issues concerning the source of an asset cannot remain on hold indefinitely whilst the loss is carried forward and used by the taxpayer is undermined by the facts of this case in which the taxpayer failed to make a full and true disclosure of the source of that asset in his return for the year of its disposal. Whatever argument might be made to the effect that once full disclosure has been made regarding an asset in the return for one year it need not be repeated in subsequent years, that is simply not the situation in this case where complete information as to the source of the asset was never provided. We leave open the question as to whether such disclosure would have been required for 2005 if a full and true disclosure had been made in 2004.

54. A further argument made by the taxpayer concerning whether the information could be described as "necessary for the making of an assessment" when an assessment was in fact made in 2005 was, in our view, rightly rejected by the trial judge. It would, as she states, lead to an absurd interpretation of s. 955(2) if, when an assessment has issued on the basis of return infected by material non-disclosure, Revenue is then precluded from arguing that the non-disclosure is material.

55. In light of the above analysis, we find that the High Court was correct to hold that the taxpayer had not made full and true disclosure in his 2004 return but incorrect to hold that he had made full and true disclosure of all material facts in his 2005 return. On the basis that a full and true disclosure of all material facts necessary for the making of an assessment had not been made in his return for either 2004 or 2005, the 4-year time limit under s. 955(2) does not apply to any of the matters covered in the Notice of Opinion. Therefore, it remains open to Revenue to issue an assessment in respect of CGT or to amend the assessment issued for 2005 should the Revenue succeed in its appeal on the substantive issue.

56. Notwithstanding that the conclusion reached on the full and true disclosure issue disposes of the time limit issue in full, we will briefly address the application of s. 811(5A) as that is the basis on which the Appeal Commissioner proceeded and was relevant in light of the trial judge's findings regarding the 2005 return.

57. The arguments made by the taxpayer as the appellant on this issue were twofold. Firstly, he relied on the decision of the Supreme Court in *Droog* to draw a distinction between the issuing and becoming final and conclusive of a Notice of Opinion under s. 811 and the making of an assessment and liability to tax on foot of such assessment under s. 955(2). It is indisputable in light of *Droog* that, had the taxpayer made fully compliant returns, the procedures under s. 811 leading to the potential for liability to tax on foot of an assessment or amended assessment would be subject to the time limit in s. 955(2) unless that time limit were disapplied by s. 811(5A). This was accepted by the trial judge, but nonetheless the taxpayer has raised a specific ground of appeal contending that she failed to have regard to *Droog* "and its significance to the proper interpretation of s.811(5A)". The argument is based on the contention that as *Droog* held that it was legally impermissible to raise a Notice of Opinion whose only end could be the requirement to pay additional tax in circumstances where such additional payment was prevented by the time limit in s. 955(2), the Notice of Opinion was void *ab initio* in this case and could not be resurrected by a subsequently enacted provision such as s. 811(5A).

58. Secondly, and perhaps more fundamentally, the taxpayer characterised s. 811(5A) as having an impermissible retrospective effect which impaired his constitutionally protected rights such that it should be given only prospective effect. Notably s. 130 of the Finance Act, 2012 came into effect about eight years after the date of the Transaction, some three years after the date of the Notice of Opinion and during the period the taxpayer's initial appeal was pending before the Appeal Commissioners. The High Court accepted that the expiration of a time limit which conferred immunity on a taxpayer from recovery of tax was capable of constituting a vested right such that s. 130 of the Finance Act, 2012 constituted retrospective legislation. Without disagreeing with this characterisation in principle, it is of course relevant that we have held that the time limit in s. 955(2) did not apply to the taxpayer in this instance because of his failure to make full and true disclosure of all material facts in his 2004 and 2005 tax returns. Therefore, on the facts of this case there is no vested right in issue since the time limit did not apply.

59. Revenue responded by pointing out that *Droog* concerned the application of the time limit in s. 955(2) to a compliant return, which was not the position here. The taxpayer seemed to believe that an investigation under s. 811 as to whether a transaction constitutes a tax avoidance transaction necessarily assumes that the return is accurate, or to use the language of Clarke J in *Droog* "fully compliant", and consequently that *Droog* applied generally to all cases coming within s. 811. There is no basis in s. 811 for making that assumption and indeed the judgment in *Droog* is careful to emphasise that the court was dealing with a fully compliant taxpayer. Revenue's concerns as to whether a transaction constitutes a tax avoidance transaction may arise in conjunction with or entirely independently of concerns about the completeness and truthfulness of a return to which the transaction is relevant. Indeed, investigations into the nature of the transaction might lead Revenue to discover that a return which it had taken at face value is not in fact fully compliant.

60. Revenue also sought to distinguish *Droog* on the basis that the Notice of Opinion in *Droog* had been issued many years outside the 4 year period whereas here the Notice of Opinion was formed within the 4 year period (albeit so close to the end of that period as regards

2004 that an assessment on foot of it could never have issued within time). In our view it is significant that s. 811(5A) expressly disapplies the time limit that would otherwise be applicable to the making or amendment of an assessment in respect of a tax avoidance transaction and the recovery of tax on foot of such assessment. The reason that the Supreme Court in *Droog* held that the raising of a Notice of Opinion outside the 4 year time period was impermissible was because the only object of such opinion would be to require the payment of additional tax in circumstances where the collection of such tax was prevented by the time limits in s. 955(2). As that time limit is now expressly disapplied by s. 811(5A) it would seem to follow that the rationale for holding that a Notice of Opinion which could only become final and conclusive outside the relevant time limit was impermissible is no longer operative. Consequently, arguments as to when the Notice of Opinion might be said to become final and conclusive are of little relevance if, properly construed, s. 811(5A) allows the raising of an assessment and the payment of tax unconstrained by s. 955(2).

61. The core issue here is whether s. 130(2) of the Finance Act, 2012 Act gives s. 811(5A) impermissible retrospective effect. As the trial judge correctly notes, although there may have been an inference that the section was impermissible on a constitutional basis, that issue could not be determined by the High Court on an appeal by way of case stated from a decision of the Appeal Commissioner. Separate proceedings to which the Attorney General would be a necessary party would have to be issued if the taxpayer wished to make that challenge. Given our findings on the applicability of s. 955(2) it may be open to question whether the taxpayer has standing to do so. In any event, the argument made was premised on the Notice of Appeal having become time barred on some date prior to 28 February 2012 while the taxpayer's appeal was still pending.

62. The starting point for any analysis of this issue is the presumption at common law against a statute having retrospective effect, i.e., the taking away or impairing any vested right or creating new duties or disabilities in respect of transactions which have already concluded (see O'Higgins C.J in *Hamilton v Hamilton* [1982] IR 466 citing Craies on Statute Law (7th ed., p 387). However, this presumption does not operate as a prohibition on retrospective legislation and where it is clear from the terms of the legislation itself that the Oireachtas intended it to have retrospective effect the presumption may be displaced.

63. The manner in which the presumption operates is shown in *Minister for Social Community and Family Affairs v Scanlon* [2001] 1 IR 64 ("*Scanlon*"). That case concerned the repayment of disability benefits by a social welfare recipient who was held not to have been entitled to receive them over a nine-year period. The legislation as originally passed in 1981 only permitted recovery on foot of a revised decision where the recipient had made a false or misleading statement or wilfully concealed a material fact. This was amended in 1991 by a provision which, in cases where a decision was revised in light of new evidence or new facts, allowed the deciding or appeals officer to determine the date from which the revised decision would take effect and, by extension, the date from which the liability to repay would operate. The relevant provision was further amended in 1992 with an addition which clarified that the new evidence or new facts could relate to periods both prior to and subsequent to the passing of the 1992 Act. The entire social welfare code was re-consolidated in 1993 and the 1993 Act created the procedural mechanism for allowing recovery of amounts which should not have been paid "to the extent to which it would not have been payable if the decision on the appeal or revision had been given in the first instance". The decision in issue was revised on the basis of new evidence but not on the basis that the recipient had made false or misleading statements. The bulk of the period in respect of which the Minister sought recovery predated the 1991 and 1993 amendments.

64. Laffoy J. in the High Court dismissed the Minister's claim insofar as it related to the period before 1991. She held that insofar as the 1991 Act created an obligation to refund benefit it should be read as having only prospective effect and did not create an obligation to refund benefit paid at a time when no such requirement existed. Even though such amounts were in principle recoverable under the 1991 Act, they could not in fact be recovered until the procedural mechanism for doing so was introduced in 1993 and this change should also be read as having prospective effect only. The Supreme Court disagreed and allowed the Minister's appeal. Fennelly J. rejected the notion that there was a constitutional right to retain monies which had been wrongly paid in the first place. The entitlement arose as a result of the statutory prohibition on recovery unless there was fraud or wilful concealment under the 1981 Act and therefore amendment of that provision did not give rise to the infringement of a vested and constitutionally protected right. Equally the absence of a procedural mechanism to collect refunds of payments wrongly made until 1993 did not affect the retrospective nature of the 1992 amendments. He confirmed that the rule against retrospective effect was a rule of construction, that it was not inflexible and could be displaced by the clear words of the statute.

65. The taxpayer sought to distinguish *Scanlon* on the basis that unlike a social welfare payment which Fennelly J. had characterised as a "privilege", a taxpayer had the right to arrange his affairs on the basis of the tax legislation as it stood at the material time. That may be correct so far as it goes but does not fully reflect the position here. If the Revenue are correct on the substantive issue (which is addressed further below) then the taxpayer was not simply arranging his affairs in a manner which was permitted under the legislation as it stood at the time. He was engaging in a tax avoidance transaction, had wrongly claimed tax relief on foot of that transaction and was hoping to rely on the passage of time to put the transaction beyond the reach of Revenue regardless of its true character. The taxpayer also characterised s. 811(5A) as ambiguous although it was not entirely clear where he claimed the ambiguity lay save for the assertion that the section should not be applied in a retrospective manner.

66. We agree with Revenue that the clear legislative intent behind s. 811(5A) of the TCA and s. 130(2) of the Finance Act 2012 Act was to enable assessments to be made or amended at any time after the enactment of that section, in order to give effect to a s. 811 opinion which had become final and conclusive, regardless of the chargeable period to which the assessment related and regardless of whether that chargeable period pre-dated the enactment of s. 811(5A). Save that the assessment or amended assessment must itself be one made after 28 February 2012, there is no qualification as to the chargeable period for which such assessment may be made and, in particular, no basis for restricting it to chargeable periods post-2012. Whilst there might be some ambiguity as regards whether s. 811(5A) would be operative so as to disapply the time limit if Revenue were seeking to recover tax on foot of the Notice of Opinion directly rather than by way of raising or amending an assessment, we agree with the trial judge that this is simply not in issue in this case.

67. In circumstances where the meaning of s. 811(5A) and s. 130(2) are clear and are clearly intended to have retrospective as well as prospective effect, they are not precluded from having that effect by reason of the presumption against retrospective legislation. Equally, absent a constitutional challenge, the presumption of constitutionality cannot avail the taxpayer and operate to disapply what is a clearly unambiguous provision. Consequently, we agree with the trial judge that the Appeal Commissioner was correct in holding that s. 811(5A) applied so as to disapply the time limit contained in s. 955(2) from the Notice of Opinion in this case. However, for reasons explained at the outset of this analysis, we would prefer to decide the issue on the basis that the time limit in s. 955(2) never applied in the first place (and therefore did not need to be disapplied) since the taxpayer had not made a full and true disclosure of all facts material to the assessment of CGT in either 2004 or 2005. As the Notices of Opinion are not statute barred we will now proceed to consider the substantive issue.

The Substantive Issue

68. It was never truly contested by the taxpayer that the Transaction was anything other than carefully arranged to take advantage of the rules concerning the valuation of assets for CGT purposes in respect of transactions between connected persons. In the context of the clear findings of the Appeal Commissioner as to the meaning and purpose of the transaction as coming within s. 811(2), the issue is whether the High Court judge was correct in holding, pursuant to s. 811(3)(a)(ii) TCA, that the transaction was nonetheless not to be regarded as a tax avoidance transaction because it was not the result of *an abuse or misuse of the relieving provision* of which it engaged. At issue therefore is whether this was a transaction undertaken or arranged for the purpose of obtaining the benefit of an "allowance or abatement" provided by the Taxes Acts, namely the deduction of capital gains tax losses under s. 31 TCA and whether it was a misuse or abuse of that provision having regard to the purpose for which it was provided.

69. The difference between the parties on this issue is stark. Revenue contends that s. 31 must be read in conjunction with s. 549 and that, when read together, it is evident that the Transaction is an abuse of these provisions, at very least indirectly so. The taxpayer on the other hand contends that the trial judge was correct to characterise s. 549 as an anti-avoidance provision and not as a provision under which any relief, allowance or abatement is provided. Thus, s. 549 simply does not come within the scope of s. 811(3)(a)(ii) and the High Court was correct to focus only on whether there had been an abuse or misuse of s. 31(b) having regard to the purpose for which it was enacted, i.e., the deduction of allowable losses from chargeable gains.

70. The starting point is a consideration of the terms of s. 811(3)(a)(ii) TCA. Its predecessor, s. 86 of the Finance Act, 1989, was considered by the Supreme Court in *O'Flynn Construction*. Both the taxpayer and Revenue rely extensively on that judgment in support of their respective positions. It is Revenue's position that the trial judge erred in not finding that there was a misuse or abuse of the relieving provisions of s. 31 having regard to the purposes for which that provision was intended. Section 31 provides that capital gains tax shall be charged on the total amount of chargeable gains after deducting any allowable losses. In interpreting "allowable losses" Revenue submit the trial judge ought to have considered the sections which "feed into" the provision of those allowable losses. In particular, the taxpayer should have only been allowed his actual loss rather than the artificial loss generated through the misuse or abuse of s. 549. The taxpayer submits that what is at issue is an interpretation of the purpose for which s. 31 was enacted. In the taxpayer's view, the purpose of s. 31 is a more neutral one; it is to provide for all losses allowable under the tax code to be deducted from the chargeable gains.

71. Both Revenue and the taxpayer agree that s. 549 is a tax avoidance provision in itself. The taxpayer however places significant reliance upon para 74 of the judgment of O'Donnell J. in *O'Flynn Construction* to the effect that in some cases it may be that there is a gap that the Oireachtas neglected or an intended scheme that was not foreseen. In those cases, the courts are not empowered to disallow a relief or to apply any taxing provision, since to do so would be to exceed the proper function of the courts in the constitutional scheme. In other cases, the provision may be so technical and detailed so that no more broad or general purpose can be detected or may have its own explicit anti avoidance provision. In such a case, there may be no room for the application of s. 86 (now s. 811) since it may not be possible to detect a purpose for the provision other than the basic one that the Oireachtas intended, that being that any transaction which met the requirements of the section should receive the relief. As s. 549 was a tax avoidance provision and s. 31 is a relieving provision, the taxpayer submits that the transaction was not a misuse or abuse of the section.

72. Moreover, the taxpayer says that, in the case of *McGrath v McDermott* the High Court and Supreme Court on appeal refused to adopt the type of interpretive approach to Tax Acts which could have allowed the judiciary to have regard to the form and substance of tax transactions in assessing whether they amounted to "fiscal nullities". That interpretative approach was adopted in the United Kingdom in cases such as *WT Ramsay Ltd v Commissioners of Inland Revenue* [1982] AC 300 and *Furniss v Dawson* [1984] 2 WLR 226. Instead, in *McGrath v McDermott*, the Supreme Court stated that: -

> "The function of the courts in interpreting a statute of the Oireachtas is however, strictly confined to ascertaining the true meaning of each statutory provision, resorting in cases of doubt or ambiguity to a consideration of the purpose and intention of the legislature to be inferred from other provisions of the statute involved, or even of other statutes expressed to be construed with it." (p. 276)

Interpreting Taxation Legislation

73. Section 811(3)(a)(ii) specifically directs the Revenue Commissioners, when forming their opinion, not to regard the transaction as being a tax avoidance transaction, if, *inter alia*, they are satisfied that the transaction was undertaken or arranged for the *purpose* of obtaining the benefit of "any relief, allowance or other abatement" under the Acts and the transaction would not result directly or indirectly in a misuse or abuse of the provisions having regard to the purpose for which it was provided. It is common case between the parties that s. 5 of the Interpretation Act, 2005, which allows for a purposive interpretation of certain statutes, does not apply to taxation statutes (any suggestion to the contrary in *O'Flynn Construction* being clarified by O'Donnell J. in *Bookfinders*). In the High Court, the taxpayer contended for a very narrow view as to how much regard the Appeal Commissioners and the Court could have to the "purpose" for which s. 811 was enacted (see para, 141 of the High Court judgment). In submissions to this Court, he now accepts the great clarity which the trial judge brought to its interpretation. The taxpayer submits however that the approach that Revenue takes to the interpretation of s. 31 is akin to the type of broad and expansive purposive approach which according to the taxpayer was rejected in *Bookfinders* (see para 42 of the judgment of O'Donnell J. referring to a purposive or teleological approach as being one "in which words and text are of lesser importance than the apparent objective of the legislation").

74. Revenue's position in their submissions to this Court is more nuanced than the taxpayer suggests. They note that the High Court judge agreed with Revenue's position that the judgment of O'Donnell J. in *Bookfinders* does not alter the fact that s. 811(3)(a)(ii) mandates a purposive approach in terms of a consideration of the purpose of the relieving provisions. Moreover, they submit that, although O'Donnell J. accepted that s. 5 of the 2015 Act did not apply to the interpretation of tax legislation, this did not mean that "the interpretation of tax statutes cannot have regard to the *purpose* of the provision in particular, or that the manner in which the court must approach a taxation statute is to look solely at the words…" (para 47 of *Bookfinders; emphasis* in original).

75. By the time this appeal came on for hearing, the Supreme Court decision in *Heather Hill Management Company CLG v An Bord Pleanála* [2022] IESC 43 ("*Heather Hill*") had been delivered. The Supreme Court (per Murray J.) highlighted how the identification of the purpose of legislation plays a role in the interpretation of <u>all</u> statutes. Any doubt, if doubt there was, as to the importance of the consideration of statutory purpose where a question of interpretation arises, was settled in the course of his judgment. At para 109 Murray J. stated:

> "What, in fact, the modern authorities now make clear is that with or without the intervention of that provision, in no case can the process of ascertaining the 'legislative intent' or the 'will of the Oireachtas' be reduced to the reflexive rehearsal of the literal meaning of words, or the determination of the plain meaning of an individual section viewed in isolation from either the text of a statute as a whole or the context in which, and purpose for which, it was enacted."

76. Murray J. goes on to point out that legislative intent is a misnomer, as the subjective intent of parliamentarians is not relevant to construction. He pointed out that what a court is concerned with when interpreting a statute is to ascertain the legal effect attributed to the legislation by a set of rules and presumptions the common law (and laterally statute) has developed for that purpose. Murray J. emphasised the importance of primacy being given to the words of the statute as the best guide to the result the Oireachtas wanted to bring about (see para 115). Murray J. also pointed out the Oireachtas usually enacts a composite statute and not a collection of disassociated provisions and it does so in a pre-existing context and for a purpose.

77. Murray J. noted that although McKechnie J. was the dissenting judge in *The People (DPP) v Brown* ("*Brown*"), Supreme Court, 21 December 2018, his basic proposition has been restated since in a variety of Supreme Court decisions including *Dunnes Stores v The Revenue Commissioners* [2020] 3 IR 480 ("*Dunnes Stores*"), *Bookfinders* and *Minister for Justice v Vilkas* [2020] 1 IR 676. In *Minister for Justice v Vilkas*, McKechnie J. stated (with which Clarke C.J., O'Donnell, MacMenamin and O'Malley JJ. agreed) "[c]onsideration of the context forms a part of the literal approach" (para 84).

78. Of particular note, Murray J. explained what was envisaged by McKechnie J. when he posited two stages to an inquiry; words in context and (if there remained ambiguity), purpose. Murray J. said:

> "it is now clear that these approaches are properly viewed as part of a single continuum rather than as separated fields to be filled in, the second only arising for consideration if the first is inconclusive. To that extent I think that the Attorney General is correct when he submits that the effect of these decisions – and in particular of *Dunnes Stores* and *Bookfinders* – is that the literal and purposive approaches to statutory interpretation are not hermetically sealed. Indeed McKechnie J. later suggested as much in Brown (at

para. 95) (and see more recently *O'Sullivan v. Ireland* [2019] IESC 33, [2020] 1 IR 413, 443 per Charlton J.) and *Dunnes Stores* ('subject matter ... and the object in view … will inform the meaning of the words, phrases or provisions in question')." (para 108).

79. Murray J. was very alive to the dangers of pushing the analysis of the context of the provision too far from the moorings of the language of the legislative section; the line between the permissible admission of "context" and identification of "purpose" may become blurred if too broad an approach to the interpretation of legislation is taken. He outlined four basic proposition that must be borne in mind. The first is a restatement of *Crilly v Farrington* [2001] IESC 60 (the subjective intent of parliamentarians is not relevant to construction). Second, in interpreting legislation the court is concerned to ascertain legal effect by a set of rules and presumptions that the common law and statute have developed for that purpose. Third, and to that end, the words of a statute are given primacy within this framework as they are the best guide to the result the Oireachtas wanted to bring about.

80. His fourth basic proposition has considerable relevance to this appeal. He said that "the Oireachtas usually enacts a composite statute, not a collection of disassociated provisions, and it does so in a pre-existing context and for a purpose. The best guide to that purpose, for this very reason, is the language of the statute read as a whole, but sometimes that necessarily falls to be understood and informed by reliable and identifiable background information of the kind described by McKechnie J. in *Brown*. However - and in resolving this appeal this is the key and critical point - the 'context' that is deployed to that end and 'purpose' so identified must be clear and specific and, where wielded to displace the apparently clear language of a provision, must be decisively probative of an alternative construction that is itself capable of being accommodated within the statutory language". (para 116)

81. Murray J. went on to discuss s. 5 of the 2005 Act and noted that it had not featured in many of the recent judgments, possibly because those were concerned with provisions that were arguably penal in nature and thus excluded from the scheme. In this appeal, we are concerned with a penal provision and s. 5 does not apply to its interpretation. Nonetheless, as Murray J. noted, the decisions in *Dunnes Stores*, *Bookfinders* and *Brown* suggest that even when construing penal provisions all the contextual material can be consulted in construing such statutes.

82. It is also important to note that the trial judge in the present case cited and relied upon the approach to the interpretation of taxation legislation that Murray J. in the Court of Appeal identified in *Used Car Importers Ireland Ltd. v Minister for Finance* [2020] IECA 298 when he said that the provision then at issue "falls to be construed in accordance with well established principle. The Court is concerned to ascertain the intention of the legislature having regard to the language used in the Act but bearing in mind the overall purpose and context of the statute." (para 162).

83. Thus, the High Court correctly held that in interpreting taxation statutes generally, context and purpose are relevant. Therefore, not only does s. 811 direct Revenue and the court to have regard to the purpose of the provisions at issue but even in a more general manner the context and purpose of the statute is relevant. Having accepted that to be the position, the taxpayer relies upon the limitations on interpretation that were identified in *O'Flynn Construction* and also relied upon the decision in *McGrath v McDermott* in support of his argument on the limitation of interpretation.

A brief history of the treatment of tax avoidant transactions in this jurisdiction

84. The decision in *McGrath v McDermott* presented the courts of this jurisdiction with the opportunity to consider the doctrine of "fiscal nullity" that had been developed in the courts of the United Kingdom. In short, that doctrine was to the effect that, if in a transaction that involved a series of steps there were steps that although legally valid had no commercial purpose, those devoid of commercial purpose could be ignored for fiscal purposes. What was under scrutiny in *McGrath v McDermott* was a series of transactions designed to create losses so that they could be offset against the taxpayer's gains on the disposal of assets which would otherwise be subject to capital gains tax.

85. The High Court, and Supreme Court on appeal, held that such a doctrine did not form any part of Irish law. Irish courts had previously approved the principles set out in *Inland Revenue Commissioners v Westminster (Duke)* [1936] AC 1 and they rejected the "emerging principle" of law expressed by the House of Lords in *Ramsay v Commissioners of Inland Revenue*. and in *Furniss v Dawson,* stating that the principle went far beyond how Irish courts had interpreted tax legislation. The High Court and Supreme Court held that, in the absence of general statutory provisions against tax avoidance (as had been enacted in Canada and Australia), there were no grounds for departing from the plain meaning of these sections.

86. Both Revenue and the taxpayer recognise the importance of the decision in *O'Flynn Construction* to the interpretation of s. 811 TCA. *O'Flynn Construction* concerned the export sales relief exemption under TCA. As the headnote of the reported decision records: "The first appellant, which was not an exporting company, entered into a complex transaction whereby its shareholders were enabled indirectly to access the export sales relieved resources of an unconnected exporting company. The transaction involved a number of steps whereby the export sales relieved reserves were effectively sold to the first appellant for cash consideration which then permitted, by way of statute, tax free dividends to be paid out of those reserves to the second and third appellants as shareholders of the first appellant. The respondent concluded that the transaction as a whole was a tax avoidance transaction…" (para 1).

87. O'Donnell J. (with whom Fennelly and Finnegan JJ. concurred) gave the judgment for the Supreme Court. McKechnie J. (with whom Macken J. agreed) gave a judgment dissenting in part. It is not necessary to set out in detail the background to the appeal or the extensive consideration given to the section in each of the judgments. It is, however, helpful to point out that the Appeal Commissioners had held that to conclude there had been a misuse of the export sales relief provisions would be to ignore the statement of the law laid down in *McGrath v McDermott*. They concluded that while it was necessary to look at the purpose for which s. 86 was enacted, s. 86 itself could not be used to abandon the clear principles of statutory construction laid out in the case of *McGrath v McDermott*.

88. O'Donnell J. held that those conclusions contained errors of law which were traceable to the approach of the Appeal Commissioners to statutory interpretation. The minute focus on the language contained in part of s. 86(3)(b) had, according to O'Donnell J., resulted in an unduly constrained application of the section. It was necessary to place the subsection at issue in the context of s. 86 more generally and, also, against the background of the law which it sought to change. He said it was common case that the purpose of the section was to address the consequences of *McGrath v McDermott* and to reverse it. Indeed, he went on to explain the reasons why it was central to the question of interpretation that s. 86 was enacted as an immediate response to the decision in *McGrath v McDermott* and its implicit invitation to enact a comprehensive anti-avoidance provision. It is against that background that s. 86 was clearly directed towards the reversal of *Inland Revenue Commissioners v Westminster (Duke)* in Ireland and more.

89. O'Donnell J. went on to say that under s. 86, the potential tax benefit to a taxpayer may be disallowed if the Revenue Commissioners reach a conclusion that the transaction is one designed to confer a tax advantage and constituted a tax avoidance transaction. The essential starting point to s. 86 was a determination that absent its provisions the taxation charge would not apply, or in the case of an exemption, that its benefit would be available to the taxpayer on a literal construction of the language of the relevant statute.

90. O'Donnell J. addressed the interpretation of s. 86(2) and (3) in paragraphs 66 – 69. It is to be noted when considering that passage, that the provisions of s. 86, while virtually identical to s. 811, are laid out in slightly different subsections. Section 86(3)(a)(ii) of the 1989 Act requires Revenue to address whether the transaction "was not undertaken or arranged primarily to give rise to a tax advantage". Section 86(3)(b) of the 1989 Act is the equivalent provision to s. 811(3)(a) (ii) TCA. O'Donnell J. stated:

> "66. Looked at in this light, sections 86(2) and 86(3) appear to be directed towards making the difficult distinction between a commercial transaction which has been legitimately structured in such a way as to mitigate the tax view on the one hand, and a purely tax driven transaction designed to give rise to a tax advantage on the other. This is apparent from the provisions of s.86(2)(ii) and its mirror image in s.86(3)(a)(ii). The fact that any given transaction gives rise to a tax advantage is not in itself enough to disallow that benefit. Such a transaction only becomes a tax avoidance transaction if it satisfies the requirements of s.86(2). That subsection directs the Revenue Commissioners to have regard to the results of the transaction, and its uses and means of achieving those results and any other means by which part of the results could have been achieved. In considering this issue the proviso to s.86(3) requires that the Revenue Commissioners have regard both to the form and substance of the transaction. The transaction will be a tax avoidance transaction if the Revenue Commissioners (having considered the matters set out above i.e. results, use, form and substance) form the opinion that the transaction gives rise to a tax advantage and that the transaction was not undertaken or arranged primarily for purposes other than to give rise to a tax advantage.

67. It may be of some significance that s.86(3)(a) goes on to state positively what shall not be regarded as a tax avoidance transaction. That will arise if the Revenue are satisfied that even though the transaction could have been structured in a way which had given rise to a greater amount of tax, the transaction was nevertheless "undertaken or arranged by a person with a view, directly or indirectly, to the realisation of profits in the course of business activities of a business carried on by the person", and "was not undertaken and arranged primarily to give rise to a tax advantage".

68. While this does not purport to be a definitive or detailed analysis of the provisions of s.86(2) and s.86(3)(a), it is clear that the distinction sought to be made in the section between permissible tax advantage and impermissible tax avoidance, is a distinction between legitimate tax mitigation of a genuine commercial transaction on the one hand, and a transaction undertaken or arranged primarily for the purposes of giving rise to a tax advantage. This is a distinction which is more easily described than applied, but for present purposes, it is neither necessary nor desirable to explore the well travelled and heavily contested borderline between these concepts. It is sufficient for the interpretation of the critical provisions of s.86(3)(b) to observe that that is the distinction sought to be made throughout s.86.

69. In my view the background to s.86, together with its internal structure, is important in considering the true meaning and application of s.86(3)(b). That subsection cannot be treated as a stand alone provision on reliefs and benefits. It is a component part of the overall provision. Section 86 as a whole requires a consideration of whether or not the Revenue Commissioners should form an opinion that a transaction is a tax avoidance transaction, and sets out those matters to which the Commissioners should have regard in forming that opinion. Section 86(2) seeks to identify those matters which are to be treated as tax avoidance transactions. The matter could perhaps have been left

at that, but s.86(3) seeks to identify positively matters which are not tax avoidance transactions. In considering paragraph (b) of subsection (3) the pattern set by s.86(2) is instructive. The starting point for the application of s.86(2) is that the transaction would not come within the taxing provision, were it not for the provisions of s.86(2) and the disallowance and re-characterisation permitted pursuant to that section, s.86(3)(b) is only capable of applying to transactions which are otherwise within the relief provision at least as literally construed. There must be use, before there can be said to be misuse or abuse. Here again, therefore, it is clear that the Westminster approach has been modified significantly. Prior to the enactment of s.86(3)(b) if a transaction came within the specific words granting relief then that was the end of the inquiry. However, it is now necessary to consider whether the transaction constitutes a misuse or abuse of that relief having regard to the purposes for which it was provided." (Emphasis added).

91. O'Donnell J. rejected the conclusions of the Appeal Commissioners that *McGrath v McDermott* prohibit the Appeals Commissioners from taking a purposive approach. He did so by pointing out that the *ratio decidendi* of that decision "was merely that it was not open to the court by a process of development of the common law to develop a doctrine of fiscal nullity…" (at para 71). He also opined that it could not be said that the decision in *McGrath v McDermott* laid out "clear principles of statutory interpretation.". This, we consider, is an important statement.

92. Revenue relies upon the following passage in *O'Flynn Construction* to demonstrate where the trial judge went wrong in this case:

"What I consider to be the unduly narrow approach taken to the provisions of s.86, and the changes effected by it, led inevitably to an erroneous application of the provision to the facts of this case. In the first instance the Commissioners offered a generalisation which might have been thought to have led to the disallowance of the relief in this case:-

> ‘To generalise, it may be that the use of the tax free nature of the dividends to avoid a specific tax charge that otherwise would have arisen could be said to be a misuse whether direct or indirect of the relief.’” (para 74).

93. The taxpayer on the other hand stresses the following dicta contained in para 77, which was relied upon by the trial judge:

> “The idea that any particular scheme can produce a result that the Oireachtas did not intend, is much more easily expressed than applied in practice. The legal intent of the Oireachtas is to be derived from the words used in their context, deploying all the aids to construction that are available, in an attempt to understand what the Oireachtas intended. But in very many cases, the Oireachtas will not have contemplated at all the elaborate schemes subsequently constructed, which will take as their starting point a faithful compliance with the words of the statute. In some cases it may be that there is a gap that the Oireachtas neglected, or an intended scheme that was not foreseen. In those cases, the courts are not empowered to disallow a relief or to apply any taxing provision, since to do so would be to exceed the proper function of the courts in the constitutional scheme. In other cases the provision may be so technical and detailed so that no more broad or general purpose can be detected, or may have its own explicit anti-avoidance provision. In such a case there may be no room for the application of s. 86 since it may not be possible to detect a purpose for the provision other than the basic one that the Oireachtas intended that any transaction which met requirements of the section should receive the relief. However, there are some cases of which this is one, where it may be possible to say with some confidence that, though there has been compliance with the literal words of the statute, the result is not the sort of relief that the Act intended should result. In such cases, s. 86 permits an evaluation of the particular transaction and a consideration as to whether it comes not just within the

words, but also within the intended scheme, or is rather a misuse or abuse of it. The fact that such an evaluation may be difficult and can create some uncertainty, is not a reason to avoid the task. Certainly in tax matters it is difficult to achieve and the desire to provide certainty to those who wish to avoid a taxation regime that applies to others similarly situated to them is something that ranks low in the objectives that statutory interpretation seeks to achieve. The tax payer could, after all, achieve a high level of certainty, but at the price of paying tax on dividends received."

94. The taxpayer in this appeal relies upon the reason given by O'Donnell J. for his lack of doubt that what was in issue in *O'Flynn Construction* was a tax avoidance transaction; namely because it was a misuse and/or abuse of the export sales relief scheme. O'Donnell J. said, *inter alia*, exports by themselves did not generate the tax relief, it was necessary to achieve profits before any tax could be relieved. Similarly, it was only if the company was in a position to lawfully declare a dividend that any shareholder could receive a tax free benefit. Furthermore, and significantly, the scheme itself made no provision for the sale or trade in export sales relief reserves. The form of the transaction was highly artificial and contrived. It was not the realisation of profits in the ordinary course of business. This, according to the taxpayer, is the ratio of the case.

95. Finally, O'Donnell J. concluded:

"…the most reliable guide to the interpretation of s. 86 is to interpret it with the assistance of the canons of construction regularly employed by the courts, and by placing the text carefully in its context within s. 86 generally, and against this the background of the decided cases and in particular the law that was sought to be changed by the section. When so viewed it is clear that s. 86 seeks to make a decisive change in the approach to taxation schemes. In doing so it requires the Revenue Commissioners to engage in an exercise, if not of discretion, then at least of evaluation and judgment.

This may be a difficult task in some cases and certainly is a distinct change of approach in tax law" (para 86).

Discussion

Burden of Proof

96. An issue raised in the appeal by Revenue is that of the "burden of proof". Revenue submitted that, as a matter of law, the burden of proving the transaction came within s. 811(3)(a)(ii) rested with the taxpayer (per McKechnie J. in *O'Flynn Construction*). They referred to the finding of the Appeal Commissioner that the taxpayer had failed to discharge the positive obligation to prove that the Transaction did not result in a misuse of the provision or an abuse of the provision having regard to the purposes for which it was provided.

97. Where the onus of proof lies can be highly relevant in those cases in which evidential matters are at stake. It is perhaps easier to use an example that might arise under a different subclause of s. 811(3) to demonstrate the importance of this issue. For example, if there was an issue as to whether a particular transaction "was undertaken or arranged by a person with a view, directly or indirectly, to the realisation of profits in the course of the business activities of a business carried on by the person" (pursuant to s. 811(3)(i)(I)), the placing of the burden of proof on the taxpayer would be of particular significance.

98. In the present case however, the issue is not one of ascertaining the facts; the facts themselves are as found in the case stated. The issue here is one of law; whether a transaction, which has been found to have no commercial or business purpose, is not, by virtue of s. 811(3)(ii) TCA, a tax avoidant transaction. It is difficult to see how any particular burden, other than one of seeking to persuade by way of argument that as a matter of law the transaction is not one that falls foul of s. 811 TCA, could arise in such a situation. Ultimately when an Appeal Commissioner is asked to apply the law to the agreed facts, the Appeal Commissioner's correct application of the law requires an objective assessment of what the law is and cannot be swayed by a consideration of who bears the burden. If the interpretation of the law is at issue, the Appeal Commissioner must apply any judicial precedent interpreting that provision and in the absence of precedent, apply the appropriate canons of construction, when seeking to achieve the correct interpretation. The High Court cannot be bound by an interpretation of law by an administrative body. It is the role of the courts to apply the law and it is therefore difficult to see how reference to this particular burden goes beyond the usual burden that a moving party would bear before a court when seeking to persuade a court of the correctness of their position at law.

99. In this appeal, Revenue's submission that the burden is on the taxpayer to show that there is no misuse of the provision has even less force. Revenue is the appellant. The High Court has found as a matter of law that this particular Transaction is *not* a tax avoidance transaction within the meaning of s. 811 TCA. The trial judge has so found because of her interpretation of s. 811(3)(a)(ii) and the relieving provisions of s. 31 and s. 549 TCA. Revenue bears the usual burden in this appeal; Revenue must demonstrate that there the trial judge was incorrect in law in finding as she did.

Fiscal Nullity

100. In the present appeal, it is Revenue's position that s. 86 of the 1989 Act reversed the decision in *McGrath v McDermott* and that that was the legislative intention at the time the section was enacted. There is a sharp disagreement between the parties as to the extent to which the purposive approach advocated by Revenue may assist in the interpretation of the CGT provisions of s. 31 TCA. In Revenue's contention, a purposive approach meant that only "real" or "monetary" losses could be deducted. Revenue criticises the trial judge's statement at para 202 that "[w]hile it is true to say that s. 86 of the 1989 Act and now s. 811 may justify a more purposive approach, the fact is that, notwithstanding *McGrath v. McDermott*, where similar arguments were made (albeit by reference to the precursors of s. 546(2) and s. 549), no such words were included in s. 31 when it was enacted some years later". In Revenue's submission, s. 811 is widely framed and what must be considered is whether the transaction was a proper or intended use of the relief (relying on O'Donnell J. in *O'Flynn Construction,* above).

101. On the other hand, a strong theme running through the taxpayer's submissions is that the fact the Oireachtas "took up the invitation" of the High and Supreme Court in *McGrath v McDermott* to change the law does not mean that the subsequent legislation incorporated the doctrine of "fiscal nullity". The taxpayer submits that in introducing s. 86 of the 1989 Act (and later s. 811), the Oireachtas enacted a very limited form of tax avoidance legislation which, he submits, was recognised even by the majority in *O'Flynn Construction*. The taxpayer points to the decision in *O'Flynn Construction,* which was decided by a three to two majority, and says that each of the judgments assessed the transaction at issue in the step-by-step manner called for by s. 811 and not by any general reference to looking at the substance of the scheme in the sense that was required by the doctrine of fiscal nullity.

102. The taxpayer submits that the judgment of McKechnie J. is valuable to consider because both that judgment and the judgment of the majority in *O'Flynn Construction* agreed on the approach to statutory interpretation while disagreeing on its application to the facts of the case. In particular, the taxpayer rejects an implicit argument of Revenue that as s. 89 was brought in to reverse *McGrath v McDermott*, the doctrine of fiscal nullity still applies. The taxpayer relies upon the following passage from McKechnie J., who, having set out what he considered the position as regards the interpretation of taxation statutes, said at para 130:

> "Having established in my view what the correct interpretive approach is, I now turn to consider the relevant parts of s. 86. I do so whilst expressly rejecting any suggestion that such interpretation should be influenced by background, as so described by the

Revenue. They say that it must be assumed that s .86 is a direct response to *McGrath's* rejection of their invitation to the court in that case, to develop a doctrine of fiscal nullity by judicial means. Further, in effect it is also said that one should proceed on the basis that the section achieved what was intended, namely disowning *McGrath v. McDermott*. Such a proposition, if I have correctly summarised it, is in my view alarming. I refuse to speculate as to the motives behind the enactment of s. 86 or any other taxation provision, for that matter. Unless such are clearly grounded and ascertained, the exercise is fraught, not only with difficulty, but also with danger: in particular as to the use to which any such conclusion may be put. This case illustrates the point: it has been squarely said that the provision was intended to override *McGrath v. McDermott* and of necessity, by implication at least, to apply *W.T. Ramsay v. Inland Revenue Commissioners* [1982] A.C. 300 in this jurisdiction. If so, why did not the section model itself on the key points deducible from such line of authority? In fact the section seems to have been heavily aligned to its Canadian equivalent, albeit with some modest judicial and statutory input from elsewhere. To try and identify the reasons giving rise to this composite approach may be of great interest to academic lawyers but is surely of little value to judicial decision. Moreover, it would be unthinkable from my point of view to accept that a provision, effectively per se, implemented what was intended, unless that could be independently verified by acceptable rules of construction. Otherwise intolerable uncertainty and confusion would be introduced, which would, in the long run, benefit neither government nor tax payer. Therefore, in my view the section, construed in the manner indicated, covers what it does, no more no less."

103. We are not convinced that anything is to be gained by discussing whether or not the principle of "fiscal nullity" remains outside Irish law. The relevance of *McGrath v McDermott* is that it is part of the background to the coming into operation of general tax avoidance provisions in the Irish tax legislation. Just as O'Donnell J. in *O'Flynn Construction* rejected the reliance by the Appeal Commissioners on the approach to interpretation found in *McGrath v McDermott,* we too reject an interpretation of s. 811 that promotes the principles in that case *above* the legislative measures enacted in its aftermath. As the established principles of statutory interpretation demand, what is of importance are the words of s. 811 when understood within its context. If this Transaction is *not* a "tax avoidance transaction" because it does not come within the boundaries of s. 811(3)(a)(ii), then Revenue's appeal will fail. This will be because the legislation, when properly understood, will not have encompassed the type of transaction at issue here.

104. We are however of the view that the bald contention of the taxpayer that s. 86 (and s. 811) did not reverse *McGrath v McDermott* is incorrect; it was reversed in the sense that Revenue was provided with a legislative basis for looking at the form, substance and final outcome of transactions and related transactions in reaching a determination as to whether they were tax avoidance transactions. Moreover, the decision in *McGrath v McDermott* is relevant to the legal background in which the legislation was enacted. Consideration of such background is part of the context in which the words of the statute are to be interpreted. The majority in *O'Flynn Construction* were of the view that it had so reversed *McGrath v McDermott* and, if any doubt had been created by some of the *obiter* comments *in O'Flynn Construction,* O'Donnell J. confirmed the position in *Bookfinders;* that having regard to the purpose of legislation is a helpful guide to its interpretation. The correctness of that approach to statutory purpose is now definitively stated in *Heather Hill*.

105. The Supreme Court in *O'Flynn Construction* gave a definitive interpretation to the predecessor of s. 811 TCA, but that is only the start of the present examination.

106. It must be recalled that there is a specific statutory requirement in s. 811 demanding that Revenue look at the misuse or the abuse of a provision having regard to its purpose. It is a statutory imperative to consider the *purpose* of the relevant provisions when required to do so under s. 811 TCA.

107. Bearing those considerations in mind, the issue in this appeal is whether the trial judge was correct to find that the Transaction came within a gap in the legislation because of the specific text of the anti-avoidance provisions which meant that s. 811 "cannot be used to go so far as to disapply the express provisions of section 549". We turn now to examine that in detail.

Generalised Expressions of Purpose

108. The taxpayer highlighted that Revenue was criticised by the trial judge for failing to make anything other than generalised assertions as to the purpose of s. 31 being to allow losses that were "real" or "monetary". The taxpayer relied upon para 78 of *O'Flynn Construction* and in particular the following dicta of O'Donnell J.: "When recourse is had to a generalised purpose such as the encouragement of exports, there is a frustrating of ascending the levels of generalisation rather then (*sic*) descending towards specificity". He also relies upon McKechnie J. who says that there is no room for a general enquiry into the use or abuse, instead there must be a specific enquiry measured against the purposes of the CGT relief.

109. In *O'Flynn Construction*, O'Donnell J. had no doubt the scheme was a tax avoidance one because he said that the export sales relief scheme had a number of limitations which he identified. Importantly, he referred to the matters that Revenue must take into account in determining whether something is a tax avoidance transaction. He said those matters are "important guides to whether a transaction that complies with the words of a statute providing a benefit and/or a relief may nevertheless be disallowed as a misuse or abuse of the provisions" (para 82).

110. O'Donnell J., at para 82, said that "the determination under s. 86(3)(b) [s. 811(3)(a)(ii)] is part of the general process of the formation of an opinion under s. 86 and s. 86(3) makes it clear that in the forming of such an opinion in accordance with the subsection, the Revenue Commissioners shall "have regard to the form of the transaction" and "the substance of the transaction" and the other matters set out in the proviso to s. 86(3). In my view, however, for the reasons already set out the Commissioners are not confined to the proviso but should have regard to those other matters to which attention is direction under s. 86". O'Donnell J. went on to say that the form of the transaction was highly artificial and contrived. It was a transaction arranged primarily to give rise to a tax advantage and the substance was to permit the company to distribute profits to shareholders. He said at para 83: "A scheme that allows shareholders in a non-exporting company to benefit from ESR on the profits of the exporting company is surely a misuse or abuse of the scheme having regard to the purpose for which the provision is provided".

111. Undoubtedly the Supreme Court in *O'Flynn Construction* rejected generalised assertions as to the purpose of the scheme, in that case "the promoting manufacture and export and therefore maintenance of employment" and instead required a focus on the particular scheme. It is also clear however, that the Supreme Court was directing attention towards the abuse or misuse of the provision in the context of the particular scheme and that even a transaction which complies *with the words of a statute* may nevertheless be disallowed as a misuse or abuse of the provisions. Indeed, as Revenue pointed out, consideration of whether something is a tax avoidance transaction under s. 811 is unlikely to arise unless the transaction conforms with other provisions of the tax code. We consider therefore that, the phrase "having regard to the misuse or abuse of the purpose of the provisions", s. 811(3)(b) requires that the form, substance and final outcome and result of the transaction must be taken into account. Thus, the fact that the Transaction was directed solely towards taking a tax advantage is a matter to be considered.

Does s. 811 apply where use is made of specific anti-avoidance legislation?

112. The trial judge refused to accept Revenue's submission on how s. 31 was to be interpreted because, she said, s. 31 had its own tax avoidance provision which was s. 549. The taxpayer, it seems, argued in the High Court that s. 549 had "no purpose" in the sense that it was "fiscally neutral". While still maintaining that position, he now accepts that "there can be no doubt" that s. 549 is an anti-avoidance provision. The trial judge's findings were premised on what she said was the implication of both the majority and the minority judgments in *O'Flynn Construction* that *"*where there is a specific anti-avoidance provision in place which governs the transaction under consideration, a general anti-avoidance provision such as s. 811 does not apply as this would exceed the proper constitutional role of the court". The taxpayer urges on the Court this interpretation of para 77 of the judgment of O'Donnell J.

113. In our opinion, the construction sought to be put on para 77 ought to be rejected. In the first place, judicial *dicta* must not be parsed and analysed in the same way as legislative provisions. Secondly, the dictum at issue makes no such extensive claim that where there is a specific anti-avoidance provision the general provision may not apply. Not only did O'Donnell J. use the word *"may"* before *"have its own anti-avoidance provision"* the sub-clause was preceded by "the provision may be so technical and detailed so that no more broad or general purpose can be detected". In any event, O'Donnell J. was doing no more than illustrating that there may be cases where there is a gap that the Oireachtas neglected or did not foresee. Most fundamental of all, however, is that nothing in para 77 can take away from the necessity to interpret both s. 811 and all other sections in the TCA in accordance with the words used taking into account the context and background of the provisions.

114. Moreover, Revenue is correct to point out that the minority judgment of McKecnhie J. in *O'Flynn Construction* expressly rejected the submission by the taxpayer in that case that because there was an anti-avoidance measure specific to export sales relief which is a selfcontained code, the same disapplies the more general measure from having any application in the case. McKechnie J. expressly held that s. 86 was of sufficient breadth to have general application to any "transaction" so defined (see para 144).

115. We are satisfied therefore that in so far as the trial judge relied upon the existence of the anti-avoidance provision of s. 549 to preclude the operation of s. 811, she was in error. Such a conclusion was not so found in *O'Flynn Construction* and that case is not authority for the approach taken by the trial judge. Moreover, the proposition urged by the taxpayer is not apparent from any view of the words used in s. 811. On the contrary this is a general provision which is intended to apply to *any* transaction undertaken or arranged to benefit from to *any* relief, allowance or abatement.

The Identification of Purpose

116. At the appeal, Revenue opened in detail the relevant provisions of the TCA concerning the CGT provisions. Revenue also referred to and opened case law which in hindsight, counsel submitted, ought to have opened to the trial judge, namely *Ramsay v Inland Revenue Commissioners* and *Aberdeen Construction* (see further below).

117. Under s. 28(1) TCA, capital gains tax shall be charged in accordance with the Acts in respect of capital gains, that is, in respect of chargeable gains computed in accordance with those Acts and accruing to a person on the disposal of assets. Section 31 provides that CGT is charged on the total amount of chargeable gains after deducting "any allowable losses accruing to that person". There is no definition of the word "losses" in the TCA. Revenue says that "allowable" is defined elsewhere. It is Revenue's contention that the word "losses" bears a literal and ordinary meaning and is indicative of something that a taxpayer ceases to have which they had previously. Therefore, it is a tangible financial deprivation.

118. Revenue submits that s. 549 is directed to relieving what are real as opposed to artificial losses. Pointing to the connected nature of the taxpayer and Parnell, Revenue refers to the general rule of acquisition of assets in other than arms-length transactions in s. 547 which is that the acquisition shall be deemed to be for a consideration equal to the market value of the asset.

119. It is against that background that Revenue contend that s. 549 and s. 31 are the focus of the appeal and point to the findings of the Appeal Commissioner and the High Court judge that they operate in lock step with each other. Revenue submits that when s. 549(3) refers to "loss" which shall not be deductible except from a chargeable gain, the section is referring here to the type of loss which had been allowed by the Appeal Commissioner, i.e. the actual monetary loss on the transaction of €258,591. Revenue's position in the Notice of Opinion was that even that amount of loss could not be deducted as it should have been disregarded in the context of the finding that this was a tax avoidance transaction. Revenue had not appealed against the finding of the Appeal Commissioner to allow that loss; at the hearing of this appeal, counsel submitted that it could be inferred from the decision of the Appeal Commissioner that he had viewed it as just and reasonable to allow the actual loss incurred. Revenue contended that every other "loss" that the taxpayer claimed was an artificial loss through the deployment of the rules, the purpose of which was to ensure that gains were not undervalued and losses were not overvalued. Thus, an artificial loss was not a loss at all because s. 31 was a relieving position, the purpose of which was to relieve financial loss against financial gain.

120. Revenue submit that it is s. 549(7) which is relevant to the Transaction. They refer to Cap Securitisation, which had the call option, being connected to Cap Parnell, which made the disposal in favour of the taxpayer. Subsection 6 of s. 549 provides for the situation where an asset is subject to a right or restriction and that the market value is that which it would be if not subject to the right or restriction, reduced by the lesser of a) the market value of the right or restriction and b) the amount by which its extinction would enhance the value of the asset to its own. Subsection 7 deals with the situation where there is an option/right to acquire the asset. This provides for how the impairment is to be dealt with and what consequence there is to be in terms of the acquisition cost. As this was not a transaction at arms-length, the market value is inserted as the disposal proceeds and no deduction is made to the impairment. It was through the deployment of this subsection that the taxpayer was able to generate what Revenue asserts is an entirely artificial loss.

121. That leads to consideration of Revenue's argument that sections 546, 549, 552 and 556 are indicative of the intention of the legislature that real gains and real losses are taxed and relieved as opposed to apparent gains and apparent losses. Part of their argument was based upon *dicta* contained in speeches in the House of Lords in both *Aberdeen Construction Group Ltd v Commissioners of Inland Revenue* [1978] AC 885 ("*Aberdeen*") and the decision in *Ramsay*. In *Aberdeen*, Lord Wilberforce said that CGT was of comparatively recent origin:

> "But a guiding principle must underline any interpretation of the Act, namely, that its purpose is to tax capital gains and to make allowance for capital losses, each of which ought to be arrived at upon normal business principles. No doubt anomalies may occur, but in straight-forward situations, such as this, the courts should hesitate before accepting results which are paradoxical and contrary to business sense. To paraphrase a famous cliché, the capital gains tax is a tax upon gains: it is not a tax on arithmetical difference".

122. In *Ramsay*, Lord Wilberforce reprised what he said in *Aberdeen* as follows:

> "The capital gains tax was created to operate in the real world, not that of make-belief. As I said in *Aberdeen Construction Group Ltd. v Inland Revenue Commissioners* [1978] A.C. 885, it is a tax on gains (or I might have added gains less losses), it is not a tax on

arithmetical differences. To say that a loss (or gain) which appears to arise at one stage in an indivisible process, and which is intended to be and is cancelled out by a later stage, so that at the end of what was bought as, and planned as, a single continuous operation, there is not such a loss (or gain) as the legislation is dealing with, is in my opinion well and indeed essentially within the judicial function".

123. Revenue's contention is that although those two decisions lead to the decision in *Furniss v Dawson,* which was not followed in *McGrath v McDermott,* nonetheless s. 86 and s. 811 have been interpreted as being intended to reverse *McGrath v McDermott* and, to that extent, Revenue submits that the views of Lord Wilberforce are apposite. It was also submitted that while general anti-avoidance legislation had been introduced into the UK and the principles in *Furniss v Dawson* no longer applied, the concept that capital gains tax operated in the real world was retained. An arithmetical difference created by a deeming provision was not a real world operation of the provisions regarding capital gains tax.

124. At this point it is necessary to return to the principles of statutory interpretation. What s. 811 permits a court to consider is, *inter alia*, the misuse or abuse of a provision having regard to its purpose. The purpose of the provision must be identified. The purpose of a provision is to be understood by looking at the words in their context having regard to the legal background against which it was enacted. While we accept that the background is the decision in *McGrath v McDermott* and that s. 86 (and s. 811) reversed that decision, that reversal was in the sense that there is now general anti-avoidance legislation which permits the form, substance and outcome of the transaction to be addressed having regard to purpose. It was not a reversal of every aspect of *McGrath v McDermott*.

125. *McGrath v McDermott* concerned the original CGT provisions, which are largely reproduced in the provisions at issue in these proceedings. Section 811 did not purport to amend those provisions; nothing in the wording of the section could lead to that conclusion. Rather it is in how they might be applied (or misused/abused) that is the issue.

126. The taxpayer points to what was said in *McGrath v McDermott* about s. 12 and s. 33(5) of the Capital Gains Tax Act, 1975 (now s. 546(2) and s. 549(6) and (7) TCA respectively) and submits that this still applies. Carroll J. in the High Court in their said that the s. 12(1) "requires that capital losses are to be computed in the same way as capital gains. Therefore just as Section 33(5) would be applied in computing a capital gain regardless of whether there was a corresponding actual gain, so also the section must be applied in computing a capital loss regardless of whether there is a corresponding actual loss." Both Supreme Court judgments of Finlay C.J. and McCarthy J. record that Revenue argued for reading into the relevant statutory provisions a rule or principle which rendered them inoperable unless the taxpayer established a real loss (ultimately conceding that it would also have to apply to the computation of a gain under the section). Finlay C.J. went on to say that what was being urged was the insertion of a new subclause or sub-provision into each one of those subsections providing that a condition precedent to the computing of an allowable loss pursuant to the provisions of s. 33(5) is the proof by the taxpayer of an actual loss, presumably at least coextensive with the artificial loss to be computed in accordance with the sub-section.

127. In *O'Flynn Construction*, when O'Donnell J. held that the effect of s. 811 was to reverse *McGrath v McDermott*, he was referring to the entitlement of Revenue to look at the substance of the transaction rather than a reversal of any specific legislative provision. If there is any doubt about that, and we do not believe there is, O'Donnell J. clarified that in his judgment in *Bookfinders* (para 40). In those circumstances, we do not accept that s. 811 can be said to have altered the purpose of sections 31, 456 and 459 TCA. Instead, what is altered by s. 811 is the entitlement of Revenue to look at the substance, form and outcome of a transaction when considering if such a transaction is a tax avoidance transaction and that Revenue must have regard to a misuse or abuse of any relieving provision.

Section 811(3)(a)(ii) and the Transaction

128. We turn once more to the wording of s. 811(3)(a)(ii) TCA. This sub-section specifically provides for what is not to be regarded as a tax avoidance transaction. It is the provision which requires there to be a misuse or abuse of a relieving or abatement provision having regard to the purpose for which it was enacted. That requires a specific consideration of the purpose of each legislative provision. In *O'Flynn Construction*, however, O'Donnell J. held that certain aspects of the provisions of s. 811(2) and (3) were mirror images of each other and were directed towards making the difficult distinction between a commercial transaction which had been legitimately structured in such a way as to mitigate the tax view on the one hand and a purely tax driven transaction designed to give rise to a tax advantage on the other (para 63).

129. Revenue submits that s. 549 feeds into s. 31 in terms of understanding what is at issue. Revenue does not accept the taxpayer's submission that it is asking to insert "real" before loss in the s. 31 but submits it is an approach to its interpretation that demonstrates the type of loss involved. The Appeal Commissioner was correct, Revenue submits, to say that its ordinary meaning was "denoting the process that leads to a position where you no longer have something or have less of something" and in a financial context requires some element of tangible financial deprivation.

130. As we have seen, the Supreme Court in *McGrath v McDermott* did not accept Revenue's contention that the losses at issue had to be real and could not be artificially created. It is important however that the Supreme Court did so in the context of a finding in the case-stated that the transaction was "not a sham" (see p 296 per Finlay CJ.). There was genuine disposal and purchase of the shares. That must be understood in the context of the overall decision in

McGrath v McDermott which precluded Revenue from looking at the form and substance of the transactions in question. In other words, Revenue was not permitted prior to s. 86 (and s. 811) to make its assessment on the basis that the entire transaction was devoid of commercial purpose and had no purpose other than to exploit taxation provisions to the fullest. We view that change in the legislation as of importance.

131. The taxpayer has pointed to the amendment of s. 549 by the insertion of subs. 8 in the aftermath of the decision in *McGrath v McDermott*. Subsection 8 provides that the rules in subs. 7 did not apply where the person making the disposal was not chargeable to CGT under s. 29 or s. 30 (i.e. where resident outside the jurisdiction). The taxpayer says its relevance is that it demonstrates that the Oireachtas moved to shut down the "loophole" in the aftermath of *McGrath v McDermott* but did not go any further. As a general principle we do not accept that a prior legislative provision must be construed in light of amendments made to it subsequently; Revenue correctly points to *Cronin (Inspector of Taxes) v Cork and County Property Co. Ltd.* [1986] IR 559 in saying that such an amendment could at best be viewed neutrally. That general principle does not govern the circumstances that arise here. The taxpayer is correct in saying that the provisions of what is now s. 549 *had been judicially considered* in *McGrath v McDermott* and therefore this legislative amendment was not being used to aid interpretation of the provision; it was simply addressing a "loophole" identified in the provisions. The Revenue also pointed to the general anti-avoidance provision, s. 811, which was also enacted in the aftermath of the decision. The legislature reacted in two ways to the *McGrath v McDermott* decision - by means of a specific amendment directed at the loophole that had been the subject of that decision (s. 549(8)) and by means of a general anti-avoidance provision (s. 811 TCA). We have observed that s. 811, while not directed specifically to CGT rules, permits Revenue to look at the form, substance and outcome of transactions, including transactions giving rise to gains and losses for CGT purposes, in assessing whether they were tax avoidance transactions and to consider the use or misuse of relieving provisions to that extent. Overall, therefore, the mere fact of the amendment of s. 549 by the insertion of ss. 8 does not provide useful assistance in understanding whether this Transaction is covered by the exemption in s. 811(3)(a)(ii).

132. The taxpayer relied upon the concept of "fiscal neutrality" to a significant extent before the High Court and the import of that term was discussed in the course of the hearing of the appeal. On the one hand, the taxpayer accepted the trial judge's view that s. 549 was an anti-avoidance measure but takes issue with her finding that it was therefore not fiscally neutral. The taxpayer placed considerable weight on s. 549 being a deeming provision, which it undoubtedly is, and said that this imposes an artificial figure for the acquisition and/or the disposal proceeds. In that context, he says that the application of the provisions of s. 31 to this transaction resulting in the loss to be set off against his capital gains elsewhere is the outcome of the terms of the legislation itself. Thus, a deemed market price is inserted on both sides of the same transaction, i.e., it applies to the one who buys and to the one who sells.

133. The taxpayer points to the example of a father passing an asset on to his son for 50% of the market value, which value, as connected parties, will be deemed to be for the full market value. He submits the TCA will deem the father to have sold the asset at 100% and the son to have purchased it for 100% market value. He submits this is a balanced transaction. If it is sold on by the son, the son will only have to pay tax on the difference between the deemed market value and the greater value it is sold for. He contrasts this type of "fiscal neutrality" with the imbalance of neutrality that existed in s. 549 before the insertion of subs. 8 in the aftermath of *McGrath v McDermott*. He contends that it is of importance that the legislature left the fiscally balanced sections intact.

134. We do not accept that perfect symmetry is necessarily at the heart of s. 549. The taxpayer says that it is so because on one side of a transaction it inflates the actual acquisition costs and that is the high base costs for the CGT calculation and on the other side it inflates the sale proceeds. The taxpayer has pointed to a tax return for Cap Parnell to demonstrate the two sides of the transaction but that is of little help. It demonstrates in fact that Cap Parnell did not pay CGT but instead claimed a small loss which was the commission they paid to Davy Stockbrokers for the acquisition of the bond.

135. More importantly in our view, that approach fails to engage with the purpose of s. 549 which is an anti-avoidance measure. We consider that the High Court was correct in accepting the Appeal Commissioner's determination that s. 549 is directed towards preventing "the avoidance of tax by a disponer who is connected to the acquirer… disposing of the asset at an undervalue by the simple device of artificially depressing the consideration or disposing of it at an undervalue" (at para 179). It cannot be said that fiscal neutrality is its purpose and we reject that proposition.

136. The taxpayer urged that the judge was correct to ask the question whether s. 811(3)(a)(ii) permitted her to disapply s. 549 (which the Appeal Commissioner had disapplied). It was an anti-avoidance provision and not a relieving provision. We have already said that s. 811 could apply to it even if it was a specific anti-avoidance provision. We have also pointed out how the decision in *O'Flynn Construction* indicates that in assessing whether a transaction is not an anti-avoidance provision by virtue of the said subsection, all aspects of the transaction must be considered. Moreover, general principles of statutory construction must also apply to the assessment of relieving provisions.

137. It is no longer argued by the taxpayer, as had been his position before the High Court and the Appeal Commissioner, that s. 31 is devoid of purpose. The High Court judge found that the purpose of s. 31 was clear: "before a chargeable person is assessed to capital gains tax, they may deduct allowable losses." Its purpose, she said, was establishing an important principle for the assessment of capital gains tax at the general level, and that the manner in which those losses and gains are computed are dealt with elsewhere in the TCA. The taxpayer now accepts this as a purpose but says it is effectively a neutral one; "to allow for deduction of losses". The taxpayer submits that the losses incurred in the Transaction are therefore deductible because those losses incurred as a result of the deeming provision which is s. 549. The taxpayer is however saying that the only section whose purpose is relevant to the provision is s. 31 and that purpose is a straightforward deduction of losses that arise through the operation of the provisions of the Acts.

138. It is beyond doubt that in the Transaction the taxpayer was taking advantage of the deeming provision in s. 549 TCA. According to the taxpayer, s. 549 always creates an artificial outcome as it taxes the vendor on a receipt that never existed and allows a deduction to the purchase on an amount that was never incurred. He says he was not involved in a tax avoidance transaction because the deeming provisions of s. 549, although an anti-avoidance provision, involved two resident entities and thus the ss. 8 amendment did not apply. He was, under the provisions, deemed to have incurred a cost at market value. That was the effect of the provision and he was entitled to engage in a transaction or series of transactions which ultimately allowed him to deduct his allowable losses from the capital gains he had incurred elsewhere.

139. Both parties to the appeal accuse each other of confusing "purpose" with application and effect. Revenue submits that s. 31 applies to real or monetary losses and that the purpose of s. 31 is to ensure, *inter alia*, that only allowable losses are deducted when determining the amount chargeable to capital gains. Not only does the taxpayer say the concepts of real or monetary losses are vague but submits that Revenue conflates application of s. 31 with purpose. Section 31, he submits, did apply to the loss relief claimed and s. 549 did capture the acquisition from Parnell. On the other hand, Revenue submits that in simply saying that the section had no purpose or that its purpose was limited to directing that one deducts from capital gain one's capital losses, is to merely point to its effect and application. This, Revenue submits, was the error into which the trial judge also fell.

140. How then to discern the purpose of s. 31? The purpose of the section must come from the plain and ordinary meaning of the words as they are seen in context within the taxation provisions. Section 31 however does not operate in isolation from the other provisions relevant to CGT and which address what losses are allowable and what are not allowed. Section 31 comes within Part 2 of the TCA dealing with The Charge to Tax, and Chapter 4 of that Part which deals specifically with Capital Gains Tax. Section 28 provides for the taxation of capital gains and the rate of charge. Section 31 provides that the tax shall be charged on the total amount of chargeable gains in the year of assessment after deducting any allowable losses accruing to that person in the year of assessment.

141. Section 31 refers to allowable losses. The meaning of "allowable" or "losses" or "allowable losses" are not defined in s. 31. There are, however, provisions that define what losses are allowable. These matters are dealt with later in the TCA at Part 19, Chapters 1 and 2. Those section are the principal provisions relating to CGT and to the computation *inter alia* of allowable losses. We consider that s. 546 distinguishes between "loss" and "allowable loss"; not all "loss" is an "allowable loss". We accept that in so far as may appear from the words used, s. 546 is directing attention towards what may be said to be "real" losses rather than towards an artificially created loss; for example, subs. 5 prevents relief being given more than once in respect of any loss or part of a loss. We have already discussed the purpose of s. 549 as being to prevent tax avoidance by preventing connected persons manipulating the CGT provisions by the disposal of assets at an undervalue.

142. We note that the Appeal Commissioner used s. 556 to support his conclusion as to the purpose of s. 31 referencing real losses. This section permits, for the purpose of computing the chargeable gain, a deduction related to the consumer price index to be made from the gain. The section, however, restricts that indexation relief to prevent turning an actual loss into a gain, increasing an actual loss or indeed converting an actual gain into a loss. The taxpayer points out that this indexation relief ceased to apply to gains and losses from 2003 onwards. Revenue, on the other hand, says that it still applies to chargeable gains on assets acquired before/up to that date. We are satisfied that s. 556 as enacted certainly supported the view that it was real losses/gains which were at issue. The cesser of the effect of that section from 2003 onwards does not affect the interpretation of the meaning of "allowable losses" within s. 31. More definitively it can be stated that it does not support an interpretation under which the deduction of artificially created losses would be consistent with the purpose of s. 31.

143. Both parties point to s. 549 as central to their interpretation. We are concerned that while both parties use similar terminology, they may be using them to mean different things. Our main concern here is the use of the word "artificial". Revenue says that artificial losses are not the allowed losses that are the purpose of the section, but the taxpayer submits that the provisions which deemed certain valuations are all about creating "artificial" outcomes as he was deemed to have acquired the asset at market cost. We are of the view that as the provisions of s. 549 are clearly anti-avoidance provisions, their purpose was to ensure that CGT provisions were not manipulated by disposals of assets between connected persons at an undervalue. For those transactions caught by s. 549(7), the market value is determined as if the right or restriction did not exist. This is not an "artificial" gain in the sense of being a contrived gain, instead it is a gain deemed necessary for the purpose of preventing manipulation of the CGT provisions.

144. We have no doubt that the purpose of s. 31 must be viewed in the context of the overall provisions of the Act which includes general provisions providing for the computing of chargeable gains and allowable losses. That is a standard canon of statutory interpretation. It is not appropriate, therefore, to say that a court is limited only to the words within the section when ascertaining its purpose. The section exists within the TCA and its provisions must be interpreted accordingly. The other provisions in TCA provide for losses which are allowable. It also must be viewed in the context of the deeming provisions which are clearly purposed to prevent manipulation of the CGT provisions by overvaluing losses or undervaluing gains. In their ordinary meaning, the words "loss" or "losses" mean having something less, i.e., something tangibly less. Any understanding of loss within s. 31 would have as a starting point that it was to relieve financial loss against financial gain. Nothing in what has been submitted to us demonstrates that "allowable losses" were to be anything other than tangible losses. It is in that sense that losses which are "real" or "monetary" are at the heart of s. 31 TCA. Section 549 identified what those gains and losses were in the context of disposal/acquisition of assets between connected persons.

145. The taxpayer argues strongly that if his "artificial losses" are not to be allowed, which said losses arise from the deeming provisions, then why was recourse to s. 811 needed at all? Why, he asks, did Revenue not simply say that s. 31 does not permit those artificial losses? The premise behind that argument is one which, in our view, fails to take into account the very point of s. 811 TCA. If there was no s. 811, there would be no examination of the form, substance, and outcome of the Transaction. There would simply be a consideration of the steps that were taken and the application of the provisions of s. 549 to each of those steps taken in isolation. Each step in the Transaction would be considered individually and would have the provisions of s. 549 applied to them. Those steps would, quite legitimately, include the application of the deeming provisions, and, thus, the gain directed to have been obtained by those provisions would apply.

146. Applying that to the facts here, the sale of the bond by Parnell (for €578,529) to the taxpayer was a transaction between connected persons and the acquisition was deemed to be for a consideration of €2,977,446 because there was a call option in favour of Securitisation, and Parnell and Securitisation were connected persons. The taxpayer then exercised the put option and Securitisation purchased the bond for €319,938. These were actual transactions which took place and the provisions of the tax code applied to them such that the gains and losses which were generated or deemed to have been generated under the provisions applied. In the same way that the provisions at issue in *McGrath v McDermott* were applicable to those transactions, so are the relevant provisions applicable here. As *McGrath v McDermott* said, the taxpayer was entitled to exploit the provisions to the fullest in search of a tax advantage. Thus, even where the purpose of the provisions was to prevent tax avoidance, if the provisions when *applied* to particular transactions created a tax advantage then the taxpayer was entitled to take the benefit. If s. 811 did not exist, there would be nothing further that Revenue could do.

147. Section 811 does, however, exist. It gives to Revenue a completely different dissection kit with which to examine the Transaction. Gone is the restriction on looking at the form, substance, final outcome and result of the Transaction. Examination of the Transaction by looking at the results and its use as a means of achieving those results led Revenue to conclude under the provisions of s. 811(2) that it was, subject to the provisions in s. 811(3), a tax avoidance transaction. From the perspective of s. 811(3)(a)(ii), and s. 811(3)(b), Revenue had to assess the form, substance, final outcome and result of the Transaction before Revenue could be satisfied that it was not a tax avoidance transaction because (a) it was arranged for the purpose of obtaining the benefit of any relief or allowance or other abatement provision and (b) the Transaction would not result directly or indirectly in a misuse or abuse of the provision having regard to the purposes for which it was enacted. Undoubtedly, this Transaction was undertaken or arranged for the purpose of taking advantage of the relief under s. 31 through the use of the deeming provisions of s. 549. The purpose of s. 31 must be considered in the context of the provisions of TCA including those of the interlocking section 549. Those provisions are material to a consideration of s. 31 TCA. Actual or real financial losses are to be set against actual or real financial gains in circumstances where provision is made intending that connected persons are not permitted to manipulate the CGT provisions so as to over value losses and undervalue gains. We say directly because the purpose of s. 31 cannot, contrary to the trial judge's finding, be assessed without reference to the interlocking provisions of s. 549 TCA.

148. In those circumstances, there was a clear misuse and abuse of the provisions of s. 31 by this Transaction. Its sole purpose was to manipulate, and thereby misuse and abuse, the provisions of s. 549 concerning connected persons for the purposes of constructing "an artificial loss". This was truly an "artificial loss" because it made use of the deeming provisions to generate a loss for the sole purpose of avoiding tax. That is a clear misuse of s. 549 which results directly or indirectly in a clear misuse of s. 31 provisions. As O'Donnell J. in *O'Flynn Construction* said of the concepts of abuse and misuse, while it may be helpful to offer some sort of definition of the individual concepts the section is best understood when those concepts illuminate each other. We say that the words "directly or "indirectly" illuminate the comprehensive nature of the subsection. Revenue has used the phrase "feeds into" to describe the interaction of s. 549 with s. 31 and we say that such a concept is useful in understanding how a purpose may be either "directly or indirectly" misused or abused. This is another way of saying that the purpose of s. 549 must be considered when addressing the purpose of s. 31. We have done so and it is clear that there has been a misuse and abuse of that purpose. Put simply, this Transaction, which was carried out solely for the purpose of avoiding tax, exploited the anti-avoidance provisions of s. 549 and thus misused and abused the purpose of that provision. Prior to the enactment of s. 86 in 1989, that was an entirely legitimate approach to avoiding paying full tax. That approach can no longer bring about its stated purpose to avoid tax. The general tax avoidance provisions in s. 811 set at nought this particular attempt to avoid tax.

149. There is an anomaly based upon this reasoning which arises from the Appeal Commissioner's decision to allow the "actual loss" incurred during the course of the Transaction. Under the original Notice of Opinion, Revenue had withdrawn the full amount of the losses claimed which the provisions of s. 811 permitted them so to do. The Appeal Commissioner in his determination had allowed the CGT loss of €258,591 actually incurred in the course of the transaction. He did not explain the precise reason for doing this other than to say that it was in accordance with the TCA and the relevant subsection that the taxpayer's entitlement to capital gains tax loss relief was limited to his actual loss. We consider that this does not take into account that once the Transaction is found to be a tax avoidance transaction, other provisions of s. 811 give Revenue (and the Appeal Commissioner on appeal) wide powers to disallow in whole or in part any deduction made as a consequence of the tax avoidance transaction. This was not appealed by Revenue in the case and Revenue say that s. 811(5)(a) permits the making of such adjustments as are just and reasonable in order that the tax advantage is withdrawn or denied to the person concerned. In those circumstances, the allowance of the actual loss may be said to be explained in this case.

<u>Validity of Notice of Opinion</u>

150. From the outset the taxpayer has maintained that the Notice of Opinion dated 23 December 2009 is itself invalid as the Nominated Officer misdescribes the transaction to which it purportedly relates. In essence, the taxpayer contends that the whole procedure is fatally flawed by reason of this error as the transaction described in the Notice never occurred and the Transaction which did occur is not set out in the Notice. Consequently, it is argued that as the Notice of Opinion is invalid, no tax consequences can flow from it, and it cannot become the basis for an assessment the effect of which would be to withdraw the relief from CGT previously granted to the taxpayer.

151. The transaction is described in a series of six bullet points and the misdescription occurs in a sub-paragraph at point 3. It recites, *inter alia*, that a put option in respect of the Bond was granted by Securitisation to Parnell when in fact the put option was granted by Securitisation to the taxpayer directly. Revenue acknowledge that this statement is erroneous. However, Revenue argues that the misdescription is not material for a number of reasons including the fact that the taxpayer was fully aware of the transaction both because of his involvement in it and because it is correctly set, albeit more briefly, out in a letter from Revenue to the taxpayer pre-dating the Notice of Opinion on 8 September. Further, Revenue contends that the misdescription is not material in that it relates to an element of the overall scheme which had absolutely no tax consequences.

152. It might be useful to note that under s. 811(6)(a) TCA where Revenue forms the opinion that a transaction is a tax avoidance transaction, they must give notice in writing of the opinion to any person from whom a tax advantage would be withdrawn if the opinion were to become final and conclusive. That Notice of Opinion is required to specify a number of things including "*the transaction which in the opinion of the Revenue Commissioners is a tax avoidance transaction*". It must also specify the tax advantage as calculated by Revenue and the tax consequences of the transaction as determined by Revenue insofar as they apply to the person to whom the Notice is sent.

153. The issue was initially raised by the taxpayer before the Appeal Commissioner. It was common case that the Appeal Commissioner had jurisdiction under s. 811(9)(a)(II) TCA to amend the description of the transaction in the Notice of Opinion but did not exercise that jurisdiction. Instead the Appeal Commissioner found that the Nominated Officer "understood the essential fundamentals of the transaction" such that the Notice could not be regarded as void and, in any event, irrespective of the misdescription he had reviewed all of the necessary documentation and had regard to all of the matters which he was obliged to consider under statute and concluded that the transaction was a tax avoidance transaction and the taxpayer had procured a tax advantage such that the misdescription in the Notice was “irrelevant”.

154. When the trial judge came to consider this matter, the point was *obiter* because of her earlier findings in favour of the taxpayer on the substantive issue. Nonetheless, in deference to the arguments which had been made to her, she proffered her views. She held firstly that the creation of the put option was a material element of the transaction designed to ensure that the taxpayer could dispose of the Bond in a manner which would procure the necessary tax advantage. Further, insofar as the Appeal Commissioner thought otherwise and based his decision on a slightly amended description of the transaction which is set out in his determination (and in the case stated) she felt there was an issue as to whether he was required to formally amend the Notice of Opinion and, if so, whether the matter should be remitted to him to do so or whether the High Court should make the amendment. She reserved this issue to a suitable case in which it might have a bearing on the outcome.

155. In light of our conclusions in the preceding sections of this judgment, this issue now has a bearing on the outcome of this appeal. In addition, the taxpayer has expressly included it in his Respondent’s Notice as an additional ground upon which the High Court decision should be affirmed. At its height, if the taxpayer is correct the whole procedure is fatally flawed and if Revenue are to recover sums by which the taxpayer benefitted pursuant to the tax advantage they must re-commence the process, subject to whatever may be the applicable time limits. Even without going that far, the taxpayer could technically succeed on the appeal if the Court found it necessary to remit the matter to the Appeal Commissioner for the formal amendment of the Notice of Opinion. Apart from the delay which would necessarily follow and perhaps some advantage in terms of legal costs, it is difficult to see how this would be of real benefit to the taxpayer since it is clear from the Appeal Commissioner's determination that he fully understood the nature of the transaction including the element of it misdescribed in the Notice of Opinion so there is no basis for assuming that correcting the formal record would change the outcome of the first instance appeal.

156. On balance we are of the view that the Notice of Opinion is not invalid. Crucially the element of the transaction which is misdescribed (the identity of the grantee of the put option) is not a matter which fed into the tax consequences of the transaction nor its nature as a tax avoidance transaction. The two key factors which made the transaction a tax avoidance transaction were the connection between Parnell as the vendor of the Bond and the taxpayer as purchaser, and the consequent substitution of market value for the price actually paid by the taxpayer for the Bond. Neither the identity of Securitisation as the purchaser of the bond nor the fact that it was purchased pursuant to the exercise of a put option conferred any tax advantage on the taxpayer or had any bearing on the tax consequences of the transaction. We do not agree with the trial judge that the granting of the put option must be regarded as a material step in the transaction because the Nominated Officer included it in the description of the transaction and therefore must have regarded it as such and the Appeal Commissioner did not expressly say it was not material. The connectivity between the parties did not arise from the put option. The put option simply ensured that the taxpayer could sell the Bond, or, as Revenue termed it, provided the taxpayer with comfort. Equally the substitution of market value for the price paid for the Bond did not arise from the put option. Insofar as the price of the Bond was affected by its impairment, that arose because of the call option.

157. We do not however accept the argument made by Revenue that the taxpayer should be regarded as being on notice of the correct details of the transaction having been a participant in it. The purpose of the statutory notice is to put the taxpayer on express notice of what Revenue alleges to be a tax avoidance transaction so that the taxpayer can respond to the opinion set out in the notice. It could never be sufficient and indeed would be somewhat Kafkaesque to allow Revenue to rely on a taxpayer's knowledge of a transaction they had supposedly been involved in to constitute notice of Revenue's opinion of that transaction.

158. In fairness to Revenue, the argument in this case is not based on that factor alone but also on the fact that the earlier correspondence from Revenue to the taxpayer set out the transaction without including the subsequent misdescription. That latter argument carries more weight but in light of the conclusions in the preceding paragraph that the misdescription is not material to the tax avoidant nature of the transaction, it is unnecessary for us to decide whether that would be sufficient to outweigh the misdescription. It is of course also salient that the matter proceeded before the Appeal Commissioner, who has a full *de novo* jurisdiction on appeal under s. 811(9)(a)(i), in circumstances where everybody including the Appeal Commissioner was on notice of and understood each element of the transaction which is correctly set out in the determination from which this case stated arises.

159. In any event, in light of our conclusions on the time issue, it is probable that this point is of less significance that it would be if the time limit were to be treated as having expired by reference to the chargeable period for which repayment of tax is sought and not by reference to the date of any assessment to be raised on foot of a final and conclusive Notice of Opinion even where the chargeable period pre-dates the 2012 amendments. As the s. 955(2) time limit does not apply, there would be nothing to prevent Revenue re-commencing the process and issuing a further Notice of Opinion which would exclude the misdescription. For the avoidance of doubt, if it were necessary to do so this Court would be prepared to exercise the jurisdiction conferred on the High Court under s. 811(9)(b) when dealing with a question of law arising on a case stated to do any of the things an Appeal Commissioner can do under s. 811(9)(a) to formally amend the Notice of Opinion so as to state that the put option was granted to the taxpayer rather than to Securitisation.

Conclusion

160. In these circumstances we would answer the questions of the Appeal Commissioner as:

(a) Yes, the Appeal Commissioner was correct to hold that the Notice of Opinion was not void;

(b) Yes, but subject to the following proviso. Revenue is not precluded by the operation of the time limit in s. 955(2) from raising an assessment on foot of the Notice of Opinion primarily because that time limit did not apply in circumstances where the taxpayer had not made a full and true disclosure of all facts material to an assessment of his liability to CGT in either 2004 or 2005. However, even if the taxpayer had made a fully compliant disclosure the effect of s. 811(5A) TCA read with s. 130 of the Finance Act, 2012 is to disapply the time limit in s. 955(2) and to allow an assessment to be raised on or after 28 February 2012 withdrawing the tax advantage of any tax avoidance transaction even where 4 years has passed from the end of the relevant chargeable period;

(c) Yes, the Appeal Commissioner was correct in his interpretation and application of s. 549 TCA;

(d) Yes, he was correct in determining that the Transaction was a tax avoidance transaction as statutorily defined;

(e) Yes, in holding that the appellant/taxpayer was required to discharge a "positive burden" in the interpretation and application of s. 811 (3)(a)(ii) TCA but only insofar as such relates to an evidential burden where matters of fact are concerned;

(f) Yes, in holding that the intention of the Oireachtas, as discerned from the wording of s. 31 TCA, is to provide relief to ameliorate actual financial hardship correlating to actual monetary loss;

(g) Yes, in holding that there was a misuse of s. 31 TCA for the reasons set out in this judgment, and

(h) Yes, in determining that the capital gains tax actual loss be restricted to €258,591 but only in so far as it just and reasonable to make that adjustment.

161. The Order of the Court is therefore to allow the appeal of Revenue, to dismiss the cross appeal of the taxpayer, and to answer the questions posed in the case stated as set out in the foregoing paragraph.

162. As the Revenue Commissioners have been successful in this appeal, it would appear they are entitled to the costs of the appeal and to the costs of the High Court proceedings. If there is no agreement between the parties as to this order of costs (or any other agreed costs order), an application to the Registrar should be made on or before 29 May 2024 with short written submissions, and if necessary, seeking a short hearing date on the issue of costs.

As this judgment is being delivered electronically, our colleague Faherty J. has asked us to indicate that she has read this judgment in draft and has authorised us to record her agreement.