Neutral Citation Number: [2007] IEHC 466

THE HIGH COURT

[2007] No. 329R

BETWEEN

PATRICK W. KEANE AND COMPANY LIMITED

APPELLANT

AND
THE REVENUE COMMISSIONERS

RESPONDENTS

Judgment of Mr. Justice John Edwards delivered on the 18th December, 2007

Introduction
1. This is a case stated by His Honour Judge Patrick Moran, a Judge of the Circuit Court, pursuant to s. 941 of The Taxes Consolidation Act, 1997 as extended by s. 943 of the same Act, at the request of the Revenue Commissioners, the respondents named in the title to these proceedings. The relevant provisions provide, in substance, that after the determination of an appeal against an assessment to tax by an Appeal Commissioner, or the Circuit Court, as the case may be, a party dissatisfied with the determination as being erroneous in point of law, may declare his or her dissatisfaction and require the appellate tribunal (the Appeal Commissioner or the Circuit Court, as the case may be) to state and sign a case for the opinion of the High Court on the determination. In the case stated by His Honour Judge Moran dated 27th April, 2007 this court is asked to answer the following question:-

> "Does the arrangement in the present case constitute a 'reconstruction' within the meaning of s. 80 of the Stamp Duties Consolidation Act, 1999?"

Facts
2. Prior to November, 2001 the appellant Patrick W. Keane and Company Limited (hereinafter referred to as "the company"), had five shareholders, namely Catherine Neville, Tim Keane, Gerard Keane, Pat Keane and Liligan Limited (a company controlled by Gerard Keane and Pat Keane). The company carried on a jewellery business. It had jewellers shops at Oliver Plunkett Street, Cork, Winthrop Street, Cork, Patrick Street, Cork and High Street, Killarney, County Kerry. In addition, it had a property at 2A Pembroke Street, Cork and it also had an investment property portfolio comprising properties at Cook Street, Cork, North Main Street, Cork and Brentwood, Wilton, Cork. It appears that a dispute arose between the shareholders that was subsequently settled by agreement. This court has been informed by counsel for the company (the appellant), Mr. Shipsey, S.C., that this agreement (for clarity hereinafter called "the initial agreement") was entered into "about a month" before a subsequent agreement of the 23rd November, 2001 and with which this court is centrally concerned. For the purposes of the initial agreement, the ordinary shares in the company where redesignated into "A shares" "B shares" and "C shares". In addition a new class of shares, namely the "E" shares where created. However, Article 4.2. of the company's Articles of Association provided that the holders of the "E" shares were not entitled to receive notice of, attend or vote at general meetings of the company or even to receive copies of the accounts of the company. The company's Articles of Association further provided that the "E" shareholders were not entitled to any distribution save such distribution as might be approved by the company in general meetings (which they had no right to attend, or to vote at). The "A" shares were held by Catherine Neville; the "B" shares were held by Tim Keane and the "C" shares were held by Gerard Keane and Pat Keane and Liligan Limited. "E" shares in the company were issued to each of Catherine Neville, Tim Keane, Patrick Keane, Gerard Keane and Liligan Limited. The Articles of Association were amended to provide that the "A" shares were to benefit only from the "A" assets, the "B" shares were to benefit only from the "B" assets and the "C" shares were entitled to benefit only from the "C" assets. Essentially, each of the assets and businesses hereinbefore described were divided into three classes of assets. The premises and business of the company at Winthrop Street, Cork, known as the "*Swiss Gem Business*" together with the investment property portfolio became the "A" business; the premises and business of the company carried on at 116 Patrick Street, Cork, known as the "*Michel's Business*", became the "B" business while the balance of the assets of the company were attributed to the "C" business.

3. On 23rd November, 2001 a further agreement, (to which I have already alluded) was entered into between the company and its shareholders and certain other parties, pursuant to which the trades and businesses previously carried on by the company would henceforth be carried on by two separate and distinct companies, namely Harrowby Limited and Ritaville Limited, and partly by the company itself. The learned Circuit Court judge has appended a copy of this agreement as Appendix I to his Case Stated. Pursuant to this agreement the "A" assets of the company were transferred to Harrowby Limited (which is controlled by Catherine Neville). "E" shares in Harrowby Limited were issued to the holders of the "E" shares in the company in proportion to the number of "E" shares held by them in the company. The "B" assets of the company were transferred to Ritaville Limited (which is controlled by Tim Keane). "E" shares in Ritaville Limited were also issued to the holders of the "E" shares in the company in proportion to their holdings of "E" shares in the company. The "C" assets remain with the company which is now controlled by Gerard Keane and Patrick Keane.

4. It was a term of the agreement dated 23rd November, 2001 that an application would be made to High Court for sanction under the terms of s. 201 to s. 203 of the Companies Act, 1963. Thereafter a scheme of arrangement and reconstruction was prepared and the shareholders of the company approved the scheme of arrangement and reconstruction at a meeting held on 13th March, 2002 pursuant to an order of the High Court made on 18th February, 2002. A petition was then presented to the High Court on 27th March, 2002 seeking sanction for the "scheme of arrangement and reconstruction" pursuant to s. 203 of the Companies Act, 1963. By order of the High Court made on 22nd April, 2002 the High Court, (Kearns J.) sanctioned the scheme. In the terms of the order made by the High Court, it was expressly recited that it was shown to the High Court "that a scheme of arrangement and reconstruction has been proposed for the purposes of the reconstruction of the company and that under such scheme, certain undertakings and property of the company are to be transferred to Harrowby Limited and Ritaville Limited". The learned Circuit Court judge has appended a copy of the petition presented to the High Court together with the affidavits grounding same and the documents exhibited in the said affidavits as Appendix 2 to his Case Stated. He has further appended a copy of the order of the High Court made on 22nd April, 2002 as Appendix 3 to his Case Stated . The scheme of arrangement and reconstruction in respect of which High Court sanction was sought, and granted, is set out in the first schedule to that order.

Relevant Correspondence
5. Following the making of the High Court order of the 22nd April, 2002 the company, through its tax agent Price Waterhouse Coopers, applied to the Stamps Branch of the Office of the Revenue Commissioners by a letter dated the 20th November, 2001 seeking confirmation that "the proposed reorganisation of the P. W. Keane and Company Limited Group will qualify for exemption from capital duty, as provided for under s. 119 of the Stamp Duties Consolidation Act, 1999. The said letter, running to just over four pages of single spaced typescript, went on to make the company's case for the exemption claimed. No specific claim was made at that time for

an exemption pursuant to s. 80 of the Stamp Duties Consolidation Act, 1999. It is not necessary to recite the full terms of the letter of the 28th November, 2001 save to allude to the fact that some light is shed on the purpose of the transaction on page 3 of the said letter under the heading "Departing shareholders/directors". In that regard the letter states:-

> "Irreconcilable differences have arisen amongst the directors as to the future direction of the company and its businesses. Accordingly, proposals have been drawn up in order to resolve those differences through a negotiated settlement. The purpose of the proposals is to enable the existing businesses within the P. W. Keane group to develop in three separate and distinct companies"

6. That letter was the commencement of a course of correspondence between the company and the Revenue Commissioners, and the learned Circuit Court Judge had regard to that correspondence by in arriving at his determination. The correspondence in question is appended to the Case Stated as Appendix No. 5. It is not necessary to refer to the entirety of this correspondence for the purposes of this judgment, though I have had regard to all of it. It is necessary, however, to refer to some of the correspondence wherein the transaction that I am concerned with has been described or characterised in a particular way, as some reliance has been placed on the descriptions and characterisations used. The aforementioned letter of 28th November, 2001 was replied by Mr. Seamus Carey, Assistant Principal, attached to the Stamp Duty Technical Unit of the Office of the Revenue Commissioners on 13th September, 2001. The relevant part of that letter states:

> "On the basis of the information furnished I can confirm that relief from capital duty will be available under s. 119 of the Stamp Duties Consolidation Act, 1999 in relation to the share allotments made by Harrowby Limited and Ritaville Limited in consideration of the acquisition of the "A" business and "B" business as outlined in your submission.
>
> A liability to stamp duty will arise on the transfer of the "A" business and "B" business as the transaction is not a reconstruction for the purposes of s. 80 of the Stamp Duties Consolidation Act, 1999".

7. Now it appears that as well as corresponding with the Stamps Branch of the Revenue Commissioners about capital duty and stamp duty, Price Waterhouse Coopers was conducting a parallel course of correspondence with the Office of the Chief Inspector of Taxes in connection with the availability of the Revenue's administrative arrangement for the partition of family companies in relation to capital gains tax. In the course of that correspondence there is a letter from Price Waterhouse Coopers of 6th March, 2002 to Mr. Jim Byrne of the Office of the Chief Inspector of Taxes in the following terms:-

> "Dear Mr. Byrne,
>
> P.W. Keane and Company Limited
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> We refer to your letter of 12th December, 2001 in relation to the re-organisation of the P. W. Keane Group.
>
> We enclose letters of undertaking from P.W. Keane and Company Limited, Harrowby Limited and Ritaville Limited confirming their acceptance that for capital gains tax purposes, following the reorganisation, all assets of the companies will remain at historic cost. Furthermore, we attach letters from Catherine Neville and Tim Keane confirming that for capital gains tax purposes the shares in Harrowby Limited and Ritaville Limited will assume the historic cost of the individual shareholders shares in P.W. Keane and Company Limited."

8. The courts attention has been drawn to the fact that in each of the letters of undertaking from P.W. Keane and Company Limited, Harrowby Limited and Ritaville Limited, respectively, and also in the letters from Catherine Neville and Tim Keane, respectively, the transaction has been characterized as a "proposed partition of Patrick W. Keane and Company Limited". The Revenue Commissioners place considerable reliance on this.

9. Returning to the stamp duty correspondence, on 22nd May, 2002 Price Waterhouse Coopers wrote again to Mr. Seamus Carey of the Stamps Branch of the Revenue Commissioners submitting completed statutory declarations in connection with applications under s. 80 and s.119 of the Stamp Duty Consolidation Act for relief from stamp duty and capital duty arising from what they characterised as "the reorganisation" of the P.W. Keane and Company Limited Group on the transfer of the Swiss Gem Business and the Investment Business to Harrowby Limited and the Michel's business to Ritaville Limited. Relevance supporting documentation was also enclosed. A response was eventually received on 13th February, 2003 in the form of a lengthy letter from Mr. Carey to Price Waterhouse Coopers. Although the letter is lengthy it is an important letter and it is appropriate that I should recite the terms of it in full. The letter states:-

> "I refer to your application for relief from stamp duty under s. 80 of the Stamp Duties Consolidation Act, 1999 in connection with a reorganisation of the above company.
>
> **Background**
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> The circumstances giving rise to the reorganisation were set out in detail in a submission dated 9th May, 2001 to this office and in a similar submission dated 19th April, 2001 to the office of the Chief Inspector of Taxes. The nature of the transaction was described as a partition of the P.W. Keane Group arising from irreconcilable differences between the different shareholders. The submissions addressed the availability of relief from capital duty under s. 119 of the S.D.C.A. 1999 and the availability of Revenue's administrative arrangement for the partition of family companies in relation to CGT.
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> A revised submission in relation to the capital duty treatment was made to this office on 28th November, 2001 and on the basis of the information furnished it was confirmed that relief under s. 119 would be available in relation to the share allotments made by Harrowby Limited and Ritaville Limited in consideration of the acquisition of "A" business and the "B" business of P.W. Keane and Company Limited as described in the submission. This confirmation was sought on the basis that the substance of the transaction was a partition rather than a reconstruction.
>
> If the transaction was in substance a reconstruction rather than a partition the reliefs available under s. 119 and s. 80 would have automatically been available subject to satisfying the specific conditions of the sections, and there would have been no need to seek confirmation in relation to the availability of s. 119 relief or to seek to avail of the benefit of the CGT administrative arrangement for family partitions.
>
> **The reorganisation**

The reorganisation involved the division of the existing business carried on by P.W. Keane and Company Limited into three separate undertakings (referred to as the "A", "B" and "C" businesses) to be carried out by separate companies under the control and ownership of (a) Catherine Neville, (b) Tim Keane and (c) Gerard & Pat Keane respectively. The steps carried out on or about 23rd November, 2001 give effect to the transaction including the following:-

· Catherine Neville transferred part of her shareholding in P.W. Keane and Company Limited to Liligan Limited (a company owned by Gerard and Pat Keane) for a sum of £2.65 m.

· None voting "E" shares were issued in P.W. Keane and Company Limited to the shareholders by way of bonus issue.

· The ordinary shares in P.W. Keane and Company Limited were reclassified into three classes of shares linked to the "A", "B" and "C" businesses with a view to streaming the benefits of the three separate businesses to the three separate shareholding groupings.

· Two new companies were established, Harrowby Limited and Ritaville Limited for the purpose of receiving the "A" business and the "B" business respectively.

· The shareholders in P.W. Keane and Company Limited entered into an agreement under which the "A" business was to be transferred to Harrowby Limited and "B" business transferred to Ritaville Limited with the "C" business remaining with P.W. Keane and Company Limited. As a result of the shareholding structure put in place within the above companies the economic benefit of the "A" business vested in Catherine Neville, the economic benefit of the "B" business vested in Tim Keane and the economic benefit of the "C" business vested in Gerard Keane and Pat Keane.

It is clear that the effect of the Shareholders Agreement together with the other steps was the division of P.W. Keane Company Limited into three separate businesses and the placing of the separate businesses under the separate control and ownership of the different shareholding groupings.

Re-construction v. Partition

The reliefs available under s. 80 applies in the context of a "bona fide scheme of reconstruction". The term "reconstruction" has been the subject of judicial review on a number of occasions in the U.K. courts in relation to a similar stamp duty relief. The main elements of a reconstruction comprise the transfer of the whole or part of the undertaking of an existing company to a new company or companies which are owned by the shareholders of the existing company.

10. Buckley J. in *Re South African Supply and Cold Storage Co,* [1904] 2 C.H. 268 at 286 addressed the issue as follows:-

> "What does 'reconstruction' mean? To my mind it means this. An undertaking of some definite kind is being carried out, and the conclusion is arrived at that it is not desirable to kill that undertaking, but that it is desirable to preserve it in some form, and to do so, not by selling it to an outsider who should carry it on – that would be a mere sale – but in some altered form to continue the undertaking in such a manner as that the person now carrying it on will substantially continue to carry it on. It involves, I think, that substantially the same business shall be carried on and substantially the same person should carry it on."

11. The concept of a reconstruction was also considered in the case of *Brooklands Selangor Holdings Limited v. I.R.C.*, [1970] 1 W.L.R. 429 where the transaction involved the partition of the company's underlying business between two groups of shareholders and it was held that the scheme was not a scheme of reconstruction but rather a partition. Pennycuick J. stated at 446-447:-

> "Turning to the facts of the present case, the substance of the scheme is that the undertaking of BSR is partitioned between plantation holdings and the minority shareholders in proportions corresponding to their holdings of the ordinary stock of BSR, the preference shareholders being paid off. That partition, in order to comply with the requirements of company law, was carried out by the transfer of part of the undertaking of BSR to the new company in consideration of stock in the transferee company i.e. the taxpayer, and the issue of that stock directly to the minority shareholders by way of reduction of capital. The effect of that transaction is that the holders of the stock in the taxpayer company are most substantially different from the holders of stock in BSR. So the transaction represents the transfer of a part of BSR's undertaking from holders of the whole of the stock in BSR to the holders only of approximately half the stock in BSR. That, I think, involves a substantial alteration in the membership of the two companies within the meaning of the passages which I have quoted from the judgment of Chitty J. and Buckley J. It seems to me that that transaction is not a reconstruction and that a transfer made pursuant to that transaction falls neither within the letter nor within the intent of section. 55."

12. The above cases were again referred to in the case of *Fallon v. Fellows*, [2001] S.T.C. 1409 where a transaction very similar to the current transaction was considered in relation to a CGT liability. The case involved the streaming of shareholdings as part of the scheme to affect the partition of the company and Park J. held that the transaction was not a reconstruction. In his judgment he also stated that:-

> "In my opinion it is certainly appropriate to regard the scheme in this case as beginning with F.& M. in its original condition, with ordinary and preference shares, but without the further classifications into A and B ordinary and preference shares. I agree with Mr. Massey that this is supported by the following passage from the judgment of Ferris J. in *Swithland Investments Limited v. IRC*, [1990] STC 448 at 459:-
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> > "In my judgment the transaction which I ought to look at in order to see whether there has been a reconstruction here is the wider transaction as contended for by counsel for the commissioners. It does not seem to me to be correct to try to separate the Newco part of the transaction from the rest when, as letter F makes clear, all the steps were planned and carried through as a composite whole. I cannot agree the Newco part of the transaction as a preliminary to the rest of the transaction"

Conclusion

In all the circumstances of this case and having regard to the authorities referred to above, it cannot be accepted that the reorganisation of P.W. Keane and Company Limited was effected in pursuance of a bona fide scheme of reconstruction as envisaged under s. 80.

Accordingly, your claim for relief is denied and a liability to ad valorem stamp duty arises on the transfer of the "A" business to Harrowby Limited and the "B" business to Ritaville Limited. To enable the stamp duty liability to be calculated you should furnish details of the assets comprising the "A" business and "B" business together with a valuation of the assets (including good will) transferred.

Please accept my apologies for the delay in responding to the matter.

Yours sincerely".

13. By letter dated 31st March, 2003, Messrs. O'Flynn Exhams and Partners, Solicitors, became involved in the correspondence with Mr. Carey. They wrote in the following terms:-

"Re: Patrick W. Keane and Company Limited

Dear Mr. Carey

We refer to your letter to PWC dated 13th February, 2003 and confirm that we are writing to you on behalf of the above named company, Ritaville Limited and Harrowby Limited.

We have sought advice from senior counsel and we enclose a copy of that advice dated 21st March, 2003.

You will see that the High Court has already examined the circumstances of this case and determined that the arrangement is a reconstruction. Accordingly, the issue is res judicata and that the determination of the High Court is binding on Revenue. Please now confirm that the relief provided for in s. 80 of the Stamp Duties Consolidation Act, 1999 applies. We should be grateful to hear from you as soon as conveniently possible as this matter Has been dragging on for some time.

Yours faithfully".

14. As indicated Messrs O'Flynn Exhams and Partners, letter of 31st March, 2003 enclosed the opinion of Mr. Bill Shipsey, S.C. In the course of that opinion Mr. Shipsey comments:-

"In all the cases cited by the Revenue, there has been no determination on the issue by court of competent jurisdiction. Accordingly, the case law cited by the Revenue is fundamentally different from the present case, as there has been a determination by an order of High Court in the present case."

15. He further states:-

"The High Court has already examined the circumstances in the present case and has determined that the arrangement is a reconstruction. In my opinion, the issue has been determined and now stands "*res judicata*"

16. The final letter of relevance in the course of correspondence was a response to Messrs. O'Flynn Exhams and Partners from a Mr. Ben Ryan, Administrative Officer in the Stamp Duty Interpretation Section of the Stamps Branch of the Revenue Commissioners, dated 3rd September, 2003. Again this is a somewhat lengthy letter. However, it is not necessary to set it out in its entirety. The arguments previously advanced by Mr. Seamus Carey in his letter of 13th February, 2003 to Price Waterhouse Coopers were reiterated and then, with respect to the contention that the issue was *res judicata*, the Revenue stated their position in the following terms.

"In relation to (ii) above (whether the matter is res judicata), the High Court decision of 2nd April, 2002 was made solely on the petition of the company (P.W. Keane and Company) For the matter to be res judicata it is required that the court has already decided the issue between the same parties. No petition was served on the Revenue Commissioners. P. W. Keane and Company did not take that course of action and chose instead to apply for s. 80, SDCA relief in the usual way (as per para. 8.1.1 of the agreement). Therefore the Revenue are free to deal with the matter de novo and are not bound by the decision of the High Court.

As the transaction is not a reconstruction with the meaning of s. 80 SDCA, the relief does not apply and the transaction is liable to *ad valorem* stamp duty. I trust that this clarifies the matter for you. Should you have any following queries, please do not hesitate to contact me.

Yours sincerely".

17. The letter of 3rd September, 2003 represented the Revenue's last word on the matter and in due course an assessment of stamp duty was raised in the sum of €631,846. That tax assessed was duly paid by Patrick W. Keane and Company Limited and by a letter dated 11th September, 2003 from Ernst and Young, Business Advisors, who were now representing the company, an appeal was lodged against the tax assessed on the grounds that no stamp duty was payable as a result of the application of s. 80 of the Stamp Duty Consolidation Act, 1999 and/or the amounts assessed were excessive.

18. The matter proceeded to hearing before an Appeal Commissioner who found in favour of the Revenue Commissioners. The Appeal Commissioner's decision was then appealed to the Circuit Court and the appeal was heard by his Honour Judge Moran in Cork on the 11th October, 2004. Both Patrick W. Keane and Company Ltd and the Revenue Commissioners, respectively, were represented by Senior Counsel instructed by the parties respective Solicitors. No oral evidence was heard and the matter was dealt with by way of the submissions of counsel based upon relevant documentation. Having heard the submissions of counsel on behalf of the company and the submissions of counsel on behalf of the Revenue Commissioners the learned Circuit Court judge came to the conclusion that, applying the test laid down by Buckley J. in *Re South African Supply and Cold Storage Company* [1904] 2 C.H. 268, the arrangements described in the documents constituted a "reconstruction" within the meaning of s. 80 of the 1999 Act. On the basis of the

documents before him the learned Circuit Court Judge concluded that substantially the same business was being conducted both before and after the transaction and the same persons were interested therein. In those circumstances he formed the view that the arrangement constituted a "reconstruction".

19. Immediately after the learned Circuit Court Judge delivered his judgment the Revenue Commissioners expressed dissatisfaction with his determination and requested him to state a case for the determination of this court pursuant to s. 941 of the Taxes Consolidation Act, 1997. The question posed is in the terms set out in the introduction to this judgment.

The appellant's submissions
20. Counsel for the appellant referred the court to the provisions of s. 203 of The Companies Act, 1963, and s. 80 of the Stamp Duties Consolidation Act, 1999 respectively.

21. It was submitted that the following passage from s. 203 is of relevance

> 203(1) "Where an application is made to the court under section 201 for the sanctioning of a compromise or arrangement proposed between a company and any such persons as are mentioned in that section, and it is shown to the court that the compromise or arrangement has been proposed for the purposes of or in connection with a scheme for the reconstruction of any company …"

22. The applicant contends that it is clear from the working of s.203 that the court can only make such orders where it is satisfied that the proposed compromise or arrangement is for the reconstruction or amalgamation of the company.

23. Section 80 of the Stamp Duties Consolidation Act, 1999 is entitled in the marginal note "Reconstructions or amalgamations of companies", and it provides for relief from stamp duty in the following terms:-

> "(2) Where it is shown to the satisfaction of the Commissioners that there exists a scheme for the *bona fide* reconstruction of any company or companies or the amalgamation of any companies and that, in connection with the scheme, there exist the following conditions, that is –
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> (three conditions (a), (b) and (c) are thereinafter listed)
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> then, subject to this section, stamp duty …….(under various headings specified) …….shall not be chargeable on any instrument made for the purposes of or in connection with the transfer of the undertaking or shares, or on any instrument made for the purposes of or in connection with the assignment to the acquiring company of any debts, secured or unsecured, of the target company".

24. Counsel for the appellant pointed out that what constitutes a reconstruction is not defined, either in s. 203 of the 1963 Act or in s. 80 of the 1999 Act. However, he submits that the respondents have not sought to argue that what constitutes a reconstruction within the meaning of s. 80 of the 1999 Act is any different to what constitutes a reconstruction within the meaning of s. 203 of the 1963 Act. Rather the respondents' argument is that the transaction in this case constitutes a partition and that a partition is not reconstruction. Counsel for the appellant contends that there was a determination as to the nature of the transaction in the course of the s. 203 proceedings and that, at the very least, the order of Kearns J. can be relied upon for guidance in determining whether the arrangement is a reconstruction or a partition. However, in the proceedings before this court there was a retreat from a proposition that the order of Kearns J. renders the issue *res judicata*. It was submitted before me that while the order of Kearns J. does not, strictly speaking, render the issue before this Honourable Court *res judicata*, that order was made in the exercise of an independent judicial function and, therefore, this Honourable Court is obliged to give due weight to that order.

25. It was further argued on behalf of the appellant that the respondents were wrong in suggesting that "a partition" and "reconstruction" are mutually exclusive things. Mr. Shipsey S.C. contended that this was a conceptually fallacious approach and that it was possible for a transaction to be both a partition and reconstruction. In his submission the present transaction constitutes a reconstruction on the most favourable construction of it from his point of view, but that even on the most unfavourable construction of it from his perspective it is possible to view the transaction as being both a partition and a reconstruction. The most important thing was that the same people should remain involved in the ownership of the business and that the nature of the business should remain unchanged. As Mr. Shipsey put it, the court has to look at the economic reality. In his submission the transaction presently under consideration has not altered the economic reality of the case.

26. Finally, counsel for the appellant contended that the case law relied upon by the respondents should be regarded with some circumspection in this jurisdiction. He submitted that while there are some similarities between the scheme *in Brooklands Selangor Holdings Limited v. The Inland Revenue Commissioners* [1970] 1WLR 429.and the scheme in the present case, there were also fundamental differences that distinguish the two. It was urged upon me that rather than relying upon English case law that can, at best, provide only limited guidance to courts in this jurisdiction, the correct approach would be to attach significant weight to the order of Kearns J. who dealt with the facts of the present case, and be guided by that.

The Respondents' submissions
27. It was submitted to me on behalf of the respondent that although s. 80 of the 1999 Act does not contain any definition of "reconstruction", its meaning has been considered on a number of occasions by the English Courts in the context of s. 55(1) of the Finance Act, 1927 (U.K.) upon which s. 80 is based. I will review the case law separately but at this stage it is sufficient to state that the following cases, inter alia, were particularly relied upon by the respondents.

1. *Brooklands Selangor Holdings Limited v. Inland Revenue Commissioners* [1971] WLR 429;

2. In *Re South African Supply and Cold Storage Company* [1904] Ch. D. 268;

3. *Baytrust Holdings Limited v. Inland Revenue Commissioners* [1971] 1 WLR 1333;

4. *Fallon v. Fellows* [2001] S.T.C. 1409;

5. *Swithland Investments Limited and Another v. Inland Revenue Commissioners* [1990] S.T.C. 448;

28. The respondents submit that these cases represent a consistent line of relevant authorities from the neighbouring jurisdiction and that, while they are not authorities in this jurisdiction, they ought to be regarded by me as being of significant persuasive influence. It

was submitted that I should follow the judicial reasoning in these cases and hold that a partition or division of a business cannot amount to a "reconstruction" within the meaning of s. 80 of the 1999 Act. It was further submitted that it is clear from a review of the documents in the present case that what occurred was a division of the business of the company between the members. Prior to that division taking place, there was a "streaming" of shares and assets. This forms the basis of the company's argument that in fact the same business is carried on by the same persons both before and after the transaction. However, the respondents submit that this argument overlooks the very central fact that the "streaming" of shares and assets was in itself an inherent part of the overall transaction, and that in those circumstances, despite the streaming the transaction was, in substance, a partition and not a reconstruction. In the view of the respondents the facts of the present case are virtually indistinguishable from the facts considered by Parke J. in England in *Fallon v. Fellows* [2001] S.T.C. 1409.

Review of the case law

29. The first case that requires to be considered is the case of *Brooklands Selangor Holdings Limited v. Inland Revenue Commissioners* [1970] 1 WLR 429. This involved an appeal by way of case stated from assessments to stamp duty upon (1) an increase in the nominal capital of the taxpayer company, Brooklands Selangor Holdings Limited and (2) a declaration of trust operating as a conveyance on sale and certain stock transfers in favour of that company. The basic underlying facts were as follows: a company known as Brooklands Selangor Rubber Company Limited, referred to as B.S.R., owned three rubber estates and also shares in certain subsidiary companies. A company known as Plantation Holdings Limited, referred to as P.H., acquired as part of a takeover transaction, 72% of the preference stock in B.S.R. and something over 50% of the ordinary stock of B.S.R. Differences arose between P.H. on the one hand, and the minority shareholders on the other hand, P.H. wanting to continue trading through the company and its subsidiaries and the minority wanting a quick realisation. In the event the parties agreed upon an arrangement whereby B.S.R. assets would be divided up. Under this arrangement B.S.R. was to retain certain of the estates and shares and the remainder of the estates and shares were to go to a new company in which the minority shareholders were to have the entire shareholding. The new company chosen for this purpose was the taxpayer Brooklands Selangor Holdings Limited, which I will refer to as B.S.H.. In order to comply with the requirements of company law the transaction could only be effected through the medium of a scheme of arrangement including a reduction of capital. Court approval was duly obtained and, pursuant to the approved arrangement, all of the shares in B.S.R. became vested in the majority shareholder P.H. and all of the shares in B.S.H. became invested in the minority shareholders. A question arose as to whether the transfers were exempt from stamp duty under s. 55 of the Finance Act, 1927. In the course of his judgment Pennycuick J. had this to say at p. 444:-

> "I will deal first with the question whether the transaction amounted to a reconstruction. In ordinary speech the word reconstruction is, I think, used to describe the refashioning of any object in such a way as to leave the basic character of the object unchanged. In relation to companies the word "reconstruction" has a fairly precise meaning which corresponds, so far as the subject matter allows, to its meaning in ordinary speech. It denotes the transfer of the undertaking or part thereof of the undertaking of an existing company to a new company with substantially the same persons as were members of the old company. On this point I was referred in particular to two cases the first being *Hooper v. Western Counties and South Wales Telephone Company Limited* (1892) 68 L.T 78. The question in that case was concerned with the meaning of reconstruction in a debenture issue. Chitty J. said, at p. 80:-
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> > "What is included in 'reconstruction' by persons conversant with company law? There is one mode of reconstruction, which may, perhaps, be said to be within the strict sense of the terms".
>
> He then gave a particular instance of what would be called reconstruction where a company continues to exist, and then went on:-
>
> > "The usual mode of reconstruction is when a company resolves to wind itself up, and proposes the formation of a new company, which is consist of the old shareholders, and to take over the old undertaking, the old shareholders receiving shares in the new company. In that case the old company ceases to exist in point of law, and there is in form a sale to the members of a new corporation. But the company is in substance, and may be fairly said to be, reconstructed".

30. Then a little lower down he quoted Lord Lindley on Law of Companies in this passage:-

> " 'reconstruction differs from amalgamation in that, as a rule, there is only one transferring company and the company to which the property in question is transferred is practically the same company with some alterations in its constitution."' Then he said "…that appears to me to afford a clue to the meaning of the word as used in a clause like the present".

31. In that passage Chitty J. put a very restricted meaning on the word 'reconstruction'. He said in terms that the new company is to consist of the older shareholders. No one, I think, now would put quite such a restricted meaning on the term as that.

32. The other case was In *Re South African Supply and Cold Storage Company Limited* [1904] 2 Ch. 268, where, again in a different context from the present case, Buckley J. had to consider the meaning of the term "reconstruction". He said, at p. 286:-

> "Then it remains to consider whether what was done was for the purpose of 'reconstruction or amalgamation'. What does 'reconstruction' mean? To my mind it means this. An undertaking of some definite kind is being carried on, and the conclusion is arrived at that it is not desirable to kill that undertaking, but that it is desirable to preserve it in some form, and to do so, not by selling it to an outsider who shall carry it on – that would be a mere sale – but in some altered form to continue the undertaking in such a manner as that the persons now carrying it on will substantially continue to carry it on. It involves, I think, that substantially the same business shall be carried on and substantially the same persons shall carry it on. But it does not involve that all the assets shall pass to the new company or resuscitated a company, or that all the shareholders of the old company shall be shareholders in the new company or resuscitated company. Substantially the business and the persons interested must be same".

33. So in that passage Buckley J. repeated in effect what was said by Chitty J. in the earlier case but he repeatedly inserted the qualification "substantial". I respectfully adopt that passage as an accurate statement of what is meant by the word "reconstruction", always, of course, in the absence of any controlling factor leading to some other meaning. To quote again the last sentence: "Substantially the business and the persons interested must be same".

34. Adopting the approach just outlined Pennycuick J. decided that the transaction with which he was concerned was not a reconstruction within the meaning of s. 55. In that regard he had this to at page 446 of the report:

> "Turning to the facts of the present case, the substance of the scheme is that the undertaking of B.S.R. is partitioned

between Plantation Holdings and the minority shareholders in proportions corresponding to their holdings of the ordinary stock of B.S.R., the preference stockholders being paid off. That partition, in order to comply with the requirements of company law, was carried out by the transfer of part of the undertaking of B.S.R. to the new company in consideration of stock in the transferee company i.e. the taxpayer, and the issue of that stock directly to the minority shareholders by way of reduction of capital. The effect of that transaction is that the holders of the stock in the taxpayer company are most substantially different from the holders of the stock in B.S.R. That is to say, they consist of approximately half only in value, though the vast majority in number, of the holders of the stock in B.S.R. So the transaction represents the transfer of a part of B.S.R.'s undertaking from the holders of the whole of the stock in BSR to the holders only of approximately half the stock in BSR. That, I think, involves a substantial alteration in the membership of the two companies within the meaning of the passages which I have quoted from the judgments of Chitty J. and Buckley J. It seems to me that that transaction is not a reconstruction and that a transfer made pursuant to that transaction falls neither within the letter nor within the intent of s. 55".

35. The case of In *Re South African Supply and Cold Storage Company* [1904] Ch. D. 268 was referred to in the judgment of Pennycuick J. from which I have just quoted. The facts of that case were very involved but insofar as they are relevant to the issue presently before me they may be summarized as follows. Clause 5 of the memorandum of association of the South African Supply and Cold Storage Company, Limited, provided, inter alia, that in the case of winding up for the purposes of reconstruction or amalgamation preference shareholders would be entitled to be paid a bonus of 15% on the par value of their preference shares in addition to the amount of capital paid up thereon and the said bonus should also rank in priority to any distribution upon any other shares in the capital of the company. Between 1902 and 1904 the South African Supply and Cold Storage Company Limited (the Supply Company) was party to a number of agreements with other companies (variously called by way of abbreviation the Australasian Company, the Imperial Company, and the Ocean Company) in the context of a major reorganisation of its business. Pursuant to these agreements the business, and the vast majority of the assets of the Supply Company, were taken over by another company called The Cold Storage Trust Limited (the Cold Storage Trust). Subsequently at an extraordinary meeting of the Supply Company a special resolution was passed and confirmed. It was resolved simply that the company should be wound up voluntarily. The resolution did not refer to any amalgamation or reconstruction. An action was brought by one Wilde, on behalf of himself and other preference shareholders of the Supply Company against that company and certain other parties seeking, inter alia, the determination of the question as to whether the preference shareholders were entitled to receive a bonus of 15% on the par value of their preference shares. The question was, therefore, whether there had been a winding up "for the purpose of reconstruction or amalgamation". Giving judgment in the matter Buckley J. stated:-

> "The only question I have to determine is whether … there has or has not been a winding up 'for the purpose of reconstruction or amalgamation'. Neither of these words, 'reconstruction' and 'amalgamation', has any definite legal meaning. Each is a commercial and not a legal term, and, even as a commercial term, bears no exact definite meaning. In each case one has to decide whether the transaction is such as that, in the meaning of commercial men, it is one which is comprehended in the term 'reconstruction' or 'amalgamation'. Beyond that, I have to consider whether the winding up is 'for the purpose' of reconstruction or amalgamation. I cannot answer that question simply by reading the resolutions for liquidations and seeing whether they are expressed to be "for the purpose" I have named; I must go further and ascertain whether, as a matter of substance and of fact, the winding up was arrived at for one of those purposes".

36. In the event Buckley J. arrived at the view that there had been a reconstruction of the Supply company. The legal ratio of the case is largely encapsulated in the quotation from the judgment of Buckley J. cited with approval by Pennycuick J. in the Brooklands Selangor Holdings case and it is not necessary for me to repeat it again. However, Buckley J then applied those principles to the facts of the case before him and in doing so stated:-

> "Now let us see what has happened in this case. First, as regards the Supply company. By virtue of its two sales – first, to the Australasian Company for shares and stock of that company, and, secondly, by the sale of all of those shares and all the Supply company's other assets to the Cold Storage Trust for all the share capital of the lastly named company – the Supply Company (by which I mean that corporation) became entitled to all the shares in the Cold Storage Trust, which represented all the assets of the Supply Company with the trifling exception (having regard to the figures) of this £295,085. The Supply company had the power by using Clause 159 of its articles of association to hold all those shares in the Cold Storage Trust as a corporator, and distribute them amongst the coporators of the Supply Company; and in point of fact, by a resolution of November 20th, 1903 the company resolved to divide the 618,000 shares amongst its ordinary shareholders. The result is that the undertaking which it had theretofore carried on is found reproduced in the hands of another corporation, the Cold Storage Trust, and the Supply Company now has, and by virtue of its powers can give to its corporators the right to be all the corporators of the Cold Storage Trust. To my mind, that is a reconstruction of the Supply Company. You cannot say that it is an amalgamation for this reason, that the Cold Storage Trust had nothing to bring into an amalgamation. It had not a business of its own, but was acquiring its business by this purchase. It comes into existence as a company which is a reproduction, in a new form, of the Supply Company. That, I think, is a reconstruction of the Supply Company".

37. The court was also referred to *Baytrust Holdings Limited v. Inland Revenue Commissioner* and the related case of *Thomas Firth and John Brown (Investments) Limited v. Inland Revenue Commissioners.* These cases are reported as [1971] 1 WLR 1333. These were conjoined appeals against assessments to share capital duty and ad valorem stamp duty arising from the transactions hereinafter described. A company known as Thomas Firth Limited was the parent and holding company of a group of manufacturing companies in the steel industry. In 1963 it held certain trade investments as a minority shareholder and a considerable sum of cash surplus to its requirements which it decided to hive of by causing them to be transferred to a wholly owned subsidiary Nitralloy Limited (later renamed as Baytrust Holdings Limited), the first taxpayer, in exchange for newly created shares in Nitralloy Limited and then by selling the whole issued capital of Nitralloy Limited to a newly formed company Thomas Firth and John Brown (Investments) Limited, the second named taxpayer, for shares in that company which were to be issued to the shareholders of Thomas Firth Limited. However, prior to the creation and transfer of the new shares in Nitralloy Limited, Thomas Firth Limited had already contracted to sell its holdings in Nitralloy Limited to the new company and prior to the issue of the shares in the new company Thomas Firth Limited was already bound to allot those shares to its own shareholders. The taxpayer companies contended that the whole operation amounted to a scheme for the reconstruction of Thomas Firth Limited and that they were therefore entitled to an exemption from share capital duty and ad valorem stamp duty under s. 55 of the Finance Act, 1927. The appeals were heard by Ploughman J. In the course of his judgment he identified a number of questions in each appeal which required to be determined. With respect to the first appeal he was of the view that in relation to s. 55 the following questions arose

> 1. Was the scheme in question a scheme for the reconstruction of Thomas Firth?
>
> 2. Did the trade investments which Thomas Firth transferred to Nitralloy form part of the undertaking of Thomas Firth

38. Similarly, in relation to the second appeal

> 1. Was the scheme in question a scheme for the reconstruction of Thomas Firth?
>
> 2. Did the shares in Nitralloy which Thomas Firth transferred to the new company or the cash which Thomas Firth paid to the new company form part of the undertaking of Thomas Firth?

39. In the course of his judgment Ploughman J. dealt with these issues as follows:-

> "I turn now to the first of the questions which I narrated earlier on: was the scheme in question a scheme for the reconstruction of Thomas Firth? The word 'reconstruction' is not defined by the Finance Act, 1927. It is not a term of art and has no technical meaning in law, and even as a commercial term it bears no exact meaning: see *Hooper v. Western Counties and South Wales Telephone Co Ltd* [1892] 68 L.T.7.8., 80, per Chitty J. and In *Re South African Supply and Cold Storage Co* [1904] 2 Ch. 268, 281, per Buckley J.. I was referred to a number of text books on company law but they expressed no unanimity as to the meaning of the word and were not, I think, of any real assistance.
>
> If one considers the position of Thomas Firth at the end of the day and compares it with the position before the scheme was initiated, what does one find? The objects and the business of Thomas Firth were the same; its nominal and issued capital were the same; the ordinary shareholders were the same; their rights as shareholders were the same. All that happened, in effect, was that certain assets which were not required by Thomas Firth for employment in its business had been passed on to its shareholders in the form of shares in the new company. It would not, in my judgment, be an ordinary use of language to say that, in those circumstances, Thomas Firth had been reconstructed.
>
> I was referred to certain authority on the meaning of 'reconstruction', but I need only refer to the decision of Pennycuick J. in *Brooklands Selangor Holdings Limited v. Inland Revenue Commissioners* [1971] 1 WLR 429, where the earlier cases are reviewed."

40. Ploughman J. then went on to quote extensively from that case and the relevant quotations have already been recited earlier in this judgment. Having done so he continued as follows:-

> "… it comes to this: that a reconstruction normally involves the transfer of a company's undertaking (or part of it) to a new company which is going to carry on substantially the same business as the business transferred to it. It is apparent, therefore, that the question of reconstruction or no reconstruction is closely bound up with the second question which I have to consider; namely, whether Thomas Firth transferred any part of its undertaking to Nitralloy. I shall come to that in a moment, pausing here only to say that I see nothing in the Brooklands Selangor case which is inconsistent with the prima facie view I have already expressed that there was no scheme of reconstruction in the present case.
>
> The second question to which I referred earlier in this judgment was as follows: Did the trade investments (namely, the shares in British Acheson and High Speed) which Thomas Firth transferred to Nitralloy form part of the undertaking of Thomas Hurst?" …..
>
> ……." The word 'undertaking' in my judgment, denotes the business or enterprise undertaken by a company and while Thomas Firth holdings of British Acheson and High Speed shares were no doubt required in the course of Thomas Firth's business, they were not, in my judgment, a part of that business. A greengrocers business is no doubt to sell fruit, but the pound of apples which you buy can hardly be described as a purchase of part of the greengrocer's business. If this right, it is a fortiori that the scheme undertaken by Thomas Firth was not a scheme for its reconstruction since it did not involve a transfer of any part of Thomas Firth's undertaking, and I answer the… questions which I enumerated earlier in the negative".

41. Another important case to which I was referred is the case of *Fallon and Another (executors of Morgan, deceased) v. Fellows (Inspector of Taxes)* [2001] S.T.C. 1409. This case concerned a limited company known as J. Fox and R. H. Morgan Limited (hereinafter called F. & M.) which carried on business through several divisions, one of which carried on a locks business and the other the business of pressings. There were two groups of shareholders of approximately equal size, the leading member of one group was a Mr Norman Morgan (hereinafter N.M)., and the leading member of the other group was a Mr Barrie Morgan (hereinafter B.M.). The wish of the shareholders was that the company and its businesses should be divided, with the N.M. group taking the locks division and the B.M. group taking the pressings division. In April, 1980 two shelf companies were acquired and renamed "Locks" and "R.H. Morgan" respectively. The share capital of F. & M. was reorganised. The shares owned by N. M. and his group of shareholders became "A" shares and those owned by B.M. and his group became "B" shares. The "A" shares had rights which were streamed through F. & M. to the underlying business of the locks division; and "B" shares had rights which were streamed through to the underlying businesses of the pressings division. F. & M. was put into liquidation. The liquidator transferred the undertaking and assets of the locks division to Locks in consideration of shares in Locks which were issued directly to N.M. and the other "A" shareholders in F. & M.; and transferred the undertakings and assets of the pressings division to R.H. Morgan in consideration of shares in R.H. Morgan which were issued directly to B.M. and the other "B" shareholders in F. & M. In 1987 N. M and his wife disposed of their shares in Locks for about £1.5 m. The revenue assessed N.M. to capital gains tax on the disposal on the basis that the base value of the shares in Locks was the base value in the shares of F. & M. since the shares in Locks had been acquired under an arrangement within the meaning of s. 86 of the Capital Gains Act, 1979. Section 86 applied, *inter alia*, where an arrangement was entered into between a company and the persons holding shares in it or any class of such shares, for the purposes of or in connection with a scheme of reconstruction; and under the arrangement another company issues shares to those persons in respect of and in proportion to their holdings of shares in the first company. In such circumstances those persons were to be treated as exchanging the first mentioned shares for those held by them in consequence of the arrangement. N.M. having died, his executors appealed contending that s. 86 did not apply as there had been no reconstruction, F. & M. having being partitioned between the two companies, and that although by concession the revenue had not charged capital gains tax on that disposal of F. & M. shares in 1980 that concession had not altered the legal position as to the base value of the Locks shares which was their market value in 1980. The Special Commissioners held that there had been a reconstruction within the meaning of s. 86 and dismissed the appeal and the executors further appealed to the High Court. The case was heard before Parke J. in the Chancery Division. In a lengthy judgment Park J. reviewed the case law at some length and referred in particular to the concept of reconstruction for stamp duty purposes. Referring to what he described as the "frequently quoted passage" from the judgment of in Buckley J. in *Re South African Supply and Cold Storage Company* [1904] 2 Ch. 268 at 286 (referred to earlier in the present judgment) he stated:-

> "In the context I think it is clear that, when the learned judge referred to the persons carrying on an undertaking, he had in mind the shareholders who were carrying it on through a corporate body. He was referring to persons carrying on an

undertaking in the sense of owning it, not in the sense of being involved in the management and conduct of the business operations. The basic concept is that one starts with a group of shareholders who own a business through one corporate vehicle, and one ends with the same group of shareholders or substantially the same group of shareholders, who own the same business or substantially the same business, still through a corporate vehicle, but now through a different corporate vehicle. The concept of a reconstruction has been considered in several stamp duties cases, but the only one which I need to examine in any depth is *Brooklands Selangor Holdings Limited v. I.R.C* [1970] 1 WLR 429".

42. Park J. went on to summarise the facts in the Brooklands case and to quote the passage from the judgment of Pennycuick J. to which I have already referred. Park J. then stated:-

> "Brooklands Selangor Holdings Limited v. I.R.C. was not a capital gains tax case, but it had important implications for capital gains tax, or at least was thought to have them at the time. It appeared to show that, if the shareholders in a company wanted, for purely commercial reasons, to partition its activities between themselves, there was no natural way of doing it without throwing up capital gains tax charges, both for the shareholders and for the company."
>
> …
>
> "The Revenue, to their great credit, recognised this, and did something about it. They did not amend the law in any respect, but instead they issued a press release which described a procedure which would bring about the partition of a company and which, so far as the capital gains tax reliefs were concerned, would in practice be treated as a scheme of reconstruction."
>
> …
>
> "After the issue of the press release partitions carried out in the manner described by it became common. They were frequently referred to by practitioners in this field as 'press release reconstructions'.
>
> F. & M. was a classic subject matter for a press release reconstruction."

43. Parke J. then considered in some detail the facts of the case and the ruling of the Special Commissioners. He concluded that he was unable to derive much assistance from the commissioners' analysis of the case and that he was therefore required to approach it largely *de novo* and form his own conclusions. I regard Parke J.'s analysis as particularly helpful and I therefore propose to recite it in full.

> "The critical question is whether s. 86 of the 1979 Act, which the revenue certainly applied to the 1980 transaction, applied to it as a matter of law or only as matter of concessionary practice. The question reduces to whether the events that happened were, as the commissioners held, a scheme of reconstruction in law. On behalf of the taxpayer, Mr. Massey advances two reasons why the commissioners were wrong, and why the events were not a scheme of reconstruction. I do not agree with his first reason, but I do agree with his second.
>
> The first reason is that the concept of a reconstruction postulates the reconstruction of a single company into another single company, and anything more complicated than that though certainly a scheme, is not a scheme of reconstruction. In this case the starting position was a single company, F. & M., but the end position was that its activities were divided between two companies, Locks and R.H. Morgan. Mr. Massey says that that cannot have been a reconstruction. I cannot agree."

44. I accept that in the 19th Century case of H*ooper v. Western Counties and South Wales Telephone Co Ltd* (1892) 86 L.T. 78, Chitty J. gave a description of reconstruction in terms which assumed that one company was being reconstructed into a single successor company. I also accept that, in the passage from the judgment of Buckley J. in the *South African Supply and Cold Storage* case which I have already quoted, the judge discussed the position on the basis of the successor company being 'the new or resuscitated company' in the singular. However, the facts of those cases concerns reconstructions from one predecessor company into one successor company, and it was natural that the judges analysed the concept in the ways that they did. It would be entirely wrong to regard their expositions as ossifying the law and ruling out the possibility that there could be a reconstruction in law where the movement is from one Predecessor Company to two or more successor companies. It is interesting to note, that, in *Brooklands Selangor Holdings* [1970] 1 WLR 429 at 445 Pennycuick J. noted a statement of Chitty J. in *Hooper v. Western Counties* about a rather different aspect of the meaning of reconstruction in this context, and commented: 'No one, I think, now would put quite such a restricted meaning on the term as that'. In the *Brooklands Selangor Holdings* case itself there was one company before the reorganisation and there were two companies after it. It is true that Pennycuick J. held that there had not been a reconstruction but that was because the essence of the transaction was a partition, not because it was legally impossible for a movement from one predecessor company to two successor companies to rank as a reconstruction.

45. Further, the capital gains tax provision which applies to the company rather to than to the shareholders (s. 267 of the 1970 Act at the time of the transaction involved in this case) contemplates that there can be a reconstruction when what is transferred may be the whole or part of the business of the company which is being reconstructed. Where what is transferred is only part of the business it will almost always be the case that business activities which were previously carried on by one company will thereafter be carried on by two companies.

46. For those reasons I do not accept Mr. Massey's first argument. In my opinion, however, his second argument has much more to commend it. Mr. Furness has suggested a possible refutation of the argument which I will examine carefully, below, but the subject to that, I agree with it. The argument is that the transactions in this case were a partition, and on the authority of Brooklands Selangor Holdings they could not be a reconstruction.

47. The problem in the *Brooklands Selangor Holdings* case was that, before the scheme, the majority and the minority shareholders were all, through a corporate structure, carrying on both the main business and the lesser activities, but, after the scheme, the majority shareholders were not, through a corporate structure, carrying on the lesser activities, and the minority shareholders were not, through a corporate structure, carrying on the main business. It was the same in this case. Before the scheme all the shareholders – the Norman Morgan group of shareholders and the Barrie Morgan group of shareholders – were, through a corporate structure consisting of F. & M. and a subsidiary, carrying on all the businesses of both the locks division and the pressings division. However, after the scheme, although the Norman Morgan Group of shareholders were, through a corporate structure consisting of locks, carrying on the business of the locks division, they were not, through the corporate structure which consisted of R.H. Morgan and a subsidiary, carrying on any of the businesses of the pressings division. *Mutatis Mutandis* the same applied to the Barrie Morgan

Group of shareholders.

48. It would have been different if all the shareholders – the Norman Morgan Group and the Barrie Morgan Group – owned all the shares in both successor companies, but they did not. The detailed mechanics of the scheme in the Brooklands Selangor Holdings case were different from those adopted in this case, but the fundamental point remains that the essence of the scheme in this case, as in Brooklands Selangor Holdings, was a partition. As such it was not a reconstruction. Such as Mr. Massey's second argument, and subject to Mr Furness's and reputation of it, I agree with it.

49. I need now to consider Mr. Furness's argument. It rests entirely on the feature whereby, before F. & M. was placed into liquidation and the liquidator transferred its business to the successor companies, the F. & M. shares were reorganised into A and B shares, with the A shares having rights streamed to the locks division, and B shares having rights streamed to the pressing division. I believe that, if that had not been done, Mr. Furness would accept that Mr. Massey is right. I doubt that the Revenue accepted that at all times in the past, but I think that, through Mr. Furness, they would accept it now. The argument is that, because of the streaming of the share rights, the shareholders who, through a corporate structure, carried on the locks divisions were the A shareholders to the exclusion of the B shareholders, and after the scheme those same shareholders, through the new corporate structure consisting of Locks, similarly carried on the locks division to the exclusion of the former B shareholders in F. & M. Mutatis Mutandis the same applied to the B shareholders and the pressings division.

50. There is no existing authority on this point. I could see a lot of force in Mr. Furness's argument if the A shares/ B shares structure had been in existence for some time but was not itself part of the scheme. But that was not the case. The reclassification of the shares into A and B shares with streamed rights was a step in the scheme. It was a purely transient feature, and was merely a piece of mechanics built into the scheme as whole. The documents and the commissioner's decision do not record for how long the A and B shares existed before the two divisions were transferred to the two successor companies but I hazard the suggestion that it was probably no longer than about half an hour.

51. The judgment of Buckley J. in the *South African Supply and Cold Storage* case speaks in terms of the business and the persons carrying it on (in the sense of the shareholders interested in the business through their shareholdings in the corporate structure) being "substantially … the same". I ask in this case whether the fact that for a very brief time the Norman Morgan Group of shareholders had had shares in F. & M. which were streamed to the locks division to the exclusion of the pressing division meant that in substance they, through corporate structures, were the persons who carried on the locks division business both before and after the restructuring. I say that the answer is obvious: no. The reclassification of the F. & M. shares into A and B shares was part of the scheme. It was not the situation which already existed when the scheme was adopted. In substance the persons who, through a corporate structure, carried on the locks business before the scheme were all the shareholders in F. & M, including the Barrie Morgan Group as well as the Norman Morgan Group. In substance the persons who, through a corporate structure carried on the locks business after the scheme were the Norman Morgan Group of shareholders to the exclusion of the Barry Morgan Group. The sets of person who, before and after, carried on the locks business were not in substance the same.

52. In my opinion it is certainly appropriate to regard the scheme in this case as beginning with F. & M. in its original condition, with ordinary and preference shares, but without the further classifications into A and B ordinary and preference shares. I agree with Mr. Massey that this is supported by the following passage from the judgment of Ferris J. in *Swithland Investments Limited v. IRC* [1990] S.T.C. 448 at 449.

> "In my judgment the transaction which I ought to look at in order to see whether there has been a reconstruction here is the wider transaction as contended for by counsel for the commissioners. It does not seem to me to be correct to try to separate the Newco part of the transaction from the rest, when, as letter F makes clear, all the steps were planned and carried through as a composite whole. I cannot regard the Newco part of the transaction as a preliminary to the rest of the transaction."

53. For those reasons I am unable to accept Mr. Furness's argument, The commissioners appear to have accepted a variant of it, which was not the way in which it had been advanced to them by Mr. Furness. They said that, because it was the Norman Morgan Group who, before the scheme, were involved in the management and running of the locks business that sufficed to meet the necessity for substantially the same persons, before and after, to be the persons carrying on that particular business. Mr. Furness does not support this part of the reasoning of the commissioners. He accepts that the cases look not to management participation in a particular business, but to shareholder participation. I agree with Mr. Furness on this, and I cannot agree with the commissioner's decision.

Conclusion
54. For the reasons which I have explained I respectively disagree with the commissioners. In my opinion the 1980 transaction by which Mr and Mrs Morgan acquired their shares in Locks was not a scheme of reconstruction …. ."

55. The court was also referred to the case of *Swithland Investments Limited v. I.R.C.* [1990] STC 448. In that appeal the shares of Swithland Estates Ltd (hereinafter the existing company) were held as to 90% by a husband and wife and as to 10% by a minority shareholder. All the shareholders wished to accept an offer by another company Whitbread Plc (hereinafter the purchaser) to acquire the greater part of the undertaking of the existing company. However, the husband and wife wanted to invest the proceeds in a new licensed premises and also in an arable farming business, whereas the minority shareholder wanted to withdraw some of his proceeds and invest the balance in a new licensed premises. Accordingly three new companies were formed. The first was Newco. The existing company transferred to Newco all the assets which the purchaser wanted to purchase and then sold to the purchaser for cash all the shares in Newco. The second new company was Swithland Investments Ltd (hereinafter Investments) who acquired all the shares of the husband and wife in the existing company in consideration of shares in Investments. The third new company was Swithland Leisure Ltd (hereinafter Leisure) and the minority shareholder transferred his shares in the existing company to Leisure in consideration of shares in Leisure and a cash payment. Investments then transferred to Leisure some of the shares in the existing company which it had acquired from the husband and wife in return for shares in Leisure. Leisure then sold to Investments the shares it had acquired from the minority shareholder and the shares it had earlier acquired from Investments in consideration of a cash payment. The Commissioners of Inland Revenue contended that transfers in question attracted stamp duty but the taxpayer companies contended that they were exempt by virtue of s. 55 of the Finance Act, 1927. Ferris J., adopting and following the approach of Pennycuick J. in *Brooklands Selangor Holdings Limited v. I.R.C.*, held that the exclusion of the minority shareholder from the existing company, and the exclusion of the husband and wife from the cash paid to the minority shareholder, together with the new proportionate interests in Leisure, meant that the transaction was a partition and not a reconstruction and was, in effect, a partition of the assets in the existing company.

(The court was also referred to two other cases, although I did not find these to be of significant assistance. However, for

completeness they were *In Re Bowling and Welby's Contract* [1895] 1 Ch. 663; and *Russian and English Bank and Florence Montefiore Guedalla –v- Bearing Brothers and Company Limited,* [1936] AC 405.)

Decision

56. Section 80 of the Stamp Duties Consolidation Act 1999 provides that stamp duty under various headings shall not be chargeable in the case of a "*bona fide* reconstruction of any company or companies" or "the amalgamation of any companies", subject to the satisfaction of the other conditions for qualification that are set out in the section. While I agree with the statement of Buckley J. in *Re South African Supply and Cold Storage Company* that in their common commercial usage neither of the word "reconstruction" nor the word "amalgamation" has any definite legal meaning, it does seem to me that they must nevertheless be construed in a manner that is consistent with the objective of the statutory provision under consideration. Having carefully considered s. 80 of the Stamp Duties Consolidation Act, 1999, in its entirety, and with due regard for its place within the scheme of legislation that finds expression in that Act, I am satisfied that the apparent purpose of s. 80 is to grant relief against stamp duty charges where the underlying ownership of the undertaking transferred remains substantially unaltered.

57. I adopt and approve of the words of Pennycuick J. in *Brooklands Selangor Holdings Limited v. I.R.C.* when he said that the word reconstruction denoted "the transfer of the undertaking or part of the undertaking of an existing company to a new company with substantially the same persons as members, as were members of the old company".

58. As previously rehearsed, Pennycuick J. in turn adopted the oft quoted passage from Buckley J. in *Re South African Supply and Cold Storage Company*, (at p. 286 of the report, beginning with the question, "What does 'reconstruction' mean?") as an accurate statement of what is meant by the word "reconstruction". With respect to the word "reconstruction" Buckley J. was of the view that "substantially the business and the persons interested must be same", and I agree with him. Buckley J's approach was that in each case one has to decide whether the transaction is such that, in the meaning of commercial men, it is one that is comprehended in the term "reconstruction" (or "amalgamation", as the case may be).

59. The quotation from the judgment of Buckley J adopted by Pennycuick J was referred to specifically in the lengthy letter of 13th February, 2003 from Mr. Carey to Price Waterhouse Coopers, and at all times has been heavily relied upon by the respondent. I, in turn, approve of it as correctly representing the law in this jurisdiction.

60. I further adopt and approve of the comments of Parke J. with respect to it *in Fallon v. Fellows* as follows:-

> "… I think it is clear that, when the learned judge referred to the persons carrying on an undertaking he had in mind the shareholders who were carrying it on through a corporate body. He was referring to persons carrying on an undertaking in the sense of owning, not in the sense of being involved in the management and conduct of the business operations. The basic concept is that one starts with a group of shareholders who own a business through one corporate vehicle, and one ends with the same group of shareholders or substantially the same group of shareholders, who own the same business or substantially the same business, still through a corporate vehicle but now through a different corporate vehicle."

61. Adopting that approach for the purposes of this case I find that I cannot agree with the submissions urged upon me by counsel for the appellant. I do not accept that for the purposes of s. 80 of the Stamp Duty Consolidation Act, 1999 a transaction can be both a partition and a reconstruction. I don't consider that to be a tenable proposition. It seems to me that the scheme of arrangement in this case was either a scheme for the bona fide reconstruction of Patrick W. Keane and Company Limited, in which case it may qualify for relief under s. 80 subject to satisfaction of the other statutory requirements; or it was a scheme for the partition of Patrick W. Keane and Company Limited, in which case it cannot qualify for relief under the section. For the reasons hereinafter set out I come to the conclusion that the transaction in this case involved a partitioning of the company rather than a *bona fide* reconstruction of the company.

62. In the present case I have come to the conclusion, on the balance of probabilities, that the initial agreement giving rise to the "streaming" of shares and assets, taking place as it did only a month (approximately) before the agreement of the 23rd of November 2001, was neither coincidental nor unrelated to the second transaction. Rather the "streaming" of shares and assets was an inherent part of an overall transaction, and in that regard the facts of the present case, on one view of it, are somewhat similar to the facts in *Fallon –v- Fellows*. I have to say that I found the judgment of Parke J. in *Fallon v. Fellows*, to be particularly helpful and I find the logic of his decision to be unassailable. However, I do not agree with the submission of the respondent that the facts of the present case are virtually indistinguishable from the facts in *Fallon v. Fellows*. I have already acknowledged there are similarities between the two cases but there is one important feature of the transaction that I have had to consider that is not replicated in the *Fallon v. Fellows* case. That feature is the existence of the "E" shares.

63. The appellant company makes the case that the existence of the "E" shares means that both before and after the scheme of arrangement, the company and each of Harrowby Limited and Ritaville Limited continued to have the same shareholders and that, accordingly, the business carried on before the scheme was the same as the business carried on after the scheme, and the persons interested remained the same.

64. Superficially, this is an attractive argument. However, the respondents make the case that there is no substance to it. The respondent says that the "E" shareholders are shareholders in name only. They do not, in fact, have any stake in the business in the way that one would ordinarily expect in the case of a shareholder. The "E" shareholders are not entitled to attend general meetings; they are not entitled to vote; they are not entitled to obtain copies of the company's accounts; they have no right to appoint directors, they are not entitled to any distribution save such distribution as might be approved by the company at general meetings (which, it is reiterated, they have no right to attend, participate in or vote at). In fact their only real entitlement is to a return of capital on winding up, so say the respondents. The respondents say it is quite clear that they have no interest in any part of the business of the company, or of Harrowby Limited ,or of Ritaville Limited, while those companies continue in business.

65. I think the respondents make an important point. I acknowledge the correctness of the appellant's submission that in considering whether or not the transaction at issue in this case constitutes a bona fide reconstruction or a partition I am not to be concerned with the entitlement of interested parties to participate in management. Rather, the focus of my concern must rest instead on the ownership of the undertaking or undertakings in question. Nevertheless, I consider that to avail of the s.80 exemption the quality of ownership enjoyed by a party claiming that exemption must be real and meaningful and not merely technical. I am driven to the conclusion in this case that the "E" class of shares are a contrivance whose sole purpose was to "technically" qualify the transaction as a reconstruction so that Patrick W. Keane and Company Limited, and the owners thereof, might seek to avail of the exemption in s. 80 of the Stamp Duty Consolidation Act, 1999. In reality, therefore, what we have here is a partition that is being dressed up to look like a reconstruction. Accordingly in my view it is not a "*bona fide*" scheme of reconstruction for the purposes of s. 80 of the Stamp Duties Consolidation Act, 1999. Even if it is, technically speaking, a reconstruction (and I do not agree that it is) it would in any

event almost certainly fall foul of s. 80 subs. 4 of the 1999 Act which provides that s. 80 shall not apply unless the scheme of reconstruction is effected for bona fide commercial reasons and does not form part of a scheme or arrangement of which the main purpose, or one of the main purposes, is avoidance of liability to tax including stamp duty.

66. Finally, I should say that I do not consider that the doctrine of *res judicata* has any application in this case. The proceedings before Mr. Justice Kearns were proceedings under a completely different statutory code to the proceedings in the present case and were not proceedings between the same parties. Accordingly, no question of *res judicata* or issue estoppel can arise. Moreover, with respect to the submission that I should be guided by Kearns J's view of the transaction I think it would be wrong to attach undue weight to it in the particular circumstances of the case. Even assuming that a "reconstruction" is the same thing for the purposes of company law and revenue law (and I am not to be taken as deciding that) the proceedings before Kearns J took the form of an unopposed petition and, unlike the situation in the present case, there was no *contradictor* with respect to the proposition that the transaction was properly to be characterised as a reconstruction.

67. In conclusion, it remains for me to specifically address the question posed in the case stated. This court was asked "Does the arrangement in the present case constitute a *'reconstruction'* within the meaning of s. 80 of the Stamp Duties Consolidation Act, 1999?" In my opinion the answer to that question must be"No".