AN COIMISIÚN UM ACHOMHAIRC CHÁNACH
TAX APPEALS COMMISSION

70TACD2024

Between

[redacted]

Appellant

and

THE REVENUE COMMISSIONERS

Respondent

Determination

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Introduction

1. This matter comes before the Tax Appeals Commission (hereinafter "the Commission") as an appeal against a Notice of Amended Assessment to Capital Gains Tax ("CGT") raised by the Revenue Commissioners ("the Respondent") on 29th March 2023. The Assessment relates to the year of assessment 2018 and the quantum of tax at issue is €670,926 exclusive of interest and penalties. The Appellant makes his appeal in accordance with the provisions of section 945 of the Taxes Consolidation Act 1997, as amended ("TCA 1997").

2. The appeal relates to the consideration of whether certain loan notes disposed of by the Appellant constitute a "debt on security" within the meaning of section 541 TCA 1997 and as such, whether the Appellant was entitled to claim loss relief on their disposal.

Background

3. The Appellant, together with his son, owned 100% of the issued ordinary share capital of a company known as [redacted]. [redacted] was incorporated on [redacted] and the principal object of the company was "*to carry on the business of* [redacted] *and other related activities thereon*". [redacted] had an authorised share capital of 1,000,000 €1 shares and an issued share capital of 100 €1 ordinary shares from the date of incorporation to the date of its sale in 2018.

4. From the date [redacted] commenced its trading activities to 2nd August 2013, the Appellant had advanced sums totalling €1,281,237 from his own resources to [redacted] in the form of a director's loan. On the latter date, the Appellant entered into a Convertible Loan Agreement ("the CLA") with [redacted]. It was a term of the CLA that the Appellant would provide finance to [redacted] by way of monetary loans. These loans were to include the sum of €1,281,237 which the Appellant had previously advanced to [redacted] in the form of his director's loan and future unspecified amounts necessary for the operation of [redacted]s trade.

5. Between 2nd August 2013 and 31st December 2017, the Appellant advanced a further €942,678 to [redacted] and it made repayments on the loan of €88,724 to him. As a result of these advances and repayments, [redacted] owed the Appellant the sum of €2,135,191 as at 31st December 2017.

6. On 10th December 2018, the Appellant entered into an agreement with a third-party purchaser, Mr [redacted], to dispose of his entire issued share capital in [redacted] at par value. The day following, on 11th December 2018, the Appellant assigned his rights under the CLA to the same third-party purchaser for the sum of €21,350. Given the loan balance

outstanding on the CLA as at the date of sale was €2,135,000, the Appellant incurred a loss in 2018 of €2,113,650 on the disposal of the CLA.

7. As the Appellant had a chargeable gain in 2018 on the disposal of his shareholding in a separate and distinct company, [redacted] (which is discussed below) he claimed the loss incurred on the disposal of the CLA in calculating his chargeable gains and CGT liability for 2018. Within the Appellant's CGT computation for 2018, he advised the Respondent that he was claiming a CGT loss on the disposal of the CLA as being allowable on the grounds it constituted a "debt on security".

8. Following receipt of the Appellant's 2018 Income Tax Return, which contained details of the Appellant's CGT calculations for 2018, the Respondent instigated an aspect query into the Appellant's CGT position for 2018 on 21st March 2022. The Appellant's taxation agent, [redacted], replied to that correspondence on 28 h April 2022.

9. On 17th May 2022, the Respondent sought information and documentation from the Appellant's agent. In particular, the Respondent requested information as to how the balance owed to the Appellant under the CLA had accrued together with a copy of documentation which included a copy of the CLA and the Deed of Assignment in respect of the disposal of the CLA. Within the reply from the Appellant's agent, on 17th June 2022, enclosing that documentation, it explained the Appellant's motivation for engaging in the CLA as follows:

> *"The convertible loan agreement ("CLA") was considered to be the most suitable option by* [redacted] *at that time as the benefits of this form of investment asset included security of investment, flexibility in terms of repayment, a marketable asset capable of transfer at value with an option of converting to ordinary share capital.*"

10. Subsequent correspondence ensued between the Appellant and the Respondent. On 7th March 2023, the Respondent wrote to the Appellant's agent as follows:

> "*…Revenue does not accept that your rights under the Convertible Loan Agreement ("CLA") between you and* [redacted] *amount to a 'debt on a security'. On this basis, we do not accept that an allowable loss of €2,113,650 arose on this assignment of your rights under the CLA….*
>
> *In the event that it is argued that the rights under the CLA do amount to a 'debt on a security', Revenue does not accept that the losses would be allowable pursuant to Section 546A TCA 1997 on the basis that we believe the loss accrues to you 'directly or indirectly in consequence of, or otherwise in connection with, any arrangements,*

and the main purpose, or one of the main purposes, of the arrangements is to secure a tax advantage…"

11. As noted above, the Respondent issued its Notice of Amended Assessment to CGT on 29th March 2023 which reflected its position that the losses derived from the disposal of the CLA were not allowable for CGT purposes. The overall CGT liability shown on the Amended Notice was €759,371. However, as the Appellant had previously discharged the sum of €88,445 in respect of his 2018 CGT liability, the net amount due and owing by the Appellant was in the sum of €670,926, before the imposition of interest and penalty.

12. The Appellant's agent lodged a Notice of Appeal to the Commission on 28th April 2023. The Appellant's appeal was heard over two dates on 23rd and 27th February 2024. The Appellant was represented by Senior Counsel and his solicitor. In addition, the Commissioner heard sworn evidence from the Appellant, his son, [redacted] accountant and its expert witness. The Respondent was represented by Senior and Junior Counsel, its solicitor and two members of its staff.

Documentation Presented to the Commission

13. Included in the documentation presented to the Commission was the following:

    13.1. A copy of the CLA dated 2nd August 2013. This agreement was entered into, and signed, by the Appellant ("the Lender") and [redacted] ("the Borrower") and contained the following clauses:

    "*2.4 The Borrower hereby covenants with the lender that at (sic) the Lender that (sic) at the written request of the Lender to the Borrower (said request to be addressed to the registered office of the Borrower) the Lender may convert the financial assistance advanced by way of loan from the Lender to the Borrower Ordinary Shares in the Company within twenty-eight days of the delivery of the written request by the lender. The Lender will be entitled to convert each €1 of the outstanding balance due to him on the financial assistance to the Borrower into a €1 Ordinary Share in the Borrower. The Borrower will take all appropriate actions to issue and register the Lender as the owner of the Ordinary Shares in the Borrower within the twenty-eight-day time period as referred to. The Borrower will, without the written approval of the Lender not authorise the issue of any future Ordinary Shares in the Borrower or the authorisation or issue of any other form of Share Capital in Borrower.*

[…]

3.1 Interest

The Borrower hereby covenants to pay interest (as well as before any judgement or demand) on the Secured Liabilities at the rates and upon terms from time to time agreed with the Lender (or in the absence of agreement at the rate of four percent per annum above the Lenders cost of funding the relevant amount from whatever source the Lender may from time to time determine) and such interest shall be compounded in the event of it not being paid on an annual basis by 31 January for the previous calendar year but without prejudice to the right of the Lender to require payment of such interest when due.

[…]

7 Assignment

7.1 This Agreement shall be binding upon and inure to the benefit of each party hereto and its personal representatives, successors and permitted assigns.

7.2 The Lender may (without the need for any further consent from or notice to the Borrower) assign, transfer, mortgage, charge or otherwise grant interest in or dispose of all or any of its rights, benefits and obligations hereunder and the monies hereby secured and grant participation in relation to same. Any reference in this Agreement to the Lender shall be deemed to include any assignee, transferee, mortgage, charge, grantee or other dispose and the Lenders successors who shall be entitled to enforce and proceed upon and to exercise all rights powers and discretions under this agreement in the manner as if named herein.

7.3 The Borrower shall not be entitled to assign or transfer any of his rights, benefits or obligations hereunder without the prior written consent of the Lender.

13.2. A copy of the Deed of Assignment dated 10th December 2018. This was executed by a firm of solicitors and signed by the Appellant ("the Grantor"). It was not signed by the assignee ("the Grantee") described in print as [redacted] and included the following:

"*5. The Grantor has agreed, for the consideration hereinafter appearing, to assign the benefit of the Convertible Loan Agreement to the Grantee, the said consideration representing a payment in cash as part recovery of the Grantors loss.*

NOW THIS AGREEMENT WITNESSETH *that the Grantor the Beneficial Owner of a debt due and owing by the Company in the sum of Two Million One Hundred and Thirty Five Thousand Euros (€2,135,000) as delivered to the Company pursuant to the Convertible Loan Agreement, in consideration of the sum of €21,350 (now paid by the Grantee to the Grantor)* ***HEREBY GRANTS, ASSIGNS & DELIVERS*** *all right entitlement and interest both Legal and Equitable in the Convertible Loan Agreement to the Grantee absolutely to the declared intent that the Grantee shall from this day onward be the party having sole entitlement to the benefit of the Convertible Loan Agreement and all rights and privileges contained therein for the recovery of the Secured Assets and that, where required, the Grantor will agree to execute such further documents as the Grantee may need to have signed to register the said Convertible Loan Agreement and this Assignment in the Companies Registration Office as a Burden on the Assets of the Company and the Grantor further acknowledges the entitlement of the Grantee to notify the Company of the change of ownership and benefit of the said Convertible Loan Agreement to the Company and all other parties having like right."*

13.3. A document entitled "Asset Listing Schedule 2nd August 2012". It was common case between the Appellant and the Respondent that this was an error and should have been dated 2013 rather than 2012. It detailed the following items:

Fixed Assets	127,935.00
Debtors	55,413.00
Cash at Bank and on Deposit	100,473.00
Stock Listing	992,682.03
[redacted]	757.51
[redacted]	1,500.20
[redacted]	683.16
[redacted]	370.24
[redacted]	1,262.50
[redacted]	53,810.00
[redacted]	71,000.00
[redacted]	21,017.00
[redacted]	20,864.20
[redacted]	13,909.00
[redacted]	23,800.00
[redacted]	9,800.00
[redacted]	18,000.00
[redacted]	130,500.00
[redacted]i	22,218.00
[redacted]	31,114.00
[redacted]	6,294.00
[redacted]	24,087.44
[redacted]	35,775.00
[redacted]	134,500.00
[redacted]	37,660.00
[redacted]	31,250.00
[redacted]	12,967.00
[redacted]	5,869.00
[redacted]	9,463.00
[redacted]	2,967.78
[redacted]	5,808.00
[redacted]	21,880.00
[redacted]	38,090.00
[redacted]	75,707.00
[redacted]	54,615.00
[redacted]	30,708.00
[redacted]	44,435.00
Total	2,269,185.06
(Note: Not totalled on provided sheet).	

13.4. A handwritten document entitled “stock list – August 2013”. This document purported to be the backup for the provided listing at paragraph 13.3 above but proved a challenge to comprehend owing to the handwriting and layout.

13.5. Copy of a Stock Transfer Form dated 11th December 2018. This document recorded the transfer of 70 ordinary shares in [redacted] from the Appellant into the name of a Mr [redacted]. The consideration money shown on that Form was €70.

13.6. By letter dated 26th January 2022, the Respondent advised the Appellant that they did not accept that his rights under the CLA amounted to a 'debt on a security' and on that basis they did not accept that an allowable loss of €2,113,650 arose on the assignment by him of his rights under the CLA to Mr. [redacted]. The basis for such opinion was as follows:

"*We note from company records (from the date of incorporation in 2009 up to the date of assignment by [the Appellant] of his rights under the CLA) that the authorised share capital of the company was €1,000,000.00. It so follows that at all times (i.e. both at the date on which the Appellant entered into the CLA and at the date of assignment by him of his rights under the CLA) that there was insufficient authorised share capital available to* [redacted] *to make the execution of the conversion rights under the CLA realistic. One cannot possess a right to do that which is not legally possible and on that basis, Revenue's view is that the potential of the loan to increase in value was purely illusory and theoretical and therefore your rights under the CLA did not amount to a 'debt on a security' for the purposes of the CGT Acts*."

The letter also claimed alternatively that the loss should not be allowed pursuant to Section 546A of TCA 1997 on the basis that:

"*…it is Revenue's view that the main purpose of entering into the CLA (or at least one of the main purposes) was to have the rights under the CLA subject to CGT on an ultimate disposal under the guise of a 'debt on a security' so as to realise capital loss relief.*"

13.7. In response to subsequent queries raised by the Respondent regarding the reasons why the Appellant entered into the CLA, the Appellant's agent stated in its correspondence dated:

17th June 2022

"*…*

(i) The Convertible Loan Agreement ("CLA") was considered to be the most suitable option by [redacted] *at that time as the benefits of this form of investment asset included security of investment, flexibility in terms of repayment, a marketable asset capable of transfer at value with an option of converting to ordinary share capital.*

(ii) *Any amounts advanced by [redacted] to the company are defined as Secured Liabilities in the CLA, this was to include all amounts which "now or anytime hereafter may be or become due". The amount owing by the company to [redacted] was documented as at 2nd August 2013 and this was updated to take account of subsequent advances/repayments with the position agreed and reflected in the Financial Statements of the company at the end of each accounting period. Please see attached schedule.*

(iii) *The €21,350 negotiated between [redacted] and [redacted] brokered by a mutual acquaintance of both parties and was ultimately accepted by [redacted] as the maximum return he would achieve based on the financial position of the company at that point in time. [redacted] had no personal relationship (personal, family or business) with [redacted]. [redacted] had no joint shareholding with [redacted] at the time (or immediately prior to) this transaction taking place.*

…"

29th August 2022:

"*…The CLA formally documented the arrangement between [redacted] and [redacted] (the 'Company') in this respect and set out the various rights / terms relating to same to include security in the form of a charge on the property and assets of the Company, confirming the position with regard to the assignment / transfer by [redacted] of his rights, benefits and obligations under the CLA and an option for [redacted] to convert the loan to shares should he so wish. On entering into the CLA, [redacted] had security over his investment and could if he so wished and without the prior consent of the Company assign / transfer his rights, benefits and obligations under the CLA or convert his loan to shares in the Company therefore formally documenting and strengthening his position as a lender and converting his investment to a marketable asset. This would not have been the case prior to entering the CLA.*

Any loan advances to / loan repayments by the Company were reflected in the Financial Statements of the Company with the position agreed at the end of each accounting period. The loans pre-dating the date of entering the CLA were therefore documented. We attach a copy of the Company's Abridged Financial Statements for each accounting period ending prior to the date of entering the

CLA which sets out the position agreed in this respect at the end of each relevant accounting period – the amount of the loans reflected in the Balance Sheet of the Company as Creditors: amounts falling due after more than one year."

13.8. Following a letter from the Respondent dated 26th January 2023, the Appellant's agent replied to the points raised by the Respondent (underlined below) in its correspondence on 13th February 2023:

"…

1. Revenue does not accept that your rights under the CLA between you and [redacted] amount to a 'debt on a security' [Section 3 of your correspondence dated 26th January last]

It is noted from your correspondence that Revenue's view is that the potential of the loan to increase in value was purely illusory and theoretical as it was not legally possible for [redacted] to possess a right to make the execution of the conversion rights realistic either at the date of entering into the Convertible Loan Agreement ('CLA') or at the date of assignment by [redacted] of his rights under the CLA given that there was insufficient authorised share capital available to [redacted] to do so.

You will note that there was no clause in the CLA requiring [redacted] to maintain sufficient authorised share capital to satisfy the execution by the Lender of their rights. The CLA did however require [redacted] to "take all appropriate actions to issue and register the Lender as the owner of the Ordinary Shares in the Borrower" following the receipt by [redacted] of a written request from the Lender to convert the loan to Ordinary Shares in the Company. Given that, for example, the authorised share capital could be increased as part of the process of issuing and registering the Lender as the owner of the Ordinary Shares in [redacted], "all appropriate actions" would therefore have included such actions as would have been required to be taken by [redacted] to increase its authorised share capital at that time. It is understood that there is no reason as to why the loan could not have been converted to Ordinary Shares in [redacted] had the Lender so requested, with all appropriate steps being taken by [redacted] as required under the CLA, and on this basis [redacted] does not agree with Revenue's view that it was not legally possible for the Lender to make the execution of the conversion rights realistic.

2. Revenue does not accept that the losses would be allowable pursuant to Section 546A TCA 1997 [Section 4 of your correspondence dated 26th January last]

When [redacted] advanced the loan to [redacted] he did not do so with the expectation that he would not recoup his investment in [redacted] in full. He did not at any time advance funds to [redacted] with the intention that he would as a result suffer a permanent real financial loss in respect of any of those funds. He did not make such a loan with any purpose (being a main purpose or otherwise) of realising a capital loss. This was a bona fide commercial transaction that unfortunately ultimately resulted in a material financial loss for [redacted].

As such there was no intention on the part of [redacted] when entering into the CLA to realise a "tax advantage" as is defined in Section 546A TCA 1997, i.e. he did not provide a loan to [redacted] with a "main purpose, or one of the main purposes" being to secure a "tax advantage". [redacted] therefore did not have any purpose (main or otherwise) or intention to suffer a material financial loss to secure a tax advantage when entering into the CLA. The financial loss suffered has had a material impact on [redacted].

On this basis [redacted] does not therefore agree with Revenue's view 'that the main purpose (or at least one of the main purposes) of entering into the CLA was to have the rights under the CLA subject to CGT on an ultimate disposal under the guise of a 'debt on a security' so as to realise capital loss relief."

13.9. A copy of the Appellant's Loan Account with [redacted] This detailed the following transactions:

Loan balance @ 2/8/2013	1,281,237
Movement – Advanced	365,461
Loan Balance @ 31/12/2013	1,646,698
Movement – Repaid	(86,724)
Loan Balance @ 31/12/2014	1,557,974
Movement – Advanced	210,966
Loan Balance @ 31/12/2015	1,768,940
Movement – Advanced	59,236

Loan Balance @ 31/12/2016	1,828,176
Movement – Advanced	307,015
Loan Balance at 31/12/2017	2,135,191

13.10. The Memorandum and Articles of Association of [redacted]. Included in those documents was the following:

"*4. The Share Capital of the Company is €1,000,000 divided into 1,000,000 Ordinary Shares of €1 each. The capital may be divided into different classes of shares with any preferential, deferred or special rights or privileges attached thereto, and from time to time the company's regulations may be varied so far as may be necessary to give effect to any such preference, restriction or other term.*

…

3. The share capital of the Company is €1,000,000 divided into 1,000,000 Ordinary shares of €1.00 each."

13.11. Unaudited abridged financial statements for [redacted] for the period 10th September 2009 (date of incorporation) to 31st December 2010, and for the years ended 31st December 2011 to 31st December 2018 (inclusive). These financial statements contained the following information:

[redacted] - Extracts from Financial Statements					
Period/Year Ended	**31/12/2010**	**31/12/2011**	**31/12/2012**	**31/12/2013**	
	€	**€**	**€**	**€**	
Tangible Assets	[redacted]	[redacted]	[redacted]	[redacted]	
Stocks	[redacted]	[redacted]	[redacted]	[redacted]	
Debtors	[redacted]	[redacted]	[redacted]	[redacted]	
Cash at Bank	[redacted]	[redacted]	[redacted]	[redacted]	
Creditors < 1 year	[redacted]	[redacted]	[redacted]	[redacted]	
Director's Loan	[redacted]	[redacted]	[redacted]	[redacted]	
Deficiency of Assets	[redacted]	[redacted]	[redacted]	[redacted]	
Called up Share Capital	100	100	100	100	
Profit & Loss Account	[redacted]	[redacted]	[redacted]	[redacted]	
Shareholder Funds	[redacted]	[redacted]	[redacted]	[redacted]	
Authorised Equity	1,000,000	1,000,000	1,000,000	1,000,000	
Year Ended	**31/12/2014**	**31/12/2015**	**31/12/2016**	**31/12/2017**	**31/12/2018**
	€	**€**	**€**	**€**	**€**
Tangible Assets	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
Stocks	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
Debtors	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
Cash at Bank	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
Creditors < 1 year	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
Deficiency of Assets	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
Called up Share Capital	100	100	100	100	100
Profit & Loss Account	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
Shareholder Funds	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
Authorised Equity	1,000,000	1,000,000	1,000,000	1,000,000	1,000,000

13.12. The Appellant's expert report completed by [redacted] on behalf of [redacted] who are described as "[redacted]s." Included within that Report was the following:

13.12.1. A summary of "the issue" which contains a brief overview of the Appellant's appeal.

13.12.2. The "sequence of events" which details the incorporation of [redacted] and transactions subsequent up to the disposal of the CLA.

13.12.3. The [redacted] This detailed that the list of stock was provided to the author of the Report and that he was asked to value that list, which covered the periods 2012, 2013 and 2014. The heading also detailed a

glossary of terms associated with the [redacted] for ease of reference. The Report also stated

> "*With the lapse in time between the 2012, 2013 and 2014 period to the submission of the report in 2024, no physical inspection of [redacted] was possible…The valuation is based to the point where [redacted] exits the ownership, or alternatively up to the end of 2014 only. Depending on which comes first. But, notes where possible, any differing valuation/pricing post 2014.*"

13.12.4. The Report proceeded to place valuations on [redacted]. Those valuations ranged in value from €5,000 to €210,000. The valuations considered the [redacted]

13.12.5. The concluding remarks to the Report stated:

> "*In totalling the stock value over the various years, from the listing that has been forwarded to the reporter, as laid out here in this report, it accumulates to a total value of approx. €1,340,000.*
>
> *Breaking that down to differentiate between the years that each subject [redacted] valued, comes to the following breakdown:*
>
> **(Some [redacted] may be stock valued in more than one year)*
>
> *2012 approx. €121,500*
>
> *2013 approx. €424,500*
>
> *2014 approx. €656,000*
>
> *Post 2014 approx. €454,500*
>
> *There may be [redacted] missing, that have not been brought to the valuer and the reporters attention for the purposes of the above figures breakdown.*"

13.12.6. The Report also contained a section entitled "[redacted]" which detailed narrative on the subjective valuation of [redacted] and highlighted that the valuation of such [redacted] can increase significantly in value depending on a number of factors which include the [redacted]

13.12.7. Annexed to the Report was the author's background in the [redacted] industry which confirmed his expertise in his chosen field.

13.13. Share purchase agreements entered into between the Appellant and his business partner which recorded the sale of the Appellant's entire shareholding in [redacted] for [redacted] on 15th February 2018.

Witness Evidence

The Appellant

14. The Appellant presented to the Commissioner as a credible individual. He explained he became involved in a separate and distinct company, [redacted] in or around 2000 and he was a 50% shareholder in that company. He stated he had been employed by the [redacted] for 22 years and after identifying a gap in the market, he set up [redacted] with another work colleague of his who owned the other half of the company. He explained the activity of [redacted] was the provision of [redacted].

15. The Appellant stated that his son [redacted] at a young age and as he, the Appellant, was making good money in [redacted] he started to purchase [redacted] which he [redacted] He advised that between the years 2005 to 2010, he had purchased [redacted]. He added during those years, he and his son were "learning the business from the ground up" with the aim of [redacted]

16. The Appellant advised in or around 2008 he sold [redacted], for a sum of €205,000 and having made a profit on the sale of [redacted] he "grew a hunger" for the business.

17. The Appellant stated that his income from [redacted] at this time was in or around [redacted] per annum and following the success on the sale [redacted], he decided to invest more heavily [redacted]. He stated as he was getting financial returns and was becoming more involved in the industry, he decided to incorporate a limited company to house those activities. That company was [redacted]

18. Having established [redacted], the Appellant stated that he decided to split the issued share capital of [redacted] 70% to himself as the investor in the company and 30% to his son, as he was managing the business activities. The Appellant said that he did not intend on drawing any salary from [redacted] and during its years of operation did not do so.

19. Having incorporated [redacted], the Appellant advised that he advanced additional funding to it, which included personal loans from financial institutions. The Appellant explained that

as [redacted] had only commenced trading, financial institutions were unwilling to advance any funding to it, which resulted in him borrowing funds personally and advancing those funds to the company in the form of a director's loan.

20. Based on the provided financial statements, the Appellant confirmed that up to and including 31st December 2012, he had lent the company the sum of €1,241,243 in the form of a director's loan.

21. The Appellant stated in or around 2012 or 2013, his son wanted to move from the [redacted]. He explained the change in the business activities of [redacted] from [redacted] made the business a riskier venture. Around that time, the Appellant explained he was introduced by his son to an accountant, [redacted] who had a lot of experience in the [redacted]

22. Having met with [redacted], the Appellant stated that he took the decision to switch [redacted] accountants from its existing accountants, [redacted], to [redacted] firm. He stated that he continued to use his existing accountants for his own personal tax return but owing to [redacted] knowledge in the [redacted] he felt that his firm were a better fit for the needs of [redacted].

23. Following the appointment of [redacted], the Appellant was advised by [redacted], owing to the risky nature of [redacted] activities, that it would be ideal if he put some security around the monies he had invested in [redacted], which at that stage were sitting on [redacted] Balance Sheet in the form of an unsecured director's current account.

24. The Appellant stated [redacted] advised him that the CLA was the ideal structure to offer such security. The Appellant said that up to that point he did not know what a CLA was or how it operated. He stated that the CLA was entered into between him and [redacted]. He confirmed that he signed that agreement on his own behalf and his son signed it for and on behalf of [redacted] He understood once executed it offered him better security.

25. The Appellant advised that, while [redacted] had incurred losses up to and including 2014, a profit was made in 2014 as [redacted] Owing to the profit that year, the Appellant explained that he withdrew some funds from [redacted] in 2014 which had the effect of reducing the amount of his loan that [redacted] owed him.

26. The Appellant explained in the years following 2014 his fortunes changed. He advised that [redacted] began incurring heavy losses and following adverse factors within [redacted] that he was required to reduce his salary from [redacted] by some 90%. While his partner in [redacted] had accumulated savings over the years, the Appellant had not (as he invested his excess

salary into [redacted]). As such, the Appellant made the ultimate decision in 2018 to sell his interests in [redacted] to his business partner and remove himself from that business. It was not economically feasible for him to stay within that business on a significantly reduced salary.

27. In conjunction with the change in his financial position, the Appellant advised that his daughter became seriously ill and he was required to devote a large amount of time to attending to his daughter. The Appellant became visibly distressed in mentioning his daughter. The Appellant was not requested to provide details of his daughter's medical condition. But it was evident that the Appellant was providing credible evidence in relation to the upset of this life event on his business (and no doubt private) life. Coupling the change in his financial position and the amount of time he was able to devote to his business activities, the Appellant advised that he made the decision to dispose of his interests in [redacted]

28. In order to facilitate his transition from [redacted], the Appellant stated that he was introduced by [redacted] to a third-party purchaser, [redacted], who was interested in acquiring [redacted] from him. He explained that [redacted] was interested in acquiring [redacted] as he wanted to acquire the accumulated losses within that company and utilise the available credit facilities that [redacted] had built up with supplier companies.

29. The Appellant stated that as [redacted] had performed poorly over the years, he was offered the sum which equated to 1% of the value of the CLA by [redacted]. He stated that as [redacted] had no assets and as it would have cost him money to liquidate [redacted], he accepted the offer from [redacted] and disposed of his interest in [redacted] to him.

30. The Appellant advised that he signed the provided Deed of Assignment and the stock transfer form to dispose of both the CLA and his 70% shareholding in [redacted] to [redacted] When he undertook such actions, he was no longer involved in the activities of [redacted]

31. Under cross examination, the Appellant stated:

    31.1. He repaid the personal bank loans he acquired and subsequently lent to [redacted] when he disposed of his shareholding in [redacted]

    31.2. He did not recall ever purchasing [redacted] nor did he sell [redacted] and after 2009, he did not personally own [redacted]

    31.3. Turning to the provided CLA, under the definition of "secured property" within that agreement it defined secured property as "the property described in the Schedule".

31.4. The Schedule was based on the provided handwritten stock list which he now understood was typed in excel format in the sheet provided to the Commission. When asked if he compiled that handwritten list, the Appellant stated that he did not compile it and owing to the handwriting that it did not appear that his son had done so either. He stated that he did not know who prepared the list but assumed it was compiled by [redacted] accountant.

31.5. That he could not explain why the Respondent was provided with a copy of the CLA when requested but not the Schedule purportedly attached to it.

31.6. He only met his provided expert witness once before the appeal hearing and did not provide him with any documentation to prepare his report.

31.7. That he never previously met [redacted] and didn't "know the man" as his accountant had set up the sale of [redacted] to [redacted] and attended to all the paperwork.

31.8. The provided 2017 accounts of [redacted] detailed that the company had stock of €115,907 and cash in bank of €555,699 as at that date while the 2018 provided accounts showed stock of €540,909 and the bank figure had reduced to €1. When asked what happened to the cash between 2017 and 2018, the Appellant stated "I can't answer that, that is accountancy, I don't know[1]."

31.9. When asked why [redacted] purchased stock between 2017 and 2018 rather than use the cash to repay him some of the money he had advanced, the Appellant stated "okay, I hear what you are saying but I can't give you answers on it[2]"

31.10. He was unsure if any [redacted] remained in [redacted] when [redacted] acquired it.

31.11. He was uncertain how the CLA provided him with additional security but he understood that it did.

31.12. That he did not think the CLA was a saleable asset when he acquired it and he did not know of the conversion rights (to ordinary share capital) within the CLA.

31.13. That within the notes to the 2013 financial statements, under the heading "transactions with directors", it stated:

"[redacted]

[redacted]

[1] Transcript, day 1, page 71 at line 21.
[2] *Ibid*. Page 73 at lines 10 to 11.

[redacted]

31.14. When asked to whom the above narrative referred to, he stated "*I honestly don't know*[3]".

31.15. That any agreement regarding the operation of [redacted] with his son was verbal and no written agreement was in place.

31.16. The highest value [redacted] sold was for [redacted].

31.17. He knew based on the market that investment in the industry, absent considerable luck, normally took a significant number of years for a return to be achieved.

31.18. When he entered into the CLA, he did not have any intention of converting the loan into ordinary shares.

[redacted] – [redacted] *Accountant*

32. [redacted] having being sworn in by the Commissioner advised that he was an accountant engaged in private practice and had been in that business for around 25 years. He stated that his firm specialised in the [redacted]

33. The witness stated that he first met the Appellant's son at various [redacted] from about 2010 onwards. The witness advised following those meetings his relationship with the Appellant's son intensified as the years progressed and ultimately he met with the Appellant following an introduction [redacted] in July 2013.

34. The witness recalled prior to that meeting he had reviewed [redacted] draft financial statements for 2013 and the Appellant and his son attended the meeting. The witness said he knew prior to the meeting that the Appellant was the investor in [redacted] and his son was essentially the manager of the business activities of [redacted].

35. The witness advised he had knowledge prior to the meeting that the Appellant's son had taken out [redacted] and would be conducting the activity [redacted] in addition to his role with [redacted]. He stated that the issued share capital of [redacted] split 70% in the Appellant's favour and 30% to his son. He explained that the 30% allocated to the Appellant's son was in place to incentivise and reward him for the work he was performing within [redacted].

[3] Transcript, day 1, page 79, at line 5.

36. Having noted the director's loan account balances in the name of the Appellant from his review of [redacted] provided financial statements, the witness advised that he discussed the idea of the CLA with the Appellant, as he deemed it a better fit for structuring the funds he had advanced to [redacted]. The witness explained he considered this to be so as if the Appellant converted his director's loan account balance into additional ordinary shares, this would dilute the Appellant's son's shareholding in [redacted]. The effect of such dilution, the witness explained, would act as a deterrent to the incentive scheme in place which arose from the rights attached to the Appellant's son's 30% shareholding in [redacted].

37. The witness further explained in the event that [redacted] became highly profitable after the CLA was put in place, this would enable the underlying loan proceeds to be discharged and following such repayment, for any excess profits to be split between the Appellant and his son in accordance with the agreed profit sharing ratio. In the alternative, the witness explained while noting the relationship between the Appellant and his son, in the event of [redacted] achieving high profits, the conversion rights within the CLA (to convert the value of the loan into ordinary shares), if activated would give the Appellant control over [redacted]. This, the witness explained, could be necessary in the event that the Appellant and his son had a falling out over the direction or operation of [redacted] business activities such as the Appellant's son wishing to buy [redacted] while his father wished his loan, or a portion of his loan, to be repaid in place.

38. The witness advised while he did not type the CLA from scratch, he had prepared the agreement on the Appellant's behalf. He stated he was aware that the security provided under the CLA captured all the assets of [redacted] and that the Appellant could request [redacted] to convert the loan amount into equity at any stage he wished that to occur. When asked if the authorised share capital of €1 million shares in [redacted] caused him any concern in relation to the conversion rights, the witness stated "No, no.[4]"

39. The witness further advised that the CLA provided a term for interest to be paid on the principal rate outstanding at 4% per annum, and that it provided a fixed and floating charge over [redacted] assets and that the CLA could be assigned if required.

40. The witness stated that he drew up the handwritten stock schedule which he later typed up in excel and annexed the typed version to the CLA. He advised he began compiling the document from the 2012 prepared financial statements and with the assistance of the Appellant's son who reviewed and valued the stock. He explained that the completed Schedule comprised of [redacted], cash and "debtors and stuff". He explained that the values

[4] Transcript, day 1, page 97 at line 14.

placed on those items were market value and that the market value was derived from a combination of his own, and the Appellant's son's experience, in the [redacted].

41. The witness explained when he got the CLA signed and witnessed by the Appellant and on [redacted] behalf by the Appellant's son in 2013, that he had completed the document using word and the Schedule in excel. Owing to the different format of these documents, he explained that he put the word document and the excel spreadsheet separately on the Appellant's file in his office.

42. The witness further explained when the Respondent requested the CLA, that he sent the word document to the Appellant's taxation agent for onward submission to the Respondent but owing to the separate documents, omitted to attach the excel document to the word document. He stated that when the Appellant's taxation agents noticed this omission, he sent a copy of the excel document on to them when requested.

43. Turning to the connected party note in the 2013 financial statements, the witness stated that while the note detailed [redacted] being purchased and sold to a director, the actual position was different. He stated that the [redacted]" description related [redacted] He explained when this occurred, [redacted] transferred from the company [redacted] to the Appellant and in turn the Appellant availed of his son's services as [redacted] (with his son providing those services within his sole trade) with the aim [redacted]. If successfully [redacted] and value was added to the [redacted] the witness explained that [redacted] would re-acquire [redacted] from the Appellant with a view to realising value on the subsequent sale of the [redacted] The witness stated in the event of the latter course of action occurring, the reacquisition of the [redacted] was treated as a "[redacted]" from the Appellant for the purpose of its financial statements.

44. The witness further explained as the activity of [redacted] and as those activities were conducted by the Appellant's son, then this necessitated the withdrawal and reinstatement [redacted]. The witness elaborated as he looked after the Appellant's son's sole trade accounts he was able to confirm that the Appellant's son got his [redacted] and that he was in the business of [redacted] for the Appellant and other people. The witness stated that the Appellant's

[5] [redacted]

[redacted]

45. The witness confirmed that [redacted] made a profit in 2014 and as a result of that profit it repaid the Appellant some of the monies that were due and owing to him on that date.

46. Turning to the 2017 financial statements, the witness confirmed that those accounts showed the sum of €555,699 as "cash at bank and in hand" but he could not recall exactly what this amount related to. He explained while that money may have been in the bank, that the bank figure could not be looked at in isolation as the accrued expenses needed to be taken into account before establishing if the bank figure was a distributable cash figure. Having reviewed note 10 to the 2017 financial statements, the witness stated that the accruals were listed at €509,000 and to establish a true cash figure those accruals would need to be offset against the available cash balance. The witness explained as he had "only been hit with this today" that he was unable to provide a full breakdown of either the bank/cash figure or the accruals figure.

47. The witness advised that he brokered the deal between the Appellant and [redacted]. He stated he was aware from meeting the Appellant [redacted] that the Appellant's "head was basically checked out of everything, as regards business anyway[6]" and that he wished to dispose o[redacted] He stated that the position presented to him required either [redacted] to be liquidated, which would cost money, or a buyer to be found for[redacted].

48. The witness advised he had a new client, [redacted], who wished to enter the market which [redacted] was in and as the Appellant was not in the right frame of mind, he negotiated the sale of [redacted] to his new client. He stated that the negotiation he undertook resulted in an agreed price of 1% of the loan value being paid plus the par value of the issued share capital in return for the sale of both the Appellant's and his son's share capital in [redacted] and the entire value of the CLA.

49. When asked why [redacted] would buy [redacted] rather than establish his own company, the witness stated:

> "*Well effectively he needed to get a business that was already established, a trade name that was already established and* [redacted] *had been going for over ten years at this stage and they were big enough players in the market,* [redacted] *had put 2 million into it, so it was a recognisable name and it would have given* [redacted] *the access to credit and recognition within the industry straightaway*."[7]

[6] Transcript, day 1 at page 108, lines 3-5.
[7] *Ibid.*at pages 108-109, lines 29-7.

50. The witness stated his "reward" for negotiating the sale was he was retained by [redacted] to continue to look after the affairs of [redacted]. He advised after completing the deal between the Appellant and [redacted] that a solicitor attended to the legal formalities of the sale which included the execution of the Deed of Assignment.

51. The witness stated prior to the sale completing the Appellant removed the remaining stock of [redacted] from [redacted] and paid the market value for those [redacted] which represented the sales figure of €116,200 in the 2018 financial statements of [redacted]

52. Under cross examination, the witness stated:

    52.1. The excel spreadsheet attached to the CLA derived from the provided hand written stock sheet. He explained that he compiled the final document from the stock closing balance shown in the 2012 accounts of [redacted] which gave him the opening balance of the stock on 1st January 2013. Following this, he went through the values with the Appellant's son and adjusted the stock list to allow for any sales or purchases throughout the year and any adjustments required to obtain the market value of those [redacted] as at the date the CLA was entered into.

    52.2. That the Schedule annexed to the CLA was attached to the CLA after the CLA parties' signatures were affixed.

    52.3. As he omitted to send the Appellant's taxation advisors a copy of the Schedule at the time, it was not until 2018 that he provided the Appellant's taxation advisors with a copy of the Schedule. The witness stated that he assumed the Appellant's taxation advisors only requested the Schedule following the Respondent's enquiries into the Appellant's taxation affairs.

    52.4. That the executed CLA did not commit the Appellant to provide any additional funding to [redacted] and he could stop making advances to [redacted] at his discretion.

    52.5. While a shareholders' agreement could have been implemented in [redacted], owing to the relationship between the Appellant and his son, it was decided that such an agreement was too intrusive on the day-to-day operation of [redacted] and as such, the CLA was preferred. When asked whether he put the CLA in place as a sort of crude shareholders' agreement, the Appellant stated "you are probably right but I wouldn't have expressed it in that sort of term. But yes, you are probably right"[8].

[8] Transcript, day 1, page 138 at lines 24-27.

52.6. While describing potential [redacted] returns as a "theatre of dreams", that he did not view such returns as illusory. The witness stated that of his clients within the industry some half of those returned annual profits.

52.7. That the value of [redacted] could increase in value if [redacted]

52.8. As the "big" returns generated within the [redacted] often take numerous years to achieve, that the quantum of the Appellant's losses within [redacted] arose as "*he wasn't able to stick it*"[9].

52.9. That he did not have any input into the correspondence between the Appellant's taxation agents and the Respondent in the matters preceding the appeal. He further stated he did not understand the Appellant's taxation advisors' comments contained within their correspondence to the Respondent in which they stated the CLA provided more flexibility.

52.10. The CLA and the assignment of the CLA on sale were drafted by a firm of solicitors and not him personally. The witness advised that he only prepared the excel spreadsheet attached to the CLA.

52.11. The CLA was signed by the Appellant the day before it was executed and the day following execution, the Appellant witnessed his son's signature on the CLA. The witness acknowledged as the CLA included the words "in the presence of", that the Appellant should have been physically present when affixing his signature.

52.12. When he put the CLA in place, the fact that the Appellant might ultimately have a claim for a CGT loss "didn't come into his field of vision"[10].

52.13. No balance sheet of [redacted] was prepared as at the date of sale of the company in 2018 as any assets and liabilities of the company at the date of sale had been "cleaned out".

52.14. That he was unable to put a value on the line of credit available to [redacted] at the date of sale.

52.15. The advantage of [redacted] acquiring the company included the right to avail of the corporation tax losses it had sustained during its period of operation.

[9] Transcript, day 1, page 133 at lines 14-16.
[10] *Ibid.* at page 145, lines 7-10.

53. Under questioning from the Commissioner, the witness stated:

    53.1. To his knowledge no interest was ever paid to the Appellant under the terms of the CLA and no reason was provided to him as to why that interest was never paid.

    53.2. That [redacted] valued at €200,000 was left off the excel Schedule annexed to the CLA. As such the witness agreed that the value of the assets shown on that Schedule was understated by €200,000.

    53.3. The entirety of the assets within [redacted] as at the date of sale in 2018 were tangible assets of €12,000 and debtors of €22,664. The only creditor in existence as at the date of sale was the value of the CLA.

[redacted] – *The Appellant's expert witness*

54. Having being sworn in by the Commissioner, [redacted] stated that he was engaged by the Appellant as an expert witness owing to his expertise [redacted]

55. The witness confirmed that his provided report was prepared by him. Turning to that report, the witness stated that he provided a glossary of terminology of relevance to the [redacted] at the beginning of his report, since various terms within that industry have specific meanings.

56. The witness stated that he was provided with a list of stock [redacted] from the Appellant's solicitor and was asked to value those [redacted] at open market value. The witness advised that he was aided in the valuation process as some of the [redacted] the stock list had been sold at public auction subsequent which assisted with the valuation.

57. The witness explained that the market value of [redacted].

58. The witness stated that there is nothing scientific about [redacted]

[redacted]

59. In considering those variables and having regard to the list provided, the witness advised that he valued [redacted] on the listing at €1.34 million. He proceeded to explain that the industry has produced vast fortunes for [redacted] but nobody in the industry is guaranteed a direct or quick return on their investment and any return may take numerous years to materialise.

60. The witness advised his review of [redacted] business activities led him to believe that the Appellant and his son were learning the business rapidly and [redacted] lose money continuously for the first number of operating years, often between ten to twenty such years, that he was impressed with [redacted] achieving profits so quickly after inception.

61. The witness explained that the concept of losing money continuously for a significant number of years may seem like a strange way for a business to operate but what makes it worthwhile is the possibility and reality that life changing money can be made within the industry in the blink of an eye. In his own words he stated[11]:

[redacted] *…But you have to put an awful lot of money into it*"

62. Under cross examination, the witness stated that:

    62.1. He compiled his report in 2024 and his instructions were to value [redacted] on the provided list and those valuations were to be "*objective, truthful and my own*". The witness stated that while provided with the stock list and valuations annexed to the CLA, he was not influenced "at all" by those provided figures in reaching his own valuations.

    62.2. The witness advised that he completed his report in the alphabetical name [redacted] The witness stated that he was instructed to conduct his valuations within the period 2012, 2013 and 2014. Following those instructions, the witness stated that "perhaps" the provided list for 2014 was not accurate so he valued the list up to 2014 and where a subsequent 2014 valuation was made available, he noted that within his report.

[11] Transcript, day 1 at page 184, lines 18-26.

62.3. When asked if he was asked to value them on a specific date, for example 2nd August 2013, the witness stated[12]:

"*There was no specifics like that, no. No specifics. It was to value these at the time of their sale as late as possible within that '12, '13 and '14 periods. [As late as possible?]. Yes.*"

62.4. [redacted]

62.5. When asked whether the [redacted] he was asked to value was the same as those appearing on the schedule to the CLA, the witness advised that he valued those items not included on the CLA schedule but rather a different list provided by the Appellant's solicitor. The witness further advised that he did not present the Commission or the Respondent with a copy of the list provided by the Appellant's solicitor but the list was apparent from his report as he listed all the requested valuations within that report.

62.6. [redacted] When advised [redacted] stock figure in its 2013 accounts was €781,000 and whether he was of the view that figure was too high, the witness stated:[13]

"*I have to be very sure that it is like for like and I am not sure that it is like for like. To be honest with you I couldn't really answer that question because I don't have a definitive list that you might be working off from the accountant's side for instance.*"

The Appellant's Son – [redacted]

63. The Appellant's son having being sworn in by the Commissioner stated that he began his career in the [redacted] when he began working for [redacted]r and fell in love with the "game" and decided to make a career of it.

64. Following completion of his leaving certificate in 2006, the witness stated that he did some work experience with [redacted] until Autumn 2010 when his father bought [redacted]. At that stage the witness advised he returned home and looked after his father's [redacted] In addition, he began to study for [redacted] and as part of that education he was

[12] Transcript, day 1, page 186 at lines 16-20.
[13] *Ibid.*, page 197 at lines 25-29.

required to live at the [redacted] for a number of months. Following completion of the course, he advised that he was offered a position of [redacted]

65. In conjunction with that role, the witness stated following discussions with his father, he decided to rent [redacted] which is about 20 minutes from the [redacted]. The reason for relocating the business from his father's lands in [redacted] to [redacted], the witness explained, was to be nearer the "action" and so that the business could avail of more suitable [redacted].

66. As the acquisition of the [redacted] increased commitment to the business and as more of his father's finances were being made available to the business, the Appellant explained that a decision was reached by his father in September 2009 that his father would incorporate the business into a limited company.

67. Following incorporation of [redacted], the Appellant stated that his father put him on a salary of €30,000 per annum and agreed that he would get a shareholding of 30% in [redacted] to incentivise him. Having relocated the business, the witness explained that he became interested in [redacted] and began to focus on that aspect of the business. He stated that this required him to obtain training and experience [redacted].

68. The witness stated that he met [redacted] at mart sales initially and was aware from colleagues that [redacted] provided accounting services to them. He stated that he spoke to his father about switching [redacted] accountancy requirements to [redacted] and this was subsequently agreed.

69. Following [redacted] appointment, the witness stated that [redacted] discussed converting his director's loan account into a CLA as this would give his father enhanced security over his investments in [redacted] The witness stated that despite being warned by [redacted] that the CLA if implemented could cause a big fallout he was fully agreeable to it being put in place as he knew that his father had put up all of the capital in [redacted].

70. The witness stated he signed the CLA on [redacted] behalf and confirmed that he assisted [redacted] compose the handwritten schedule which later became the excel spreadsheet attached to the CLA.

71. From 2013 onwards the witness explained that he had two roles, which consisted of looking after [redacted] business activities and developing his own business [redacted]. He confirmed that [redacted] incurred a profit in 2014 before reverting to a loss making position in its latter years of ownership.

72. The witness stated in 2018 it became apparent that [redacted] needed further capital injections to remain operational and owing to his father's position at the time that it was no longer feasible for his father to inject further funds into the business. The witness stated that he was aware that [redacted], whom he had not known previously, wished to acquire [redacted] from him and his father and as such, he signed over his 30% shareholding in [redacted] to facilitate the sale. The witness stated at that stage his involvement with [redacted] was finished and he focused on his own business [redacted].

73. Under cross examination, the witness stated:

    73.1. He no longer [redacted] but is still involved in the business [redacted].

    73.2. He introduced his father to [redacted] at some stage in 2013 but was unsure of the exact month.

    73.3. He signed the CLA on behalf of [redacted] The witness added he was aware that if he signed the CLA he knew that his percentage shareholding in [redacted] could potentially go down to almost nothing. He added that scenario was explained to him at the time the CLA was being executed but as his father had contributed 100% of the funding to [redacted], his father was to be repaid his investment before he, the witness, got any dividends or such like from [redacted].

    73.4. He did not seek any independent legal or accounting advice at the time the CLA was executed but had discussions with his father at the time. The witness stated that he[14] "was aware of the pros and cons of it and was happy to go with it."

    73.5. He had one or two disagreements with his father about the operation o [redacted] but nothing major. When questioned further, the witness stated that those disagreements centred on the amount of time he was spending in managing the affairs of [redacted] in that he was devoting too much time to the business and not enough time with his family. The witness stated that they never fell out over anything business related but would often have discussions about whether to purchase a [redacted] or not. When asked whether there was a risk of a serious disagreement between himself and his father, the witness stated "potentially, who knows?"[15]

[14] Transcript, day 1 at page 219, lines 2-3.
[15] *Ibid.* at page 219, line 24.

73.6. Any purchases or sales [redacted] by a director [redacted] must have been to or from his father as he would not have had the money to make such purchases.

73.7. Because he was aware of his father's personal and financial circumstances in 2018, he may have informed [redacted] about his father's desire to exit [redacted]

73.8. When asked what happened to the stock value of €115,907 detailed in [redacted] financial statements for the year ended 31st December 2017, the witness advised that he did not recall what happened [redacted].

Submissions

Appellant

74. Counsel for the Appellant submitted as section 585 TCA 1997 does not define "debt on security" then in ascertaining the meaning of those words, the Commission is required to have regard to the jurisprudence of the Superior Courts.

75. The Appellant's Counsel opened the case of *McSweeney v J.J. Mooney (Inspector of Taxes)* [1997] 3 I.R. 424 ("*McSweeney*") where Morris J noted that established United Kingdom ("UK") jurisprudence held that for a debt to be considered a debt on security, it had to:

    (i) Be capable of being assigned;

    (ii) Carry interest;

    (iii) Have a structure of permanence;

    (iv) Provide proprietary security.

76. The Appellant's Counsel noted that Morris J disagreed with those characteristics in noting:

    "*Having considered the judgment of Robert Walker J I am not satisfied that the case is authority for this proposition. If it is, then I respectively disagree with it. In the earlier cases it is clear that a number of eminent members of the English and Scottish Bench have found difficulty in defining and identifying the nature of a 'debt on security'. All have agreed, however, that it does not mean simply 'a debt which is secured', or, put another way, it is not the opposite to an unsecured debt.*"

77. Before finding:

"*The pure loan is exempt from capital gains tax because it can never exceed in value. With the additional rights to convert it into stock, a debt on a security may appreciate in value and can be marketed at a profit. This is a clear distinction between the two.*

I am of the view that the four characteristics of a loan on security proposed to be identified in Taylor's case arise only because in separate cases transactions have been disallowed as 'loans on security'. For these stated reasons, however, I do not believe that these reasons of necessity identify what is and what is not a loan on security. The essence of a loan on security must be whether the additional 'bundle of rights' acquired with the granting of the loan, to use Wilberforce LJ's phrase, enhances the loan so as to make it marketable and potentially more valuable than the value of the repaid loan upon repayment. This potential increase in value must not be illusory or theoretical. It must be realistic at the time when the loan and the rights are acquired by the lender.

I am in no doubt that these elements can be identified in the present transaction. Had he chosen to do so, the appellant could have offered this loan complete with its rights and entitlements on the market. While I appreciate that the company was at the relevant time ailing and that it might have been difficult to find a buyer it was, nevertheless, possible that a buyer would be found and would be prepared to offer a cash value for the loan which was enhanced by the appellant's right to shares. Given the number of financial institutions which were prepared to participate in the funding of the project and were prepared to accept it as a realistic business proposition, it seems to me to be probable that this transaction was marketable. I do not consider that it is relevant that the appellant might have difficulty in finding a purchaser, because this difficulty might arise by reason of local or transient commercial considerations."

78. The Appellant's Counsel submitted that there was no basis whatsoever for the Respondent to refuse the Appellant's claim to CGT loss relief on the basis that [redacted] had *"insufficient authorised share capital available to make the execution of the conversion rights under the CLA realistic*". Counsel submitted that this position was so as under the terms of the CLA as the Appellant could mandate [redacted] to take "*all appropriate actions to issue and register the [Appellant] as the owner of the Ordinary Shares in* [redacted]. Counsel further submitted that if requested, at any stage by the Appellant, [redacted] was required to take such actions as were necessary to ensure the conversion of the loan balance were converted into ordinary shares.

79. The Appellant's Counsel submitted that the CLA itself satisfied the requirements for it to be qualify as a debt on security. In particular, Counsel submitted:

(i) The [redacted] operated is a unique industry where spectacular profits can be achieved. The Appellant stated that the industry is built around the potential upside – on hitting the top 1% which has a pyramid effect and can only be compared to markets such as the [redacted]. The Appellant noted that [redacted] is only worth what two people think it is worth on a given day.

(ii) The Appellant continued to lend significant further monies to [redacted] after execution of the CLA and such step would only have been taken if he believed he would get an adequate return on his investment.

(iii) The CLA had the "added feature" of granting the Appellant with a fixed and/or floating charge over the assets of [redacted]. In the event [redacted], this could be of significant value to the Appellant as steps could be taken to both recover the full loan and make a good return.

80. The Appellant's Counsel stated that there appears to be no judicial determination on the parameters of section 546A TCA 1997. However, the Appellant advised that the Respondent has issued a guidance document[16] outlining what factors, in their view, determine a tax advantage under that section as follows:

"*There is no one factor that determines whether the obtaining of a tax advantage is a main purpose of an arrangement. All of the circumstances in which the arrangements were entered into need to be taken into consideration. Such circumstances might include:*

(i) the overall commercial objective (this should be considered from the perspective of not only the individual participants but also from any wider corporate group to which they belong – for these purposes a commercial objective does not include tax motivated reasons);

(ii) whether this objective is one which the parties involved might ordinarily be expected to have, and which is genuinely being sought;

(iii) whether the objective is being fulfilled in a straightforward way; or

(iv) whether the introduction of any additional complex or costly steps would have taken place were it not for the tax advantage that could be obtained."

[16] Restriction on the allowance of capital losses (S.546A) – issued August 2022. https://www.revenue.ie/en/tax-professionals/tdm/income-tax-capital-gains-tax-corporation-tax/part-19/19-02-05a.pdf

81. The Appellant further advised that the Respondent have also issued guidance[17] on how it considers "the main purpose or one of the main purpose of an arrangement" as follows:

> "*There is a difference between something being the sole or main purpose of a transaction and being one of the main purposes of that transaction. That a transaction has a genuine commercial motive as the main purpose does not mean it does not have obtaining a tax advantage as one of the main purposes.*
>
> *Where a tax advantage is simply 'the icing on the cake' then it is not a primary purpose or main benefit of the transaction.*
>
> *It is often obvious whether or not a primary purpose or main benefit of a transaction was to give rise to a tax advantage.*"

82. The Appellant's Counsel submitted that it was necessary to review the circumstances in place when the Appellant entered into the CLA in August 2013. Counsel submitted that when the Appellant entered into such agreement he did, given the industry involved, believe he would recoup his investment in full and that no tax consideration whatsoever entered his mind at that stage. Counsel stated that it was unclear whether the Respondent is maintaining that the August 2013 transaction, the assignment of the CLA in December 2018 and the unrelated sale of shares in [redacted] in February 2018 should all be considered together when considering Section 546A TCA 1997. Counsel submitted that if such contention is being made there can be no basis whatsoever for it as the Appellant had no intention of selling his shares in [redacted] in 2013. Furthermore, Counsel submitted there was no connection between the assignment of the CLA and the sale of the shares in [redacted] in 2018. Counsel further submitted that there is no tax scheme in place here that has any of the characteristics of the scheme in *Hanrahan v Revenue Commissioners* [2022] IEHC 43 as the loss suffered by the Appellant as a result of the assignment of the CLA was a real loss and not an artificial loss.

83. The Appellant's Counsel submitted that Section 546A TCA 1997 cannot be interpreted in a way which prevents taxpayers from legitimately carrying out *bona fide* transactions. Counsel submitted that a taxpayer is entitled to arrange his affairs so that he can offset genuine CGT losses against gains and it cannot be the case that the Respondent have an entitlement to forensically examine the motives of a taxpayer whenever loss relief is claimed pursuant to Section 546.

[17] Main purpose tests – November 2023. https://www.revenue.ie/en/tax-professionals/tdm/income-tax-capital-gains-tax-corporation-tax/part-33/33-01-01.pdf

84. Turning to the issue of related party transactions occurring at undervalue, the Appellant's Counsel submitted that he could not understand the Respondent's submissions in this regard. Counsel submitted that there was no authority for underlying loan value to be reduced to reflect the market value pertaining at the time the CLA was entered into, since the CLA converts the loan into a chargeable asset.

Respondent

85. The Respondent's Counsel submitted that the rights pursuant to the CLA do not constitute a debt on a security within the meaning of section 541 and section 585 TCA 1997. As a consequence, Counsel submitted that the rights under the CLA are not considered a chargeable asset and therefore, the Appellant is not entitled to claim loss relief on the disposal of his rights.

86. The Respondent's Counsel acknowledged that there is no statutory definition of the phrase "debt on security" as while section 541 TCA 1997 refers to a "*debt on security within the meaning of section 585 TCA 1997*", the latter section does not contain such definition. As such, the Respondent submitted that regard must be had to a number of authorities that have considered the meaning of the term "debt on security" in both Irish and the UK jurisdictions.

87. The Respondent's Counsel also opened the case of *McSweeney* in which Morris J. considered and rejected the jurisprudence of the UK courts in the case of *Taylor Clarke International v Lewis* [1997] STC 499. At paragraph 26 and 27 of his judgement, Morris J. held that:

> "*In my view, these are the elements which identify a debt on a security. This, seems to me, to be no more than common sense. The pure loan is exempt from capital gains tax because it can never exceed in value. With the additional rights to convert it into stock, a debt on a security may appreciate in value and can be marketed at a profit. This is a clear distinction between the two.*
>
> *…The essence of a loan on security must be <u>whether the additional 'bundle of rights' acquired with the granting of the loan, to use Wilberforce L.J.'s phrase, enhances the loan so as to make it marketable and potentially more valuable than the value of the repaid loan upon repayment. This potential increase in value must not be illusory or theoretical. It must be realistic at the time when the loan and the rights are acquired by the lender</u>.*" [<u>Emphasis Added</u>]

88. The Respondent's Counsel submitted that this jurisprudence was later examined in the case of *O'Connell (Inspector of Taxes) v Keleghan* [2001] 2 I.R. 490 ("*Keleghan*") in which Murphy J. approved and endorsed the analysis of Morris J. in *McSweeney* as follows:

> "*Whilst the right to assign a debt in whole or in part and the arrangements made to facilitate such an assignment may be material in determining whether a particular debt has the requisite characteristic of marketability, the clear analysis provided by Morris P shows the decisive importance of the underlying commercial potential of the debt to appreciate in value if it is to qualify as a 'debt on security' for capital gains tax purposes." [Emphasis Added].*

89. In *Keleghan,* the shares were part of a complex transaction and were purchased by way of a loan note. The purchaser had retained the right to convert their loan to shares. However, Murphy J. noted their rights were "*extremely limited indeed*". The Court found that the loan notes possessed insufficient characteristics to "*elevate it above the status of a mere unsecured debt*".

90. Within *Keleghan*, the Supreme Court further identified a number of key characteristics which included the "*capability of having an enhanced value*". The Respondent's Counsel submitted that these enhancing qualities include the presence of share conversion rights, a reasonable commercial rate of interest, a structure of permanence as detailed by the terms of loan notes and whether the borrower can make repayment at any time.

91. As such, the Respondent's Counsel submitted in line with the Supreme Court's findings, for a debt to be considered a debt on security, it is essential that the following characteristics are present:

    (i) An entitlement to receive interest on the underlying loan;

    (ii) A consideration of whether the loan is repayable on demand; and,

    (iii) Whether the loan is capable of being converted into ordinary shares and if so, if it is capable of having an enhanced value.

92. The Respondent's Counsel submitted following consideration of the foregoing required characteristics, that the CLA entered into between the Appellant and [redacted] does not amount to a "debt on security" within the meaning of section 541 and 585 (1) TCA 1997.

93. In coming to this finding, the Respondent's Counsel submitted that the CLA was not in reality marketable as any potential increase in value was purely illusory or theoretical as held in *McSweeney*. In addition, Counsel submitted that as [redacted] had an authorised share capital of 1,000,000 €1 ordinary shares and an issued share capital of 100 €1 ordinary

shares on the date the parties entered into the CLA (2nd August 2013), then it was not possible for the outstanding loan balance on that date (€1,281,237) to have been converted into ordinary shares, since [redacted] did not have sufficient authorised share capital to facilitate the conversion. As such, the Respondent's Counsel submitted this was indicative that the Appellant lacked the real ability to convert his loan into ordinary shares and thus, had no prospect of generating a profit. Given this position, Counsel submitted that the CLA could not be construed as having a commercial reality ascribed to it.

94. The Respondent's Counsel further submitted that clause 2.4 of the CLA did not afford the Appellant an automatic right to convert the loan into ordinary shares in [redacted]. Rather, Counsel submitted that all this clause entitled the Appellant to do was to make a written request to [redacted] to convert the loan value into ordinary shares, and [redacted] retained discretion as to whether it would so do. Furthermore, Counsel submitted that clause 2.4 implied that [redacted] would maintain sufficient authorised share capital to satisfy the exercise of the Appellant's conversion rights if so permitted, but yet it had failed to do so.

95. In the event that the Commissioner determined that the Appellant's rights under the CLA did amount to a debt on security within the meaning of section 541 TCA 1997, the Respondent's Counsel submitted in the alternative that the capital losses arising on the disposal of the CLA are not allowable pursuant to section 546A TCA 1997.

96. The Respondent's Counsel submitted that it is clear from the wording of section 546A (2) TCA 1997 that a CGT loss shall not be considered an allowable loss if it accrues in connection with any "arrangements" whose main purpose, or one of whose main purposes, is to secure a tax advantage. Counsel submitted that the use of the word "shall" in section 546A (2) TCA 1997 mandates a statutory obligation on the Commissioner to deny the capital losses arising on the disposal of the CLA as they occurred in such circumstances. Counsel further submitted if any ambiguity arises from the wording of section 546A TCA 1997, then the Commissioner must look to the intention of the Oireachtas in enacting such legislation, which the Respondent submitted was to counter the exploitation of CGT loss relief by persons who have not made genuine capital losses.

97. The Respondent's Counsel submitted that a subjective test should be applied when considering the main purpose of such an arrangement. Counsel proceeded to open the case of MacAonghusa *(Inspector of Taxes) v Ringmahon Company Ltd* [1999] IEHC 48 in which the High Court considered the meaning of "purpose" in the context of determining whether an expense was incurred wholly and exclusively for the purposes of a trade. Budd J cited with approval the principles as enunciated by Millet L.J. in *Vodafone Cellular limited and Ors v Shaw (Inspector of Taxes)* [1997] STC 734, as follows:

"*2. To ascertain whether the payment was made for the purposes of the taxpayer's trade it is necessary to discover his object in making the payment. Save in obvious cases which speak for themselves, this involves an inquiry into the taxpayer's subjective intentions at the time of the payment.*

3. The object of the taxpayer in making the payment must be distinguished from the effect of the payment. A payment may be made exclusively for the purposes of the trade even though it also secures a private benefit. This will be the case if the securing of the private benefit was not the object of the payment but merely a consequential and incidental effect of the payment.

4. Although the taxpayer's subjective intentions are determinative, these are not limited to the conscious motives which were in his mind at the time of the payment. Some consequences are so inevitably and inextricably involved in the payment that unless merely incidental they must be taken to be a purpose for which the payment was made." [Emphasis Added]

98. The Respondent's Counsel submitted it is reasonable to infer that one of the main purposes for the Appellant selling his rights to the third party purchaser was to avail of a tax advantage and that the Appellant would not have entered into this transaction had this tax advantage not been an inevitable consequence. Counsel noted that the third party purchaser paid €21,350 to the Appellant for the CLA which at the time appear to have been entirely worthless with no potential for a return. As such, Counsel submitted that the disposal of the CLA by the Appellant constitutes an "arrangement" as defined by section 546A TCA 1997 and as such loss relief ought to be denied to the Appellant.

99. The Respondent's Counsel submitted that the Commissioner was not limited to the reasons why the Appellant stated he entered the CLA but in place is required to consider the wider context of why the arrangement took the form it did. In support of that submission, the Respondent's Counsel opened the UK Upper Tribunal case of *Seven Individuals v Revenue and Customs Commissioners* [2017] UKUT 132 (TCC) where Nugee J. held:

"103. *Brebnor[18], therefore, undoubtedly proceeds on the basis that the question was a subjective one, although the contrary does not appear to have been argued. I was shown some other examples. In Lloyd -v- Customs Commissioners[19], the Special Commissioner, Dr. Avery Jones was concerned with a section 703 ICTA 1988, which*

[18] *IRC v Brebnor* [1967] 1 All ER 779.

[19] [2008] STC (SCD) 681

was a re-enactment of and in similar terms to the section considered in Brebnor. He referred to the object, which he equated with purpose, as what the transaction hoped to achieve and he answered the statutory question by considering whether one of the main objects in the mind of the taxpayer was to obtain the tax advantage. In Snell 2008 SCD 1094[20], another Special Commissioner, Mr. Barlow, was also concerned with section 703 and on the basis of Brebnor held that the taxpayers' specific intentions were highly relevant, although the taxpayers' representative accepted that the intentions of the taxpayers' advisors were relevant as well. On that latter point [counsel for the appellants] told me that in a case called Marwood Homes, which I was not shown, a tribunal known as the Section 703 Tribunal had said that one could look at the advice which a taxpayer had acted on in order to look into his mind and he accepted that that must be right.

…104. I have not found this entirely easy but I am inclined, despite what was said in these cases and despite the high authority of Brebnor, to accept Mr. Davey's submission and hold that in considering what the object of a set of arrangements are, one can look more widely than what was in the taxpayer's own mind. The reality is that complex arrangements such as were involved in the Icebreaker Partnerships are not devised by the taxpayer. They are devised with considerable care and sophistication by those who are responsible for coming up with the idea and turning that idea into a series of transactions or arrangements. They are then promoted to members of the public, who are invited to participate in them. It does seem to me that when the statutory question is whether the main purpose, or one of the main purposes of the arrangements is the obtaining of a reduction in tax liability by means of sideways relief, it would be surprising if that question were intended to be answered by looking at the intentions, motives or purposes of the individual taxpayer alone without regard to the wider context of why the arrangements took the form they did, how those who devised the arrangements hoped they would work and the way in which they were promoted to potential participants."

100. The Respondent's Counsel submitted that the explanation of the reasons why the Appellant converted the simple debt into a debt on security was not credible. In place, Counsel submitted that the Appellant's only reason to enter into the CLA was to use it as a form of insurance policy since if he did not get his money back, he could avail of a tax benefit on the write-off of his investment.

[20] [2008] STC (SCD) 1094

101. Further, or in the alternative, the Respondent's Counsel submitted that the base cost ascribed to the CLA should be limited to the market value of the rights under the loan agreement on the date they were acquired in accordance with the provisions of section 547 (1) TCA 1997

102. In support of this position, the Respondent's Counsel submitted that section 547 (1) TCA 1997 is unambiguous in its wording and clearly states that market value will be automatically imposed and as such, the consideration paid will be irrelevant in certain transactions. Counsel noted that this provision operates when an asset has been acquired otherwise than by means of an arm's length agreement. Counsel submitted that as the Appellant and [redacted] were connected parties on the date the CLA was entered into, 2nd August 2013, then it followed that the market value of the CLA on that date was the applicable base cost to be ascribed on the subsequent disposal of the CLA. Furthermore, Counsel submitted that any further advances made by the Appellant to [redacted] after the date the CLA was entered into should be similarly treated with reference to the date those advances were made.

103. In summation, the Respondent's Counsel submitted that the Appellant's appeal should be refused by the Commission as the Appellant failed to establish that his rights under the CLA are a "debt on security" within the meaning of section 541 and section 585 TCA 1997 and as such, are not eligible for claim loss relief pursuant to section 546 (1) TCA 1997.

104. In the alternative, if the Commissioner were to determine that the CLA was a debt on a security, the Respondent's Counsel submitted that the capital losses arising on the disposal are not allowable pursuant to section 546A TCA 1997.

105. Further and in the alternative, the Respondent's Counsel submitted that the Appellant's acquisition of the CLA was not a bargain at arm's length and accordingly, under section 547(1)(a) TCA 1997, market value rules apply to the disposal of the CLA and the Appellant's base cost should be restricted to the value of the rights under the CLA on the date he entered into that agreement, with any further advances made by the Appellant after that date similarly restricted.

Material Facts

106. The Commissioner finds the following material facts which are not in dispute between the parties:

106.1. The Appellant owned 70% of the issued share capital of a company known as [redacted]. The Appellant's son owned the remaining 30% of the issued share capital of [redacted].

106.2. The business activities of [redacted] were the [redacted].

106.3. At all material times, the Authorised Share Capital of [redacted] was 1,000,000 ordinary shares of €1 each.

106.4. On 2nd August 2013, the Appellant entered into a CLA with [redacted] On that date, [redacted] owed the Appellant the sum of €1,281,237 in the form of a director's loan account. On the same date the Appellant converted his director's loan account balance into the CLA and hence, the balance on the CLA as at the close of business on 2nd August 2013 was €1,281,237.

106.5. It was a term of the CLA that the Appellant would advance further sums to [redacted] and that these advances would increase the balance owed to the Appellant under the CLA.

106.6. Between 3rd August 2013 and 31st December 2017, the Appellant advanced a further €942,678 to [redacted] and received repayments of €88,724 from it. As at 31st December 2017, the Appellant was owed the sum of €2,135,191 by [redacted] under the CLA.

106.7. Clause 2.4 of the CLA required [redacted], within 28 days of being requested by the Appellant, to convert the balance owed by [redacted] to the Appellant under the CLA into ordinary shares within [redacted] and to take all appropriate actions to effect this.

106.8. Clause 3.1 of the CLA required [redacted] to pay the Appellant interest at rates to be agreed between [redacted] and the Appellant. Absent such agreement, [redacted] was required to pay the Appellant annual interest at the rate of 4% above the Appellant's cost of funds. In the event of non-payment of the interest by [redacted], the Appellant was entitled to have the accrued interest compounded to the amount owing under the CLA. No such interest was paid or compounded to the Appellant's benefit.

106.9. Clause 7 of the CLA permitted the Appellant a right of assignment of that instrument. In the event the Appellant wished to assign the CLA the consent of [redacted] was not required under that agreement.

106.10. On 10th December 2018, the Appellant entered an agreement with an unconnected third party to sell his shares in [redacted] for par value. The Appellant's son also sold his shares in [redacted] on the same date for par value.

106.11. The day following, on 11th December 2018, the Appellant sold his interest in the CLA to the same unconnected third-party for €21,350. The balance owed to the Appellant by [redacted] on that date was €2,135,000. The Commission was provided with a copy of the Deed of Assignment of the CLA dated 11th December 2018.

106.12. The Appellant incurred a monetary loss of €2,113,650 on the disposal of the CLA on 11 h December 2018.

106.13. The Appellant disposed of his shareholding in another company, [redacted], on 15 h February 2018 for [redacted]. The Appellant offset the loss made on the disposal of the CLA against the gain made on the disposal of the [redacted] shares.

107. In addition, the Commissioner finds the following material facts following his evaluation of the parties' submissions and evidence:

107.1. The [redacted] is a volatile industry.

107.2. The Appellant advanced sums of money to [redacted] for the periods 2013 to 2018 and as such is considered an investor in that company. In return for providing that finance, the Appellant owned 70% of the equity of [redacted] and was entitled to the repayment of sums advanced by him to [redacted]

107.3. The Appellant's son managed the business activities of [redacted] and owned 30% of the equity of [redacted]

107.4. The Appellant's son was in agreement that the CLA should be put into place on 3rd August 2013 as the Appellant had provided all of the finance necessary to ensure [redacted] operation.

107.5. [redacted] was only required to have sufficient authorised share capital in place to facilitate the conversion of the CLA into ordinary shares when requested by the Appellant to so do.

107.6. On the date the CLA was entered into, [redacted] accountant valued the assets of [redacted] at 2nd August 2013. The value of those assets was €2,469,185, which [redacted] valued at €200,000 which was omitted from the Schedule of Assets annexed to the CLA.

107.7. Following a profit for the year 2014, [redacted] incurred losses in the subsequent years to its date of sale in 2018. In addition, between the years 2014 and 2018, the Appellant's financial and personal fortunes declined.

107.8. When profitability was achieved by [redacted] in 2014, a portion of the Appellant's outstanding loan was repaid to him that year.

107.9. Prior to the sale of [redacted] in December 2018, the Appellant acquired the remaining [redacted] in [redacted] as at that date for market value. On the date of sale of [redacted], the only assets in existence were tangible assets of €12,000 and debtors of €22,664.

Analysis

108. As confirmed in *Menolly Homes v Appeal Commissioners* [2010] IEHC 49, the burden of proof is, as in all taxation appeals, on the taxpayer. As confirmed in that case by Charleton J at paragraph 22: -

"*This is not a plenary civil hearing. It is an enquiry by the Appeal Commissioners as to whether the taxpayer has shown that the relevant tax is not payable*."

109. The rules for statutory interpretation are set out in the judgment of McDonald J. in *Perrigo Pharma International DAC v John McNamara, the Revenue Commissioners and ors.* [2020] IEHC 552 ("*Perrigo*") where he summarised the fundamental principles of statutory interpretation at paragraph 74 as follows:

"The principles to be applied in interpreting any statutory provision are well settled. They were described in some detail by McKechnie J. in the Supreme Court in Dunnes Stores v. The Revenue Commissioners [2019] IESC 50 at paras. 63 to 72 and were reaffirmed recently in Bookfinders Ltd v. The Revenue Commissioner [2020] IESC 60. Based on the judgment of McKechnie J., the relevant principles can be summarised as follows:

(a) If the words of the statutory provision are plain and their meaning is self-evident, then, save for compelling reasons to be found within the Act as a whole, the ordinary, basic and natural meaning of the words should prevail;

(b) Nonetheless, even with this approach, the meaning of the words used in the statutory provision must be seen in context. McKechnie J. (at para. 63) said that: "… context is critical: both immediate and proximate, certainly within the Act as a whole, but in some circumstances perhaps even further than that";

(c) Where the meaning is not clear but is imprecise or ambiguous, further rules of construction come into play. In such circumstances, a purposive interpretation is permissible;

(d) Whatever approach is taken, each word or phrase used in the statute should be given a meaning as it is presumed that the Oireachtas did not intend to use surplusage or to use words or phrases without meaning.

(e) In the case of taxation statutes, if there is ambiguity in a statutory provision, the word should be construed strictly so as to prevent a fresh imposition of liability from being created unfairly by the use of oblique or slack language;

(f) Nonetheless, even in the case of a taxation statute, if a literal interpretation of the provision would lead to an absurdity (in the sense of failing to reflect what otherwise is the true intention of the legislature apparent from the Act as a whole) then a literal interpretation will be rejected.

(g) Although the issue did not arise in Dunnes Stores v. The Revenue Commissioners, there is one further principle which must be borne in mind in the context of taxation statute. That relates to provisions which provide for relief or exemption from taxation. This was addressed by the Supreme Court in Revenue Commissioners v. Doorley [1933] I.R. 750 where Kennedy C.J. said at p. 766: "Now the exemption from tax, with which we are immediately concerned, is governed by the same considerations. If it is clear that a tax is imposed by the Act under consideration, then exemption from that tax must be given expressly and in clear and unambiguous terms, within the letter of the statute as interpreted with the assistance of the ordinary canons for the interpretation of statutes. This arises from the nature of the subject-matter under consideration and is complementary to what I have already said in its regard. The Court is not, by greater indulgence in delimiting the area of exemptions, to enlarge their operation beyond what the statute, clearly and without doubt and in express terms, except for some good reason from the burden of a tax thereby imposed generally on that description of subject matter. As the imposition of, so the exemption from, the tax must be brought within the letter of the taxing Act as interpreted by the established canons of construction so far as possible".

110. Section 546 TCA 1997 provides that where an asset is outside the scope of CGT any loss on the disposal of that asset is not available for offset against the Appellant's chargeable gains. Section 541 (1) TCA 1997 states that unless a debt is a "debt on

security" it is not a chargeable asset and as such is outside the scope of CGT. It therefore follows that unless the acquisition of CLA by the Appellant is considered a debt on security, the loss on its disposal is not available for offset against the Appellant's chargeable gains.

111. As noted, while the term "security" is defined in section 585 TCA 1997, the term "debt on security" is not so provided for and as such the Commissioner is required to consider the meaning of the term having regard to established jurisprudence.

112. In order to qualify as a debt on security, the Appellant's loan must at the time of the agreement have had, per the definition provided by Morris J in *McSweeney,* some additional right attaching to it which gave it the potential to increase in value, thereby making it marketable.

113. The Commissioner notes that the Deed of Assignment provided to him dated 11th December 2018 is not signed by [redacted] and that conflicting details were given by the Appellant's witnesses as to the exact nature of the execution of that document. However, as [redacted] acquired the CLA and as the Appellant no longer has any involvement in [redacted] the Commissioner concludes that nothing turns on these assumed oversights/events as both the Appellant and [redacted] performed the actions contained within the Deed.

114. In addition, the Commissioner notes that the Schedule attached to the CLA was not provided to the Respondent when requested but accepts the Appellant's submissions that this was an oversight on his behalf owing to the manner and nature of how the Schedule and CLA were compiled and stored between the date of execution of those documents and the date they were requested by the Respondent. Finally, in noting that clause 3.1 of the CLA required interest to be charged on the sums advanced by the Appellant, while this was not paid or accrued by [redacted] the test required under *McSweeney* is not the **payment or accrual of that interest** but rather an **entitlement to interest** on the principal advanced.

115. The Appellant submits that the right of conversion of the loan to shares under the CLA had the effect of "potential to increase in value". The Respondent submits that it did not because the conversion was not an "automatic" right in the Appellant's favour and as [redacted] had insufficient authorised share capital, then this *"lacked the real ability to convert [the Appellant's loan] into ordinary shares.*"

116. As noted at paragraph 13.1 above, clause 7 of the CLA governs conversion rights. Having regard to that clause and in noting, without the need for the Appellant to obtain

the consent of [redacted], he was entitled to "*assign, transfer, mortgage, charge or otherwise grant interest in or dispose of all or any of its rights, benefits and obligations*" under the CLA, it is clear to the Commissioner that the conversion of the debt into shares was wholly at the discretion of the Appellant, which he could have availed of at any time prior to the assignment of the loan on 11th December 2018.

117. Furthermore, as [redacted] did not have the ability to block the exercise of this right and it was under an express obligation to "*take all appropriate actions to issue and register the Lender as the owner of the Ordinary Shares in the Borrower"* (Clause 2.4 of the CLA at paragraph 13.1 above refers), the Commissioner does not agree with the Respondent's submissions that the Appellant's conversion rights were theoretical or lacked the ability to convert into ordinary shares. In coming to the latter finding, the Commissioner notes that while [redacted] lacked sufficient authorised share capital to facilitate the conversion process, as it was controlled by the Appellant and his son, who operated [redacted] in harmony, it could have, and would have been mandated under the terms of the CLA, to pass resolutions of the company in accordance with section 19 of the Companies Act 2014 increasing the authorised share capital of [redacted] to a level sufficient to enable the conversion of the Appellant's loan into issued shares in [redacted].

118. Arising from the foregoing considerations, it follows that the Commissioner finds under the terms of the CLA, the Appellant was entitled to convert the balance outstanding on his loan account into ordinary shares in [redacted]

119. In line with the findings in *McSweeney*, the Commissioner is also required to consider whether the right to the shares in the company ([redacted]) had the **potential**, at the **time the loan agreement was entered into,** to **increase the value of the debt such that it would have been marketable.**

120. The Commissioner notes from sub-paragraph 106.6 above that the Appellant advanced the sum of €2,135,191 to [redacted] from the date that company commenced trading up until 31st December 2017. At the outset, the Commissioner finds it improbable that the Appellant would have lent such substantial sums of money to [redacted] were there to have been no realistic prospect of him getting a return from his investment, notwithstanding his son's desire to have a career in [redacted].

121. The Commissioner heard evidence from the Appellant's expert witness. While that evidence was interesting and useful to the Commissioner's understanding of the [redacted] industry, the Commissioner is unable to place any reliance on the valuations provided by the Appellant's expert witness as the Appellant's expert witness potentially duplicated [redacted] in his Report and provided his valuations over a range of years. As

such, the Commissioner notes that the schedule of [redacted] valued by the Appellant's witness was not relevant to the net issues to be determined by the Commissioner. It is also uncontroversial and common sense and confirmed by the Appellant's expert witness that a number of variables can affect the valuation of [redacted] and that "life changing" returns can be achieved within the [redacted] industry in the "blink of an eye".

122. As [redacted] held a number of [redacted] on the date the Appellant entered into the CLA and as those [redacted] **could** have substantially increased in value at that time or thereafter, the Commissioner finds that the value of the underlying assets in [redacted] had the **potential to increase in value**. As that potential increase in value may have enabled the CLA to be marketable, the Commissioner finds as a material fact that the second test under *McSweeney* is satisfied and as such the CLA entered into by the Appellant is considered a "debt on security".

123. The Commissioner notes from the Respondent's submissions in the event the Commissioner finds that the loan advanced by the Appellant is a debt on security, then its position is that the CLA is subject to the provisions of section 546A TCA 1997.

124. Those provisions state:

"Restrictions on allowable losses.

(1) In this section—

"arrangements" includes any agreement, understanding, scheme, transaction or series of transactions (whether or not legally enforceable);

"tax advantage" means—

(a) relief or increased relief from tax,

(b) repayment or increased repayment of tax,

(c) the avoidance or reduction of a charge to tax or an assessment to tax, or

(d) the avoidance of a possible assessment to tax;

"tax" means capital gains tax or corporation tax on chargeable gains.

(2) For the purposes of the Capital Gains Tax Acts, a loss shall not be an allowable loss if—

(a) it accrues to the person directly or indirectly in consequence of, or otherwise in connection with, any arrangements, and

(b) the main purpose, or one of the main purposes, of the arrangements is to secure a tax advantage.

(3) For the purposes of subsection (2), it shall not be relevant—

(a) whether or not the loss accrues at a time when there are no chargeable gains from which it could otherwise have been deducted, or

(b) whether or not the tax advantage is secured for the person to whom the loss accrues or for any other person."

125. Absent any domestic judicial findings to date on section 546A TCA 1997, the Commissioner must take cognisance of *Perrigo* and consider each word or phrase within that section should be given a meaning as it is presumed that the Oireachtas did not intend to use surplusage or to use a word or words without meaning.

126. In noting the words used in section 546A TCA 1997 are plain and there is no ambiguity therein, the Commissioner finds that he is required to interpret that section using the "ordinary, basic and natural" meaning of those words. In addition, the Commissioner is further required to consider the context of those words, both immediate and proximate.

127. Section 546A TCA 1997 is an anti-avoidance provision of the TCA 1997. It applies by disallowing an otherwise allowable CGT loss in circumstances where the taxpayer enters an arrangement where the **main purpose, or one of the main purposes** of the arrangement is to secure a tax advantage, as defined.

128. As such, the Commissioner is required to consider the purpose(s) of the transaction at the point in time when the Appellant entered into the CLA i.e. 2nd August 2013. While the Respondent submits that the purpose of the Appellant engaging in the CLA was to avail of a tax advantage, the Commissioner must consider the Appellant's submissions in which he submits it was otherwise.

129. The Commissioner notes on 2nd August 2013, the Appellant engaged in a transaction (the conversion of his director's loan under the CLA) and made subsequent advances to [redacted] up to and including the year ended 31st December 2017 (which were also subject to the CLA). However, for the provisions of section 546A TCA 1997 to be operative, it was necessary **at the time of those advances,** that the main **purpose or one of the main purposes of the "transactions" was to secure a tax advantage.**

130. Within the Appellant's submissions and evidence (see paragraphs 13.7 and 13.8 above in particular), his position is that the CLA was entered into for the following reasons:

(i) To provide security for the Appellant's investment in [redacted] which at that stage was in the form of an unsecured director's loan account.

(ii) To provide flexibility in terms of repayment.

(iii) To create a marketable asset.

(iv) To "regulate" the affairs of the company.

131. In noting from the Appellant's direct evidence that he availed of the CLA to protect his investment and that the CLA had a "fixed and floating charge" over the assets of [redacted] the Commissioner finds point (i) above satisfied. Furthermore, in noting [redacted] accountant's evidence in which he said that the CLA was put in place so that the Appellant's son, who owned 30% of the equity of [redacted], would not be discouraged (in noting at that time, the Appellant could have converted his unsecured director's loan account balance into ordinary shares in [redacted], in place of the CLA, which would have had the effect of diluting the Appellant's son's interest in [redacted] to almost nothing), the Commissioner finds point (ii) satisfied.

132. Owing to the characteristics of the CLA, it is evident to the Commissioner that point (iii) is also satisfied. In addition, as the CLA operated as, to use the Respondent's Counsel's phrase, "a sort of crude alternative to a shareholders' agreement", point (iv) above is also satisfied.

133. The Commissioner notes on the date the CLA came into operation the Appellant's financial and personal positions were in good order and it was not until 2018 that those fortunes changed which formed the basis for him disposing of his interests in both [redacted] and [redacted]. As [redacted] provided the Appellant with the income necessary to fund the trading activities of [redacted], and without that income [redacted] was unable to operate, it appears that the Appellant had little choice but to dispose of his interests in [redacted]. The Commissioner notes the genuine change of familial circumstances relating to the health of the Appellant's daughter and the effect it had on his business and private life.

134. Had that not been the position and in noting that the Appellant was aware from the outset that "significant" returns in the [redacted] often took "a number of years" to achieve, it is unlikely that the Appellant would have disposed of his interest in [redacted] until it fulfilled its potential. The Commissioner also considers it unlikely that the Appellant would have advanced further sums under the CLA after the date he entered into it unless he was of the belief that he would have been able to recoup those advances at a future date.

135. For those reasons, the Commissioner finds the Appellant's evidence persuasive and as a result holds that the main purpose of the CLA was, for those reasons provided by the Appellant, rather than the purpose or one of the main purposes of securing a tax advantage.

136. The Commissioner is aware from the wording of section 546A (3) TCA 1997 that it is irrelevant whether on the date the transaction was entered into if chargeable gains were in existence to offset the potential loss against but as no evidence was provided to the Commissioner to demonstrate that a tax advantage was available, potentially or otherwise, on the date the CLA was entered into, it is unclear to the Commissioner what tax advantage was available to the Appellant **on the date he entered the CLA** and as such the tax advantage obtained by the Appellant, was per the Respondent's own guidance, ultimately the "icing on the cake", having regard to the significant monetary losses incurred by the Appellant.

137. As numerous commercial transactions entered into by a taxpayer incur or could incur a loss which could fall foul under the provisions of section 546A 1997 and in noting that this, in the words of *Perrigo*, would lead to an absurdity, for the purpose of completeness, the Commissioner also considers the true intention of the legislature in enacting the provisions of section 546A TCA 1997.

138. Section 546A TCA 1997 was introduced by section 59 of the Finance Act 2010 in response to a number of tax schemes that were in place where artificial tax losses were created through "marketed tax schemes". Within the Respondent's guidance leaflet[21] it states that section 546A TCA 1997 -

> "*will not apply where there is a genuine commercial transaction that gives rise to a real commercial loss as a result of a real commercial disposal. In these circumstances there will be no arrangements with a main purpose of securing a tax advantage. Conversely, where there is either no genuine commercial disposal, or no real commercial loss, or no real commercial disposal or any combination of the foregoing then there are likely to be arrangements in place with a main purpose, or one of the main purposes, of securing a tax advantage so the legislation will apply."*

139. The UK equivalent[22] of section 546A TCA 1997 was considered by the First Tier Tribunal ("FTT") in *Conegate Limited v HMRC* [2018] TC06340 ("*Conegate*"). In *Conegate*, the FTT denied a claim for capital loss relief and held that market value should have been

[21] Restriction on the allowance of capital losses (S.546A) - https://www.revenue.ie/en/tax-professionals/tdm/income-tax-capital-gains-tax-corporation-tax/part-19/19-02-05A.pdf
[22] Section 16A TCGA 1992.

applied to the disposal and one of the main purposes for entering into the transaction was to secure a tax advantage.

140. Within *Conegate,* the taxpayer entered into arrangements involving the purchase of shares in a company he controlled whereby:

- Ordinary shares were converted into deferred shares, and
- This was intended to lower their value to £1, allowing them to be repurchased for a lower amount than the original purchase price and generate a capital loss.
- The taxpayer argued that the primary purpose of the transactions was not to generate a capital loss but in place was to generate funding for a football club.

141. The FTT dismissed the taxpayer's appeal finding:

- Applying section 29 of the Taxation of Chargeable Gains Act 1992 ("TCGA 1992")[23], the taxpayer was treated as having disposed of his ordinary shares and acquired the deferred shares in exchange, at a value of £1.
- The consideration that could have been received was considerably higher, and the taxpayer had not presented evidence to show that he could not have achieved any greater consideration than £1.
- Therefore, the disposal must be treated as not being at arm's length, with section 17 TCGA 1992[24] applying and the market value of the shares replacing the actual consideration received for the purposes of calculating the capital loss.
- Whilst the transactions had been intended to generate funding for the football club, the capital loss anti-avoidance rules at section 16A TCGA 1992 only require the securing of a tax advantage to be "one of the main purposes" not "the main purpose" of the arrangements, and so relief would have been denied on this basis anyway. There was more than one way for the taxpayer to provide funds to the club and he chose the route he did because of the capital loss which would result.

[23] This section provides that if a person exercises control over a company so that value passes out of shares which he or she owns, and passes into other shares, the exercise of control is treated as a disposal of the shares out of which value passes.
[24] Section 17 TCGA 1992 relates to disposals and acquisitions treated as made at market value. This section is broadly similar to the provisions of section 547 TCA 1997 which is considered below.

142. The Commissioner notes, in the Appellant's appeal, it is not in dispute that the Appellant lent considerable sums of money to [redacted] and suffered an almost total loss of those funds advanced. As that loss was a monetary loss and as the CLA was disposed of to an unconnected third-party, it follows that the loss incurred by the Appellant was a "real commercial loss" which arose as a result of a "real commercial disposal" and not the type of artificial loss generated in *Conegate* which the Commissioner finds is the type of loss that section 546A TCA 1997 legislates against.

143. While the Appellant engaged in a "transaction" (the conversion of his director's loan into the CLA) and secured a "tax advantage" (the loss on the disposal of the CLA which was subsequently offset against chargeable gains in 2018), the Commissioner finds that the transaction is not subject to the provisions of section 546A TCA 1997 as the loss suffered by the Appellant was a **real monetary loss** and on the dates the funds were advanced by the Appellant to [redacted], the purpose of those advances was for the reasons provided by the Appellant, rather than to secure a tax advantage.

144. The Commissioner notes from the Respondent's submissions its position is that as the Appellant and [redacted] were considered "connected parties", then in accordance with the provisions of section 547 TCA 1997, market value should be imposed on any asset acquired by the Appellant from [redacted] which is not considered to have occurred at "arm's length".

145. Section 547 TCA 1997 states – *"*

> *(1) Subject to the Capital Gains Tax Acts, 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).*
>
> *…*"

146. As the only relevant asset acquired by the Appellant from [redacted] was the CLA, and as that asset was not acquired by the Appellant as a gift from [redacted] but rather by the provision of monetary funds which equate to the value of the CLA, the Commissioner is unclear on how the provisions of section 547 TCA 1997 can be applied to the Appellant's appeal.

147. The Commissioner notes that *Conegate,* which examined the UK equivalent of section 547 TCA 1997, concerned the imposition of market value in circumstances where the appellant in that case **artificially** reduced the value of assets in order to secure a tax

advantage. However, unlike *Conegate*, as the funds advanced by the Appellant to [redacted] were **real** monetary funds, this endorses the Commissioner's finding that the provisions of section 547 TCA 1997 are not of relevance to the facts and circumstances of the Appellant's appeal.

148. If, however, the Respondent is submitting that the value of the monetary funds provided by the Appellant under the CLA should be revalued to reflect the underlying assets in [redacted] on the dates of those advances, the Commissioner notes it was held in *McSweeney* that a "debt on security" does not *"mean simply 'a debt which is secured', or, put another way, it is not the opposite to an unsecured debt*". As this confirms to the Commissioner that it is not an essential requirement for a CLA to exist that it is secured to a class or particular class of assets, the Commissioner does not agree that any consideration of section 547 TCA 1997 is required to such argument.

Determination

149. In the circumstances, and based on a review of the facts and a consideration of the submissions, material and evidence provided by the parties, the Commissioner determines that the Appellant has succeeded, on the balance of probabilities in showing that the Respondent was incorrect to hold that the CLA was not a debt on security within the meaning of section 541 TCA 1997. In addition, the Commissioner finds that the provisions of sections 546A and section 547 do not apply to the facts and circumstances of the Appellant's appeal.

150. Accordingly, the Commissioner finds that the Notice of Amended Assessment to CGT, which issued by the Respondent on 29th March 2023 in the sum of €670,926 should be reduced to nil in accordance with the provisions of section 949AK (1) (a) TCA 1997.

151. This Appeal is determined in accordance with Part 40A of the TCA 1997 and in particular sections 949AK thereof. This determination contains full findings of fact and reasons for the determination, as required under section 949AJ (6) of the TCA 1997.

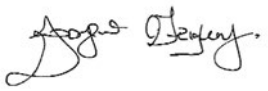
Notification

152. This determination complies with the notification requirements set out in section 949AJ of the TCA 1997, in particular section 949AJ (5) and section 949AJ (6) of the TCA 1997. For the avoidance of doubt, the parties are hereby notified of the determination under section 949AJ of the TCA 1997 and in particular the matters as required in section 949AJ (6) of the TCA 1997. This notification under section 949AJ of the TCA 1997 is being sent via digital email communication only (unless the Appellant opted for postal communication

and communicated that option to the Commission). The parties will not receive any other notification of this determination by any other methods of communication.

Appeal

153. Any party dissatisfied with the determination has a right of appeal on a point or points of law only within 42 days after the date of the notification of this determination in accordance with the provisions set out in section 949AP of the TCA 1997. The Commission has no discretion to accept any request to appeal the determination outside the statutory time limit.



Andrew Feighery
Appeal Commissioner
17th April 2024