



Neutral citation: [2022] UKFTT 00214 (TC)

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

Case Number: TC 08537

By remote video hearing

*Partnership – spouses – development of land*

*– valid elections s 178 ITTOIA s 161 TCGA*

Appeal reference: TC/2020/01013  
TC/2021/00443

**Heard on:** 30 March and 16 June 2022

**Judgment date:** 05 July 2022

**Before**

**TRIBUNAL: JUDGE RACHEL SHORT  
MICHAEL BELL (MEMBER)**

**Between**

**SC PROPERTIES LIMITED (1)  
RICHARD COOKE (2)**

**Appellants**

**-and-**

**THE COMMISSIONERS FOR  
HER MAJESTY’S REVENUE AND CUSTOMS**

**Respondents**

**Representation:**

For the Appellants: Mr Patrick Cannon

For the Respondents: Dr Jeremy Schyrber, litigator of HM Revenue and Customs’ Solicitor’s Office

## **DECISION**

### **INTRODUCTION**

1. This appeal concerns (i) whether a chargeable gain arose on the transfer by Richard Cooke (“Mr Cooke”) to SC Properties Limited (“SCP”) of his interest in a property known as Marepond Copse (“the Property”) and (ii) whether an SDLT charge arose to SCP on the transfer of the Property from Mr Cooke to SCP.
2. On behalf of SCP and Mr Cooke it is argued that because he and his wife were partners in a partnership known as R&E Cooke Partnership (“the Partnership”) which owned the Property before it was transferred to SCP, s 161(3) Taxation of Chargeable Gains Act 1992 (“TCGA 1992”) and s 178 Income Tax Trading and Other Income Act 2005 (“ITTOIA 2005”) apply with the result that no taxable gain was generated and taxable profits were deferred until the Property was sold to a third party.
3. They also argue that no SDLT arose on the transfer of the property to SCP because of the partnership rules at Schedule 15 Finance Act 2003.
4. HMRC say that the Partnership did not exist at the time of the transfers so that both a CGT and an SDLT charge arise.
5. HMRC inquired into Mr Cooke’s 2016/17 self-assessment return and issued a closure notice on 27 November 2018 increasing Mr Cooke’s self-assessment by £42,554.96 of capital gains tax. Mr Cooke appealed against the closure notice on 21 December 2018 and HMRC issued a review conclusion letter upholding the closure notice on 16 October 2020. Mr Cooke appealed against this assessment and made his appeal to the Tribunal on 10 February 2021.
6. HMRC inquired into the SDLT return on 17 March 2017 and issued a closure notice on 22 November 2018. SCP appealed against the SDLT closure notice on 19 December 2018. On 10 February 2020 HMRC issued a review conclusion letter upholding the closure notice. SCP requested that its appeal against the closure notice be combined with Mr Cooke’s appeal which the Tribunal confirmed on 9 September 2020.

### **Issues in Dispute**

7. The main issue in dispute is whether the Partnership existed at the time of the transfer of the Property and whether the two CGT elections were validly made.
8. Second, whether the partnership provisions of the SDLT legislation apply to reduce the SDLT charge on the transfer of the Property to SCP to nil.
9. If the Tribunal finds in favour of HMRC in respect of either of these issues, the Appellants dispute HMRC’s capital gains tax calculation, in particular by reference to additional allowable deductions.

### **Preliminary issues**

10. The parties clarified that although a member of the alleged partnership, Mrs Cooke was not a party to this appeal, her tax affairs were not in dispute for the relevant years.
11. At the hearing on 30 March 2022 Mr Cooke referred to a copy of the election made under s 178 ITTOIA 2005 which HMRC had not previously seen and which had not been included in the bundle of evidence provided to the Tribunal.
12. In order to allow HMRC to properly deal with this late evidence, the Tribunal adjourned the hearing on 30 March and the hearing was re-convened on 16 June 2022.
13. A copy of that election was produced to the Tribunal and HMRC at the hearing on 16 June and HMRC confirmed that the copy of the election had been received by them.

14. At the hearing on 16 June 2022 on behalf of the Appellants Mr Cannon submitted a witness statement from the Appellants advisers, a Mr Hardy. Mr Hardy had not been made available to give witness evidence and neither had the standard directions concerning witness evidence been followed. Having considered the contents of Mr Hardy's statement the Tribunal decided that it should not be admitted as witness evidence; the evidence provided by Mr Hardy was not of sufficient significance to outweigh the need to comply with the specific Tribunal rules about witness evidence.

## BACKGROUND FACTS

15. The Property was acquired by Mr Cooke and his wife in 1989 when they purchased an area of land known as Marepond Farm for an estimated price of £515,000. Part of Marepond Farm included, amongst other areas of land (see below), the Property.

16. There were various buildings on the land including Marepond Farmhouse, a 16th Century Cottage, and a barn. In 1994 the Cookes refurbished and extended Marepond Farmhouse.

17. In 1997 SCP was incorporated, primarily as a property development company owned in equal shares by the Cookes.

18. In 2000 the Cookes converted a barn known as “Marepond Barn” for their own occupation and in 2009 they converted another barn, “The Old Barn”, which they sold to a third party for £950,000.

19. On 21 August 2014 SCP completed a Company Voluntary Arrangement or “CVA”, which is a process by which an insolvent company can enter into an agreement with its creditors to pay off some or all of its debts over a period of time.

20. On 17 September 2014 planning permission was granted for the development of the Property which became known as “Marepond Copse”. It is agreed between the parties that the Property was worth £256,794 at this date.

21. According to Mr Cooke on 17 September 2014 the Cookes created a partnership called R & E Cooke Partnership (“the Partnership”) to develop the Property, and that the Property was appropriated to trading stock of the Partnership. The existence of the Partnership is in dispute.

22. On 5 January 2015 Close Brothers Property Finance granted a facility to the Cookes in the sum of £920,000 (subject to the provision of a valuation report) to provide for:

- |                             |  |
|-----------------------------|--|
| • Equity Release            | £200,000   |
| • Building costs (est'd)    | £650,000 (to be drawn against building certificates) |
| • Interest (est'd)          | £ 40,000   |
| • Professional fees (est'd) | £ 30,000   |

23. On 6 January 2015 Mr Cooke renewed the planning application for developing the Property. Permission was granted on 4 March 2015.

24. On February 2015 the Property was valued by Savills (UK) Ltd at this date, for the purposes of a loan from Close Brothers Property Finance. The market value was £830,000 and the “Gross Development Value” (that is the value on the assumption that the proposed development was completed) was £2,000,000.

25. On 20 March 2015 Close Brothers Property Finance permitted the initial drawdown of £200,000 as reflected in a statement issued by Close Brothers Property Finance in the name of the Cookes. The same statement disclosed subsequent drawdowns against Certificates.

26. In April 2015 HMRC conducted a VAT visit related to the VAT affairs of SCP.

### **Development of the Property**

27. According to Mr Cooke, on 5 May 2015 work started on developing the Property. Mr Cooke also says that demolition of the existing barn on the site was complete by the end of the month.

28. On 15 June 2015 the Cookes signed a contract for building work with SCP with a contract value of £650,000, and SCP signed a building contract with Stacey Builders Ltd. Services were stated to commence on 15 June 2015 and due to complete on 8 January 2016. The stated value of the contract was £356,312. Mr Cooke has told HMRC that work had started earlier, by agreement.

29. Between 21 July 2015 to 1 August 2016 stage payments were made from SCP to Stacey Builders Ltd totalling over £670,000 and further significant amounts to other suppliers. The Cookes transferred money from their joint personal account into SCP's account to fund the payments. The transfers were funded by drawdowns pursuant to the Close Brothers Property Finance facility.

### **Option Agreement**

30. On 23 August 2015 at an SCP board meeting, it was agreed that the company would enter into an option agreement with the Cookes ("the Option"). Such an agreement was entered into between the Cookes and SCP on the same day. The Cookes granted the SCP the right to purchase the Property for £830,000 by giving notice within 1 year, for consideration of £1 (one pound).

31. On 8 January 2016 the Cookes submitted an election under section 161(3) TCGA 1992 to defer any gain arising on the nominal increase in the land value to date. This was sent in the Cookes' names using their tax references.

32. According to Mr Cooke contracts were exchanged on 25 April 2016 for SCP's acquisition of the Property.

33. 9 June 2016 SCP obtained a loan of £1,215,000 from Close Brothers Property Finance for the acquisition of the Property from the Cookes.

34. On 9 June 2016 £830,000 was credited to the Cookes' director's loan account with SCP in consideration for the acquisition of the Property. The parties agree that the value of the Property on that date was £1,583,945.

35. On 31 January 2018 an election was made under section 178 ITTOIA in respect of the transfer to the company; the effect being that the sum realised on "sale" into the company was nil and the deferral of realising any profit until the Property was sold by SCP in March 2017.

36. On 9 June 2016 registered title of the Property was transferred from the Cookes to SCP. The parties have agreed the value of the Property at this date as £1,583,945.

37. On 23 March 2017 the completed Property was sold by SCP to a third party for £1,875,000.

38. On 19 February 2019 the Partnership was registered with HMRC.

## THE LAW

39. The legislation which is relevant to the chargeable gain is set out at:

(1) S 161(1) TCGA 1992 “Appropriation to and from trading stock”:

“....where an asset acquired by a person otherwise than as trading stock of a trade carried on by him is appropriated by him for the purposes of the trade as trading stock..... and, if he had then sold the asset for its market value, a chargeable gain or allowable loss would have accrued to him, he shall be treated as having thereby disposed of the asset by selling it for its then market value”

(2) S 178(1) ITTOIA 2005 “Sale basis of valuation; election by connected person”

“The value of trading stock is determined in accordance with this section if-

It is sold to a person who carries on, or intends to carry on, a trade profession or vocation in the United Kingdom and is entitled to deduct the costs of the stock as an expense in calculating the profits of that trade, profession or vocation for income or corporation tax purpose.

The buyer is connected with the seller, and

An election is made under this section”

40. The legislation relevant to the SDLT charge is set out at Schedule 15 Finance Act 2003, paragraphs 18 and 20. “Transfer of chargeable interests from a partnership” and sets out how the chargeable consideration should be calculated when a chargeable interest is transferred from a partnership to a connected party. SCP is a connected party for these purposes.

41. There is no dispute about the technical analysis or application of this legislation, the only dispute between the parties is whether the Partnership which is said to be a party to the relevant transactions actually existed.

## AUTHORITIES

42. We were referred to:

(1) the recent decision in *Burnett v Barker* EWHC [2021] 03332 for its statements on partnership law: and

(2) the Partnership Act 1890 which provides at section 1 the definition of a partnership: “A partnership is the relation which subsists between persons carrying on a business in common with a view of profit”.

## THE EVIDENCE

43. We saw

(1) Development loans and personal guarantees between Mr and Mrs Cooke and Close Brothers dated January 2015.

(2) Letter from Close Brothers to Mr and Mrs Cooke of 5 January 2015 offering a loan facility for the approved costs of the building works at the Property.

(3) Savills’ valuation of the Property on behalf of Close Brothers February 2015 giving a valuation of £830,000.

(4) Partnership tax return for the year 5 April 2017.

(5) Partnership accounts for the years 5 April 2015, 2016 and 2017.

(6) Option Agreement dated 23 August 2015 between Mr and Mrs Cooke and SCP over the Property. Consideration for the option is stated as £1.00. Option price of the Property is stated as £830,000.

(7) Emails between Mr Cooke's advisers, Shipleys and Mr Cooke dated 14 December 2015 stating:

“Please find attached the various forms requiring filing with HMRC in order to create a property development partnership as discussed”

(8) Letter on Shipleys letterhead to HMRC 8 January 2016 and signed by Mr and Mrs Cooke representing a 161-election stating that the Property had been appropriated to trading stock as at 17 September 2014 (the date when planning permission was obtained).

(9) Correspondence between Mr Cooke and HMRC dated from 17 March 2017 to 30 October 2020, including an email of 2 February 2019 in which Mr Cooke says:

“Hence myself and my wife created a partnership “R&E Cooke” and appropriated the land to trading stock.....This partnership commenced at 6 April 2015”

(10) Contract entered into for the development of the Property between:

SCP and Mr and Mrs Cooke 15 June 2015 for building services at the Property with a contract price of £650,000.

SCP and Stacey Builders Limited 15 June 2015 for building services at the Property with a contract price of £356,312.

(11) Copy of s 178 election dated 31 January 2018.

(12) Correspondence from the District Valuer dated 20 June 2018 suggesting a valuation for the Property as at June 2015 as £1,583,945.

44. We heard oral evidence from Mr Cooke who provided a witness statement dated 22 July 2021. Mr Cooke was cross-examined at the hearing by HMRC's representative.

### **Financing**

45. Mr Cooke told us that he had been involved in property development for some years. The company which he had previously used for that development business, SCP entered into a voluntary arrangement with creditors which was finalised in September 2014. At that stage it was not possible to obtain financing for property development through SCP.

46. The financing for Marepond Copse was obtained in the name of Mr and Mrs Cooke in partnership from Close Brothers. Mr Cooke said that Close Brothers would not lend to individuals (regulated lending) so the loan must have been made to them as a partnership not as individuals. After questioning Mr Cooke clarified that Close Brothers would not lend to individuals to build properties for their own residence.

47. The funds provided by Close Brothers were transferred as stage payments to Mr and Mrs Cooke's joint personal bank account.

48. Mr Cooke told us that all of the invoices for the development work on the Property were borne by SCP. When costs were incurred, SCP would request reimbursement from Mr and Mrs Cooke, who used monies from the Close Brothers loan facility to make those payments to SCP.

49. Any VAT on the development costs was claimed by SCP not Mr and Mrs Cooke.

## **Planning permission**

50. Mr Cooke explained that the original planning application for Marepond Copse was rejected in about June 2013, but an appeal was successfully made with few changes in September 2014. It was only when that planning permission was obtained that a decision was made about what would be done with the Property; that it would be developed and not used as Mr and Mrs Cooke's own home. That was why the April 2015 date had been taken as the date for the commencement of the Partnership.

51. At the time of the VAT inspection in April 2015 the options for what to do with the Property were still being weighed up.

52. Mr Cooke said that he was advised that no decision about what would be done with the Property needed to be made until his self-assessment tax return for the year ended 5 April 2015 was finalised in January 2016 and accepted that a final decision was made when the relevant forms were sent to HMRC on that date, although the existence of the partnership between him and his wife had been discussed at a much earlier stage.

## **Valuations and the Option**

53. Mr Cooke accepted that the Property was valued by an external valuer (Savills) as worth £830,000 and this figure was used in the SDLT return. In July 2018, the district valuer valued the Property as at 5 June 2016 at £1.584 million. Despite this, the Option Agreement gave SCP an option to acquire the Property for £830,000, meaning that any gain would accrue to SCP not Mr and Mrs Cooke. The Option price was £1, despite the fact that it gave SCP a valuable right.

54. Mr Cooke could not explain why the partnership accounts for the year ending 2017 showed a turn over figure of £1,193,135 despite the Property being sold for only £830,000.

## **The Partnership business**

55. Although no formal partnership agreement had been entered into, Mr Cooke was adamant that the partnership between himself and his wife was a business enterprise. It was run by them both from home, but entailed project management and design and taking on significant financial obligations. Mrs Cooke's role was the design of the kitchens and bathrooms and dealing with the sales agents; the sale took nine months to complete. He described Mrs Cooke as "working strongly with him" on the Property.

56. Mr Cooke accepted that no evidence had been provided about Mrs Cooke's views of the partnership or her understanding of what the arrangement was.

57. Mr Cooke argued that the Partnership was in existence before returns were made to HMRC in January 2016, work had already started on the project and that he had put tax and accounting to one side until the end of the year.

58. No evidence was provided by Mrs Cooke.

## **The Elections**

59. Mr Cooke told us that he relied on his adviser at a local firm of accountants for advice about the best way of structuring the Property transactions and to ensure that the relevant forms were completed and sent to HMRC. He recalled signing the Partnership tax returns following the end of each year (and in each case shortly before the relevant filing deadline) and that the forms were signed to register the Partnership with HMRC in December 2015.

60. Mr Cooke said that the two relevant elections were sent to HMRC's self-assessment centre; on 8 January 2016 (the s 161 election) and 31 January 2018 (the s178 election).

61. At the hearing on 16 June 2022 Mr Cooke produced a copy of the s 178 election signed and dated by Mr & Mrs Cooke but not by S C Properties.

## THE APPELLANTS' ARGUMENTS

### The CGT charge

62. The Partnership was set up by Mr Cooke and his wife and operated as a business to carry out the development of the Property.

63. The start date for the Partnership was the date when planning permission was obtained for the Property: 17 September 2014.

64. The Partnership was registered with HMRC in 2015 and completed partnership tax returns for the 2015, 2016 and 2017 tax years.

65. The partnership "carried on a business with a view to profit" (Section 1(1) Partnership Act 1890):

(1) Its business was gaining planning consent, building the Property and selling it.

(2) It was never the certain intention of Mr Cooke and his wife to move into the property themselves (despite what was said at the time of a VAT visit in April 2015).

(3) The Partnership was a common enterprise between Mr Cooke and his wife. As a partnership between spouses, it is not unusual for there to be no formal documentation due to the existing relationship of mutual trust between Mr Cooke and his wife.

(4) Despite the fact that there was no partnership agreement, in fact Mrs Cooke took an active role in the Partnership; she was responsible for the design and project management issues on site and dealt with the sales agents.

(5) Mr and Mrs Cooke took out the development loan through their joint bank account as a partnership with Close Brothers bank.

(6) The Property was appropriated to trading stock under an election s 161(3) TCGA 1992 submitted on 8 January 2016.

(7) The Property was transferred to SCP in June 2016 pursuant to the exercise of the August 2015 Option and an election made under s 178 ITTOIA 2005 was made on 31 January 2018, as advised by professional advisers.

66. Mr Cannon referred to the definition of a partnership considered in the 2021 high court decision of *Burnett v Barker* ([EWHC] 3332 (Ch)) at paragraphs [37-38],

"Fundamentally, partnership is a contractual relationship, or a relationship resulting from a contract, whether express or implied, which has been described as a continuing personal as well as commercial relationship. Like any other contract, the terms must be sufficiently certain, so that where it is found that alleged partners have either reached no binding agreement, or specifically agreed *not* to enter into a partnership, or one of them has expressly declined to enter into a partnership agreement, the existence of a partnership is unlikely to be inferred from their conduct (*Lindley & Banks, para 2-17*)  
.....

In respect of implied contracts, in *Blackpool & Fylde Aero Club Ltd v Blackpool Borough Council* [1990] 1 WLR 1195, Bingham LJ said this (at p 1202 F):

I readily accept that contracts are not to be lightly implied. Having examined what the parties said and did, the court must be able to conclude with confidence both that the



parties intended to create contractual relations and that the agreement was to the effect contended for”

67. While Mr Cannon accepted that a contract, including a contract of partnership could not be “lightly inferred” in his view there was sufficient evidence here to establish that there was a partnership between Mr and Mrs Cooke; they had both signed documents relating to tax elections and the tax returns for the partnership.

68. The tax planning which had been undertaken was not aggressive, but was a well-trodden route which simply deferred any tax charge until the Property was disposed of by the company, SCP.

### **The SDLT charge**

69. Schedule 15 FA 2003 applies and the transfer of the Property from the Partnership to SCP is free from SDLT because SCP is owned by the same individuals who are members of the Partnership.

70. The overall impact of the CGT elections was to defer, not avoid a tax charge; when the Property was sold in 2017 to a third party all deferred gains were recognised and tax was paid on those gains.

### **HMRC’S ARGUMENTS**

#### **The CGT charge**

71. HMRC contend that the Appellants have not provided evidence to suggest that the Partnership existed. The Partnership did not acquire the Property and did not carry on a trade of developing the Property.

72. In support of this argument HMRC point out that the Partnership was not registered with HMRC until February 2019, some time after the property transactions. No partnership agreement was entered into and the Partnership had no other commercial dealings; no bank accounts, no contracts, no invoices and no correspondence.

73. The Option granted to the Partnership was also devoid of commerciality; granting a valuable right for a nominal price. In any event, the Appellants have not provided any evidence that the Option was exercised; Mr Cooke has made contradictory statements about when it was exercised and no written evidence of the exercise has been provided.

74. In respect of the development of the Property HMRC point out that:

- (1) The planning application was made by Mr Cooke, not the Partnership.
- (2) No reference was made to the Partnership at the time of HMRC’s VAT visit in April 2015, when Mr Cooke said that the Property was owned by the directors (of SCP).
- (3) The financing for the development was through a loan in the Cookes’ name not the Partnership’s.
- (4) The development work was carried out by a contractor via SCP, not the Partnership.
- (5) The SDLT return referred to Mr and Mrs Cooke, not the Partnership.

75. On the basis that the Partnership did not exist and the Option was not exercised, the Cookes made a chargeable transfer of the property when it was sold to SCP on 6 June 2016.

The disposal value is the market value of the property in accordance with s 17 and 18 TCGA 1992.

76. In response to a question raised by the Tribunal, HMRC also accepted that the s 178 election was not in fact valid because it had not been signed by both parties (SCP was not a signatory) as required by s 178(4). Nevertheless, HMRC's position remained that the validity or otherwise of the election was not relevant since the Partnership did not exist.

### **CGT Quantum of the charge**

77. HMRC also reject the Appellants' claims for allowable deductions against the chargeable gain other than the build costs (£710,000) and fees (£57,200).

78. As a result, the correct tax charge should be £97,236.30 taking account of the apportionment of the original acquisition cost of £100,000 as previously agreed by HMRC.

79. The claims relating to the planning consent and maintenance of the land amounting to £156,793 were rejected by HMRC on the basis that the Appellants had not provided evidence to show that those costs fell within the category of "enhancement expenditure" at a 38(1)(b) TCGA 1992.

### **The SDLT charge**

80. The relevant land transaction for SDLT purposes occurred on 9 June 2016 at a market value of £1,583,945. On the basis that the Partnership did not acquire the Property (because it did not exist) the SDLT charge under s 53 Finance Act 2003 is £151,342.

## **DISCUSSION AND DECISION**

81. It is for the Appellants to demonstrate to the ordinary standard (more likely than not) that the Partnership existed at the relevant time.

### **Findings of Fact**

82. On the basis of the evidence which we saw and heard we find as a fact that:

- (1) At the date of a VAT visit in April 2015, the stated intention of Mr Cooke was to live in the Property.
- (2) The loan to finance the Property made by Close Brothers to Mr and Mrs Cooke was a loan made to them in their individual names.
- (3) None of the other documents provided relating to the Property referred to the Partnership, all were in the names of Mr and Mrs Cooke as individuals.
- (4) The Option was granted to SCP at the then market value of the Property, meaning that any increase in value of the Property would generate a profit for SCP, not the Partnership.
- (5) Mr Cooke provided inconsistent information to HMRC about the date when the Partnership commenced.

### **Did the partnership exist?**

83. The parties are agreed, as set out in the *Burnett v Barker* decision referred to by both of them, that in order for a partnership to exist three conditions must be satisfied:

- (1) There must be a business
- (2) The business must be carried on by two or more persons in common

(3) The business must be carried on with a view to profit.

84. The Appellant argues that the Partnership between him and his wife existed as a business with a view to profit. The business was the “property development business” carried on by both of them.

### **Two or more persons carrying on business in common**

85. Mr Canon stressed that because this was a partnership between husband and wife, it should not be expected that the usual formalities would be in place given the “mutual trust” already in existence between the parties.

86. We cannot accept this approach for a number of reasons:

(1) We have ascribed significance to the fact that we were provided with absolutely no evidence of Mrs Cooke’s view of the relationship between herself and Mr Cooke as far as the Property development was concerned. That makes it very difficult to accept that even the most basic requirement of a partnership existed in this case; that two parties were acting in common. As HMRC stressed, we heard only Mr Cooke’s understanding of the Partnership and how it was intended to operate.

(2) It is correct that it may be difficult to disentangle the joint enterprise which naturally arises between spouses and something which amounts to a partnership for legal purposes; spouses are already partners in many respects. The differentiation we believe comes in the second requirement of the partnership law; that the partnership must be for a business purpose, suggesting that it has hallmarks of a relationship over and above the normal relationship which one would expect from spouses who share a bank account and make joint decisions about finances and where they want to live.

(3) While it may be the case the spouses would be happy to enter into relatively small business transactions on the basis of an assumed and unwritten “partnership” we do not think that any reasonable person would consider that this is appropriate for the significant development activity of the kind undertaken here.

### **The partnership**

87. Even if we accepted that both Mr and Mrs Cooke understood there to be a partnership in existence, the evidence that this Partnership existed other than in their minds and in the minds of their professional advisers is extremely thin:

(1) None of the relevant documents to which the Partnership was alleged to be a party made reference to the Partnership, all were signed only in the name of Mr and Mrs Cooke.

(2) Mr Cannon referred to the tax returns and partnership accounts, but they are at best self-serving documents and cannot be treated as independent evidence that the Partnership existed. We note the reference in Shipley’s email of 14 December 2015 to the “forms requiring filing in order to create a property development partnership”, suggesting that the forms created rather than reflected the existence of the partnership.

(3) Added to this is the confusion even in Mr Cooke’s mind about when the Partnership actually started, exemplified by his email to HMRC of 2 February 2019 (when a date of 6 April 2015 is referred to, rather than the 17 September 2014 date) and his suggestion in his witness evidence that he had understood that the Partnership only needed to be decided before the tax returns were submitted in January 2016.

88. In the face of this lack of evidence, we can only agree with HMRC's characterisation of the Partnership as something which was suggested by Mr Cooke's financial advisers and which existed only when the relevant tax and accounting forms were completed, but had no substantive existence in the real world.

89. For these reasons we agree with HMRC that the Appellants have failed to demonstrate to the necessary standard that the Partnership existed at the relevant times, or at all.

### **Carrying on a business**

90. We agree with HMRC that, other than in the assertions of the Appellants, no evidence has been provided that the Partnership entered into any of the commercial relationships which would be expected from a Partnership carrying on a business.

91. The Partnership did not have its own bank account and was not registered for VAT. It did not issue any invoices or enter into the contracts for the development of the Property. The costs of the development work were born by SCP, not the Partnership, as Mr Cooke explained in his witness evidence.

### **A view to profit**

92. Again, we agree with HMRC that the evidence suggests that the intention was that any profit which could be derived from the development of the Property should accrue to SCP and not to the Partnership. This is best evidence by the grant of the Option by the Partnership to SCP in August 2015.

93. The Option was granted for a nominal sum and gave SCP the right to buy the Property at its then market value (£830,000) at any time. This meant that if the value of the Property increased, any profits would accrue to SCS not the Partnership.

94. In our view this supports HMRC's contention that the Partnership was never intended to make a profit, indeed it was intended to make a loss and was effectively, if it existed at all, a holding entity through which profits could be transferred elsewhere.

95. Of some additional support to this conclusion is Mr Cooke's apparent inability to explain certain discrepancies in the Partnership's accounts, which we think indicate a disregard for the actual profitability or otherwise of the Partnership.

### **Conclusion on the partnership question**

96. For these reasons we have concluded that the Partnership has no legal reality. It existed as a planning idea in the minds of the Appellants' advisers and Mr Cooke, but had no substance beyond the forms which were completed in order for it to obtain the tax result suggested by the Appellant's advisers.

97. For these reasons neither of the elections purportedly made by the Partnership have legal effect and

(1) The Property was not appropriated to trading stock of the Partnership on 14 September 2014 or at any other date.

(2) The Property was owned by Mr and Mrs Cooke when it was sold to SCP on 9 June 2016.

(3) A chargeable gain arose on that sale, half of which is chargeable on Mr Cooke.

(4) SCP acquired the Property from Mr and Mrs Cooke on 9 June 2016 for a chargeable consideration of £1,583,945 and SDLT is chargeable on that amount resulting in a charge of £151,342.

### **CGT Quantum**

98. We were not provided with any evidence by the Appellants that the claimed additional expenditure of £156,793 allegedly relating to planning permission and maintenance of the land was incurred by Mr and Mrs Cooke on the Property.

99. We agree with HMRC that this should not be included as an allowable deduction and that the taxable gain in respect of the disposal of the Property amounts to £716,745 of which half should be chargeable on Mr Cooke.

100. This takes account of the agreed allowable deduction of £100,000 agreed by HMRC in their previous correspondence.

### **Costs**

101. As a result of the Appellants providing evidence concerning the s 178 election on the day of the first hearing, meaning that the hearing was adjourned until a later date, I directed that HMRC should have the right to make an application for costs under Rule 10 of the Tribunal Procedure (First-tier Tribunal)(Tax Chamber) Rules 2009 for the hearing on 30 March 2022.

102. At the hearing on 16 June 2022 HMRC requested time to consider a costs application to which the Tribunal agreed.

### **RIGHT TO APPLY FOR PERMISSION TO APPEAL**

103. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to “Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)” which accompanies and forms part of this decision notice.

**Rachel Short**  
**TRIBUNAL JUDGE**

**Release date: 06 JULY 2022**