The Personal Tax Planning Review

TOMMEY v TOMMEY: THE TIMING OF DISPOSALS ON DIVORCE

David Ewart[1]

When parties to a marriage are separating or divorcing, it can be critical to determine exactly at what point disposals are regarded as taking place for the purpose of capital gains tax legislation. There are a number of reasons for this. First, the disposal is regarded as taking place on a no gain/no loss basis only if the disponor and disponee are a husband and wife who were living together at some time in the year of assessment in which the disposal takes place: TCGA 1992 section 58(1). Secondly, the husband and wife will be connected persons, so as to automatically bring the disposal at market value rules into play, until decree absolute but not thereafter.

The confusion in this area starts with the decision of Nourse J in *Aspden v Hildesley* (1981) 55 TC 609. In that case a married couple separated in 1970. On 12th February 1976 a decree nisi of divorce was granted. The judge in the Family Division (Dunn J) made a Consent Order at the same time which provided, *inter alia*, that the husband should forthwith transfer to the wife all his interest both legal and equitable in certain property. The Revenue raised a capital gains tax assessment on the husband for the tax year 1975/76. In the High Court, on appeal against that assessment, the Revenue accepted that, in order to succeed, they had to establish that the Consent Order was a contract so that FA 1965 Schedule 10 paragraph 10 applied (now TCGA 1992 section 28(1)). The reason for this was that if the Order was a contract, the date of disposal would be the date of that contract (i.e. 12th February 1976). If it was not a contract, then the date of disposal would be the date when the disposal actually took place, which was not in the year 1975/76: see page 615A-B.

Nourse J considered the cases of *de Lasala v de Lasala* [1980] AC 546 and *Thwaite v Thwaite* [1982] Fam 1 which established that, while an obligation under a Consent Order is normally contractual in nature, in matrimonial proceedings it draws its validity from the Order rather than contract. He decided, however, that this exception to the general rule only applied to Orders made after decree absolute. Alternatively, he relied on the fact that the Order in that case was not a full Consent Order but an Order that the general terms be "filed and made a rule

[1] David Ewart, Barrister, Pump Court Tax Chambers, 16 Bedford Row, London WC1R 4EB
Tel: (0171) 414 8080 Fax: (0171) 414 8099.

of court". It was established in *Re Shaw* [1918] P 47 that the effect of an Order in that form is that the obligation remains contractual.

Tommey v Tommey [1982] 3 All ER 385 was an action to set aside a Consent Order on the basis of undue influence. It was heard on 25th February 1982. *Aspden v Hildesley* was reported in early March 1982. When Balcombe J came into court to give judgment in *Tommey* on 10th March 1982, he was faced with every judge's nightmare, a recent decision of another High Court judge which conflicted with the judgment he was about to deliver. Balcombe J had decided that a Consent Order in matrimonial proceedings, whether made before or after decree absolute, derived its legal effect from the Order itself and not from the agreement of the parties. The judge could have distinguished *Aspden* on its facts on the ground that the Order in *Tommey* was not a positive order and had not been filed and made a rule of court as in *Aspden*. However, he rightly felt that he had to grasp the nettle as it seemed important to him that:

> "... on a question as fundamental as this the law should not be bedeviled by fine distinctions".

Balcombe J robustly held that Nourse J was wrong in his wide proposition that Consent Orders made before decree absolute sounded in contract. However, he did approve a narrower basis for the decision in *Aspden*. He accepted that until decree absolute a Consent Order is contractual in its effect. This is because the Order only has effect as an order from decree absolute: see section 24(3) Matrimonial Causes Act 1973. Since Nourse J was only concerned with the position in the year 1975/76 (before decree absolute) then he was correct that the Order was contractual in effect.

It seems to the writer that Balcombe J was not entirely correct in his analysis of *Aspden*. However, he cannot be blamed as he was literally extemporising that part of his judgment. His analysis does, however, point the way to the true principles. This requires one to go back to the words of section 28(1):

> "... where an asset is disposed of and acquired *under a contract* the time at which the disposal and acquisition is made is the time the contract is made (and not, if different, the time at which the asset is conveyed or transferred)." (my emphasis)

The correct approach must be to look at the actual disposal (i.e. the conveyance or transfer of the asset) and ask whether it has taken place under a contract. If the conveyance or transfer takes place in pursuance of a Consent Order but before decree absolute then, in the writer's opinion, it is taking place *under a contract* as the Consent Order still has contractual effect at that time. As a result, section 28(1) would apply. If, on the other hand, the conveyance or transfer takes place after decree absolute, then it would be taking place under the Order which no longer had contractual effect. Therefore, the disposal would not take place under

a contract, and section 28(1) would not apply. The time of the disposal in that case would be the time of the actual conveyance or transfer.

For those reasons, the writer does not agree with the Revenue's current view which is:

(i) *Aspden* was wrong, although the Revenue argued for the result in that case against a taxpayer in person; and

(ii) the timing of a disposal under a Consent Order in matrimonial proceedings is always the date of the Consent Order.