

Greenbank Holidays Ltd v Revenue and Customs Commissioners

[2011] UKUT 155 (TCC)

UPPER TRIBUNAL (TAX AND CHANCERY CHAMBER)

ARNOLD J

4, 11 APRIL 2011

Deduction in computing profits – Intangible fixed assets – Goodwill – Commencement of new statutory code – Application of code to assets created or acquired after commencement – Taxpayer purchasing business and goodwill from company within same group after commencement of code – Taxpayer recognising goodwill as purchased goodwill in accounts – Whether expenditure on goodwill deductible in computing profits – Whether goodwill created by taxpayer after commencement of code – Finance Act 2002, Sch 29, paras 4(2), 121.

G and K were members of the same group of companies. In September 2003, K sold its business (save for certain excepted assets) to G for just over £46.6 million. G's accounts for the year ended 30 September 2003 showed, in accordance with generally accepted accounting practice, an entry for 'goodwill' on the balance sheet of just over £37.1 million. The value ascribed to the goodwill represented the difference between the purchase price of £46.6 million and the value of the net identifiable assets of the business acquired by G from K. By contrast, no matching or related entry for goodwill appeared in K's accounts for the period prior to the sale. In its corporation tax return for the relevant period, G claimed a deduction in respect of that goodwill, electing to write down the cost of the goodwill at an annual fixed rate of 4% pursuant to paras 10 and 11 of Sch 29 to the Finance Act 2002. The Revenue and Customs Commissioners ('HMRC') disallowed that deduction on the basis that the goodwill was created before the commencement date of Sch 29, namely 1 April 2002. G appealed. G argued, inter alia, that the definition of 'goodwill' in para 4(2)^a of Sch 29 did not include internally generated goodwill; on that basis K had no goodwill within the meaning of para 4(2), and that the goodwill was created by G after 1 April 2002 when G purchased the business of K and recognised the goodwill in its balance sheet. The tribunal dismissed the appeal, holding: (i) that the definition of 'goodwill' in para 4(2) included internally generated goodwill; and (ii) the goodwill was created by K before the commencement of Sch 29 and acquired by G, not created by G after commencement. Paragraph 121^b of Sch 29 provided that internally generated goodwill was to be regarded as created before (and not after) the commencement of Sch 29 if the business in question was carried on at any time before commencement by the relevant company or a related party. G appealed.

Held – (1) 'Goodwill' in para 4(2) of Sch 29 of the Finance Act 2002 was what was treated as goodwill when drawing up accounts in accordance with

^a Paragraph 4 is set out at [4], below.

^b Paragraph 121 is set out at [4], below.

- a* generally accepted accounting practice. As generally accepted accounting practice recognised the existence of internally generated goodwill, albeit that it did not permit it to be capitalised as an asset on a balance sheet, ‘goodwill’ included internally generated goodwill as well as purchased goodwill. ‘Goodwill’ had a straightforward meaning which an accountant would recognise as such, whether or not it was capitalised on the balance sheet.
- b* Moreover, that construction was consistent with other provisions in Sch 29 (see [17]–[24], below).
- (2) G had not created the goodwill by recognising it in its accounts. Immediately prior to the sale of the business, K owned internally generated goodwill which was not recognised in its accounts. On the sale of the business, K sold and G purchased that goodwill. Because it was purchased by G it was properly capitalised in G’s accounts; but that was simply the accounting treatment of the goodwill in accordance with generally accepted accounting practice. That accounting treatment did not mean that the goodwill either came into existence for the first time, or that it was a different asset to the goodwill owned by K. By virtue of para 121, that goodwill was to be treated as having been created before the commencement of Sch 29 (see [25]–[28], below).
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G’s appeal would, accordingly, be dismissed.

Notes

- e* For the scope of the intangible asset regime and for the transitional provisions in relation to that regime, see Simon’s Taxes D1.601, D1.608.
- For the Finance Act 2002, Sch 29, paras 4(2), 121, see the Yellow Tax Handbook 2010–11, Part 1b, pp 615, 675. Schedule 29 was repealed by the Corporation Tax Act 2009, ss 1322, 1326, Sch 1 paras 526, 545, Sch 3 Pt 1, with effect for accounting periods ending on or after 1 April 2009 (for corporation tax purposes) and for the 2009–10 and subsequent tax years (for income and capital gains tax purposes).
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Cases referred to in decision

- Comr of Inland Revenue v Hang Seng Bank* [1990] STC 733, [1991] 1 AC 306, PC.
- Omar Parks Ltd v Elkington* [1993] 1 All ER 282, [1992] 1 WLR 1270, CA.
- g Walker (Inspector of Taxes) v Centaur Clothes Group Ltd* [2000] STC 324, [2000] 1 WLR 799, [2000] 2 All ER 589, 72 TC 379, HL.

Appeal

- h* Greenbank Holidays Ltd appealed with permission from a decision of the First-tier Tribunal (Tax Chamber) (Judge Oliver QC and Mark Buffery) released on 8 March 2010 ([2010] UKFTT 109 (TC), [2010] SFTD 653) dismissing Greenbank’s appeal against an amendment by the Revenue and Customs Commissioners (‘HMRC’) to Greenbank’s corporation tax return for the accounting period ending 30 September 2003 so as to disallow a deduction claimed by Greenbank in respect of goodwill purchased by Greenbank from Keyline Continental Ltd. The agreed facts are set out in the decision.
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Francis Fitzpatrick (instructed by *Reynolds Porter Chamberlain LLP*) for Greenbank.

Christopher Tidmarsh QC and *Nicola Shaw* (instructed by the *Solicitor for Revenue and Customs*) for HMRC.

The tribunal took time for consideration.

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11 April 2011. The following decision was released.

ARNOLD J.

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INTRODUCTION

[1] This is an appeal by Greenbank Holidays Ltd from a decision of the First-tier Tribunal (Tax) (Judge Oliver QC and Mark Buffery) ('the tribunal') dated 8 March 2010 ([2010] UKFTT 109 (TC), [2010] SFTD 653) by which the tribunal dismissed Greenbank's appeal against an amendment by HMRC pursuant to para 34 of Sch 18 to the Finance Act 1998 to Greenbank's corporation tax return for the accounting period ending on 30 September 2003. The effect of the amendment was to disallow a deduction claimed by Greenbank in respect of goodwill purchased by Greenbank from Keyline Continental Ltd ('Keyline'), an associated company, on 30 September 2003 ('the goodwill'). Greenbank elected to write down the cost of the goodwill at an annual fixed rate of 4% pursuant to paras 10 and 11 of Sch 29 to the Finance Act 2002. The Revenue and Customs Commissioners ('HMRC') disallowed the deduction on the ground that the goodwill was created before the commencement date of Sch 29, namely 1 April 2002.

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THE FACTS

[2] There is no dispute as to the facts, which are set out in paras [6]–[9] of the tribunal's decision. They may be summarised as follows. Both Greenbank and Keyline were members of the same group of companies. By an agreement dated 30 September 2003 Keyline sold its business (save for certain excepted assets) to Greenbank for just over £46.6m. Greenbank's accounts for the year ending 30 September 2003 showed, in accordance with generally accepted accounting practice, an entry for 'goodwill' on the balance sheet of just over £37.1m. This is the goodwill in issue. The value ascribed to the goodwill reflected the difference between the purchase price of £46.6m and the value of the net identifiable assets of the business acquired by Greenbank from Keyline. By contrast, no matching or related entry for goodwill appeared in Keyline's accounts for the period prior to the sale.

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THE RELEVANT PROVISIONS OF SCHEDULE 29

[3] Schedule 29 to the Finance Act 2002, 'Gains and losses of a company from intangible fixed assets', was introduced as a new corporation tax code for intangible fixed assets. In essence, the code brought the tax treatment of intangible fixed assets into line with the manner in which such items were treated in a company's accounts and treated gains in respect of them as income for corporation tax purposes.

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[4] The relevant provisions of Sch 29 as they stood at the material time were as follows:

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'PART 1

INTRODUCTION ...

Intangible assets

2.—(1) In this Schedule "intangible asset" has the meaning it has for accounting purposes ...

a **Intangible fixed assets**

3 ... (3) Unless otherwise indicated, the provisions of this Schedule apply to an intangible fixed asset whether or not it is capitalised in the company's accounts ...

b **Goodwill**

4.—(1) Except as otherwise indicated, the provisions of this Schedule apply to goodwill as to an intangible fixed asset.

(2) In this Schedule “goodwill” has the meaning it has for accounting purposes ...

PART 14

c **COMMENCEMENT AND TRANSITIONAL PROVISIONS**

Commencement date

117.—(1) The commencement date for the purposes of this Schedule is 1st April 2002 ...

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Application of Schedule to assets created or acquired after commencement

118.—(1) Except as otherwise expressly provided, the provisions of this Schedule apply only to intangible fixed assets of a company (“the company”) that—

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(a) are created by the company after commencement, or

(b) are acquired by the company after commencement from a person who at the time of the acquisition is not a related party in relation to the company, or

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(c) are acquired by the company after commencement from a person who at the time of the acquisition is a related party in relation to the company in the cases specified in sub-paragraph (2).

As to when assets are regarded as created or acquired, see paragraphs 120 to 125 ...

Assets regarded as created or acquired when expenditure incurred

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120.—(1) This paragraph has effect for the purposes of paragraph 118 (application of Schedule to assets created or acquired after commencement) and applies to all intangible assets except those to which paragraph 121 or 122 applies (certain internally-generated assets).

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(2) An intangible asset to which this paragraph applies is regarded as created or acquired after commencement to the extent that expenditure on its creation or acquisition is incurred after commencement.

As to whether expenditure on the creation or acquisition of the asset was incurred after commencement, see paragraphs 123 to 125 ...

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Internally-generated goodwill: whether created before or after commencement

121. For the purposes of paragraph 118 (application of Schedule to assets created or acquired after commencement) internally-generated goodwill is regarded as created before (and not after) commencement if the business in question was carried on at any time before commencement by the company or a related party ...

Expenditure on acquisition treated as incurred when recognised for accounting purposes *a*

123.—(1) For the purposes of paragraph 120 (assets regarded as created or acquired when expenditure incurred) the general rule is that expenditure on the acquisition of an asset is treated as incurred when it is recognised for accounting purposes.' *b*

'FOR ACCOUNTING PURPOSES'

[5] A number of the provisions in Sch 29, including paras 2(1) and 4(2), include the phrase 'for accounting purposes'. This expression was defined by s 832 of the Income and Corporation Taxes Act 1988 ('the 1988 Act') (as amended by s 103(1) of the Finance Act 2002) as meaning (unless the context otherwise required) 'for the purposes of accounts drawn up in accordance with generally accepted accounting practice'. 'Generally accepted accounting practice' was defined by s 836A of the 1988 Act as meaning (unless the context otherwise required) 'generally accepted accounting practice with respect to accounts of UK companies that are intended to give a true and fair view'. *c*

GENERALLY ACCEPTED ACCOUNTING PRACTICE ('GAAP') *d*

[6] At the material time, the Fourth EC Council Directive 78/660 of 25 July 1978 on the annual accounts of certain types of companies laid down certain requirements for annual accounts. Article 8 provided that member states shall prescribe one or both of the layouts prescribed by arts 9 and 10 for the presentation of the balance sheet. Both arts 9 and 10 included 'Goodwill, to the extent that it was acquired for valuable consideration' amongst fixed intangible assets. *e*

[7] These provisions were implemented by Pt VII of and Sch 4 to the Companies Act 1985 ('the 1985 Act'). Section 226(3) provided that a company's accounts 'shall comply with the provisions of Schedule 4 as to the form and content of the balance sheet'. Schedule 4 prescribed two formats. Both formats included 'Goodwill' amongst fixed intangible assets. The notes to the balance sheet formats specified that 'Amounts representing goodwill shall only be included to the extent that the goodwill was acquired for valuable consideration'. Paragraph 36A provided that in the notes to the accounts, 'It shall be stated whether the accounts have been prepared in accordance with applicable accounting standards ...'. Section 256(1) defined 'accounting standards' as meaning 'statements of standard accounting practice issued by such body or bodies as may be prescribed by regulations.' *f*

[8] The Accounting Standards (Prescribed Body) Regulations 1990, SI 1990/1667, prescribed the Accounting Standards Board Ltd for the purposes of s 256(1) of the 1985 Act. *g*

[9] Financial Reporting Standard 10 ('FRS10'), 'Goodwill and Intangible Assets', was issued by the Accounting Standards Board Ltd in 1997. It included the following definitions in para 2: *h*

'Intangible assets:

Non-financial fixed assets that do not have physical substance but are identifiable and are controlled by the entity through custody or legal rights. *j*

An identifiable asset is defined by companies legislation as one that can be disposed of separately without disposing of a business of the entity. If an asset can be disposed of only as part of the revenue-earning activity to which it contributes, it is regarded as indistinguishable from the goodwill relating to that activity and is accounted for as such ...

a **Purchased goodwill:**

The difference between the cost of an acquired entity and the aggregate of the fair values of that entity's identifiable assets and liabilities. Positive goodwill arises when the acquisition cost exceeds the aggregate fair values of the identifiable assets and liabilities. Negative goodwill arises when the aggregate fair values of the identifiable assets and liabilities exceed the acquisition cost.'

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[10] It is common ground that goodwill does not fall within the definition of 'intangible asset' in FRS10 since it cannot be disposed of separately from the business of the entity.

c Practice:

'Goodwill

7 Positive purchased goodwill should be capitalised and classified as an asset on the balance sheet.

8 Internally generated goodwill should not be capitalised.

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Intangible assets

9 An intangible asset purchased separately from a business should be capitalised at its cost.

10 An intangible asset acquired as part of the acquisition of a business should be capitalised separately from the goodwill if its value can be measured reliably on initial recognition ...

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13 If its value cannot be measured reliably, an intangible asset acquired as part of the acquisition of a business should be subsumed within the amount of the purchase price attributed to goodwill.

14. An internally developed intangible asset may be capitalised only if it has a readily ascertainable value.'

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THE EXPERT EVIDENCE

[12] Both Greenbank and HMRC adduced expert evidence before the tribunal, Greenbank from Professor David Cairns OBE and HMRC from Matthew Blake. The experts prepared a joint statement setting out matters on which they agreed and on which they disagreed. Both experts were cross-examined. As the tribunal recorded in its decision, the following matters were common ground between the experts:

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(i) Some assets that may exist in a commercial or legal sense are not recognised on the balance sheet as assets in accounts drawn up under GAAP.

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(ii) Goodwill is the difference between the value of a business and the fair value of its identifiable net assets.

(iii) On the purchase of a business, the purchaser's accounts recognise the difference between the purchase price and the fair value of the identifiable assets and liabilities that have been purchased as goodwill on the balance sheet. This is called 'purchased goodwill' in the accountancy literature.

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(iv) For the purposes of both the Companies Act 1985 and FRS10, 'goodwill' comprises both 'purchased goodwill' and 'internally generated goodwill'. 'Internally generated goodwill' is goodwill other than 'purchased goodwill.'

(v) 'Internally generated goodwill' is prohibited from being recognised on the balance sheet under GAAP. *a*

SUMMARY OF GREENBANK'S CONTENTIONS

[13] Greenbank's primary case is that the definition of 'goodwill' in para 4(2) of Sch 29 does not include internally generated goodwill. On this basis, Greenbank contends that Keyline had no goodwill within the meaning of para 4(2), and that the goodwill was created by Greenbank after 1 April 2002 within para 118(1)(a) when Greenbank purchased the business of Keyline and recognised the goodwill in its balance sheet. Greenbank's alternative case is that, even if the definition of 'goodwill' in para 4(2) includes internally generated goodwill, the goodwill held by Greenbank and recognised in its accounts was purchased goodwill which was a different asset to the internally generated goodwill previously held by Keyline. *b*
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THE TRIBUNAL'S DECISION

[14] The tribunal decided that: (i) the definition of 'goodwill' in para 4(2) included internally generated goodwill; and (ii) the goodwill was created by Keyline before commencement and acquired by Greenbank, not created by Greenbank after commencement. *d*

[15] Greenbank contends that the tribunal erred in law on both points. It also challenges the tribunal's handling of the expert evidence.

FIRST ISSUE: DOES 'GOODWILL' INCLUDE INTERNALLY GENERATED GOODWILL? *e*

[16] If the definition of 'for accounting purposes' contained in s 832 of the 1988 Act and the definition of 'generally accepted accounting practice' contained in s 836A of the 1988 Act are plugged into the definition of 'goodwill' contained in para 4(2) of Sch 29, the full definition of 'goodwill' is as follows: *f*

'In this Schedule "goodwill" has the meaning it has for the purposes of accounts drawn up in accordance with generally accepted accounting practice with respect to accounts of UK companies that are intended to give a true and fair view.'

[17] Counsel for Greenbank submitted that, on the true construction of this definition, 'goodwill' was what was shown as goodwill in accounts drawn up in accordance with GAAP ie the finished product of the accounting process. Since GAAP only permits purchased goodwill to be recognised in such accounts, 'goodwill' is restricted to purchased goodwill and does not extend to internally generated goodwill. Counsel for HMRC submitted that 'goodwill' was what was treated as goodwill when drawing up accounts in accordance with GAAP ie during the process of preparing the accounts. Since GAAP recognises the existence of internally generated goodwill, albeit that it does not permit it to be capitalised as an asset on the balance sheet, 'goodwill' includes internally generated goodwill as well as purchased goodwill. *g*
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[18] Greenbank's construction emphasises the words 'drawn up' in the definition, whereas HMRC's construction emphasises the words 'for the purposes of'. As a matter purely of language, it seems to me that both constructions are tenable. I agree with HMRC and the tribunal, however, that HMRC's construction is the correct one for the following reasons. *j*

[19] First, although I regard Greenbank's construction as linguistically possible, HMRC's construction seems to me to be the more natural way in

- a* which to read the definition. On HMRC's construction, 'goodwill' has a straightforward meaning which embraces any goodwill which an accountant would recognise as such whether or not it is capitalised on the balance sheet. On Greenbank's case the definition in para 4(2) contains a trap for the unwary, since it is only when the definition is expanded that the potential significance of the words 'drawn up' becomes apparent. Furthermore, on Greenbank's case
- b* the effect of those words is to restrict the definition to purchased goodwill. But if the draftsman had intended to say that goodwill meant purchased goodwill, it would have been much simpler to say so in terms.

[20] Secondly, it is common ground and trite law that Sch 29 should be construed as a whole so that, as far as possible, the various provisions make sense together. In my judgment HMRC's construction is consistent with other

c provisions in Sch 29, namely paras 3(3) and 121, whereas Greenbank's is not.

- [21] Paragraph 3(3) expressly says that the provisions of the schedule apply to an intangible fixed asset *whether or not* it is capitalised in the company's accounts. This makes it clear that, when para 2(1) defines 'intangible asset' as having the meaning it has 'for accounting purposes', it does not exclude assets
- d* which are not capitalised in the company's accounts. Paragraph 4(1) provides that (except where otherwise indicated) the provisions of the schedule apply to goodwill in the same way as to an intangible fixed asset. This implies that the definition of goodwill in para 4(2) does not exclude goodwill which is not capitalised in the company's accounts ie internally generated goodwill. Counsel for Greenbank argued that para 3(3) would be otiose unless para 2(1)
- e* was interpreted in the same way as Greenbank construes para 4(2) ie as restricted to intangible assets which are recognised in the accounts when drawn up in accordance with GAAP. On that interpretation of para 2(1), intangible assets which are not capitalised in the accounts because they cannot reliably be valued would fall outside the definition in para 2(1), but would be caught by
- f* para 3(3). By contrast, he argued, if para 2(1) were interpreted as extending to intangible assets which would be recognised as such during the process of drawing up the accounts, para 3(3) would be unnecessary. I do not accept that argument. It is well established that arguments from redundancy are rarely compelling as a basis for statutory interpretation: see eg *Omar Parks Ltd v Elkington* [1993] 1 All ER 282 at 285, [1992] 1 WLR 1270 at 1273 and *Walker (Inspector of Taxes) v Centaur Clothes Group Ltd* [2000] STC 324 at 330, [2000]
- g* 1 WLR 799 at 805. In the present case, I consider that para 3(3) is a classic confirmatory provision which makes the position clear even though it would probably be inferred anyway.

- [22] Paragraph 121 is even clearer. This explicitly deals with internally generated goodwill. It follows that para 121 necessarily proceeds on the basis
- h* that internally generated goodwill is within the definition of goodwill in para 4(2). Counsel for Greenbank argued that to interpret para 4(2) by reference to para 121 would be to allow the tail to wag the dog, since para 4(2) is a general definition for the purposes of the whole schedule whereas para 121 is a minor commencement provision. I do not accept that argument. Greenbank's construction of para 4(2) would mean that para 121 would have
- j* no application and had been included in error. Counsel for Greenbank tried to rebut that in two ways. First, he argued that para 121 confirmed that internally generated goodwill was not within Sch 29. I cannot accept that. Not only is that not what para 121 says, but also it cannot apply at all if 'goodwill' does not include internally generated goodwill in the first place. Secondly, he argued that para 121 catered for the possibility that FRS10 might be changed to allow

internally generated goodwill to be recognised on the balance sheet. Again, I cannot accept that. Schedule 29 was designed to align the tax treatment of goodwill with existing GAAP, not some speculative future change in GAAP. Paragraph 121 is clearly designed to address the temporal issue discussed in para [28] below. In my view that is a strong indication that Greenbank's construction is wrong. *a*

[23] Thirdly, I consider that HMRC's construction is supported by the Companies Act 1985, FRS10 and the expert evidence. It is clear from these that goodwill consists of purchased goodwill and internally generated goodwill. The only difference between them is that purchased goodwill is capitalised in the balance sheet, whereas internally generated goodwill is not. As is common ground, the rationale for this is that purchased goodwill has an objective measure of its value, namely the surplus of the purchase price which a purchaser has agreed to pay for the business over the identifiable net assets of that business, whereas the valuation of internally generated goodwill by a company is subjective. Given that, as is also common ground, the purpose of Sch 29 was to align the corporation tax treatment of intangible fixed assets and goodwill with the accounting treatment, one would expect Sch 29 to deal with both. On Greenbank's case, however, Sch 29 contains a lacuna since it does not deal with internally generated goodwill even though para 121 suggests that it does. Again, this indicates that Greenbank's construction is wrong. *b*

[24] Fourthly, Greenbank's construction has the consequence, and is designed to have the consequence, that goodwill is created by the act of purchasing it. In my view that is not merely wrong as a matter of construction of Sch 29 for the reasons given below, but also offensive to common sense. This is another indication that Greenbank's approach to these provisions is flawed. *c*

SECOND ISSUE: DID GREENBANK CREATE THE GOODWILL?

[25] Greenbank contends that it created the goodwill when it purchased the goodwill on 30 September 2003, ie after 1 April 2002, and thus falls within para 118(1)(a). As noted above, it advances this contention on two alternative bases. The first is that internally generated goodwill is not within the definition of 'goodwill' in para 4(2). On this basis, Greenbank says that the goodwill came into existence for the purposes of Sch 29 when it was recognised as purchased goodwill in Greenbank's accounts. The second basis is that the goodwill, being purchased goodwill, was a different asset to the internally generated goodwill owned by Keyline. Again, Greenbank says that it created the goodwill by recognising it in its accounts. I do not accept either argument for the following reasons. *d*

[26] First, it is common ground that, immediately prior to 30 September 2003, Keyline owned internally generated goodwill which was not recognised in its accounts. In my judgment it is manifest that what happened on 30 September 2003 was that Keyline sold and Greenbank purchased that goodwill ie the goodwill. Because it was purchased by Greenbank, it was properly capitalised in Greenbank's accounts. But that was simply the accounting treatment of the goodwill in accordance with GAAP. That accounting treatment did not mean that the goodwill either came into existence for the first time or that it was a different asset to the goodwill owned by Keyline. *e*

[27] Secondly, counsel for Greenbank relied on para 120(2) as supporting Greenbank's argument. This provides that what counsel described as the 'general rule' is that an intangible asset is regarded as created or acquired after *f*

- a* commencement to the extent that expenditure on its creation or acquisition is incurred after commencement. Counsel argued that Greenbank purchased the goodwill after commencement, hence the expenditure on the creation (on Greenbank's primary case) or the acquisition (on Greenbank's alternative case) of that asset was after commencement. I do not accept that argument.
- b* Paragraph 120(2) refers to paras 123 to 125 for determining whether expenditure is incurred after commencement; but counsel for Greenbank accepted that on Greenbank's primary case none of those paragraphs was applicable. Although para 123(1) would be applicable on Greenbank's alternative case, it does not support the proposition that what Greenbank acquired was a different asset to the asset sold by Keyline, but rather contradicts it. In any event, para 120(1) expressly provides that para 120 does not apply to intangible assets to which para 121 applies.

[28] Thirdly, I agree with HMRC and the tribunal that it is clear that the position with regard to the internally generated goodwill created by Keyline is governed by para 121. This provides that internally generated goodwill is regarded as created before commencement if the business in question was

- d* carried on at any time before commencement by the company or a related party. There is no dispute that the business was carried on by a related party, namely Keyline, before commencement. It follows that the internally generated goodwill is to be treated as created before commencement. Indeed, I consider that the whole point of para 121 is to deal with cases, such as the present, where some of the internally generated goodwill was created before
- e* 1 April 2002 and some after that date.

THE 2009 AMENDMENT

- [29] Counsel for Greenbank pointed out that the definition of 'goodwill' had been amended in 2009 to address the issue which arose in the present case.
- f* Schedule 29 was repealed and replaced by Pt 8 of the Corporation Tax Act 2009. The definition of 'goodwill' in s 715(3) of that Act, which replicated the definition in para 4(2) of Sch 29, was then amended by s 70 of the Finance Act 2009 to add the parenthesis '(and includes internally-generated goodwill)'. Counsel argued that, if (contrary to Greenbank's case) the definition of 'goodwill' in para 4(2) was ambiguous, then it was legitimate to construe it by
- g* reference to the amended legislation, relying on the principle stated and applied by the Privy Council in *Comr of Inland Revenue v Hang Seng Bank* [1990] STC 733 at 740–741, [1991] 1 AC 306 at 323–324.

- [30] I do not accept this argument. I do not regard para 4(2) as sufficiently ambiguous to make this principle of construction applicable. Even if it were
- h* applicable, I do not accept that the amendment proceeds on the basis that the definition contained in para 4(2) excludes internally generated goodwill. To my mind, it is a confirmatory amendment.

THE EXPERT EVIDENCE

- j* [31] Finally, Greenbank attacks the tribunal's handling of the expert evidence on two grounds. First, counsel for Greenbank submitted that the tribunal had rejected Professor Cairns' opinion expressed in para 3.4 of the joint statement that, for the purposes of accounts drawn up in accordance with GAAP, goodwill meant purchased goodwill without giving any, or any sufficient reasons, for doing so. I disagree. It is clear that Professor Cairns interpreted 'for

the purposes of accounts drawn up in accordance with [GAAP] in the same way as Greenbank. The tribunal gave perfectly clear and cogent reasons for rejecting that construction. *a*

[32] Secondly, counsel for Greenbank complained that the tribunal had wrongly prevented him from cross-examining Mr Blake as to his reasons for expressing the contrary opinion in para 3.5 of the joint statement. In my judgment the tribunal was perfectly correct to do so. This issue is one of construction, and hence one of law. *b*

CONCLUSION

[33] For the reasons given above, which are essentially the same as those given by the tribunal, the appeal is dismissed. *c*

Appeal dismissed.

Aaron Turpin Barrister.