

**Judgment 65/2003**

**Carpenter v Administrator of  
Income Tax  
Royal Court  
(Civil Action file 728)  
31<sup>st</sup> December, 2003**

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**Income Tax (Guernsey) Law, 1975 – appeal by way of case stated from Guernsey Tax Tribunal – whether in the circumstances of the case profit on the purchase and sale of a single property was assessable to income tax – badges which identify a transaction as an adventure in the nature of trade – procedure followed by the Tribunal – whether the Tribunal’s finding was a true and reasonable conclusion open to it on the facts – principles of natural justice must be observed.**

**IN THE ROYAL COURT OF THE ISLAND OF GUERNSEY**

The 31st day of December, 2003 before Geoffrey Robert Rowland, Esquire, Deputy Bailiff; sitting alone.

IN THE MATTER OF

JOHN PATRICK CARPENTER

Appellant

V

THE ADMINISTRATOR OF INCOME TAX

Respondent

WHEREAS on 18<sup>th</sup> June and 2<sup>nd</sup> October, 2003 the Deputy Bailiff considered an appeal from the decision of the Guernsey Tax Tribunal given orally on 26<sup>th</sup> November, 2001 against an assessment to Income Tax in respect of £600,000 received by the Appellant in the tax year 1999 and heard thereon Advocates P. T. R. Ferbrache and R. McMahon for the Appellant and Respondent respectively, the Deputy Bailiff this day handed down judgment in the terms attached hereto and;

ALLOWED the Appeal.

AWARDED costs on the standard recoverable basis.

S.M.D. ROSS  
Her Majesty’s Deputy Greffier

**IN THE ROYAL COURT OF THE ISLAND OF GUERNSEY**  
Ordinary Division

**JOHN PATRICK CARPENTER**

**APPELLANT**

**v**

**THE ADMINISTRATOR OF INCOME TAX**

**RESPONDENT**

**Judgement of the Deputy Bailiff Geoffrey Robert Rowland**

**Advocate Peter Ferbrache for the Appellant, John Patrick Carpenter**  
**Crown Advocate Richard McMahon for the Respondent, The Administrator of Income Tax**

**Hearing dates: 18<sup>th</sup> June and 2<sup>nd</sup> October 2003**  
**Judgement handed down: 31st December, 2003**

**Cases, Legislation and Texts referred to:**

Cases

Edwards (Inspector of Taxes) v Bairstow [1955] 3 ALL ER 48 pages 6-17

Taylor v Good (1974 49 T.C.277 pages 18-39

Sharpless v Rees (1940) 23 T.C.361 pages 40-45

Simmons (as liquidator of Lionel Simmons Properties Ltd) v Inland Revenue Commissioners) [1980] 2 All ER 798. pages 46-54

In the matter of the Administrator of Taxes v Tremoille Properties Limited (2002). Judgement of the Royal Court pages 59-77 27 May 2002

Marson (Inspector of Taxes) v Morton [1986] BTC page.377

Wiseman and Another v Borneman and Others [1971] AC 297

Perkins v The States Housing Authority Guernsey Court of Appeal 2<sup>nd</sup> August 1995 20 GLJ page 66

Gold v The Administrator of Income Tax Judgement of the Guernsey Court of Appeal 22<sup>nd</sup> July 1999

Webber v Allied Dunbar Assurance PLC Judgement of the Royal Court 16<sup>th</sup> August 2001

Russel v Duke of Norfolk [1949] All ER 109

R v Monopolies and Mergers Commission, exp Matthew Brown plc [1987] 1 WLR 1235

R v Panel on Take-overs and Mergers, exp. Guinness plc [1990] 1 QB 146

Legislation and Texts

The Income Tax (Guernsey) Law, 1975 as amended – secs, 2, 19 and 209

The Income Tax (Amendment) (Guernsey) Law, 1990 (Third Schedule)

The Income and Corporation Taxes Act 1988 sec 18 (i) and sec 832 (i)

Butterworths Simon's Direct Tax Service – Para B 3.231 pp 3241-3244

The Dwellings Profits Tax (Guernsey) Law, 1975 secs 1 and 9(i)

Billet D'Etat XVI of 1973 p 579

Vol. 1 (i) of Halsbury's Laws of England, 4<sup>th</sup> ed. 2001 Reissue, paras 95-111

### **Introduction**

1. This is an appeal from the decision of the Guernsey Tax Tribunal (“the Tribunal”) given orally on 26<sup>th</sup> November 2001, when the Tribunal dismissed an appeal by John Patrick Carpenter, (“the Appellant”) a Guernsey resident. It was an appeal against an assessment to income tax in respect of £600,000 received by the Appellant in the tax year 1999, (“the tax assessment”) being the Respondent’s estimate of profit arising from the sale by the Appellant in 1999 of a Guernsey dwelling known as La Lague.
2. The Respondent had charged the Appellant to income tax because he had concluded that the Appellant in buying, improving and selling La Lague had realised a profit from business. It was, he claimed, not the realisation of an investment profit but profit amounting to an adventure in the nature of trade.

### **Appeals Provisions**

3. The appeal provisions are contained in Sections 76 – 81(a) of the Income Tax (Guernsey) Law, 1975 as amended (“the Law”). Appeal lies to the Guernsey Tax Tribunal. (“The Tribunal”) The Administrator of Income Tax is entitled to be present at the hearing and “.. to give reasons in support of the assessment..” (Section 77). The Appellant and the Administrator are entitled to appear by an Advocate or a qualified Accountant, as defined.
4. In the determination of appeals the Tribunal has under section 79 a range of disposals that it may order. Section 79 (2) provides that subject to section 80 the orders made by the Tribunal shall be final and conclusive. Section 80 provides that upon the determination of an appeal the Appellant or the Administrator, if dissatisfied with the determination as being erroneous in point of law, may within 21 days require the Tribunal to state and sign a case for submission to the Royal Court. The Tribunal shall in its case stated set forth the facts and its determination.
5. Section 80 provides that:-
  - (6) The Royal Court sitting as an Ordinary Court shall hear and determine any question of law arising on the case, and may reverse, affirm, or amend the determination of the Tribunal remit the matter to the Tribunal with the opinion of the Court thereon, or make such other order as the Court may think fit.

- (7) The Court may cause the case to be sent back for amplification or clarification and thereupon the case shall be amplified or clarified accordingly and returned to the Court and the last preceding subsection shall thereupon apply.
- (8) Where the amount of the assessment is to be altered in consequence of the judgement of the Court, the Administrator shall alter the assessment and charge accordingly.”
6. The Tribunal was established under the provisions of the Third Schedule of the Income Tax (Amendment) (Guernsey) Law, 1990. Its functions consist of hearing and determining appeals and stating and signing cases for submission to the Ordinary Court. The Tribunal comprises a President and Vice President one of whom shall preside and seven other members. Three members (including the President and the Vice President) shall constitute a quorum. The Tribunal has a clerk with appropriate qualifications and experience responsible for the administration of the Tribunal’s work and advising the Tribunal, when so requested, on questions of law. The Clerk is an Advocate who retired from active private practice a few years ago.
7. Para 3 (4) states that the Tribunal shall be provided inter alia with secretarial, clerical and recording services as are reasonably necessary to enable it to discharge its functions.
8. Para 5 deals with appeal proceedings. It provides that:
- (2) (e) the proceedings shall be conducted
- (i) in accordance with natural justice;
- (ii) with as little formality, and with as much expedition, as a proper consideration of the matters before the Tribunal will permit;
- (f) every question shall be determined by the opinion of the majority of the members sitting but if they are equally divided the opinion of the person presiding shall prevail;
- (g) subject to this Schedule and the provisions of any other enactment, the Tribunal’s procedure is within its discretion.
- (3) Proceedings before the Tribunal are not to be held bad for want of form or void by reason of any informality.
- (4) The President or Vice President may, by means of a certificate signed by him, correct any error arising from an accidental slip or omission in a decision of the Tribunal.”

### **The Tribunal Appeal**

9. An oral hearing took place on 26<sup>th</sup> November 2001. Mr. Backer, a Chartered Accountant, represented the Appellant. Mr. Gray, the Assistant Administrator of Income Tax, represented the Respondent.

10. The Tribunal having given a decision orally (by a majority of 3 to 2) on the day of the hearing provided its reasons in writing on 20<sup>th</sup> May 2002. The Appellant, dissatisfied with the determination of the Tribunal as being erroneous in point of law, required the Tribunal to state a case for submission to the Royal Court. The Tribunal produced a Case Stated on 31<sup>st</sup> January 2003.

Sitting as a single judge of law I heard the appeal.

### **Case Stated**

11. Under the provisions of Section 80 of the Law the Tribunal stated a Case Stated for the opinion of the Royal Court in the following terms:

1. *At a meeting of the Guernsey Tax Tribunal held at Sir Charles Frossard House on Monday 26 November 2001, Mr T. Backer assisted by Mr R. Berry of Chandler Backer & Co, appeared for the Appellant and Mr Robert Gray and Mr N. Garland for the Respondent. The Tribunal consisted of Mr J.P. Lee (Vice President), Mrs. L.E. Crowder, and Messrs I.O. Dorey, O.E. Bourgaize, K.J. Guille and N. Counihan (Members).*
2. *On the day of the hearing, the Tribunal announced that it would dismiss the appeal and provide a written decision later. The written decision was handed down on 20 May 2002.*
3. *Mr Carpenter appealed against that part of an assessment for the Year of Charge 1999 that charged £600,000 as being the Administrator's estimate of the profit arising from the sale of a dwelling known as La Lague situated in La Rue de Gains in the Parish of Torteval.*
4. *At the state of the hearing it was agreed that four witnesses summoned by the Tribunal on behalf of the Administrator could give their evidence at an early stage of the hearing.*
5. *The question for the determination of the Tribunal was whether La Lague was sold in the course of business and therefore subject to tax on the profits from that sale as being income from a business or whether it was sold as a disposal of an investment.*
6. *Documentary evidence tendered before the Tribunal was:*
  - a) *A Statement of agreed background facts and attachments;*
  - b) *A bundle of documents provided by the Administrator, including copies of cases, numbered RRG/1 – RRG/43; and*
  - c) *A bundle of documents provided by Mr Carpenter together with a statement of the Appellant's case, statements from witnesses unable to attend and copies of cases.*
7. *The following facts were admitted:*
  - a) *Mr Carpenter acquired La Lague on 12 January 1995 for £315,000 (reality);*

- b) *Bonds in the aggregate of £700,000 were registered against the property over the period 12 January 1995 through to 16 December 1997;*
- c) *Mr Carpenter owned various properties in the UK and sold one of these on 19 June 1998 for £400,000. This yielded a net sum of £125,373.36 after payment of outstanding loans relating to it;*
- d) *Various planning applications relating to La Lague were submitted by Mr Carpenter to the Island Development Committee. The first of these was submitted on 24 March 1995. Initial Building Control approval was granted on 19 April 1996 and a further approval was granted on 30 January 1997;*
- e) *Work on the property was completed during July 1998 and the property was put on the market in September of that year;*
- f) *It was sold on 16 February 1999 for £1,300,000 (realty) and £100,000 (personalty);*
- g) *Just prior to the purchase of La Lague, the total of the Appellant's outstanding loans on all his properties was £1.3m. His borrowings had increased to about £1.8m by the end of 1998 but were reduced to about £1.3m by the end of 1999;*
- h) *Subsequent to the sale of La Lague, Mr Carpenter sold three of his UK properties and received an aggregate of about £1 million.*

**Evidence**

- 8. *Evidence was given by the Appellant, Mr Carpenter, by three contractors who worked on the site – Ian Baker, David Sebire and Brian Torode – and by Russ Marquand, an Estate Agent.*
- 9. *Mr Carpenter in his evidence stated as follows:*
  - a) *He started his career in financial services and had developed a love of ancient buildings and built up a rental portfolio of beautiful properties. He fell in love with Guernsey and wanted to make his home here. He lived what he described as a dangerous life of borrowing without having much liquid capital. He could only afford a property in Guernsey if he were able to purchase a house to restore;*
  - b) *In 1994 he found La Lague and was able to purchase it with the help of a 15 year secured loan from Hambros Private Bank (Guernsey) Limited (“Hambros”). La Lague dated from the 1960s but needed modernisation. Eventually he was able to obtain the necessary planning permission;*
  - c) *He moved to Guernsey on a permanent basis in 1996 and stated that this move was occasioned both by his love of Guernsey and by being in a better tax position as regards the sale of his UK property portfolio. The sale of these proved more difficult than anticipated and he became short of finance;*

- d) *He restored La Lague to the best of his ability and used the best possible materials. His financial situation was such that he had no option but to sell it, with reluctance, an event that caused him considerable upset. The decision to sell was taken in July 1998;*
- e) *Eventually he was able to sell off his UK properties but this was too late to enable him to pay off the Hambros loan;*
- f) *He had La Lague valued to ensure that he was getting a fair price. Valuations ranged from £1.2 million upwards to £1.75 million. He sold it privately and was able to come out of the deal with sufficient funds to purchase a property at Le Village du Putron that although not exactly what he required, was of an acceptable standard. He was looking to demolish and rebuild it.*

10. *Mr Ian Baker testified as follows:*

- a) *He did electrical work for Mr Carpenter at La Lague from 15 May 1996 until December of that year. He was paid regularly by cheque;*
- b) *There were about 8-10 workers on the site for the majority of the time and most appeared to be local;*
- c) *Mr Carpenter lived from time to time in various rooms on the property, initially with a young lady and later with his daughter;*
- d) *He had the impression that the house was to be sold and recalled a remark by Mr Carpenter wondering how much he would make when the work was done;*
- e) *In response to questions by Mr Backer, the witness told the Tribunal that Mr Carpenter used the words ‘when I sell it’ on many occasions and the witness formed the honest impression that Mr Carpenter intended to sell it.*

11. *Mr David Sebire testified as follows:*

- a) *He worked at La Lague from 31 May 1996 through to April 1997 doing general roofing work. The majority of the materials that he used were provided by Mr Carpenter.*
- b) *He formed the impression that Mr Carpenter did property development in England. He was on site most of the time in various rooms along with his girl friend and daughter. There were 10-20 men working on site and good quality materials were used;*
- c) *He accepted the contents of his Fax of 16 September 2001 to the Administrator which was tendered as an exhibit and its statement that very early on in the course of the building work he and others were advised that this property was the first in the line of building projects to be undertaken and that ongoing services would be required;*
- d) *He told the Tribunal that Mr Carpenter told those on site that La Lague was to be a show house and he felt that the clear intention of Mr Carpenter was to renovate it as the first of many;*

- e) *When asked in cross examination as to whether Mr Carpenter spoke of other work so as to encourage loyalty from his workforce, Mr Sebire said that no indication was given that La Lague was to be Mr Carpenter's principal home.*

12. *Mr Brian Torode testified as follows:*

- a) *He did various work at La Lague during 1996 and possibly 1997, mostly in the nature of carpentry;*
- b) *Mr Carpenter lived at La Lague during most of the period of the renovations and moved from room to room as the work progressed;*
- c) *He said that he had no recollection of Mr Carpenter saying that he was renovating the place for sale although he commented that Mr Carpenter was making a nice job;*
- d) *In cross examination, he stated that the general impression on site was that it was being renovated for sale, but he had no exact recollection of this but neither did Mr Carpenter make it clear that it was destined for personal use even though he spent time there.*

13. *Mr Russ Le Marquand testified as follows:*

- a) *He was employed by Cooper Brouard, Estate Agents and previously by Shields & Co. He offered an opinion to Mr Carpenter as to its worth rather than a valuation. He thought that £1.25 million was too low and that it should be offered at £1.45 million. In the event it sold at £1.35 million;*
- b) *He was questioned about the allocation of £100,000 for the personalty given that there was less fitted carpets than usual. He took the view that an allocation of that amount was not unusual;*
- c) *In cross examination he stated that if someone new to the island were looking to buy an open market property for re-development he would probably suggest the Fort George or St Martin's area although he qualified this to take into account individual preferences.*

### ***Appellant's Arguments***

14. *Mr Backer, for the Appellant, contended as follows:*

- a) *Mr Gray's reliance upon the evidence of the witnesses is misplaced. The remarks that the renovation was the first of a series was designed to keep a good team of workmen together.*
- b) *The Appellant purchased the property for his own use and had no intention to sell until placed under financial pressure.*
- c) *It was substantially finished in 1997.*
- d) *Although a single transaction can be trade, the Tribunal could not conclude on the facts before it that Mr Carpenter had purchased the property with the intention of selling it. He had purchased it to make it his home. In response to a question on that point from*

*the Tribunal, Mr Backer emphasised that Mr Carpenter had emigrated to Guernsey from the United Kingdom and only owned one property in Guernsey at a time.*

15. *The Vice President referred to a facility letter from Hambros and questioned why, when it was being argued that the intention to sell was only formed in July 1998, a facility letter of 27 November 1997, and contained in the Appellant's bundle, referred to a sale of La Lague. Mr Backer contended that this was a standard form letter.*
16. *In reply to a further question from the Tribunal, the Tribunal were told that the assessment of £600,000 was acceptable if the appeal failed. Mr Carpenter stated that he had not retained the majority of the costs of labour and material used in the course of the building works carried out at La Lague.*

### ***Administrator's Argument***

17. *It was contended on behalf of the Administrator that Mr Carpenter was principally resident in Guernsey in the Year of Charge 1999 and thus was taxable on his worldwide income. Taylor v Good [1973-4], Vol. 49, Official Tax Case Reports, (contained in the Appellant's Bundle) is an authority for the proposition that a house can be bought with no thought of trading but an intention to trade could be acquired later (see page 56). Marston v Morton [1986] BTC 377 (see page 10 (RRG/13)) is authority for the fact that a single one-off transaction can be an adventure in the nature of trade. Whether something is trading depends upon facts. The judgement set out nine badges of trade. Badge six is relevant. Work was done on the property, this is a pointer to the sale being a transaction in the nature of trade. Badge eight deals with intentions. This is important. What were the Appellant's intentions? Mr Sebire had a clear belief that the property was for sale. Badge nine raises the question as to whether it was purchased for personal satisfaction or to produce income yield. Mr Gray submitted that it was a matter of convenience for Mr Carpenter to live at La Lague, even though he was surrounded by building works. He had to live somewhere and living at La Lague enabled him to oversee the building works. He put it up for sale almost immediately the work was completed.*
18. *The Administrator took the view that Mr Carpenter was conducting a business and renovation for sale was a business. Mr Carpenter said that he was forced into a sale, Mr Sebire and the other witnesses suggested that a sale was always in contemplation. The case of MacMahon and MacMahon v Commissioners of Inland Revenue [1950-1952] TC311 is another case in point. He also drew the Tribunal's attention to a letter comprising Document 24a of his bundle from the Appellant's bankers to Appellant on 17 December 1998 that he said was evidence of trading. Mr Gray sought to persuade the Tribunal that because*

*a one-off transaction can be trade, there was ample evidence from which trade could be inferred.*

19. *Mr Gray also mentioned the fact that the profit was estimated at £600,000. The Appellant had not produced any documents to show his expenditure on the property although these had been requested.*

### **The Findings**

20. *We the Tribunal that heard the appeal found the following facts established by the evidence of Mr Carpenter:*
- a) Mr Carpenter purchased La Lague with a 15 year loan from Hambros secured against the property;*
  - b) He moved to Guernsey permanently in 1996 and started work on the property;*
  - c) He was engaged in property development in the United Kingdom;*
  - d) His financial situation deteriorated to the point that La Lague was put up for sale;*
  - e) He was subsequently able to sell some of his UK properties and purchase another property in Guernsey.*
21. *We the Tribunal that heard the appeal found the following facts established by the evidence of Mr Baker:*
- a) From mid-1966 until the end of that year, there were generally about 10 workers on site. During that period, Mr Carpenter lived in various rooms on the property;*
  - b) Mr Carpenter spoke during that period of the sale of La Lague.*
22. *We the Tribunal that heard the appeal found the following facts established by the evidence of Mr Sebire:*
- a) From mid-1996 until the April 1997 there were generally 10 or more workers on site. During that period Mr Carpenter lived in various rooms on the property;*
  - b) Mr Carpenter used good quality materials;*
  - c) The development was the first in a line of building projects that Mr Carpenter intended to carry out in Guernsey.*
23. *We the Tribunal that heard the appeal found the following fact established by the evidence of Mr Torode:*
- Mr Carpenter lived at La Lague during most of the period of the renovations and moved from room to room as the work progressed.*
24. *We the Tribunal that heard the appeal accepted as fact the evidence of Mr le Marquand as set out in Paragraph 13 (above) but were not assisted by it.*

25. *We the Tribunal that heard the appeal did not make any findings of fact arising from the written submissions of Mr David Illingsworth, Mr John McCormack and Mr G S d'A Collings that were contained in the Appellant's bundle.*
26. *We the Tribunal that heard the appeal considered the agreed evidence and the evidence adduced before us and the arguments addressed to us on behalf of the parties and were divided as to the inferences that could be drawn from them. We agreed that we could not take into account any matter concerning "Spindrift", the property purchased by Mr Carpenter subsequent to the sale of La Lague. We also agreed that the passage in Marson v Morton, where the Vice Chancellor spoke of extensive surveys being made of the authorities and went on to caution that the purpose of authority is to find principle, not to seek analogies on the facts and went on to say "It is clear that the question as to whether or not there has been an adventure in the nature of trade depends on all the facts and the circumstances of each particular case and depends upon the interaction of the various factors that are present in any given case ..... " served to remind us that we must look at the facts of this particular case and not seek to find analogies of facts in other cases:*
27. *We the Tribunal who heard the appeal also accepted that in situations such as this, it was possible for intentions to change and therefore it was important to consider the circumstances leading up to the sale.*
28. *The majority of the Tribunal, whilst accepting that cash flow problems may well have been the event that precipitated the sale of La Lague, nevertheless, was satisfied from the totality of the evidence before it that the Appellant had already formed the intention to sell La Lague at least by the time that he started its renovation in 1996 and did not depart thereafter from that intention. The sale of La Lague, although a one off transaction as far as the Appellant's activities in Guernsey were concerned, was in all the circumstances an adventure in the nature of trade.*
29. *The Administrator's estimate of profit was not countered by any computations by the Appellant, and indeed was accepted by him.*
30. *We the Tribunal that heard the appeal by a majority of 3 to 2 accordingly dismissed the appeal and confirmed that part of the Administrator's assessment for the Year of Charge that estimates as £600,000 the profit arising from the sale of La Lague, Rue des Gains, Torteval and therefore subject to tax.*
31. *The Appellant has declared his dissatisfaction with the Tribunal's decision as being erroneous in points of law and has requested the Tribunal to state and sign a case for the opinion of the Court which case, WE, the members of the Guernsey Tax Tribunal who heard the appeal have hereby stated and signed accordingly.*

*The questions for the determination of the Court was whether the Tribunal was correct in law:*

1. *In concluding on the evidence put before it that the sale of La Lague was an adventure in the nature of trade;*
  2. *In concluding that someone who has lived in his property as his residence can ever be held to be trading if, due to economic necessity, he later has to sell it?; and*
  3. *In reaching its conclusions from the evidence and the material before it. ”*
12. The Case Stated was dated 31<sup>st</sup> January 2003 and signed by the Vice President and Members of the Tribunal.

**The Income Tax (Guernsey) Law 1975 (as amended) (“the Law”)**

13. It was common ground before the Tribunal that the Appellant was at the material time resident for tax purposes in Guernsey. As a consequence he was liable to Guernsey tax for the year of charge 1999 on his worldwide income.
14. Furthermore the relevant statutory provisions concerning the taxation of business in the way of an adventure in the nature of trade are to be found in sections 2,19 and 209 of The Law.
15. Section 2 of the Law provides as follows:
2. Income in respect of which tax is chargeable shall be income of one or other of the following classes namely –
    - (1) income from businesses;
    - (2) income from offices and employments;
    - (3) income from the ownership of lands and buildings; and
    - (4) income from other sources;and the income for any year of charge in respect of which tax is chargeable (in this Law referred to as “assessable income”) shall in the case of each particular class be computed in such manner and by reference to such year of computation or other period as is mentioned in this Law.”
16. The material part of sec 19 of the Law which deals with casual receipts provides as follows:
17. In computing the amount of assessable income under this Law no account shall be taken of:-
- (a) profits and losses arising from the realisation of investments except where the varying of investments and the turning of such investments to account is a business or part of a business;

- (b) receipts of a casual or non-recurring nature other than receipts arising from a business or from the exercise of an office or employment.

18. Sec 209(i)

(the General Interpretation section) defines business in the following terms:

“business” includes any profession, trade, commerce or manufacture or any adventure or concern in the nature of trade, commerce or manufacture;

19. The Assistant Administrator drew the attention of the Tribunal to similar provisions contained in UK legislation. Section 18 (1)(a) of the Income and Corporate Taxes Act 1988 provides that tax under Schedule D shall be charged in respect of “.. the annual profits or gains arising or accruing from any trade, profession or vocation.” Section 832 (1) defines trade as including “.. every trade, manufacture, adventure or concern in the nature of trade.”
20. He contended and Mr Backer and the Tribunal accepted that Guernsey and UK legislation are sufficiently similar to justify direct comparison and hence for the Tribunal to have regard to the body of English case law which deals with the meaning of trade and that there was no authority under the law of Guernsey, which directly assisted the parties. English authorities were used in support of arguments before the Tribunal and before me. They are not binding on the Royal Court but they are of strongly persuasive value given the close resemblance between the applicable Guernsey legislation and its English equivalent.
21. In order to place the Guernsey tax law in its context the Dwellings Profits Tax (Guernsey) 1975 (“the Dwellings Profits Tax Law”) is worthy of note.
22. On 31<sup>st</sup> October 1973 the States of Deliberation debated a Policy Letter concerned with speculation in dwellings. It was proposed that there should be a control of speculation in dwellings by taxation. The Policy Letter contained at para 10.2 the following statement (emphasis provided):
- “10.2 At present, in Guernsey persons are liable to income tax on profits if they can be shown to have indulged in a trade or in a venture in the nature of trade. Property transactions which are speculative (in the strict sense of the definition given earlier) are therefore taxable under the provisions of the Income Tax Law. The layman’s connotations of “income” and “profit” are not though the legal connotations. Income tax, as the name implies, is a tax on income. The fact that a person makes a surplus on the sale of a property does not of itself mean that he has acquired income. He may have made a capital profit, but that is a different matter. Companies describing themselves as property companies and the like are embraced by the Income Tax Law but in practice liability to tax on single property transactions is difficult to establish. Individuals are rarely liable to pay income tax on the surpluses resulting from property sales. Guernsey has no legislation covering capital gains.”

23. The Policy Letter resulted in the enactment of The Dwellings Profits Tax Law. It provided for the imposition of a dwellings profits tax of 100% on the true profit realised on a sale of a dwelling subject to certain exemptions. That legislation provided inter alia that the sale of a dwelling by a person who held ownership of that dwelling for a period of 12 months or more prior to sale would be exempt from Dwellings Profits Tax if the said dwelling had been occupied throughout any continuous period of 12 months by that person as his only or main residence.
24. In the light of the fact that the Appellant had resided in La Lague from 1996 to the date of sale in January 1999 the Appellant would not be chargeable to Dwellings Profits Tax.
25. The Respondent in this case no doubt considered that the Appellant's conduct placed him in the category of rare cases when the purchase and sale of a single property would be chargeable to Income Tax. The Assistant Administrator (at p.67 of the unofficial transcript) accepted that a profit arising on the sale of a dwelling is "normally treated as capital". The Respondent argued however that in this case the circumstances were such that the Appellant's activities constituted an adventure in the nature of trade. The Appellant who was not liable to Dwellings Profits Tax considered that he had done nothing that should result in him being chargeable to income tax.

**Documentary Evidence Tendered Before the Tribunal**

26. Documentary evidence tendered to the Tribunal comprised:
  - (a) A statement of agreed background facts and attachments.
  - (b) A bundle of documents provided by the Respondent. It comprised the Appellant's Income Tax returns, correspondence with the Bank, correspondence with the Income Tax Office, details of the Appellant's property portfolio in England and his dealings with individual properties, documents concerned with planning applications and approvals relating to La Lague and Spindrift. There were also documents relating to the sale of La Lague and the purchase of Spindrift. Also included were copies of relevant English tax cases.
  - (c) A bundle of documents provided by the Appellant. It comprised a statement of his case together with statements made by David Illingworth, his UK Chartered Accountant, John McCormack, a local author and authority on historic buildings in Guernsey, Geoffrey Collings, a friend, and correspondence concerned with borrowings from Hambros Bank (Guernsey) Limited and Hambro Assured plc. There were also letters from an English solicitor, English property advisors and agents relating to the marketing for sale and sale of properties in England and a letter to the Appellant from States Income Tax. Also included were copies of relevant English tax cases.

27. I shall not summarise the documents (over 100 pages) placed before the Tribunal. Some of the information contained in the documents is digested in the Case Stated. I do not duplicate that but confine my review of both oral and documentary evidence to that necessary for recording my decision and outlining the reasons supporting it.
28. An informal transcript of the proceedings before the Tribunal was prepared by secretarial staff at the office of Mr Ferbrache. Mr McMahon did not contest its accuracy and counsel were content that it be used in proceedings before me. Both counsel referred me to it. I considered it not only to be helpful but essential.
29. It is evident that the proceedings before the Tribunal were conducted in a most informal way. As already detailed the Third Schedule of the Amendment Law of 1990 at para 5(2) states that the proceedings shall be conducted:
- (1) In accordance with natural justice.
  - (2) With as little formality and with as much expedition as proper consideration of the matters before the Tribunal will permit.

### **Brief Review of the Facts**

30. What emerged from the Statement of Agreed Background Facts and emerged from the agreed documents is worthy of summary. In reviewing the facts I am mindful that I am bound by the findings of fact made by the Tribunal provided, of course, that they are true findings of fact and that the Tribunal had not omitted facts which they ought to have included. I summarise the facts in chronological order. I do so mindful of para. 28 of the Case Stated which records as a Finding of the Tribunal that: *“the Appellant had already formed the intention to sell La Lague at least by the time he started its renovation in 1996”*.
31. In England where the Appellant resided for most of his life he had assembled a substantial portfolio of character residential properties from which he derived income. Some of these properties he had renovated. The quality of his renovation work was such that he had received national awards. He had borrowed in order so to do.
32. Prior to coming to Guernsey the Appellant had spent some time in the early 1990’s residing in France.
33. He resolved to acquire a dwelling in Guernsey. In November 1994 he contracted to acquire La Lague.
34. Just prior to the acquisition of La Lague the Appellant had total outstanding debts on all his properties of some £1.3m.

35. He acquired La Lague, a dwelling registered on the Housing Control Register (an Open Market dwelling) on 12<sup>th</sup> January 1995 paying £315,000 for the realty. He used some of his own money to purchase it. The balance he borrowed from Hambros Bank (Guernsey) Ltd (“the Bank”). He had been granted a loan facility on 24<sup>th</sup> October 1994. This would enable him to borrow more monies in order to carry out structural and other work to it.
36. The amount was to be a maximum of £300,000 at any one time outstanding. The purpose of the personal loan facility was stated as follows:

“Purpose

To enable you to complete the purchase of an open market property for your own occupation at La Lague, Rue de Gains, Torveval at a price of £450,000, including renovation costs of £100,000.

Please note that £200,000 of this facility will be available towards the purchase cost of the property, the balance of £100,000 may be drawn against invoices for materials and labour relating to renovation work on the property.”

37. It was further stated that the intention at that time was that the facility be available on a reducing balance basis for a maximum period of 15 years with repayment instalments to include capital and interest as agreed at each review date, apparently annually.
38. The Open Market status of La Lague would enable him to reside in the dwelling without contravening Guernsey’s strict laws controlling occupation of dwellings and for other members of his family also to live there.
39. This was the first realty that he had acquired in Guernsey. He did not acquire any other realty in Guernsey whilst he owned La Lague.
40. The Appellant resided at La Lague from 12<sup>th</sup> January 1995, although he spent much time elsewhere in that year.
41. On 25<sup>th</sup> March 1995 the Appellant made a first application to the Island Development Committee (“the Committee”) for permission to carry out extensive structural and other development work to La Lague. It was not granted. On 26<sup>th</sup> July 1995 a second application was submitted but on 31<sup>st</sup> August he secured permission in principle to the sketch plans. Drawings were submitted to the Committee on the 26<sup>th</sup> October 1995. They were subsequently approved. The permission enabled the Appellant to extend and alter the dwelling and demolish a garage.
42. On 20<sup>th</sup> October 1995 (the first review date), the Bank confirmed that the facility had been extended until 17<sup>th</sup> October 1996, that is to say there was no increase in the facility granted just prior to the acquisition of La Lague. By then work had not started on site

43. By 12<sup>th</sup> January 1996 he had acquired necessary approvals from the Committee and work commenced. During the course of the building work application was made for revisions and further approvals were secured.
44. From 1996 until he sold La Lague he claimed to be continuously resident there. His partner also lived there for some time until their relationship ceased during the course of the work and his daughter also lived there (p. 47 of the unofficial transcript). Two of the Respondent's witnesses testified to them living there with the Appellant. The Appellant contended that his purpose in the creation of a suite on the ground floor with an en suite bathroom was to provide accommodation for his mother. (See also p. 3 of the unofficial transcript). The Appellant also created an office within the dwelling and added extra telephone lines (p. 39 of the unofficial transcript).

The Appellant claimed that the break up of his relationship with his partner, and the fact that his daughter left to live elsewhere, was another factor which led to his decision to sell La Lague (p.1 of the statement submitted on behalf of the Appellant).

45. On 15<sup>th</sup> July 1996 the Bank increased the facility to a maximum of £400,000. By then the work at La Lague had been underway for over 6 months. Curiously it was still stated that £200,000 would be available towards the purchase cost of La Lague (purchased in January 1995), the balance of the facility, now of £200,000, could be drawn against invoices for materials and labour. A further bond for £100,000 to be secured against La Lague was required.
46. On 11<sup>th</sup> March 1997 the total facility was increased to a maximum of £550,000. Again reference was made to £200,000 being available towards the purchase cost of the property. The balance of £350,000 could be drawn against invoices for materials and labour. A further bond for £150,000 to be secured against La Lague was required. It would appear that a sale was not in contemplation so far as the Bank was concerned or if this was not the case the author of the letter paid little attention to the content of his letter.
47. The Appellant was to claim that most work had been completed by the late summer of 1997 (p.40 of the unofficial transcript) and only minor works and work on the garden were carried out in 1998.
48. On 27<sup>th</sup> November 1997 the Bank, nearly 3 years after the acquisition of La Lague and over 4 years after the first facility letter, sent a further facility letter to the Appellant. The pattern of a relatively standard letter previously used by the Bank was varied. The maximum facility was increased to £700,000. The increase facility was to be made available to complete the renovation and refurbishment of La Lague. In addition a fee of £10,000 would become payable upon the sale of La Lague and this amount would be added to the loan redemption figure upon receipt of the sale proceeds. The Bank did not require a further bond, thus saving fees and document duty. If the balance of the loan account had not been reduced to a maximum of £350,000 by 30<sup>th</sup> June 1998, the Bank would be empowered to take a bond over the unencumbered assets of the Appellant with a

- minimum market value of £350,000 by way of additional security for the new facility. The Bank required a further bond in the sum of £150,000. The other terms and conditions continued to apply.
49. On 19<sup>th</sup> June 1998 the Appellant sold one of his English properties (Manor House) for £400,000. The net sum available to him was £125,373.36. The Appellant was to advise the Respondent that the proceeds were used by him to reduce his overall indebtedness, including credit card debts and to acquire some shares.
50. In July 1998 building work at La Lague had been completed. The cost of the work had mounted considerably during the course of the work.
51. In September 1998 La Lague was put on the market for sale.
52. On 10<sup>th</sup> November 1998 the Bank was on notice that the La Lague was being offered for sale for £1.45m and that the balance of the loan (then £700,000) would be repaid out of the sale proceeds. The facility was extended until 31<sup>st</sup> May 1999 on interest only terms.
53. The Appellant also had an outstanding loan with Hambro Assurance plc. A Term Loan Facility of £150,000 has been granted by Premium Life Assurance Co. Ltd to him in July 1994. The benefit of the facility and the mortgage securing the facility were transferred by that Assurance Company to Hambro Assured plc on 31<sup>st</sup> December 1996. The Appellant (p. 44 of the unofficial transcript) referred to the loan as being a smaller mortgage of £150,000 with Hambros Offshore. On 24<sup>th</sup> November 1997 the repayment date for the facility was extended until 30<sup>th</sup> April 1998.
54. On 8<sup>th</sup> December 1998 the Appellant signed a contract for the sale of La Lague. Later that month the Bank facility was increased to £740,000. The Appellant advised the Respondent that by the end of 1998 total borrowings were approximately £1.8m.
55. On 17<sup>th</sup> December 1998 the facility was increased by a further £40,000 to £740,000. The Bank required further security for that £40,000 facility over and above the bonds already secured on the property. It required exceptionally, if not uniquely, an assignment of the Appellant's right title and interest, in the £140,000 paid by the prospective purchaser to the Estate Agent stakeholders by way of a 10% deposit on the purchase price of La Lague. That sum would be due to the Appellant in the event of a default by the prospective purchaser in completing the conveyance as liquidated damages or in the event of a completed conveyance as part of the purchase price. Given the considerable difference between the price at which the property was being marketed, the likely price to be realised and the amount owed to the Bank it was perhaps surprising that a further Bank bond was not required. However a far cheaper route was to take security over the Appellant's right title and interest in the stakeholder deposit and that was the security route pursued.
56. The conveyance of La Lague was completed on 16<sup>th</sup> February 1999. On that day he purchased another dwelling, named Spindrift for £499,500. He borrowed £360,000 from NatWest Offshore secured by a bond over Spindrift. It was also an Open Market property. He took up residence

there. On 28<sup>th</sup> April 1999 he applied to the Committee for permission to partially demolish it and redevelop it including the addition of a double garage.

57. The Appellant disposed of 3 further properties in his English portfolio during the course of 1999 for an aggregate sale price of £1m. The Appellant advised the Respondent that the proceeds were partially used to reduce his overall indebtedness which had been reduced to approximately £1.3m by the end of 1999.

### **Financial Pressure**

58. It is evident that the Appellant was under some short term financial pressure in 1997 and increasingly in 1998, albeit largely self induced, arising from his expenditure on La Lague and a continuing shortfall between his expenditure and income which had prevailed for several years. The pressure was increasing from the Bank to reduce the amount of the loan. The Appellant acknowledged that there was no specific pressure exerted by the Bank to sell La Lague but in the end faced with increasing financial pressure he concluded that it was appropriate to seek to sell La Lague. In short he felt overstretched financially and whereas the UK sale market was depressed in Guernsey this was not the case.

### **Proceedings before the Tribunal**

59. The Tribunal proceedings were conducted in an informal manner which Mr Ferbrache on behalf of the Appellant categorised as being so unfair as not to accord with principles of natural justice. At this stage I do no more than outline the way in which the appeal proceeded before the Tribunal.
1. It was noted by the Tribunal Vice Chairman, who was presiding, that 4 witnesses were present who had been subpoenaed by the Tribunal, at the instance of the Respondent. He enquired whether it was intended that they be heard first. This would not have been the normal order of things. It would appear there was an acknowledgement on the part of those present that it would suit the convenience of the subpoenaed witnesses that they should give their evidence at the outset and accordingly be able to leave at the earliest opportunity. Comment was invited from the representatives of the parties. They did not dissent from the Vice Chairman's proposal.
  2. The bundle of documents which had been prepared for the hearing was handed out.
  3. Mr Backer immediately indicated that efforts had been made by or on behalf of the Appellant to have in attendance witnesses who would testify on his behalf. Mr Illingworth was indisposed and Mr McCormack was in Jersey that day honouring a prior commitment. Mr Backer produced copies of statements which the 3 witnesses namely Mr Illingworth, Mr McCormack and Mr Collings had made. In the event they were to be treated as documentary evidence (Case Stated para 6(c)).

4. In an opening address Mr Backer referred to notes which had been prepared on behalf of the Appellant. This appeared to be a statement of the Appellant's case which was treated as documentary evidence by the Tribunal (Case Stated para 6(c)). He proceeded briefly to outline his client's case.
5. The Assistant Administrator was invited to call witnesses. He called 4 witnesses and they gave evidence in succession.
  - (i) Mr Baker who carried out electrical work at La Lague.
  - (ii) Mr Sebire who carried out general roofing work at La Lague.
  - (iii) Mr Torode who had done various works, mostly carpentry at La Lague.
  - (iv) Mr Le Marquand who was an employee at an estate agency who had offered at the request of the Appellant an opinion on the market value of La Lague.

All 4 witnesses were cross examined by Mr Backer. He tested their evidence. Members of the Tribunal did not ask any questions.

6. When invited by the Tribunal to present the Appellant's case Mr Backer, in what appeared to be a further opening address or a resumption of his previous brief address, reviewed the legal position. He then developed his client's case by referring to the letter from Mr Illingworth, the Appellant's English Chartered Accountant. He also commented on the evidence given by Mr. Baker. (p37 of the unofficial transcript). He proceeded to briefly review its content.
7. The Appellant then gave evidence. He was not cross examined by the Assistant Administrator. His evidence at that stage went untested and unchallenged by the Assistant Administrator.

Members of the Tribunal did not ask questions at that stage but it was indicated (it would appear by the Vice President) that the Tribunal might ask the Appellant to answer questions after the Assistant Administrator had been heard.

8. The Assistant Administrator then addressed the Tribunal. In his closing speech he confined himself in some measure to submitting legal arguments but also gave evidence. He introduced new points. He also contradicted matters contended by the Appellant in evidence without having tested or challenged them in cross-examination. Mr. Backer surprisingly did not object nor did the Tribunal intervene. Mr. Backer and the Tribunal by refraining from doing so contributed to the procedural irregularities which concerned Mr. Ferbrache.
9. Those present were asked if they had any questions of the Assistant Administrator. No questions were asked by Mr Backer nor by members of the Tribunal.

10. Mr Backer was then asked if he wished to comment on what the Assistant Administrator had said. He proceeded in his closing remarks to comment on aspects of the Assistant Administrator's address.
  11. The Vice President then asked whether anybody had any questions of any of the parties. Several persons asked questions of the Appellant. It appears that they were members of the Tribunal. They tested some of the Appellant's evidence.
  12. The Tribunal retired to consider its decision. The Tribunal returned. The Vice President announced that the appeal had failed by a majority. Reasons would be given in writing as quickly as possible.
60. As already noted the reasons of the Tribunal were provided on 20<sup>th</sup> May 2002, some six months after its decision.
61. Mr Ferbrache caused a transcript of the hearing to be prepared. He corresponded with Mr McMahon and the Clerk to the Tribunal between October and December 2002. During this correspondence Mr Ferbrache elicited information which he considered would be of relevance in the preparation of his client's appeal to the Royal Court.
62. This resulted in the production on 18<sup>th</sup> November 2001 on behalf of the Respondent of a number of documents. They included a note faxed by Mr Sebire to the Income Tax Office on 16<sup>th</sup> September 2001, some 2 months before the Tribunal hearing. This was the fax to which the Assistant Administrator had referred in his address to the Tribunal and which he had evidently handed in at the end of the hearing. He had not however given advance notice of his intentions with regard to the fax to the Appellant or to Mr Backer nor were copies made available to them during the course of the hearing. That fax should have been put in evidence formally. Curiously the Tribunal in the Case Stated at para. 11(c) (Mr. Sebire's evidence) treat it as evidence formally introduced..
63. It also resulted in the production on 24<sup>th</sup> December 2002 of a number of other documents. They included copies of letters sent by the Assistant Administrator to Mr Baker, Mr Sebire, Mr Torode and Mr Le Marquand seeking information concerning the Appellant and La Lague. Also disclosed at that time were:
- (i) A copy of notes prepared by the Assistant Administrator dated 18<sup>th</sup> June 001 and 5<sup>th</sup> November 2001 of telephone calls to him by Mr Baker.
  - (ii) A copy of the Assistant Administrator's 3 page file note of a meeting with Mr Baker on 6<sup>th</sup> July, 2001.

(iii) A copy of the Assistant Administrator’s short note dated 23<sup>rd</sup> July 2001 of a telephone call to him by Mr Torode.

64. During this period the parties were afforded the opportunity by the Clerk of the Tribunal to comment on the draft Case Stated. The parties availed themselves of that opportunity.

### **The Parties’ Submissions**

65. Skeleton arguments were submitted on behalf of the parties for the hearing in the Royal Court on 18<sup>th</sup> June 2003 and further skeleton arguments were submitted for the resumed hearing on 2<sup>nd</sup> October. The skeleton arguments were further developed and amplified by Counsel during the course of their oral submissions.

### **Submissions on behalf of the Appellant**

66. Mr Ferbrache’s submissions may be summarised as follows:

1. The Court can grant the Appeal and reverse the decision of the Tribunal:

- (i) where the determination is wrong in law
- (ii) where the tribunal, if properly instructed in law and acting judicially could not have reached its decision either because:-
  - (a) there were no facts to support the finding or;
  - (b) a view of the facts was taken that could not be reasonably entertained [Edwards (Inspector of Taxes) v Bairstow (1955) 3 All ER 48 – Viscount Simmonds p. 53 d-f; Lord Radcliffe p.57 h-i]

2. In Taylor v Good (1974) 49 T.C. 277 – Megarry J. (in the High Court) stated:

*at p.287(c):*

*“.....If a house is bought with the intention of providing a home for the purchaser, that is a valuable element in a contention that in so doing the purchaser was not trading, especially if the intention is fixed and settled”.*

*At p.289(e):*

*“But what he did was to pursue a course which would realise the best price on a sale. That by itself does not necessarily establish that there was trading: the owner/occupier of a house may improve it before he sells it without its being held after the sale that he has been engaging in trade”.*

Russell LJ in the Court of Appeal at p.295 E-H considered whether the case should be remitted to the Commissioners. With reference to the contention that there had been an adventure in the nature of trade he concluded that the activities of the tax payer subsequent to the purchase could not be so regarded by any reasonable body of Commissioners versed in the relevant law.

Russell LJ at p.297 B-C also indicated that if there was an existing trade in the purchase and sale of land it may not be difficult to find that the investment properties had been brought into the stock-in-trade of that trade –

*“But where, as here, there is no question at all of absorption into a trade of dealing in land of lands previous acquired with no thought of dealing, in my judgement there is no ground at all for holding that activities such as those in the present case, designed only to enhance the value of the land in the market, are to be taking to point to, still far less establishing, an adventure in the nature of trade”.*

3. In I.R. Commrs v Reinhold (1953 34 T.C. 389) Lord Carmont at p.393 stated:

*“If, however, the subject of the transaction is normally used for investment – land, houses, stocks and shares – the inference is not so readily to be drawn from an admitted intention in regard to a single transaction to sell on the arrival of a suitable pre-selected time or circumstance and does not warrant the same definite conclusion as regards trading or even that the transaction is in the nature of trade”.*

4. In Simmons (as liquidator of Lionel Simmons Properties Ltd) v Inland Revenue Commissioners [1980] 2 All ER 798 Lord Wilberforce stated:

*p.800 e-h:*

*“Trading requires an intention to trade; normally the question to be asked is whether this intention existed at the time of the acquisition of the asset. Was it acquired with the intention of disposing of it at a profit, or was it acquired as a permanent investment? Often it is necessary to ask further questions: a permanent investment may be sold in order to acquire another investment thought to be more satisfactory; that does not involve an operation of trade, whether the first investment is sold at a profit or a loss. Intentions may be changed. What was first an investment may be put into the trading stock, and I suppose, vice versa. If findings of this kind are to be made precision is required...”*

*p.802:*

*“Frustration of a plan for investment, which compels realisation, even if foreseen as a possibility, surely cannot give rise to an intention to trade”.*

Lord Salmon stated:

*p.804 (e-f)*

*‘A passage in the findings of the Commissioners was strongly relied on by the respondents. It reads: “The decision to liquidate was in our view not inconsistent with the original aim to create investments for retention where possible, or where not possible for turning to account by way of trade. A strange concept indeed. An investment does not turn into trading stock because it is sold’.*

5. For profits from the realisation of a dwelling purchased for residential purposes to be taxable as “an adventure in the nature of trade, either:-
  - (i) it had to be purchased with the primary intent of re-sale, or
  - (ii) although not purchased with such an intent, such an intent is later formed and the dwelling is appropriated into a trading stock, which is either:-
    - (a) an existing one; or
    - (b) one that is brought into existence.

The fact that circumstances change and force a sale, does not in itself make it an adventure in the nature of trade.

There were no findings by the Tribunal that supported any of these. The findings of the Tribunal from the evidence of Mr Baker at para 22(c) - “The development was the first in a line of building projects that Mr Carpenter intended to carry on in Guernsey” - were inconsistent with the Tribunal’s findings in paragraph 28 - “The sale of La Lague, although a one off transaction as far as the Appellant’s activities in Guernsey were concerned was in all the circumstances an adventure in the nature of trade”

Mr Ferbrache further argued that the procedure before the Tribunal was marred by procedural irregularities:

6. The Third Schedule of the 1990 Amendment Law provides that:

“The proceedings shall be conducted:

- (i) In accordance with natural justice;
- (ii) With as little formality, and with as much expedition, as a proper consideration of the matters before the Tribunal will permit.”

7. In *Wiseman and Another v Borneman and Others* (1971) AC 297 Lord Reid at p. 308 stated:

*at B-C*

*“Natural justice requires that the procedure before any Tribunal which is acting judicially shall be fair in all the circumstances, and I would be sorry to see this degenerate into a series of hard and fast rules.” and*

*at F-G*

*“...Even where the decision is to be reached by a body acting judicially there must be a balance between the need for expedition and the need to give full opportunity to the Defendant to see the material against him.”*

*Lord Morris of Borth-y-Gest at p.308 stated:*

*At H*

*“...that the conception of natural justice should at all stages guide those who discharge judicial functions is not merely an acceptable but is an essential part of the philosophy of the law. We often speak of the rules of natural justice. But there is nothing rigid or mechanical about them. What they comprehend has been analysed and described in many authorities. But any analysis must bring into relief rather their spirit and their inspiration than any precision of definition or precision as to application. We do not search for prescriptions which will lay down exactly what must, in various divergent situations, be done. The principles and procedures are to be applied which, in any particular situation or set of circumstances, are right and just and fair. Natural justice it has been said, is only “fair play in action”.*

The onus was upon the Appellant to disturb any assessment.

8. In *Gold v The Administrator of Income Tax* (Guernsey Court of Appeal 22<sup>nd</sup> July 1999) Beloff J.A. stated:

p.9. *“The Administrator’s function, if not duty, is to defend his assessment with the material available to him and by cross-examination, if he chooses, of the Appellant. What is required to disturb an assessment must depend upon the facts and circumstances of the particular case, but the more cogent the evidence supplied by the Appellant in support of his appeal, the more cogent must be the rebuttal by the Administrator.”*

p.10. *“While the Appellant is not obliged to answer questions, he runs the risk that if he does not do so he will in fact fail to discharge the burden which, I repeat, lies upon him.”*

There was no cross-examination of Mr Carpenter by or on behalf of the Administrator.

*p.11 “Errors of law could embrace:-*

(2) *Material departure from the prescribed procedure or the doctrines of fairness.”*

This is a clear statement of the Guernsey Court of Appeal.

The Statutory appeal procedure under Section 80 of the 1975 Law is wide enough to deal with procedural irregularities. A contention that matters of judicial review should be brought against the Tribunal and not raised in an appeal between the parties was not the approach adopted to date by the Guernsey Court of Appeal and would add unnecessarily to the costs and complexity of the appeal procedure and lengthen it.

9. In the Administrator of Taxes v Tremoille Properties Limited (Royal Court 27<sup>th</sup> May 2002) a case that turned solely on legal submissions, Lt Bailiff Talbot heard argument on 9<sup>th</sup> October 2001 (some seven weeks prior to the hearing by the Tribunal in this case). An issue had been raised in regard to procedural irregularities before the Tribunal. The Assistant Administrator had addressed the Tribunal before Tremoille’s accountant. The serious irregularity did not in the result, adversely affect the validity of the hearing. Lt Bailiff Talbot recommended clear procedures which should be followed in preparation for a hearing and in the conduct of a hearing.

The Lt. Bailiff Talbot said:

*para 12*

*“Nevertheless, on any other appeal to the Tribunal in the future from an assessment of income tax by the Administrator the appeal should, in my judgement, be conducted on a very different basis. Amongst other things, the parties to the appeal should provide the Tribunal with an indexed, paginated and chronological bundle of relevant documents, preferably having also produced a written summary of argument with attached legal authorities to the Tribunal in good time, say a few days before the hearing date, the Appellant taxpayer should address the Tribunal on the issues arising on the appeal first, the Administrator should address the Tribunal second and the Appellant taxpayer should have the final right of reply. I also believe it would be helpful for written transcript to be taken during the hearing so that a case may be stated reasonably soon after one is requested by the unsuccessful party.”*

The Respondent would have been aware of the concern expressed by Lt. Bailiff Talbot in argument in Tremoille Properties although the Tribunal hearing in this case pre-dated the judgment.

In this case:

- (a) The fax of 16<sup>th</sup> September 2001 from Mr Sebire was produced at the hearing [referred to as an exhibit at paragraph 11(c) of the Case Stated]
- (b) There was no indexed, paginated and chronological bundle of relevant documents.
- (c) There was no written summary of any argument with attached legal authorities.
- (d) Effectively the Assistant Administrator presented his evidence first.
- (e) There was no official written transcript.
- (f) The Case Stated although asked for promptly is dated 31<sup>st</sup> January 2003.

10. In this case:

- (i) It was agreed that the Respondent's 4 witnesses be called. That was a clear breach of the guidance given in the Gold and Tremoille cases.
- (ii) Three statements were submitted on behalf of the Appellant from Mr Illingworth, Mr McCormack and Mr Collings who could not attend for a variety of reasons. No objection was taken to their submission.

All were relevant to the Appellant's case. Mr Illingworth who had acted for the Appellant in England had asserted with reference to the Appellant's portfolio of properties in England that there was no suggestion that the Appellant was trading. It was an investment portfolio. He said:

"For my part I am clear that his original intention in moving to La Lague was to establish a private residence for his own occupation, a move which would also give him the facility to realise his considerable investment in UK properties without suffering the attendant Capital Gains Tax liability."

The Assistant Administrator in his submission to the Tribunal had doubted the avoidance of UK Capital Gains Tax contention advanced by the Appellant.

The Tribunal in its Case Stated (para. 25) stated :

*"We the Tribunal that heard the appeal did not make any findings of fact arising from the written submissions of Mr Illingsworth (sic), Mr McCormack and Mr G S d'A Collings that were contained in the Appellant's bundle."*

It is assumed that the Tribunal ignored the evidence of the Appellant's 3 witnesses because they were not available to attend. At no time until the receipt of the Case Stated was that known to the Appellant or his advisors. If such had been the case then an adjournment could have been sought.

- (iii) The Assistant Administrator lead his 4 witnesses particularly in the vital disputed fact of the intent of the Appellant, in particular he lead Mr Sebire and Mr Torode. He referred to a fax sent by Mr Sebire to the Assistant Administrator which was not an admitted document and would not have been admitted.

It was incumbent on the Assistant Administrator to deal with vital disputed matters of fact with the greatest procedural care.

- (iv) The Appellant gave evidence.

He was cross-examined on behalf of the Respondent. The appellant was willing to answer questions put by the Assistant Administrator.

- (v) The Assistant Administrator introduced the facsimile of 16<sup>th</sup> September 2001 from Mr Sebire into the proceedings. The Tribunal treated it as an exhibit (Case Stated at para. 11(c)). It was not an agreed document. It should not have been admitted and offended against the rule against hearsay.

- (vi) The Assistant Administrator in his closing address purported both to give evidence and to contradict matters given by the Appellant in evidence when he, the Assistant Administrator, had not challenged the same in cross examination.

At page 305 the Assistant Administrator said this:

“You have heard the witnesses say he moved from room to room as the work proceeded around the house. But it is the Administrator's argument that he did so principally because he had to live somewhere and because of his financial situation he probably couldn't afford to rent somewhere else more comfortable to live...”

- (vii) The evidence of Mr Baker was the only evidence referred to in the Case Stated which was anything other than neutral. In any event it was not decisive. The Tribunal in the Case Stated found as facts established by Mr Baker's evidence, that the Appellant had spoken during the period from mid 1996 until the end of 1996 “of the sale of La Lague”. That in itself cannot be decisive. It could well have been the only ground for the Tribunal rejecting the Appellant's appeal.

After the Tribunal hearing, certain documents were disclosed to the Appellant’s advisors by the Respondent. The documents disclose that Mr Baker in a telephone call had told the Assistant Administrator that he was “not a nice man” and that he had heard that the Appellant “had left the UK under accusation of paedophilia.” Because his wife worked at Children Board he decided he could not continue working with the Appellant. When he told the Appellant he was leaving there was an argument and a scuffle.

Disclosure of this information could have been material. It might well have been put by Mr Backer to Mr Baker in cross-examination and affected Mr Baker’s credibility.

11. In all the circumstances there were so many procedural irregularities. The Court cannot reasonably be left with the conclusion that natural justice took place. To use the words of Beloff J.A. at page 11 of Gold there was a:

*“Material departure from the prescribed procedure (and) the doctrine of fairness.”*

12. The Court has the power to remit but the Court should not exercise this power. There has been much delay in preparing the Case Stated. Witnesses for example would be asked to recall conversations going back over seven years.

On a proper consideration the only justification for the upholding of the Respondent’s assessment by the Tribunal was the evidence of Mr Baker. That in itself could not have been decisive. Nothing thus would be gained in any event by remitting the matter back to the Guernsey Tax Tribunal.

13. In any event an error of law has occurred. The proper decision should be that the appeal should be allowed.

### **Submissions on behalf of the Respondent**

69. Mr McMahon’s submissions may be summarised as follows:

1. The Court can allow an appeal where the determination of the Tribunal has been erroneous in point of law (sec 80(1), of the Law). Following Edwards v Bairstow this extends to a finding reached by the Tribunal either without evidence or on a view of the facts that could not reasonably be entertained. The Tribunal having correctly directed itself in law, there was evidence upon which the Tribunal could find that the Appellant had engaged in an adventure in the nature of trade. This is not a case where the true and only reasonable conclusion based on the facts contradicts the Tribunal’s determination, thereby permitting the appellate court to interfere with a finding of fact the Tribunal was entitled to make.

Procedural irregularities did not affect adversely the validity of the hearing.

2. The issue for the Tribunal was whether or not the profit from the sale of La Lague was chargeable to tax as income from a business (sec 2(1) of the Law). The term “business” is defined in section 209(1) as including “any.....trade... or any adventure or concern in the nature of trade.....”. The Tribunal will also have had in mind that section 19(a) excludes from account when computing assessable income “profits..... arising from the realisation of investments”. Ultimately, the Tribunal had to decide whether or not the transaction by which the Appellant realised a profit amounted to an adventure in the nature of trade.
3. What characteristics distinguish an adventure in the nature of trade is a question of law. Inferences from the facts as to whether a particular transaction is, or is not, such an adventure is an inference of fact (Edwards v Bairstow, at page 54E). The Tribunal clearly had in mind (see paras 17 and 26, Case Stated) the badges of trading referred to in Marson v Morton [1986] BTC 377. There has been no error of law in that regard.
4. No one test is decisive. Each relevant badge must be considered and balanced before reaching a conclusion on the facts and circumstances of the case. Reference to previous decisions in order to attempt to find analogous facts is unhelpful (see Marson v Morton at p.10). The passages quoted from Taylor v Good and Simmons v IRC are examples of the application of the relevant legal considerations, the principles from which are summarised in any event in the badges of trading set out in Marson v Morton.
5. The various indicia towards being engaged in an adventure in the nature of trade, do not enable the Appellant to make the specific contention made at para 5 of his submissions.

Rather, the aim is to provide common sense guidance for the conclusion one way or the other that is appropriate in the circumstances of the particular case under consideration. The conclusion is a determination of fact, or inference of fact, that can only be interfered with in the limited circumstances set out in Edwards v Bairstow.

6. A one-off transaction can in law be an adventure in the nature of trade (see Taylor v Good). The Tribunal members had to consider on the basis of the information supplied by both parties, who they believed. The findings at paragraphs 20-23 of the Case Stated, coupled with the Statement of Agreed Background Facts, explain the factual matrix from which the members had to draw the inference about whether or not the Appellant was engaged in an adventure in the nature of trade. Certain assertions of the Appellant about his intentions were disbelieved. The evidence of the tradesmen was preferred. As paragraph 26 describes, the members “were divided” but a majority reached a decision on the facts that they were capable of reaching. The facts do not point so clearly one way or the other that the only conclusion is clear (see, e.g. Simmons v IRC, at page 804h, per Lord Scarman). In other words, this is “one of those cases

which falls in ‘no-man’s –land’” (see Marson v Morton, at page 13) and the determination of the Tribunal should not therefore be set aside.

In relation to Mr Ferbrache’s contention that the proceedings were marred by procedural irregularities:

7. Paragraph 5(2)(e) of the Third Schedule to the Law, indicates that proceedings before the Tribunal must be conducted in accordance with natural justice but also with as little formality, and with as much expedition, as a proper consideration of the matters permits. Paragraph 5(2)(g) of the Third Schedule enables the Tribunal broadly to decide its own procedure and paragraph 5(3) provides expressly that proceedings are not to be held bad for want of form or void by reason of informality.

The Appellant had a full opportunity to put his case fairly. The conclusion should be that this is not a case where something has gone wrong in nature and degree so that injustice has resulted or that the procedure adopted was so unfair that no reasonable tribunal could have adopted it.

General guidance about the principles of natural justice can be found in paragraphs 95-111 of Volume 1(1) of Halsbury’s Laws of England, 4<sup>th</sup> ed. 2001 Reissue (“Halsbury”). In the context of the proceedings before the Tribunal, the Appellant is effectively alleging that certain features of the procedure affected his opportunity to put his case fully (see para. 107, Halsbury) or that the overall conduct of the hearing was such that the hearing was unfair (see para. 108, Halsbury).

8. When there are no express rules of procedure the precise procedure to be followed will depend upon the subject matter of the decision and upon all the circumstances of the case. (see, e.g., Russell v Duke of Norfolk [1949] 1 All ER 109, at 118D). The Tribunal is intended to operate at a less formal level than a court. If that were not the case, the wording of paragraph 5(2)(e)(ii) of the Third Schedule to the 1975 Law would be redundant. Where a hearing takes place before a less formal tribunal such as this, an appeal court should intervene only if the procedure adopted was so unfair that no reasonable tribunal could have adopted it (see R v Monopolies and Mergers Commission ex p. Matthew Brown plc [1987] 1 WLR 1235, at 1242C). The evolution of the Tribunal, its composition and the intention of the legislature in conferring upon it its powers and responsibilities are all relevant to that issue. The Tribunal allowed the parties a full opportunity to present their cases, as regards evidence and submissions. The Tribunal was attempting to allow the parties to proceed in a way that suited them without imposing any stricter rules. That does not, of itself, involve a breach of natural justice.

9. An alternative approach to the circumstances in which a court should intervene was adopted in *R v Panel on Take-overs and Mergers, exp. Guinness plc* [1990] 1 QB 146 which involved proceedings by way of judicial review. The English Court of Appeal indicated that the question of whether the rules of natural justice had been broken was not determined by reference to *Wednesbury* unreasonableness but by assessing whether something had gone wrong of a nature and degree that requires court intervention (p.178G per Lord Donaldson of Lynton MR, developed slightly by Woolf LJ at P. 193G and by Lloyd LJ at p. 184A-E). In making that assessment, the court must consider the effects of what is alleged to have gone wrong on the person complaining about the outcome and not more generally. The proper question is -Were there departures from the principles of natural justice that affected the ability of the Appellant to present his case fairly and, if so, did they result in injustice to him?
10. Although Lieutenant Bailiff Talbot gave guidance to the Tribunal in *Administrator of Income Tax v Tremoille Properties Limited*, his judgment was not handed down until more than six months after the Tribunal hearing in this case. It cannot have had a direct impact on the hearing. Because the Tribunal is expressly permitted by paragraph 5(2)(g) of the Third Schedule to the 1975 Law to regulate its own procedure, his comments are non-binding guidance.
11. The Appellant's representative -
  - (a) had the opportunity to cross-examine the witnesses called on behalf of the Respondent in order to test their evidence fully,
  - (b) could, if he had so wished, sought an adjournment to enable him to call in person the witnesses from whom he wished to elicit testimony,
  - (c) questioned the Appellant so that he gave his evidence as completely as he wished or needed to,
  - (d) could have objected to any of the perceived wrongdoings on behalf of the Respondent and
  - (e) made an opening statement and closing submissions to the Tribunal as to why the assessment raised by the Respondent against the Appellant should be annulled, etc.

The Appellant had a full and fair opportunity to present his case and comment on the Respondent's case. The Appellant's complaints are less about procedural unfairness directed at the Appellant's ability to put his case as completely as he wished, but rather than, because the outcome was not what he wanted, the alleged defects must have contributed to that.

12. Natural justice does not impose on administrative and domestic tribunals a duty to observe all the technical rules of evidence applicable to proceedings before courts of law (para. 108 of Halsbury). The key issue is whether the parties had the opportunity to adduce the evidence they wanted to lay before the Tribunal. Thereafter, the Tribunal had to weigh up and balance all the evidence, and analyse what facts relevant to the matter for their determination they found as proved. With the benefit of those conclusions of fact, they had to apply the relevant legal tests, namely the badges of trade, and decide whether or not the Appellant had been engaged in an adventure in the nature of trade. This process was undertaken in the round in a manner that was fair to the Appellant. The conclusion, unless it is attackable on the basis of *Edwards v Bairstow* perversity, should not be annulled for reasons of informality or non-court-style procedure.

13. In relation to breaches of natural justice advanced by the Appellant:

- (i) Everyone agreed that evidence from the live, non-party witnesses should be taken at the start of the proceedings. The order of proceedings is largely irrelevant provided that the Appellant's representative was able to ask questions of the witnesses. He was able to do so. He has waived the ability to complain about it.
- (ii) The Tribunal had to decide what weight, if any, to give to anything contained in 3 letters produced by the Appellant from Mr Illingworth, Mr McCormack and Mr Collings.

The issue of whether to seek an adjournment or how to handle the material adduced was a matter for the Appellant rather than anyone else. The failure of the Appellant's representative to deal with this issue adequately cannot be taken to affect the overall fairness of the proceedings vis-à-vis the Appellant.

Para. 25 of the Case Stated shows that they were considered as part of the decision making process. They were found to add nothing to the findings made as a result of hearing the Appellant himself.

- (iii) The leading of witnesses itself is not a procedural irregularity. Such conduct should be checked by another party drawing the attention of the Tribunal to it or by the Tribunal itself. What matters most is the evidence that is actually given during the hearing. The witnesses brought by the Respondent were subsequently cross-examined on behalf of the Appellant. There was ample opportunity for the Appellant's representative to test such evidence. In spite of the poor style of questioning, the evidence actually given by Messrs. Sebire and Torode did not greatly assist the Tribunal in its findings of fact (see paras. 22 and 23 of the Case Stated). Leading witnesses did not render the proceedings unfair to the Appellant.

- (iv) It is accepted that the Assistant Administrator gave evidence before the Tribunal by way of a lengthy monologue. The failure to cross-examine does not in itself render the procedure unfair to the Appellant. There may be consequences in relation to the conclusions or findings of fact to be drawn from the evidence adduced but a decision not to cross-examine does not affect the fairness of the proceedings and amount to a breach of natural justice for the Appellant.
- (v) The Case Stated records that Mr Sebire's facsimile was tendered as an exhibit. It is important to have regard to whether or not the content of the fax led to any material findings of fact that should not have been made. That finding of fact in para.22(c) would have been relevant if the Tribunal's determination rested on the conclusion that the Appellant was engaged in a series of property developments as trade. Para. 26 and 28 of the Case Stated demonstrate that this was not the basis on which the Tribunal concluded as it did. The use of the facsimile did not lead to any injustice against the Appellant.
- (vi) In the course of his closing address the Assistant Administrator made comments of a factual nature. He did not confine himself to submissions. The Appellant's representative could have drawn this to the Tribunal's attention. The Tribunal itself should have stopped him straying from the role of presenting the case. The Assistant Administrator could have called himself as a witness in which case the opportunity to cross-examine would also have been available. The Tribunal made no findings of fact as a result of anything factual said by the Assistant Administrator. Thus it did not affect the Tribunal members' overall evaluation of the issues before them. It did not in the event result in any unfairness or injustice to the Appellant.
- (vii) The complaint in relation to Mr Baker is not so much about the evidence he gave but rather about the non-disclosure of information to which the Assistant Administrator was privy or its possible use during examination-in-chief. The circumstances under which Mr. Baker ceased working for the Appellant would have been known to the Appellant.. They could have formed part of the preparation of his case. It would be highly surprising if that had been forgotten or overlooked.
- (viii) Formal disclosure of what a witness is going to say is not required. Credibility was always going to be an issue. The Appellant's representative had and should have taken the opportunity to discredit the witness or otherwise test the evidence being given as he saw fit.

14. The contention that there were so many procedural irregularities that natural justice did not take place is refuted. The onus was on the Appellant to displace the assessment. There were choices to be made as to how to develop the case of annulling, etc. the assessment to his best

advantage. If witnesses were required, the duty of the Appellant was to secure their attendance. The Appellant was given the opportunity to cross-examine and to make submissions as to why the relief sought should be granted. When taken in the round the Appellant has not been denied natural justice through alleged procedural irregularities.

15. If (which is denied) there has been a breach of the principles of natural justice because something went wrong of a nature and degree that requires its intervention, the proper course would be for the decision of the Tribunal to be quashed and the original proceedings to be annulled (see, e.g., paragraph 111 of Halsbury). The Tribunal could then be seized afresh of the Appellant's appeal. The hearing could proceed without any irregularity and a new determination can follow. This would be consistent with the court's powers under section 80(6) of the 1975 Law and the way in which relief for breach of natural justice would operate had a remedy by way of judicial review been sought.

The duty of the Tribunal is to make findings of fact and then determine the consequences of those findings. This is what the Tribunal did in this case and the Appellant's case turned on a determination of fact.

There is nothing in law, procedurally or substantively, affecting the Tribunal's determination. There was evidence from which the majority of the members could draw the ultimate inference of fact they did. This is not a case where the appellate court should correct a determination that cannot be reached and, accordingly, the appeal should be dismissed.

## **DECISION AND REASONS FOR DECISION**

67. The question the Tribunal had to determine was whether the Appellant's dealings with La Lague constituted an adventure in the nature of trade such that the profit in the Appellant's hands was liable to Guernsey income tax in the year of charge 1999.
68. The legal issue before the Tribunal was therefore not a complex one. The intent of the Appellant would be a central issue.
69. It is clear from Section 80(i) of the Law that the Royal Court may allow an appeal from the Tribunal's determination only if it is erroneous in point of law. Before me the Appellant additionally contended that there were procedural irregularities in the Tribunal hearing which called into question the fairness of the proceedings generally and in particular the Tribunal's treatment of key evidence. Mr. Ferbrache argued that the Tribunal's findings were fatally compromised. Mr. McMahon whilst accepting that there were some irregularities asserted that they did not, in the event, affect the validity of the proceedings.

70. It was common ground (following *Edwards (Inspector of Taxes) v Bairstow*) that if the Tribunal properly instructed in the law and acting judicially, could not properly have reached its determination, then I could proceed on the assumption that a misconception of law has been responsible for the determination, even if the Case Stated shows on its face no misconception of law. The Tribunal's finding that the Appellant's dealings constituted an adventure in the nature of trade could therefore be set aside if the Tribunal had acted either without evidence or on a view of the facts that could not reasonably be entertained. The quality of relevant evidence or the absence of relevant evidence would be of crucial significance.
71. It was common ground also following *Edwards (Inspector of Taxes) v Bairstow* (per Viscount Simonds at P54 E-F) that the characteristics of an adventure in the nature of trade is a question of law. Assuming that the Tribunal was correctly directed on the law, its inference from the facts as to whether a particular transaction is or is not, an adventure in the nature of trade, is an inference of fact.
72. Whether the profit arising from the Appellant's dealings with La Lague would render him liable to Guernsey Income Tax would require the Tribunal to diligently consider all material admissible evidence placed before it. The Tribunal would have to consider the agreed background facts, the documentary evidence, the oral evidence and the credibility of key witnesses. Where there was a conflict of evidence the Tribunal would need to consider which evidence it preferred. It would need to look at the totality of the picture before it. The Tribunal would also need to ensure that proceedings were conducted in accordance with the principles of natural justice, an essential part of the philosophy of the law.
73. It is evident from the unofficial transcript that the Assistant Administrator realised that the occasions when a taxpayer will be found liable to Guernsey Income Tax on his profit arising from his dealing with a single dwelling which is redeveloped will be infrequent and probably very rare.
74. This will be particularly so where the period of ownership is several years or more and the dwelling is occupied by the owner and other members of his family. It would be even more difficult for him to substantiate if the taxpayer has never previously been involved with any Guernsey realty nor conducted any trade or been involved in an adventure in the nature of trade in Guernsey or elsewhere relating to realty. The Assessment Administrator was also aware that it is not uncommon for persons to move home more than once in their lives as they move up and down the so called property ladder (p. 58-59 of the unofficial transcript) and that often homeowners will redevelop them, often substantially, without being held liable to Income Tax on any realised profit.
75. The Assistant Administrator had properly drawn to the attention of the Tribunal to the case of *Marson (Inspector of Taxes) v Morton* and cited a passage from the judgement of Sir Nicolas Browne-Wilkinson V.-C at p.10:

*“I will deal first with the submission that the true and only reasonable conclusion in this case was that the taxpayers were entering into an adventure in the nature of trade. It is well established in dealing with appeals of this nature that there is a band of cases, sometimes referred to as ‘no-man’s land’, in which different minds might come to different conclusions in the circumstances on the question of whether or not there was an adventure in the nature or trade. There are some cases where the position is so clear, one-way or the other, that there is only one true and reasonable conclusion. If so, then if the Commissioners reached something other than that conclusion, an error of law was disclosed. But if the case falls within the band where more than one conclusion is possible on the basis of the facts found, then in the absence of misdirection on the face of the decision the court has no jurisdiction or right to intervene.”*

76. It was thererore necessary for me to consider whether there were sufficient facts found on which the Tribunal could come to a true and reasonable conclusion that there had been an adventure in the nature of trade.
77. Given the limited scope in law to challenge a decision of the Tribunal on any appeal arising from its findings of fact the need to present the facts and elicit evidence with great care and fairness so as to assist the Tribunal should have been self evident to those involved.
78. A passage from the judgement of the Vice-Chancellor also in Marson (Inspector of Taxes) v Morton at p.10 in regard to the need to find principle was properly drawn to the attention of the Tribunal by the Assistant Administrator:

*“Against the background one turns to consider what the position is so far as the law on this matter is concerned. Like the Commissioners I have been treated to an extensive survey of the authorities. But as far as I can see there is only one point which as a matter of law is clear, namely that a single, one-off transaction can be an adventure in the nature of trade. Beyond that I found it impossible to find any single statement of law which is applicable to all cases in all circumstances. I have been taken through the cases and invited to compare the facts in some cases with the facts in the case here before me. I fear that the General Commissioners may have become as confused by that process as I did. The purpose of authority is to find principle, not to seek analogies on the facts.*

*It is clear that the question whether or not there has been an adventure in the nature of trade depends on all the facts and circumstances of each particular case and depends on the interaction between the various factors that are present in any given case. The most that I have been able to detect from the reading of the authorities is that there are certain features or badges which may point to one conclusion rather than another. In relation to transactions such as this, that is to say a one-off deal with a view to making a capital*

*profit, there do seem to be certain things which the authorities show have been looked at. For convenience I will refer to them in a moment. But I would emphasise that the factors I am going to refer to are in no sense a comprehensive list of all relevant matters, nor is any one of them so far as I can see decisive in all cases. The most they can do is provide common sense guidance to the conclusion which is appropriate.”*

79. It was therefore common ground that a single transaction as in this case could constitute an adventure in the nature of trade. It is also necessary to look at all the facts and circumstances of each particular case. The outcome will depend on the interaction between the various factors that are present in any given case.
80. The Assistant Administrator who was contending that the purchase and sale of La Lague, after works had been carried out, was an adventure in the nature of trade directed the Tribunal to each of the 9 badges of trade. In so doing he emphasised those which he considered to be of particular relevance in supporting the Respondent’s decision.
81. I confine myself to noting only those badges of trade which counsel argued might in light of the evidence before the Tribunal, be relevant. I adopt the numbering used by the Vice Chancellor in his judgement. I am mindful of his emphasis on the need to look at the whole picture, that the badges are not a comprehensive list and that any one of them is not decisive in all cases. After each badge of trade I make brief comment.

*“The matters which are apparently treated as a badge of trading are as follows:*

- (1) *That the transaction in question was a one-off transaction. Although a one-off transaction is in law capable of being an adventure in the nature of trade, obviously the lack of repetition is a pointer which indicates there might not here be trade but something else.*

In this case the transaction was a one-off. It involved purchase, building works and sale. Spindrift was purchased on the day that La Lague was sold. It had not been renovated and was still owned by the Appellant. The issue of repetition did not arise in this case. At para 28 of its findings the Tribunal stated as follows: “ we agreed that we could not take into account any matter concerning “Spindrift” the property purchased by Mr Carpenter subsequent to the sale of La Lague.”

- (2) *Is the transaction in question in some way related to the trade which the taxpayer otherwise carries on? For example, a one-off purchase of silver cutlery by a general dealer is much more likely to be a trade transaction than such a purchase by a retired colonel.*

The Appellant had not previously bought and sold houses in Guernsey. The Respondent had not cited any other adventure in the nature of trade carried on by the Appellant in Guernsey or elsewhere. This was the Appellant's first realty transaction in Guernsey. He had owned and still owned a number of investment properties in England. The Respondent was not contending that Appellant was trading in dwellings in England.

- (3) *The nature of the subject matter may be a valuable pointer. Was the transaction in a commodity of a kind which is normally the subject matter of trade and which can only be turned to advantage by realisation, such as referred to in the passage that the Chairman quoted from Reinhold? For example, a large bulk of whisky or toilet paper is essentially a subject matter of trade, not of enjoyment.*

Dwellings can be the subject of trade but this is not normally the case. The Assistant Administrator accepted at (p. 58- 59 of the unofficial transcript) that for “the majority of people who buy property, live in it and then sell it, there is no question of them having carried on a business”. For most people the badges of trade would not fit the facts. He reiterated this later (at p. 67 of the unofficial transcript).

Dwellings are in the overwhelming majority of cases an investment. The Policy Letter submitted to the States of Deliberation which led to the Dwellings Profits Tax Law expressly acknowledges this. In this case there was no subdivision.

In *Inland Revenue Commissions v. Reinhold* (cited by Mr. Ferbrache in his submissions) Lord Carmont had stated his view that where:

*“the subject of the transaction is normally used for investment – land, houses, stocks and shares – the inference is not so readily drawn from an admitted intention in regard to a single transaction to sell on the arrival of a suitable pre-selected time or circumstance and does not warrant the same definite conclusion as regards trading or even that the transaction is in the nature of a trade.”.*

Megarry J (in the High Court) in *Taylor v. Good* at p.287(c) (cited by Mr. Ferbrache in his submissions) had emphasised that if a house is bought with the intention of providing a home that is a valuable element in a contention that a purchaser was not trading.

- (6) *Was the item which was purchased resold as it stood or was work done on it or relating to it for the purposes of resale? For example, the purchase of second-hand machinery which was repaired or improved before resale. If there was such work done, that is again a pointer towards the transaction being in the nature of trade.*

La Lague was the subject of extensive building works. Building works are often carried out by homeowners as an investment to improve their homes so as to accord with the tastes and needs of an owner/occupier and no doubt with an eye to increasing its investment value. The scale of such work will often depend upon the wealth, energy and enthusiasm of a purchaser or his ability to borrow in order to finance the work.

Development is therefore not a feature unique to an adventure in the nature of trade. However development can also be carried out to a property by a person carrying on an adventure in the nature of trade.

- (8) *What were the purchasers' intentions as to resale at the time of purchase? If there was an intention to hold the object indefinitely, albeit with an intention to make a capital profit at the end of the day, that is a pointer towards a pure investment as opposed to a trading deal. On the other hand, if before the contract of purchase is made a contract for resale is already in place, that is a very strong pointer towards a trading deal rather than an investment. Similarly, an intention to resell in the short term rather than the long term is some indication against concluding that the transaction was by way of investment rather than by way of a deal. However, as far as I can see, this is in no sense decisive by itself.*

The period for which a homeowner will hold a dwelling will depend upon a range of factors. They will vary from case to case. In this case there was no evidence or allegation that a contract for re-sale of La Lague was in place before it had been purchased. La Lague was owned for just over 4 years.

An intention to sell once formed is in no sense decisive in itself. Furthermore a succession of purchases can be for investment purposes. Investments can be realised from time to time and will not necessarily render profit liable to Income Tax.

- (9) *Did the item purchased either provide enjoyment for the purchaser (for example, a picture) or pride of possession or produce income pending resale? If it did, then that may indicate an intention to buy either for personal satisfaction or to invest for income yield, rather than do a deal purely for the purpose of making a profit on the turn. I will consider in a moment the question whether, if there is no income produced or pride of purchase pending resale, that is a strong pointer in favour of it being a trade rather than in investment.*

La Lague was not leased to a third party. There was no income. The Appellant was in possession and his occupation was of advantage to himself. At some time his partner and daughter also lived there with him. Enjoyment can encompass a whole range of benefits including the sense of joy and pride some persons derive from redevelopment and renovation.

82. It is clear from paras. 26-28 of the Case Stated that the Tribunal had in mind the badges of trade when determining its findings.

83. The Assistant Administrator had in his submissions stressed the importance of badges 6,8 and 9 (see Case Stated at para. 17).

### **Badge 6**

84. The Assistant Administrator (p.56 of the unofficial transcript) emphasised the considerable amount of work done to La Lague. That was an undisputed fact. He categorised it in taxation terms as “work in progress” (p.56 of the unofficial transcript).

85. The Vice Chancellor’s example was the purchase of second-hand machinery which was repaired or improved. In this case the dwelling was habitable before the building work and also during the course of it. The Appellant’s contention was that he was redeveloping his home and that redevelopment was to be treated as an investment. He was creating a two-storey extension and upgrading, to his own taste and needs, that part of the dwelling that would survive.

86. The Assistant Administrator in order to refute that argument contended that the Appellant lived there principally because he had to have somewhere to live and that his financial situation meant he could not afford to live somewhere else.

There was however no evidence that between 1995 and 1997 the Appellant was under compelling financial pressure, certainly not from the Bank. The point was never put to the Appellant by the Assistant Administrator. The Appellant had no opportunity to respond in cross-examination because there was no cross-examination of him. It amounted to no more than speculation.

### **Badge 8**

87. The Assistant Administrator focused on the Appellant’s intention at the time of purchase. In support of his contention that the Appellant “had a clear and present intention to trade” (p.57 of the unofficial transcript) the Assistant Administrator had argued that the Appellant had sought planning permission, carried out work to the property and sold it soon after the work was completed. In support of his contention he also relied upon the belief or impressions of those of the Respondent’s witnesses who gave evidence that the Appellant was developing the property to sell it. As they were not employed until a year or so after the purchase of La Lague the relevance and precision of their evidence concerning the Appellant’s intention was likely to be very limited. He also relied upon the evidence of Mr Sebire who testified that the Appellant had said that this was to be one of a series of properties to be acquired by the Appellant in Guernsey. The Respondent was not claiming that a sale had been lined up by the Appellant before he had purchased La Lague.

88. The Appellant in his evidence had contended that at the time of the acquisition he had no intention to sell the premises. He had tried to “find something that I could stamp my own desires on” (p. 39

of the unofficial transcript). He also stated that he had “restored the house absolutely utterly to the very best of my ability in terms of design. I’ve put in many features which certainly would not increase the value” (p. 41 of the unofficial transcript). It was, to employ and paraphrase the words used by the Vice-Chancellor in Badge 8, a pure investment which the Appellant intended at the time of purchase and for some 3 years thereafter to hold indefinitely albeit with an intention to make a capital profit at the end of the day. No doubt like any home owner the Appellant would not have intended to convey the impression to anyone that his home would never be sold during his lifetime and that he would never realise a capital profit.

89. The Appellant asserted that he purchased La Lague as his home and that his partner and daughter lived there and he had intended that his mother would do so in ground floor accommodation designated for her.
90. The Appellant’s 3 witnesses Mr Illingworth, Mr McCormack and Mr Collings had also gained the impression that he was investing monies in La Lague as a home for his occupation. Mr. Illingworth in his statement stated that a move offshore legitimately to avoid UK Capital Gains Tax liabilities on the sale of properties in the English property portfolio had been discussed. The Appellant had a fondness for the Channel Islands and he had not been surprised to hear that the Appellant “had found a property in Guernsey which he felt could be made suitable for his personal use... For my part I am clear that his original intention in moving to La Lague was to establish a private residence for his own occupation, a move which would also give him the facility to realise his considerable investment in UK properties without suffering the attendant Capital Gains Tax liability”.
91. Mr. McCormack in his statement mentioned the use at La Lague of imported oak rather than local elm even though it was more difficult to work with and he emphasised the decision of the Appellant to use the more expensive and extremely time consuming ancient joints. It was his view that “no one who did not intend to make such a palace his home would have indulged himself in this way.... such work, all carried out whilst he, and sometimes his family, were living in the house, was done, needless to say, purely because this was his home, where he fully intended to spend all the rest of his time in Guernsey. I feel that anyone calling into question his motives at La Lague could not possibly have seen what he had achieved there, or witnessed how he achieved it. I have no hesitation in saying that John Carpenter’s integrity in this matter is unassailable”.
92. Mr. Collings in his statement stated that it had never occurred to him and his wife, at any time, that there could have been any intention regarding the property other than that it was to be his (the Appellant’s) permanent home. It seemed obvious from the amount of time, trouble and attention he was bestowing upon the property. He gave instances when they (Mr. and Mrs. Collings) remarked to the Appellant “that he could never expect to be able to get his money back on the sale”. To this the Appellant’s reply was that “he had no intention to sell and was actually then

preparing a special suite in the house to enable him and his partner to look after his elderly mother in her old age. We also happened to know of his deep sadness at having to vacate the house”.

93. The facility letter from the Bank clearly contemplated that the Appellant was acquiring a property for his own occupation. It is expressly stated as a purpose for which the facility was being granted. The facility was granted for 15 years.
94. The Assistant Administrator did not cross-examine the Appellant. The Assistant Administrator did not object to the introduction of the 3 witness statements produced by Mr Backer nor when he addressed the Tribunal did he refer to them, although they each deal in different ways with the Appellant's motives and intent. He did not request that an officer of the Bank give evidence in person so that he could test the stated purpose for which the facility had been granted.

### **Badge 9**

95. The Assistant Administrator sought to minimise the extent to which the Appellant may have enjoyed the redevelopment and renovation of La Lague. He pointed to the experience of an owner/occupier being surrounded by building work and having to move from one part of the building to another as work progressed. He also argued that the Appellant had to have somewhere to live and his occupation was a convenience – “nothing more than a lodging house for him”. In so doing he did not explore the fact that the Appellant had chosen also to have members of his family there with him nor mention the emphasis which the Appellant, Mr. McCormack and Mr. Collings had commented on the pleasure the Appellant appeared to derive from the renovation work and the very personal stamp which the Appellant was applying to the building.
96. As already noted the Assistant Administrator did not challenge the Hambros facility letter.
97. The evidence of Mr Le Marquand was considered by Counsel to be neutral. Counsel referred me in turn to the evidence of Mr Baker, Mr Sebire and Mr Torode, which the Assistant Administrator considered to be of great relevance. It is to be recollected that Mr. Ferbrache contented that individually and collectively it amounted to very little and carried no significant weight.

### **Mr Baker’s evidence**

98. Mr Baker had worked on site from May 1996 to December 1996 and may have worked for a month sometime in 1997, although he was not clear on this. He testified that the Appellant had lived from time to time in various rooms, initially with a partner (p. 8 of the unofficial transcript) and later his daughter had lived there.
99. Mr Baker had gained the impression that the property was to be sold. When asked whether the Appellant had said this to him Mr Baker answered “he didn’t”.
- However, he testified that the Appellant had said “I wonder how much I am going to make when I am going to sell the house”. He also stated - “that is what led me to believe that he was going to sell the house”. (p.10 of the unofficial transcript).

100. Mr Baker when cross-examined by Mr Backer recollected that the Appellant had used the words “when I sell it” on many occasions. Mr Baker (in his own words as recalled in the unofficial transcript) had formulated “an honest impression in my honest opinion is that ..... this guy is going to sell it”. (p.11 of the unofficial transcript)..
101. Mr Baker volunteered that the Appellant had told him that someone had offered the Appellant money for the property but he had not sold it.
102. Mr Baker was not asked either by the Assistant Administrator nor by Mr Backer whether the Appellant had indicated precisely when La Lague would be sold. There was, therefore, no evidence whether the sale of which the Appellant had talked would take place. Would it be when the majority of work had been completed or once all of the work had been completed or at some time shortly thereafter or at some specified time long after completion of the works or merely at some future time.
103. Mr Ferbrache argued with some force that what the Appellant may have said to Mr Baker (after May 1996) would have amounted to no more than casual discussion arising from the Appellant’s concern whether his increasing expenditure on the dwelling was adding profitability to its value and would one day be recouped if the property was sold. Mr. Ferbrache argued that general mention of selling the property was not to be taken as an indication that the Appellant had crossed the threshold between being a pure investor who might one day realise a capital profit and a businessman intent on redeveloping a property and selling it by way of an adventure in the nature of trade. The Assistant Administrator contended that it was of great significance.
104. The Assistant Administrator and the Tribunal members did not explore the crucial distinction between someday selling a pure investment and carrying on an adventure in the nature of trade. This matter was left unsatisfactorily in the air.

The relevance and weight of Mr. Baker's evidence would be an important issue when considered and weighted in light of other unchallenged or lightly tested evidence before the Tribunal.

105. The Tribunal at para. 21 of the Case Stated succinctly recorded its findings on the evidence given by Mr. Baker:

*"We the Tribunal .....found the following facts established by the evidence of Mr. Baker:*

- a. from mid-1996 until the end of that year, there were generally about 10 workers on site. During that period Mr. Carpenter lived in various rooms in the property;*
- b. Mr. Carpenter spoke during that period of the sale of La Lague"*

106. Mr Ferbrache, whilst not in any way accepting that the evidence of Mr Baker carried the weight attributed to it by the Assistant Administrator, raised separately an issue concerning the credibility of Mr Baker’s evidence. He raised it in view of the extent of Mr Baker’s hostility to the Appellant, the full extent of which had been disclosed to the Assistant Administrator but not disclosed to the

Appellant or Mr Becker. Mr. McMahon was to claim that the Appellant knew of the hostility and so questions could have been asked of Mr. Baker in cross-examination. Mr. McMahon emphasised that the existence of animosity did not mean that Mr. Baker was not telling the truth.

107. It was not disputed that there may have been about 10 workers on site. Mr. Carpenter, in his evidence, had noted that permission had been given to demolish some side extensions to the house and they would be replaced by a two-storey wing. (p.40 of the unofficial transcript).

108. It was also not contested that the Appellant lived in various rooms on the property indeed the Appellant stated in evidence that we -

"tackled this extension first because my idea was that if that was finished and nicely habitable we could then go back into the old part of the building and we'd work on that. I did try to have some decorum because my partner was with me". (p.40 of the unofficial transcript).

### **Mr Sebire's evidence**

109. Mr Sebire had worked on site from 31<sup>st</sup> May 1996 until April 1997. He confirmed that the Appellant had lived there with his partner and daughter. The Assistant Administrator referred him to the fax dated September 2002 which he had sent to the Assistant Administrator. In it Mr Sebire had said that the Appellant had referred to La Lague as the first in a line of many building projects.

110. The reference to a succession of building projects equally ought not to have advanced significantly the Respondents case since the Appellant had carried out a number of renovation projects to properties in England. The Inland Revenue had treated them as investments.

111. Mr Sebire also accepted that the reference to future projects may have been made by the Appellant in order to retain the loyalty of workmen.

112. When asked whether Mr Carpenter "was renovating La Lague in order to live in it or to sell it" (p.17 of the unofficial transcript) Mr Sebire had said –

"He did mention ... it being like a show house at one stage ... and he did say people would want to.... look at it...."

113. Mr. Ferbrache argued that an inference which may be drawn is that a show house is likely to be retained as an example of quality workmanship by an investor. If the Appellant had formulated an intention at the time to sell the property arguably this would be inconsistent with an intention to retain it as a show house. The term show house was not to be taken as indicating that the Appellant was like a building contractor developing an estate with an intention to sell the show house after it had acted as a catalyst for the sale of other dwellings held as trading stock.

114. Mr. Ferbrache argued that the Assistant Administrator did not pursue with Mr Sebire:

- (i) the distinction between a trader acquiring a succession of dwellings as trading stock and an investor accumulating an investment portfolio;
- (ii) what he thought was meant by a show house. Mr Ferbrache asserted that the Appellant intended to keep it to show proudly to persons who might be interested in a quality dwelling with unique features.

115. The Tribunal, at para 26 of the Case Stated, stated that they agreed not to take into account any matter concerning Spindrift. Mr. Sebire's evidence was considered by counsel to be of neutral value.

### **Mr Torode's evidence**

116. Mr Torode had been employed at La Lague in 1996 and possibly in 1997. He recollected that the Appellant had moved around into different rooms when demolition was in progress. The Appellant's daughter and another lady had also been living there. He did not recall telling the Assistant Administrator in a telephone conversation that "Mr Carpenter said from the outset he was glitzing up the property with a view to sale". (p.23 of the unofficial transcript). He emphasised that the Appellant was definitely making "a very nice job of the property". When asked whether the Appellant had said "that he was doing up the property to sell" Mr Torode replied (emphasis added) –

*"I don't actually recall him actually saying that he was definitely going to sell the property... there was that feeling on site that that might have happened."* (p.23 of the unofficial transcript).

117. When cross-examined by Mr Backer whether he had the impression that the Appellant might be improving the property with a view to selling it Mr. Torode said "... it's difficult to say but yeah I do think that was the general feel on site and I am sure someone must have indicated that". (p.24 of the unofficial transcript).

118. When pressed further he appeared to indicate that he was unsure whether it was intended for sale by the Appellant or was for his own personal use. He added "he did spend a lot of time and money doing personal touches that might have been..." (Unfortunately the tape at this point was inaudible) (p.25 of the unofficial transcript)..

119. The Tribunal in its findings made little of Mr. Torode's evidence. The Tribunal in the Case Stated said:

*"Mr. Carpenter lived at "La Lague" during most of the period of the renovations and move from room to room as the work progressed."*

Mr. McMahon accepted that if anything Mr. Torode's evidence was more in favour of the Appellant than the Respondent.

120. The evidence given by Mr. Baker, Mr. Sebire and Mr. Torode was limited in its scope. Their involvement post-dated the acquisition of the property. It is not clear how much weight the Tribunal attached to the evidence of Mr. Baker. The Tribunal did not indicate whose evidence it preferred.

### **Analysis of the Case Stated**

121. In view of the Tribunal's findings Mr McMahon did not rely upon the purchase of Spindrift and the permissions obtained to redevelop it.
121. It was, however, arguable, as Mr. Ferbrache pointed out; that the purchase of Spindrift on the day La Lague was sold underscored and corroborated the Appellant's expressed intention to make Guernsey his home. To that extent the acquisition of Spindrift on the day that La Lague was sold could have been viewed by the Tribunal as supportive of the Appellant's case. I agree.
122. The Tribunal, in my view correctly, focused on the Appellant's motive and purpose concerning La Lague. It is clear from para. 6 of the Case Stated that it treated as evidence: "*statements from witnesses unable to attend, namely the statements of Mr. Illingworth, Mr. McCormack and Mr. Collings*"

The Tribunal at para. 27 of the Case Stated accepted:

*"that in situations such as this, it was possible for intentions to change and therefore it was important to consider the circumstances leading up to the sale"*.

123. There can be no doubt that intent can change in respect of a dwelling purchased as a pure investment and so a dwelling can become an adventure in the nature of trade. However, such instances are likely to be rare.
124. The crux of the Tribunal's determination is found in the Case Stated at para. 28 (emphasis supplied):

*"The majority of the Tribunal, whilst accepting that cash flow problems may well have been the event that precipitated the sale of La Lague, nevertheless, was satisfied from the totality of the evidence before it that the Appellant had already formed the intention to sell La Lague at least by the time that he started its renovation in 1996 and did not depart thereafter from that intention. The sale of La Lague, although a one off transaction as far as the Appellant's activities in Guernsey were concerned, was in all the circumstances an adventure in the nature of trade."*

125. Thus the Tribunal having considered the totality of the evidence had concluded that the Appellant had formed an intention to sell La Lague by the time the renovation had started in 1996. The Tribunal did not state in its findings the date when the renovation work had started. However, in its findings at para. 20(c) the Tribunal states -
- “He moved to Guernsey permanently in 1996 and started work on the property.”* .
126. In the Statement submitted on behalf of the Appellant (p. 188 of the bundle) it is stated that “approval was granted in January 1996 and work then commenced...”. The Appellant in his evidence had said (p. 40 of the unofficial transcript) “I immediately came totally and permanently in January 1996 and we started work”.
127. There may be some doubt as to what the Tribunal meant by “renovations”. That word is used in paras. 12, 14, 23 and 28 of the Case Stated. It would appear to encompass demolition, rebuilding and refurbishment. The skills of the three tradesmen called by the Assistant Administrator were those of electrician, roofer and carpenter. Building work pre-dated their arrival on site. Indeed Mr. Baker in his evidence (p. 7 of the unofficial transcript) confirmed that he had started work in the middle of 1996 and the extension had already been built.
128. It would therefore appear, and I see no need to seek clarification from the Tribunal, that it had concluded that the Appellant had formulated his intention to carry on an adventure in the nature of trade by January 1996 because that is when the Appellant had “started its renovation”. To that extent anything to be inferred from the evidence of Mr. Baker, would be by way of corroborating what the Assistant Administrator claimed was the intention of the Appellant held from the day he acquired La Lague (12<sup>th</sup> January 1995) or from some later date in 1995 when planning permissions were being sought.
129. The planning applications and permission may have been viewed by the Tribunal as an important factor. There was nothing in the Statement of Agreed Background Facts and Documents which could in any way have been treated by the Tribunal as indicating an intention to carry on an adventure in the nature of trade when he acquired La Lague or one that changed from a pure investment intention sometime in 1995.
130. Mr. Illingworth had been clear that the Appellant’s intention had been to establish a private residence for his own occupation. Mr. Collings had been told by the Appellant that he did not intend to sell the La Lague. Mr. McCormack was satisfied from the Appellant’s indulgence in renovating La Lague that he did not intend to sell. All of this was consistent with the purpose stated by the Bank in its facility letter of 24<sup>th</sup> October 1994 granting a 15 year facility.

*“To enable you to complete the purchase of an Open Market property for your own occupation at La Lague...at a price of £450,000 including the renovation costs”.*

131. It was not until the 15<sup>th</sup> July 1996 that the sum available under the facility was increased by the Bank by £100,000. Before then there was no evidence that the Appellant was under any significant financial pressure.
132. It was open to the Tribunal and the Assistant Administrator to request that an officer of the Bank should appear so that he could be cross-examined on the purpose of the loan as recorded in the Bank’s facility letter. Neither did so. In my judgment the Tribunal did not deal with this issue satisfactorily. If the Tribunal believed that from the outset the Appellant did not intend to hold La Lague as a pure investment, then the Appellant must, in the Tribunal’s eyes, have misled the Bank by not telling the Bank before 24<sup>th</sup> October 1994 that he intended to conduct an adventure in the nature of trade thereby making any profit on sale taxable. Alternatively the Tribunal may have concluded that between 24<sup>th</sup> October 1994 and the acquisition of La Lague on 12<sup>th</sup> January 1995 the Appellant had changed his intention, but there is no evidence of this. If the Appellant changed his intention during the planning application period in 1995 then it is difficult to see what would have motivated that change other than the acquisition of the planning permission. There is no evidence that that was a decisive factor.
133. The Tribunal’s decision and its reasoning is further confused by the second question posed in the Case Stated:
- “Q Was... the Tribunal correct in law... in concluding that someone who has lived in his property as his residence can ever be held to be trading if, due to economic necessity, he later has to sell it?”.*
134. The Tribunal did not require the authors of the statements to appear in person to give oral evidence. The Assistant Administrator, perhaps surprisingly, did not resist the introduction of the statements by Mr. Illingworth, Mr. McCormack and Mr. Collings. This may be an example of the Tribunal in reliance on para. 5 of the Third Schedule of the 1990 Law conducting proceedings with little formality, and with much expedition. What is open to question is whether that enabled the Tribunal “to give proper consideration to the matters before the Tribunal”.
135. Those statements corroborated the evidence given in person by the Appellant. Coupled with the express purpose for which the facility letter was granted the evidence of the Appellant and the statements of Mr. Illingworth, Mr. McCormack and Mr. Collings appeared on their face to be cogent and compelling. It is therefore surprising that the Tribunal having treated these statements as documentary evidence (para. 6(c) of the Case Stated) did not proceed to review them in the way

it reviewed the oral evidence of the Appellant and the witnesses called by the Assistant Administrator. The Tribunal did not state that it disbelieved them nor did it criticise their evidence.

At para. 25 of the Case Stated the Tribunal records that it:

*“Did not make any findings of fact arising from the written submissions of Mr. Illingworth, Mr. McCormack and Mr. Collings”.*

136. The Tribunal did not state whether they preferred Mr. Baker’s evidence to that of Mr. Carpenter, Mr. Illingworth, Mr. McCormack and Mr. Collings.
137. It may be that the Tribunal was of the view that the facts to be found in the 3 statements introduced on behalf of the Appellant duplicated those which the Tribunal found in the evidence of others, most particularly the Appellant. It does not state that to be the case. The Tribunal’s conclusion with regard to the contents of the 3 statements was at best perplexing and at worst highly damaging to the Appellant’s case. It suggests on the face of the Case Stated a one sided approach to the evidence before it. This was particularly remarkable in an appeal which would turn on the determination of fact, the inferences to be drawn from determined facts and in a case where the credibility of witnesses might be of real significance.
138. Whether or not I would have reached the same conclusion as the Tribunal is not the central question. I must be satisfied that a true and reasonable conclusion open to the Tribunal on the facts was that the Appellant’s activities were such that those activities constituted an adventure in the nature of trade.
139. Having given the matter lengthy and anxious consideration in my judgment there was no evidence of sufficient weight on which the Tribunal could rely to conclude that the Appellant had a fixed intent on 12<sup>th</sup> January 1995 when he acquired La Lague to hold La Lague as an adventure in the nature of trade. If an intention to pursue an adventure in the nature of trade was acquired after the 12<sup>th</sup> January 1995 and before the start of January 1996 then it is difficult to see what evidence of any weight could have been decisive in the minds of the Tribunal. The Tribunal does not say that it relied upon the grant of the planning permissions in 1995 as a decisive factor. There appears to be no evidence of economic pressure sufficient for the Appellant to change his intention during 1995. Nor indeed is there evidence of economic pressure during the first 6 months of 1996. If the Tribunal relied on the development permissions it should be noted that substantial development was in contemplation before the property was acquired. The Bank had agreed to lend a further £100,000 for renovation work and the first application to the Island Development Committee was made on the 24<sup>th</sup> March 1995, some 10 weeks after the property was acquired.

140. I remind myself that in *Simmons (as Liquidator of Lionel Simmons Properties Ltd) v. Inland Revenue Commissioners* Lord Wilberforce (para. 4 of my summary of Mr. Ferbraches's submissions) emphasised that if there is a determination that an investment is put into trading stock or vice versa for findings of that kind precision is required. That view and hence the requirement for precision is equally appropriate in this case if the Tribunal believed that the Appellant challenged his intention.
141. Counsel differed as to the weight attributed to Mr. Baker's evidence. I had the benefit of the unofficial transcript and the opportunity to consider it carefully alongside the other evidence. I also had the advantage of cogent submissions of senior Counsel. In my judgment Mr. Baker's evidence could have counted for very little. On its own it could not be decisive. I could find no other evidence of any significant relevance which could support the decision of the Tribunal.
142. In my judgment the Tribunal adopted a view of the facts that could not be reasonably entertained. I am satisfied that the Tribunal's determination which was by the narrowest majority, was a determination contradictory of the evidence before them and was a determination not reasonably open to them.
143. It may be that the majority of Tribunal members were overly influenced by the weight to be attached to the evidence of Mr. Baker and the importance it could properly attach to talk of a sale. I confirm that in reaching my decision it was not necessary to take into consideration the failure of the Respondent to disclose information concerning the full extent of Mr. Baker's animosity to the Appellant.
144. I would add further that I could not find evidence between January 1996 and the sale in February 1999 which would have been of sufficient weight for there to be a finding that there was an adventure in the nature of trade. The more deeply I reviewed the papers in this appeal the more convinced I became that on the limited evidence on which the Respondent relied this was a case which could not fall into the category of those rare cases where ownership, renovation and sale of a single property could constitute an adventure in the nature of trade. Taking account of all the facts and circumstances of the case and the interaction between the various factors that were present, that is to say the full picture, in my judgment there was only one true, proper conclusion and that was that the Appellant acquired La Lague as a pure investment and he never changed his intention. There was only one conclusion which the Tribunal could have reached on the facts.

### Questions

I therefore answer the questions in the Case Stated for the determination of the Court as follows.

*Was the Tribunal correct in law:*

Q1 *In concluding on the evidence put before it that the sale of “La Lague” was an adventure in the nature of trade.*

A1 No.

Q2 *In concluding that someone who has lived in his property as his residence can ever be held to be trading if, due to economic necessity, he later has to sell it?*

A2 The question does not readily admit of a yes or no answer and its purpose is not clear.

A person can live in a property as his residence and yet do so by way of an adventure in the nature of trade.

A person’s intention can change during the course of owner/occupation from an investment purpose to an adventure in the nature of trade.

Economic necessity can influence a sale decision. It is unlikely without something else ever to constitute a catalyst for a change of intent from pure investment to an adventure in the nature of trade. A decision to trade will have a tax consequence on any profit and would not be a decision lightly taken in the case of a single transaction.

The evidence that economic necessity had caused a change of intent would need to be compelling or result from a decisive admission by the Appellant. If a person acquires a property with a pure investment intention intending to hold it for many years then an intervening factor such as economic necessity which may induce the owner to sell it does not of itself change a pure investment intention to an adventure in the nature of trade.

Q3 *In reaching its conclusions from the evidence and the material before it.*

A3 No.

145. In light of my decision and my reasons I did not consider it appropriate to amend the determination or remit it to the Tribunal.

146. There were some matters which might have been sent back to the Tribunal for amplification or clarification. However, having given the matter anxious and careful consideration I could not satisfy myself that my decision would have been different in light of any amplification or clarification which the Tribunal could have provided.

147 The appeal succeeds.

### **Irregularities in the proceedings**

148. In light of my decision I do not need to make any determination on the procedural irregularity points advanced by Mr. Ferbrache. He developed every possible point. Some were matters of legitimate concern whilst others in my judgment were not.
149. Mr. McMahon readily and properly acknowledged that there were many irregularities. Mr. McMahon argued with equal force and convincingly that in many instances potential unfairness arose from procedural concessions made by the parties and the absence of complaint made during the hearing by the Appellant or his representative. Furthermore in view of the Tribunal's determination as to what evidence was relevant many instances of potential unfairness did not in the event cause unfairness to the Appellant. I agree with many of his submissions in that regard.
150. It is nevertheless proper to observe that it is imperative for the Tribunal at all times to observe principles of natural justice. This is clear from the provisions of the Third Schedule of the Law. The natural justice imperative is not qualified by the requirement that the proceedings shall be conducted with as little formality and with as much expedition, as a proper consideration of the matter before the Tribunal will permit. A proper consideration must of necessity take account of principles of natural justice.
151. In this case the determination of fact and the inferences to be drawn from the facts were of vital consequence. A proper consideration of the factual matrix of evidence and admitted facts, the inferences to be drawn and the credibility of witnesses dictated the need for a substantial degree of formality in order that the Tribunal could reach a true and fair conclusion. Mr. McMahon advised that the Tribunal has now have taken into account the observations of the Guernsey Court of Appeal in Gold and the guidance given by Lt. Bailiff Talbot in Tremoille Properties. I draw some comfort from this. I therefore refrain from giving further specific guidance.

### **Reasons of the Minority of Members of the Tribunal**

152. In a case such as this where the decision was taken by the narrowest majority the Case Stated should have indicated succinctly the reasons why the minority came to a different conclusion.

### **Secretarial Assistance**

153. The Third Schedule of the 1990 Law (at para. 3(4)) states that the Tribunal shall be provided inter alia with secretarial, clerical and recording services as are reasonably necessary to enable it to discharge its functions. It is imperative that such provision is made. This should enable the Tribunal to produce speedily an accurate authorised transcript when requested so to do and also reduce the unacceptably long period which it took to provide reasons and the Case Stated. When a

determination of the Tribunal hinges on facts and inferences to be drawn from facts and when some facts or the inferences to be drawn are hotly disputed recourse to an official transcript will be essential.

G. R. Rowland

Deputy Bailiff

31<sup>st</sup> December 2003.