



[2012] UKUT 206 (TCC)
Appeal number: FTC/26/2011

INCOME TAX – Interest – Life Insurance Policy – Extra payment – Presumed death of missing life assured – Insurer satisfied of death as at particular date – Extra payment in respect of period starting with that date until date of payment of sum assured – Whether extra payment interest – Yes — Whether next of kin “entitled” to the income – No – Whether next of kin taxable under s.59(1) of ICTA 1988 – No

**UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER**

**MR JASON POPE (Deceased)
MRS GENEVRA POPE
MR ALAN POPE**

Appellants

- and -

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

Respondents

**TRIBUNAL: SIR STEPHEN OLIVER QC
EDWARD SADLER**

Sitting in London on 17 January 2012

Mrs Genevra Pope for the Appellants

Oliver Conolly, counsel, instructed by the General Counsel for HM Revenue and Customs, for the Respondents

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DECISION

- 5 1. The Appellants appeal against a decision of the First-tier Tribunal (FTT) (Judge Rachel Short and Mr William Haarer) dated 15 October 2010 dismissing appeals by the Appellants against various assessments summarised below.

10 **Issues in summary**

2. In summary, the FTT held that a payment of £36,425.97 which was made by the Equitable Life Assurance Company ('Equitable') in addition to the £100,000 paid as the principal amount insured (i) was not exempt from tax under section 329 of the Income and Corporation Taxes Act 1988 [ICTA]; (ii)
15 was a payment of "interest" for tax purposes, and thus chargeable to income tax under s 18 ICTA (Schedule D Case III); (iii) that the persons liable for the tax under s 59(1) ICTA were Mrs Genevra Pope and Mr Alan Pope ("Mr and Mrs Pope").
- 20 3. The Appellants had contended before the FTT that (i) the payment of £36,425.97 (referred to hereafter, and in the Decision of the FTT as "the Extra Payment") was, if interest, exempt under s 329 ICTA; (ii) in the alternative that it was not interest at all but a payment of a capital sum and therefore not taxable; and (iii) that if there was a liability to tax it was that of Mr Jason Pope
25 (Jason Pope) and/or his estate, but not that of his parents, Mr and Mrs Pope.
4. The Appellants have appealed the decision of the FTT on the bases that:
- (i) the FTT erred in law in holding that the Extra Payment was, if interest, not exempt from tax under 329 ICTA. For the reasons
30 given below we reject that element of the Appellants' appeal;
- (ii) the FTT erred in law in holding that the Extra Payment was interest. We reject that too;

- (iii) the FTT erred in law in holding that the persons liable for the tax, if any, were Mr and Mrs Pope. We think the Appellants are correct in that respect.

Facts in summary

- 5 5. Mr Jason Pope was a geologist employed by Diamond Works Ltd, a mining company, in Angola.
6. On 8 November 1998, it is believed that Jason Pope was abducted by Unita rebels in Angola: he has been missing and nothing has been heard of him since
- 10 then.

Terms of Life Assurance Policy

7. Jason Pope had entered into a life assurance policy ('the Life Assurance Policy') with Equitable dated 15 April 1996 on his own life. He was the
- 15 grantee of the Life Assurance Policy. The "sum assured" is £100,000. The "event on which the sum assured is to become payable" was "[the] death of the Life Assured before the Terminal Date specified in this Schedule [as 9 April 2016] but not otherwise".
- 20 8. The Life Assurance Policy provided that "the Society [i.e. Equitable] hereby agrees that if the subsequent premiums (if any) to be paid as provided in the Schedule shall be duly paid to the Society then after satisfactory proof shall have been delivered to the Society of the happening of the Event on which the sum assured is to become payable and of title to receive payment under the
- 25 Policy and on delivery of the Policy duly discharged the Society will pay the Sum Assured".
9. It also provided that where only one person is named as "Grantee", "payment shall be made to the Grantee or his personal representatives". This was subject
- 30 to the following proviso: "Provided that if in any case another person or

persons is or are legally entitled to the Policy payment shall be made to such person or persons”.

10. The Life Assurance Policy provides with respect to interest (in clause (i)) as follows:

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“Interest on any amount payable under the Policy will be paid by the Society calculated from a date one month after the date upon which such amount shall become payable up to the actual date of payment the rate of interest being at the Society’s absolute discretion and any payment of interest being subject to deduction of any tax applicable thereto.”

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11. Before his death, Mrs Pope, Jason Pope’s mother, had been appointed to act on Jason’s behalf under a power of attorney dated 30 January 1998.

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12. The Decision states:

“After protracted negotiations between Mrs Pope acting on Jason’s behalf and Equitable, Equitable agreed to make a payment under the Life Assurance Policy of the principal amount insured (£100,000) plus an additional amount, expressed by Equitable as “interest” of £36,425.97.

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Payment of this amount was agreed on 29th September 2002 under the terms of a Deed of Discharge signed by Mrs Pope in her capacity as attorney for her son Jason and Mr and Mrs Pope as Jason’s next of kin. The terms of that Deed of Discharge were that payment was to be made to Mr and Mrs Pope as Jason’s next of kin.

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In fact the proceeds of the Life Assurance Policy were transferred almost immediately into a bank account in the name of Jason Pope. On the 8th November 2002 the monies in that account were transferred by Mrs Pope in her capacity as Jason’s attorney into an offshore account in Jason’s name.”

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13. Mrs Pope entered into a deed to swear to Jason’s death and obtain a grant of representation in respect of Jason’s estate.

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14. The assessments in question were made with respect to the Extra Payment in the tax year 2002/3 (the chronology behind the assessments is briefly set out

below). The FTT dealt with the three issues as issues of principle. At the hearing before the FTT and at the appeal to this Tribunal Mrs Pope represented the Appellants.

5 **Issue 1: was the Extra Payment exempt under section 329 ICTA?**

15. Subsection 329(1)(a) ICTA provided at the relevant time as follows:

“(1) The following interest shall not be regarded as income for any income tax purpose:

(a) any interest on damages in respect of personal injuries to a plaintiff or any other person, or in respect of a person’s death, which is included in any sum for which judgment is given by virtue of a provision to which this paragraph applies”

16. Sub-section 329(2) ICTA provided that

“The provisions to which subsection 1(a) above applies are—

(a) section 3 of the Law Reform (Miscellaneous Provisions) Act 1934;

(b) section 17 of the Law Reform (Miscellaneous Provisions) Act (Northern Ireland) 1937;

(c) section 35A of the Supreme Court Act 1981;

(d) section 69 of the County Courts Act 1984;

(e) section 33A of the Judicature (Northern Ireland) Act 1978; and

(f) Article 45A of the County Courts (Northern Ireland) Order 1980”.

17. Subsection (3) provided that:

“A payment in satisfaction of a cause of action, including a payment into court, shall not be regarded as income for any income tax purpose to the extent to which it is in respect of interest which would fall within subsection (1) above if included in a sum for which judgment is given or if decree for payment of it were included in an interlocutor”.

18. This section has been re-written as 751 of the Income Tax (Trading and Other Income) Act 2005 [ITTOIA].

- 5 19. We see the purpose of this provision as plain: where a person is awarded damages with respect to either personal injury or death, and a court under specific statutory provisions awards a payment of interest on those damages, the interest payment is exempt from tax.
- 10 20. Subsection (3) of 329 ICTA provides that this is the case even where a court does not make the order, but would have done so had it been included in a sum for which judgment was given.
21. The Appellants argued before the FTT and before us that the Extra Payment was, if interest, a payment of interest on damages under that section.
- 15 22. The FTT rejected this submission on the basis that the Extra Payment was, on any view, interest on a payment not of “*damages in respect of... a person’s death*” and that payments under “*a life assurance policy were of a different kind*” (paragraph 44 of the Decision).
- 20 23. Before us the Appellants argued that the Extra Payment should be characterised as damages for distress and the inconvenience of late payment.
- 25 24. In the context of both life and general insurance there is, we think, a clear distinction between on the one hand a payment of interest made with respect to a payment of “*damages ... in respect of a person’s death*” and a payment made pursuant to the death of a person whose life has been insured under a life insurance policy, which is not a payment of “*damages*”.
- 30 25. The Extra Payment was not on any possible analysis of the present arrangements “damages in respect of the ... death of” Jason Pope. The FTT’s holding of law in this respect is plainly correct.

Issue 2: Was the Extra Payment a payment of Interest?

26. The Appellants had argued before the FTT that the Extra Payment was not a payment of interest.

27. Their arguments were:

- 5 (i) that the Extra Payment was not in substance a payment of interest but rather a payment of compensation, relating to the difficulties and traumas arising from the late payment under the Life Assurance Policy [see paragraph 24 of the Decision];
- (ii) that the Extra Payment was a capital receipt, and so could not be a
10 payment of interest [see paragraph 25];
- (iii) that because the rate of interest was within the absolute discretion of Equitable, it could have paid zero interest, that the payment was accordingly ex gratia, and that as an ex gratia payment it could not be a payment of interest [see paragraph 26];
- 15 (iv) that because the death of Jason had not been confirmed at the date of the Extra Payment, there was no debt under the Life Assurance Policy under which interest could run [see paragraph 27];
- (v) that all of the cases dealing with the definition of interest were
20 distinguishable because they dealt with payments in a commercial context and not in the context of a death [see paragraph 28].

28. The FTT dealt with each of those five sub-issues as follows.

Sub-issue (i): was the Extra Payment in substance “interest”?

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29. With regard to sub-issue (i), the FTT applied the “*relevant conditions*” for “*interest*” set out in *Re Euro Hotel (Belgravia) Ltd* 51 TC 293. In *Re Euro Hotel*, Megarry J. held on pages 301-2:

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“It seems to me that running through the cases there is the concept that as a general rule two requirements must be satisfied for a payment to amount to interest, and a fortiori to amount to “interest of money”. First, there must be a sum of money by reference to which the payment which is said to be interest is to be ascertained. A payment cannot be

“interest of money” unless there is the requisite “money” for the payment to be said to be “interest of”. Plainly there are sums of “money” in the present case. Second, those sums of money must be sums that are due to the person entitled to the alleged interest.”

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30. The FTT applied that test as follows:

10 “The labelling of the payment as interest is not the definitive test, but here, in addition, all of the relevant conditions referred to in the *Euro Hotels* case were satisfied in respect of the Extra Payment. The Extra Payment was made by reference to the Death Benefit as defined in the Deed of Discharge. Under that agreement there was a specific sum owing from an agreed date and the Extra Payment was calculated by reference to that sum. The Extra Payment was payable to the persons to whom the debt was due, Mr and Mrs Pope as Jason’s next of kin.”
15 [see paragraph 46 of the Decision]

31. The FTT found (in paragraph 45 of the Decision) that there was “good evidence from the correspondence to which the Tribunal had been referred, that both Equitable and Mrs Pope had assumed that this was the correct characterisation of the payment [i.e. as interest]”. This paragraph appears to refer back to the following words in paragraph 30: “HMRC referred to the correspondence between Mrs Pope and Equitable (particularly the letters of 3 July 2002, 13 September 2002, 27 August 2002, and 26 Sept 2002) to which the Tribunal were referred, as evidence for the fact that Equitable certainly believed the payments to be correctly characterised as interest and that Mrs Pope herself referred to the Extra Payment as an interest payment in that correspondence on a number of occasions”.

30 32. With regard to sub-issue (i), HMRC contend that the FTT was wholly justified in concluding that the Extra Payment was made by reference to the Death Benefit of £100,000.

33. In addition to the *Euro Hotels* case, the FTT also referred to *National Westminster Ltd v Riches* (1945) 28 TC 159, in which Lord Wright held, at
35 page 189, that

5 “the essence of interest is that it is a payment which becomes due because the creditor has not had his money at the due date. It may be regarded either as representing the profit he might have made if he had had the use of the money, or conversely the loss he suffered because he had not that use. The general idea is that he is entitled to compensation for the deprivation.” .

10 34. It is clear on the evidence (detailed below) to which the FTT referred that it was not only entitled to conclude that the Extra Payment was interest but that that was the only conclusion available to it.

15 35. In its letter to Mrs Pope dated 13 December 2000, Equitable stated inter alia:
 “I can confirm that if your son was declared dead, then any premiums that had been paid into this policy since the date of death would be refunded in full, with interest”. In a further letter to Mrs Pope dated 15 February 2002, Equitable stated inter alia:

20 “If it is established that Mr Pope has died, the sum of £100,000 would be payable to his estate as from the date of death. Interest would be payable from the date of death to the date that payment leaves the Society.”

25 36. In a letter dated 22 March 2002, Equitable requested evidence of Jason Pope’s death, in particular a letter from the Foreign and Commonwealth Office to which Mrs Pope had previously referred. Mrs Pope replied on 23 March 2002. She enclosed a copy of the letter of 12 July 2001 from Mr Jack Straw, the Secretary of State for the Foreign and Commonwealth Office, which stated the likelihood that John Pope was no longer alive. Having received confirmation
30 from the Foreign and Commonwealth Office as to the likelihood of Jason Pope’s death, Equitable proceeded to write to Mrs Pope on 28 June 2002 stating its conclusion that “it is unlikely that Jason is still alive” and stating its willingness to make the £100,000 payment on receipt of the policy document, completion of an attached “payment instruction form by Jason’s next of kin”
35 and completion of an attached “Deed of Discharge”. Mrs Pope was also required to sign the Deed of Discharge in her capacity as Jason Pope’s attorney.

37. Mrs Pope replied on 3 July 2002, stating inter alia:

5 “I am disturbed that the amount stated in the payment instructions does not take into account the life assurance premiums that have been paid post November 8 1998 and any interest accrued by the late settlement of the policy.”

38. Equitable replied on 22 August 2002, arguing that because it was only on
10 receipt of the Foreign and Commonwealth Office letter dated 7 June 2002 that it was prepared to make the payment of the death benefit, that interest ought to run from that date, but that as a concession they would use the date of the initial FCO letter, 12 July 2001, as the starting point.

15 39. On 27 August 2002, Mrs Pope rejected this position and argued that liability becomes due on death, which was probably within a few days of 8 November 1998, but that she was prepared to settle on Jason’s birthday on 20 December 1998 as a compromise. In its reply dated 29 August 2002, Equitable stated that it had “decided that interest on late payment of the benefit under the
20 policy should be calculated from 8 November 1998, and premium payment made after 8 November 2002 should be refunded”. In a subsequent letter dated 12 September 2002, Equitable stated:

25 “The general principle adopted by Equitable Life is that interest is paid on late payment for the period for which the Society has held money beyond the due date. The amount of interest payable is based on the change in the bid price of units in The Equitable Life Assurance Society’s Money Pension Fund for the appropriate period.” .

30 40. It is clear from this letter that Equitable’s “principle” was to calculate the rate of interest in accordance with the benefit it had obtained from retention of sums due. This is of course consonant with the “*essence*” of interest as set out in *National Westminster Ltd v Riches* above.

41. In her reply dated 13 September 2002, Mrs Pope stated that “the Financial Ombudsman’s general principle in such matters is to award interest at 8% p.a.” and stated that she intended to refer the matter to the Financial Ombudsman. In its reply dated 26 September 2002, Equitable Life stated that whilst it did not accept that she was entitled to interest at 8% per annum, it was decided in that particular case “as a concession” that interest would be paid at that rate from 8 November 1998.

42. Whilst it is plain that the use by the parties of the word “interest” is not determinative of the nature of the Extra Payment and that it is the “*true nature of the payment*” that is always in question (see *Re Euro Hotels* at 301), HMRC contend that in view of the above correspondence, the FTT was correct to find that there was “good evidence” that the Extra Payment was “interest” as so understood.

43. Finally, as the FTT held in paragraph 47, there is no contradiction between a payment being interest and its being compensation. The FTT referred to *Westminster Bank Ltd v Riches* as authority for this proposition. The FTT was clearly correct in this regard. In *Westminster Bank*, Viscount Simon (at page 187) said:

“The Appellant contends that the additional sum of £10,028, though awarded under a power to add interest to the amount of the debt, and though called interest in the judgment, is not really interest such as attracts Income Tax, but is damages. The short answer to this is that there is no essential incompatibility between the two conceptions”

44. Lord Simonds cited (at 195 of *Westminster Bank v Riches*) a passage from Lord Hershell’s speech in *London, Chatham and Dover Railway Co. v South Eastern Railway Co.*, [1893] A.C. 429, at page 437, which included the following:

“It would be difficult, I suppose, in a case where a man, being deprived of the use of his money, was awarded interest by way of compensation, to say that what he was awarded was not interest but something else.”

45. In the light of those decisions and judicial observations we are satisfied that the FTT's holdings of law in this respect are correct as a matter of well-established principle.

5 Sub-issue (ii) : was the Extra Payment capital?

46. With regard to sub-issue (ii) ie the Appellants' proposition that the Extra Payment was a capital receipt it is displaced by the finding that it was interest. We did not understand the Appellants to be pressing that particular argument before the Upper Tribunal.

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Sub-issue (iii): was the Extra Payment ex gratia?

47. With regard to sub-issue (iii), the FTT held that:

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“The Tribunal did not accept that the interest payments could properly be treated as ex-gratia. The terms of the Life Assurance Policy clearly contemplated that interest would be payable in respect of late payment of claims, the fact that the rate to be imposed was discretionary did not alter that fundamental contractual entitlement.”

20

48. The Appellants argue that the FTT erred in finding that the Extra Payment was not ex gratia.

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49. The Appellants written reasons for appealing advance the following four arguments for this proposition. The first argument is that both the £100,000 and the Extra Payment were “ex gratia” because a life assurance policy payment is “only contractually due when death is a legally established certainty, acknowledged as such by law with evidence of a death certificate or a presumption of death decree”.

30

50. HMRC submit that the terms of the Life Assurance Policy make it clear that Equitable was liable to pay the Death Benefit “after satisfactory proof” of the death was provided. There is no contractual requirement for either a death certificate or a presumption of death decree.

51. The Appellants' second argument in this regard is that "if a life insurer refuses to pay out on a contract, only the party to the contract can sue upon its breach (basic contract law)" and that in this instance "only Jason could sue on his breached life policy and on his death, this 'party' would be his legally constituted representative".

52. However, Mrs Pope purporting to act as attorney for Jason was a party to the Life Assurance Policy. As set out in more detail below she gave up any rights Jason Pope may have had under the Life Assurance Policy when she entered into the Deed of Discharge in her capacity as his attorney.

53. The Appellants advance the third argument that if the Deed of Discharge nullified the Life Assurance Policy, it follows that the Extra Payment must have been ex gratia and the fourth argument that at the time of the payment, Jason was "legally alive", from which the same conclusion is said to follow. Both arguments are misconceived. With regard to the third argument, clause 5 of the Deed of Discharge makes it clear that the payment is made in consideration of the Appellants giving up their rights under the Life Assurance Policy, so the payment was made for valuable consideration. With regard to the fourth argument, whilst it is the case that Jason's death had not been sworn, Equitable still had "satisfactory proof" of his death so as to trigger an obligation to make a payment on its part.

54. The FTT records an argument to the effect that because the rate of interest payable on the Death Benefit was within the "absolute discretion" of Equitable, the Extra Payment must have been ex gratia. In paragraph 46 of their Decision the FTT rejected this argument as follows:

"The Tribunal did not accept that the interest payments could properly be treated as ex-gratia. The terms of the Life Assurance Policy clearly contemplated that interest would be payable in respect of late payment of claims, the fact that the rate to be imposed was discretionary did not alter that fundamental contractual entitlement."

55. Although the FTT did not refer to it in its Decision, HMRC argued that there was ample evidence before the FTT on which it was entitled to find that the Extra Payment was not ex gratia. This evidence is to be found in the correspondence referred to above. In particular:

(i) the Equitable letter dated 15 February 2002 in which it stated that:

“If it is established that Mr Pope has died, the sum of £100,000 would be payable to his estate as from the date of death. Interest would be payable from the date of death to the date that payment leaves the Society.”

(ii) the Equitable letter dated 12 September 2002 in which it stated:

“The general principle adopted by Equitable Life is that interest is paid on late payment for the period for which the Society has held money beyond the due date. The amount of interest payable is based on the change in the bid price of units in The Equitable Life Assurance Society’s Money Pension Fund for the appropriate period.”

56. It is clear from the fact that it was the “general principle” adopted by Equitable to pay interest at a given rate following the date when the Death Benefit was due that Equitable’s payment of interest was not ex gratia, but simply part of its normal practice. Furthermore, it is clear from clause (i) of the Life Assurance Policy (cited above) that it is the rate of interest that is within the discretion of Equitable. It does not provide that the decision whether to make additional payments (by way of interest or otherwise) is within the discretion of Equitable.

57. The FTT found as a fact that the Extra Payment was not paid “*benevolently*” or ex gratia. That finding cannot, we think, be displaced.

Sub-issue (iv): was there a debt due at the time of the Extra Payment?

58. With regard to sub-issue (iv), the Appellants argued that because the death of Jason had not been confirmed at the date of the Extra Payment, there was no debt under the Life Assurance Policy under which interest could run.

5 59. The FTT held as follows in this regard:

10 “At the time when the Extra Payment was agreed between Mrs Pope and Equitable an assumed date of death for Jason and therefore an assumed due date for payment under the Life Assurance Policy were agreed. As a result there was a specific debt to which the payment related and interest had not been “back dated” to a period when the debt was not in existence.”

15 60. It is clear from the terms of the Life Assurance Policy that there was no need for Equitable to possess anything other than “satisfactory proof” of Jason’s death for the death benefit to be due. There was no contractual requirement for the Appellants to provide Equitable with either a death certificate or a deed swearing Jason Pope’s death. It is clear that Equitable accepted that the date of death would be 8 November 1998, and that interest would run from that date when the death benefit was properly due.

20 61. Where there is no acceptable affirmative evidence that a person was alive at some time during a continuous period of seven years or more, and it is proved that there are persons who would be likely to have heard of him over that period, and those persons have not heard of him, and that all due inquiries have been made appropriate to the circumstances, there is a rebuttable presumption of law that he died sometime within that period. On proof of sufficient inquiries, the court will, however, allow the death of a testator to be sworn after a disappearance of less than seven years (*Halsbury’s Laws*, (5th ed), Volume 11, paragraph 1100).

30 62. As noted by the FTT in paragraph 11 of the Decision, Mrs Pope entered into a deed swearing Jason’s death on the 2 June 2005. But receipt of this by Equitable was not necessary for the death benefit to be due under the Life

Assurance Policy. On that basis we accept that there was a debt due at the time of the Extra Payment.

Sub-issue (v): are the other cases on interest distinguishable because they do not deal with payments on death?

63. The fact that the other cases did not deal with payment on death is irrelevant. The case law makes it plain that where a debt is due on a given date, irrespective of the cause of that debt – including death – any payment which is made so as to compensate the creditor by reference to the passage of time that has passed since the due date is interest. It is “*payment by time for use of money*” (*Bennett v Ogston (HM Inspector of Taxes) (1930) 15 TC 374 at 378*, per Rowlatt J.).

Issue 3: were Mr and Mrs Pope properly assessable for the tax on the Extra Payment of £36,425 under Section 59(1) ICTA?

64. The disputed decision is stated in the closure notice issued on 1 November 2005 which reads:

“My conclusion is that the interest originally declared in the tax return you signed on 5 May 2003 was not assessable on Mr Jason Pope but on you and your husband.

HMRC’s case is based on section 59(1) ICTA which provides:

“Subject to subsections (2) and (3) below, income tax under Schedule D shall be charged on and paid by the persons receiving or entitled to the income in respect of which the tax is directed by the Income Tax Acts to be charged.”

65. Their contention is that under the Deed of Discharge dated 29 September 2002 the persons entitled to the Extra Payment were the next of kin, i.e. Mr and Mrs Pope. Equitable was, say HMRC, under an obligation to make the Extra Payment to them as the next of kin; consequently the next of kin were entitled to the Extra Payment. Mrs Pope, as attorney, had disclaimed her

rights under the Life Assurance Policy and had assigned them to the next of kin.

5 66. We do not agree with HMRC. In our view HMRC and the FTT erred in law in treating the next of kin as “entitled to the income”, namely the interest represented by the Extra Payment, for the purposes of section 59(1). Because Jason Pope’s estate was unadministered (and not even in the course of administration) at the time when the Extra Payment was made by Equitable, no person entitled under his assumed intestacy will have had any sufficient
10 entitlement to the death benefit and the Extra Payment to make him or her “entitled to the income in respect of which the tax is directed by the Income Tax Acts to be charged”.

67. To start with the obvious: if, as is not impossible, Jason Pope had been found to have been alive in September 2002 when the Deed of Discharge was
15 executed, Mr and Mrs Pope as “next of kin” could not have been entitled to the Extra Payment, either as against Equitable or as against Jason Pope. The present issue only arises on the basis that Jason Pope was not alive in the year covered by the assessment, i.e. 2002/03.

68. Jason Pope had been missing since November 1998. On 2 June 2005 Mrs
20 Pope was granted administration of Jason Pope’s estate by the High Court. Also on 2 June 2005 Mrs Pope entered into a deed swearing to Jason Pope’s death. Throughout that period (and we presume until a future date when administration of Jason Pope’s estate was complete) Jason Pope’s estate must therefore have remained unadministered.

69. We have to proceed on the basis that Jason Pope died and that he was
intestate. It was established (for purposes of English law) in *Marshall v Kerr*
[1995] 1 AC 148 and [1994] STC 638 that “beneficiaries” under an intestacy
do not have a direct interest in the assets of the estate until it is ascertained in
5 due course of administration. The decision of Lord Templeman in that case
contains the following passage:

“The relevant common law and law of the Administration of Estates
Act 1925 were explained by Lord Radcliffe delivering the advice of
the Privy Council in *Commissioners of Stamp Duties (Queensland) v*
10 *Livingston* [1965] AC 694 and was summarised by Buckley J in *In re*
Leigh’s Will Trust [1970] Ch 277, at pages 281-282:

“(1) The entire ownership of the property comprised in the
estate of a deceased person which remains unadministered is in
15 the deceased’s legal personal representative for the purposes of
administration without any differentiation between legal and
equitable interests;

(2) No legatee or person entitled upon the intestacy of the
deceased has any proprietary interest in any particular asset
20 comprised in the unadministered estate of the deceased;

(3) Each such legatee or person so entitled is entitled to a
chose in action, viz. a right to require the deceased’s estate to
be duly administered, whereby he can protect those rights to
which he hopes to become entitled in possession in the course
25 of the administration of the deceased’s estate;

(4) Each such legatee or person so entitled has a
transmissible interest in the estate, notwithstanding that it
remains unadministered. This transmissible or disposable
interest can, I think, only consist of the chose in action in
30 question with such rights and interests as it carried *in gremio* ...
If a person entitled to such a chose in action can transmit or
assign it, such transmission or assignment must carry with it the
right to receive the fruits of the chose in action when they
mature.”

70. Applying the *Livingston* principles to the circumstances of the Deed of
Discharge requires recognition of the fact that throughout the year in

question Jason Pope was missing and there was no certainty as to whether he was alive or dead. If he were alive, the next of kin would have had no rights; if he were dead, Mr and Mrs Pope would have been his next of kin. If he were alive his estate would be his; if he were dead, all beneficial interests in the estate would be held in suspense, pending the grant of letters of administration (as happened sometime after 2 June 2005). With that uncertainty and its consequences in mind one can say no more than this:

- (i) During the year 2002/3 and until at least 2 June 2005 Mr and Mrs Pope as apparent next of kin had choses in action relating to the as yet unadministered estate of Jason Pope. After 2 June 2005 their status as next of kin did not give them “any proprietary interest in any particular asset comprised in the unadministered estate of “Jason Pope”.
- (ii) At most Mr and Mrs Pope as next of kin each had an apparent chose in action, namely a right “to require [Jason Pope’s] estate to be duly administered” and that chose in action would only have arisen, at the earliest, on 2 June 2005.

The terms of the Deed of Discharge

71. The Deed of Discharge of 29 September 2002 was effected long before the grant of letters of administration to Mrs Pope and at a time when she may still have held a power of attorney. Mr and Mrs Pope had been negotiating for the payment of the Death Benefit and the Extra Payment under the Life Assurance Policy since before 2002/3. In March 2002 Equitable had been provided with the letter from the Secretary of State for the Foreign and Commonwealth Office stating that it was unlikely that Jason Pope was still alive; and by letter of 28

June 2002 Equitable had stated that it was willing to make the £100,000 payment on receipt of the policy documentation. However, if Equitable were to release the Death Benefit and the Extra Payment they presumably had to be as sure as possible that every imaginable claim under the policy was covered. The parties were therefore Mrs Pope in her capacity as attorney for Jason Pope, Mr and Mrs Pope as next of kin and Equitable. Having Mrs Pope as a party in her capacity as attorney for Jason Pope presumably protected Equitable against the possibility of Jason Pope being alive and dying at some other time during the period of cover.

72. The Recitals to the Deed of Discharge go through the history of the Life Assurance Policy. Recital E states that “on the conclusions” made by the FCO in their letters, Jason “is no longer alive”. Recital F states that Jason died intestate. Recital G states – “The Society and the Attorney and the Next of Kin have agreed to effect payment of the Death Benefit under the terms of this Deed.”

73. Turning now to the operative part of the Deed of Discharge, clause 1 states that “the Society undertakes to make payment of the Death Benefit to the Next of Kin using the Society’s reasonable endeavours”. (On the assumed basis that Jason Pope was no longer alive, it would not, we note, have been appropriate to have made payment to Mrs Pope as holder of the power of attorney.)

74. Clause 2 states:

“By giving effect to payment of the Death Benefit to the Next

of Kin the Society shall be making a full and final discharge of all legal and beneficial interests under the Policy”.

(By this means, we note, Equitable was obtaining recognition that all possible claims as at 29 September 2002 were being covered.)

75. Clause 4 provides:

“The Attorney and the Next of Kin warrant that the Next of Kin have sole lawful entitlement to the Death Benefit determined by Act of Parliament subordinate legislation or statutory amendment including but not limited to the Administration of Estates Act 1925 and that no other person known to the Attorney and Next of Kin has any legal or beneficial right, title or interest in the Death Benefit”.

(That, we note, gives Equitable a measure of protection should some further claimant assert a right against Equitable to the estate.)

76. Clause 5 provides that in consideration of giving effect to the payment, it is agreed that Equitable is discharged from any obligation which Mrs Pope (as attorney) and Mr and Mrs Pope, among others, have under the Life Assurance Policy.

77. Clause 7 provides:

“The Attorney and the Next of Kin agree to surrender all legal and beneficial rights title and interest they may have in respect the Policy and to the Death Benefit.”

Payment Instructions dated 29 September 2002

78. On the same date, Mr and Mrs Pope signed a “Payment Instructions” form instructing Equitable to pay £100,000 to a bank account in the name of Jason Pope with HSBC. It appears that Mrs Pope caused the monies in this account, totalling £182,600, to be paid into a bank account in the Isle of Man on 16 November 2002.

The effect of the Deed of Discharge and the Payment Instructions

79. The transactions covered by the Deed of Discharge and the Payment Instructions affect the material rights and obligations of the parties to the Deed of Discharge. Equitable is for all practicable purposes discharged from its obligations under the Life Assurance Policy and has the benefit of the warranty from Mr and Mrs Pope should any other claim be found to be available. If Mrs Pope had any rights or obligations as holder of the power of attorney, these were not hers as beneficial owner. The rights of Mr and Mrs Pope as next of kin were not yet rights in an estate in the course of administration. They were potential rights in the estate of Jason Pope whose death was recognised as a likelihood and proved as such to the satisfaction of Equitable; they were expectations of Mr and Mrs Pope that each would, when the estate was administered, be recognised as next of kin.
80. The *Livingston* principles apply to estates in the course of administration. The interests of Mr and Mrs Pope are more remote than those of the claimants in the *Livingston* case; this is because Mr and Mrs Pope did not even have claims to an estate in the course of administration. It must follow we think that, as things stood in the relevant year (2002/3), neither Mr nor Mrs Pope were “entitled to” the income represented by the Extra Payment in the sense that that expression is used in section 59(1). The most they had were potential choses in action to require the “estate” to be duly administered. The warranty in clause 1.4 of the Deed of Discharge neither recognises nor

creates a greater “entitlement” on the part of Mr and Mrs Pope. On the basis that section 59(1) is the only charging provision on which HMRC rely to sustain their decision, we think that the decision is unfounded.

The FTT’s decision

5 81. The FTT held as follows with regards to this issue:

 “50. Finally, the Tribunal concluded that persons who were taxable on the Extra Payments made under the Deed of Discharge were Mr and Mrs Pope and were not the estate of Jason Pope.

10 52 . The Deed of Discharge was intended to be, and did operate as, a standalone deed which overrode the original Life Assurance Policy.

15 53. The persons to whom payment was due under the Deed of Discharge and who were therefore “entitled” to the interest for the purposes of section 59(1) ... were Mr and Mrs Pope as Jason’s next of kin. The fact that payment had been immediately passed on to an account in the name of Jason Pope, and that Mrs Pope considered herself to be acting as a trustee for her son, did not alter the legal entitlement of Mrs Pope to that payment.”

20 82. The Statements in the Deed of Discharge that payment was to be made to Mr and Mrs Pope as next of kin (clauses 1 and 2) covers their rights and obligations as against Equitable; but they do not make them “entitled” in the relevant sense. Thus, when they came to pass on the payment of the Death Benefit and the Extra Payment to Jason Pope’s account, they were not exercising rights as beneficial owners of the money. In the hopes that Jason Pope might still be alive, they were exercising such rights as the choses in action (if any) under the unadministered estate of Jason Pope gave them and placing the money in an account that bore his name.

83. For those reasons we decide that the FTT erred in law in holding that the persons liable for the tax on the Extra Payment were Mrs Geneva Pope and Mr Alan Pope. We therefore allow the appeal as regards issue 3.

5 **Costs**

84. HMRC did not ask for their costs. In the circumstances we do not consider that any order for costs should be made.

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SIR STEPHEN OLIVER QC

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**EDWARD SADLER
TRIBUNAL JUDGES**

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RELEASE DATE: 26 JUNE 2012