[2014] UKUT 0292(TCC)

Upper Tribunal
(Tax and Chancery Chamber)

Appeal Number: FTC/15/2013

Heard at George House, 126 George Street, Edinburgh	Determination Promulgated
On 24 – 28 February and 3 – 7 March 2014	08 July 2014

Before

LORD DOHERTY
(Sitting as a Judge of the Upper Tribunal)

Between

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS

Appellants

and

(1) MURRAY GROUP HOLDINGS LTD
(2) MURRAY GROUP MANAGEMENT LTD
(3) THE PREMIER PROPERTY GROUP LTD
(4) G M MINING LTD
(5) RFC 2012 PLC (in liquidation)
(formerly The Rangers Football Club plc)

Respondents

Representation:

For the Appellant: Mr Roderick Thomson QC instructed by the Office of the Advocate General for Scotland

For the Respondent: Mr Andrew Thornhill QC, Mr Jonathan Bremner and Mr Thomas Chacko instructed by HBJ Gateley

DETERMINATION AND REASONS

Income Tax and NIC – emoluments/earnings – tax avoidance scheme - remuneration trust – employees' individual sub-trusts – "protectors" - (1) whether payments into sub-trusts were emoluments/earnings subject to PAYE and NIC; -No (2) whether loans from sub-trusts were emoluments/earnings subject to PAYE and NIC; -No (3) "Ramsay" principle - whether FTT erred in law; - No - Case remitted to FTT to determine certain matters, but otherwise appeal dismissed.

DECISION

Case remitted to the FTT (i) with a direction to allow the taxpayers' appeals against the assessments relating to the payments to the sub-trusts of Sir David Murray, his sons, Mr McClelland, and Mr MacMillan; (ii) to proceed as accords in relation to the termination payments, the payments in respect of guaranteed bonuses, and any related questions of grossing up. *Quoad ultra* the appeal is dismissed.

REASONS

Introduction

1. The appellants are HMRC. The respondents are companies in the Murray Group. The ultimate holding company is Murray International Holdings Ltd. The first respondent is a subsidiary holding company. The second respondent, third respondent and fourth respondent are companies in the Group. The fifth respondent ("Rangers") was part of the group during the years of assessment under appeal, but in the course of 2011 was sold outside the group.

2. I have used the undernoted abbreviations in this decision:
"ICTA" – Income and Corporation Taxes Act 1988
"ITEPA" – Income Tax (Earnings and Pensions) Act 2003
"NIC" – National insurance contributions
"PAYE" – Pay As You Earn
"TCEA" – Tribunals, Courts and Enforcement Act 2007
"UT" – Upper Tribunal

3. The appeals relate to the tax years 2001/02 to 2008/09, and concern a number of assessments for PAYE and NIC issued between February and April 2008 covering the period up to 5 April 2007, and additional assessments issued in March 2010 for 2007/08 and 2008/09. The PAYE Determinations were raised under Regulation 80 of the Income Tax (Pay as You Earn) Regulations 2003, and Section 8 Notices of Decision for NIC were made under Section 8 of the Social Security Contributions (Transfer of Functions) Act 1999. The initial assessments were variously amended and subsequently consolidated. The Determinations and Notices were served on the respondents and arose out of an Employees' Remuneration Trust established for the benefit of employees of the Murray Group and their families.

4. The respondents' appeals against the Determinations and Notices (all heard together as one appeal) came before the First-tier Tribunal ("FTT") comprising Mr Kenneth Mure QC, Dr Heidi Poon CA, CTA, PhD, and Mr Scott Rae LLB, WS. The hearing took place on

25 October - 5 November 2010; 18-21 and 26-28 April, 3-6 May, and 7-10 and 16 November 2011; and 16-18 January 2012. The FTT were unable to reach a unanimous view. They released their decision on 29 October 2012 ([2012] UKFTT 692 (TC)). The majority (Mr Mure and Mr Rae) allowed the respondents' appeal "in principle", deciding most of the contentious issues in their favour. A number of matters were left over for later decision in the event of the parties not reaching agreement on them. Dr Poon dissented. The appellants now appeal against the decision.

The Scheme

5. The following were among the findings made by the majority:

"103 …

(iii) By Deed dated 20 April 2001 ("the Definitive Deed") MGM Ltd set up the Employees' Remuneration Trust ("the principal trust"). It was subsequently amended by Deed of Variation dated 28 January 2002, Deed of Amendment dated 29 November 2002, and Deed of Amendment and Rectification dated 12 October 2005.

(iv) 108 sub-trusts were established subsequent to the date of the Definitive Deed. These are in name of individual employees of companies in the group and bear to be for the benefit of their families individually. The Deeds purporting to create the sub-trusts referred to and adopted the terms of the Definitive Deed.

(v) When the possibility of creating a sub-trust in name of an employee was contemplated, the benefits and trust mechanism would be explained to him *viz* the loan facility providing a tax-free sum, greater than a payment net of tax deducted under PAYE, and repayable out of his estate, so reducing its value for Inheritance Tax purposes. Further, the employee could also be appointed *protector* with extended powers in respects resembling trusteeship, but without title to the trust assets, and not enabling the conferring of any absolute beneficial right on the employee himself.

(vi) When an employing company decided to propose that a sub-trust be constituted in name of a particular employee, it would have the employee complete a Letter of Wishes (naming the family members benefiting on his death) together with (almost invariably) a Loan Application on his own behalf. These would be submitted to the Trustee. A standard form of deed to create the sub-trust would then be provided by Messrs Baxendale Walker, the specialist "wealth" adviser to the Group. The employing company would pay a contribution to the principal trust which at its discretion would set up a sub-trust in name of the selected employee.

(vii) On these occasions the employing company would advance monies to the Principal Trust and without exception a sub-trust in name of the employee was established. In (almost) all of these cases loans for the full amount advanced for an extended term (10 years) and on a discounted basis were granted by the trustees to the employee. The terms of these loans to date have not expired but the employees' general expectation is that they will be renewed. The discount reflected LIBOR interest rates fixed at the outset plus about 1½ to 2%.

(viii) Subject to limited exceptions none of the loans has been waived and none of the nominated employees has obtained an absolute right to any part of the capital value of the loan.

(ix) Virtually all the sub-trusts continue to date.

(x) In July 2006 the original trustee of the Principal Trust, Equity Trust Jersey Ltd (known earlier as Insinger Trust Company Ltd) was succeeded by Trident Trust Company Ltd. Each trustee was resident in Jersey. Sub-trusts set up before that date had also been administered by Equity. Certain of these were also transferred to Trident then. The new appointment made by MGML was prompted by several instances when Equity had questioned certain loan applications, which had delayed payment.

(xi) In the case of the Group's employees other than footballers, they had no contractual right to a bonus. However, a practice had developed within the Group to pay on a discretionary basis annual bonuses depending on the work performance of the employee and the profitability of his employing company.

(xii) In the case of certain footballers the terms of engagement were commonly recorded in two documents, one being a contract of employment, the other being described as a side-letter. The latter would provide ordinarily for the constitution of a sub-trust in name of the footballer. While the SFA required players' contracts to be registered with it, Rangers did not consider it appropriate to have side-letters registered."

6. Earlier the majority had commented upon the evidence of Mrs Orchard, the professional trustee from Trident who had given evidence:

"47 In particular we would make the following observations about Mrs Orchard's evidence:—

....

(ii) In para 22 of her Witness Statement Mrs Orchard explained how Trident's reservations about the granting of loans were allayed. Generally the football players and senior employees were highly paid and with substantial capital assets. The thrust of cross-examination was that loans were issued automatically, without any objective assessment or proper exercise of discretion. In reply Mrs Orchard explained that compliance files were kept as a matter of routine on individuals who were settlors, protectors and beneficiaries. Identification and copy utility bills were preserved to satisfy money-laundering and banking ("know your client") practice. She referred also to a "World Check" verification. This seemed to produce only negative results, suggesting only a limited value, but, as we were advised, this relates to fraudulent activity or politically sensitive involvement. It is not a credit check. Client profiles were reviewed regularly depending on a "risk" rating. (This varies between 6 months and 2 years). While Mrs Orchard was insistent that the granting of loans (and in due course) the extension of any loans were made strictly on a discretionary basis and assessed individually, the criteria by which this would be determined remain unclear. The criteria acknowledged in para 22 of the WS [witness statement] do not appear to be reflected in any records relating to the grant of loans with no specific information on the debtors' remuneration, means and future prospects. (Indeed no considered decision about a loan recorded in a formal Minute was produced in the course of the hearing). We are conscious that a footballer's career in particular is precarious and inevitably limited in term.

In the event of a borrower defaulting then the interests of those individuals identified in the Letter of Wishes (ordinarily the employee's family) would be prejudiced. Mrs Orchard did acknowledge that liability for any breach of duty could result if a

> beneficiary sustained loss. It was, she explained, her company's policy to ensure that loans could be repaid in the interests of those persons entitled to the Trust capital, usually the family…

86. We made particular comment (at para 47) in respect of Mrs Orchard's evidence. We found this unsatisfactory in many respects. In somewhat vague and general terms and in a repetitive manner she acknowledged the broad principles of her role as Trustee. However, we would question her understanding and awareness of these responsibilities in detail. While she may not have been involved in the detailed management of the taxpayers' Remuneration Trust, she was the senior official with responsibility for it. In our view her attitude seemed casual and even lax given the legally onerous nature of her responsibilities. While Equity took a firm stance about trust administration, Trident was prepared to be more compliant."

The majority opinion

7. The majority opinion was set out between paragraphs 186 and 233 of the decision.

> "186 Essentially the issue before us is whether the term *earnings* (or *emoluments* for 2002/03) extends to the "loans" made to the Murray Group executives and Rangers footballers under the Trust arrangements with a resulting charge to tax under PAYE. The same consideration arises in respect of liability to National Insurance Contributions.…
>
> 188 In reply, and significantly in our view, Mr Thomson accepted that both the trusts and loan arrangements were not "shams" (although certain detailed criticisms were made) but, rather, urged us to view these structures in a broader context, *viz* a practical and commercial reality in which payments were made by the companies in the Murray Group, and where these were invariably received by the favoured employee or footballer and enjoyed in effect absolutely by him. As we understand too, Mr Thomson did not attack the principles affecting the primary interpretation of *earnings* and *emoluments* and the tax and NIC charges in respect of these as set out by Mr Thornhill. Rather, Mr Thomson submitted, as this was a scheme devised purely for tax avoidance purposes, an extended sense including monies advanced into trust and then lent, should be adopted.
>
> 189 Crucially the difference between Mr Thornhill and Mr Thomson was whether the anti-avoidance principles set out initially in *Ramsay* and other related decisions could be invoked here to extend the charges on *earnings* to the loans. Helpfully, Mr Thomson presented us with detailed and meticulously drafted written submissions on which he addressed us, and which develop a *Ramsay* plus argument focussing on *Ramsay* but fortified by other propositions in support of the tax charge on earnings and NIC liabilities being applied.
>
> 190 We agree – and this was conceded by Mr Thornhill (see, for instance, Notes of Evidence, 18 January 2012, p60) – that we should adopt a *purposive* interpretation of *earnings* in our approach. In relation to statutory interpretation we note the comments of Ribeiro PJ in *Collector of Stamp Revenue v Arrowtown Assets Ltd* at para 35:—
>
> > "The driving principle in the *Ramsay* line of cases continues to involve a general rule of statutory construction and an unblinkered approach to the analysis of the facts. The ultimate question is whether the relevant statutory provisions, construed purposively, were intended to apply to the transaction, viewed realistically."

This was noted approvingly in *Barclays Mercantile Business Finance Ltd v Mawson* at para 36, *infra* .

191 However, that approach, on one view, is circumscribed inasmuch as there are already specific statutory provisions affecting *loans* (Sections 173-175 and 188–189 ITEPA) and from the 1960s and 1970s there date more general charging provisions in respect of benefits-in-kind of a non-cash nature. Further, the legal effect of the trust structure and loans (all of which, it was conceded, were not in law a sham) reinforces these constraints. This qualification seems to be reflected in the Court of Appeal's recent deliberations in *Mayes v HMRC* (albeit a highly artificial scenario) per Toulson LJ at the conclusion of the decision especially paras 102, 103, 105, 106 and 107:—

> "102. The root problem in this case from the viewpoint of HMRC lies in the structure of the relevant statutory scheme. As has been pointed out by Proudman J and Mummery LJ Chapter 11 of Part XIII of ICTA 1988 creates a complex set of rules for determining when a gain is to be treated as arising in connection with a life insurance policy.
>
> 103. Inherent in the scheme is the possibility of a disconnection between what would be regarded as a gain on an ordinary commercial view and what is to be treated as a gain for the purposes of the statute.
>
> 104. …
>
> 105. In the present case the opposite has occurred. The inventor of SHIPS 2 has found a clever way of making the legislative structure work to HMRC's disadvantage by devising a series of steps giving rise to a chargeable event and a corresponding deficiency, albeit that the taxpayer was no worse off commercially.
>
> 106. The *Ramsay* principle permits a purposive approach to the construction of tax legislation. …
>
> 107. In the present case it has not been suggested that the payment of premium following shortly by a surrender of the bonds were a sham. As Mummery LJ has said, they were legal events with legal consequences. They were events which ICTA has caused to carry physical consequences. The particular consequences in the present case were obviously not foreseen or intended by the legislature; but legislation, especially legislation which is highly engineered, can have unintended consequences."

192 The *Ramsay* principle and earlier related case-law were reviewed by the House of Lords in the conjoined appeals in *Barclay's Mercantile Business Finance Ltd v Mawson* and *IRC v Scottish Provident Institution*. *Mayes* suggests (per Mummery LJ at para 71) that the starting-point now in assessing tax avoidance schemes should be reviewing the principles set out in *Mawson* at paras 26-42. Reading this somewhat selectively we note –

> "[32] The essence of the new approach was to give the statutory provision a purposive construction in order to determine the nature of the transaction to which it was intended to apply and then to decide whether the actual transaction (which might involve considering the overall effect of a number of elements intended to operate together) answered to the statutory description. Of course this does not mean that the courts have to put their reasoning into the straitjacket of first construing the statute in the abstract and then looking at the facts. It might be more convenient to analyse the facts and then ask whether they satisfy the requirements of the statute.

> But however one approaches the matter, the question is always whether the relevant provision of statute, upon its true construction, applies to the facts as found. As Lord Nicholls of Birkenhead said in *MacNiven v Westmoreland Investments Ltd* [2001] UKHL 6 at [8],…
>
> > 'the paramount question always is one of interpretation of the particular statutory provision and its application to the facts of the case.'
>
> [36] Cases such as [*Ramsay* and the earlier related authorities] gave rise to a view that, in the application of *any* taxing statute, transactions or elements of transactions which had no commercial purpose were to be disregarded. But that is going too far. It elides the two steps which are necessary in the application of any statutory provision: first, to decide, on a purposive construction, exactly what transaction will answer to the statutory description and, secondly, to decide whether the transaction in question does so. [There follows then the quote *supra* from the Opinion of Ribeiro P J].
>
> [38] *MacNiven* shows the need to focus carefully upon the particular statutory provision and to identify its requirements before one can decide whether circular payments or elements inserted for the purpose of tax avoidance should be disregarded or treated as irrelevant for the purposes of the statute. In the speech of Lord Hoffmann in *MacNiven* it was said that if a statute laid down requirements by reference to some commercial concept such as gain or loss, it would usually follow that elements inserted into a composite transaction without any commercial purpose could be disregarded, whereas if the requirements of the statute were purely by reference to its legal nature (in *MacNiven* , the discharge of a debt) then an act having that legal effect would suffice, whatever its commercial purpose may have been. This is not an unreasonable generalisation, indeed perhaps something of a truism, but we do not think that it was intended to provide a substitute for a close analysis of what the statute means. It certainly does not justify the assumption that an answer can be obtained by classifying all concepts *a priori* as either 'commercial' or 'legal'. That would be the very negation of purposive construction; …
>
> [39] The present case, like *MacNiven*, illustrates the need for a close analysis of what, on a purposive construction, the statute actually requires. …"

193 In short it would seem that even in cases of "aggressive" tax avoidance, such as the present case, the application of the *Ramsay* doctrine to strike at tax saving arrangements may be fettered in a context where there is already a highly prescriptive statutory code and, also, enforceable legal structures in place which are of fundamental practical effect, and not merely incidental or artificial for tax avoidance purposes only…

222 In *Ramsay* and a sequence of decisions following shortly thereafter the "rule" was considered to strike at any non-commercial elements in a tax avoidance scheme. The rule was reviewed by the House of Lords in *Mawson* and that interpretation was considered there to be too sweeping. As now refined the rule emphasises that it is a principle of interpretation: where a commercial concept is introduced into the legislation, then any non-commercial aspects in the transaction may possibly be ignored; and where the legal nature is of the essence, then the legal effects should prevail. Recently in *Mayes* the Court of Appeal acknowledged as having full legal effect certain "self-cancelling" steps in a tax avoidance scheme –

> "[78] It would be an error … to disregard the payment of a premium at Step 3 and the partial surrender at Step 4 simply because they were self-cancelling steps inserted for

> tax advantage purposes. It was right to look at the overall effect of the composite Step 3 and Step 4 in the seven step transaction in the terms of ICTA to determine whether it answered to the legislative description of the transaction or fitted the requirements of the legislation for corresponding deficiency relief. So viewed, Step 3 and Step 4 answer the description of premium and partial surrender. On the true construction of the ICTA provisions, which do not readily lend themselves to a purposive commercial construction, Step 3 was in its legal nature a premium paid to secure benefits under the Bonds and Step 4 was in its nature a withdrawal of funds in the form of a partial surrender within the meaning of those provisions. They were genuine legal events with real legal effects. The court cannot, as a matter of construction, deprive those events of their fiscal effects under ICTA because they were self-cancelling events that were commercially unreal and were inserted for a tax avoidance purpose in the pre-ordained programme that constitutes SHIPS 2. It follows that a corresponding deficiency relief is available to Mr Mayes."

Earlier, the Court commented in relation to *Ramsay* –

> "[74] … *Ramsay* did not lay down a special doctrine of revenue law striking down tax avoidance schemes on the ground that they are artificial composite transactions and that parts of them can be disregarded for fiscal purposes because they are self-cancelling and were inserted solely for tax avoidance purposes and for no commercial purpose. The *Ramsay* principle is the general principle of purposive and contextual construction of all legislation. ICTA is no exception and is not immune from it. That principle has displaced the more literal, blinkered and formalistic approach to revenue statutes often applied before *Ramsay*."

223 In our view in the present Appeal we have to regard the trust structure and loans as "… genuine legal events with real legal effects". (*Mayes* para 78 *supra*).

224 In applying the charging provisions anent *earnings* to the monies advanced here we have followed strictly the requirements for *payment* following on *Garforth* and *AAM* . We consider that the employees benefiting did not obtain an absolute legal entitlement to the monies. Having regard to the legal effect of the trust and loan structure, the employees' entitlement or, rather, expectation is to no more than a loan. Further, we do not consider that that was altered by the employee's status and powers as *protector* of his sub-trust: the fundamental structure could not be revised by the employee *qua protector* to confer absolute rights.

225 While we accept that there was a degree of orchestration in the arrangements made with employees, we are satisfied that these fall short of enabling an absolute transfer of funds to the employee. The trust management by Trident came under close scrutiny. Its attitude differed from that of Equity. But they both operated within the same trust framework. It is that legal framework rather than the lax attitude of a particular professional trustee which matters, in our view. The reaction of Equity in, for instance, seeking a form of loan security, is consistent with the legal effectiveness of the trust. Trident, while it (and Equity too) had the benefit of a broad indemnity provision, risked possible criticism from beneficiaries with a potential interest in the capital of the sub-trust fund. Another professional trustee in the future might revert to Equity's more critical attitude.

226 The terms of the Appellants' internal memos and communications anent the operation of the Remuneration Trust were highlighted by Mr Thomson. This had been a major feature emerging from HM Inspectors' investigation. While these are suggestive of

"aggressive" tax avoidance, we are conscious that they were composed by lay persons without specialist legal experience. They cannot on any view override the legal effect and tenor of the constituting documents.

227 In the course of evidence we were invited to consider several cases in which footballers had left Rangers. The sub-trust / loan arrangements subsisted. Only with the consents of those interested in the capital of the sub-trust concerned, could the legal framework be "unscrambled", so enabling the player to receive an absolute right to the monies put into trust. Mr Klos was a case in point (see para 23).

228 No instances of a contrasting approach, with an uncomplicated system for payment were noted, and we have no reason to consider that the cases cited were contrived. The case of the sequestration of Maurice Ross might be noted briefly. Mr Thomson considered it significant that he had not declared the loan from his sub-trust as a debt. However, we are unaware as to the nature of any professional advice which he then received, and we are not prepared to speculate as to his understanding of the legal technicalities of the trust / loan arrangements.

229 In several instances players (and their professional advisers) had sought further expert specialist advice on the trust / loan arrangements. On behalf of Mr McLeish, Mr Morgan had consulted with Messrs Turcan Connell, WS, and on behalf of Mr Stefan Klos, Mr David Glen, CA, a tax partner himself in PwC, had sought guidance from his legal department. On such independent referral, it seems, these arrangements had been viewed as enforceable in law.

230 During his closing submissions we invited Mr Thomson to give us a considered reply as to whether or not HMRC would regard the loans as debts on an employee's estate in the event of death. He replied (two days later) to the effect that HMRC preferred not to commit itself. We would have expected such a claim of indebtedness to be vigorously disputed.

231 The trust / loan scheme is essentially straightforward. It does not include a complicated sequence of stages. The extent of the employer's obligation is to make a payment into trust. The trust structure and loans bear to be of legal effect. Loans were discretionary although in fact they were (almost) invariably granted. But that was the extent of the employee's benefit. Whether the arrangement is viewed commercially or legalistically, the inexorable conclusion, in our view, is that the payments into trust became a loan and no more. They were not paid over absolutely and so do not become *earnings* or *emoluments* . We do not regard the liability to make repayment as a remote contingency which might in the context of a purposive construction fall to be disregarded as too remote for practical purposes c / f *Astall & Anor v R & C Commissioners.*

232 Our Findings of Fact are as set out in para 103 *supra* and in our consideration of tax liability in particular cases (para 203 *et seq*) we have identified a factual matrix upon which we have proceeded. We are unable to make further Findings-in-Fact in support of there being an orchestrated scheme extending to the payment in effect of wages or salary absolutely and unreservedly to the employees involved, as Mr Thomson urged us to do. We considered this with some care in view of his trenchant criticism of certain witnesses' evidence. We make the following **Findings of Law** as affecting the general arrangements and confirming *in Law* as well as *in Fact* the trust structure and loan arrangements –

1. The principal trust purportedly constituted by the Trust Deed by MGM Limited and Insinger Trust Co Ltd dated 20 April 2001 was valid and subsisting and continues.

2. The sub-trusts (subject to our remarks in paras 210 and 226) purportedly constituted by the relative declarations of trust were valid and subsisting and continue.

3. The sums advanced to the employees of the Appellants by way of loan in terms of the relative loan documents, were made in pursuance of discretionary powers and remain recoverable and represent debts on their estates.

4. The sums advanced by the Appellant companies into the principal trust, whether on payment thereto, or on payment to a sub-trust, or thereafter on being advanced by way of loan to the employee, were not at any time held absolutely or unreservedly for or to the order of the individual employee.

233 Accordingly, the assessments made fall to be reduced substantially. It was conceded that advances in favour of certain players are taxable and liable to NIC, and we have found that in certain other limited instances, there may be a similar liability. To that extent the assessments should stand. In these circumstances we expect that it is sufficient that we allow the Appeal in principle. Parties can no doubt settle the sums due for the limited number of cases mentioned without further reference to the Tribunal."

The minority opinion

8. In her dissent Dr Poon observed:

"1. …The essential differences between the majority and minority can be summarised in two respects. With regard to Findings-in-Fact, I cannot subscribe to the conclusion reached by the majority that 'we are unable to make further Findings-in-Fact in support of there being an orchestrated scheme extending to the payment of wages or salary absolutely and unreservedly to the employees involved' (paragraph 232). In respect of Findings-in-Law, our essential difference lies in how the *Ramsay* principle is to apply. The kernel of my colleagues' decision, contained in paragraph 223, is that they 'have to regard the trust structure and loans as "… genuine legal events with real legal effects" [quoting from *Mayes*].' I disagree that the legal form of a transaction with its corollary legal effect is conclusive as a dictum in applying the *Ramsay* principle, and make extra Findings-in-Law regarding *Ramsay* and its application to the present case…

14. The critical issue in front of this Tribunal is whether payments made via the remuneration trust mechanism amount to being emoluments for tax purposes. The questions that arise are as follows:

(1) Whether upon the true interpretation of the contractual arrangements, there have been payments made to the employees via the trust?

(2) Can these trust payments be characterised as having been made 'unreservedly at the disposal' of the employees?..."

Subsequent procedure

9. The hearing before the FTT took place in private. In the decision which was published the identities of all of the witnesses were anonymised. On 9 August 2013 the UT, having heard the parties, directed that all further hearings, whether before the UT or the FTT, should be in public and no decisions should be anonymised or redacted save that (i) the names of the

HMRC officers who gave evidence should not be made public; and (ii) the names of those other witnesses (two in number, and referred to as Mr Silver and Mr Gold in the anonymised version of the decision) who were not compellable and who gave evidence to the FTT after having being assured of anonymity, should not be made public.

10. The hearing had been set down for 24 February 2014 and the following 19 days. Following a directions hearing on 13 February 2014 I directed that the UT would hear argument on (i) the grounds of appeal, and (ii) appropriate further procedure in the event of the grounds of appeal being successful: but that the scope of the hearing would not extend to examination of the evidence with a view to persuading the UT to remake the decision and make findings in fact. A revised duration of 10 days was fixed, 5.5 days of which were allocated to the appellants and 4.5 days to the respondents.

The relevant legislation

11. Before 6 April 2003, tax was charged under Schedule E "in respect of any office or employment on emoluments therefrom which fall under one or more than one of" Cases I, II or III (ICTA, section 19(1)). ICTA, s 131(1) provided:

> "Tax under Case I, II or III of Schedule E shall, except as provided to the contrary by any provision of the Tax Acts, be chargeable on the full amount of the emoluments falling under that Case, subject to such deductions only as may be authorised by the Tax Acts, and the expression 'emoluments' shall include all salaries, fees, wages, perquisites and profits whatsoever."

ICTA, s 203(1) provided that on the making of any payment of any income assessable under Schedule E, income tax should be deducted by the person making the payment in accordance with the regulations made by the Commissioners. The relevant regulations were the Income Tax (Employments) Regulations 1993 (SI 1993/744).

12. With regard to the tax years from 6 April 2003, the relevant legislation, ITEPA Part 2, imposes a charge to tax on employment income. ITEPA, s 62 provides (so far as material) that:

> "62 Earnings
> (1) This section explains what is meant by 'earnings' in the employment income Parts.
> (2) In those Parts 'earnings', in relation to an employment, means –
> (a) any salary, wages or fee,
> (b) any gratuity or other profit or incidental benefit of any kind obtained by the employee if it is money or money's worth, or
> (c) anything else that constitutes an emolument of the employment.
> (3) For the purposes of subsection (2) 'money's worth' means something that is –
> (a) of direct monetary value to the employee, or
> (b) capable of being converted into money or something of direct monetary value to the employee.… "

ITEPA s 684 provides that the Commissioners must make regulations with respect to the assessment, charge, collection and recovery of income tax in respect of PAYE income. Under the provisions of section 684 the Commissioners made the Income Tax (PAYE) Regulations 2003. These provide that an employer must deduct tax from payments of, or on account, of, any taxable earnings and pay the tax to the Commissioners (reg 21(1)).

Regulation 80 provides that if it appears that there may be tax payable by an employer which has not been paid, the Commissioners may determine the amount of that tax and serve notice of their determination on the employer.

13. Thus, the relevant question so far as income tax is concerned is whether, in each case, there has been a payment of earnings (or emoluments) by the Appellants to the relevant employee.

14. Provision for the making of NIC is contained in the Social Security Contributions and Benefits Act 1992 and subordinate legislation. Sections 6 to 9 of that Act provide, in relation to an earner employed under a contract of service, that where in any tax week earnings are paid to or for his benefit, the employed earner shall pay a Class 1 contribution and his employer will pay a secondary Class 1 contribution. Section 3 provides that "earnings" includes "…any remuneration or profit derived from an employment." Before the FTT both parties proceeded on the basis that the appeals in relation to income tax and NIC raised essentially the same issues. If the respondents were liable to pay the income tax assessments in relation to earnings they were also liable to pay the corresponding sums in respect of NIC in respect of those earnings. That remained the parties' position before the UT. The appellants did not argue that the wider scope of "earnings" in the NIC legislation (compared to "emoluments" in the income tax legislation) was of any significance for present purposes (*cf. Forde & McHugh Limited v HMRC* [2014] UKSC 14 per Lord Hodge at paras 10-13).

15. Sections 401 and 403 of ITEPA provide:

> "Part 6 EMPLOYMENT INCOME: INCOME WHICH IS NOT EARNINGS OR SHARE-RELATED
> Chapter 3 PAYMENTS AND BENEFITS ON TERMINATION OF EMPLOYMENT ETC.
> Preliminary
> 401 Application of this Chapter
> (1) This Chapter applies to payments and other benefits which are received directly or indirectly in consideration or in consequence of, or otherwise in connection with—
> (a) the termination of a person's employment,
> (b) a change in the duties of a person's employment, or
> (c) a change in the earnings from a person's employment,
> by the person, or the person's spouse [or civil partner], blood relative, dependant or personal representatives.…
> (3) This Chapter does not apply to any payment or other benefit chargeable to income tax apart from this Chapter.
> (4) For the purposes of this Chapter—
> (a) a payment or other benefit which is provided on behalf of, or to the order of, the employee or former employee is treated as received by the employee or former employee …
>
> 403 Charge on payment or other benefit
> (1) The amount of a payment or benefit to which this Chapter applies counts as employment income of the employee or former employee for the relevant tax year if and to the extent that it exceeds the £30,000 threshold.
> (2) In this section *"the relevant tax year"* means the tax year in which the payment or other benefit is received.
> (3) For the purposes of this Chapter—

(a) a cash benefit is treated as received—
(i) when it is paid or a payment is made on account of it, or
(ii) when the recipient becomes entitled to require payment of or on account of it, and
(b) a non-cash benefit is treated as received when it is used or enjoyed…."

The appeal hearing

16. Mr Thomson's submissions took six days. Mr Thornhill's took four days. Following the conclusion of the hearing both parties made further written submissions (relating to *PA Holdings Ltd v HMRC* [2011] EWCA Civ 1414, [2012] STC 582, and *DB Group Services (UK) Ltd v HMRC; HMRC v UBS AG* [2014] EWCA Civ 452). I am grateful to counsel for the very considerable assistance they gave me. What follows is an outline of the main arguments which were advanced. The principal authorities referred to were:

Aberdeen Asset Management Plc v HMRC 2014 SLT 54
Abbott v Philbin [1961] AC 352
American Express Services Europe Ltd v HMRC [2010] STC 1023
Armitage v Nurse [1998] Ch 241
Astall v R & C Commissioners [2010] STC 137
Autoclenz Limited v Belcher [2011] UKSC 41, [2011] 4 All ER 745
Barclay's Mercantile Business Finance Ltd v Mawson [2005] 1 AC 684
Brander v HMRC [2010] STC 2666 (UT)
CIR v Scottish Provident Institution 2005 1 S.C. (HL) 33, (2004) 76 TC 538
Collector of Stamp Revenue v Arrowtown Assets Ltd [2003] HKCFA 46
DB Group Services (UK) Ltd v HMRC; HMRC v UBS AG [2014] EWCA Civ 452
DTE Financial Services v Wilson [2001] STC 777
Eagil Trust Co Ltd v Pigott-Brown [1985] 3 All ER 119
Edwards v Bairstow 1956 AC 14
Edwards v Roberts (1935) 19 TC 618
English v Emery Reimbold & Strick Ltd [2002] EWCA Civ 605
Forde & McHugh Limited v HMRC [2012] EWCA Civ 692, [2014] UKSC 14
Furniss v Dawson [1984] STC 153 (HL)
Garforth v Newsmith Stainless Ltd [1979] STC 129
Georgiou (t/a Mario's Chippery) v CCE [1996] STC 463 (CA)
Heaton v Bell [1970] AC 728
HMRC v Mayes [2009] EWHC 2443 (Ch), [2011] EWCA Civ 407
John Mander Pension Trustees v HMRC [2013] UKUT 51, [2013] EWCA Civ 1683
Leeds Design Innovation Centre v HMRC [2014] UKFTT 9 (TC)
Liquidator of Letham Grange Development Co Ltd v Foxmouth 2013 SLT 445
McBride v Scottish Police Services Authority 2013 S.C. 268
Macdonald v Dextra Accessories Ltd (2002) 77 TC 146
MacNiven v Westmoreland Investments Ltd [2003] 1 AC 311
Meek v City of Birmingham District Council [1987] IRLR 250
Morrow v Enterprise Sheet Metal Works (Aberdeen) Ltd 1986 SLT 697
PA Holdings Ltd v HMRC [2011] EWCA Civ 1414, [2012] STC 582
Pendragon Plc v R & C Commissioners [2013] EWCA Civ 868
Procter & Gamble UK v R & C Commissioners [2009] STC 1990
(WT) Ramsay Ltd v IRC [1982] AC 300
R & C Commissioners v London Clubs Management Ltd [2011] EWCA Civ 1323
Rank Group plc v HMRC [2013] STC 420
Sempra Metals Ltd v HMRC [2008] STC (SCD) 1062

Sinclair Roche & Temperley v Heard (No.1) [2004] IRLR 763
Smyth v Stretton (1904) 5 TC 36
Snook v London & West Riding Investments Ltd [1967] 2 QB 786 (CA)
Tennant v Smith [1892] AC 150
Wilkins v Rogerson [1961] Ch 133

The appellants' submissions

17. The main thrust of Mr Thomson's submissions was that the FTT had misdirected itself in law in relation to the proper interpretation and application of the *Ramsay* principle. It had not approached matters correctly.

18. What it ought to have done was to ask whether, construing each of the relevant statutory provisions purposively, and viewing the facts realistically, the composite transaction fell within the scope and intendment of the provision. The circumstances to which regard had to be had when considering the composite transaction were that employer and employee understood that payments would be made into the trust and then into a sub-trust; that the monies could be immediately obtained by way of loan or left in the sub-trust to be invested subject to the direction of the employee; that the employer had rights as protector of the remuneration trust which included the right to remove the trustee; that the employee had rights as protector of his sub-trust which included the right to remove the trustee and to appoint (and remove) beneficiaries; that the understanding and expectation of the employer, employee and trustee was that loans would be renewed on request and that repayment would not be demanded during the employee's lifetime; that on the employee's death a loan could be treated as a debt to the sub-trust, with consequent inheritance tax advantages; and that the employer would facilitate the operation of the scheme in accordance with how the parties understood it was to operate. The appellants' primary position was that, in those circumstances, the composite transaction resulted in payment of earnings being made when monies were transferred to the sub-trusts. Their alternative submission was that it resulted in payment of earnings when loans were advanced to employees (as they had been in respect of 453 of the 457 payments to sub-trusts, *i.e.* each and every case where a loan had been applied for).

19. The majority had not asked themselves whether the composite transaction fell within the scope and intendment of the relevant statutory provisions. They had not taken a realistic view of the facts. They had gone seriously wrong. They had misinterpreted and misapplied observations of the court in *HMRC v Mayes* [2011] EWCA Civ 407. The statutory provisions which required to be construed in *Mayes* - Chapter II of part XIII of ICTA - constituted a code for identifying and quantifying gains on life policies and for subjecting those gains to tax. The legislation was highly engineered. It adopted a formulaic and prescriptive approach. The gains to be taxed were gains attributable to the statute rather than real ones. Those features of the legislation had made it difficult to give it a purposive commercial construction (see [2009] EWHC 2443 (Ch), Proudman J at paras 14, 21, 27, 28, 31-33, 35, 37, 44, 47; [2011] EWCA Civ 407, Mummery LJ at paras 9, 77, 78, Toulson LJ at paras 102, 103, 106, 107). The legislation under consideration in the present case was very far removed from that sort of legislation. "Emoluments", "earnings" and "payment" where they occurred in each of the relevant statutory provisions were terms which lent themselves readily to purposive construction. Notwithstanding that, the majority had proceeded as if the approach to each of these legislative provisions should be along the same lines as the approach to the highly prescriptive and formulaic provisions

under consideration in *Mayes* (see in particular paras 191, 193, 222, 223, 224 of the majority decision). They had erred in law in doing so.

20. An illustration of the correct approach was to be found in the decision of the Inner House in *Aberdeen Asset Management Plc v HMRC* 2014 SLT 54. The intention underlying the legislation relating to income from employment and the PAYE system was that both should be comprehensive in nature (per Lord Drummond Young at para 27). The fact that an employee had practical control over the disposal of funds was sufficient to constitute payment for the purposes of the PAYE legislation (paras 34, 36). The composite transaction had to be looked at as a commercial whole. It was the practical ability to make use of the funds which was important, not the strict legal form of component parts of the transaction (para 38).

21. The majority had erred in approaching the case on the basis that, as the trusts and the loans were not shams, evidence as to how matters were intended to and did operate was immaterial: the terms of the trusts and loans were determinative. Had they approached their task correctly, and considered the result of the composite transaction rather than focussing solely on the trusts and the loans, they ought to have concluded that there was indeed payment of earnings / emoluments. Their failure to focus on the composite transaction was evident from their characterisation in para 186 of the essential issue before them. Further, they had erred by approaching matters the wrong way round. They should have analysed the facts first and then asked whether they satisfied the requirements of "emoluments", "earnings" and "payment" in the relevant statutory provisions.

22. The majority had failed to consider what the reality of the agreement between employer and employee was (*Heaton v Bell* [1970] AC 728*; Autoclenz Limited v Belcher* [2011] UKSC 41). They had treated unreserved disposal as being a prerequisite of payment of emoluments / earnings in all circumstances. They had been wrong to do so. If, as the appellants maintained, there had been a tacit underlying agreement to pay earnings, or if there had been directed payment of earnings, it would not be necessary also to demonstrate that the funds advanced to the sub-trust, or the funds loaned, were at the unreserved disposal of the employee. The majority had failed to recognise that. They had failed to address the appellants' submissions on those matters. They had failed to make findings in fact on the evidence material to those submissions.

23. They had erred by proceeding on the basis that for there to be payment the employee had to have an absolute legal entitlement to the monies in the sub-trust or to the monies advanced to him. That was the crux of their decision. Where the reality was that in the whole circumstances an employee was given practical access to or control of monies it mattered not that he did not have absolute legal title to them. In such circumstances there was payment or an equivalent to payment. Unreserved disposal was an equivalent to payment. The majority had decided the matter before them on the basis that it was unnecessary to make findings in relation to most of the circumstances relied upon by the appellants because those circumstances were incapable, in their view, of putting the employees in the position where they had unreserved disposal. They had reasoned, wrongly, that for there to be payment or an equivalent to payment the result must be that the employee ended up with absolute legal title to the monies. The correct approach was to consider the whole circumstances of the composite transaction, including how the scheme was intended to operate, and how it actually operated.

24. The majority had failed in its duty to make findings in fact on all matters material to the dispute between the parties. Only very limited findings in fact had been made - those set

out in para 103 - to supplement the (equally limited) agreed findings in the Statement of Agreed Facts. Over and above that the majority proffered certain comments and observations during their narration of the evidence and in the course of their decision, but these ought not to be treated as if they were findings in fact. They were, in any event, of unclear or ambiguous import in many cases. What was clear beyond peradventure was that there was a lot of evidence, much of it which could only be uncontentious, which had been material to a correct application of the *Ramsay* approach, or which bore upon the other arguments which had been advanced by the appellants, but in relation to which no findings had been made. Thus, for example, there were no findings setting out what the documentary evidence and oral evidence disclosed as to how the scheme was intended to operate and how it actually operated; that the only purpose of the scheme was tax avoidance; or in relation to the question whether the trustees, Equity and then Trident, had in fact exercised any real discretion when granting loans or making investments at the direction of employees. Nor had proper findings been made on the question whether loans would be renewed, or whether there was any material risk of repayment being sought during the lifetime of the employee in circumstances where he was not agreeable to making repayment. They commented that there was "a degree of orchestration with employees" but made no clear findings in fact setting out what that orchestration was. They did not discuss or deal with the appellants' argument that there was an underlying tacit agreement to pay earnings to employees and that the payments to the sub-trusts and the loans were just a means of giving effect to that. Nor did they discuss or deal with the appellants' argument that the payments to the sub-trusts involved directed payment of earnings (*i.e.* that the employee had simply chosen and directed that part of his remuneration be paid in that way).

25. The majority had erred in their consideration and application of *CIR v Scottish Provident Institution* 2005 S.C. (HL) 33, (2004) 76 TC 538. The expectation of all concerned was that loans would be renewed during the employee's lifetime. The risk of loans not being renewed was not appreciable. It was the sort of contingency that the parties had been prepared to accept. The composite effect of the scheme required to be considered as it was intended to operate and without regard to the possibility that, contrary to the intention and expectation of the parties, it might not work as planned because the trustee might exercise a discretion in a way which was adverse to an employee's wishes. It was commercially irrelevant, and the FTT ought to have so found. The comment in para 231

> "We do not regard the liability to make repayment as a remote contingency which might in the context of a purposive construction fall to be disregarded as too remote for practical purposes c/f *Astall & Anor v R & C Commissioners."*

was not a finding in fact. All it appeared to be based on was the formal legal validity of the loans. No findings in fact had been made about the likelihood of actual repayment being demanded.

26. The FTT had also fallen into error in following *Sempra Metals Ltd v HMRC* [2008] STC (SCD) 1062. That case had been wrongly decided: the Special Commissioners ought to have concluded that the risk of the trustee not acting "according to plan" was the sort of risk which ought to have been disregarded in accordance with the guidance provided in *CIR v Scottish Provident.* The majority had not addressed that argument. Further, they had wrongly proceeded on the basis that the decision of the Special Commissioners had not been appealed by HMRC. It had been appealed and the parties had reached a compromise. In any event *Sempra* was distinguishable and ought to have been distinguished. The Special Commissioners had been clear that, looking at the facts realistically, the trustee was

not a cipher. The majority ought to have distinguished *Macdonald v Dextra Accessories Ltd* (2002) 77 TC 146 for the same reason. No such finding that the trustees were not ciphers had been made here, nor had it been open to the majority on the evidence to make such a finding. The only reasonable conclusion was that there had been no genuine exercise of discretion by trustees in relation to the setting up of sub-trusts and the granting and processing of loans. The conclusion ought also to have been that there would be no genuine exercise of discretion in relation to renewal of loans or repayment.

27. Certain of the findings which the majority had made had been unreasonable in an *Edwards v Bairstow* sense: *viz* the observations made as to Mr MacMillan's credibility, reliability and motivation; the statement in para 205 that it was not the generally held view of executives that they had a choice between a cash bonus and a discretionary trust benefit; the (inferential) suggestions in para 224 that Mrs Orchard's conduct as a trustee and Equity and Trident's conduct were merely "lax"; the reference to Equity having taken "a firm stance"; the reference in para 207 to Rangers making "take it or leave it" offers to footballers; that the employees' expectation was to no more than a loan (para 224); that there was merely "a degree" of orchestration and that it fell short of enabling an absolute transfer of funds to the employee (para 225); their conclusion concerning Mr Ross and that they were "not prepared to speculate"; their conclusion that loans were "almost invariably granted" (paras 103(vii), 231); and the acceptance of Mr Bain and Mr Dickson's evidence as being credible and reliable, in particular on the issue of UEFA Champions League bonuses.

28. It was also submitted that the majority had erred in law in failing to make a finding that the non-disclosure to the SFA of footballers' side-letters had been in breach of rule 4.5 of the SFA Registration Procedure Rules.

29. The majority had failed to determine how each of the 35 termination payments made through the remuneration trust fell to be treated. They had merely identified (para 209) some considerations which might be applicable in the case of the termination payments to footballers. The onus had been on the respondents to satisfy the FTT that the assessments in relation to these payments were erroneous. They had failed to do so. The FTT ought simply to have upheld the assessments.

30. More generally, the FTT had been wrong to provide only a decision in principle in circumstances where only the respondents asked them to do so (para 204), and where the appellants had asked for each of the various appeals to be determined.

31. In the event that it was accepted that the FTT had erred in law, some of the findings it made would have been made on an erroneous basis. Further fact finding in relation to relevant and material evidence would be required. Mr Thomson submitted that the FTT's approach had been so fundamentally erroneous that it would not be right to remit the matter to them, even with appropriate directions. The choices were remitting to a freshly constituted FTT to consider the case anew (TCEA, s. 12(2)(b)(i), 12(3)) or that the UT consider the evidence, make such findings in fact as it considers appropriate, and remake the decision (TCEA, s. 12(2)(b), (4)). Neither course was particularly attractive, but, on balance, the latter was preferable. While it was accepted that fact finding on such a large scale was not an exercise normally performed by the UT, beginning again before a fresh FTT would have considerable time, expense and inconvenience consequences.

32. The majority had mentioned, but not ruled upon, "particular exceptional cases" (para 211). They ought to have decided them. Mr Thomson indicated that the appellants did not seek to uphold the assessment (or assessments) relating to the Bel Azur profit. The other

assessments relating to payments to Sir David Murray's sub-trust, his sons' sub-trusts, Mr MacMillan' s sub-trust, and Mr McClelland's sub-trust did not in fact give rise to considerations which were any different in principle from those which applied in the cases of the other sub-trusts. Whether those assessments stood or fell turned on those same considerations. Although in relation to Mr McClelland the respondents now argued, for the first time, that the employer had not been the respondent upon whom the assessments had been made, it was not open to the respondents to seek to advance that point at this juncture. They had had the opportunity to take it before the FTT, and to lead evidence in support of it, but had not done so. The onus had been on them to do so.

33. The onus had also been on the respondents to satisfy the FTT that the grossing up element of the assessments was incorrect. In each case the agreement had been to provide a net sum, free of tax and national insurance, to the employee. Grossing up had accordingly been appropriate.

The respondents' submissions

34. The appeal to the UT was a restricted one - it had to be on a point of law arising from the decision of the FTT (TCEA, s. 11). Mr Thornhill submitted that the FTT had not erred in law. In large part the appeal demonstrated a refusal by the appellants to accept that the FTT had not agreed with their view of the facts. In fact, a great deal of the evidence which had been led had been of marginal or of no importance.

35. There had not been payment of earnings. The payments to the sub-trusts and the subsequent loans were not earnings. They were benefits in kind but were not taxable. They were not money or money's worth.

36. It was wrong to suggest that the FTT had misunderstood and misapplied the *Ramsay* approach. The majority had clearly identified the applicable law (see in particular paras 190 and 192). They had applied a purposive construction to the relevant statutory provisions and had taken a realistic view of the facts (see in particular paras 190, 200, 203, 231). The references by them to *Mayes* had not signified any departure from that approach, albeit it was accepted that the legislation in *Mayes* had been of an entirely different kind. The reference to "a highly prescriptive statutory code" at para 193 is likely to have been a reference to the code dealing with emoluments. If it was a reference to the statutory provisions dealing with beneficial loans it was open to question whether it was an accurate description, but the majority were not suggesting that there could be taxation *only* under such provisions. The suggestions in *Aberdeen* and in *Sempra* (para 130) that "emolument" ought to be given a wide construction were puzzling, and they did not accord with the conventional view (cf. *Forde & McHugh Ltd v HMRC*, per Lord Hodge at para 10). The order in which the FTT approached the tasks before them was a matter for them: the important thing was that the correct questions were addressed (*Astall v R & C Commissioners* [2010] STC 137, per Arden LJ at paras 44-45; *Barclays Mercantile Business Finance Ltd v Mawson* [2005] 1AC 684, per Lord Nicholls at para 32). It was not correct to suggest that the FTT had failed to consider the composite transaction. It was clear from a careful reading of the decision that they had. Thus the reference in para 186 was to "loans" (in inverted commas). In para 231 what was being considered was the whole "trust/loan scheme": that ought reasonably to be read as including all its aspects including the employees' powers as protectors (para 224), and the fact that there was a degree of orchestration in the arrangements made with employees (para 225). From beginning to end the FTT had emphasised that it required to take a "purposive", "commercial", "realistic"

view. What the majority had to, and did, concentrate on was whether there was more than a loan: whether there was there some further arrangement.

37. There had not been a failure to find facts. The starting point was that the findings were not only in para 103 and the Statement of Agreed Facts. Important findings could be found elsewhere in the decision. It was erroneous to suggest that the FTT had a duty to make findings in relation to all the evidence they had heard. The duty of a statutory tribunal was to set out those facts necessary to an understanding of its decision (*Proctor & Gamble UK v R & C Commissioners* [2009] STC 1990, per Jacob LJ at para 19, Toulson LJ at paras 61-62). The FTT more than performed their duty. They fully grasped the appellants' case - but concluded that the case for the findings sought by them had not been made out (paras 225,232). The parties had been told "why they have won or lost" (*Meek v City of Birmingham District Council* 1987 [IRLR] 50, per Sir Thomas Bingham at para 8).

38. The FTT had not erred in holding that for there to be payment of earnings the employee had to have unreserved disposal. That was in accordance with what had been decided in *Garforth v Newsmith Stainless Ltd* [1979] STC 129, *Sempra, Dextra* and, most recently, by the Inner House in *Aberdeen*. There was no conflict between the FTT's decision and the *ratio* of the Inner House decision in *Aberdeen*. In addition, *Aberdeen* was clearly distinguishable on its facts: the monies there had been at the unreserved disposal of the employees. On a fair reading, the FTT's decision was not that absolute legal title to the monies was needed for there to be unreserved disposal. It was that for the test to be satisfied the employee had to be able to obtain such an absolute right if he chose to. Mr Thornhill accepted that if the appellants had established that there was an underlying tacit agreement to pay earnings, or that there was directed payment of earnings, the arrangements would have been entered into at a time when the employees already had a present right to payment. It was also accepted that if the FTT had overlooked the underlying tacit agreement argument and/or the directed payment argument that would be an error of law. However, Mr Thornhill submitted that while the FTT had not explicitly referred to them, on a fair reading of the decision the proper inference was that they had been rejected.

39. The findings, particularly those in paras 224, 231 and 232 were completely inconsistent with there having been an underlying tacit agreement to pay earnings.

40. The directed payment argument depended upon the FTT accepting that the employees had a choice, and that at the time the choice was exercised the employees already had a present entitlement to payment. The FTT had not accepted that there had been a present entitlement to earnings at the relevant times (cf. the analogous position in *DB Group Services (UK) Ltd v HMRC; HMRC v UBS AG* discussed by Rimer LJ at paras 67-75). The FTT had not accepted that the employees had had a choice (see paras 205 (executives) and 207-8 (footballers)).

41. The FTT had not failed properly to identify the composite transaction. They had identified such a transaction but concluded that the end result of it was a loan which was repayable. Importantly, they had found in fact (para 231) that the liability to make repayment was not a remote contingency which would fall to be disregarded as too remote for practical purposes. It was salutary that the appellants had not sought to attack that finding on *Edwards v Bairstow* grounds. The finding put paid to any possible argument to the contrary. The finding that the monies were not at the unreserved disposal of the employees was a finding in fact too. If it was not a finding in fact it was of the nature of a value judgement in relation to which there had been no error of principle.

42. The FTT were not persuaded that *Sempra* had been wrongly decided. That was unsurprising because it may readily be inferred from the Special Commissioners' conclusions that they did not regard repayment of loans as being a remote contingency. By contrast, here the FTT had addressed the matter squarely and had found in fact that repayment of the loans was not a remote contingency.

43. It was also unsurprising that the FTT did not accept that *Sempra* and *Dextra* ought to be distinguished from the present case on the basis that the trustees there were held not to be ciphers. Here it was clear that the FTT must have rejected the contention that the trustees were ciphers. Reference was made to their findings (i) relating to the trust legal framework, at least one period of trustee non-compliance in the past, and the risk of possible criticism from beneficiaries (paras 47(ii) and 225); (ii) that loans were repayable and that repayment was not a remote contingency (para 231); (iii) that only with the consents of those interested in the capital of the sub-trust could the legal framework be "unscrambled" enabling the player to receive an absolute right to the monies put into trust (para 227).

44. Of the numerous *Edwards v Bairstow* points advanced by the appellants, only two were critical, *viz* (para 225) "that there was a degree of orchestration in the arrangements made with employees [but] … that these fall short of enabling an absolute transfer of funds to the employee"; and (para 224) "Having regard to the legal effect of the trust and loan structure, the employees' entitlement or, rather, expectation is to no more than a loan." The other complaints related to peripheral matters which did not go to the core of the case.

45. The FTT was the primary fact finder, and the primary maker of value judgments based on those primary facts. Unless the FTT had made a legal error in carrying out these tasks (e.g. reached a perverse finding, or failed to make a relevant finding, or misconstrued the statutory test) the UT ought not to interfere (*Edwards v Bairstow***,** per Lord Radcliffe at page 229; *Procter & Gamble,* para 7; *Pendragon Plc v R & C Commrs Plc v R & C Commissioners* [2013] EWCA Civ 868 at para 75. In *Georgiou (t/a Mario's Chippery) v CCE* [1996] STC 463 at page 476 Evans LJ, with whom Saville LJ and Morritt LJ agreed, said:

> "There is a well-recognised need for caution in permitting challenges to findings of fact on the ground that they raise this kind of question of law … It is all too easy for a so-called question of law to become no more than a disguised attack on findings of fact which must be accepted by the courts.**…**Secondly, the nature of the factual inquiry which an appellate court can and does undertake in a proper case is essentially different from the decision-making process which is undertaken by the tribunal of fact. The question is not, has the party upon whom rests the burden of proof established on the balance of probabilities the facts upon which he relies, but, was there evidence before the tribunal which was sufficient to support the finding which it made? In other words, was the finding one which the tribunal was entitled to make? Clearly, if there was no evidence, or the evidence was to the contrary effect, the tribunal was not so entitled.
>
> It follows, in my judgment, that for a question of law to arise in the circumstances, the appellant must first identify the finding which is challenged; secondly, show that it is significant in relation to the conclusion; thirdly, identify the evidence, if any, which was relevant to that finding; and, fourthly, show that that finding, on the basis of that evidence, was one which the tribunal was not entitled to make. What is not permitted, in my view, is a roving selection of evidence coupled with a

> general assertion that the tribunal's conclusion was against the weight of the evidence and was therefore wrong."

46. The inferences to be drawn from primary facts were also a matter for the FTT. An inference could only be challenged if it was not one which could be drawn on the basis of the primary facts (*Furniss v Dawson* [1984] STC 153 (HL) per Lord Brightman at p. 167; *American Express Services Europe Ltd v HMRC* [2010] STC 1023 at para 8).

47. Turning then to the important *Edwards v Bairstow* points. There was evidence entitling the FTT to find that the orchestration arrangements fell short of enabling the absolute transfer of funds to the employee. The finding that the employees' expectation was to no more than a loan was a finding the FTT were entitled to make standing their conclusions as to the legal effectiveness of the loans and the trust structure, the findings made as to the extent of the powers of protectors (para 224), and the finding that only with the consents of those interested in the capital of the sub-trust could the legal framework be "unscrambled" (para 227). In relation to neither of these two points had the appellants even embarked upon the third and fourth stages identified in *Georgiou.* The descriptions of Mrs Orchard as "lax" (paras 86 and 225) and of Equity taking a "firm stance" (para 86) were both conclusions that the FTT had been entitled to reach on the evidence. They both related to the broader issue of whether or not the trustees were ciphers. The FTT had been asked by the appellants to find that they were but, on a fair reading of the decision, they had declined to do so. There had been evidence from Mrs Orchard that she owed duties to beneficiaries and could be answerable for breach of those duties. The trustee's indemnity would not protect the trustee in the case of reckless or dishonest actings, *cf. Armitage v Nurse* 1998 Ch 241, per Millet LJ at pp. 251B - 252G, 253H - 254A. On the evidence the FTT had been entitled to use the descriptions they had. They had not been obliged on the evidence to conclude that the trustees were mere ciphers.

48. The observations made relating to Mr MacMillan were the sort of evaluative judgements which the FTT had been entitled to make. There had been evidence entitling it to find that the generally held view of executives was that they had a choice between a cash bonus and a discretionary trust benefit. There had been evidence that once the stage had been reached that a deal which included remuneration trust payments was offered to footballers, the offer had been on a take it or leave it basis. The FTT had been entitled to accept the evidence of Mr Bain and Mr Dickson in relation to the UEFA Champions League bonuses. The approach the FTT took in relation to the evidence about Mr Ross' sequestration was clearly one which had been open to it to take. The criticism about the finding that loans were "(almost) invariably granted" was nit-picking. It was plain that the FTT had understood that if an employee had wanted a loan from his sub-trust he got it. None of these challenges was well-founded. None was important to the FTT's reasoning and conclusions. In none of them were all of the *Georgiou* criteria satisfied.

49. There had been no obligation on the FTT to decide whether there had been an obligation under SFA rules to disclose side-letters. That issue was collateral to the issues which it had to determine. If it was not collateral it was very peripheral.

50. In relation to the termination payments Mr Thornhill's primary submission was that employees had no prior entitlement to payments made through the remuneration trust on termination. If the FTT had accepted that that was indeed the position then there ought to be no tax charge. If para 209 could not be read in that way, then in relation to this matter the FTT had only reached a decision in principle. In that event, in the absence of resolution

by agreement, the matter should go back to it to decide each of the individual cases involving termination payments, if necessary hearing further evidence in relation to them.

51. The FTT had been entitled to reach a decision in principle in the first instance even if the respondents had resisted that. The FTT has wide powers to determine their procedure (rule 5(1) of the The Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009).

52. If, contrary to Mr Thornhill's submissions, the FTT's decision was vitiated by error of law the proper course would be to allow the appeal and remit the case to the FTT with directions as to how they should proceed. This was not the sort of case where it would be desirable or expedient for the UT to be taken through all the evidence again with a view to it remaking the decision. The UT would not have the advantage of having seen and heard the witnesses, and the exercise would be of a nature and scale quite unsuited to an appellate tribunal. Nor would it be appropriate for the case to begin afresh before a newly constituted FTT, with all the consequent resource, expense and delay implications that would be likely to give rise to. The advantages to be gained from the FTT having considered the documents in depth and heard evidence and argument over 29 days should be exploited. This was not a case where the hearing before the FTT had been wholly flawed or completely mishandled. If there had been an error of law it had been an honest misunderstanding of the legally required approach. The presumption should be that the FTT would go about the tasks set on remission in a professional way, paying careful attention to the guidance given to it (*Sinclair Roche & Temperley v Heard (No.1)* [2004] IRLR 763, per Burton J at paras 45, 46.4, 46.6; *Rank Group plc v HMRC* [2013] STC 420 (UT), per Norris J at paras 27-31; *McBride v Scottish Police Services Authority* 2013 S.C. 268 at paras 35, 36, 40, and 41).

53. So far as the cases which the FTT had raised as possibly presenting special circumstances, it was common ground that the appeal(s) against the assessment(s) relating to the Bel Azur profits should not stand. In relation to the assessments relating to Sir David Murray's sub-trust, his sons' sub-trusts, Mr MacMillan's sub-trust, and Mr McClelland's sub-trust, their correctness fell to be decided on the basis of the same arguments as the assessments concerning other sub-trusts. The only exception to that was Mr McClelland's sub-trust. The evidence did not confirm that he had been employed by the respondent who had been assessed in respect of the payments to his sub-trust. The appeals against those assessments should accordingly be allowed. If on the evidence the matter was unclear and was in dispute the appeals relating to the termination payment assessments should be remitted to the FTT to determine.

54. If any of the assessments were to be upheld the issue of grossing up would be a live one. The FTT did not decide that issue. In the case of the footballers the agreement to pay "[x] net" was not an agreement to pay [x] after deduction of income tax. It had simply been an agreement to pay [x] on the understanding and belief that there was no tax liability. It had been a promise to provide [x], not a promise to provide a sum which after deduction of income tax comes to [x]. The surrounding circumstances showed that that must have been what the parties intended. Rangers could only afford to recruit the players on that basis. In the case of executives, if an executive had said he did not want his bonus of [x] net paid to the remuneration trust he would have got [x] less tax through payroll. It followed that neither in the case of footballers nor executives would grossing up be appropriate.

Discussion and decision

The scope of the appeal

55. An appeal from the FTT to the UT lies only on a point of law (s. 11(1) TCEA). The question for the UT is: as a matter of law, was the FTT entitled to reach its conclusions? (*Procter & Gamble UK v R & C Commissioners,* per Mummery LJ at para 74). Unless the FTT has erred in law, or made a finding which on the evidence it was not entitled to make, the UT is bound by the FTT's findings in fact (*Edwards v Bairstow*).

56. The FTT is a specialist tribunal. When considering its decision its expertise in the particular area requires to be borne in mind. As was observed in *Procter & Gamble*:

> (per Jacob LJ at para 11)
>
> "11 It is also important to bear in mind that this case is concerned with an appeal from a specialist Tribunal. Particular deference is to be given to such Tribunals for Parliament has entrusted them, with all their specialist experience, to be the primary decision maker, see per Baroness Hale in *SH (Sudan)* at [30] cited by Toulson LJ."
>
> (per Toulson LJ at para 48)
>
> "48 Parliament has designated a specialist Tribunal to determine these matters. In reviewing the Tribunal's decision, it is right to bear in mind the cautionary words of Baroness Hale in *Secretary of State for the Home Department v AH (Sudan) [2007] UKHL 49*, para 30, which were expressed in an asylum appeal but were clearly not intended to be limited to that area:
>
> "This is an expert Tribunal charged with administering a complex area of law in challenging circumstances. To paraphrase a view I have expressed about such expert Tribunals in another context, the ordinary courts should approach appeals from them with an appropriate degree of caution; it is probable that in understanding and applying the law in their specialised field the Tribunal will have got it right: see *Cooke v Secretary of State for Social Security [2001] EWCA Civ 734, [2002] 3 All E R 279* , para 16. They and they alone are the judges of the facts. It is not enough that their decision on those facts may seem harsh to people who have not heard and read the evidence and arguments which they have heard and read. Their decisions should be respected unless it is quite clear that they have misdirected themselves in law. Appellate courts should not rush to find such misdirections simply because they might have reached a different conclusion on the facts or expressed themselves differently."

57. Mindful of the UT's proper role I turn to the appellants' challenges to the FTT's decision.

Consideration and application of Ramsay principle

58. The FTT's approach to *Ramsay* appears to have been influenced to some extent by observations which were made in *Mayes* - that the steps under consideration there "were genuine legal events with real legal effects"; and that similar principles to those which applied in *Mayes* might constrain the application of the *Ramsay* approach in the present case.

59. It was common ground that the statutory provisions which were being construed in *Mayes* were of a very different sort from the provisions which fell to be construed in the present case. Sections 539-554 of ICTA were a set of intricate provisions for the taxation of life assurance policies, which provisions were formulaic and prescriptive. They did not lend themselves readily to purposive construction. Here the relevant provisions are not of that type. They are more open to purposive construction.

60. In para 78 of his judgment Mummery LJ concluded that on the true construction of the provisions the steps in SHIPS 2 attacked as being artificial did fall within the ambit of the provisions - being a "premium" paid and a "partial surrender". As I read the judgment, he described them as "genuine legal events with real legal effects" because the events and effects were among those for which specific statutory provision had been made. At para 107 Toulson LJ observed to similar effect:

> "…As Mummery LJ has said, they were legal events with legal consequences. They were events which ICTA has caused to carry physical consequences…"

Neither judge was purporting to set out a stand-alone test of more general application. Mr Thomson says that is in fact how the majority approached matters (paras 191, 223) – the dictum had been taken out of context and misapplied.

61. I am not convinced that the FTT did in fact misdirect themselves in the way suggested. I think it more likely that in para 223 they have borrowed the terminology used in *Mayes,* acknowledged its source, and used it as convenient shorthand for the "enforceable legal structures … which are of fundamental practical effect, and not merely incidental or artificial for tax avoidance purposes only" already referred to (para 193).

62. In any event, on a fair reading of the decision as a whole, I am not persuaded that the majority have fallen into any material error in their consideration and application of the *Ramsay* principle. There is no doubt that elsewhere (*e.g.* paras 190, 192, 200) they identified and set out the correct approach. They were entitled to approach the exercise in the order they chose provided that the end result was a proper application of the criteria (which in my view it was). The criticism that they did not have regard to the composite transaction as the parties intended it to operate appears to me to be unfounded. They approached matters having regard to all the circumstances as they saw them, which must include all the facts they found (including all those at para 103 and elsewhere in the decision). Those circumstances included findings as to how the scheme was in fact operated. They were fully aware of the appellants' contentions in this regard (see *e.g.* para 188*)*. They made specific reference (*e.g.* by way of citation of para 32 of *Mawson*) to the fact a transaction might involve consideration of a number of elements intended to operate together. As already discussed, they drew a distinction between enforceable legal structures which were of fundamental practical effect and legal structures which were "merely incidental or artificial for tax avoidance purposes only."

63. Before the FTT both parties accepted that it was appropriate to adopt a purposive construction of the relevant provisions and to take a realistic view of the facts. The appellants asked the FTT to conclude that in the whole circumstances the reality for fiscal purposes was that earnings were paid to employees when monies were paid to each sub-trust; or, alternatively, that earnings were paid when loans were advanced to them. Their submission was that the trusts and loans were artificial and could be ignored for fiscal purposes. When an unblinkered view of the facts was taken the monies advanced could be, and were, enjoyed by the employees not as loans but as earnings. The trustees were

ciphers. There was no realistic prospect of employees being forced to repay loans against their will.

64. In my opinion it is clear that the FTT did not accept the conclusions which the appellants urged upon them. The majority identified the applicable law (see in particular paras 190 and 192). They applied a purposive construction to the relevant statutory provisions and endeavoured to take a realistic view of the facts (see in particular paras 190, 200, 203, 231). Having done that they held that the end result was that the employees received loans, not earnings. There was neither payment of earnings, nor was there an equivalent of payment in the form of monies being at the unreserved disposal of the employee. The employees could not, without the intervention and co-operation of beneficiaries, obtain absolute entitlement to the monies. The majority held that the loans were recoverable, and that recovery was not a remote contingency of the sort that ought to be ignored. They did not accept the appellants' invitation to find that the trustees were ciphers. They had regard to the fact that the terms of some internal memos and communications were suggestive of "aggressive" tax avoidance, but they were cautious about attaching weight to them. Read in the context of the decision as a whole I think the fair reading of the final sentence of para 226 is that, taking a realistic view of all the facts, the end result is a loan and nothing more. The FTT had indicated at a number of points that a "purposive", "commercial", and "realistic" approach was being taken. They concentrated on whether there was more than a loan: whether there was there some further arrangement. They accepted there was an element of orchestration between employer and employee but they held that such orchestration as there was did not result in it being within the employee's power to obtain anything greater than a loan.

That appears to me to be a conclusion which was open to the FTT.

Aberdeen Asset Management, unreserved disposal, and Scottish Provident

65. The decision and reasoning of the Inner House in *Aberdeen Asset Management* do not lead me to conclude that the FTT erred in law in the present case. In *Aberdeen* the money held by each cash box company was at the employee's unreserved disposal. He could have taken steps which would have resulted in him obtaining absolute entitlement to the money. That was the context in which the employee had practical control of the company's money. That was the setting within which practical control of the funds was seen as being an equivalent to payment.

66. Here the FTT have found that the reality is that the employees have a loan and no more. While the funds in the sub-trusts could be borrowed (and in almost all cases were borrowed) they were not at the unreserved disposal of the employee. Such practical control and use of the funds as he could have/did obtain was as a borrower (albeit on a long term basis). In the event that that was indeed the reality, I did not understand the appellants to suggest that there would be unreserved disposal. It was not contended, for example, that if there were (i) no appreciable prospect of the loans being recovered during life, but (ii) likely repayment on death, there would be unreserved disposal. In those circumstances it is unsurprising that the FTT's finding about the liability to make repayment (at para 231) does not differentiate between repayment during the life of the employee and repayment after his death. Nevertheless, it is apparent from that finding that the FTT were conscious of, and gave thought to, considerations of the sort discussed in *CIR v Scottish Provident.* Had they not been considering matters in accordance with the *Ramsay* approach no such finding would have been required.

67. Given the FTT's findings that the reality of the transaction was that the employees had loan access to the funds, but not more, their conclusion that there was not unreserved disposal cannot be faulted.

Realistic view of what was agreed; tacit agreement to pay earnings; directed payment of earnings.

68. Under reference to *Heaton v Bell* and *Autoclenz v Belcher* Mr Thomson submitted that the FTT had erred in law in failing to conclude that the reality of the agreement between employer and employee was for the payment of earnings. I reject this submission, for very substantially the same reasons that the *Ramsay* challenge fails. I am satisfied on the basis of the FTT's findings and reasoning that they did indeed view the facts realistically, and that they did consider the reality of what the parties agreed.

69. I accept that the argument that there was an underlying tacit agreement between employer and employee to pay earnings was not referred to expressly in the decision. Nevertheless, bearing in mind the significant overlap between this argument and the *Ramsay* argument, I am not readily disposed to hold that the FTT omitted to consider it. In any event in my opinion the findings, particularly those in paras 224, 231 and 232, are inconsistent with there having been an underlying tacit agreement to pay earnings.

70. For similar reasons I am hesitant to conclude the directed payment of earnings argument has been overlooked. In any case, the argument depended upon the FTT accepting that the employees had a choice, and that at the time the choice was exercised they already had a present entitlement to payment. I leave aside for the moment the issue of termination payments. In relation to other payments to sub-trusts there does not appear to have been a present entitlement to earnings at the relevant times (cf. the analogous position in *DB Group Services (UK) Ltd v HMRC; HMRC v UBS AG,* discussed by Rimer LJ at paras 67-75). Nor at the critical times did the employees have a choice between payroll payments and remuneration trust payments (see paras 205 (executives) and 207-8 (footballers)). Accordingly, this challenge also fails.

Failure in fact finding?

71. In my opinion it is disingenuous to suggest that the only findings in fact are in para 103 and the Agreed Statement of Facts. It is plain that the FTT also made other findings of fact - particularly in the "Majority opinion" section beginning at para 186, but also elsewhere. While there is much to be said, in the interests of clarity, for having all the findings in fact together (and labelling them clearly as such), the essential question is whether the decision fell short of what the law required of the FTT.

72. The FTT was not required to make findings in relation to all the evidence it had heard. The duty of a statutory tribunal is to set out those facts necessary to an understanding of their decision (*Procter & Gamble UK v R & C Commrs*, per Jacob LJ at para 19, Toulson LJ at paras 61-62). I am not persuaded that the majority failed to comply with that requirement. They understood the appellants' case, but concluded that the case for the findings sought by them was not made out (paras 225, 232). Even having regard to such orchestration as there was the employees only obtained loan access to the monies advanced to the sub-trusts. In my view the parties have been told "why they have won or lost" (*Meek v City of Birmingham District Council,* per Sir Thomas Bingham at para 8).

Edwards v Bairstow challenges

73. I agree with Mr Thornhill that of the numerous *Edwards v Bairstow* points advanced by the appellants, several were peripheral and have no material bearing on the disposal of this appeal. I shall deal only with those which do not fall into that category; but in relation to all of the *Edwards v Bairstow* challenges I am in very substantial agreement with Mr Thornhill's submissions.

74. The statement in para 205 that it was not the generally held view of executives that they had a choice between a cash bonus and a discretionary trust benefit cannot be dismissed as being immaterial, but there was plainly evidence which entitled the FTT to make the finding.

75. The contention that it had been unreasonable of the majority to accept Mr Bain and Mr Dickson's evidence as credible and reliable, in particular on the issue of UEFA Champions League bonuses, appeared to me to be virtually unstateable. On the basis of the evidence to which I was referred Mr Thomson came nowhere near satisfying the *Edwards v Bairstow / Georgiou* criteria.

76. Next to be challenged were the suggestion (in paras 86 and 225) that Mrs Orchard's conduct, and Equity and Trident's conduct, were merely "lax", and the reference to Equity having taken "a firm stance" (para 86). In my opinion these descriptions were evaluative judgements that the FTT were entitled to make on the evidence before them.

77. Those descriptions related to the broader issue of whether or not the trustees were ciphers. The FTT had been asked by the appellants to find that they were, but the FTT declined to do so. In my view that was a course which was open to them. While the evidence of sub-trusts being established and loans being granted undoubtedly raised questions as to whether there had been any real or substantial exercise of trustee discretion at those stages, it did not compel the FTT to conclude that the trustees were ciphers who would never exercise independent discretion and would always comply, without question, with employees' wishes. Other evidence material to this issue included: (i) the evidence from Mrs Orchard that she was conscious she owed duties to beneficiaries and could be answerable for breach of those duties; and that it was her company's policy to ensure that loans could be repaid in the interests of those persons entitled to the trust capital (para. 47(ii)); (ii) the evidence that Equity had ultimately refused to make loans without security (paras 103(x), 225); and (iii) evidence that the structure of the loans and sub-trusts were of fundamental legal, *real and practical* effect (paras 191,193, 204, 212, 223, 224).

78. The challenge to the finding that there was merely "a degree" of orchestration, and that it fell short of enabling an absolute transfer of funds to the employee (para 225), was not made out. It was not suggested that there was no evidence which could a form a basis for the finding. Mr Thomson did not even attempt to satisfy the *Georgiou* criteria in relation to this head of challenge.

79. The challenge to the finding that the employees' "expectation is to no more than a loan" (para 224) was advanced on the basis (i) that if it referred to the employees' legal expectation it was wrong because it ignored the employees' powers as protectors; (ii) that if it was directed to any sort of practical or commercial expectation, it was irrational.

80. In my opinion the first contention is contrary to the clear findings made bearing upon the powers of protectors (para 224, but also, less directly, paras 225 and 227). The second

contention does not get off the ground as an *Edwards v Bairstow* challenge. There was a good deal of evidence indicating that employees did consider the advances made to them to be loans. That was the way matters were explained to them (see *e.g.* para 103 (v)). (Indeed, in para 19 of his closing submissions to the FTT Mr Thomson observed "The players do appear to have considered that the loans were real" (but he argued that "they also appear to have recognised that they would never actually have to repay the money against their will.")).

Failure to hold Sempra was wrongly decided; failure to distinguish Sempra and Dextra

81. I am unimpressed by the suggestion that the Special Commissioners in *Sempra* erred in law by failing to consider whether repayment of loans was a remote contingency. In my opinion it may reasonably be inferred from the Special Commissioners' conclusions (and bearing in mind that they had been referred to *CIR v Scottish Provident Institution*) that they were not of the view that repayment of loans was a remote contingency. In any event, the matter appears to me to be of no moment because here there is no doubt that the FTT did address the question. It found in fact that repayment of the loans was not a remote contingency.

82. In both *Sempra* and *Dextra* there were findings that the trustees were not mere ciphers. The appellants argue that here the trustees were ciphers, and that accordingly, *Sempra* and *Dextra* ought to have been distinguished. The difficulty with that submission is that I think it is clear, for the reasons already discussed, that the FTT declined to find that the trustees were ciphers; and that that was a course they were entitled to take on the evidence.

The "particular exceptional cases" which the FTT did not decide

83. In relation to the case of Mr McClelland I agree with the appellants that it is now too late for the respondents to claim that Mr McClelland did not work for the respondents who were assessed in respect of the payments to his sub-trust. If that was the respondents' position it ought to have been advanced before the FTT. I am clear that that contention was not advanced.

84. Otherwise, it was common ground in relation to this group of cases that there were in fact no special considerations which applied to them. They fall to be decided in the same way as the other cases. It follows that the assessments in relation to them cannot stand. I shall remit this matter to the FTT with a direction to allow the taxpayers' appeals against the relevant assessments.

Miscellaneous matters

85. In my opinion it was not essential for the FTT to decide whether SFA rule 4.5 required that the side-letters be registered with the SFA. The FTT were entitled to regard that as either a collateral, or a peripheral, issue. It was the terms of the side-letters and the other evidence bearing upon the arrangements with employees that were important.

86. It was for the FTT to decide whether they acceded to the proposal to reach a decision in principle. That was the sort of matter which fell squarely within their case management powers, whether or not the appellants assented to it.

Termination payments

87. I am not satisfied that the FTT have made any final disposal in relation to the termination payments. As I read para 209, they identify categories into which footballers' termination payments might fall but they do not assign any of the termination payments to the three categories mentioned. There is no discussion at all in relation to termination payments to non-footballers.

88. It was evident from the submissions made to me that there may be issues (i) as to whether any of the payments were made in lieu of prestable salary entitlements, and (ii) as to whether there were compromise agreements (and if so their precise terms). If the evidence which was led before the FTT did not illuminate these matters, it will be for the FTT to determine (having regard to considerations such as the basis upon which the appeal hearing before them proceeded, and on whom the onus in relation to these matters lay) what, if any, further procedure is appropriate before it disposes of the appeals relating to the termination payments.

Grossing up

89. The FTT did not rule upon the issue of grossing up. In relation to the payments made in respect of guaranteed bonuses (para 210 of the FTT decision), and in relation to such termination payments (if any) as they find to be taxable, they should determine whether the appellants' grossing up of the payments is appropriate.

Disposal

90**.** The appeal is dismissed except in so far as it relates to the termination payments. I shall remit the case to the FTT (i) with a direction to allow the taxpayers' appeals against the assessments relating to the payments to the sub-trusts of Sir David Murray, his sons, Mr McClelland and Mr MacMillan; (ii) to proceed as accords in relation to the termination payments, the payments in respect of guaranteed bonuses, and any related questions of grossing up. Standing my findings and my disposal, the remit should be to the FTT as originally constituted. I reserve meantime all questions of expenses.

Signed **Date 08 July 2014**

Lord Doherty

Release Date 08 July 2014