[2015 UKUT 0514 (TCC)

Appeal number: FTC/117/2014
UT/2014/0042

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

(1) JAMES H DONALD (DARVEL) LTD
(2) GORDON DAVIES
(3) REGINALD DONALD
(4) RICARDO TOGNERI

Appellants

- and –

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS

Respondents

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

Sitting in public at The Tribunal Centre George House 126 George Street Edinburgh EH2 4HH on 14 & 15 April 2015

Counsel for the appellants: Young QC, Simpson QC

Solicitors: Nick Davis, Minim Law Ltd

Counsel for the respondents: Artis, advocate

Solicitors: Office of the Advocate General

DECISION

Introduction

1. This is an appeal against a decision of the First-tier Tribunal ("FtT") which was issued on 3 June 2014, after a hearing on conjoined appeals. These appeals concerned assessments in respect of income tax and national insurance contributions ("NICs") which HMRC contended were payable by James H Donald (Darvel) Limited ("Darvel"), a private company limited by shares, and assessments to income tax on three individuals, Darvel's sole director, Reginald Donald, and two employees, Ricardo Togneri and Gordon Davies, in respect of the provision of motor cars. The appeals to the FtT were dismissed.

2. At issue in the case is the effect of each of three arrangements known as "Plan 2", "Plan 5" and "Plan 7", respectively. The appellants acknowledge that these were all devised as tax avoidance schemes. Because the questions raised in this appeal fall to be determined as matters of law, it is unnecessary to record the workings of these plans in detail. Looked at broadly, Plan 5 was introduced in November 2000. To implement it, J H Donald Company Services Limited ("Services") was incorporated on 13th of that month. Its shares were issued to Darvel, a number of employees of Darvel who wished to participate in the plan, and certain other individuals. Those employees who joined the plan continued to be employed by Darvel and agreed to a reduction in their pay to the level of the national minimum wage, which was taxed under PAYE. The balance between what these employees received by way of the minimum wage and what they would have been paid by Darvel under their pre-plan contracts of service was paid by way of dividend from Services.

3. Plan 7 was introduced in October 2005. Those participating in it were certain selected employees of Darvel, and another company, J H Donald Retail Limited ("Retail"), which had been set up in 2002 and was owned, initially, by Reginald Donald. In March 2006, and on a number of subsequent occasions, shares in Retail were allotted to individuals who were, or had been, employees of Darvel. Reedon Partnership LLP ("Reedon") was incorporated as a limited liability partnership on 16 January 2006. In accordance with the plan, those individuals who were shareholders in Retail received a profit share and dividends as members of Reedon.

4. Plan 2 involved motor vehicles provided for the use of Reginald Donald, Gordon Davies and Ricardo Togneri. Mr Donald's car was provided by Services, of which he was company secretary, but not a director. Darvel, then Reedon, provided cars for Mr Togneri and Mr Davies.

Proceedings before the FtT

5. The hearing before the FtT occupied a total of 12 days. The parties presented a Joint Statement of Agreed Facts, and four witnesses were led by the appellants. The witnesses were: Reginald Donald, the sole director of Darvel at the time of giving evidence; Stuart Ferguson, a certified accountant whose practice acted as accountants to Darvel, preparing, among other things, their annual accounts; Ricardo Togneri; and Gordon Davies.

The FtT's decision

6. The FtT made the following findings in fact and law:

i. Mr Reginald Donald was sole director of Darvel and solely responsible for the management and control of its business.

ii. Although Mr Donald was registered only as secretary of Services, he was its controlling mind.

iii. Although he was registered only as secretary of Retail, he was its controlling mind.

iv. Notwithstanding its constitution, the real control of Reedon rested with Mr Donald.

v. Each of Services, Retail and Reedon did not act independently but merely as ciphers of Darvel and that under the *de facto* control of Mr Donald. The object was to facilitate the payment of wages/salaries to Darvel's employees with a tax saving.

vi. Notwithstanding Plan 5, the total sums received by the subscribers from Services, whether by way of wage or salary or dividend, represented emoluments of their employment with Darvel. These were all referable to their employments and represented a reward for their services. They had been calculated by reference to their entitlement in terms of their original contracts of employment.

vii. Notwithstanding Plan 7, the total sums received by the subscribers from Reedon, whether by way of profit share or dividend from Retail, represented emoluments of their employment with Darvel. These were all referable to their employments and represented a reward for their services. They had been calculated by reference to their entitlement in terms of their contracts of employment albeit "rounded up" slightly to disguise their legal nature.

viii. The cars used by Mr Donald, Mr Togneri and Mr Davies, purportedly supplied in terms of Plan 2, were truly provided to them and funded ultimately by Darvel. They were referable to their employments with Darvel.

ix. Mr Donald's intention in introducing each of the Plans was to secure tax and NIC savings in the business' wage and salary bill.

The Appeal

First ground of appeal – the appellants' submissions

7. The FtT gave the appellants permission to appeal on three grounds. The first, as summarised in their skeleton argument, is that, once the FtT concluded that payments to Plan 5 and Plan 7 participants were income from employment, it erred in law in finding that it was not necessary to consider whether they were also dividends, as the provisions which charged dividends to income tax took precedence over and precluded the application of the provisions charging employment income to income tax, in cases of overlap.

8. In developing his argument in the hearing before me, senior counsel for the appellants invited the tribunal's attention to the development over the years of the relevant statutory provisions. The terms of the legislation, contended counsel, demonstrate that there is a hierarchy of charging provisions, which has changed over time.

9. In the narrative which follows, the various statutes are referred to by the following abbreviations:

i.	Finance Act 1965	FA65
ii.	Finance Act 1969	FA69

iii.	Finance Act 1970	FA70
iv.	Finance Act 1971	FA71
v.	Finance Act 1972	FA72
vi.	Income and Corporation Taxes Act 1970	ICTA70
vii.	Income and Corporation Taxes Act 1988	ICTA88
viii.	Income Tax (Earnings and Pensions) Act 2003	ITEPA03
ix.	Income Tax (Trading and Other Income) Act 2005	ITTOIA05

10. Until 5 April 2003, employment income was taxed under Schedule E as set out in section 19(1) ICTA88. It provided:

"(1) The Schedule referred to as Schedule E is as follows-

SCHEDULE E

1 Tax under this Schedule shall be charged in respect of any office or employment on emoluments therefrom which fall under one or more than one of the following Cases-"

11. Until 5th April 2005, dividends were taxed under Schedule F. Schedule F was introduced to UK tax legislation by FA65, as part of the creation of corporation tax. Section 47 FA65 provided, among other things, as follows:

"(1) Except as otherwise provided by this Part of this Act, corporation tax shall not be chargeable on dividends and other distributions of a company resident in the United Kingdom, nor shall any such dividends or distributions be taken into account in computing income for corporation tax; but income tax for a year of assessment after the year 1965-66 shall be chargeable under a new Schedule F in respect of all dividends and other distributions in that year of a company resident in the United Kingdom which are not charged under Schedule D or Schedule E and are not specially exempted from income tax, and for purposes of income tax all such distributions shall be regarded as income, however they fall to be dealt with in the hands of the recipient.

(2) Income tax under Schedule F for any year of assessment shall be charged in respect of any distribution made in the year on such sum as, after deduction of income tax thereon at the standard rate, equals the amount or value of the distribution after any deduction of income tax actually made; and, subject to any enactment to the contrary, the distribution shall be deemed for purposes of income tax to represent income, of an amount equal to that sum, on which income tax has been borne by deduction:

Provided that in the case of preference dividends the tax chargeable and the amount of income represented by the dividends shall be determined by reference to the fixed gross rate of dividend.

(3) Where, in the year 1966-67 or any later year of assessment, a company resident in the United Kingdom makes any distribution, not being a payment of interest other than yearly interest nor a payment in respect of which deductions or repayments of income tax may fall to be made under section 157 [pay as you earn] of the Income Tax Act 1952, the company shall under this subsection account for and pay income tax in respect of the distribution at the standard rate for that year.

…"

12. Counsel for the appellants submitted that the references to Schedule D and E in section 47(1) FA65 reflected the rules established by case-law that dividends could be within those Schedules as, respectively, trading profits and employment income and be taxed accordingly. In support of that contention, counsel referred to *Cenlon Finance Company Limited* v. *Ellwood* [1962] A.C. 782 and *Recknell* v. *Inland Revenue Commissioners* [1952] 2 All E.R. 147. It could therefore be seen, he argued, that, on the introduction of corporation tax (i) it was accepted by Parliament that dividends could fall within Schedules D or E, as well as falling within the general taxing provision in the new Schedule F, and that (ii) there was a deliberate decision by Parliament that where such a case occurred, Schedule D or E (as the case might be) was given precedence over Schedule F.

13. By paragraph 22(3) of Schedule 20 to FA69, the words in section 47(2) FA65 "Schedule D or Schedule E" were substituted by the words "any other Schedule".

Thus, said counsel, it can be seen that, on the enactment of FA69, (i) it was accepted by Parliament that dividends could fall within any of the other Schedules A to E, as well as falling within the general taxing provision in Schedule F, and (ii) there was a deliberate decision by Parliament that where such a case occurred, the other Schedule in question, whatever it might be, was given preference over Schedule F. The consolidation statute, ICTA70, continued this approach: section 232.

14. Counsel submitted that, in 1972, the structure of corporation tax was fundamentally changed to the imputation system, and with it the relationship between Schedule F and the other income tax Schedules. This occurred at a time when fundamental changes were also being made to personal direct taxation, these having been legislated for by FA71 to come into force with effect from tax year 1973/74.

15. FA72 substituted a new Schedule F in place of the Schedule F set out in section 232(1) ICTA70 as follows:

"87(1) This section shall have effect for the year 1973-74 and subsequent years of assessment.
(2) For the Schedule F set out in subsection (1) of section 232 of the Taxes Act there shall be substituted—

'Schedule F

1 Income tax under this Schedule shall be chargeable for any year of assessment in respect of all dividends and other distributions in that year of a company resident in the United Kingdom which are not specially excluded from income tax, and for the purposes of income tax all such distributions shall be regarded as income however they fall to be dealt with in the hands of the recipient.

2 For the purposes of this Schedule and all other purposes of the Tax Acts any such distribution as aforesaid in respect of which a person is entitled to a tax credit shall be treated as representing income equal to the aggregate of the amount or value of that distribution and the amount of that credit, and income tax under this Schedule shall accordingly be charged on that aggregate.'

(3) No distribution which is chargeable under the said Schedule F shall be chargeable under any other provision of the Income Tax Acts.

(4) Subsections (2) and (3) of the said section 232 (which require a company resident in the United Kingdom to deduct and account for income tax in respect of distributions made by it) shall cease to have effect.

…"

16. At the time, submitted counsel, commentators asserted that the FA72 provisions displaced the former rule which gave precedence to a charge under Schedules A to E (if possible) by a rule that precluded duplication of a charge raised under Schedule F (Taxation, 4th November 1972, p.71). This view was also advanced in academic commentary: P.G. Whiteman and D.C. Milne, Income Tax (2nd edn, 1976), paragraphs 1-11, 1-22, and 3-06. The FA72 provisions were consolidated in ICTA88, in particular in section 20.

17. Counsel submitted that the decision in *Fry v. Salisbury House Estate Limited* [1932] AC 432 ("*Fry*") has to be understood in the context of that legislative history. The taxpayer company owned a block of offices which it let. The Inland Revenue sought to tax the rent received as trading income under Schedule D. The taxpayer argued that Schedule D did not impose a charge on the rents it received and that, instead, Schedule A was to be applied, with the effect that income tax was charged on the lower annual value of the building. The Appellate Committee held that the rents were profits arising from the ownership of land in respect of which the assessment under Schedule A was exhaustive, and that they could not, therefore, be included in the assessment under Schedule D as trade receipts of the company. Counsel for the appellants contended that the speeches of the members of the Appellate Committee should be considered carefully. Viscount Dunedin, giving the leading speech, said this:

> "The next proposition is that when income is dealt with in the proper Schedule the same income cannot be dealt with again under another Schedule. There is no stronger foundation for this proposition than may be found in the fact of the option given not to the Crown but to the taxpayer who is assessed under Schedule B to be assessed under Schedule D. This obviously points to the fact that, once assigned to its appropriate Schedule, the same income cannot be attributed to another Schedule." (Page 442)

18. His Lordship also said:

> "It is very obvious to suggest that if the Crown can opt as between Cases why should it not opt as between Schedules, and that the company is carrying on a business I do not doubt." (Page 446)

In other words, submitted counsel, the company was carrying on the business of renting out property. The income in question, therefore, fell within Schedule D. But because the statute clearly allocated the charge to tax to Schedule A, the same source could not also be charged under Schedule D. On the view that, as regards the source in question, Schedule A had "imperative character", that source had to be charged under that Schedule and not under Schedule D.

19. Counsel for the appellants looked also at passages from the speech of Lord Warrington of Clyffe (at page 450) and Lord Atkin (at pages 454, 455 and 458). At page 455, Lord Atkin noted that section 100 of the Income Tax Act 1842 provided that Schedule D taxation: "shall extend to every description of property or profits which shall not be contained in either of the said Schedules (A.), (B.), or (C.), and to every description of employment of profit not contained in Schedule E". Lord Atkin's view, therefore, was that, although an item of income could fall within the wording of Schedule D, if it was within one of the other Schedules, that other Schedule took precedence.

20. Lord Tomlin said that, when the annual value has been ascertained and fixed for the purposes of Schedule A, it is irrelevant to consider whether the landlord in fact receives

by way of rent more or less than or the same as the assessed annual value. That is because the subject-matter being necessarily taxed under Schedule A cannot be brought again under any other Schedule. To do so would breach the rule against double taxation. Thus, argued counsel, Schedule A took precedence over any other Schedule in respect of any item of income that fell within it. That is different from saying that an item of income could not be encompassed within Schedule A and another Schedule.

21. Finally, counsel for the appellants drew attention to the speech of Lord Macmillan, at page 466, where his Lordship concluded that it is obligatory to assess to income tax under Schedule A all lands, etc., and that the revenue authorities had no option in the matter. Once it is determined that the annual value of all lands and houses must be assessed to income tax under Schedule A, it follows that it cannot be assessed to income tax under any other Schedule. The meaning of that, contended counsel, is that Schedule A took precedence over all other Schedules. The correct analysis as regards any item of income was first to consider whether it fell within Schedule A; if it did, then it did not matter whether it also fell within any other Schedule. If it did not, then, and only then, was it appropriate to ask whether or not it fell within any other Schedule. If it did, then it could be taxed under that Schedule (subject to rules of precedence among the other Schedules).

22. Accordingly, submitted counsel, *Fry* is authority for the proposition that, if an item of income was within Schedule A as it was then in force, then it could not be taxed under any other Schedule. It follows, therefore, that there is a hierarchy among Schedules. The only possible reason for the existence of a hierarchy is that the Schedules overlap. As a matter of generality, argued counsel, it would seem unlikely that provisions worded as broadly as the income tax charging provisions could not overlap. Such overlap is only to

be expected where some of the charging provisions use as a reference point the source of the income to which they relate (for example the provisions charging employment income to tax), while others (in particular, the provisions charging dividend income to tax) use the form in which the income is received. Leaving aside any question of hierarchy, an item of income can fall within more than one Schedule. As income tax is a single tax, it is necessary, therefore, to choose which Schedule takes precedence. At the time of *Fry*, Schedule A stood at the top of the hierarchy, and Schedule D at the bottom. By contrast, argued counsel, *Fry* is not authority for the proposition that, if an item of income is within one of the Schedules, it cannot be within the scope of another.

23. In the FtT proceedings, the respondents had relied on *HM Revenue and Customs* v. *P.A. Holdings Ltd* [2012] S.T.C. 582 ("*PA*"), in support of their argument that the Plan 5 income comprised emoluments from employment and not dividends. The appellants argued that *PA Holdings* was wrongly decided. In its decision, the FtT disagreed, and followed the reasoning of the Court of Appeal.

24. The background to the dispute in *PA* was, put shortly, as follows. The taxpayer company ("PA") wished to pay its employees discretionary annual bonuses. It adopted arrangements whereby the employees who would have been paid bonuses were awarded shares and received dividends. It was PA's contention that the money that the employees received as dividend income was subject to Schedule F rates and not to the basic or higher rates. Further, it contended that there was no liability to make NICs in respect of these payments. Both the FtT and the Upper Tribunal concluded that the income that the employees received was from their employment. Both decided, however, that, because the income was received in the form of dividends, the provisions of Schedule F and section 20(2) of ICTA88 required HMRC to tax the income as

dividends or distributions under Schedule F, and they could not be charged as emoluments under Schedule E. HMRC appealed further.

25. The question for the Court of Appeal was whether both tribunals were correct in deciding that the cash received by the employees was both from employment, for the purposes of Schedule E and also dividends or distributions for the purposes of Schedule F. It decided that question in the negative.

26. In submitting that *Fry* is not authority for the proposition that, if an item of income is within one of the Schedules, it cannot be within the scope of another, Mr Young argued that, if that were so, the question would remain as to the order in which to consider the Schedules. Counsel noted that, in *PA*, Moses LJ held that, once it had been decided that the payments were emoluments of employment, "there was no room whatever for any further consideration of a different Schedule." (Paragraph 60) But, contended counsel, if Schedule F were considered first, the conclusion would be reached that the payments were distributions, and there would be no room whatever for any further consideration of a different Schedule. Yet the Court of Appeal did not explain why one had to start at Schedule E before considering Schedule F rather than *vice versa*. It was "absolutely clear" that, while the Schedules were in force, the source of any dividends paid by a company whose sole activity was letting out flats in a block that it owned was, "the annual profits or gains arising from any business carried on for the exploitation, as a source of rent or other receipts, of any estate, interest or rights in or over any land in the United Kingdom". (Schedule A, as it appeared in section 15(1) of ICTA88) But "there is no doubt at all", submitted counsel, that the company's dividends would be taxed as distributions under Schedule F. It is possible, therefore, for a particular item of income to fall within two Schedules. So long as Schedule F was in force during the material

period (that is, up to 5th April 2005), it took precedence over Schedule E (section 20(2) ICTA88).

27. Thereafter, counsel submitted, the position is even clearer. The provisions of ITEPA03 and ITTOIA05 contain rules of precedence that clearly suppose that income can fall within more than one of the charges to income tax imposed by those Acts. So, the charge under section 383 ITTOIA05 takes precedence over the charge on employment income under Part 2 of ITEPA03 (see section 716A ITEPA03). But it is also important to observe that this was not seen as one of the changes made by the re-write process that produced these Acts: see Explanatory Notes to sections 366 and 367 of ITTOIA05. Therefore, if payments by Services and Retail to their shareholders were "dividends", then they are charged to tax as such regardless of whether they were also earnings or emoluments from employment.

28. So far as payments were dividends, argued counsel, they were made out of distributable reserves of both the companies in question. The respondents, he said, do not challenge the proposition that all dividends were in fact covered by distributable reserves. The dividends were thus payments out of part (indeed, generally, the whole) of the profits of the company in question at the time. On that basis, the payments were, in substance, dividends paid by the companies. Reference was made to *Esso Petroleum Company Limited* v. *Ministry of Defence* [1990] Ch. 163, and *Memec plc* v. *Commissioners of Inland Revenue* (1996) 71 T.C. 77.

29. Therefore, the appeal should be allowed as regards the first issue. The Upper Tribunal should, submitted counsel, hold that the provisions charging income tax on dividend income take precedence over and, in the present case, preclude the application of the

provisions charging income tax on employment income so far as participators in Plans 5 and 7 received payments from Services and Retail in the form of dividends.

First ground of appeal – the respondents' submissions

30. In response, Mr Artis, advocate for the respondents submitted that, before considering any "order of precedence between the tax charge on employment income and the tax charge on dividends", it is necessary first to ask: "what kind of income is it?" Related questions are: "from whom did the income derive and from what activity?" Counsel for the respondents submitted that these were questions of fact and that the FtT had found, as a fact, that the income was employment income. The FtT was right to observe that, for the appeal to it to succeed in relation to Plan 5, the tribunal "would have to be satisfied that the dividends paid were in respect of a shareholding in a company independent of, although associated with, the employer, and not a reward for services rendered in the employment." (FtT decision, paragraph 118) The FtT was not so satisfied.

31. The essence of the respondents' submissions which were advanced in response to those advanced on behalf of the appellants was that the determination of the charge under which income is to be assessed requires the determination of the substance of the source of the income rather than the form of its receipt. Counsel for the respondents took issue with what he characterised as the "source/form" dichotomy which the appellants contended for in arguing that employment income is identified by having regard to the source of payment and that income from dividends and other distributions is identified by having regard to the form of its receipt. In determining the "source" of employment income, argued counsel, one has regard, not to the payer of the funds, but to the relationship from which the income is derived. That is the employment relationship.

The source of earnings from employment is the employee's services. The employee is paid for being or agreeing to be an employee. The consideration for money paid to him or her is the employee's services. Reference was made to the speech of Lord Templeman in *Shilton v Wilmurst* [1991] 1 AC 684 (*Shilton*) and to that of Viscount Simonds in *Hochstrasser v Mayes* [1960] A.C. 376 (*Hochstrasser*). In *Shilton*, on a consideration of the authorities, Lord Templeman expressed the view "that an emolument 'from employment' means an emolument 'from being or becoming an employee.'" On that analysis, the taxing provision "comprehends an emolument provided by a third party, a person who is not the employer." (Pages 688 and 690) The question, argued counsel is one of attribution not of precedence.

32. In support of his argument that, for the purposes of correct attribution, it is necessary to determine what is, in substance, the source of the income under consideration rather than its form, counsel referred to *Cenlon Finance v Ellwood* [1962] AC 782 and *Recknell v IRC* [1952] 2 All ER 147. Mr Artis also drew support from the judgment of Moses LJ in *PA.*

First ground of appeal - decision and reasons

33. The FtT identified three issues as arising for determination, having regard to the parties' submissions on the relevant case law and legislation. They were (i) the true source of the controversial receipts; (ii) the effect of the company and partnership structures created in terms of the Plans; and (iii) the implications of the schedular structure of the taxes on income and their mutual exclusivity. (FtT decision, paragraph 127) The tribunal took the view that the determination of the first of these was "critical and resolutive of the controversy" in the appeal. Adopting that approach, the FtT held that the true source of

the receipts was the various individuals' employment with Darvel. In doing so, in my opinion, the FtT applied the correct test and asked itself the right question. As Viscount Simonds said, at page 390 in *Hochstrasser*: "The question is one of substance, not form". Lord Radcliffe, Lord Cohen and Lord Keith of Avonholm agreed. Having reached the view that the payments in question were, in substance, income from employment, the FtT effectively held that they were not, in substance, dividends. The appellants do not, because they cannot, challenge the finding in fact that the Plan 5 dividends were, in substance, emoluments from employment.

34. In contending that the FtT erred in law by not going on to consider whether the income fell within the provisions of Schedule F, the appellants invited me to hold that *PA* was wrongly decided. In that case, the FtT held that the cash received by the employees was a profit arising from employment, because it was made by reference to the services which each employee had rendered by virtue of his office and was something in the nature of a reward for past, present or future services. The tribunal went on, however, to conclude that the payments "were also dividends or distributions within the scope of Schedule F. Accordingly [it] applied section 20(2) of ICTA since [it] thought both Schedule E and Schedule F were relevant." The FtT held, therefore, that the cash received by the employees should be taxed under Schedule F as dividends and not under Schedule E as emoluments. (*PA*, paragraph 23)

35. The court considered that its "essential task" in the appeals was to identify the source of the dividend income received by PA's employees in the relevant years. As Moses LJ put it, it was "the source of those income receipts which determines the rules and rates appropriate for taxing those receipts." (Moses LJ, with whom Arden and Maurice Kay LLJ agreed, paragraphs 23 to 26) I pause to note that the Court of Appeal set out to

identify a single source of the income received. His Lordship continued: "Different Schedules, with their own rules, are applied according to the source of the income", and noticed the terms of Schedules E and F. Guidance as to the purpose of these sections, said Moses LJ, had been definitively expressed in *Fry*, and his Lordship derived three "fundamental propositions" from the speeches. (Paragraph 28) These are as follows:

> "i. income tax is only one tax, and the different Schedules do no more than to provide the method of computation charge and assessment peculiar to the Schedule to which the income is allocated;
> ii. the Schedules are mutually exclusive, each Schedule is dominant over its own subject matter and provides a complete code for the class of income which falls within that Schedule;
> iii. the same source of income cannot be taxed twice."

36. Moses LJ next quoted from the speeches of Viscount Dunedin, Lord Atkin, and Lord Tomlin. For the purposes of this opinion, it is sufficient to quote the following words from the speech of Viscount Dunedin:

> "… Income tax is only one tax, a tax on the income of the person whom it sought to assess, and the different Schedules are the modes in which the statute directs this to be levied… tax is to be levied on the income of the individual…, but then you have to consider the nature, the constituent parts of his income to see which Schedule you are to apply."

37. By applying those principles, said Moses LJ, the property company in *Fry* fell to be taxed exclusively under Schedule A. His Lordship continued: "It can be seen that the exercise on which their Lordships were engaged was to identify the <u>real</u> source from which the company's income was derived." (My emphasis) Once that source had been identified as property, the income could not be brought under any Schedule other than that appropriate to the source, Schedule A. (Paragraph 30)

38. What the Court of Appeal was concerned with was the need to identify what, in **substance**, was the source of the income. The court was required: "not to be restricted to the legal

form of the source of the payment but to focus on the character of the receipt in the hands of the recipient." (Paragraph 37, my emphasis) "The question", therefore, "is one of substance and not form". (Paragraph 38) In determining the character of the receipts in the hands of PA's employees, Moses LJ cautioned against being seduced by the form in which the payments reach the employees, i.e. as dividends. The court should focus on the character of the receipt in the hands of the recipients. (Paragraph 39) On that approach, the Court of Appeal held that receipts in the hands of the employees were emoluments and nothing else.

39. I respectfully agree with and adopt Moses LJ's reasoning in *PA*. I reject the appellants' argument that there is any significance in their observation that some of the charging provisions use as a reference point the source of the income to which they relate (for example the provisions charging employment income to tax), while others (in particular, the provisions charging dividend income to tax) use the form in which the income is received. I agree with counsel for the respondents that the source of employment income is not the employer but the employment relationship. As Lord Templeman put it in *Shilton*, income tax is levied not on "emoluments from the employer" but on "emoluments from employment". The taxing provision, therefore, comprehends "an emolument provided by a third party, a person who is not the employer". Consequently, "'an emolument from employment' means an emolument 'from being … an employee.'" (Page 689B-D) Similarly, dividends and distributions are paid to shareholders and members of the company. It is the relationship between the company and the shareholder or member that gives rise to the payment.

40. If the appellants' analysis were correct it would mean that, notwithstanding that, in this case, the income constitutes emoluments from employment having regard to its

substance, it is nevertheless to be charged as dividend income, having regard to its form. Parliament cannot have intended that result. The fallacy in the appellants' argument is the proposition that form trumps substance. That proposition derives no support from the authorities. On the contrary, they are to the opposite effect. In *Mitchell and Eden v Ross* [1962] AC 814, for example, which was cited by Mr Artis, Viscount Simonds said this:

> "I regard it as fundamental and well settled law that the Schedules to the Income Tax Acts are mutually exclusive, and that the specific Schedules A, B, C and E, and the rules which respectively regulate them, afford a complete code for each class of income, dealing with allowances, deductions and exemptions relating to them respectively. Accordingly, when it is conceded, as it has to be conceded, that Dr. Ross was assessable under Schedule E and also Schedule D, [having two separate sources of income] I cannot look further than the rules under Schedule E to determine his liability under that schedule and the rules under Schedule D to determine his liability under that schedule." (Page 832)

41. As is noted in paragraph 22 of this opinion, counsel for the appellants argued that there is a hierarchy among Schedules and that the only possible reason for the existence of a hierarchy is that the Schedules overlap. That was the premise on which counsel challenged Moses LJ's conclusion that, once it had been decided that the payments in question were emoluments of employment, "there was no room whatever for any further consideration of a different Schedule", and complained that the Court of Appeal had failed to explain why Schedule E fell to be considered before Schedule F. He contended that one might as easily have said that once the conclusion had been reached that the payments were distributions, there was no room whatever for any further consideration of a different Schedule. (Paragraph 26 of this judgment)

42. That argument falls away when the context in which the Court of Appeal reached its decision in *PA* is recognised. Both the FtT and the Upper Tribunal had held that,

because the income at issue was received in the form of dividends, it had to be taxed as dividends or distributions under Schedule F. It could not, therefore, be charged as emoluments under Schedule E. (*PA* paragraph 2) HMRC appealed against the decision of the Upper Tribunal, contending that the dividends were in reality bonuses and liable to be taxed under Schedule E. What the Court of Appeal had to do, therefore, was decide:

> "whether the First Tier Tribunal and Upper Tribunal were correct in deciding that the cash received by the employees was both from employment, for the purposes of Schedule E, and also dividends or distributions for the purposes of schedule F." (*PA*, paragraph 25)

The Court of Appeal did not, therefore, approach its task by construing Schedule E before Schedule F, but by seeking to identify the real source of the income, as I have noted in paragraph 37 of this judgment. As Moses LJ put it at paragraph 67 of *PA*: "The purpose of the relevant statutory provisions is to classify the income according to an appropriate and mutually exclusive Schedule. In the instant appeal, viewed realistically, the payments were emoluments."

43. Consequently, I reject counsel for the appellants' proposition that, if the Court of Appeal had directed itself first to a consideration of Schedule F, it would have concluded that the payments were distributions, and there would have been no room whatever for any further consideration of a different Schedule. If the Court of Appeal had looked first at the terms of Schedule F, it would have asked itself the same question as it did when addressing the issue that is alluded to in paragraph 38 above: "the essential question is as to the character of the receipts in the hands of PA's employees." (*PA*, paragraph 39) In seeking to answer that question, the Court of Appeal directed itself that it "should not be seduced by the form in which the payments reached the employees. It should focus

on the character of the receipts in the hands of the recipients." (*PA* paragraph 39) The court would, therefore, have reached the same conclusion as, in the event, it did.

44. In this case, the FtT found as a fact that the total sums received by the subscribers from Services, whether by way of wage or salary or dividend, represented emoluments of their employment with Darvel. That finding is not challenged, it is not undermined by any error of law, for the reasons that I have given, and was determinative of the appeal in respect of the Plan 5.

Second Ground of Appeal - the appellants' submissions

45. The second ground on which the appellants sought permission to appeal is in the following terms:

> "The FtT erred in law as regards Plan 7 in concluding that the income received by participants, whether in the form of profit share of Reedon or dividends from J H Donald (Retail) Limited, was employment income. Participants in Plan 7 had no contract of employment at all with James H Donald (Darvel) Limited ('Darvel'). There is no reason to suppose Plan 7 participants had any of the protections conferred by employment law on employees. There is no basis for the FtT's conclusion that Plan 7 participants remained employees of Darvel. In any event, the FtT did not give adequate reasons for its decision, in that it did not identify (i) the test it applied to determine whether Plan 7 participants remained employees of Darvel, (ii) the facts it considered relevant to the question of whether Plan 7 participants remained employees of Darvel, or (iii) the effect of the change from participation in Plan 5 to participation in Plan 7 in terms of the obligations between Darvel and Plan 7 participators. The conclusion the FtT ought to have reached was that Plan 7 participators ceased to be employees of Darvel from the moment their employment contracts with Darvel were terminated. Given that conclusion, the appeal should be allowed so far as it concerns Plan 7."

46. The FtT granted permission to appeal on that ground. In their skeleton argument, the appellants put their second ground shortly, submitting that the FtT erred in law in concluding that Plan 7 participants continued to be employees of Darvel, "despite the absence of any contract of employment". In support of that proposition, they submit

that, in summary, Plan 7 involved the establishment of a limited liability partnership, Reedon, and a company, namely Retail. Employees of Darvel who wished to participate in Plan 7 "gave up" employment with Darvel and became members of Reedon and shareholders in Retail. Retail, too, became a member of Reedon. Darvel and Reedon entered into a contract in terms of which Reedon supplied to Darvel services consisting of electrical goods repairs and maintenance, administration, and so on. In exchange, Darvel paid Reedon a share of Darvel's profits. Reedon's profits were distributed among its members, including Retail. Retail paid its shareholders dividends, and, on an annual basis, redeemed C shares in it, owned by Plan 7 participants, and allotted further C shares for the forthcoming year.

47. Mr Young submitted that the FtT made a fundamental error "in failing to distinguish between the operation as a whole, and the part that Reedon was required to carry out." Reedon did no more than provide certain services to the business. There was no suggestion that it had any say in the overall strategy of the business; nor would one expect a third party service provider to have such a say. All that one would expect a third-party service provider to decide, once the tasks it was required to be performed had been identified, would be which individuals would carry out which bits of the tasks in question, and the timetabling of those tasks. The FtT held that timetabling was decided by "senior employees" with Mr Donald, on the basis of evidence that the members got together each morning to allocate and timetable tasks for the day.

48. In addition, the FtT held that Reedon and Retail had been properly constituted, even though administrative matters were not perfectly attended to. On the FtT's own findings, the only conclusions open to it, contended counsel, were that Reedon was engaged to provide specific services to Darvel and that members of Reedon determined how, when

and by which individuals the specific tasks required to be performed by Reedon were to be done. Consequently, the FtT ought to have proceeded to ascertain whether any individual member of Reedon was an employee of Darvel.

49. It was submitted on behalf of the appellants that there is no single test for whether an individual is an employee. (See *Hall* v *Lorimer* [1994] 1 W.L.R. 209 ("*Hall*")). Instead, one must look at all the circumstances of the case.

50. Mr Young referred to the decision in *Autoclenz Ltd. v Belcher and others* [2011] ICR 1157 ("*Autoclenz*"), in which the dispute centred on the question whether the claimants were "workers" for the purposes of the National Minimum Wage Regulations 1999 and the Working Time Regulations 1998. The term "worker" is defined to include an individual who has entered into or works under a contract of employment, and the question in the litigation was whether or not the claimants fell within that definition. In the course of his judgment, Lord Clarke of Stone-cum-Ebony JSC, with whom the other members of the court agreed, expressed the view that the question for the court "in every case is… what was the true agreement between the parties." (Paragraph 29)

51. In the present case, the first points are that Reedon was properly established as an entity separate from Darvel; that Reedon was under an obligation to provide identified services; and there was a real sense among those who considered participating in Plan 7 that to do so would involve the loss of their employment rights, with the consequence that some of them chose not to participate. The individuals in question were all, on the face of things, the members of Reedon who, amongst themselves, decided who was to carry out what services and when. Darvel had no right to require a specific task to be performed by a specific individual. That was a decision for Reedon. For example, if a member of Reedon was off ill, it was the other members of Reedon, and not anyone in

Darvel, who had to decide how to deal with what was required to be done by Reedon during the period of that individual's absence.

52. As against those considerations, the factors the FtT relied upon in concluding that Plan 7 participants remained employees of Darvel all relate to Mr Donald's control over the whole operation. So far as the services provided by Reedon were concerned, this control was limited, in the normal way when a business engages a third-party service provider, to deciding what services are to be outsourced and assessing whether the third party performed its obligations adequately. Darvel evidently had no control over how those services were performed, far less over the individuals involved while they were performing them.

53. In those circumstances, the only conclusion open to the FtT was that Plan 7 participants were not employees of Darvel. Accordingly, the appeal on the second ground should be allowed and this tribunal should hold that those individuals were members of Reedon and shareholders in Retail.

Second ground of appeal – the respondents' submissions

54. It is contended on behalf of the respondents that there was more than sufficient evidence from which it was open to the FtT to conclude that the participants in Plan 7 had remained employees of Darvel and that the total sums received by the subscribers from Reedon, whether in the form of profit share or dividend from Retail, represented emoluments of their employment with Darvel. They were all referable to their employments and represented reward for their services.

55. Mr Artis submitted that when, as in this case, the question of whether a relationship is one of employment depends not merely on the construction of documents, but has to be

objectively ascertained partly from documents and partly from oral exchanges and conduct, the question is fundamentally one of fact and one for the tribunal of first instance. In support of that contention, he referred to *Carmichael v National Power* [1999] 1 WLR 2042. Counsel cited *Ready Mixed Concrete v Pensions Minister* [1968] 2 QB 497, for the proposition that there is no exhaustive list of factors which may be considered. In *Lee Ting Sang v Chung-Keung* [1990] 2 AC 374, at page 382, Lord Griffiths said this:

> "Their Lordships agree with the Court of Appeal when they said that the matter had never been better put than by Cooke J. in Market Investigations Ltd. v. Minister of Social Security [1969] 2 Q.B. 173 , 184-185:
>
> > 'The fundamental test to be applied is this: 'Is the person who has engaged himself to perform these services performing them as a person in business on his own account?' If the answer to that question is 'yes,' then the contract is a contract for services. If the answer is 'no,' then the contract is a contract of service. No exhaustive list has been compiled and perhaps no exhaustive list can be compiled of the considerations which are relevant in determining that question, nor can strict rules be laid down as to the relative weight which the various considerations should carry in particular cases. The most that can be said is that control will no doubt always have to be considered, although it can no longer be regarded as the sole determining factor; and that factors which may be of importance are such matters as whether the man performing the services provides his own equipment, whether he hires his own helpers, what degree of financial risk he takes, what degree of responsibility for investment and management he has, and whether and how far he has an opportunity of profiting from sound management in the performance of his task.'"

56. The FtT considered the issue of control, finding that it remained throughout with Mr Donald. (Decision, paragraphs. 119, 122, 123). The employees were not participants in the business in terms of capital, strategy or management. The evidence was that their receipt of sums equivalent to wages was not at material risk, but neither could they profit from sound management in the performance of their tasks; they worked as they had done before the plans were executed, and Mr Donald directed payments. Services, Retail and Reedon were but ciphers.

57. At paragraph 33 of its decision, the tribunal records that it viewed the evidence of Mr Donald with "a degree of caution". The evidence in relation to Plan 7 is summarised at paragraphs 20 to 22 and 24 to 32. At 30 the tribunal records Mr Donald's acceptance that departing employees remained shareholders but were not treated as such in the notification of meetings. He was vague over matters of administration, but said that the scheme's purpose was to "give 'the boys' (his staff) an enhanced income." At all times he had remained in charge of all important decisions. His remained the directing mind.

58. By contrast, argued Mr Artis, the tribunal was impressed by Mr Ferguson, the accountant. (Decision, paragraph 45) Mr Ferguson explained how he continued to prepare a "notional payroll" for Darvel and Reedon (paragraph 40), and that Darvel kept Reedon in funds for the equivalent of the total gross pay of Plan 7 participants, plus employers' NIC and pension contributions. At paragraph 44, he is noted as confirming that the payments made to the individuals who were partners were based on pay information and not on a profit-share calculation.

59. Counsel submitted that the evidence of staff, recorded by the tribunal at paragraphs 46 to 65 of the decision, supports the conclusion at paragraph 118 that they remained in employment with Darvel; the relationship had been one of "unalloyed employment". Mr Artis relied, in particular, on the findings that staff had continued under Plan 5 to be paid the national minimum wage and that there had been no material change to the business or how it was run as the arrangements moved from Plan 5 to Plan 7; participants continued to provide their services to Darvel only; there was no change in line management; the "partnership" arrangements were casual; the "partners" were not involved in administering or directing the business; shareholders' meetings were not held or attended by participants; the business, the business name and connection, and

equipment/tools/vehicles remained with and were provided by Darvel; Mr Donald remained in charge; pay levels had been maintained and were expected ("guaranteed") to continue; the basis of payments and how they were calculated were not discussed with or amongst staff and were not understood.

60. It was submitted that the tribunal's discussion of the evidence is not exhaustive of possible findings. At paragraphs 86, 87, 90, 91, 93, 96 and 98 of the decision, the FtT makes reference to the contentions which were advanced by Mr Tebbet, who appeared for the respondents, as to what had been established in the evidence, and it did not demur to his submission that the factors he pointed to were to be found in the evidence.

61. The tribunal's conclusion, at paragraph 125, that "the 'staff' remained throughout as employees of Darvel", was thus justified on the evidence; the staff were not self-employed. That is an inference of fact by the tribunal of fact with which, submitted counsel, this tribunal should not interfere. The FtT's conclusion that the receipts fall to be treated as employment income is likewise an inference that is justified by the evidence and, indeed, necessarily follows. The evidence was wholly against the receipts being calculated, agreed, resolved upon or conferred as a share of profits.

62. Counsel submitted that there was more than sufficient evidence for the proposition that Reedon's role was that of a mere cipher or agent of Darvel. (Decision, paragraph 119) Mr Donald confirmed that Reedon's whole income came from Darvel and that, to third parties, no apparent changes were brought about by Plan 7; partners had no formal meetings; whilst there was a suggestion that Plan 7 offered the prospect of Darvel employees taking over the retail arm of the business, that was an uncertain "genie in the bottle"; Mr Ferguson, the accountant, confirmed that payments to the individuals who were partners was based on pay information and not a profit-share calculation

(paragraph 44); Reedon had no assets, and employees did more or less the same work as they had done before Plan 7 (paragraphs 49, 57, 63); notwithstanding the supposed risks of partnership, pay levels were "guaranteed" and could be expected to increase (paragraphs. 53, 60); supposed partners had no idea how dividends or drawings were calculated (paragraphs. 54, 60); formal agreements were not entered into that "partners" were aware of. (Decision, paragraphs 21, 22, 26, 44, 49, 53, 54, 57, 60 and 63)

63. Mr Artis contended on behalf of the respondents that the appellants have fallen into the error of making, in what is an appeal on a point of law, assertions of fact about Reedon's role and Mr Donald's control of Reedon, which are merely conclusions which they wish the FtT had made. He submitted that they have not shown that the findings that the FtT did make, and on which it drew its conclusions, were not findings or conclusions that were available to it. The appellants merely invite this tribunal to come to different judgments on the evidence. That is not the role of the appeal tribunal.

64. Counsel noted that the parties' Statement of Agreed Facts narrates, at paragraph 9, that the employment of participants in Plan 7 terminated, and P45s were issued to them "as a matter of form". But, argued Mr Artis, the tribunal was dealing with substance, not form. Just as a partnership is not created by saying that there is one, an employment relationship is not brought to an end "as a matter of form" if the facts are that the employment continued. Plainly the FtT engaged with the task of distinguishing form from substance; and its conclusions cannot be impeached.

Second ground of appeal - decision and reasons

65. In considering this ground of appeal, it is important to note that the appellants' complaint, in its shortened form, is that the FtT erred in law in concluding that Plan 7 participants continued to be employees of Darvel, "despite the absence of any contract of employment". It is clear from the tribunal's decision that it understood the need to determine the existence of a contract, and to identify its nature, in order to address this ground. At paragraph 116, it observes that the charge on emoluments depends on their being referable to services rendered by an employee in the course of his employment, and continues: "There has to be a contract of services i.e. an employment, rather than a contract for services in the context of self-employment." Whether there was such a contract was a matter of fact to be determined by the tribunal. It is clear that the FtT so found, because, in its findings in fact and law at paragraph 135, it holds that the total sums received by the Plan 7 participants "represented emoluments from their employment with Darvel." The tribunal did not, therefore, err in law, as contended for by the appellants in their shortened version of the second ground.

66. The appellants can succeed in this part of the appeal, therefore, only if it can be said that the FtT was not entitled, on the evidence, to find that there was a contract of employment which endured after Plan 7 was put into effect. The second ground, in the form advanced by the appellants when seeking permission to appeal, can be read as a challenge to the tribunal's entitlement to make that finding. I turn, therefore, to address that issue.

67. It is common ground that, as a matter of objective fact, the Plan 7 participants provided services to Darvel. In order to decide whether they did so under a contract of service or under a contract for services, the FtT was entitled to infer what was the true agreement

between the parties having regard to the whole circumstances of the case. (*Hall* and *Autoclenz*)

68. As is noted at paragraph 47 of this judgment, Mr Young submitted that the FtT "made a fundamental error in failing to distinguish between the operation as a whole, and the part that Reedon was required to carry out." In elaboration of that contention, counsel argued that Reedon did no more than provide certain services to the business. There is no suggestion, he said, that it had any say in the overall business strategy. Counsel's argument is more fully set out in paragraph 47.

69. The appellants' contentions, however, ignore a number of the FtT's findings in fact which are not the subject of challenge. Mr Donald was the sole director of Darvel and solely responsible for the management and control of its business; he was its controlling mind; he was the controlling mind of Retail; the real control of Reedon rested with Mr Donald; each of Services, Retail and Reedon did not act independently, "but merely as ciphers of Darvel and that under the *de facto* control of Mr Donald"; the object of the arrangement was to facilitate the payment of wages/salaries to Darvel's employees with a tax saving. (Decision, paragraphs 135i to 135v) Since Mr Donald was held to be Darvel's controlling mind, his "control over the whole operation" is a relevant consideration in determining whether the Plan 7 participants continued to be employed by Darvel. I therefore reject the appellants' submission to the contrary. Further, the total sums received by the subscribers from Reedon, whether by way of profit share or dividend from Retail, represented a reward for their services to Darvel, and had been calculated by reference to the entitlement in terms of their contracts of employment with Darvel, albeit rounded up slightly to disguise their legal nature. (Decision, paragraph 135vii)

70. When read in the context of these findings, the appellants' assertion that the FtT made a fundamental error in failing to distinguish between the operation as a whole, and the part that Reedon was required to carry out, can be seen to be without substance. The appellants are right to say that there was "no suggestion that [Reedon] had any say in the business strategy overall". That is because, as the FtT was entitled to find, Reedon, among others, was "merely" a cipher of Darvel "and that under the *de facto* control of Mr Donald". There was, therefore, no proper distinction to be made between the operation as a whole and the part that Reedon was required to carry out. The FtT was entitled to hold, and, in effect, did hold that Reedon was no more than a cog in the machine.

71. I am satisfied that, on the evidence before it, the FtT was entitled to find, as a matter of fact, that those participating in Plan 7 were paid for the services which they rendered to Darvel, and that they did so under a contract of service, not a contract for services. In reaching that conclusion, I agree with and adopt the reasons advanced on behalf of the respondents, which I need not rehearse.

Third ground of appeal – the appellants' submissions

72. In their third ground of appeal, the appellants contend that the FtT has failed to give adequate reasons for holding that the Plan 2 cars were benefits-in-kind provided by Darvel. They submit that Mr Donald was provided with a car by Services as remuneration for his being company secretary, from around 23rd May 2002 to 31st March 2006. It is clear, argues Mr Young, that the only person who could be regarded as having occupied the position of company secretary of Services was Mr Donald. Although what he did in carrying out his duties in that post did not take up a lot of time, he did it in exactly the same way as he carried out his duties as company secretary of

Darvel. Services was established as a separate corporate entity; it therefore required a company secretary; and, although there were some errors in its administration, returns were in fact made generally in accordance with the applicable legislation. There is no other benefit that could be regarded as remuneration for his acting as company secretary of Services. Mr Young submitted that, in these circumstances, the FtT did not give adequate reasons for finding that the cars provided to Mr Donald were not provided to him as a benefit in relation to his office as company secretary of Services. All the FtT says, in short, is that Mr Donald was an employee of Darvel (which he was at all material times, in any event so far as that term encompasses a director), and that, therefore, the cars were provided to him in that capacity by Darvel. It is contended that this reasoning is inadequate.

73. Mr Young argues that there was documentary evidence before the FtT which demonstrated that the vehicles provided to Mr Davies and Mr Togneri were provided by Reedon. He contends that the FtT "does not refer to any of this evidence in its decision." Indeed, he says, the FtT appears not to have appreciated that the appellants' position was that the cars provided to Mr Davies and Mr Togneri were provided by Reedon, not Services.

Third ground of appeal – the respondents' submissions

74. In response, counsel for the respondents submitted that whether the FtT gave adequate reasons for its refusal of this part of the appeal falls to be tested by the principles referred to in *Wordie Property Co Ltd v Secretary of State for Scotland* 1984 SLT 345, at page 348, and *Lai Lee Lian v Singapore Bus Service* [1984] 1 AC 729. The decision must leave the informed reader and the court in no real and substantial doubt as to what were the considerations which were taken into account in reaching it. Under reference to *Proctor*

& Gamble UK v RCC [2009] STC 1990 per Jacob LJ at paragraph 19, and Toulson LJ at paragraphs 61 and 62, Mr Artis submitted that the tribunal's duty was to set out the facts necessary for an understanding of its decision, not to make findings in relation to every item of evidence and still less to make findings in relation to submissions of fact that it had rejected. Applying these principles, the FtT has given adequate reasons for its decision on the vehicles issue, and this ground of appeal should be rejected.

Third ground of appeal - decision and reasons

75. In resisting this ground of appeal, counsel for the respondents referred to a number of passages in the FtT's decision, by reference to which he contended that its conclusions are "wholly justified and sufficiently reasoned". Only one of these passages is to be found under the heading "Decision", and it is in the following terms:

> "We find also that the cars provided under Plan 2 for Messrs Donald, Togneri, and Davies were benefits-in-kind from Darvel. While certain vehicles may have been registered in the name of Services, they belonged truly to Darvel. Reference may be made to documentary records relating to insurance, maintenance and day-to-day running costs."

76. I did not understand Mr Artis to dispute counsel for the appellants' assertion that the tribunal had before it documentary evidence demonstrating that the vehicles provided to Mr Davies and Mr Togneri were provided by Reedon. The FtT does not identify that evidence, nor does it explain why it rejected it, as it must have done. As Mr Young submitted, Reedon is not mentioned in the tribunal's findings in respect of Plan 2. No attempt is made to deal with the appellants' argument that Mr Donald was Services' company secretary, that he carried out work for that company, that he was entitled to

remuneration therefor, and that the use of a car represented that remuneration. In my view, therefore, the third ground of appeal is made out.

77. Counsel were agreed during the hearing that, in the event that I upheld this ground, the case should be remitted to the tribunal to give further reasons for its rejecting the appellants' appeal in respect of Plan 2, and I shall do so. It follows from what I have said earlier in this judgment that the appeal on grounds 1 and 2 is dismissed.

LORD JONES

Release date: 05 October 2015