[2014] UKUT 0454 (TCC)

Appeal numbers: FTC/71/2013 and FTC75/2013

Procedure - appeal against closure notice - reliance on grounds for amendment not stated in closure notice-* Tower McCashback *considered

Corporation tax – loan relationships – application of paragraph 13 Sch9 FA 1996 to debit arising under para19A

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

FIDEX LIMITED	**Appellant in Appeal no FTC/75/2013, and Respondent in Appeal no FTC/71/2013**
- and -	
THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS	**Respondents in Appeal no FTC/75/2013 and Appellant in Appeal no FTC/71/2013**

TRIBUNAL: Mr Justice Barling
Mr Charles Hellier

Sitting in public in London on 13, 14 and 15 May 2014

Michael Flesch QC instructed by Clifford Chance LLP for Fidex Limited
John Tallon QC and Charles Bradley, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for HM Revenue and Customs

DECISION

Introduction

1. This is a single decision relating to two appeals against two decisions of the First-tier Tax Tribunal (the "FTT"). One appeal is by Fidex Limited ("Fidex") and is against a decision that the effect of a particular closure notice was not to prevent HMRC arguing that paragraph 13 of Schedule 9 to the Finance Act 1996 ("the FA") applied to deny Fidex a claimed loss; the other appeal is by HMRC against a decision that paragraph 13 did not deny Fidex the benefit of that loss.

2. Until 2002 Fidex was an orphan company associated with BNP Paribas. The shares in its holding company ("FHL") were held by a charitable trust. It had been used to repackage bonds issued by a number of different companies: it bought bonds, entered into derivatives, and issued its own commercial paper which carried some of the economic characteristics of the bonds it had purchased.

3. Initially Fidex's debts and assets were not consolidated in BNP Paribas group accounts. But the accounting practice changed: Fidex's commercial paper programme was terminated in 2002 and it was left holding a portfolio of some 22 bonds of varying maturities.

4. In 2004 Swiss Re proposed a tax avoidance scheme to BNP Paribas. The object of the scheme was to create a tax loss in Fidex's 2005 accounting period, and to enable that loss to be surrendered to companies in the BNP Paribas group. The BNP Paribas group decided to implement the scheme and paid Swiss Re a fee for its idea.

5. In broad outline the following steps were taken in 2004 in what was called Project Zephyr:

> (1) Fidex was brought back into the BNP Paribas tax group by the acquisition of FHL's shares by BNP Paribas (so that the expected losses might be group relieved against taxable profits of companies in the group);
>
> (2) Fidex issued to Swiss Re four classes of preference shares, each of which had rights which matched those of one of four sets of bonds held by the company;
>
> (3) Fidex decided that, for the year ending 31 December 2005, it would change the accounting principles used in making up its accounts from UK Generally Accepted Accounting Practice ("UK GAAP") to International Financial Reporting Standards ("IFRS").

6. The terms of each of the classes of preference shares gave the holders rights which reflected Fidex's rights in relation to the four different bond holdings. The rights of each class of preference share entitled the holders to amounts equal to 95% of the amounts Fidex received from the corresponding bonds. Under the terms of the subscription agreement Fidex undertook to Swiss Re not to dispose of its interest in

the relevant bonds while Swiss Re remained the holder of the related preference shares.

7. The economic effect of each issue of preference shares was that Fidex had disposed of 95% of its interest in the related bonds to Swiss Re.

8. Under UK GAAP Fidex's 2004 accounts showed both the preference shares and the bonds on Fidex's balance sheet; in Fidex's 2005 accounts, under IFRS, neither the preference shares nor 95% of the bonds were shown on its balance sheet since the terms of the preference shares so matched and cancelled the economic qualities of the bonds (or of 95% of the bonds) that the IFRS accounting policy required them to be "derecognised".

9. Paragraph 19A of Schedule 9 to the FA provided that if by reason of a change in accounting policy the carrying value of a loan relationship in a company's accounts changed between the end of one period (in this case 2004) and the beginning of the next (in this case 2005) the difference should be treated as deductible or taxable in the later year (depending on whether it was respectively a decrease or an increase in carrying value). The reduction of the carrying value of the bonds was €84m, and Fidex claimed a debit of that amount in its tax computations for 2005 giving rise to a trading loss.

10. The magic in this scheme was that the existence of the preference shares coupled with the change in accounting policy would mean that paragraph 19A would deliver a loss equal to 95% of the value of the bonds, without any economic loss being suffered by Fidex.

11. Before implementing the scheme the BNP Paribas group took external legal and accounting advice. A number of internal documents describing the scheme and its risks and benefits were before the FTT. The FTT quoted an extract from one in its second decision at [146]. This included the following statement:

> "The risk transfer of €84 million of bonds is structured such that it results in the BNP P[aribas] UK group being able to claim a UK tax deduction for €84 million ... as a result of the application of the transitional rules for UK taxpayers moving accounting basis from UK GAAP to IFRS on 1 January 2005."

12. The scheme was notified to HMRC as a tax avoidance scheme, and Fidex, when it made its tax return for 2005, notified HMRC that it had used the scheme.

13. HMRC opened an enquiry into Fidex's tax return for 2005. They disputed the way in which the bonds had been or should be accounted for. They argued that the carrying value of 95% of the bonds was nil both at the end of 2004 and at the beginning of 2005 so that no difference and no debit or loss arose under paragraph 19A. The correspondence continued on this issue for over three years.

14. Then on 2 August 2010 HMRC issued a closure notice in which they indicated that the company's return should be amended so as to reduce the claimed trading loss

by €84 million. There was then a review which upheld the conclusions in relation to paragraph 19A, and Fidex appealed to the FTT.

15. In its statement of case for the FTT hearing, HMRC raised for the first time a new attack on the scheme. They said that the anti-avoidance provisions of paragraph 13 Schedule 9 applied to deny Fidex the benefit of any debits which arose under paragraph 19A. Paragraph 13 provides among other things that a debit does not arise to the extent it is attributable to a main tax avoidance purpose.

16. Fidex applied to the FTT to strike out this part of HMRC's case. It said that, given the terms of the closure notice, HMRC were prevented from raising this issue. The strike out application was heard by Sir Stephen Oliver QC on 10 October 2011. He refused the application.

17. Fidex appeals against that decision. This is the appeal on what we shall call the Closure Notice Issue.

18. The substantive appeal in respect of the closure notice was then heard in May 2012. At the hearing HMRC argued both (a) that because of the way the accounting ought to work paragraph 19A did not give rise to a debit of €84 million in 2005, and (b) that if it did, paragraph 13 applied to deny Fidex the loss which would arise. The FTT (John Walters QC and John Robinson) held in favour of Fidex on both issues.

19. HMRC has not appealed against the FTT's finding in relation to the first issue, but it appeals against the FTT's conclusions in relation to paragraph 13. This is the Paragraph 13 Issue.

The legislative context

20. Sections 81 to 103 of the FA provide a separate and exclusive code for the taxation of companies' "loan relationships" (a term defined by section 81). Section 82 provides that the profits and deficits arising on loan relationships are to be computed "using the credits and debits given for the accounting period in question" by the provisions of the Chapter. Section 85A provides that the amounts to be brought into account are those that "in accordance with generally accepted accounting practice, are recognised in determining the company's profit and loss for the period".

21. Thus the code requires (i) the identification of loan relationships; (ii) the determination in accordance with accounting practice of the debits and credits arising in respect of those loan relationships in any period; and (iii) the treatment of those debits and credits as taxable or deductible respectively. When the loan relationship is held for the purposes of trade those debits and credits form part of the computation of trading profits.

22. Schedule 9 to the FA provides special computational provisions. In that schedule paragraph 19A provides special rules where there is a change in accounting policy. One of its purposes is to ensure that profits and losses which arise on a change in the accounting value of a loan relationship arising as a result of a change in accounting policy is not left out of account. That is because without paragraph 19A only the

debits and credits arising in an accounting period would be brought into account; those which arose in the interstices between accounting periods would fall out of account. Paragraph 19A applies where there is a change "of accounting policy in drawing up a company's accounts from one period of account (the 'earlier period') to the next period (the 'later period')" and continues:

> "(2) This paragraph applies, in particular, where –
>
> > (a) the company prepares accounts for the earlier period in accordance with UK generally accepted accounting practice and for the later period in accordance with international accounting standards ...
>
> (3) If there is a difference between –
>
> > (a) the accounting value of an asset or liability representing a loan relationship of the company at the end of the earlier period, and
> >
> > (b) the accounting value of that asset or liability at the beginning of the later period,
>
> a corresponding debit or credit (as the case may be) shall be brought into account for the purposes of this Chapter [viz: Chapter 2, Finance Act 1996] in the later period.
>
> (4) In sub-paragraph (3) "accounting value" means ... the carrying value of the asset or liability recognised for accounting purposes.
>
> ……"

23. The FTT accepted that the bonds were loan relationships of Fidex and that Fidex had changed its accounting policy from UK GAAP in 2004 (the earlier period) to IFRS in 2005 (the later period). IFRS were international accounting standards: see section 80 of the Finance Act 2004 and the FTT's decision at [135] to [140]. It held that there was a difference between the accounting value of the bonds at the end of 2004 and the accounting value of those bonds at the beginning of 2005; that difference was the €84 million reduction which had arisen by reason of the derecognition of 95% of the value of the bonds; and accordingly that a debit of €84 million arose.

24. Paragraph 13 of Schedule 9 provides that if a loan relationship has an "unallowable purpose" the debits which fall to be brought into account in accordance with the code "shall not include so much of the debits….as respects that relationship as on a just and reasonable apportionment, is attributable to the unallowable purpose." A main tax avoidance purpose is an unallowable purpose. (See sub-paragraphs 13(2) to (6).)

The Closure Notice Issue.

25. Paragraph 1 of Schedule 18 to the Finance Act 1998 provides that HMRC "may by notice require a company to deliver a return (a "company tax return") of such information, accounts, statements and reports -

(a) relevant to the tax liability of the company, or

(b) otherwise relevant to the application of the Corporation Tax Acts to the company

as may reasonably be required by the notice."

26. The company tax return form which Fidex completed for the year ending 31 December 2005 started with a statement that if notice to deliver the company tax return had been given a penalty would be charged if it was not made, and said:

> "the return includes a company tax return form, any Supplementary Pages, accounts, computations and any relevant information."

27. Thus, on this basis the "return" which Fidex was required to make was not limited to the filling in of boxes in the company tax return form but included any accounts and computations.

28. Paragraph 7(1) of Schedule 18 requires every company tax return to include a self-assessment of the tax payable for the period. There was a box (number 86) for this amount on the company tax return form that Fidex filled in for 2005.

29. In box 122 of its (revised) 2005 company tax return form Fidex declared a "Trading Loss Case 1" of £61,035,440, and in box 86 declared that the self assessed tax payable was nil. Apart from the disclosure of the tax avoidance scheme these were the only significant entries on the company tax return form.

30. Fidex sent with its returns computations showing the origin of the trading loss as follows:

Trading Profits	€12,548,720
(Gain)/Loss on revaluation of…investments	€ (4,592,099)
Change in basis adjustments	€ (97,227,055)
Schedule DI losses	€89,270,434

This being translated into sterling gave:

Loss for the period	£61,035,440

A further schedule explained the derivation of the Change in basis adjustments:

Available for sale revaluation	€13,704,332
Derecognised Assets (listed bonds)	€ **(83,849,399)**
Revaluation of swaps	€ (363,676)

€97,227,055

The Paragraph 13 Issue relates to the € (83,849,399) highlighted above.

31. Paragraph 24 of Schedule 18 provides that HMRC may, if they give notice, enquire into a company tax return. HMRC gave such notice in relation to Fidex's 2005 return on 3 September 2007. There followed three years of correspondence in which HMRC argued that there was no paragraph 19A difference because UK GAAP would also have required derecognition of the bonds in 2004. (On appeal to the FTT, as we note below, HMRC also put Fidex to proof that the bonds were required to be derecognised at the beginning of 2005).

32. Paragraph 32 of Schedule 18 provides that:

> "An enquiry is completed when [HMRC] by notice ("closure notice") inform the company they have completed their enquiry and state their conclusions."

33. Paragraph 34, as it applied from 1 April 2010, provided:

> "…..
> (2) The closure notice must
> (a) ….
> (b) make the amendments of that return that are required
> (i) to give effect to the conclusions stated in the notice…
>
> (3) An appeal may be brought against an amendment of a company's return under sub-paragraph (2)…."

34. HMRC issued a closure notice on 2 August 2010. We set it out in full later. The notice concluded that the €84m change in basis adjustment should not have been made and therefore that the trading loss should be revised downwards.

35. Fidex's case before the FTT, and before us, was that the scope and subject matter of any appeal was defined by, and so must be confined to, the amendments made to give effect to the conclusions in the closure notice, and that, because the closure notice related only to the paragraph 19A issue ("Therefore the sum of €83,849,399 representing the value of derecognised listed bonds should not have been included…"), HMRC could not raise the Paragraph 13 Issue on the appeal. More particularly, the FTT did not have jurisdiction to consider the Paragraph 13 Issue, and should have struck out that part of the proceedings under rule 8(2)(a) of the FTT's rules:

> "The tribunal must strike out the whole or part of the proceedings if the tribunal does not have jurisdiction in relation to the proceedings or that part of them."

36. The leading case on this issue is *Commissioners for Her Majesty's Revenue and Customs v Tower MCashback LLP1* [2011] UKSC 19, an appeal which reached the Supreme Court. The majority of the Court of Appeal, and the seven judges who heard the appeal in the Supreme Court were united with Henderson J, on the correct

principles to be applied but differed from him in the application of those principles to the closure notice in question.

37. Before turning to the judgments in *Tower MCashback* there are two matters we should note. First the legislation applicable in that case was not quite the same as that relevant to this appeal. There are two differences:

(1) The first is that that case related to a partnership return for which the relevant legislation is to be found in Taxes Management Act 1970 ("TMA") rather than Schedule 18. However, the provisions are almost identical save for the fact that the equivalent of the right to appeal against "an amendment of a company's tax return" in paragraph 34(3) of Schedule 18, appears in the TMA as a right to appeal against "any conclusions stated or amendment made by a closure notice" (see section 31(1)(b) TMA).

Neither party placed much reliance upon this apparent difference. Mr Flesch QC, who appeared for Fidex, said that, reading sub-paragraphs 34(2) and (3) of Schedule 18 together any appeal was against "an amendment ... to give effect to the conclusions" set out in the closure notice, which meant much the same. Mr Tallon QC, who appeared with Mr Bradley for HMRC, did not demur;

(2) the second difference is that since *Tower MCashback* was decided sections 49A to 49I have been added to TMA 1970. These new provisions relate to the conduct of a review by HMRC and apply to both corporation tax and income tax.

Fidex submits this change is significant because these provisions demonstrate the limitation of the issues in dispute provided by the legislature to give some measure of certainty to the taxpayer.

38. The second matter is that in *Tower MCashback* the Court of Appeal and the Supreme Court recognised that if the scope of an appeal was limited by the terms of the closure notice, there could be a temptation for HMRC to write their conclusions as widely as possible to ensure that there was scope for every possible attack to be made in the appeal. The judges recognised that there was a balance to be struck between the collection of the right amount of tax and the protection to be afforded to the taxpayer against a roving attack after an enquiry had closed. Certain passages in the judgments appear to be directed principally to giving guidance to HMRC on this issue, rather than to the precise scope of the issues permitted to be ventilated in the light of the closure notice in that appeal.

39. In that case Tower MCashback, an LLP (which was taxed as a partnership), sought capital allowances on its purchase of software pursuant to section 45 of the Capital Allowances Act 2001 (the "CAA") for expenditure "incurred" by a small enterprise on IT. Sub-section 45(4) prevents expenditure from qualifying for such capital allowances if it was incurred with a view to granting another person the right to use the software. During the course of an enquiry HMRC had argued that the expenditure in question fell foul of sub-section 45(4). Under some pressure from the taxpayer the enquiry was closed and the Inspector wrote:

"I have now concluded my enquiries into the Partnership Tax Return for the year ended 5 April 2005. As previously indicated, my conclusion is:

The claim for relief under section 45 CAA 2001 is excessive.

The partnership return for the year ended 5 April 2005 is amended as follows.

Capital Allowances £Nil

Allowable Loss £Nil".

40. This notice was sent with a covering letter in which the inspector had indicated that he was satisfied that the scheme failed on the section 45(4) point, and said that whilst additional points might arise they would make no difference to the bottom line because section 45(4) proscribed the relevant relief.

41. Before the Special Commissioner HMRC had started by relying on sub-section 45(4). But, on the third day of the hearing, HMRC abandoned that contention and argued instead that the claimed expenditure had not been "incurred" by the partnership within the meaning of that word in section 45 (because of the mechanism of a circular scheme). The Special Commissioner permitted this argument to be pursued.

42. In the High Court, Henderson J said, in passages expressly approved by the majority of the Court of Appeal, and by the Supreme Court, that:

> (1) what mattered were the officer's conclusions, not the process of reasoning which led to those conclusions [113];
>
> (2) the Special Commissioner had jurisdiction to entertain legal arguments which had played no part in the officer's reasoning for the conclusions in the closure notice, subject to proper case management [115]; and
>
> (3) an appeal did not permit HMRC to launch a (second) roving enquiry into a return for
>
> "the scope and subject matter of the appeal will be defined by the conclusions stated in the closure notice and by the amendments (if any) made to the return. [116]"

43. Referring to this last passage Moses LJ, with whose judgment Scott Baker LJ agreed, said that it all depended on what was meant by the "subject matter". He also adopted slightly different wording from Henderson J's reference to the subject matter of the appeal: Moses LJ referred to the subject matter of the *enquiry* as well as of the conclusions in the notice, stating at [41] (with similar phrases at [35] and [42]):

> "The appeal against the conclusions is confined to the subject matter of the enquiry and of the conclusions."

44. There was some criticism by Mr Flesch of this wording and of Moses LJ's statement at [41] that:

> "the statute looks to identify what section 28ZA [of the TMA] describes as the subject matter of the enquiry".

Section 28ZA relates to matters brought to the tribunal during the course of an enquiry and which arise "in connection with the subject matter of the enquiry", rather than to matters arising after the closure of the enquiry. Section 28ZA was not directly relevant in *Tower MCashback* nor is it relevant directly to this appeal. Mr Flesch suggested that Moses LJ had been lead by that provision into conflating the subject matter of the enquiry and the subject matter of the conclusions in the closure notice: a conflation which had as its results the wider language referred to in the quoted passages.

45. We note, however, that paragraph [41] of Moses LJ's judgment was quoted with apparent approval by Lord Walker in the Supreme Court ([16]). Moreover it is far from clear that his reference to "the subject matter of the enquiry and of the conclusions" would necessarily permit a wider range of issues to be ventilated on appeal than a reference to the "conclusions stated in the closure notice". It might just as easily serve to limit those issues in so far as the subject matter of the enquiry provides context for the proper interpretation of the conclusions in the closure notice. Therefore in referring to the subject matter of the enquiry we do not understand Moses LJ to have been intending to broaden the scope of appealable issues. We observe that he also stated at [41]:

> "The closure notice completes that enquiry and states the inspector's conclusions."

46. Henderson J had found that the context of the closure notice in that case, included the prior correspondence, the reference in the notice itself to "previous correspondence", and the letter which came with it; he concluded that these demonstrated that the subject matter of the conclusions was restricted to the section 45(4) point.

47. In this context Moses LJ said that it would be wrong for the court to attempt to identify some legal principle defining the limitations on the subject matter of the appeal given that Parliament had chosen not to do so ([37]); he would leave it to the Special Commissioner to identify the subject matter of the enquiry and thus the subject matter of the conclusions, although in doing so the tribunal would have to balance protection for the taxpayer with the public interest in the collection of tax ([38]). At [39] he said that he was "fortified in the propriety of leaving to the fact finding tribunal the task of identifying the subject matter of the enquiry, conclusions and appeal by reference to the" procedural rules of the tribunal. Having said, at [41], that the statute looks to the FTT to identify the subject matter of the enquiry, he stated at [42]:

> "Provided a party can be protected from ambush, the only limitation on issues which might be entertained by the Special Commissioner is that those issues must arise out of the subject matter of the enquiry and consequently its conclusion, and be subject to the case management powers to which I have referred."

48. Moses LJ differed from Henderson J in two respects. The two paragraphs in which he sets out these differences are quoted with approval by Lord Walker in the Supreme Court. Moses LJ said that his first point of difference was that it was a matter for the Special Commissioner to identify the subject matter of the appeal and that the Special Commissioner had done so correctly. His second point was this:

> "[51]. There is a second basis on which I differ from Henderson J. Apart from the importance of leaving it to the fact-finding tribunal to determine the subject matter of the closure notice, in my view the closure notice itself does not allow so restricted a view of the subject matter of the appeal. Whilst it did refer to previous correspondence which clearly focused on s 45(4), the closure notice itself was, in plain terms, a refusal of the claim for relief under s 45 CAA 2001. That was the conclusion stated pursuant to s 28B(1). There is neither statutory warrant nor any need to look further."

49. In the Supreme Court Lord Walker considered there was “little if any” difference between Henderson J and the Court of Appeal in the principles to be applied, the difference being as to their application. He thought that the letter which had accompanied the closure notice in that case could be read as indicating that relief might be denied for reasons other than section 45(4) and that accordingly the inspector might not, as Henderson J had considered, have been “pinning his colours” to the section 45(4) mast. He preferred the approach of Moses LJ with regard to the application of the principles.

50. Lord Hope gave the only other judgment. Having agreed with Lord Walker he said:

> “[84] Notices of this kind, however, are seldom, if ever, sent without some previous indication during the enquiry of the points that have attracted the officer's attention. They must be read in their context. In this case [the officer] drew attention to this when he prefaced his conclusion with the words "as previously indicated." He also sent a covering letter which cast further light on the approach which he had taken to the various issues that had been under examination. In these circumstances it does not seem unfair to the LLPs to hold that the issue as to their entitlement to the allowances claimed should be examined as widely as may be necessary in order to determine whether they are indeed entitled to what they have claimed. Furthermore, while the scope and subject matter of the appeal will be defined by the conclusions and amendments made to the return, section 50 of TMA does not tie the hands of the commissioners (now the Tax Chamber) to the precise wording of the closure notice when hearing the appeal."

51. In this passage Lord Hope makes clear that the closure notice must be read in context. It appears from his reference to a covering letter that he regarded that letter as part of the context, and that he must have taken the view that in it the officer was not pinning “his colours to the section 45(4) mast”, so that it was right to read the closure notice as concluding more broadly that relief under section 45 was not available, and not simply that section 45(4) precluded relief.

52. Both Lord Walker at [18] and Lord Hope at [85] make more general comments about the way HMRC should approach a closure notice. Lord Walker said

> [18] …In a case in which it is clear that only a single, specific point is in issue, that point should be identified in the closure notice. But if, as in the present case, the facts are complicated and have not been fully investigated, and if their analysis is controversial, the public interest may require the notice to be expressed in more general terms…."

53. Lord Hope said

> [85] …The aim should be to be helpful, both to the taxpayer and to the Tax Tribunal which will have to case manage any appeal. The officer should wherever possible set out the conclusions that he has reached on each point that was the subject of the enquiry which has resulted in his making an amendment to the return."

54. As we have mentioned, Fidex drew our attention to sections 49A to 49I TMA (see paragraph [37] above). These were inserted with effect from 1 April 2009, and were not in force when *Tower MCashback* was heard.

55. The sections apply where, following the issue of the closure notice, the taxpayer appeals. The appeal is made initially to HMRC. The new sections permit the taxpayer to require, and HMRC to offer, a review of “the matter in question". This phrase is defined by section 49I(4)(a) to mean "the matter to which an appeal relates". On offering a review HMRC must notify the taxpayer of its view of the matter in question. Where a review takes place the nature and extent of the review are to be such as appear appropriate to HMRC in the circumstances (section 49E(2)). HMRC are required to notify the taxpayer of the conclusions of the review "and their reasoning" within a prescribed period.

56. Once the results of the review have been communicated, the taxpayer may notify the appeal to the tribunal, and section 49G(4) provides that the tribunal "is to determine the matter in question".

57. The language of sections 49A to 49I does not affect the scope of the appeal. The "matter in question" is defined as the matters to which an appeal relates and, as we have seen, here that refers to an appeal against "an amendment of a company’s return” which is required to give effect to conclusions stated in a closure notice (see sub-paragraphs 34(2) and (3) of Schedule 18 to the Finance Act 1998).

58. The statutory language does however limit the matters to be determined by the tribunal to those in the appeal which the taxpayer makes. A closure notice might conclude on several issues, and the taxpayer might appeal against only one or some of them. The matter in question is then limited to those against which he has appealed (subject to making an application under rule 5(3)(c) of the tribunal rules).

59. Fidex points out that section 49E(4) permits the taxpayer to make representations for the purpose of the review. In the present case it was not given an opportunity to make representations on the Paragraph 13 Issue during the review because that had

not been raised by HMRC. Fidex submits that if HMRC are right and can now advance the argument, that makes a nonsense of the review system. Mr Tallon responds that this is an inevitable consequence of the fact that fresh legal arguments may be advanced, and it is properly addressed by the tribunal's powers of case management on appeal.

60. Lord Walker accepted that HMRC do not have to give reasons for their conclusions in the closure notice. Although the new provisions to which we have referred require HMRC to notify both the conclusions of the review and their reasoning within a specified period (sub-section 49E(6)), if they fail to do so the review is to be treated as having upheld HMRC's view. Therefore the new legislation contemplates that in some cases reasons might not be given as part of the review procedure.

61. There will be cases where a conclusion in a closure notice could be supported by more than one possible reason. That is unaffected by the new provisions. It is therefore quite possible that a reason for a conclusion other than those which originally motivated that conclusion may come to the fore during or after the review. Where this happens after the review it may make the review process, and the taxpayer's opportunity to make representations, otiose in the context of that new reason. The remedy, however, lies in the tribunal's case management powers, and in the obligation of the inspector to be helpful in his closure notice and to set out as precisely as possible his conclusions. We do not find that these new provisions cast much light on the issue before us in the present case.

62. In summary we derive the following principles from the legislation and case law to which we have referred:

(1) An appeal to the FTT in such a case as this is brought against "an amendment of a company's return" which is required to give effect to conclusions stated in a closure notice.

(2) The scope of the appeal is defined by and confined to the subject matter of the enquiry, the conclusions and amendments (if any) in the closure notice. An appeal does not permit HMRC to launch a new roving enquiry into a tax return.

(3) It is the HMRC officer's conclusions/amendments in the closure notice which matter, and not the process of reasoning which has led to them.

(4) The officer does not need to give reasons for his conclusions.

(5) The officer has a duty to make the closure notice as helpful to the taxpayer as is possible or appropriate in the circumstances.

(6) The FTT has jurisdiction to entertain legal arguments which have played no part in the officer's reasoning for the conclusions in the closure notice; any element of ambush or unfairness must be avoided by proper case management.

(7) It is a matter for the fact finding tribunal (the FTT) to identify the subject matter of the enquiry, the conclusions and, therefore, the appeal.

(8) In determining these matters the context is relevant and may include, in addition to the subject matter of the enquiry and the contents of the closure notice themselves, any other relevant correspondence.

(9) In making its determination the FTT should also balance protection of the taxpayer with the public interest in the collection of the correct amount of tax.

The application of the relevant principles to this appeal

63. This was the text of the closure notice of 2 August 2010, so far as relevant (with the square bracketed paragraph numbers added for ease of later reference):

"Company Tax Return – Year ended 31 December 2005

[1.] I have completed my enquiry into the company's Tax return for the period 1 January 2005 to 31 December 2005 and my conclusions are:

[2.] The derecognition of the listed bonds and preference shares should not have occurred on transition to IFRS. Therefore the sum of €83,849,399 representing the value of the derecognised listed bonds should not have been included in the change in basis adjustments following the adoption of IFRS.

[3.] The loss for corporation tax purposes is therefore as follows:

Loss for the period based on return as amended	€89,270.434
Reduction as noted above	€83,849,399
Revised loss	€5,421,035
€1=£0.68371393 Revised loss for period	£3,706,437

[4.] Please note that the loss figure of €89,270.434 takes into account a Taxpayer Amendment made during the enquiry (letter from Michael Deriaz dated 12 November 2007) and deferred under paragraph 31(3) Schedule 18 FA 98.

[5.] Further analysis may reveal additional grounds supporting the conclusions I have reached.

[6.] This notice amends the return to give effect to my conclusions. If the company does not agree with the amendments I have made to the company's Tax Return it may appeal, by notice in writing within 30 days after the amendments were notified to it.

268/89598 11746/HD

The amount available for the company to surrender as group relief has been reduced. I draw your attention to the company's obligation under paragraph 75 Schedule 18 FA 98 to withdraw, or amend, as many notices of consent as is

necessary to bring the amount surrendered within the new amount available of £3,706,437. The company has 30 days to send a copy of any new notice of consent to each company affected and to HMRC."

64. On the same day Fidex (or rather its parent company) notified HMRC of its intention to appeal against the proposed amendments. This notification, which triggered the offer of a review pursuant to the new legislation discussed above, stated:

> "…we are appealing the proposed amendments to the company's return ... The grounds of our appeal are on the basis we do not accept the conclusions of your letter dated 27 July 2010."

The letter to which Fidex's parent was referring was one which set out HMRC's conclusions just prior to the service of the formal closure notice a few days later on 2 August 2010.

65. HMRC then offered a review. In the offer letter the officer said "my view of the matter remains as explained in" letters which focused exclusively on whether a paragraph 19A difference had arisen. Fidex accepted the offer of a review. In a letter of 21 October 2010 HMRC set out the result of the review together with their reasoning. HMRC adhered to their view that "the sum of €83,849 399 representing the value of the recognised listed bonds should not have been included in the change of basis adjustments following the adoption of the IFRS." This was because the bonds in question should have been derecognised in the 2004 accounts, and therefore no paragraph 19A difference had arisen.

66. Fidex submits (and it is clearly correct) that HMRC's original view, its review and all correspondence up to and including the letter containing the result of the review, proceeded on the basis that HMRC's specific ground for challenging the debit claimed by Fidex in its return was the absence of a paragraph 19A difference. It is common ground that HMRC did not raise the Paragraph 13 Issue at any of these stages.

67. Before the FTT, as well as raising the Paragraph 13 Issue, HMRC put Fidex to proof that the bonds should be derecognised in *2005*. Mr Flesch accepted that the question of the 2005 accounting value of the bonds was part of the subject matter of the closure notice although in his submission the Paragraph 13 Issue was not. The difference, he said, was that the statement in the notice that "The derecognition of the .bonds…should not have occurred on transition to IFRS" was wide enough to permit a challenge to the 2005 opening value as well as the 2004 closing value, but it plainly did not address paragraph 13.

68. Sir Stephen Oliver QC, in the FTT, first directed himself by reference to the principles approved by the Supreme Court in *Tower MCashback,* discussed above. Then, at paragraph [29] of his judgment, he identified the enquiry as being into

> "whether a scheme designed to produce a loss through the operation of the loan relationships provisions was successful in achieving that result…The sole question….was whether, having regard to the terms of the loan relationships code in Schedule 9….the implementation of the scheme served to increase for tax purposes the loss shown in Fidex's self assessment tax return. That was the point of the enquiry. The stated effect of the [closure] notice was that in the circumstances the loan relationship provisions did not produce that result. To confine the Tribunal to an analysis of one provision in the Code, i.e. paragraph 19A, while ignoring the possible impact of paragraph 13, would be to impose an unacceptable restriction on the judicial function of the Tribunal."

69. Sir Stephen did not consider that the scope of the appeal or the jurisdiction of the FTT was limited by the new review provisions, and he therefore concluded that the FTT had jurisdiction in relation to the Paragraph 13 Issue, and declined to strike out that part of HMRC's case.

70. The essence of Mr Flesch's submissions is that the FTT failed to recognise what he submits is the clear distinction between the conclusion expressed in the closure notice and the amendments required to give effect to it. Mr Flesch submits that what Sir Stephen described as the "expressed grounds for the conclusion" (namely that there was no paragraph 19A debit) was in fact the conclusion itself. By the same token, that which Sir Stephen identified as the conclusion ("that there was no loss in the amount of €83.9m") was the amendment required to give effect to the conclusion.

71. The arguments in this case reflect very clearly the problem identified by Moses LJ in *Tower MCashback* when he said, in relation to the confinement of an appeal to the subject matter of the conclusions and any amendments stated in the closure notice, that

> "it all depends what one means by the "subject matter" (paragraph 33 of his judgment)."

He also said that in such cases as this there was likely to be controversy as to

> "how one draws the boundaries of the subject matter of the conclusions stated in the closure notice. Are reasons for the conclusion to be distinguished from the conclusion stated, and if so, how?" (paragraph 35).

72. It was for this reason that he considered the court should not attempt to lay down legal rules defining the boundaries, where Parliament had chosen not to, and should leave the identification of the subject matter of the enquiry and conclusions to the fact finding tribunal.

73. In our view Mr Flesch's approach to the interpretation of the closure notice in this case is too rigid in the boundaries he seeks to draw; it would impose on HMRC's challenge to the claimed loss precisely the kind of straitjacket on the advancement of other legitimate factual or legal arguments which Moses LJ proscribed, and would represent a misapplication of the principles derived from the case law.

74. Having regard to those principles (as to which the learned Judge properly directed himself), we consider that the FTT was clearly entitled to find that the subject matter of the enquiry, of the closure notice and of the review related to the admissibility of the debit of €83,849,399 contained in the schedule which formed part of Fidex's tax return, and gave rise to the loss claimed by Fidex in box 122 of its company tax return form. At all times it was the admissibility of that debit that was the subject matter of HMRC's concern. True, their specific ground for challenging it, as set out in the correspondence during the enquiry, in the closure notice and thereafter until the appeal, focused on paragraph 19A and the accounting treatment said to give rise to the claimed difference. There was no mention of any other parts of Schedule 9 or the code. But in our view the FTT was also entitled to regard the paragraph 19A issue as constituting the legal ground or argument on which the challenge had been made up to the time of the appeal, and as not itself representing the entirety of the subject matter of the enquiry and its conclusions. By the same token it was entitled to find that the Paragraph 13 Issue constituted an additional ground on which HMRC could seek to uphold its essential conclusion that Fidex was not entitled to bring the claimed debit into account. Indeed, we consider that the learned Judge was correct in reaching the view that he did.

75. Paragraphs 2 and 3 of the closure notice (as we have numbered its paragraphs – see above) include conclusions of HMRC that Fidex's trading loss is wrongly stated in the return, and should be "revised" as set out. Although these conclusions are preceded by "therefore", which is clearly a reference back to the ground (i.e. paragraph 19A) on which the loss is challenged by HMRC as having been wrongly claimed in the return, that does not affect the essential conclusion in the notice that the specific debit which has been the subject of the enquiry should not be brought into account.

76. We do not consider that it is appropriate to construe a closure notice as if it is a statute or as though its conclusions, grounds and amendments are necessarily contained in separate watertight compartments, labelled accordingly. We can see difficulties in attempting to draw clear boundaries within a closure notice between a "ground" or a "conclusion" or even a conclusion as to an "amendment", as Moses LJ clearly implied in the passage cited above. It seems to us that there may well be grey areas and overlaps. While there must be respect for the principle that an appeal does not provide an opportunity for a new "roving enquiry" into a company's tax return, the FTT is not deprived of jurisdiction where it reasonably concludes that a new issue of fact or law raised on an appeal represents an alternative or additional legal or factual ground for challenging or supporting an amendment in the closure notice.

77. The officer has a duty to make the closure notice as helpful as possible, and the closure notice may be considered in the light of that duty. In this closure notice the officer did not merely amend the trading loss on the return form but clearly explained which component of that loss he considered should be changed. In the light of that duty, and given this clear identification of the part of the trading loss which was at issue different considerations might well apply if HMRC had sought to argue on appeal that another figure in the computation of the loss should be changed. But

having made that identification the FTT may permit reasons in support of the change to that particular debit other than those set out in the letter to be ventilated.

78. We note that in *Tower MCashback* the essential issue was whether the LLP was entitled to capital allowances on its purchase of software pursuant to section 45 of the relevant legislation for expenditure incurred by a small enterprise on IT. HMRC originally concluded that it was not so entitled because the expenditure had been incurred with a view to granting another person the right to use the software, which disqualified it under sub-section 45(4). This ground had been the only issue relied upon during the enquiry, in the closure notice and right up until the third day of the appeal hearing. At that point HMRC changed tack: they abandoned that contention and claimed that the expenditure in question had not been *incurred* by the LLP, for the purposes of section 45.

79. It is true that there is a technical difference between that case and the present, in that in *Tower MCashback* the closure letter expressly referred to section 45 in which the requirement that the expenditure be incurred also appeared, whereas there is no such reference in the closure notice in this case. However, we can see no material difference for present purposes. In *Tower MCashback* the legal ground of challenge also changed: originally it was a contention that the expenditure had been incurred for the benefit of a third party, a disqualifying factor. At the appeal HMRC relied upon a contention that the expenditure had not been incurred. But in each case the challenge was directed to the LLP's entitlement to the capital allowance in question. The deployment of a different ground of challenge did not change the subject matter of the enquiry or the conclusion, which throughout were concerned with that entitlement.

80. The situation here is precisely parallel: the original attack on Fidex's entitlement to claim the debit in question was based on paragraph 19A, and on whether the debit claimed existed at all; the new ground was based on the contention that if the debit exists it is impermissible under paragraph 13. In each case the essential subject matter of the enquiry and the essential conclusion in the closure letter relates to Fidex's entitlement to claim the debit in question. Although every case ultimately turns upon its own facts and context, it would in our view have be extraordinary if the FTT had found that it had no jurisdiction in the present case, given the striking parallels with *Tower MCashback.*

81. Further, to decide that there is no jurisdiction would, in the circumstances of this case, allow form to triumph over substance. Nor would it represent an appropriate balance between the protection of the taxpayer on the one hand, and the public interest in the collection of the correct amount of tax, on the other.

82. We also note that in the closure letter the officer stated:

> "Further analysis may reveal additional grounds supporting the conclusions I have reached."

83. Mr Flesch suggests this is irrelevant as in view of its position within the document it can only be referring to the conclusions relating to paragraph 19A.

Although it is not a decisive point, we are inclined to the view that this statement is intended to be a general reservation referring to any other grounds on which the debit the subject of the enquiry could be impugned.

Conclusion in appeal no **FTC/75/2013**

84. For these reasons we conclude that the FTT was entitled to reach the decision it did, and, further, that it was correct to do so. This appeal is therefore dismissed.

The Paragraph 13 Issue.

85. Paragraph 13 of schedule 9 to the FA provides:

> 13 (1) Where in any accounting period a loan relationship of a company has an unallowable purpose –
>
> (a) the debits, and
>
> (b) the credits in respect of exchange gains,
>
> which, for that period fall, in the case of that company, to be brought into account for the purposes of this Chapter shall not include so much of the debits or credits (as the case may be) as respects that relationship as, on a just and reasonable apportionment, is attributable to the unallowable purpose.
>
> ...
>
> (2) For the purposes of this paragraph a loan relationship of a company shall be taken to have an unallowable purpose in an accounting period where the purposes for which, at times during that period, the company –
>
> (a) is a party to the relationship, or
>
> (b) enters into transactions which are related transactions by reference to that relationship,
>
> include a purpose ("the unallowable purpose") which is not amongst the business or other commercial purposes of the company.
>
> (3) For the purposes of this paragraph the business and other commercial purposes of a company do not include the purposes of any part of its activities in respect of which it is not within the charge to corporation tax.
>
> (4) For the purposes of this paragraph, where one of the purposes for which a company –
>
> (a) is a party to as loan relationship at any time, or
>
> (b) enters into a transaction which is a related transaction by reference to any loan relationship of the company,
>
> is a tax avoidance purpose, that purpose shall be taken to be a business or other commercial purpose of the company only where it is not the main purpose, or one of the main purposes, for which the company is a party to the relationship at that time or, as the case may be, for which the company enters into that transaction.
>
> (5) The reference in sub-paragraph (4) above to a tax avoidance purpose is a reference to any purpose that consists in securing a tax advantage (whether for the company or any other person).

(6) In this paragraph –

"tax advantage" has the same meaning as in Chapter 1 of Part XVII of the Taxes Act 1988 (tax avoidance).'

86. The term "related transaction" used in sub-paragraphs (2) and (4) of Paragraph 13 is defined in section 84(5) of the FA:

> In this Chapter "related transaction", in relation to a loan relationship, means any disposal or acquisition (in whole or in part) of rights or liabilities under that relationship.

87. "Tax advantage" was, at the relevant time, defined in section 709(1) Income and Corporation Taxes Act 1988 ("TA 88"):

> ... "tax advantage" means a relief or increased relief from, or repayment or increased repayment of, tax, or the avoidance or reduction of a charge to tax or an assessment to tax or the avoidance of a possible assessment thereto, whether the avoidance or reduction is effected by receipts accruing in such a way that the recipient does not pay or bear tax on them, or by a deduction in computing profits or gains.

88. We speak from time to time of Fidex having a "bad" or a "good" purpose for holding the bonds: this is shorthand for "unallowable" or otherwise, as the case may be, and is not a comment on the morality of Fidex's conduct.

89. It will also be noted that paragraph 13 speaks of "business or other commercial purposes" of a loan relationship. From time to time in this decision we use for convenience "an allowable purpose of Fidex"; no difference is intended.

90. As the FTT recognised, paragraph 13 applies accounting period by accounting period. The debit arose in 2005. The question is therefore whether in 2005 Fidex had a bad purpose:

> "[187]. We therefore consider that paragraph 13 requires us to examine the loan relationships which Fidex had in the 2005 year and decide whether at any time the main purpose or one of the main purposes for which it was a party to those loan relationships was a tax avoidance purpose."

91. Thus if the bonds had an unallowable purpose in 2004 but not in 2005 that could not have effect to deny Fidex the debits which arose in 2005.

92. HMRC argued before the FTT that the bonds had an unallowable purpose in 2005 when the paragraph 19A debit arose.

93. At [190] the FTT said this:

> "[190] The relevant loan relationships which Fidex had in the 2005 Year were, of course, the Relevant Assets. In considering whether, at any time at all, the main purpose or one of the main purposes for which Fidex was a party to the Relevant Assets was a tax avoidance purpose, we find, on the basis of the

findings of fact made at [148] above, that one of the main purposes for which Fidex was a party to the Relevant Assets from 22 December 2004 (the date of the PSSA pursuant to which Swiss Re subscribed for the Preference Shares in Fidex) until such time as the tax avoidance purpose inherent in the Project Zephyr Transaction was achieved, was a tax avoidance purpose within the meaning of Paragraph 13. We do not find that the tax avoidance purpose was Fidex's *main* purpose in being party to the Relevant Assets at any time, because the main purpose, or one of the main purposes, of Fidex being party to the Relevant Assets at all times when it was a party to them was the commercial purpose of being entitled to the cash flows inherent in the Relevant Assets – even if (at any time) it was contemplated that those cash flows would be accounted for to the holders of the Preference Shares."

94. It is clear in the light of the paragraph as a whole that the beginning of the last sentence should read: "We do not find that the tax avoidance purpose was Fidex's only main purpose…" .

95. In [199] the FTT made another finding about Fidex's purposes:

> "We find that it was one of Fidex's purposes in entering into and carrying out the Project Zephyr Transaction that Fidex would thereby dispose of the Relevant Assets as part of a general policy of conducting an orderly disposal of its remaining assets. Once the avoidance purpose inherent in the Project Zephyr Transaction had been achieved …that was the only "main purpose" of Fidex's retention of the legal title to the Relevant Assets…"

96. We shall come to Mr Tallon's critique of these passages shortly, but there is nothing untoward in a finding that a person has more than one purpose or main purpose. It is plain that paragraph 13 itself admits that a person may have more than one purpose, and more than one main purpose. The finding in [199] merely adds a further purpose to the list of main purposes already described. The FTT does not say that prior to the achievement of the tax avoidance purpose the paragraph [199] purpose was the only main purpose. On the contrary, it is implicit in [199] that the tax avoidance purpose was a main purpose.

97. The FTT held that the paragraph 19A debits crystallised at the end of 2004, and that therefore the tax avoidance purpose was achieved at the end of 2004 ([159], [191], [192] and [194]).

98. The FTT at [195] then addressed Mr Tallon's submission that because the scheme required the assets to be held after 31 December 2004 its purpose in retaining title in 2005 included a tax avoidance purpose. It said:

> "[195] We accept Mr Tallon's submission that the scheme would not have worked if the legal title to the Relevant Assets had been disposed of before 1 January 2005, but it does not in our view follow that Fidex's purpose in retaining legal title to the Relevant Assets in the 2005 Year was a tax avoidance purpose. The tax avoidance purpose was achieved, for the reasons we have

given, by Fidex's retention of the legal title to the Relevant Assets to the end of the 2004 Year."

99. At [199], continuing the passage quoted above it found:

> "…Once the tax avoidance purpose inherent in the Project Zephyr Transaction had been achieved – that is, after the end of the 2004 Year – [orderly disposal] was the only 'main purpose' of Fidex's retention of the legal title to the Relevant Assets. At no time during the 2005 Year (except perhaps, in an abstract sense, the *scintilla temporis* at which the 2005 Year began (cf. sub-paragraph (3)(b) of Paragraph 19A)) did Fidex have a tax avoidance purpose as a purpose for being party to the loan relationships constituted by the Relevant Assets (or the other bonds in its portfolio)."

100. And then at [201] concluded that:

> "In relation to the *scintilla temporis* at which the 2005 Year began, if (which we doubt) it is right to take any account of it at all, because the statutory language of 'times' is not applicable to it, we go on *de bene esse* to consider whether it constituted 'a time' during the 2005 Year that Fidex's purposes for being a party to the Relevant Assets included a tax avoidance purpose which was the main purpose or one of the main purposes for which Fidex was a party to the Relevant Assets at that time. Although rejecting the proposition that a tax avoidance purpose was Fidex's *main* purpose for being a party to the Relevant Assets at the time of the *scintilla temporis* (there was no evidence of any intention to make anything but a 'synthetic disposal' of the Relevant Assets to Swiss Re in 2004), we accept that a tax avoidance purpose was *one of* Fidex's main purposes for being a party to the Relevant Assets at that time."

101. In summary therefore the FTT held that any tax avoidance purpose evaporated at the end of 2004 because it had by then been achieved, but that if there was a *scintilla temporis* at the beginning of 2005 which was relevant, then Fidex had a main tax avoidance purpose for that *scintilla temporis*. Unpacking this slightly, the FTT seem to have concluded:

(1) Fidex's unallowable purpose was achieved at the end of 2004 and then ceased;

(2) but if that is wrong (because of paragraph 19(3)(b)):

(a) it was only for a *scintilla temporis* at the very beginning of 2005 that Fidex continued to have a tax avoidance purpose;

(b) during that *scintilla temporis* its tax avoidance purpose was a main purpose;

(c) but because the *scintilla* was not "times" the purpose could not be an unallowable purpose;

(d) but if that was wrong then Fidex had an unallowable purpose in 2005.

102. The FTT went on to consider, if (2)(d) was correct, what, if any attribution of the paragraph 19A debit should be made to that purpose on a "just and reasonable apportionment" pursuant to sub-paragraph 13(1). It held that none of the debit could be attributed to that unallowable purpose, so that none of it should be denied under paragraph 13. (See [202]-[205] of the FTT decision.)

103. The parties made a number of challenges to the FTT's findings. We address them below.

Beneficial Ownership

104. In his skeleton argument and at the hearing before us Mr Flesch raised the question whether it was part of HMRC's case on this appeal that, by virtue of the issue of the preference shares and the other undertakings given to Swiss Re, Fidex had disposed of beneficial ownership of the bonds (in the sense understood in *Wood Preservation v Prior* 45 TC 112 and *Sainsbury v O'Connor* [1991] STC 318). On the basis that such an argument was being made and was correct, Mr Flesch indicated that he would argue that Fidex was not "a party to" the relevant loan relationship for the purposes of paragraph 13(2)(a) and thus could not have any purpose - tax avoidance or otherwise - for being a party to it in 2004 or 2005. This, he said, would be "a very short answer" to the Paragraph 13 Issue.

105. Mr Tallon pointed out that the "not a party" point would negate the existence of any paragraph 19A(3) debit. Paragraph 19A has effect only where there is, between successive accounting periods, a change in the accounting value of "a loan relationship of the company"; and section 81, having defined when "a company has a loan relationship", provides that any reference to a company being a "party to" a loan relationship shall be construed accordingly. As a result, if for the purposes of paragraph 13 Fidex was not a party to the bonds, it would not have had a loan relationship on which paragraph 19A could operate to give rise to a debit. Accordingly Fidex could not argue that a debit arose under paragraph 19A but that, because it did not beneficially own the bonds, paragraph 13 could not apply to that debit.

106. We can see some force in Mr Tallon's point that if Mr Flesch's contingent argument is correct the 19A(3) debit would not arise. However, after the hearing both parties made clear that they did not wish to pursue any argument based on questions of beneficial ownership. In those circumstances neither Mr Flesch's contingent response to the issue, nor Mr Tallon's reply to it call for a decision and we do not consider it necessary to deal further with the issue.

Change of Purpose argument

107. Mr Flesch argued that the FTT were wrong to conclude that Fidex's originally good purpose in being a party to the bonds became (or was supplemented by) an unallowable purpose from 22 December 2004.

108. Mr Flesch reminds us that the question is not why Fidex issued the preference shares but why it was a party to the bonds.

109. He asks: what changed on 22 December 2004? What did Fidex do differently with the bonds on 23 December compared to what it did on 21 December? He submits that if the preference shares had not been issued it would not have done anything differently. On that date Fidex had no significant creditors and all that changed was the identity of its shareholders. Before 22 December 2004 Fidex held the bonds for the benefit of its shareholders, and after 22 December 2004 it continued to hold them for the same purpose. The rights of the new preference shareholders did not affect Fidex's relationship with any of its assets. Any change in purpose should have manifested itself in the way Fidex enjoyed the bonds.

110. It seems to us that what you do with an asset may be evidence of your purpose in holding it, but it need not be determinative of that purpose. The benefits you hope to derive as a result of holding an asset may also evidence your purpose in holding it. A finding that such a hope exists may, depending on the circumstances, be sufficient for a finding that a purpose of holding the assets was the obtaining of that benefit.

111. The question of what Fidex's purpose was (and whether it was a main purpose) in holding the bonds was a question of fact to be determined by the FTT. Such a determination may be upset by this tribunal only if there was no evidence for its conclusion, if the evidence was to the contrary effect, or if the conclusion was one which no person acting judicially could have come to on the evidence before her. The question is not whether we would have come to the same conclusion, but: was there evidence before the FTT on which it was entitled to reach its conclusion (see *Edwards v Bairstow* [1956] AC 14, and as re-stated by Lord Millett in *Begum v London Borough of Tower Hamlets* [2003] UKHL 5 at [99].)

112. In our view there was ample evidence on which the FTT could have reached its conclusion in relation to Fidex's purpose in 2004. We have referred to some of it in the Introduction. There was evidence that Fidex hoped to obtain a large debit and that it would obtain that debit only if it held the bonds to the end of 2004/beginning of 2005. That was sufficient for the FTT to conclude that Fidex became possessed of a purpose, or an additional purpose, for the holding of the bonds, and that that was a main tax avoidance purpose, and therefore an unallowable purpose. The facts that Fidex may have retained other purposes and that it did nothing different with the bonds cannot, in the light of evidence of hope of the debit which would come with holding the bonds, make that finding unreasonable, perverse or otherwise impermissible.

113. In reaching its conclusion at [190] that Fidex held the bonds for an unallowable purpose, the FTT said it did so "on the basis of the findings of fact made at [148]". In that paragraph the FTT said that one of the main purposes of Fidex in (I) entering into the four transactions encompassed by Project Zephyr relating to the issue of the preference shares, and (II) the adoption on 22 December 2004 of IFRS in place of UK GAAP, was a tax avoidance purpose. With Mr Tallon's acquiescence, Mr Flesch provided us with evidence that BNP Paribas in France had decided to adopt IFRS and that, of 24 active subsidiaries in the UK, 21 had also adopted IFRS at the same time.

114. This further evidence does not undermine the finding of the FTT. Even if it were evidence that in changing its accounting policy Fidex had a purpose of conforming to the group's accounting policies, that would not make the FTT's finding that it had also the purpose of obtaining the debit one which was not open to it on the evidence. Nor, even if the conclusion that the change in accounting policy had a tax avoidance purpose was not open to it, would it make the FTT's conclusion that one of the purposes for which Fidex held the bonds was a tax avoidance purpose unreasonable or unsupported by the evidence, given in particular the patent and significant evidence of Fidex's hope of the debit. It is to be remembered that paragraph 13 directs attention to the purposes for which Fidex was a party to the bonds, and not to the purpose for which the change of accounting policy was adopted, as the FTT reminded itself at [149]. On the evidence before it the FTT was clearly entitled to find that after the 22 December 2004 one of the main purposes for Fidex holding the bonds was an unallowable purpose. We can see no justification for holding that evidence of an additional purpose for Fidex's change of accounting policy would or might alter that finding of the FTT or disentitle it from making that finding.

115. Mr Flesch also referred us to section 455A of the Corporation Tax Act 2009 (which made specific provision in relation to tax avoidance arrangements related to the derecognition of creditor relationships), and to the burden of proof in relation to the Paragraph 13 Issue. As to the former, we do not see that this can possibly take the matter further, not least because it is after the event. Similarly, the FTT's finding cannot be impugned by reference to the burden of proof. There is no justification for suggesting that in making their finding the FTT misapplied what Mr Tallon accepts is HMRC's burden.

Crystallisation argument

116. The FTT said (at [142]) that following the adoption of IFRS for 2005, in the opening balances at 1 January 2005, 95% of the bonds were derecognsed. This process was shown in the 2005 accounts which in a note reconciled the closing balances under UK GAAP at 31 December 2004 to the balances at 1 January 2005 under IFRS and included the derecognition of €84m of the bonds' accounting value.

117. Before the FTT and before us Fidex submitted that because any tax avoidance purpose Fidex may have had had been achieved by the end of 2004, any purpose Fidex had in holding the bonds in 2005 was not relevant to the way in which the debit arose. This was because the difference between the accounting value of the bonds at the end of 2004 and their accounting value at the beginning of 2005 had already "crystallised" at the end of 2004. Thus, the paragraph 19A(3) debit could not be attributable to any purpose in 2005.

118. The FTT accepted this submission of Fidex:

> "[192] On this point we accept Mr Flesch's main submission that the debit under sub-paragraph (3) of Paragraph 19A crystallised at the end of the 2004 Year. This is because the Relevant Assets were held by Fidex at the end of the

> 2004 Year and, on 22 December 2004, Fidex had adopted the use of IFRS in place of UK GAAP for the period commencing 1 January 2005. The accounting value of the Relevant Assets had to be determined by reference to the facts existing at the end of the 2004 Year."

119. As we have recorded, the FTT also held at [190] that one of Fidex's main purposes in being party to the bonds was to be entitled to the cash flows inherent in them, and at [199] that, subject to the *scintilla temporis* issue, Fidex's *only* main purpose in 2005 was as part of its policy of conducting an orderly disposal of its bond portfolio (although these two purposes seem to us probably to be two sides of a coin).

120. Mr Tallon challenges these findings. He says that the only conclusion the FTT could reasonably have reached was that during 2005 the bonds retained an unallowable purpose until they were redeemed.

121. Mr Tallon submits that in 2004 Fidex had, as the FTT found, an unallowable purpose because of its adoption of the Project Zephyr scheme. That scheme required Fidex to hold the bonds to maturity because it was obliged to pass 95% of the cash flows to Swiss Re, and had undertaken not to dispose of the bonds before maturity. He says that where a company is a party to a loan relationship in order to fulfil an obligation it has entered into to pass on the cash from that loan relationship to another person one has to look at the reasons for which the company entered into that obligation to determine its purpose for being a party to the loan relationship.

122. In the same way he says that neither of the two identified purposes can properly be viewed as main purposes because one must look to the reasons for which Fidex entered into the preference share obligation (another way of putting the same argument was that the cash flow from the bonds served no commercial purpose other than to satisfy Fidex's obligation to Swiss Re, and the purpose of that obligation was tax avoidance). By failing to consider these issues he says the FTT came to a perverse conclusion.

123. The problem with this argument is that "purpose" is an ordinary English word referring to something in the future, an aim or a desired end, and once that aim has been achieved there is a difficulty in regarding the purpose as persisting. However, in the light of our conclusion below it is unnecessary for us to decide this point.

124. Mr Tallon also attacks the FTT's finding in [199] that Fidex's purpose was to dispose of the bonds as part of a general policy of conducting an orderly disposal of its portfolio. He does so on the grounds that (i) Project Zephyr related only to four bonds out of 22, (ii) there was no evidence in the board minutes of any such general policy, (iii) it was illogical to say that one's purpose in holding assets was to dispose of them if all one had was in economic terms bare legal title; and (iv) given that Fidex had effectively sold 95% of the assets to Swiss Re on 22 December 2004, holding them could not be part of a policy of holding them for disposal.

125. We have said that we do not regard the FTT's statements as to Fidex's purpose in paragraphs 190 and 199 as contradictory. If in December 2004 Fidex's policy was for the orderly disposal of its bond portfolio, then since Projest Zephyr was, in

economic terms, equivalent to a disposal of part of that portfolio, the Project Zephyr transaction could reasonably be viewed by the FTT as being in pursuit of that policy: it was just that the method of disposal left some time between what might normally be called contract and completion. It would not be perverse to say that one of your purposes in holding your house once you have signed a contract to sell it was for its disposal.

126. Although Fidex' 22 December 2004 board minutes contain no reference to an "orderly disposal" the FTT said this:

> "The Approval Document dated 10 December 2004 (see [146] above, and referred to by Mr Tallon, see [165] above) was a document by which Nick Williams and Oke Uwakwe sought internal BNPP approval for the Project Zephyr Transaction. It evidences the fact that BNPP had decided by that date, in general terms 'market conditions permitting, to propose to the board of Fidex an orderly disposal of Fidex's remaining assets' and that the Project Zephyr Transaction '[represented] a precursor to the disposal of bond assets', being 'the transfer of the risk and rewards of the selected bond assets [the Relevant Assets] (and therefore their synthetic disposal to the Swiss Re group[])]'. The commercial purpose and net effect of the Project Zephyr Transaction was described in that Document as the transfer by the BNPP group of 'the economic risks and reward of ownership of a €84 million portfolio of bonds in a tax efficient way to the Swiss Re group' (see [146] above). Colin Gardner's evidence is that he believed 'it was a tax efficient way to dispose of certain assets held by [Fidex], which was an objective of [BNPP Paris]'."

127. We therefore conclude that there was evidence before the FTT on which it could reasonably decide that in 2005 a main purpose of Fidex's being a party to the bonds was as part of a policy of orderly disposal of its bond portfolio.

128. Mr Tallon had also argued that there was no evidence of any change in Fidex's purpose after 2004. Mr Flesch responded that this submission went nowhere because it was no part of his case that there was any change of purpose in 2005. Mr Tallon accepted that one could legitimately analyse the situation as being that Fidex acquired an additional "bad" main purpose while an original "good" main purpose subsisted throughout. However, he submitted that that did not affect HMRC's case – presumably because it was his case that the bad main purpose continued into 2005.

129. Mr Flesch submits that the FTT was correct in its conclusions, for the reasons it gave. He says that paragraph 19A(3) requires a comparison of the accounting value of the bonds at the end of 2004 with that at the beginning of 2005. The value at the beginning of 2005 cannot be affected by anything which happened later in 2005, and that value is already established at the time that period begins. Thus the difference - the debit under paragraph 19A - cannot be affected by anything done by Fidex (or any purpose of Fidex) in the 2005 period: Fidex could have done nothing in that period to prevent the debit from arising.

130. In support of the proposition that the relevant facts crystallised at the end of 2004 Mr Flesch points to:

(1) Note 11 in Fidex's accounts for 2004 which showed the derecognition of the bonds as at 31 December 2004 and the new value at 1 January 2005, the application of the new IFRS policy and the carried forward accounting value of the bonds which resulted (being only 5% of the whole);

(2) the Agreed Facts which record that the bonds were de-recognised as to 95% "between" the closing balance at 31 December and the opening balance at 1 January; and

(3) the accepted evidence that the sale of the bonds early in 2005 would not have affected the position.

131. Thus, he submits that the debit cannot be attributable to any purpose whatsoever of Fidex in the later period.

132. As we have already noted, the FTT accepted this submission (see paragraph [118] above). The FTT continued:

> "193. Mr Tallon made the point that the retention of the Relevant Assets in the 2005 Year was necessitated by the obligations Fidex undertook to Swiss Re to ensure that the 'pass through' requirements of IAS 39 [19] were satisfied, and thus that the fact that the accounting value of the Relevant Assets at the beginning of the 2005 Year could properly be stated as they were, in accordance with IFRS, and giving rise to the claimed difference under sub-paragraph (3) of Paragraph 19A, depended on the retention of the Relevant Assets in the 2005 Year. This point was, we consider, answered by the unchallenged evidence of Mr Clifford that the accounting was based on the circumstances at the year-end (i.e. the end of the 2004 Year) and would have been unaffected by an unexpected sale of the Relevant Assets in January or February 2005. Mr Clifford said that he did not think that such an event would normally be viewed as an event calling for a post balance sheet adjustment."

133. The FTT accepted that the scheme would not have worked if the bonds had not been held on 1 January 2005 ([195] of their decision - see paragraph [93] above), but said that it did not follow that Fidex's purpose in 2005 was a tax avoidance purpose.

134. However, paragraph 19A(3), as we have explained, operates on the difference between the accounting value of an asset at the end of one year, and the accounting value of that asset at the beginning of the next year. The FTT accepted, and we understood there was no challenge to their conclusion, that the accounting value of the bonds was based on circumstances at the end of 2004. But paragraph 19A(3) does not simply ask whether two accounting entries are different; it asks whether the accounting values "of an asset" are different. If the company has an asset at the end of the earlier period and does not have it at the beginning of the next period (such as might happen when completion is phrased to happen "at the end of 2004") then there will be no asset whose accounting value can be ascertained for the purposes of paragraph 19A(3)(b) at the beginning of the later period, and so no difference. That subparagraph applies only if the company is a party to the loan relationship both at the end of the earlier period and at the beginning of the later period.

135. As a result, despite the fact that the relevant accounting calculation might well have been made before the beginning of 2005, that calculation and any resultant debit was contingent upon the continued ownership of assets at the beginning of 2005, and therefore upon Fidex remaining a party to the loan relationship at the beginning of 2005. Therefore, the FTT were in error in holding that "The tax avoidance purpose was achieved….by Fidex's retention of the legal title to [the bonds] to the end of the 2004 year." [195] It is clear, and indeed consistent with the first sentence of the same paragraph of the FTT judgment, that the tax avoidance purpose would not be achieved unless the bonds were held by Fidex into 2005. The FTT also appeared to acknowledge this in [199]: "At no time during the 2005 year (except perhaps, in an abstract sense, the *scintilla temporis* at which the 2005 began…..did Fidex have a tax avoidance purpose as a purpose for being a party to [the bonds]…." The FTT may have recognised the internal inconsistency in [195], because they went on to deal with the significance of the *scintilla temporis* for which Fidex needed to remain a party to the bonds at the beginning of 2005; in that regard they concluded that for that *scintilla* a tax avoidance purpose was one of Fidex's main purposes in remaining a party to the bonds (see [201], cited below). In our view that conclusion was inevitable once the FTT had found that such a purpose arose at the time and by reason of the entry into the Project Zephyr transactions. It would have been perverse to hold that the purpose in question ceased before it had been achieved.

136. The reliance by the FTT in this respect on the evidence of Mr Clifford does not help, nor do the notes to the accounts or the agreed facts. Once it is recognised that for a debit to arise under paragraph 19A(3) the asset must still be held at the beginning of the later year, the fact that the asset's accounting value is then fixed by reference to circumstances at the end of the earlier year does not mean that there was nothing required in 2005 on which the debit depended.

137. We therefore reject Mr Flesch's crystallisation argument, and turn to a point of construction which he raises.

The Scintilla temporis

138. There appears to be a very technical argument (the "accounting period argument") that the time at which the 2004 period ended is the same as the time at which the 2005 period began. This argument rests upon section 12(2) TA 1988 which provides that an accounting period shall begin "whenever…an accounting period of the company ends". Since the section does not say "immediately after the end of the prior period", the single moment of time with which the earlier period ends might be said to be the single moment of time when the later period begins.

139. If that analysis is correct then it means that the FTT's finding that Fidex had an unallowable purpose in 2004 is also a conclusion that it had a tax avoidance purpose in holding the bonds at the first moment of 2005.

140. This argument was not referred to by the FTT, but it was put to it that paragraph 19A(3)(b) required Fidex to be a party to the bonds – to hold the bonds - at the beginning of 2005, and therefore that at the very beginning of 2005 it must have had a

bad purpose. The FTT dealt with that argument in terms which would also dispose of the accounting period argument by holding that for a purpose to be unallowable it had to be held at "times" in the period, and that the opening moment of 2005 was only a singular time:

> "201. In relation to the *scintilla temporis* at which the 2005 Year began, if (which we doubt) it is right to take any account of it at all, because the statutory language of 'times' is not applicable to it, we go on *de bene esse* to consider whether it constituted 'a time' during the 2005 Year that Fidex's purposes for being a party to the Relevant Assets included a tax avoidance purpose which was the main purpose or one of the main purposes for which Fidex was a party to the Relevant Assets at that time. Although rejecting the proposition that a tax avoidance purpose was Fidex's *main* purpose for being a party to the Relevant Assets at the time of the *scintilla temporis* (there was no evidence of any intention to make anything but a 'synthetic disposal' of the Relevant Assets to Swiss Re in 2004), we accept that a tax avoidance purpose was *one of* Fidex's main purposes for being a party to the Relevant Assets at that time."

141. The FTT had previously discussed the distinction between the words "at times" in subparagraph (2) and the words "at any time" in subparagraph (4). It said at [181] to [184] that the draftsman, in paragraph 13, had drawn this distinction deliberately by using the word "times" in subparagraph (2) and the word "time" in subparagraph (4). It considered that subparagraph (2) set out "*when*" a loan relationship is to be treated as having an unallowable purpose, and that subparagraph (4) set out "what" (in the context of this case) an unallowable purpose is. It concluded that this distinction precluded the application of the normal rule in section 6 of the Interpretation Act 1978 that the singular included the plural and vice versa.

142. The FTT's statement in [201] thus must be read in the context of that earlier discussion. In that statement it "doubts" that it is right to treat a purpose which existed at one time only (treating the *scintilla temporis* as a single moment or a single "time") as an unallowable purpose.

143. Mr Flesch supports the FTT's reasoning. He says that the draftsman could have used "any time" in paragraph 13(2) as he did in paragraph 13(4) but he chose different language with a different meaning. He says that on any view there cannot have been "times" in 2005 in which Fidex had an unallowable purpose.

144. Mr Tallon submits that the FTT was wrong in its analysis of paragraph 13(2) and (4). Subparagraph 13(2) was not concerned merely with timing issues but contained the primary definition of an unallowable purpose from which subparagraph 13(4) was merely a derogation: without paragraph 13(4) tax avoidance purposes could be commercial purposes. The use of "times" simply recognised that a company's purposes may change in a period. In any event he says (a) any unit of time may be subdivided, and (b) a period of say three months (or even a full accounting period) could properly be described as "time" and if such a period could not qualify the provision would be unworkable.

145. We agree with Mr Tallon's submissions and reject the argument that Fidex could not have had an unallowable purpose within subparagraph 13(2) in 2005 on the grounds that a purpose held only for a single moment of time could not be an unallowable purpose.

146. In particular:

(1) we agree with Mr Tallon that the FTT's description of subparagraph (2) as being about "when" a purpose is bad, and subparagraph (4) by contrast about "what" is an unallowable purpose, fails to recognise that paragraph (4) is a derogation from the definition ("what") in subparagraph (2). We do not regard therefore that description of the function of these paragraphs as helpful in construing paragraph (2);

(2) the distinction between the placing of the words "at times" and "at any time" in the two subsections indicates that a different context applies which does not require the Interpretation Act provisions to be treated as inapplicable;

(3) subparagraph (2) applies not only to the purposes for which a company is a party to a loan relationship, but also to the purposes for which it enters into a related transaction. A related transaction by section 84(5) includes matters such as disposals. The entry into a disposal would occur at a single time and the purpose for that disposal would exist at that time. It cannot have been intended that "the purposes for which, at times during that period, the company [enters into a disposal of a loan relationship]" could not, by reason of the fact that a disposal took place only at the very beginning of an accounting period, be an unallowable purpose;

(4) whatever the reason for the distinction in usage between sub-paragraphs 13(2) and 13(4), to adopt the construction for which Mr Flesch contends would be unworkable, and would, as Mr Tallon submits, call into question whether a single uninterrupted period of whatever length could suffice to render the purpose "unallowable".

147. Thus, with reference to the FTT's "doubts", in our view the FTT erred in law to the extent that it considered that a purpose had to be held for "times" (plural) for it to be capable of being "unallowable". We conclude that a purpose held only for a single moment of time may be an unallowable purpose, and therefore that, given the FTT's finding that for a *scintilla* in 2005 Fidex had a main tax avoidance purpose in holding the bonds, the only conclusion open to it was that there was *an* unallowable main purpose in 2005.

148. Although it is not necessary for our decision, it seems to us that the facts before the FTT should in any event have led it to the conclusion that it was for more than a single moment that Fidex held a main tax avoidance purpose. That is for two reasons. First, in order to obtain a debit under paragraph 19A, Fidex had to be a party to the loan relationship for a sufficient period for it to be said that it was a party to the bonds at the beginning of 2005 for the purposes of paragraph 19A(3)(b). That period need

not be a single moment. It is the time for which in relation to the need to hold the bonds the purpose was held.

149. Second, a "purpose" is something human. The purpose of a company reflects the purpose of its controlling minds, that is to say the minds of human beings. Minds work quickly but not instantaneously. Any tax avoidance purpose cannot have been in existence only at 12 midnight on 1 January 2005. Even if "times" precludes the single time of 12 midnight, the purpose of the company must have existed for a measurable length of time thereafter (which comprised an infinite number of separate times of day).

Attribution

150. As we have seen, the FTT said that if there were a *scintilla temporis* in which Fidex had an unallowable purpose, and if it was right to have regard to it, then the next step would be to make the attribution required by paragraph 13 (1):

> "203. Although it might be said that the whole of the debit claimed by Fidex under Paragraph 19A should on any just and reasonable apportionment be attributed to the tax avoidance purpose under sub-paragraph (1) of Paragraph 13, this would ignore the effect of sub-paragraph (2), which must be taken into account in any purposive construction of Paragraph 13 as a whole."

151. In [204] the FTT said that the use of "times" in paragraph 13(2) was "highly relevant in carrying out the just and reasonable apportionment required by subparagraph (1)".

152. It continued:

> "205. Carrying out this exercise we conclude that, at all 'times' during the 2005 Year, Fidex's purposes for being a party to the Relevant Assets did not include a tax avoidance purpose as the main or one of the main purposes for its being a party to the Relevant Assets, except at the *scintilla temporis* at which the 2005 Year began. On this basis we consider that, even if (which we doubt) we can interpret 'times' [as] meaning 'any time', on any just and reasonable apportionment no part of the Paragraph 19A debit would be attributed to that *scintilla temporis* (on account of its having no realistic length at all) and that therefore no part of the Paragraph 19A debit falls to be excluded from the debits falling to be brought into account by Fidex under Chapter 2, Finance Act 1996 for the 2005 Year."

153. Mr Flesch submits that it would not be just and reasonable to attribute the paragraph 19A(3) debit to the *scintilla temporis* with which 2004 ended and 2005 began. He cites Lord Hoffmann in *Ingram v IRC* [1999] STC 37 at page 44F -G.:

> "An attribution based on the notion of a *scintilla temporis* [cannot] have a very powerful grasp on reality"

154. Mr Tallon contends (i) a time based apportionment is not supported by the wide nature of the statutory words. In some cases a time based apportionment might be just

and reasonable; in others not; (ii) the FTT at [203] had acknowledged that the debit was attributable to the tax avoidance purpose but was constrained by its incorrect construction of paragraph 13(2) and (4) effectively to confine the apportionment to a time basis; and (iii) the doubts Lord Hoffman expressed in *Ingram* related to a legal fiction but what is at issue here is not a legal fiction but a purpose which existed albeit possibly only for a very small element of time.

155. We agree with Mr Tallon. The debit arises because the debt was held at the beginning of 2005. The company, in holding that debt at that time, had, as the FTT accepted, in its *de bene esse* conclusion, a main unallowable purpose. The time for which the purposes held may be relevant to what it is just and reasonable to attribute to that purpose, but it is not the only consideration. In our view the FTT erred in its exclusive reliance on the time for which the purpose was held.

156. There were other main purposes for which the bonds were held during the lifetime of Fidex's 2005 unallowable purpose, but we do not see how the debit can be justly or reasonably attributable to those purposes. Those purposes related almost wholly to times after the debit had arisen and it was not attributable to them. The debit arose because of the Project Zephyr transaction, and the unallowable purpose to obtain the benefit of that transaction. In our view the debit can only be attributed to that purpose, and the FTT erred in principle in its approach and its finding.

157. In *Ingram*, Lady Ingram had conveyed her house to a nominee for herself who then granted her a lease before transferring the reversion to a trustee for her children. It was argued that for IHT purposes she had retained no interest in the reversion so that the gift did not fall within the reservation of benefit provisions. The Revenue argued that the gift must have been of the unencumbered freehold from which the lease was reserved because as a matter of conveyancing the lease could only have come into existence after the trustee for the children had acquired the freehold. Lord Hoffman's comment relied upon by Mr Flesch is preceded by a statement that both sides had argued that their position represented reality, and is succeeded by a statement that the relevant section was concerned not with conveyancing but with beneficial interest. He concluded that under the real nature of the transaction, the trustee for the children never obtained the land free from Lady Ingram's lease.

158. Mr Flesch submits that the provisions of section 12 TA 88 create a tax legal fiction like the conveyancing fiction in *Ingram*. The tax fiction should not be regarded as affecting or determining the question of whether in reality Fidex had an unallowable purpose.

159. We do not find *Ingram* of any assistance. The circumstances were very different from the present. Moreover, as Mr Tallon submits, the period at the beginning of 2005 during which the unallowable purpose subsisted, however long or short, is not a legal fiction but represents the actual position. In any event, the operation of paragraph 19A requires the identification of an accounting value "at the beginning of the later period". Even if, by virtue of section 12 TA 88, that were a single moment, the Act itself requires cognisance to be taken of it, and paragraph 13 involves an ascertainment of purpose at that time.

160. Finally, Mr Flesch submitted that one would not expect to find that a debit, expressly given by an inserted paragraph of the legislation (paragraph 19A), is then to be denied by an existing provision. One should not contort paragraph 13 to apply to something to which it was never intended to apply.

161. However, we do not regard this as a contortion of paragraph 13 but rather the application of that paragraph to a case which its language is apt to govern.

Conclusion in appeal no **FTC/71/2013**

162. It follows that on the basis of a just and reasonable apportionment under paragraph 13(1) of Schedule 9 the paragraph 19A debit in question was wholly attributable to an unallowable purpose of Fidex in respect of the loan relationships represented by the relevant bonds. Accordingly this appeal by HMRC should be allowed, and the paragraph 19A debit should not be brought in to account.

MR JUSTICE BARLING

JUDGE CHARLES HELLIER

JUDGES OF THE UPPER TRIBUNAL

RELEASE DATE: 13 November 2014