UT Neutral citation number: [2022] UKUT 00200 (TCC)

UT/2020/000384

UT/2020/00378, UT/2020/000380
UT/2020/000382, UT/2020/000381
UT/2020/000383

Upper Tribunal
(Tax and Chancery Chamber)

Hearing Venue: The Royal Court of Justice,
Rolls Building, Fetter Lane, London
Heard on: 16- 20 May 2022
Judgement date: 22 July 2022

Before:

MR JUSTICE LEECH
UPPER TRIBUNAL JUDGE TIMOTHY HERRINGTON

Between

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS
Appellants

and

(1) BLUECREST CAPITAL MANAGEMENT LP
(2) BLUECREST CAPITAL MANAGEMENT LLP
(3) BLUECREST CAPITAL MANAGEMENT (UK) LLP

Respondents

and

(1) ANDREW DODD
(2) LEDA BRAGA
(3) SIMON DANNATT
(4) MICHAEL EDWARD PLATT
(5) JONATHAN WARD

Appellants

and

THE COMMISSIONERS FOR HER MAJESTY'S
REVENUE AND CUSTOMS

Respondents

Representation:

For HMRC: Rupert Baldry QC and Thomas Chacko, Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs

For the Respondents in UT/2020/000384 and the Appellants in UT/2020/00378, UT/2020/000380, UT/2020/000382, UT/2020/000381 and UT/2020/000383: Malcolm Gammie QC and Michael d'Arcy, Counsel, instructed by Slaughter and May.

DECISION

I. Introduction

1. This decision relates to appeals brought against findings made by the First-tier Tribunal ("**FTT**") in its decision (the "**Decision**") released on 17 July 2020. In particular, this decision deals with the following matters:

(1) HMRC appeal against the FTT's decision to allow the appeals of BlueCrest Capital Management LP ("**BCM LP**"), BlueCrest Capital Management LLP ("**BCM LLP**") and BlueCrest Capital Management (UK) LLP ("**BCM UK LLP**") (together the "**Partnership**") against amendments to the Partnership's tax returns made by various closure notices issued between 25 May 2017 and 25 January 2019. In those closure notices HMRC challenged the Partnership's tax treatment of profit allocations made pursuant to the Partner Incentivisation Plan ("**PIP**") operated by the Partnership (the "**PIP Appeals**").

(2) Mr Andrew Dodd, Ms Leda Braga, Mr Simon Dannatt, Mr Michael Platt and Mr Jonathan Ward, who were all individual partners in the Partnership, (the "**IP Appellants**") appeal against the FTT's decision to dismiss their appeals against amendments to the IP Appellants' tax returns made by various closure notices issued in August 2018. In those closure notices HMRC asserted that the IP Appellants would be liable to income tax in respect of receipts under the PIP either pursuant to sections 687 to 689 of the Income Tax (Trading and Other Income) Act 2005 ("**ITTOIA 2005**") or section 776 of the Income Tax Act 2007 ("**ITA 2007**") in the event that the PIP Appeals were determined in the Partnerships' favour (the "**IP Appeals**").

(3) HMRC apply to strike out certain paragraphs of the IP Appellants' Grounds of Appeal or, alternatively, apply for a direction that the IP Appellants require permission to appeal in the IP Appeals (the "**Strike-Out Application**"). They do so on the basis that the Upper Tribunal has no jurisdiction to hear them or that the IP Appellants require permission to appeal and have not sought and obtained it. The IP Appellants resist the application on the basis that they do not require permission but, if they do, they apply for permission to appeal (the "**Permission Application**"). We refer to the Strike-Out Application and the Permission Application together as the "**Procedural Applications**".

A. The PIP Appeals

2. We defined the term "Partnership" above, and use it in this decision, to refer collectively to the various entities which have operated the BlueCrest alternative asset management business during the years which are relevant to the PIP Appeals. Those appeals concern the proper taxation of the PIP (which was described as a mechanism to facilitate the retention and incentivisation of partners in the Partnerships). The PIP provided for a discretionary award of "**Special Capital**" to be made to an individual partner if he or she remained a partner and had not engaged in behaviour that was, broadly speaking, detrimental or prejudicial to the Partnership's business. If a partner complied with the qualification requirements, the PIP provided that partners were eligible for an award but had no right to receive it. In particular:

(1) Each year individual partners had historically received performance related profit shares in the Partnership which involved an element of discretion on the part of management.

(2) A new corporate partner ("**the Corporate Partner**") was introduced into the Partnership to facilitate the PIP. The Corporate Partner was entitled to be considered for a discretionary allocation of the profits of the Partnership.

(3) If such an allocation was made, the Corporate Partner was entitled to withdraw its profit share and use it to acquire Special Capital which could then be used to acquire investments in BlueCrest managed funds.

(4) After a period of time the Corporate Partner made individual PIP awards ("**PIP Awards**") of Special Capital to individual partners based on recommendations made by a special committee of the Partnership. This period varied between a few months and several years provided that the individual partner in question had met certain conditions. If those conditions were not met, the Corporate Partner was entitled to forfeit that partner's PIP Award and put it to some other use (e.g. to reward other partners).

3. The Appellants intended the following tax consequences for this arrangement: (i) the individual partner was only taxed (in respect of the year the profits are made) on the share allocated to them directly and (ii) the share allocated to the Corporate Partner was taxed on that Corporate Partner at the (lower) corporation tax rates. It was the Partnership's case that when the Corporate Partner made PIP Awards to individual partners this gave rise to no tax charges because the transfer of Special Capital to satisfy a PIP Award was a transfer of a capital asset rather than an income payment. It was also the Partnership's case that because each transfer was a transfer in the share of the assets of a partnership it was not liable to Capital Gains Tax (in accordance with the terms of an HMRC Statement of Practice).

4. HMRC did not accept the Partnership's case and argued that profit allocations made to the Corporate Partner and subsequent PIP Awards to an individual partner were profit allocations to the individual partner and that his or her profit allocation was the total reward represented both by the direct allocation of profits and by the subsequent PIP Award. HMRC argued that by adopting a purposive construction of section 850 of ITTOIA and applying it to the facts, rights of an individual partner to share in the profits of the trade of the Partnership included both the direct profit allocations made to the individual and his or her PIP Awards of Special Capital.

5. The FTT rejected HMRC's argument and held that the Corporate Partner had been allocated a share of the profits of the Partnership and that share could not be treated as an allocation to the individual partner. The FTT held that under the PIP arrangements the profit allocation to the Corporate Partner could not be characterised as an allocation of a share of the profits to the individual partners and was properly treated as Special Capital credited to the Corporate Partner (even though the Corporate Partner later agreed to transfer it to individual partners). The FTT also held that the PIP Award made to each individual partner and then satisfied by a transfer of Special Capital was not in the character of income or a share of profits.

6. HMRC now appeals to this Tribunal with the permission of the FTT against these findings. HMRC contend that the FTT erred by taking too narrow a view of the profit sharing arrangements in this case and, in particular, that it limited itself to the formal allocation of profits made according to the terms of the relevant partnership deed rather than looking at the allocation in its true factual context. Alternatively, HMRC contend that even if the allocations were notionally made to the Corporate Partner, they must be treated as made to the individual partners by applying the reasoning and conclusion of the Supreme Court in *RFC 2012 plc (formerly the Rangers Football Club) v Advocate General for Scotland* [2017] 1 WLR 2767 ("*Rangers*") and of the Privy Council in *Hadlee v CIR* [1993] STC 294 (*"Hadlee*"). We dismiss the PIP Appeals for the reasons set out in Part II of this Decision.

B. The IP Appeals

7. In the alternative, HMRC contend that when PIP Awards of Special Capital were made to individual partners, the value of those awards was taxable income in their hands. HMRC advanced two alternative arguments: first, the PIP Awards were chargeable to tax under section 687 (1) of ITTOIA 2005 as miscellaneous income. We call this the "**Miscellaneous Income Issue**". Secondly, the PIP Awards were chargeable to tax under Chapter 4 of Part 13 of ITA 2007 ("**Chapter 4**") as capital amounts treated as income under that Chapter. We call this the "**Sale of Occupational Income Issue**".

8. The FTT found in favour of HMRC on both the Miscellaneous Income Issue and on the Sale of Occupational Income Issue. The IP Appellants now appeal to this Tribunal with the permission of the FTT against these findings. Their appeals are based on the argument that the FTT incorrectly reasoned or applied the law or failed to provide any or any adequate reasons for its conclusions. They submit that the FTT failed to address either properly or at all a number of their submissions and, accordingly, the FTT erred in law and the Decision was wrong. We dismiss the IP Appeals for the reasons set out in Part III of this Decision.

C. The Procedural Applications

9. On 16 October 2020 HMRC issued the Strike-Out Application and applied to strike out paragraphs 70 to 77 of the IP Appellants' Grounds of Appeal (the "**Disputed Paragraphs**"), in which the individual IP Appellants raise two new issues in the event that they were unsuccessful on either or both of the Miscellaneous Income Issue and the Sale of Occupational Income Issue. In particular, they sought to advance a case that the income from their PIP Awards was foreign source income and not chargeable to UK income tax in the hands of those partners who were not UK resident. They also sought to advance a case in relation to the double taxation treaty between the UK and Switzerland.

10. It was HMRC's case that the Upper Tribunal had no jurisdiction to hear and determine these issues and, even if they did, the IP Appellants required permission to appeal which they had not sought or obtained. They invited this Tribunal to strike out the Disputed Paragraphs or to direct that the IP Appellants could not raise them unless they applied for and obtained permission. The IP Appellants' primary case was that they did not need permission to raise these arguments on the IP Appeals but they applied for permission in the alternative. We have decided to strike out the Disputed Paragraphs and to refuse permission to appeal for the reasons set out in Part IV of this Decision.

II. The PIP Appeals

D. The Relevant Legislation

11. It is common ground that we are concerned in these appeals with the taxation of trading income. Section 5 of ITTOIA 2005 provides that income tax is charged on the profits of a trade, profession or vocation. General partnerships, limited partnerships and limited liability partnerships are transparent for tax purposes and section 848 of ITTOIA 2005 provides as follows:

> "Unless otherwise indicated (whether expressly or by implication), a firm is not to be regarded for income tax purposes as an entity separate and distinct from the partners."

12. Section 849 of ITTOIA 2005 makes provision for the way in which a partnership's trading profits are to be calculated:

> "(1) If –

(a) a firm carries on a trade, and

(b) any partner in the firm is chargeable to income tax,

the profits or losses of the trade are calculated on the basis set out in subsection (2) or (3), as the case may require.

(2) For any period of account in which the partner is a UK resident individual, the profits or losses of the trade are calculated as if the firm were a UK resident individual.

(3) For any period of account in which the partner is non-UK resident, the profits or losses of the trade are calculated as if the firm were a non-UK resident individual.

…"

13. In relation to limited liability partnerships section 863 of ITTOIA 2005 also provides as follows:

> "(1) For income tax purposes, if a limited liability partnership carries on a trade, profession or business with a view to profit–
>
> (a) all the activities of the limited liability partnership are treated as carried on in partnership by its members (and not by the limited liability partnership as such),
>
> (b) anything done by, to or in relation to the limited liability partnership for the purposes of, or in connection with, any of its activities is treated as done by, to or in relation to the members as partners, and
>
> (c) the property of the limited liability partnership is treated as held by the members as partnership property.
>
> References in this subsection to the activities of the limited liability partnership are to anything that it does, whether or not in the course of carrying on a trade, profession or business with a view to profit.
>
> (2) For all purposes, except as otherwise provided, in the Income Tax Acts–
>
> (a) references to a firm or partnership include a limited liability partnership in relation to which subsection (1) applies,
>
> (b) references to members or partners of a firm or partnership include members of such a limited liability partnership,
>
> (c) references to a company do not include such a limited liability partnership, and
>
> (d) references to members of a company do not include members of such a limited liability partnership."

14. As a consequence of the tax transparency of these vehicles, the profits of a trade carried on in common by the partners in a general or limited partnership or by a limited liability partnership are divided among their members who pay tax. Once those profits have been calculated, they must be allocated to the partners or members for tax purposes. For the tax year ended 5 April 2009 section 850 of ITTOIA 2005 provided so far as relevant as follows:

> "(1) For any period of account a partner's share of a profit or loss of a trade carried on by a firm is determined for income tax purposes in accordance with the firm's profit-sharing arrangements during that period.
>
> […]
>
> (6) In this section—
>
> "profit-sharing arrangements" means the rights of the partners to share in the profits of the trade and the liabilities of the partners to share in the losses of the trade."

15. Section 850 of ITTOIA 2005 was replaced by new sections 850 to 850B with effect from the tax year ended 5 April 2010 and those sections so far as relevant provide as follows:

> "(1) For any period of account a partner's share of a profit or loss of a trade carried on by a firm is determined for income tax purposes in accordance with the firm's profit-sharing arrangements during that period. This is subject to sections 850A and 850B.
>
> (2) In this section and sections 850A and 850B "profit-sharing arrangements" means the rights of the partners to share in the profits of the trade and the liabilities of the partners to share in the losses of the trade."

16. For the year ended 5 April 2009 and therefore for the first accounting period which is the subject matter of the PIP Appeals section 114 of the Income and Corporation Taxes Act 1988 (**"ICTA 1988"**) applied to corporate partners and provided as follows:

> "(1) So long as a trade, profession or business is carried on by persons in partnership, and any of those persons is a company, the profits and losses (including terminal losses) of the trade, profession or business shall be computed for the purposes of corporation tax in like manner, and by reference to the like accounting periods, as if the partnership were a company and, subject to section 115(4), as if that company were resident in the United Kingdom, and without regard to any change in the persons carrying on the trade, profession or business, except that—
>
> (a) references to distributions shall not apply; and
>
> (b) subject to section 116(5), no deduction or addition shall be made for charges on income, or for capital allowances and charges, nor in any accounting period for losses incurred in any other period nor for any expenditure to which section 401(1) applies; and
>
> (c) a change in the persons engaged in carrying on the trade, profession or business shall be treated as the transfer of the trade, profession or business to a different company if there continues to be a company so engaged after the change, but not a company that was so engaged before the change.
>
> (2) A company's share in the profits or loss of any accounting period of the partnership, or in any matter excluded from the computation by subsection (1)(b) above, shall be determined according to the interests of the partners during that period, and corporation tax shall be chargeable as if that share derived from a trade, profession or business carried on by the company alone in its corresponding accounting period or periods; and the company shall be assessed and charged to tax for its corresponding accounting period or periods accordingly. In this subsection "corresponding accounting period or periods" means the accounting period or periods of the company comprising or together comprising the accounting period of the partnership, and any necessary apportionment shall be made between corresponding accounting periods if more than one."

17. Section 114 of ICTA 1988 was replaced by section 1262 of the Corporation Tax Act 2009 (the "**CTA 2009**") with effect from the tax year ended 5 April 2010 and so far as relevant it provided as follows:

> "(1) For any accounting period of a firm a partner's share of a profit or loss of a trade carried on by the firm is determined for corporation tax purposes in accordance with the firm's profit-sharing arrangements during that period. This is subject to sections 1263 and 1264.
>
> (2) If a firm pays charges on income, a partner's share of the charges is determined for corporation tax purposes in accordance with the firm's profit-sharing arrangements during the accounting period of the firm in which the charges are paid.
>
> (3) For the purposes of subsection (2) a charge on income which arises from a disposal such as is mentioned in section 587B (1) of ICTA (gifts of shares, securities and real property to charities etc) is taken to be paid when the disposal is made.

(4) In this section and sections 1263 and 1264 "profit-sharing arrangements" means the rights of the partners to share in the profits of the trade and the liabilities of the partners to share in the losses of the trade."

18. The provisions of sections 850A and 850B of ITTOIA 2005 and sections 1263 and 1264 of the CTA 2009 are not relevant in the present case. In relation to BCM LLP section 118ZA of ICTA 1988 made similar provision for corporation tax purposes in relation to a limited liability partnership as section 863 of ITTOIA 2005 had done for income tax. Section 118ZA was succeeded by section 1273 of the CTA 2009 which so far as relevant provided as follows:

> "(1) For corporation tax purposes, if a limited liability partnership carries on a trade or business with a view to profit—
>
> (a) all the activities of the limited liability partnership are treated as carried on in partnership by its members (and not by the limited liability partnership as such),
>
> (b) anything done by, to or in relation to the limited liability partnership for the purposes of, or in connection with, any of its activities is treated as done by, to or in relation to the members as partners, and
>
> (c) the property of the limited liability partnership is treated as held by the members as partnership property.
>
> References in this subsection to the activities of the limited liability partnership are to anything that it does, whether or not in the course of carrying on a trade or business with a view to profit.
>
> (2) For all purposes, except as otherwise provided, in the Corporation Tax Acts—
>
> (a) references to a firm include a limited liability partnership in relation to which subsection (1) applies,
>
> (b) references to members of a firm include members of such a limited liability partnership,
>
> (c) references to a company do not include such a limited liability partnership, and
>
> (d) references to members of a company do not include members of such a limited liability partnership.
>
> […]"

19. For the purposes of the PIP Appeals the key issue is whether the allocations of profits to the Corporate Partner of the Partnership are to be regarded as being part of the rights of the individual partners to share in the profits of the Partnership and fall within section 850 of ITTOIA 2005 when that provision is construed purposively and in accordance with the approach taken in the authorities and then applied to the relevant facts (to which we now turn).

<u>E.</u> <u>The Facts</u>

20. Where we refer to numbered paragraphs in parentheses (below) we intend to refer to paragraphs in the Decision (unless otherwise stated). For convenience, we also summarise (below) the findings of fact made by the FTT in the Decision which are relevant to the PIP Appeals.

(1) The BlueCrest Business

21. BlueCrest is an international alternative asset management business founded in 2000 by Mr William Reeves and Mr Michael Platt, which has specialised in a number of diversified investment strategies involving both discretionary and quantitative investment management (i.e. portfolio management).

22. The BlueCrest business (and, in particular, the management of the BlueCrest Capital International Fund) originally operated from December 2000 through BCM LP, an English limited partnership. In December 2008 the business of the limited partnership was transferred as a going concern to BCM LLP, an English limited liability partnership. In April 2010 a reorganisation was effected under which BCM LLP migrated to Guernsey with effect from 1 April 2010 and no longer traded in the UK and a number of individual partners of BCM LLP also moved offshore at around the same time. A new entity, BCM (UK) LLP, commenced trading in the UK on 1 April 2010, carrying out fund management activities pursuant to agreements with BCM LLP. At all relevant times thereafter BCM (UK) LLP continued to act as the UK sub-investment manager of the BlueCrest funds. As mentioned above, BCM LP, BCM LLP and BCM UK LLP are referred to collectively as the "Partnership" where it is unnecessary to distinguish between them.

23. The individual partners who conducted the Partnership's UK trade can be categorised according to the part of the business in which they operated. Some partners carried out investment management services which consisted both of discretionary trading (i.e. portfolio management) and systematic activities based on algorithmic trading. Other partners provided infrastructure services.

(2) The PIP

24. The PIP was put in place in April 2008 and was implemented in a number of phases. At first it involved a limited number of senior personnel but it was ultimately expanded and from February 2010 it was mandatory (with some exceptions) for all individual partners to participate in the PIP. This was the case for the period ending 31 December 2010 and for all of the periods which are the subject matter of the PIP Appeals.

25. The PIP was implemented by introducing a number of Corporate Partners into the Partnership. The first Corporate Partner, Special Capital Ltd ("**SCL**") was introduced on 30 April 2008 and the second, APM Avon Ltd ("**Avon**") was introduced on 27 November 2008. Both Corporate Partners contributed small amounts of capital and SCL acquired a minimal interest in the capital profits or losses of the Partnership and rights to a discretionary allocation of income. SCL later contributed £20,074,000 of ordinary capital. From November 2009 onwards, Avon took on the principal role of facilitating the PIP and held the Special Capital in the Partnership.

26. The FTT found that a key to the success of the Partnership was the skill, reputation and performance of both its discretionary traders and the members of the Partnership's systematic trading team. It also held that a very significant driver of its investment performance and its ability to attract further assets under management was the quality of the people carrying out the investment activities: see [257].

27. The FTT also found that the hedge fund industry is a "people business" in which the requirement to deliver the very best performance and to capture as large a share of assets under management as possible drives very high levels of reward to secure the highest quality talent available. Those working in that industry were inherently mobile which created an even stronger requirement to pay high rewards and to mitigate against poaching by the inclusion of contractual notice periods, non-

competitio provisions and other restrictive covenants. Finally, it found that the attraction and retention of key individuals was an essential element of commercial success with the reward received by individual partners being key to that attraction and retention: see [258].

28. Before the institution of the PIP in 2008 partners' drawings and profit allocations were determined by the management of the Partnership, discretionary profit allocations were made to partners reflecting their respective contributions to the Partnership and profit allocations were drawn in cash: see [259].

29. For discretionary traders, their performance over the year would be reviewed, generally by reference to their individual profit and loss ("**P&L**") accounts for the portfolios which they managed. The total monetary "reward" which traders would receive would be calculated by using a standard methodology and then reviewed by Mr Dodd, the Finance Department and senior traders. The proposed discretionary profit allocation would be determined by subtracting the salary that the trader had received during the year (pursuant to his or her employment contract with the general partner of BCM LP) from the "award" and, after review by Mr Platt and Mr Dodd, the recommended annual discretionary profit allocation would be decided upon by the board of the general partner of BCM LP: see [260].

30. For partners who were members of the systematic team, the determination of the total "reward" and discretionary profit allocations involved a more "subjective" assessment of their contribution and importance to the team and was not based directly on their P&L accounts. Ms Braga, as head of the team, took a central role in recommendations concerning those partners and these would be discussed with Mr Dodd and, in the case of the most senior members of the team, Mr Platt. Ultimately, again, the annual discretionary profit allocations were determined by the board of the general partner. For partners in senior non-investment functions, the total "reward" and discretionary profit allocations were determined by Mr Platt and Mr Dodd on a similar "subjective" basis, taking into account factors such as contribution to the BlueCrest business, how much that partner might be expected to be paid in the market and their importance to the BlueCrest business. The final determination of the annual discretionary profit allocations was made by the board of the general partner: see [262] and [263].

31. Before the PIP there were no contractual provisions which enabled the Partnership to defer payment or to require partners to invest their own profits into BlueCrest funds or to claw back profit allocations after they had been made: see [264]. The FTT recorded the difficulties which arose following profit allocations which BCM LP had made to certain traders who had made trading profits in 2006 and 2007. When those traders made significant trading losses in the latter part of 2007 and 2008, BCM LP had no recourse against them and was not in practice able to recover drawings or to cancel profit allocations. It was necessary to divert performance fees from profitable funds to make profit allocations to other traders whose positive trading performance had recovered previous losses (or who had only ever experienced positive results) despite the fact that overall no performance fees were received by BCM LP in relation to this positive performance because the relevant funds were below their high-water mark: see [267].

32. The PIP was introduced to address these issues: see [268]. The Partnership was advised to offer partners the prospect of a greater share in its capital by the introduction of a Corporate Partner into the Partnership which could be awarded a portion of the profits by way of discretionary allocation (as with all partners). The Corporate Partner would take discretionary drawings in anticipation of an allocation of a proportion of the annual profits which it would expect to receive after subsequent audit of the Partnership. The Corporate Partner would then re-invest those profits back into the business as a capital contribution called "Special Capital" to distinguish it from ordinary capital. This could then be used to invest in a BlueCrest Fund or Funds. Although this would reduce the profits available for

direct allocation to individual partners, they would be eligible for discretionary awards of Special Capital: see [269].

33. This proposal was implemented through what was initially described as a "Partner Savings Plan" and which later became known as the PIP. PIP Awards made by the Corporate Partner were never intended to be an allocation of profits but an award of capital: see [270]. The FTT also found that the PIP was a bespoke piece of tax planning developed by Ernst & Young LLP (as it then was) ("**EY**"), which had been considered by HMRC but not challenged (although partners were warned that there would always be a risk that planning could be challenged by HMRC in the future): see [272].

34. The Partnership understood that the scheme enabled the Partnership to make a tax saving of the difference between the corporate rate of 28% and the top rate of income tax which was 40% at the time. This also enabled the Partnership to generate a larger pool of money. This was a benefit because the Partnership were asking partners to accept that funds which they would once have taken in cash were to be deferred and they were being asked to accept the risk that provisional awards of Special Capital might not become final: see [273].

35. The Corporate Partner was independent and not controlled by the Partnership (and was ultimately controlled by a trust company): see [274]. The objects of the first Corporate Partner, SCL, included participation in incentivisation and retention strategies for the partners of the Partnership. SCL became the Corporate Partner of the Partnership for the purposes of performing the role of receiving profit allocations and making calculations and awards of special capital under the PIP. In doing so, it was able to contribute 72% of its gross profit allocation into the Partnership, after payment of corporation tax, as special capital: see [275].

36. Under the Deed of Adherence which SCL executed when it became a Corporate Partner, it agreed to consider, at the request of the General Partner of the Partnership, whether to contribute all or part of any amounts received by way of discretionary drawings or income profits allocations to the Partnership as Special Capital, less UK corporation tax: see [276]. Avon subsequently took on the Corporate Partner role because it was able to contribute 85% of its profit allocation back into the Partnership as special capital: see [279].

37. The FTT set out in full the relevant provisions of the BCM LLP Limited Liability Partnership Agreement (to which we will refer as the "**Partnership Deed**") dealing, among other things, with the treatment of Special Capital. In particular, clause 7.4 of the Partnership Deed provided that the monies standing to the credit of a Special Capital Account and any investment assets acquired with any such monies were be held exclusively for the benefit of the member contributing such capital and only such member would be entitled to such monies and assets acquired with such monies so that no other member would have any interest in such monies save as specifically provided for in the Partnership Deed or as agreed in writing with the relevant member.

38. Clause 7.4 of the Partnership Deed also provided that a member holding Special Capital could, in its sole and absolute discretion, decide (but only following receipt of a recommendation from the Board of the Partnership) to reallocate that interest to any other member or members. The clause provided that on the making of any reallocation there would be a deemed transfer of the relevant proportion of the Special Capital used to acquire the relevant assets and the amount of Special Capital deemed transferred would be deducted from the Special Capital Account of the member who contributed it and it would be credited to the Special Capital Account of the member to whom the Special Capital had been reallocated. Once the transfers had been made, the relevant individual partners would be able to request an in specie withdrawal of the investment assets which had been acquired with the Special Capital or request that the Partnership sell the underlying investment assets

to allow a cash withdrawal. Finally, it also provided for a notice period of three months before a withdrawal could be made.

39. Clause 10 of the Partnership Deed dealt with allocations of profit and gave the Board of the Partnership the discretion to make interim profit allocations to such members as it determined. The profit allocations after retentions for expenses, working capital and specified priority distributions were to be allocated to such of the members as the Board of the Partnership determined in its absolute discretion in order to recognise management performance during the relevant financial year.

40. Partners' profit allocations were originally determined by the Board of the Partnership but after the institution of the PIP, a PIP Recommendations Sub-Committee (the "**PRSC**") was established and that committee assumed responsibility for considering whether to make a non-binding recommendation to the Corporate Partner that individual partner should receive a provisional indication of a potential future award of special capital: see [289].

(3) Operation

41. The FTT also made findings in relation to the way the PIP operated in practice and, in particular, how the total rewards of individual partners were determined: see [290] to [298]. In summary:

(1) The PRSC received from the Executive Committee of the Partnership the proposed total rewards which it had decided were appropriate for the individual partners in question. Based on these proposals, the PRSC would consider what awards of Special Capital to recommend to the Corporate Partner. When the PIP was first implemented, and for a time thereafter, the ratio of the size of the potential award of Special Capital which would be recommended to the Corporate Partner to the discretionary profit allocation which a partner would receive varied. However, from 2010 onwards the ratio was approximately 2:1.

(2) The PRSC was made up of Executive Committee members of the Partnership and Mr Andrew Beverley of Avon. The Board of Avon would decide whether it would accept the recommendations of the PRSC and thus which provisional indicative awards to make to the individual partners. If Avon (or before it SCL) adopted the PRSC's recommendations individual partners would be provided with a non-binding, provisional indication of a discretionary award of Special Capital to be made by the Corporate Partner which was often referred to as a "provisional award". This sum would become final after a "deferral period" and at a date in the future and it was frequently described as a "final award". It would take the form of a reallocation of a fractional interest in the investment assets held by the Partnership.

(3) The eligibility of a partner for a final award of Special Capital would depend on the fulfilment of a number of "eligibility conditions" which included his or her continuing to be a partner. It was for Avon as the Corporate Partner to decide whether to make such a final award at the conclusion of the deferral period having been provided with a second recommendation from the PRSC which would have considered a number of factors including the partner's performance over the intervening period, whether or not they had submitted a resignation, and their level of risk taken in the market and current P&L account (if a portfolio manager).

(4) The provisional, indicative awards of Special Capital made by Avon would only be made final after the deferral period had expired. The deferral period was initially a period of six months. Over time, a variety of deferral periods was used across the BlueCrest business. This ensured that should a partner leave they would automatically breach the eligibility criteria or "forfeit" the possibility of an award being made final.

(5) The length of the deferral period was determined so as to ensure that there was always a significant amount at stake for each individual partner, if they were to resign or commit a breach of any of the eligibility conditions stated in their provisional award letters (which would lead to the forfeiture of a final award and any future awards or, if the relevant partner had incurred losses, would lead to the receipt of a final award which was less than the amount of the provisional, indicative award).

(6) The Partnership would decide as a business matter how much of its anticipated profit distribution it wished to be subject to the PIP arrangements. Avon would then be asked to make an advance drawing on account of its expected allocation of profits, and would subscribe the amount of this advance as Special Capital. Avon's Special Capital Account was credited with the advance when these contributions were made and would also be credited when gains were subsequently realised on assets acquired using Special Capital (although gains would only be recognised in the Partnership's accounts on realisation). The Partnership would then recommend the levels of Special Capital awards to be made to individual partners. These recommendations from the Partnership to Avon were made by the PRSC, on which Mr Beverley sat as an independent member, to make sure that the decision making of the Partnership was consistent and met Avon's own principles. Mr Beverley saw himself "to some extent" as "a sort of independent conscience."

(7) The recommendations of the PRSC were generally applied by Avon but there were a number of instances when that was not the case as follows:

(i) On 10 May 2010 Avon increased the amount of a final award over the recommended amount pointing out to the Partnership that the recommended award was less than the indicative award and clarified that this was not for a good reason.

(ii) On 11 October 2011 Avon pointed out to the Partnership that it was minded not to accept a recommendation to make an award to a person who was no longer a partner and that recommendation was accepted.

(iii) On 1 September 2011 Avon noticed inconsistencies in the proposed forfeiture conditions between the letter of recommendation to Avon and in the draft indicative award letter to the participant. These inconsistencies were resolved satisfactorily and an award was made.

42. The FTT also reproduced a table adduced in evidence which set out the detailed steps which were followed before awards of Special Capital were made to individual partners under the PIP in respect of the profits of BCM (UK) LLP for the financial year commencing on 1 January 2012: see [301]. In summary, the timeline was as follows:

(1) **1 January 2012:** Commencement of the BCM (UK) LLP financial year.

(2) **Q4 2012:** Completion of performance reviews for non-traders and systematic traders in respect of the financial year ending 31 December 2012.

(3) **21 December 2012**: Crystallisation of the performance fees due from the BlueCrest-managed funds to the Partnership. This enabled the total cash pool available for distribution by the Partnership through discretionary drawings by partners (both individual partners and the Corporate Partner) to be determined.

(4) **January 2013:** Submission by managers of proposals for the total reward for each non-trader and systematic trader partner, review of the proposals by the Compensation Committee before that Committee submitted the provisional total reward amount for the non-traders and systematic traders to the PRSC.

(5) **February-April 2013:**

(i) Assessment of performance for calendar year ended 31 December 2012 of each discretionary trader partner and submission of proposed provisional total rewards to the PRSC.

(ii) Decision by the PRSC as to how each individual partner's provisional total reward should be split as between the amount to be (a) made available to the individual partner by way of discretionary drawing in anticipation of a discretionary profit allocation and (b) the subject of a recommendation made by the PRSC to the Corporate Partner to make a provisional indicative award of Special Capital to the relevant individual partner.

(iii) PRSC made recommendations to the Corporate Partner regarding the quantum of provisional indicative awards of Special Capital to individual partners and the "deferral period" which had to elapse before they could be made final.

(iv) The Corporate Partner considered the recommendations of the PRSC and, at its discretion, issued provisional indicative award letters to the relevant individual partners stating that those partners would be considered for an award, or series of awards, of Special Capital on a specific date or series of dates in the future, after the specified deferral period (ranging from 6 months to 3 years), subject to the fulfilment of specified eligibility conditions.

(v) The Partnership confirmed to the individual partners and the Corporate Partner the amounts available to take as discretionary drawings on account of their anticipated profit allocations.

(vi) Individual partners all took their discretionary drawings and the Corporate Partner, to the extent required, took a discretionary drawing such as to cover the proposed awards of Special Capital, in each case in anticipation of their discretionary profit allocation for the financial year ended 31 December 2012.

(vii) The Corporate Partner requested the Partnership to direct the entire amount of its discretionary drawing to its Special Capital Account as a contribution of Special Capital.

(viii) The Partnership invested the amounts contributed as Special Capital in underlying investment assets, following (non-binding) consultation as to the selection of appropriate investments with the partners who had received indicative award letters.

(6) **September 2013:** The profit allocations by the Partnership for the year ended 31 December 2012 were approved by the Partnership Board.

(7) **September 2013, February 2014, February 2015 and February 2016:** The deferral period of the relevant provisional indicative awards ended for those provisional awards of Special Capital (for which the deferral period was 6 months, 1 year, 2 years or 3 years respectively). On each occasion, the PRSC considered whether any individual partner had failed to satisfy the eligibility conditions for an award or whether any of the previous recommendations should be

varied. The recommendations made were then sent to the Corporate Partner which, as it thought fit, made the final awards and instructed the Partnership to reallocate Special Capital to the relevant individual partners. Special Capital allocated to the individual partners' Special Capital Accounts was then available for withdrawal on notice.

(4) Commercial Benefits

43. The FTT then recorded the commercial benefits of the PIP arrangements at [305] to [307]. In summary:

(1) Individual partners were incentivised to remain with the Partnership on an ongoing cycle and to continue to deliver returns for investors.

(2) The Partnership was now protected to some extent against downside risk from an individual trader's negative P&L in the next year because it was now possible for potential awards of Special Capital to be adjusted (or, indeed, not be made at all) in the light of subsequent performance, with the Special Capital remaining in the Partnership instead.

(3) This conditionality and adjustability also meant that: (a) the Partnership was protected against "netting risk" since it was now possible to adjust downwards the potential award of Special Capital to one trader (who had made losses) in order to free up Special Capital which could be used to reward a second trader (who had made back those losses but in circumstances where no performances fees would be earned); and (b) traders who had received provisional indications of PIP Awards, but who subsequently had a negative P&L, were no longer incentivised to take risky bets to try to make back the losses.

(4) The fact that the Special Capital associated with future PIP Awards was generally invested in BlueCrest-managed funds created alignment between the interests of individual partners (who would want the funds in which the Special Capital was invested to perform well) and investors in BlueCrest-managed funds (and it also increased the AUM of the Partnership and therefore the management fees earned). This alignment was attractive to potential investors.

(5) The PIP gave the Partnership additional bargaining power when it came to negotiating the departure terms of partners who had given, or were considering giving, notice to leave the business (since the possibility of receiving the potential award would be forfeited), and encouraged them to leave on good terms, due to the prospect of a severance payment.

F. The Decision

44. The FTT identified three agreed issues: see [253]. The first issue (which the FTT called the "**PIP Issue**") is the subject matter of the PIP Appeals. The second and third issues were the subject matter of the "**Profit Allocation Issue**" which is the subject matter of a separate decision to be handed down by a different constitution of the Upper Tribunal. The parties agreed the following formulation of the PIP Issue:

> "Did the PIP arrangements form part of the "profit-sharing arrangements" of the Partnership, within the meaning of s 850 ITTOIA 2005 and/or s 1262 CTA 2009? In particular, did the individual partners who participated in the PIP thereby have rights to share in the profits of the Partnership and, if so, what is the correct amount of profits to be allocated to them in each year under appeal and/or did SCL and/or Avon have rights to share in the profits of the Partnership and, if so, what is the correct amount of profits to be allocated to them in each year under appeal?"

45. The FTT determined this issue in favour of the Partnership. It accepted the Partnership's submission that there was an analogy between the present case and the decision of the Court of Appeal in *Rossendale Borough Council v Hurstwood Properties (A) Ltd* [2019] 1 WLR 4567: see [319]. The FTT issued the Decision in the present case, however, before the Supreme Court had handed down judgment reversing the decision of the Court of Appeal. It is necessary, therefore, for us to reconsider the Decision in the light of that development.

46. In *Rossendale* the issue was whether an avoidance scheme involving the owner of a property granting a lease to a special purpose vehicle ("**SPV**") to avoid liability for non-domestic rates was successful. That issue was to be determined by considering whether the lease could be disregarded either as a sham or by application of the *Ramsay* principle or if the SPV could be disregarded by piercing the corporate veil. The Court of Appeal decided that the lease validly conveyed a legal estate in land to the SPV and in those circumstances the tax avoidance motivation of the parties and the artificiality of the arrangements were irrelevant. As a consequence, the provisions imposing a charge to non-domestic rates applied to the person entitled to possession of the land and pursuant to the terms of the lease, that person was the SPV. The FTT accepted that the same principle applied to the Partnership Deed and held that HMRC were not entitled to substitute some different agreement to that agreed by the parties to achieve a commercial purpose.

47. The FTT also rejected HMRC's argument that the Supreme Court's reasoning in *Rangers* was applicable in relation to the transfers of Special Capital made to partners in the Partnership. In *Rangers* the Supreme Court held that bonuses paid to employees, made available through a trust mechanism and to which the employees all had no contractual entitlement, were to be regarded as emoluments of employment subject to income tax because they were paid in respect of the employee's work as an employee. The FTT concluded as follows at [333] to [335]:

> "333. However, in the case of a partnership, a provisional award, such as under the PIP, is not an allocation of profits but drawings from a partnership which is not within the scope of tax. The taxation of partners is in relation to the profits of the underlying trade and the division of profits as agreed between the partners. As such I am unable to derive an assistance from *Rangers* in this case where it is necessary to consider what the partners actually received under the PIP.
>
> 334. It is apparent from the PIP arrangements that it was not a share of the profits that the partners received or had credited to their accounts but special capital credited to the Corporate Partner, SCL and/or Avon, which it agreed to transfer to the partners and was a transfer of part of the amount credited to the Corporate Partner as a result of previously being allocated profits which removed the Corporate Partner's debt on its distribution account. As Mr Gammie submits, this is not in the character of income or a share of profits.
>
> 335. The Partnership profits, ie the profits that were agreed to be allocated were, in fact, allocated by BCM LP (BCM LLP or BCM(UK) LLP) to SCL and Avon and were correctly brought into charge to corporation tax with the post-tax share of the profits of the Corporate Partners' being invested in partnership assets as special capital which formed the basis of the awards made to individual partners under the PIP."

G. Grounds of Appeal

48. In relation to the PIP Appeals HMRC advanced two Grounds of Appeal. First, HMRC contended that the FTT failed to apply section 850 of ITTOIA 2005 to the facts viewed realistically because it wrongly interpreted the "profit-sharing arrangements" in section 850(2) as a fixed legal concept analogous to the property rights in *Rossendale* ("**Ground 1**"). Secondly, HMRC contends that the FTT wrongly distinguished *Rangers* ("**Ground 2**").

49. In support of Ground 1 HMRC submitted that the FTT erred as a matter of law by taking too narrow a view of the profit-sharing arrangements in the present case by limiting the scope of its enquiry to the formal allocation of profits made by the PRSC rather than looking at it in its proper context. HMRC argued that we should not necessarily adopt the way the Partnership described those arrangements in the Partnership Deed if the label or description which the partners placed on those arrangements did not reflect the reality of the situation. In particular, HMRC argued that the "rights to share in the profits" for any accounting year were not limited to the allocation of profits in the Partnership Deed but included their rights under the PIP arrangements by which they ultimately received a further allocation of profits.

50. HMRC also contended that the FTT failed to consider (at [334]) the possibility that the later allocations of Special Capital were simply the delayed distribution of profits which had been allocated to that member in respect of the year in which they arose. The FTT failed to engage with this exercise because (following *Rossendale*) it wrongly took the view that it could not go beyond the terms adopted by the parties in the Partnership Deed. But as the Supreme Court has since made clear when overturning the Court of Appeal in *Rossendale*, the FTT was wrong to do so. The *Ramsay* approach requires a realistic view not only of a series of transactions but also of legal rights including not only the right to possession of land but also the right to share in the profits of a partnership.

51. In support of Ground 2 HMRC contended that in the same way that an emolument from employment can still be an individual's emolument even if he or she has agreed or acquiesced in it being redirected to a third party, an individual partner's right to share in the profits of the Partnership for a particular accounting year can include those profits which he or she has agreed or acquiesced in being redirected to a third party, namely, the Corporate Partner. HMRC contended that while some rights to share in partnership profits are not based on personal activities, the awards made to individual partners under the PIP formed part of the reward for their valuable services and were in reality rewards for their work. HMRC submitted, therefore, that the principle in *Rangers* applied in both the employment context and the UK partnership context.

52. We summarise the Partnership's response to HMRC's case on both Ground 1 and Ground 2 in the following steps:

(1) For each accounting period in question the individual partners and the Corporate Partner shared the annual profits of their business on the basis they had agreed under their Partnership Deed.

(2) No part of the annual profits went untaxed.

(3) Partners, unlike employees, are the proprietors of the business and in that capacity are entitled to: (a) their agreed share of the annual profits of the business, and (b) their agreed entitlement to the partnership property, which includes assets representing post-tax retained profits.

(4) Accordingly, the "reward" which an individual partner may receive may comprise a combination of his or her agreed share of the annual profits and his or her entitlement to the partnership property.

(5) Partners, unlike employees, are not (and never have been) taxed by reference to what they take out of the business (whether this takes the form of drawings, withdrawals of capital or partnership assets or otherwise) derived from their acting as or being or remaining a partner.

(6) The PIP was introduced on a worldwide basis for entirely commercial reasons related to the nature of the Partnership's business and the critical need to encourage both partner retention

and to discourage individual partners generally from engaging in forms of trading activity which could prove detrimental to the Partnership's business.

(7) To secure those objectives, the PIP provided individual partners with the prospect (but no right or entitlement) of obtaining a share in the Partnership property represented by the Corporate Partner's Special Capital which was derived from its post-tax share of the annual profits.

(8) Although the Corporate Partner ordinarily acted on the Partnership's recommendation, this does not lead to the conclusion that individual partners had a right or entitlement to receive Special Capital. The PIP always operated (and was understood by partners to operate) on the basis that they had no such right or entitlement. Individual partners had no right to Special Capital at any time before it was reallocated to them by the Corporate Partner and at that point (and only at that point) they acquired the right to Special Capital under the Partnership Deed and generally exercised those rights to withdraw it in full.

(9) However, even if individual partners had a right or entitlement to Special Capital, that would not fall to be taxed as income as part of their share of the annual profits. Transfers of partnership property between partners, even when they occur as part of an agreed arrangement (e.g. to reflect increasing seniority, phased retirement or to recognise the importance of an individual to the partnership business) are capital transactions and are not taxed as income.

(10) In seeking to tax the PIP Awards as they do, HMRC are seeking to substitute a different agreement for sharing the annual profits of the Partnership's business for the agreement which the partners themselves had actually reached and a different way of sharing the annual profits from the way in the partners had actually agreed to share them.

(11) Alternatively, HMRC seek to tax the individual partners on their "reward" as if they were to be taxed as employees under the Income Tax (Earnings and Pensions) Act 2003 ("**ITEPA 2003**") rather than as partners under Parts 2 and 9 of ITTOIA 2005 and without regard to the fact that partners (but not employees) are the proprietors of the business and, as such, are entitled both to share in the annual profits and to the partnership property.

(12) For both Ground 1 and Ground 2 HMRC appeared to be relying on some form of extended *Ramsay* doctrine. That is not something that it is open to them (or to the courts) to do. Only legislative change by Parliament could achieve the result for which HMRC contend, which is what occurred (prospectively only) in 2014.

H. Discussion

(1) Ground 1

(a) Principles of partnership taxation

53. The three stage process for the assessment of partnership profits was explained by Vinelott J in a frequently cited passage from *MacKinlay v Arthur Young McClelland Moores & Co* [1986] 1 WLR 1468 at 1474:

> "There are, in effect, three stages. First, the profits of the firm for an appropriate basis period must be ascertained. What has to be ascertained is the profits of the firm and not of the individual partners. That is not, I think, stated anywhere in the Income Tax Acts, but it follows necessarily from the fact that there is only one business and not a number of different businesses carried on by each of the partners. The income of the firm for the year is then treated as divided between the

> partners who were partners during the year to which the claim relates – the year of assessment – in one of the many senses of that word: see the proviso to s 26 of the Taxes Act 1970. That is the second stage. The tax payable is then calculated according to the circumstances of each partner – that is, after taking into account on the one hand any personal allowances, reliefs or deductions to which he is entitled and any higher rate of tax for which he is liable. The Acts do not provide for the way in which personal allowances, reliefs and deductions are to be apportioned between the partnership income and other income. I understand that in practice they are deducted from the share of the partnership income if that was the partner's main source of income. When the tax exigible in respect of each share of the partnership income has been ascertained the total tax payable is calculated. Section 152 (formerly Rule 10 of the Rules applicable to Cases I and II of Schedule D) provides that the total sum so calculated is to be treated as "one sum … separate and distinct from any other tax chargeable on those persons … and a joint assessment shall be made in the partnership name." That is the third stage."

54. After the introduction of self-assessment it was no longer possible to require a joint assessment to be made in the partnership name after calculating the amounts of tax payable by each of the individual partners separately. In *HMRC v Vaines* [2018] EWCA Civ 45 at [22] Henderson LJ adopted the following observations of the Upper Tribunal describing how the third stage operates after the introduction of self-assessment:

> "Prior to self-assessment, the basis periods for the assessment of partnership profits depended upon whether the entry or departure of any partner was treated as a cessation of the partnership trade or its discontinuance. The determination of the basis period for the assessment of the partnership's profits on partners generally depended upon that determination. Following the introduction of self-assessment, however, each partner is assessed to tax on their share of the profits by reference to the basis period determined according to their notional trade. It is, however, as the language of [*ITTOIA 2005*] recognises, a notional trade only for the purposes of assessment. The actual trade remains that of the partners collectively and it is the profits of that collective trade that must be computed before being allocated or shared among partners to provide each partner's share of the profit that is the profit of their notional trades for the purposes of their self-assessment."

55. It is important to bear in mind that since 1 April 2010 the trade of the Partnership has been carried on by BCM UK LLP which is a limited liability partnership and although it has a separate corporate existence from its members, it is treated for income tax purposes in the same way as an ordinary English partnership: see section 863 of ITTOIA 2005 (above). Accordingly, the trade of BCM UK LLP is, for income tax purposes, to be treated as though it is carried on by its members (including the Corporate Partner).

56. It is also important to note, as Mr Gammie observed, that under the system of partnership taxation the question how much a particular partner contributes to the partnership in terms of work or expertise in any given period, is strictly speaking irrelevant. The division of the profits at the second stage is purely a matter of agreement between the partners. This is important when considering the position of the Corporate Partner as a member of BCM UK LLP. The fact that its only business was to administer the PIP and that it made no contribution to the running of the business of the Partnership makes no difference. HMRC do not contend that the Partnership was not a genuine partnership or that the Corporate Partner was not entitled to share in the profits and the effect of section 863 of ITTOIA 2005 is that the business of the limited liability partnership is to be treated as carried on in partnership by all of its members without distinguishing between them.

(b) The Ramsay approach

57. We have briefly referred to the decision of the Supreme Court in *Rossendale* (above). It is reported at [2021] 2 WLR 1125 and we return to the facts in more detail. In that case non-domestic rates were payable by the "owner of the hereditament" which was defined as "the person entitled to possession". The defendants sought to avoid liability for rates by leasing the hereditaments to SPVs which were either wound up to trigger an exemption or allowed to be struck off the register and dissolved so that the leases vested in the Crown as bona vacantia. The leases were not sham devices and genuinely conferred an entitlement to possession. Nevertheless, the claimant local authorities brought claims to recover non-domestic rates contending that a purposive construction should be placed on the rating provisions and that the term "owner" should be treated as someone with a "real entitlement to possession". The Supreme Court reversed the decision of the Court of Appeal and held that the defendants were the "owners" of the hereditaments for the purposes of the rating legislation.

58. Lord Briggs and Lord Leggatt JJSC (with whom the other members of the Court agreed) described the *Ramsay* doctrine or principle as based on the modern purposive approach to the interpretation of all legislation. They also stated that it may now be said to have reached "a state of well-settled maturity": see [9]. They set out the general principles to be applied in approaching the construction of both taxing statutes and legislation more generally at [10] to [18] and it is helpful for us to set out that passage in full:

> "10. There are numerous authoritative statements in modern case law which emphasise the central importance in interpreting any legislation of identifying its purpose. Two examples will suffice. In *R (Quintavalle) v Secretary of State for Health* [2003] 2 AC 687, para 8, Lord Bingham of Cornhill said:
>
> > 'Every statute other than a pure consolidating statute is, after all, enacted to make some change, or address some problem, or remove some blemish, or effect some improvement in the national life. The court's task, within the permissible bounds of interpretation, is to give effect to Parliament's purpose. So the controversial provisions should be read in the context of the statute as a whole, and the statute as a whole should be read in the historical context of the situation which led to its enactment.'
>
> In *Bloomsbury International Ltd v Department for Environment, Food and Rural Affairs (Sea Fish Industry Authority intervening)* [2011] 1 WLR 1546, para 10, Lord Mance JSC stated:
>
> > 'In matters of statutory construction, the statutory purpose and the general scheme by which it is to be put into effect are of central importance... In this area, as in the area of contractual construction, 'the notion of words having a natural meaning' is not always very helpful (*Charter Reinsurance Co Ltd v Fagan* [1997] AC 313, 391 C, per Lord Hoffmann), and certainly not as a starting point, before identifying the legislative purpose and scheme.'
>
> See further Lowe and Potter, Understanding Legislation (2018), paras 3.45—3.48 (and cases there cited).
>
> 11. The result of applying the purposive approach to fiscal legislation has often been to disregard transactions or elements of transactions which have no business purpose and have as their sole aim the avoidance of tax. This is not because of any principle that a transaction otherwise effective to achieve a tax advantage should be treated as ineffective to do so if it is undertaken for the purpose of tax avoidance. It is because it is not generally to be expected that Parliament intends to exempt from tax a transaction which has no purpose other than tax avoidance. As Judge Learned Hand said in *Gilbert v Comr of Internal Revenue* (1957) 248 F 2d 399, 411, in a celebrated passage cited (in part) by Lord Wilberforce in *Ramsay* [1982] AC 300, 326:

> "If... the taxpayer enters into a transaction that does not appreciably affect his beneficial interest except to reduce his tax, the law will disregard it; for we cannot suppose that it was part of the purpose of the Act to provide an escape from the liabilities that it sought to impose."

See also *Collector of Stamp Revenue v Arrowtown Assets Ltd* [2003] 6 ITLR 454, paras 112—113 (Lord Millett NPJ).

12. Another aspect of the *Ramsay* approach is that, where a scheme aimed at avoiding tax involves a series of steps planned in advance, it is both permissible and necessary not just to consider the particular steps individually but to consider the scheme as a whole. Again, this is no more than an application of general principle. Although a statute must be applied to a state of affairs which exists, or to a transaction which occurs, at a particular point in time, the question whether the state of affairs or the transaction was part of a preconceived plan which included further steps may well be relevant to whether the state of affairs or transaction falls within the statutory description, construed in the light of its purpose. In some of the cases following *Ramsay* [1982] AC 300, reference was made to a series of transactions which are "pre-ordained": see e g *Inland Revenue Comrs v Burmah Oil Co Ltd* [1982] STC 30, 33 (Lord Diplock); *Furniss v Dawson* [1984] AC 474, 527 (Lord Brightman). As a matter of principle, however, it is not necessary in order to justify taking account of later events to show that they were bound to happen – only that they were planned to happen at the time when the first transaction in the sequence took place and that they did in fact happen: see *Inland Revenue Comrs v Scottish Provident Institution* [2004] 1 WLR 3172, para 23, where the House of Lords held that a risk that a scheme might not work as planned did not prevent it from being viewed as a whole, as it was intended to operate.

13. The decision of the House of Lords in the *Barclays Mercantile* case [2005] 1 AC 684 made it clear beyond dispute that the approach for which the *Ramsay* line of cases is authority is an application of general principles of statutory interpretation. Lord Nicholls of Birkenhead, delivering the joint opinion of the Appellate Committee (which also comprised Lord Steyn, Lord Hoffman, Lord Hope of Craighead and Lord Walker of Gestingthorpe), identified the "essence" of the approach (at para 32) as being:

> 'to give the statutory provision a purposive construction in order to determine the nature of the transaction to which it was intended to apply and then to decide whether the actual transaction (which might involve considering the overall effect of a number of elements intended to operate together) answered to the statutory description.'

Lord Nicholls also quoted with approval (at para 36) the statement of Ribeiro PJ in Arrowtown, para 35, that:

> 'the driving principle in the *Ramsay* line of cases continues to involve a general rule of statutory construction and an unblinkered approach to the analysis of the facts. The ultimate question is whether the relevant statutory provisions, construed purposively, were intended to apply to the transaction, viewed realistically.'

14. Almost all statements of principle, however broadly framed, tend to be responsive to the particular facts under review. The above statements refer to "the transaction" and most of the leading expositions of the *Ramsay* doctrine do the same. This is because most of the provisions being considered taxed, or as the case may be exempted, transactions. But not all do. Some involve a tax (such as stamp duty) on instruments. Others impose charges by reference to the status of a person, or their rights in relation to specified property, such as the owner of unoccupied non-domestic property in the present case. The *Ramsay* doctrine is no less applicable in such cases. In *MacNiven v Westmoreland Investments Ltd* [2003] 1 AC 311, 320, para 8, Lord Nicholls said: 'The paramount question always is one of interpretation of the particular statutory provision and its application to the facts of the case.' No statement of the principle could be more general than that.

15. In the task of ascertaining whether a particular statutory provision imposes a charge, or grants an exemption from a charge, the *Ramsay* approach is generally described – as it is in the statements quoted above – as involving two components or stages. The first is to ascertain the

class of facts (which may or may not be transactions) intended to be affected by the charge or exemption. This is a process of interpretation of the statutory provision in the light of its purpose. The second is to discover whether the relevant facts fall within that class, in the sense that they "answer to the statutory description" (*Barclays Mercantile* at para 32). This may be described as a process of application of the statutory provision to the facts. It is useful to distinguish these processes, although there is no rigid demarcation between them and an iterative approach may be required.

16. Both interpretation and application share the need to avoid tunnel vision. The particular charging or exempting provision must be construed in the context of the whole statutory scheme within which it is contained. The identification of its purpose may require an even wider review, extending to the history of the statutory provision or scheme and its political or social objective, to the extent that this can reliably be ascertained from admissible material.

17. Likewise, the facts must be also be looked at in the round. In *Inland Revenue Comrs v McGuckian* [1997] 1 WLR 991, 999, Lord Steyn explained that it was the formalistic insistence on examining steps in a composite scheme separately that allowed tax avoidance schemes to flourish. Sometimes looking at a composite scheme as a whole allows particular steps which have no commercial purpose to be ignored. But the requirement to look at the facts in the round is not limited to such cases. Thus, in *Scottish Provident* [2004] 1 WLR 3172 where the taxing statute granted an allowance which depended upon the taxpayer having an entitlement to a specified type of property (gilts), a view of the facts in the round enabled the House of Lords to conclude that a legal entitlement to gilts generated by one element in a larger scheme failed to qualify because the entitlement was intended and expected to be cancelled out by an equal and opposite transaction."

59. The Supreme Court then applied this approach to the rating legislation. The Court considered that the central purpose of the legislation was to provide an incentive to bring unoccupied property back into use by focusing the burden of the rates on the person who had the ability, in the real world, to achieve that objective: see [30]. The Court observed on the facts that all of the elements of the schemes (and, in particular, the formation of the SPVs and the grant of the leases), were pre-planned and designed purely for the avoidance of rates without any other commercial or business purpose: see [36].

60. Applying the legislation to the facts, the Court held that the definition of the "owner" of a hereditament as "the person entitled to possession of it" was to be interpreted as denoting in a normal case the person who as a matter of the law of real property had the immediate legal right to actual physical possession of the relevant property: see [47]. Lord Briggs and Lord Leggatt then continued at [48] to [50]:

"48. In the unusual circumstances of this case, however, identifying 'the person entitled to possession' in section 65(1) of the 1988 Act as the person with the immediate legal right to possession of the property would defeat the purpose of the legislation. As we have explained, the schemes were designed in such a way as to ensure that the SPV to whom a lease was granted had no real or practical control over whether the property was occupied or not and that such control remained at all times with the landlord.

49. In our view, Parliament cannot sensibly be taken to have intended that 'the person entitled to possession' of an unoccupied property on whom the liability for rates is imposed should encompass a company which has no real or practical ability to exercise its legal right to possession and on which that legal right has been conferred for no purpose other than the avoidance of liability for rates. Still less can Parliament rationally be taken to have intended that an entitlement created with the aim of acting unlawfully and abusing procedures provided by company and insolvency law should fall within the statutory description.

> 50. In these circumstances we have no difficulty in concluding that, on the agreed and assumed facts, the SPVs to which leases were granted as part of either of the schemes we have described did not thereby become "entitled to possession" of the demised property for the purposes of the 1988 Act. Rather, throughout the term of the lease that person remained the defendant landlord. This does not involve ignoring the leases, in the way that an intermediate element in a circular transaction might be ignored under the *Ramsay* doctrine. Rather it involves their close examination in their context, and a conclusion that they did not transfer to the SPVs the entitlement to possession required by the Act as the badge of ownership. If the defendants did not thereby transfer their entitlement to possession it necessarily remained, for the purposes of the Act, with them. The Act requires someone to be identified as the owner. That will be the person who, in any tenurial chain, starting with the freeholder and working downwards, has not disposed of the entitlement to possession of the property in question."

61. The Court rejected the reasoning of Henderson LJ in the Court of Appeal that the concept of entitlement to possession in the rating legislation was an intrinsically legal one and observed that his judgment seemed to hark back to a distinction drawn by Lord Hoffmann in *MacNiven* between commercial concepts and legal concepts which had been heavily qualified in *Barclays Mercantile*: see [52] to [58]. Instead, it held that the words "entitled to possession" was "the badge of ownership triggering liability for business rates" and that it should be properly construed as meaning "being concerned with a real and practical entitlement which carries with it in particular the ability either to occupy the property in question, or to confer a right to its occupation on someone else, and thereby to decide whether or not to bring it back into occupation": see [59]. The Court concluded, therefore, that the relevant defendant remained at all times "the person entitled to possession" of each property: see [62].

62. HMRC submitted that this Tribunal should adopt a similar approach to the statutory provisions for the allocation of a firm's profits to its partners in section 850(1) of ITTOIA 2005 and that the term "profit-sharing arrangements" had to be construed purposively. Mr Baldry submitted that the purpose of section 850(1) was to tax those who in the real world have the right to share in those profits and that the individual partners to whom provisional and final PIP Awards were made had the right to share – and then shared – in those profits to the exclusion of the Corporate Partner in the same way as they had the right to share in the profits allocated to them directly.

63. HMRC's case rests on the proposition that the Partnership's profit sharing arrangements were a means by which the profits of the Partnership were channelled to the individual partners who had earned those profits. Mr Baldry submitted that in identifying the profit-sharing arrangements of the Partnership, the Tribunal should treat the intermediate steps by which profits were allocated to the Corporate Partner, it subscribed for Special Capital and it then distributed that Special Capital to individual partners, as a means by which those partners were able to share in the profits of the Partnership. By contrast, the Partnership submitted that the Tribunal should take the profit-sharing agreements agreed between the individual partners and the Corporate Partner in the Partnership Deed at face value and conclude that the Corporate Partner was entitled to the share of the profits allocated to it and on which it paid tax in accordance with the principles applicable to the taxation of partnership profits.

(c) Does Ramsay apply?

64. The FTT did not consider that there was any scope for the application of the *Ramsay* principle in the present case because it applied the reasoning of Henderson LJ in *Rossendale* by analogy: see [319]. It held that although the present case was not concerned with a fundamental principle of land law it did involve a fundamental principle of partnership law, and, as such, HMRC were not entitled to substitute some different agreement to that arrived at by the parties concerned which was clearly a

commercial agreement entered into to achieve a commercial purpose. That conclusion cannot stand in the light of the Supreme Court's decision in *Rossendale* and, in particular, its rejection of the approach adopted by Henderson LJ and in our judgment the FTT fell into error by construing the phrase "the rights of the partners to share in the profits of the trade" narrowly and by reference only to the contractual rights conferred on partners under the Partnership Deed. A broader inquiry was required.

65. We are satisfied, therefore, that the FTT made an error of law by failing to consider the proper application of the *Ramsay* principle to the construction and application of section 850 of ITTOIA 2005. That error of law is clearly material and we must exercise our powers under section 12 of the Tribunals, Courts and Enforcement Act 2007 to set aside the conclusions of the FTT in the Decision in relation to the PIP Issue. However, because none of the evidence before the FTT was in dispute and there were sufficient facts agreed between the parties or found by the FTT, we have decided that we should remake the Decision on the basis of those facts.

66. We are also satisfied that for each period of account we must construe the ambit or scope of the term "the firm's profit-sharing arrangements" in section 850(1) and (6) of ITTOIA 2005 by ascertaining the purpose of that provision and then applying it realistically to the facts as agreed between the parties and found by the FTT. Mr Baldry submitted that the purpose of section 850 was to ensure that the profits of a partnership (as calculated in accordance with s 849 of ITTOIA 2005) were allocated to those partners who in real terms had the right to share in those profits for the period in question. He also submitted that to give effect to the proper purpose of section 850 it was necessary to examine all of the arrangements between the individual partners and the Partnership including the PIP. Subject to one point, we accept both of these submissions.

67. The FTT found that the Partnership entered into the PIP for commercial reasons and not only for tax avoidance purposes: see [267] and [268]. But we also accept Mr Gammie's submission that we cannot disregard the arrangements under which the Corporate Partner became a partner in the Partnership and was allocated a profit share. Likewise, we cannot ignore the conditions which typically had to be satisfied before a provisional award became a final award or treat them as window-dressing. The evidence before the FTT showed that 16% of provisional awards (representing 3% of awards made by value) were in fact forfeited because the conditions which the partners were required to meet were not satisfied.

68. In our view, therefore, this is not the type of case which Lords Briggs and Leggatt described in *Rossendale* at [11] where it is open to the Tribunal to disregard transactions or elements of a transaction which have no business purpose and have as their sole aim the avoidance of tax. On the other hand, however, this does not mean that the *Ramsay* principle has no application in this case. If we were to take the view that the Corporate Partner was no more than a conduit and that either as a matter of contractual construction or because of the way in which the Partnership operated the PIP in practice (or both), the right to share in the profits of the Partnership remained in the hands of individual partners, it would be open to us to conclude that their PIP Awards formed part of the profit-sharing arrangements of the Partnership. Having decided that the *Ramsay* approach applies, therefore, we now consider the profit-sharing arrangements of the Partnership (including the PIP) realistically and as a whole.

(d) Application

69. Mr Baldry submitted that there was no realistic possibility that the Corporate Partner (whether SCL or Avon) would have acted otherwise than as directed by the Partnership for the following reasons:

(1) SCL was held by a purpose trust whose purpose was the advancement of the BlueCrest business.

(2) The purposes of SCL included: "to participate in incentivisation and retention strategies for the partners of BlueCrest".

(3) When the Corporate Partner took drawings which were invested in Special Capital, the funds did not move from the Partnership to the Corporate Partner but remained invested in the Partnership or in the underlying investment management business.

(4) Drawings were only taken by Avon on terms that they would be used to acquire Special Capital in the Partnership.

(5) Mr Beverley gave evidence on behalf of the Partnership which demonstrates that Avon was "fundamentally providing an administrative kind of function", and that the correspondence which it sent out was dictated by the Partnership and that Avon carried out a "word processing job from BlueCrest".

70. Mr Baldry also made a number of submissions about the contractual rights of the Corporate Partner under the Partnership Deed and the way in which they were put into operation:

(1) Clause 7.4(C) of the Partnership Deed provided that the Corporate Partner could only reallocate Special Capital following a prior recommendation by the Board of the Partnership or their delegate.

(2) Avon had no right to withdraw Special Capital for its own benefit. At best, it could frustrate the purposes of the PIP by refusing to reallocate Special Capital and leaving it invested in BlueCrest funds indefinitely.

(3) There was no prospect that SCL could obtain a benefit for itself or for a shareholder from allocations made to it because it would not spend the money and it would not declare dividends.

(4) Avon was never in a position to make a profit allocation which it could withdraw from the Partnership (as opposed to investing in Special Capital): see the timeline at [301]. This was because it would take drawings to invest in Special Capital and only after it had made that investment would the corresponding profit allocation be made to it by the Board.

(5) The only function of the Corporate Partner was to operate the PIP. Yet the Board of the Partnership made enormous awards in its favour. It was obvious that this was not because of its contribution to the business but because it was intended to operate the PIP.

(6) The individual partners were at no material risk of losing their awards except in circumstances of which they were fully aware, namely, that they left the Partnership or were guilty of misconduct. They accepted these risks but no others and the Tribunal should approach the PIP on the basis that the arrangements worked as they had been intended.

(7) The Partnership was not free to depart from the assurances which it gave to individual Partners who fulfilled all of the conditions attached to their deferred awards when it exercised its discretion to make recommendations to the Corporate Partner.

(8) The Corporate Partner was required as a matter of contract to exercise the discretion conferred by clause 7.4(C) of the Partnership Deed in good faith and not arbitrarily, capriciously or irrationally. It could not have exercised the discretion other than to reallocate Special Capital

to individual partners in accordance with the Board's recommendations (unless the forfeiture conditions applied). Any other exercise of the discretion would have been arbitrary, capricious or irrational.

71. Mr Baldry also relied on the understanding of individual partners that the Special Capital held by the Corporate Partner was their own investment in BlueCrest even before they had met the conditions for any award becoming final. In particular, he relied on the following:

(1) Partners would generally choose how the money would be invested.

(2) Allocations to the Corporate Partner were described by the Partnership's management to the participating partners as a sum put into the PIP "on your behalf ".

(3) Investments were held according to the names of the individual partners and treated as belonging to those partners or being their money.

(4) The PIP was described as a way of sheltering income. In an email dated 19 January 2009 Ms Braga explained to an individual partner that the award did not reduce their income and was: "Just a timing difference."

(5) The PIP was described as a way of delivering a profit allocation to a partner. For example the following question was put to an individual partner:

> "I wonder if you are still interested in having an award via this plan (where the profits are taxed at 28%). The general partner is considering making awards in the BlueCrest Savings Plan. Amounts up to the discretionary 2008 profit allocation may be delivered in this form. The maximum amount available in your case is £5,174,494. Would you please let me know by Friday 18th April your preferred maximum award for the general partner to consider…"

(6) The FTT recorded that a new recruit described the PIP to Mr Dodd as "the tax scheme used for bonuses": see [350].

(7) Mr Dodd confirmed in his evidence that although individual partners accepted that they could lose their awards if they did not comply with the terms of forfeiture, their understanding was that an award would not be taken away in any other case. This was made clear to the partners and they were given reassurances to that effect.

72. We accept many of these submissions. In particular, we accept that the Corporate Partner had no function other than to distribute Special Capital to individual partners, that individual partners had an expectation that they would receive their final PIP Awards and that the Corporate Partner had in most cases a contractual obligation to give effect to those expectations unless the forfeiture conditions were satisfied. We say this for the following reasons:

(1) We accept that the Corporate Partner was introduced into the Partnership for the sole purpose of administering the PIP and that the Corporate Partner had no other business purpose and made no other commercial contribution.

(2) We are also satisfied that the evidence before the FTT established that individual partners had an expectation that they would receive a final award unless the forfeiture conditions were satisfied. Moreover, as Mr Dodd's evidence demonstrated, there was a clear understanding that although in theory both the PRSC and the Corporate Partner had discretion, a provisional PIP Award would always be made final unless the forfeiture conditions were satisfied.

(3) Where a contract confers a discretion on one party the exercise of which may adversely affect the interests of another party, it will generally be an implied term that the discretion may only be exercised in good faith and not arbitrarily, capriciously, or irrationally: see *Braganza v BP Shipping Ltd* [2015] 1 WLR 1661. We therefore accept that it was an implied term of the Partnership Deed that the Corporate Partner would not exercise the discretion in clause 7.4(C) except in good faith and not arbitrarily, capriciously or irrationally.

(4) We also accept that a failure by the Corporate Partner to exercise the relevant discretion at all would have been capricious and that an exercise of discretion to reject the recommendations of the Board without good reason or to reallocate Special Capital to those partners who had not received a provisional award or to reallocate it to itself would have been arbitrary, irrational or capricious.

(5) We therefore accept that in practice the Corporate Partner was bound to exercise its discretion to give effect to the PIP Awards unless the forfeiture conditions were satisfied. Moreover, the evidence before the FTT established that in practice reallocations were made in accordance with recommendations made to the Corporate Partner, except in a few cases (where a mistake had been made or there was a good reason for departing from the recommendation).

(6) Finally, we accept that when the Corporate Partner drew monies on account of profits prior to an allocation of a profit share in accordance with clause 7.4(C), the amounts drawn were earmarked for payments to be made in respect of awards to individual partners in due course.

73. However, although we are satisfied that individual partners had an expectation of receiving their final PIP Awards and that the Special Partner generally had a contractual obligation to give effect to those expectations unless the forfeiture conditions were met, we are not satisfied that we should treat the rights of individual Partners under the PIP as rights to share in the profits of the Partnership for a number of reasons which we now explain.

74. <u>First</u>, although SCL and Avon were introduced to the Partnership to administer or give effect to the PIP and they had no other commercial function, the FTT found that the PIP was intended to solve a business issue: see [267]. Moreover, we agree with Mr Gammie that the scheme of partnership taxation takes no account of how much an individual partner has contributed to the success of the business of the partnership. Section 850 of ITTOIA 2005 simply allocates the profits of the partnership for tax purposes to the partners in accordance with the terms of the agreement under which they have agreed to share the profits. In our judgment, therefore, the fact that the Corporate Partner made no commercial or business contribution to the Partnership's profits is of no consequence. The Corporate Partner performs a different but nevertheless commercially important role.

75. <u>Secondly</u>, there was no suggestion that the Corporate Partner was not intended to be a genuine partner and that it was not intended to enjoy the rights or be bound by the obligations contained in the Partnership Deed. Mr Baldry did not suggest that the relationship between the Corporate Partner and the other partners was a sham and the FTT made no finding to that effect. Furthermore, there was no suggestion that profit allocations made to the Corporate Partner were held in any way by the Corporate Partner on trust for individual partners or in a fiduciary capacity (and this issue is the subject of detailed consideration in the separate decision referred to at [44] above.). We are satisfied, therefore, that until the Corporate Partner exercised its discretion to make a final PIP Award to a partner, that partner did not have a right or entitlement to it.

76. Thirdly, it does not follow that all of the amounts allocated as a profit share to the Corporate Partner in respect of a particular accounting period were used to fund awards to individual partners in respect of the accounting period in which the profits in question were earned. If a provisional PIP Award did not become final because the eligibility conditions were not met, the relevant assets would be retained by the Corporate Partner and became available to satisfy future awards made in future accounting periods. This raised the most difficult question for HMRC's case. If the Corporate Partner had no right to share in the profits and the individual partner had forfeited his or her rights to receive them, who was entitled to share them and on what basis?

77. HMRC's primary case was that profits which a partner had forfeited should be treated as allocated between the other partners in proportion to their awards. HMRC's alternative case was that the Corporate Partner would be taxed on any excess allocation. We find neither of those arguments compelling. Neither outcome arises out of the contractual arrangements which only contemplated the allocation of Special Capital to those partners who had received a final PIP Award reflecting their individual contributions. There was no contractual entitlement to an additional bonus simply because other partners had forfeited their PIP Awards. We, therefore, agree with Mr Gammie and the FTT that to allocate forfeited profits in the way suggested by HMRC would involve rewriting the contractual arrangements between the parties.

78. There are limits to the application of the *Ramsay* doctrine. As Patten LJ stated in *Brain Disorders Research Limited Partnership v. HMRC* [2018] STC 2382 at [32]:

> "Although the ***Ramsay*** approach to construction has undoubtedly involved the courts in looking at the commercial realities of the transaction and ignoring financial components of a scheme which are circular or have no purpose other than to produce a tax loss in order to identify whether and, if so, which parts of the transaction engage the relevant tax provisions, it does not enable the courts to fix the taxpayer with a contract which under the scheme it does not have. The actual transactions remain the same."

79. We consider that to bring the PIP within the profit-sharing arrangements of the Partnership would go beyond those limits in the present case. It would be necessary to fix the taxpayer, in this case the Partnership, with a contract to which its members did not agree. In our view, the correct contractual analysis is that the individual partner has no right to share in the profits of the Partnership at the time when allocations were made to the Corporate Partner and that the terms of the Partnership Deed which allocated those profits to the Corporate Partner must be respected. It is also our view that the contractual effect of the PIP and the way in which it was operated in practice do not change that position. When profits were allocated between the partners under the Partnership Deed, each individual partner had a legitimate expectation that his or her provisional PIP Award would be made final unless they failed to meet the eligibility conditions. Individual partners only had a right or entitlement to receive their PIP Awards once they were entitled to withdraw the Special Capital. Even adopting a purposive construction of section 850 of ITTOIA 2005, the PIP did not form part of the profit-sharing arrangements of the Partnership. We therefore dismiss Ground 1 of the PIP Appeals.

(2) Ground 2

80. HMRC also contended that even if we took the view that the profit allocations were made to the Corporate Partner (rather than to individual partners) under the profit-sharing arrangements of the Partnership, those allocations must be treated as if they were made to the individual partners. In support of this argument they relied on *Hadlee* and *Rangers.* We begin with the decision of the Privy Council in *Hadlee.*

81. In *Hadlee* the taxpayer was a partner in a firm of chartered accountants. Under New Zealand law a partnership is not a separate tax entity and partners made returns of partnership income only for information purposes so that their separate incomes could be calculated. The taxpayer executed a deed of trust under which he assigned 40% of his share in the partnership to the trustees and they had the power to pay the income to the taxpayer's wife and child. The Commissioner of Inland Revenue took the view that a taxpayer could not escape assessment for tax on income resulting from his personal services or exertions by assigning the income and assessed the taxpayer to income tax on the basis that the assignment had been ineffective to shift liability to income tax in respect of partnership income from the taxpayer to the trustees. They appealed to the Privy Council contending that the right to income was derived not only from his personal services or exertions but also from his rights under the partnership agreement, that those rights amounted to a proprietary interest in the partnership and that the trustees' right to income came from their ownership of a proprietary interest in a capital asset, namely, the partnership.

82. Lord Jauncey gave the judgment of the Privy Council. He quoted the judgment of the New Zealand Court of Appeal describing the relevant provisions of the taxation system in New Zealand at 296E:

> "New Zealand tax legislation does not isolate partnership income as a separate source of income. In New Zealand law a partnership is not a separate tax entity. It is not a "taxpayer" and partners make a return of partnership income only for the purpose of providing information on which their separate incomes are calculated."

83. He also approved a number of statements made in the lower courts that no taxpayer could escape assessment for tax on income resulting from his personal activities by assignment and then approved the following statement of Richardson J at 298H:

> "There is no justification in principle for differentiating between salary and wage earners and professionals whose income is the product of their personal exertion. In either case the person whose personal exertion earns the income derives the income."

84. For this reason, therefore, the Privy Council dismissed the appeal. The Supreme Court adopted the same reasoning in *Rangers*. In that case footballers were paid wages or a salary through the club's payroll but their employer made additional payments to an employee benefit trust with a recommendation that the trustee company exercise its discretion to resettle the sum paid on a sub-trust for the benefit of the individual footballers. The trust arrangements also contemplated that the footballer would be able to seek unsecured loans of the amount of the funds settled on a sub-trust repayable on his death. The question was whether the payments in advance by way of loan were assessable to taxes being emoluments of employment.

85. The Supreme Court held that the footballers were liable for income tax on the additional payments. The decision establishes a principle that income tax on earnings is primarily a tax on the payment of money by an employer to an employee as a reward for the work as an employee. Lord Hodge, who gave the judgment of the Court, stated that there was no requirement that an employee should receive the remuneration for it to be taxable. The employee whose work gives rise to the remuneration is taxed not the recipient: see [36] and [37]. Lord Hodge went on to say that there was nothing in the legislation which excludes from the tax charge a payment to a third party to which the employer and employee have agreed as part of the employee's contract of employment. Both sums involve the payment of remuneration for the employee's work as an employee: see [39] to [41].

86. Lord Hodge observed that the relevant statutory provision which was section 62(2)(c) of ITEPA 2003 brought into charge as earnings "anything that constitutes an emolument of the employment" and he discussed *Hadlee* in that context at [50]:

> "By contrast, the advice of the Privy Council in *Hadlee v Comr of Inland Revenue* [1993] AC 524 is in point. The appeal concerned income tax legislation in New Zealand. Section 38(2) of the Income Tax Act 1976 provided that income tax was payable by every person on income derived by him during the year for which tax was payable. A partner in an accountancy firm assigned a proportion of his share in the partnership to a trust under which the primary beneficiaries were his wife and child. He sought to argue that he was not liable to income tax on that proportion of his annual partnership income. The New Zealand courts rejected that contention and the Privy Council upheld their decision, holding that income tax was a tax on income which was the product of the taxpayer's personal exertion and that the taxpayer could not escape liability to pay that tax by assigning a part of his share in the partnership. While the relevant provision of the New Zealand statute was worded differently from the United Kingdom legislation, the latter, by its emphasis on emoluments arising from a taxpayer's employment, adopts a similar concept of the tax charge. It supports the view which I have reached that a charge to income tax on employment income can arise when an arrangement gives a third party part or all of the employee's remuneration."

87. He then considered a number of authorities dealing with PAYE before concluding that it was not necessary for payment to be made to the employee before it could be taxed as a reward or remuneration. He then concluded at [59]:

> "Parliament in enacting legislation for the taxation of emoluments or earnings from employment has sought to tax remuneration paid in money or money's worth. No persuasive rationale has been advanced for excluding from the scope of this tax charge remuneration in the form of money which the employee agrees should be paid to a third party, or where he arranges or acquiesces in a transaction to that effect."

88. Relying on both *Hadlee* and *Rangers,* Mr Baldry made the following submissions on behalf of HMRC in support of Ground 2:

(1) *Hadlee* (which was a partnership case although the rules in question were not precisely the same) establishes a general principle that no taxpayer can escape assessment from tax on income resulting from his personal activities by assignment to a third party which also applies in the UK partnership context and was found to apply in *Rangers*.

(2) It follows that an emolument awarded to an employee as part of the reward for their services or efforts remains an emolument of the employee even if he or she has agreed to it being redirected to a third party. In the same way, an individual partner's right to share in the profits as a reward for his or her services to the partnership remains the right of the partner even if he or she has agreed to it be redirected to a third party.

(3) While some rights to share in partnership profits are not based on a reward for personal activities or services, PIP Awards were. They were in substance and reality a reward for work or for personal exertion.

(4) The individual partners accepted the risk that they might not receive final PIP Awards from the Corporate Partner (e.g. if they left the Partnership) or, in certain circumstances, as much money as they would have done if they had been paid immediately. But this was a risk which they were prepared to take in order to reduce the amount of tax which they were required to pay and to receive higher sums as a reward overall.

(5) Profits which were allocated to the Corporate Partner were in substance rewards for individual partners redirected to a third party and applying the general principle in *Hadlee* those individuals should be taxed on those sums.

89. We reject those submissions for the reasons submitted by Mr Gammie. We find that *Rangers* is of no assistance in the present case because earnings from employment are taxed in a fundamentally different manner from the taxation of partnership profits. In particular, the earnings of an employee are taxed on receipt whereas partners are taxed on their shares of the profits of the partnership for a particular accounting period and a partner's drawings (either in anticipation of, or on account of annual profits) or the withdrawal of partnership capital or property are not taxable income in his or her hands.

90. Furthermore, we agree with the conclusion of the FTT at [326]. The structure of the New Zealand income tax legislation did not isolate partnership income as a separate source of income. It is clear from both *Hadlee* and the observations of Lord Hodge in *Rangers* that in New Zealand income tax (including tax on partnership income) is a tax on the product of the taxpayer's personal exertion. The position is quite different from the UK system of partnership taxation under which a partner is taxed by reference to his right to share in the profits of the partnership for the accounting period in question regardless of whether that income has been generated by personal exertion or not.

91. Finally, we do not consider *Rangers* to be authority for the wide proposition that an individual cannot escape tax on the income which they derive from their personal exertion by having it paid to another person. The case is authority for the narrower proposition that an employee cannot escape tax on his employment income by having it paid to another person. But in any event, PIP Awards were not made solely to reward the personal exertions of the individual partners. The PIP was intended to reward individual partners. But it was also intended to facilitate the Partnership's commercial purpose of ensuring the retention and incentivisation of individual partners by discouraging them from leaving to join competitor firms or engaging in inappropriately risky investment behaviour and aligning the Partnership's interests with those of the funds it managed. We therefore reject Ground 2 of HMRC's appeal.

(3) Conclusion

92. We therefore determine the PIP Issue in favour of the Partnership but for reasons which are different to those given by the FTT. We re-make the Decision but with the same outcome. We dismiss the PIP Appeals.

III. The IP Appeals

I. The Relevant Legislation

93. In relation to the Miscellaneous Income Issue the applicable legislation is section 687 and section 689 of ITTOIA 2005 which provide as follows:

> "**687 Charge to tax on income not otherwise charged**
>
> (1) Income tax is charged under this Chapter on income from any source that is not charged to income tax under or as a result of any other provision of this Act or any other Act.
>
> (2) Subsection (1) does not apply to annual payments.
>
> (3) Subsection (1) does not apply to income that would be charged to income tax under or as a result of another provision but for an exemption.

(4) The definition of “income” in section 878(1) does not apply for the purposes of this section.

(5) …

689 Person liable

The person liable for any tax charged under this Chapter is the person receiving or entitled to the income.”

94. In relation to the Sale of Occupational Income Issue the applicable legislation is now contained in Chapter 4 of the ITA 2007 which (so far as relevant) provides as follows:

“**773 Overview of Chapter**

(1) This Chapter imposes a charge to income tax–

(a) on individuals to whom income is treated as arising under section 778 (income arising where capital amount other than derivative property or right obtained), and

(b) on individuals to whom income is treated as arising under section 779 (income arising where derivative property or right obtained).

(2) Income is treated as arising under those sections only if–

(a) transactions are effected or arrangements made to exploit the earning capacity of an individual in an occupation, and

(b) the main object or one of the main objects of the transactions or arrangements is the avoidance or reduction of liability to income tax.

774 Meaning of “occupation”

In this Chapter references to an occupation, in relation to an individual , are references to any activities of a kind undertaken in a profession or vocation, regardless of whether the individual –

(a) is carrying on a profession or vocation on the individual 's own account, or

(b) is an employee or office-holder.

…

776 Charge to tax on sale of occupation income

(1) Income tax is charged on income treated as arising under–

(a) section 778 (income arising where capital amount other than derivative property or right obtained), or

(b) section 779 (income arising where derivative property or right obtained).

(2) Tax is charged under this section on the full amount of income treated as arising in the tax year.

(3) The person liable for any tax charged under this section is the individual to whom the income is treated as arising.

(4) This section is subject to section 784 (exemption for sales of going concerns).

777 Conditions for sections 778 and 779 to apply

(1) Sections 778 and 779 apply only if conditions A to C are met in respect of an individual .

(2) Condition A is that the individual carries on an occupation wholly or partly in the United Kingdom.

(3) Condition B is that transactions are effected or arrangements made to exploit the individual 's earning capacity in the occupation by putting another person (see section 782) in a position to enjoy–

(a) all or part of the income or receipts derived from the individual 's activities in the occupation, or

(b) anything derived directly or indirectly from such income or receipts.

(4) The reference in subsection (3) to income or receipts derived from the individual 's activities includes a reference to payments for any description of copyright or licence or franchise or other right deriving its value from the individual 's activities (including past activities).

(5) Condition C is that as part of, or in connection with, or in consequence of, the transactions or arrangements a capital amount is obtained by the individual for the individual or another person.

(6) For the purposes of subsection (5), the cases where an individual ("A") obtains a capital amount for another person ("B") include cases where A has put B in a position to receive the capital amount by providing B with something of value derived, directly or indirectly, from A's activities in the occupation.

(7) In this Chapter "capital amount" means an amount in money or money's worth which does not fall to be included in a calculation of income for income tax purposes apart from this Chapter.

778 Income arising where capital amount other than derivative property or right obtained

(1) This section applies if the capital amount obtained as mentioned in section 777(5) does not consist of–

(a) property which derives substantially the whole of its value from the individual 's activities, or

(b) a right which does so.

(2) The capital amount is treated for income tax purposes as income arising to the individual .

(3) The income is treated as arising in the tax year in which the capital amount is receivable.

(4) A capital amount is not regarded as having become receivable by a person for the purposes of this section until the person can effectively enjoy or dispose of it.

779 Income arising where derivative property or right obtained

(1) This section applies if–

(a) the capital amount obtained as mentioned in section 777(5) consists of–

(i) property which derives substantially the whole of its value from the activities of an individual , or

(ii) a right which does so, and

(b) the property or right is sold or otherwise realised.

(2) For the purposes of subsection (1), it does not matter whether the capital amount is obtained on one occasion or on two or more occasions (for example, because the individual acquires a stock option and subsequently exercises it)."

(3) Income of an amount equal to the proceeds of sale or the realised value is treated for income tax purposes as income arising to the individual .

(4) The income is treated as arising in the tax year in which the property or right is sold or otherwise realised."

J. The Facts

95. The FTT's findings of fact in relation to the PIP Appeals (which we have summarised above) are also relevant to the IP Appeals. But the FTT made further findings of fact which were relevant to the IP Appeals. We observe that on some occasions the FTT did no more than summarise the evidence

rather than make express findings of fact. But where the FTT set out that evidence without disapproval or comment, we have assumed that the FTT accepted that evidence and neither of the parties took issue with that approach.

96. The FTT referred to Mr Platt's evidence that the original PIP scheme was closely modelled on the JP Morgan Group bonus deferral program under which a percentage of pay was deferred and which was "extremely effective" in ensuring people did not leave the business. The FTT appeared to accept Mr Platt's explanation that the PIP was a way to "lock my people in": see [343]. The FTT also recorded that Mr Platt, Mr Dodd and Mr Dannatt gave evidence to the effect that they were happy that there was a tax benefit attaching to the PIP and that the PIP operated to shelter some of their profit shares from tax. The FTT also recorded that the tax implications of the PIP were explained to new recruits and it was described as a "tax scheme used for bonuses": see [343] to [350].

97. The FTT also recorded that the IP Appellants gave evidence about their roles in the Partnership, how they acquired their knowledge and experience of the business and how they acquired the skill of trading investments and portfolio management more generally: see [353] to [399]. That evidence was relevant to the Sale of Occupational Income Issue and, in particular, to the question whether the IP Appellants carried on a "profession or vocation". In summary:

(1) Each of the IP Appellants was university educated but not necessarily in subjects which were directly relevant to the carrying out of investment business. Typically, BlueCrest looked for graduates with first or 2.1 class degrees in mathematics, physics or engineering.

(2) The IP Appellants acquired their knowledge through their work with major financial institutions in a variety of roles including corporate finance, project management, developing personal relationships with senior management, trading securities, using technology and algorithms to develop systematic trading strategies, establishing processes to select assets for an investment portfolio, analysing and carrying out research on financial markets and individual companies, reviewing investment and market risk, including monitoring position limits, and developing pricing models.

(3) Some of the IP Appellants referred to the fact that there was no clear training or clear discipline from which BlueCrest could hire individuals who would be successful at systematic trading and that there was no training specific to many of the skills which they had developed or professional bodies regulating or monitoring the various disciplines described (above). Their evidence was that skills were developed from on-the-job training and experience.

(4) There was no university course to teach trading and when recruiting BlueCrest would look for recruits who had very good commercial sense and interest in the markets, interest in mathematical formulations and who had creative potential and the ability to think about the facts in a commercial manner.

(5) Each of the IP Appellants had moved into senior management roles where responsibilities included developing the strategic direction of the business, managing the functional teams of the business and developing processes, controls and team structure.

(6) At least some of the IP Appellants had to be approved by the Financial Conduct Authority in order to perform the roles which they undertook where those roles involved interaction with investors or the market or senior management roles.

K. The Decision

(1) The Miscellaneous Income Issue

98. The parties agreed that the Miscellaneous Income Issue required the FTT to address the following two questions:

> "(1) Were sums received by the Appellants pursuant to the PIP income or capital for the purposes of the Income Tax Acts?
>
> (2) If they were income, were they charged to tax under s.687(1) of the ITTOIA 2005?"

99. The FTT determined this issue in favour of HMRC. After reviewing the relevant authorities, it set out its reasoning briefly at [416] and [424] to [427]. The FTT held that there was no difficulty in identifying the source of income in this case, namely, the decision of the Corporate Partner to pay the awards: see [416]. The FTT rejected the IP Appellants' submission that if section 687 of ITTOIA 2005 were to be applied, then the same income would be charged to tax twice and made the following finding at [424]:

> "As I have found in the PIP Appeals that the effect of the PIP is that Special Capital "belongs" to the company concerned, ie SCL or Avon, which is not subject to any further charge to tax on that income. It then transfers that income to an individual who was not previously entitled to it under the partnership arrangements. The issue is whether those individuals are subject to tax on what they have received from the company as miscellaneous income."

100. The FTT dealt next with the question whether the payments could be characterised as income at all and, if so, whether it could be characterised as income analogous to profits or gains charged elsewhere at [425] to [427]:

> "425. It is clear from the authorities that the distinction between that income which falls within the miscellaneous income charge in s 687(1) ITTOIA and that which does not, is whether the receipts are analogous to income or something charged to income elsewhere in the Taxes Acts. If analogous to income or something charged to tax, it would be within the charge to tax but if it falls within the exclusions identified by Rowlatt J in *Ryall (Inspector of Taxes) v Hoare* it would not. As an example of the distinction to be drawn Mr Baldry compared presents and bonuses both of which as he said, "tend to get paid at Christmas". He said that the question to be asked was whether the awards of Special Capital in the present case like "the presents under the tree, or are they like the bankers' bonuses" with the answer being that there was not much doubt that it was the bankers' bonuses. As such the essential nature of the award was a deferred discretionary bonus which as it was analogous to something taxed by the legislation.
>
> 426. I agree.
>
> 427. As [Mr Platt] said in evidence… the decision to introduce the PIP was to implement a type of deferred bonus award scheme similar to that of JPM. However, as it is not paid to an individual as an employee it cannot be taxed as such. Neither, given my conclusion in the PIP Appeals, is it taxable as partnership profits. However, as the award of Special Capital is analogous to a taxable bonus then, subject to the issues of its source and whether there was double taxation, I consider that is to be regarded as income and is taxable under s 687(1) ITTOIA."

(2) The Sale of Occupation Issue

101. The parties also agreed that the Sale of Occupation Issue required the FTT to address the following two questions (the second consisting of a number of different elements):

> "If they were capital, were the sums received by the Appellants pursuant to the PIP charged to income tax under Chapter 4 of Part 13 of the ITA 2007? In particular:
>
> (1) Was the main object, or one of the main objects, of the transactions or arrangements the avoidance or reduction of the Appellants' liability to income tax?
>
> (2) In respect of each Appellant, were the transactions effected, or arrangements made, to exploit the earning capacity of that individual in an occupation? In this regard: (a) Was the relevant Appellant carrying out an "occupation" within the meaning of s.777(2) of the ITA 2007, ie was the Appellant undertaking activities of a kind undertaken in a profession or vocation? (b) If so, were the transactions effected, or arrangements made, to exploit that Appellant's earning capacity in the occupation by putting another person in a position to enjoy: (i) all or part of the income or receipts derived from the individual 's activities in the occupation; or (ii) anything derived directly or indirectly from such income or receipts?"

102. The FTT also determined this issue in favour of HMRC. In relation to the first question, it held that although the PIP had a commercial purpose, namely, the retention and incentivisation of partners, it also had as a main object the avoidance or reduction of liability to income tax. In particular, the FTT found that the PIP was a bespoke piece of tax planning developed by EY and it also relied on the evidence which the IP Appellants gave about the tax benefits of the scheme: see [272] and [344] to [350]. The FTT also held that the object of tax avoidance was not incidental but that the Partnership was able to achieve the retention and incentivisation of staff by the avoidance or reduction of tax: see [437].

103. In relation to the second question, the FTT held that the activities of the IP Appellants were of a kind undertaken in a "profession or vocation". It rejected the IP Appellants' submissions that although the IP Appellants did a very professional job this was not the sense in which the term "profession" was used in the legislation and having reviewed the authorities, the FTT set out its reasoning at [452] to [455]:

> "452. From these authorities it would appear that the issue whether the IP Appellants were carrying on an occupation, ie undertaking activities of a kind undertaken in a profession or vocation, is a question of fact.
>
> 453. Mr Gammie, in addition to relying on the authorities referred to *Pride and Prejudice* in which Jane Austen wrote of a relative of who was "merely in commerce" which Mr Gammie says is the distinction in this case. He contends that it is not a matter of defining the characteristics of a profession - something eschewed by the courts - but, having regard to the evidence, it is clear that the individuals concerned are trading which Parliament has chosen not to bring within the scope of the legislation.
>
> 454. Like Du Parq LJ in *Carr*, I do not consider it appropriate to define what is meant by "profession". However, given the comments of Scrutton LJ in *Maxse* of an occupation "requiring purely intellectual skill" and the observation of Du Parq LJ in *Carr*, of the necessity for "some special skill or ability" that is "derived from experience" I consider that the "ordinary reasonable" man or woman, whether on the proverbial "Clapham omnibus", the Northern Line or DLR going past Canary Wharf, would, having regard to the evidence, regard the term "profession" as including the activities of all of the IP Appellants.
>
> 455. It is, after all, over 100 years since Scrutton LJ noted, in *Maxse*, that that the "line of demarcation may vary from time to time" and that the word "profession "has now [in 1919], I think, a wider meaning.""

104. The FTT did not address Condition B or Condition C (for the imposition of a charge under section 776 of ITA 2007) in terms. Those conditions are set out in section 777 (above). But we draw

the inference that the FTT considered that those conditions were met from its conclusion that the PIP Awards were chargeable under section 776.

L. Grounds of Appeal

(1) The Miscellaneous Income Issue

105. The IP Appellants appeal on the grounds that the FTT made an error of law in its findings on both the Miscellaneous Income Issue and the Sale of Occupation Issue. In relation to the Miscellaneous Income Issue, the IP Appellants appeal on the following grounds:

(1) The PIP Awards made to them were capital not income in nature and do not, therefore, fall within the scope of the charge to income tax under section 687(1) of ITTOIA 2005 ("**Ground 1**").

(2) Even if it could be said that the PIP Awards have an income character, there is no relevant source by reference to which they can be brought into charge to income tax ("**Ground 2**").

(3) Even if it might be said that the IP Appellants' continued participation as partners in the Partnership was a relevant source, it would amount to taxing the same profits twice to charge to income tax on the transfer of Special Capital to them by the Corporate Partner out of its post-tax profit allocations ("**Ground 3**").

106. HMRC invited us to reject all three Grounds of Appeal and to dismiss the appeal on the Miscellaneous Income Issue for the following reasons:

(1) What confers the character of income on a receipt is the source of the payment together with the circumstances in which it was made. In the present case, the FTT was justified in finding on the evidence that the reallocation and transfer of Special Capital to individual partners was a reward for performance spread over time and analogous to the payment of a discretionary bonus or to the payment of the deferred element of a deferred bonus.

(2) The FTT's conclusion that the source of the payment was the decision of the Corporate Partner to distribute what was in substance a reward for performance spread over a period of time was a conclusion which the FTT was entitled to reach on the facts that it found.

(3) There is no double taxation because the profits of the Partnership are not being taxed twice because the Corporate Partner is taxed on the profits allocated to it in one accounting period and the IP Appellants are separately taxed on the new income which they receive as and when the Corporate Partner takes the decision to make a final award under the PIP.

(2) The Sale of Occupation Issue

107. In relation to the Sale of Occupation Issue the IP Appellants appeal on the following grounds:

(1) The PIP was an arrangement designed to incentivise and retain partners and is not an arrangement of the type contemplated by the relevant legislation ("**Ground 1**")

(2) Even if the PIP is an arrangement of the type contemplated by the legislation, the only conclusion which the FTT could have reached on the basis of the evidence which it heard and accepted in relation to the PIP was that tax avoidance was not a main object of the arrangements ("**Ground 2**").

(3) Even if the PIP is an arrangement of a type contemplated by the legislation and tax avoidance was a main object of that arrangement, none of the IP Appellants was in an occupation within the meaning of Condition A in section 777 of the ITA 2007.

108. Again, HMRC invite us to reject all three Grounds and to dismiss the appeal on the Sale of Occupation Issue for the following reasons:

(1) The PIP does fall within the scope of the legislation because the Corporate Partner had been put in a position to enjoy the IP Appellant's potential allocation of profit and on the reallocation of Special Capital the IP Appellant was entitled to withdraw it and turn it into cash.

(2) The question whether the PIP had as one of its main objects the avoidance or reduction of a liability to tax was an issue of fact for the FTT, which made no error of approach and reached a conclusion which it was entitled to do on the basis of the evidence.

(3) The FTT was correct to hold that the IP Appellants were engaged in the kind of activities undertaken in a profession or vocation and the overall characterisation of their activities based on the evidence did not involve any error of law.

M. Discussion

(1) The Miscellaneous Income Issue

109. Before ITTOIA 2005 came into force, a residual charge to income tax arose under Schedule D Case VI on any annual profits or gains not falling under any other Case of Schedule D and not charged to tax under Schedules A, E and F. This residual charge to income tax is now found in section 687(1) of ITTOIA 2005 which was enacted as part of HMRC's Tax Law Rewrite Project. It is common ground that section 687(1) was intended to have the same scope as the earlier legislation and that the authorities relating to Schedule D Case VI (which go back many years) remain relevant to its interpretation. The principles to be derived from those earlier authorities were summarised in *Kerrison v HMRC* [2019] 4 WLR 8 at [68] where the Upper Tribunal stated that the receipt must meet the following requirements:

(1) The receipts must have the nature of "annual profits". But that simply means that they must be capable of being "calculated in any one year". It does not mean that the income must recur every year.

(2) The receipts must be of an income nature.

(3) They must be analogous to some other head of charge under what was previously Schedule D. This is the *eiusdem generis* principle.

(4) They must be the recipient's income.

(5) They must involve a sufficient link between the source and the recipient.

110. The Upper Tribunal also considered the question whether it is necessary to identify a source before a Case VI liability arose. Whilst the tribunal did not decide that point because it was not necessary to do so, it made the following observations at [70]:

> "In relation to the source issue, the UT noted in the Spritebeam case at para 55 that the House of Lords in *National Provident Institution v Brown* [1921] 2 AC 222 left open the question whether

> it is necessary to identify a source before a Case VI liability can arise. We note, however, that section 687(1) expressly refers to "income from any source" which suggests to us that in order for income to be taxable under Case VI it requires a source. Moreover, it is hard to see how a receipt which had no source could be euisdem generis with the other heads of charge in what was formerly Schedule D, all of which require a source for the receipt in question. None the less, although we would be minded to accept that a receipt taxable under section 687(1) ITTOIA must have a source, it is not necessary for us to reach a decision on this point for the reasons set out below."

111. The IP Appellants' appeal on the Miscellaneous Income Issue engages the second, third and fifth principles set out above. Both parties made submissions on the basis that it is necessary to identify the source of the payment, and, in particular, whether that source is of an income rather than a capital nature. We therefore proceed on that basis (as did the FTT).

(a) Ground 1: income

112. In *Leeming v Jones* [1930] AC 415 the House of Lords had to decide whether a transaction was taxable under Case VI and emphasised the requirement that the receipt must be in the nature of income. Lord Dunedin stated as follows at 422:

> "Now, Case VI sweeps up all sorts of annual profits and gains which have not been included in the other five heads, but it has been settled again and again that that does not mean that anything that is a profit or gain falls to be taxed. Case VI necessarily refers to the words of Schedule D, that is to say, it must be a case of annual profits and gains, and those words again are ruled by the first section of the Act, which says that when an Act enacts that income shall be charged for any year at any rate, the tax at that rate shall be charged in respect of the profits and gains according to the Schedules.… profits and gains must mean profit and gains eiusdem generis with the profits and gains specified in the preceding five Cases. … none the less the receipt must be of the nature of income."

113. In that case the profits sought to be taxed were derived from an isolated property transaction. But in the present case there is no doubt that the receipts in question were annual profits and Mr Gammie did not seek to argue otherwise. Mr Gammie did not really dispute either that the fourth principle was satisfied and that if they were income rather than capital receipts, then they were the IP Appellants' income and taxable in their hands. We are satisfied that the FTT was right to find that the receipts were of an income nature in the hands of the IP Appellants.

114. The real issue between the parties was whether the PIP Awards made to individual partners were the kind of annual receipts which fell within Case VI. The FTT found that they were and placed particular reliance on the evidence which showed that the decision to introduce the PIP was to implement a type of deferred bonus scheme similar to that of the JP Morgan scheme: see [425] to [427]. The JP Morgan scheme was a scheme to reward employees and payments under that scheme would have been taxable as employment income. In the present case, however, the IP Appellants were not taxed as employees. The issue for us is whether this was a relevant distinction for tax purposes and that the FTT made an error of law by applying this analogy to the PIP Awards made to the IP Appellants.

115. In our judgment, the FTT was entitled to find that the PIP Awards fell within Case VI and were analogous to the other cases in Schedule D. That conclusion is supported by the decision of Rose J (as she then was) sitting in the Upper Tribunal in *Manduca v HMRC* [2015] STC 2002. In that case the taxpayer and a colleague set up a hedge fund. They transferred the fund to a new fund manager and the taxpayer and his colleague became its employees. They entered into a separate bonus agreement under which they were paid a bonus for the transfer of their fund. They were then made

redundant and brought a claim against their new employer. They settled the claim on terms that they received compensation for the failure to pay the bonus. An issue arose as to the correct tax treatment of the compensation to be paid under the settlement. It was common ground that the compensation should have the same tax treatment as the bonus. But HMRC also took the view that the payments fell within Case VI of Schedule D whereas the taxpayer contended that the bonus was in the nature of the capital sum subject to capital gains tax.

116. Rose J held that the bonus was remuneration for services provided to the new fund manager by the taxpayer and that those services fell within Case VI. She cited *Brocklesby v Merricks* (1934) 18 TC 576 and *Bradbury v Arnold* (1957) 37 TC 665 which establish the principle that a contract for services should be assessed under Case VI even though the income arose out of a single transaction. She relied on those authorities for the proposition that once it is established that a payment is an income receipt and that it was paid pursuant to a binding contract in return for some kind of service, then there is no need to go further to enquire into the extent of the services in fact provided: see [35]. She held that the bonus was to pay for a service and that this service was *eiusdem generis* with the services listed within the other Cases in Schedule D: see [36] to [38].

117. *Manduca* shows that if a payment is made to an employee as a reward for services it is taxable under Case VI even if it is not paid pursuant to a contract for employment. In the present case the payment was a reward for services. Although we have found that individual partners did not have the right to receive PIP Awards as part of the profit-sharing arrangements of the Partnership, this does not prevent those awards falling within Case VI. The FTT found that the PIP was intended to reward individual partners for their contribution to the success of the Partnership, because of the services they provided and to incentivise them for the future. In our judgment, the FTT was also entitled to find that these services were *eiusdem generis* with the services listed within the other Cases in Schedule D.

<u>(b)</u> *<u>Ground 2: source</u>*

118. The principal ground upon which Mr Gammie challenged the Decision related to the source of the PIP Awards. He submitted that their source was the distribution of partnership property and that partners are not taxed on the way in which they choose to distribute partnership property between themselves. He argued that profits allocated to the Corporate Partner were taxed on the usual principles of partnership taxation and that once the Corporate Partner had re-invested those profits in the Partnership by subscribing for Special Capital, they became capital assets and part of the property of the Partnership which the Corporate Partner then transferred to individual partners in accordance with their final PIP Awards. He also submitted that when individual partners withdraw their Special Capital from the Partnership, those withdrawals were not liable to tax. He drew an analogy with partners retiring from a solicitors firm withdrawing their capital from the partnership (which had never been taxed).

119. Mr Gammie relied on the decision of the Supreme Court in *Shop Direct Group v HMRC* [2016] STC 747. In that case Lord Hodge (with whom the other members of the Court agreed) rejected an argument that VAT repayments did not have the former trade as their source and that their source was the intra-group arrangement under which the right to receive payment was assigned to another group entity. He held that arrangements within the VAT group did not alter the original source of the receipt. He stated as follows at [24]:

> "Mr Goldberg also submitted that SDG's receipt of a sum equal to VRP2 did not have a former trade as its source but was the result of an intra-group arrangement which was either a transfer for no consideration of that sum or a transfer for no consideration of the rights to VRP2. He posed

> the question, 'what is the receipt from?' and submitted that the correct answer was the transfer of either the sum or the right. He referred to *Hochstrasser (Inspector of Taxes) v Mayes* [1959] 3 All ER 817, [1960] AC 376, and *Abbott v Philbin (Inspector of Taxes)* [1960] 2 All ER 763, [1961] AC 352 in support of the contention that regard must be had to the most proximate cause of the receipt. I do not accept this submission. In my view those cases have no bearing. They concern the charge to tax under Sch E on the remuneration of an employee. I accept Mr Gammie's submission that in the context of Sch E the relevant statutory question focused on the character of the receipt in the employee's hands. Rule 1 of the Schedule spoke of a charge on a 'person having or exercising an office or employment' in respect of 'salaries … perquisites or profits whatsoever therefrom' (emphasis added). The question was whether the employee has received money or money's worth representing remuneration for his services. By contrast, under s 103 the focus was on the original source of the receipt. The decisions and arrangements within the VAT group of companies about the specific company which was to receive the repayment did not alter the original source of the receipt. The question was whether the sum received arose from the discontinued trade before its discontinuance."

120. Mr Gammie submitted that in the present case the relevant source was the partnership trade which generated the profits which were converted into partnership property rather than any later decision made by the Corporate Partner. He also relied on two earlier authorities: *Purchase v Stainer's Executors* [1952] AC 280 and *Carson v Cheyney's Executor* [1958] 3 WLR 740. In the first case, the House of Lords held that sums received by the executors of Leslie Howard, the actor and director, after his death were not chargeable to income tax under Schedule D Case II because at that time post-cessation receipts were not brought within the charge to tax. In considering whether the receipts could be charged to tax under Case VI, Lord Simmonds LC identified the source of the income as Mr Howard's professional activity and rejected an argument that the individual contracts under which he was to receive the profits from individual films were themselves income-producing assets: see 289. Accordingly, there could be no claim for tax under Case VI.

121. The second case involved similar facts. Royalties paid to an author during his lifetime were assessed to income under Schedule D Case II. It was held that payments made to his executors after his death were the fruits of his professional activity and that their character did not alter when the profession was discontinued. The House of Lords followed *Stainer* and rejected the argument that the royalties could be treated after his death as consideration for the grant of a licence to use the copyright in his works.

122. Mr Baldry submitted that the FTT was correct to find that the source of the PIP Awards made by the Corporate Partner was its decision to pay the awards (or, more properly, reallocate or transfer Special Capital to them on the recommendation of the Partnership). He relied on *Spritebeam Ltd v HMRC* [2015] STC 1222. That case concerned a tax avoidance scheme which was intended to avoid tax credits arising under a loan relationship. Company A lent money to Company B but instead of Company B paying interest to Company A, Company B issued irredeemable preference shares equal in value to a commercial rate of interest on the loan to Company C. The Upper Tribunal considered a number of authorities in which discretionary payments were treated as the source of income including *Cunard's Trustee v IRC* [1946] 1 All ER 159 and drew the following conclusion at [68]:

> "The conclusion we draw from the authorities to which we have referred is that it is immaterial that the recipient cannot enforce payment; what matters is whether there is an obligation on the payer to pay. Thus in *Stedeford* there was no obligation on the governors to make any payment; they could have refrained at any time from making further payments, and neither the former headmaster nor anyone else could have compelled them to continue. By contrast, in the trustee cases the beneficiaries, individually, could not enforce the payment of any particular sum to themselves; but the trustees were under an enforceable obligation to exercise their discretion and make a payment to one or more of the beneficiaries as circumstances required. In *Drummond*, for

example, the payments were not voluntary payments in any relevant sense because the payments were made on the basis of the trustees' duties arising under the testamentary trust. In the present case, the right to payment may not have been enforceable by the Share Recipient but it was not voluntary either; the Borrower was under a contractual duty to the Lender to allot and issue shares to the Share Recipient. Thus we conclude, in relation to issue (ii), that the shares were income in the Share Recipient's hands."

123. The Tribunal held that the value of the shares fell within the scope of taxation under Case VI and that the source of the share recipient's income was the obligations contained in the relevant loan agreement. The Tribunal stated as follows at [82] to [84]:

> "[82] Here, the source of the Share Recipient's income was the Loan Agreement, in which it was the named beneficiary. It was entitled to receive the shares, by reason of its being so named, even if it did not have the capacity to enforce that entitlement itself: it was in a similar position to that of the beneficiaries in *Drummond v Collins* but not in an analogous position to that of the former headmaster. Although, in *Cunard's Trustees* [1946] 1 All ER 159, 27 TC 122, the court was addressing the question whether the payments were or were not voluntary, what Lord Greene said (see para [67] above) was equally relevant to the question whether there was a connection between the recipient and a source. The source in that case was 'the joint operation of the will and the exercise of their discretion by the trustees.' Once it was accepted (as the taxpayers had done in their skeleton argument) that the shares were derived from the Loan Agreement there was no need to enquire further: the source of the shares was identified, and sufficient.
>
> [83] On this issue we prefer Mr Ghosh's arguments. Although we accept Mr Prosser's argument that the categories of property and activities do demonstrate what constitutes a necessary connection, we are not persuaded that the test for necessary connection is limited to them. In short, Mr Prosser's test under this head is too narrow. It implies that 'possession' is to be equated with ownership, but we do not find anywhere in the authorities to which we were referred any support for the proposition that ownership is required. The beneficiaries in *Drummond v Collins* and *Cunard's Trustees* did not own the fund from which their income was derived, but they were nevertheless found to 'possess' (if that is the right word— as we have said, other terms have been used) a sufficient connection to the source.
>
> [84] We think, rather, that Mr Ghosh is correct to say that the required connection between taxpayer and source need not be limited to legal rights but can include the situation where the payment is made pursuant to any legal duty owed by the payer. That proposition is consistent with what was said by Lord Greene in the passage we have set out at para [67] above, in which the focus was on the payer's obligation to the recipient, and not on the recipient's ability to enforce it."

124. The principal issue in *Spritebeam* was whether the receipts by Company C were taxable at all, given that it had no enforceable right to receive payment under the loan arrangements. But it provides clear authority for the proposition that the source of a particular payment may be a decision taken by a party on whom a discretion has been conferred by trust or contract. *Spritebeam* is also authority for the proposition that the required connection between the taxpayer and the source need not be limited to legal rights provided that there is a legal obligation to make the payment.

125. We have found that that the Corporate Partner had a contractual obligation to give effect to the expectations of the IP Appellants that they would receive a final award of Special Capital unless they failed to meet the eligibility criteria. The decision of the Corporate Partner to reallocate or transfer Special Capital to the IP Appellants was, therefore, capable of being the source of the PIP Awards made to them (as the FTT found). Moreover, the fact that the IP Appellants did not have a contractual right to payment but only to ensure that the Corporate Partner exercised its discretion fairly and

without acting arbitrarily or capriciously did not, in our judgment, prevent the FTT from finding that there was a sufficient connection between each PIP award and the Corporate Partner's decision.

126. However, the real issue is whether there was "no need to enquire further" for the source of the payments: see [82] (above). In *Spritebeam* Company C provided no underlying services because the relevant payments represented interest or the time value of money. By contrast, in *Shop Direct* the Supreme Court held that the contractual arrangements between group companies were not the source of the payments but rather the underlying trade (and both *Stainer's Executors* and *Cheney's Executors* support that analysis).

127. In our judgment, the FTT was right to identify the source of each PIP Awards as the decision of the Corporate Partner rather than the underlying trade of the Partnership. Moreover, we consider *Shop Direct* (and both *Stainer's Executors* and *Cheney's Executors*) to be distinguishable for the following reasons:

(1) We have found that the profit-sharing arrangements of the Partnership did not include the PIP and that the terms of the Partnership Deed which allocated profits to the Corporate Partner must be respected. It follows that each PIP Award of Special Capital which the Corporate Partner re-allocated or transferred to the IP Appellants did not represent profits from the trade of the Partnership but represented awards made to them at the discretion of the Corporate Partner. Mr Gammie cannot have it both ways.

(2) One of the principal reasons why we rejected HMRC's case on the application of the *Ramsay* doctrine was that it was impossible to say for certain that individual partners had a right to share between them all of the profits allocated to the Corporate Partner. This analysis also served to break the connection between the trade of the partnership and the source of the payments.

(3) The analogy which Mr Gammie drew between the PIP and a partner who makes withdrawals of capital from the partnership is not exact and may be apt to mislead. Where a partner who re-invested his or her profit allocation back into the partnership and then later withdrew it as capital, we might well accept that the ultimate source was the partnership trade. But in the present case the profits were allocated to the Corporate Partner who re-invested those profits. It then exercised a discretion to transfer those profits to the IP Appellants. There was, therefore, a second and entirely separate stage before the IP Appellants withdrew their capital. Unlike Mr Gammie's partner in the solicitor's firm the IP Appellants had no right to withdraw their Special Capital unless the Corporate Partner made a decision to re-allocate it to them and made their PIP Awards final.

(4) Further, each PIP Award did not involve the withdrawal by partners of retained profits reinvested as capital but the transfer of a partnership interest by one partner (the Corporate Partner) to another partner. Mr Gammie attempted to meet this argument by relying on the fact that the members of the partnership hold the assets on trust for the partnership as a whole and, in the present case, this must include the Special Capital. In our judgment, this is not an answer (or at least a complete answer). Even though the Partnership holds funds in its bank account on trust for the partnership as a whole, this would not prevent one partner from assigning to another his or her rights to the funds in that bank account. Likewise, where partner A sells his partnership interest to partner B, the source of the payment by partner B is not the underlying trade of the partnership but the transfer of the partnership interest.

<u>(c) Ground 3: double taxation</u>

128. There is a presumption that Parliament does not intend to tax the same person on the same income twice unless it clearly and expressly legislates to the contrary. This is the principle of double taxation and Lord Macmillan explained the principle in *Canadian Eagle Oil Company Limited v R* (1945) 27 TC 205 (which was concerned with the rules for taxing foreign companies on income with a UK source) at 257:

> "The result of these considerations is to satisfy me that for the purposes of Income Tax, the income of a foreign company and the income received from it in dividends by its British shareholders are not to any extent or effect one and the same income, but are two distinct incomes. The fact that the foreign company's total income is in part composed of British dividends which have borne tax by deduction is entirely irrelevant to the question of the tax to be paid by a British shareholder on the dividends received by him from the foreign company. There is no such identification of the British shareholder with the foreign company as there is between a British shareholder and a British company, and the attempted analogy is only misleading. The income of the foreign company and the income received in dividends from it by its British shareholder are in our revenue law the incomes of two different persons, and there can thus be no room for any invocation of the rule against double taxation, which applies only against taxing twice the same income of the same person."

129. In our judgment, the FTT's conclusion that the present case did not involve double taxation (in the sense described by Lord Macmillan in *Canadian Oil*) was correct. The Corporate Partner and the IP Appellants were not the same person and they were not taxed on the same income. They were being taxed on income from separate sources. The Corporate Partner has been taxed on its profit allocation and the IP Appellants were chargeable to tax under Case VI on the receipts derived from the final PIP Awards based on the decisions made by the Corporate Partner. For these reasons we dismiss the IP Appellants' appeal on the Miscellaneous Income Issue.

(2) Sale of Occupational Income Issue

130. That is sufficient for us to dismiss the IP Appeals. Nevertheless, because the issue was fully argued, we address the Sale of Occupation Income Issue. For the PIP Awards to be taxable it was necessary for HMRC to satisfy three conditions in section 777 of ITA 2007. It was also necessary for HMRC to persuade the FTT that the main object (or one of the main objects of the PIP) was the avoidance or reduction of liability to income tax: see s 773 (2) (b) ITA 2007. The three conditions in section 777 were as follows:

(1) *Condition A*: The IP Appellants carried on any activities of a kind undertaken in a profession or vocation wholly or partly in the UK.

(2) *Condition B*: The PIP arrangements were made to exploit their earning capacity by putting another person in a position to enjoy all or part of the income or receipts derived from those activities (or anything derived directly or indirectly from such income or receipts).

(3) *Condition C:* As part of or in connection with the PIP arrangements the IP Appellants obtained an amount of money or money's worth which is not otherwise taxed as income for themselves or another person.

131. These provisions are anti-avoidance measures designed to prevent individuals avoid income tax by selling their earning potential in exchange for capital payments. We deal first with each of the requirements of Condition A, B and C before turning to the IP Appellants' challenge to the finding

that one of the main objects of the arrangements was the avoidance or reduction of liability to income tax.

_(a)_ _Condition A_

132. The word “profession” is an ordinary English word and the meaning of an ordinary word is not a question of law (unless it is used in a special or unusual sense). In *Brutus v Cozens* [1973] AC 854 Lord Reid stated as follows at 861D-E:

> “The meaning of an ordinary word of the English language is not a question of law. The proper construction of a statute is a question of law. If the context shows that a word is used in an unusual sense the court will determine in other words what that unusual sense is. But here there is in my opinion no question of the word " insulting " being used in any unusual sense. It appears to me, for reasons which I shall give later, to be intended to have its ordinary meaning. It is for the tribunal which decides the case to consider, not as law but as fact, whether in the whole circumstances the words of the statute do or do not as a matter of ordinary usage of the English language cover or apply to the facts which have been proved. If it is alleged that the tribunal has reached a wrong decision then there can be a question of law but only of a limited character. The question would normally be whether their decision was unreasonable in the sense that no tribunal acquainted with the ordinary use of language could reasonably reach that decision.”

133. The FTT referred to a number of authorities and directed itself both that the question whether the taxpayer was carrying on activities of a kind undertaken in a profession or vocation was a question of fact and that it was not appropriate to define a profession or vocation or to fix the boundaries of a profession or vocation. There is no suggestion that the FTT misdirected itself in this way and, in our judgment, it was entitled to find that Condition A was satisfied on the basis that a reasonable person would have understood the term “profession” to include the activities of the IP Appellants: see [454].

_(b)_ _Condition B_

134. Mr Gammie submitted that Condition B did not apply to the IP Appellants because the Partnership’s profits were derived from the collective efforts of the partners in general and it was impossible to identify those profits which were derived exclusively from the earning capacity of each one of them. In his Skeleton Argument he developed this argument at length but the substance is reflected in the following paragraphs:

> “108. In the present case, however, the Partnership’s business is conducted by the IP Appellants collectively, in conjunction with a large number of other partners, and many individuals who worked for the Partnership as employees. In the case of BCM LLP and BCM (UK) LLP, the IP Appellants are members and, as such, s. 863(1) of ITTOIA 2005 treats the activities of the LLP as carried on by its members collectively as partners and not as individuals to whom particular income or receipts can be attributed. Each is entitled to a share of the profits of the Partnership generated by their collective efforts (and those of the individuals employed by the Partnership). As such, there are no transactions or arrangements of the type at which Chapter 4 is directed.
>
> 109. To support an argument that Condition B was satisfied in relation to the PIP arrangements: 109.1. each individual participant in the PIP would have to have rights to an allocation of the Partnership’s profit derived from income or receipts generated by his/her specific activities or property generated by his/her activities; and 109.2. the Corporate Partner would have to have been put in in a position to enjoy all or part of the relevant individual’s allocation of profit derived from his/her specific activities.
>
> 110. It is impossible, however, to identify the Partnership’s profits or a partner’s share in the profits in the way envisaged by Condition B. The Corporate Partner, as a partner, shared with the

> other partners in the product of the collective efforts of the partners and the other individuals working for the Partnership as employees, and not in the income or receipts of any particular individual."

135. We have no hesitation in rejecting this argument. The FTT accepted the evidence of Mr Dodd that the PIP replaced the profit allocations which were made to individual partners to reward their performance: see [260] to [264]. The FTT also accepted Ms Kerridge's evidence in the timeline at [301] which described the provisional PIP Awards as "provisional total rewards" and confirmed that PIP Awards were made to discretionary traders on the basis of their performance (and, in particular, their P&L statements). Finally, Mr Baldry took us to the underlying documents which confirmed that PIP Awards were made on the basis of individual rather than collective performance. We therefore accept that the PIP was designed to put the Corporate Partner in a position to enjoy all or part of the income or receipts derived from each IP Appellant's activities or anything derived directly or indirectly from those income or receipts.

136. Furthermore, we see nothing in the wording of the legislation to preclude its application because the activities of the IP Appellants were carried on in partnership with each other (and with others). Section 782 of ITA 2007 provides that all partners in a partnership may be regarded as a person or persons distinct from the individuals or other persons who are for the time being partners. The legislation was drafted very widely and was intended to extend to any arrangements made to exploit an individual's earning capacity where the main object (or one of the main objects) was to avoid or reduce liability to income tax. For example, if the other person referred to in Condition B is another partner or partners in the partnership, there is no reason in our judgment why collective earnings from a partnership would not be caught by the section.

(c) Condition C

137. Section 777(7) provides that "capital amount" means an amount in money or money's worth which does not fall to be included in a calculation of income for income tax purposes apart from under Chapter 4. Given the expansive nature of the definition it is unnecessary to decide whether the relevant payment or payments were of an income or capital nature. Because of the way in which "capital amount" is defined, Mr Baldry also recognised that Chapter 4 was a "long stop" which was only available where all other potential options to tax the sums concerned had been exhausted.

138. Mr Gammie submitted that Condition C was not satisfied because the Corporate Partner's profit allocation was included in the Partnership's calculation of income for the purposes of the income tax legislation and did not represent a capital amount for these purposes. We reject that argument for the reasons which we have given in relation to the Miscellaneous Income Issue. The PIP Awards made to the IP Appellants were not included in the Corporate Partner's profit allocation or calculation of income for income tax purposes because the source of the income was not the underlying trade of the Partnership but the discretionary awards made by the Corporate Partner.

(d) Main object

139. The IP Appellants do not challenge the findings of fact upon which the FTT based its conclusion that one of the main objects of the PIP was to avoid liability to income tax: see [344] to [350]. Mr Gammie submitted, however, that this conclusion was wrong in law because the FTT failed to consider whether or not avoidance of tax was a main object of the arrangement or whether it was one of the means by which the Partnership achieved its commercial object. He also submitted that having reached the conclusion that the PIP had a commercial object, the FTT ought to have gone on to

consider this question and if it had done so, it would have reached the conclusion that the PIP was no more than a means by which the Partnership achieved its commercial object.

140. Mr Gammie relied on *IRC v Brebner* [1967] 2 AC 18 in which the House of Lords upheld the decision of the Special Commissioners that the anti-avoidance provision contained in section 28 of the Finance 1960 did not apply because the subject transactions had been carried out for bona fide commercial reasons and did not have tax as their main (or one of their main) objects. The House of Lords held that this was a question of pure fact. But Lord Upjohn who gave the majority speech also made the following observations at 30D to G:

> "My Lords, I would only conclude my speech by saying, when the question of carrying out a genuine commercial transaction, as this was, is reviewed, the fact that there are two ways of carrying it out — one by paying the maximum amount of tax, the other by paying no, or much less, tax — it would be quite wrong, as a necessary consequence, to draw the inference that, in adopting the latter course, one of the main objects is, for the purposes of the section, avoidance of tax. No commercial man in his senses is going to carry out a commercial transaction except upon the footing of paying the smallest amount of tax that he can. The question whether in fact one of the main objects was to avoid tax is one for the Special Commissioners to decide upon a consideration of all the relevant evidence before them and the proper inferences to be drawn from that evidence."

141. In our view there was ample evidence before the FTT that the avoidance or reduction of tax was a main object of the PIP and not just a means by which the Partnership achieved its commercial objective or a consequence of putting that objective into effect or simply a by-product of the PIP (which became apparent after the PIP had been put in place). We say this for the following reasons:

(1) Section 773(2)(b) contemplates that the relevant transactions or arrangements may have more than one main object. There was ample evidence from which the FTT could conclude that tax avoidance was one of the main objects of the plan proposed by EY: see [269] to [272]. It placed particular reliance on the statement by EY that the proposed scheme was "a bespoke piece of planning": see [437].

(2) The FTT recorded Mr Dodd's evidence that the tax saving which the implementation of the PIP would achieve would help the Partnership in selling the proposal to the partners: see [273]. It also recorded his evidence that that one could reasonably conclude that sheltering income from tax was a benefit of the scheme: see [348]. Finally, it recorded that new partners wrote to Mr Dodd describing the PIP as "the tax scheme used for bonuses": see [350].

(3) The FTT also recorded the evidence of Mr Platt that he did not "deny that getting a tax saving" was a "good thing" and that the Partnership was happy to get a tax benefit and the evidence of Mr Dannatt that it was good for the Partnership that there was the potential for a lower tax level: see [344] and [349].

142. The FTT had all of this evidence well in mind when it reached the conclusion that the avoidance or reduction of income tax was a main object of the PIP: see [437]. Moreover, it is clear that the FTT understood the distinction between purpose and effect because it found that the retention and incentivisation of staff was achieved as a result of the avoidance or reduction of tax which it was the aim of the PIP to achieve (and that this was not merely incidental): see [438]. In our judgment, the FTT made a clear finding of fact that the avoidance or reduction of tax was not just the means by which the Partnership implemented its commercial object or the effect of it or an incidental benefit but a main object in itself. *Brebner* is clear authority for the proposition that this was a question of

pure fact for the FTT and for the reasons which we have stated that there was ample evidence upon which it was entitled to make that finding of fact.

(3) Conclusion

143. We therefore determine the Miscellaneous Income Issue and the Sale of Occupational Income Issue in favour of HMRC and we dismiss the IP Appeals.

IV. The Procedural Applications

N. Procedural Chronology

(1) The Closure Notices

144. After the introduction of the PIP and the making of PIP Awards to individual partners HMRC opened enquiries against the Partnership for the tax years ended 5 April 2009 to 5 April 2014. On 25 May 2017 and following a direction by the FTT, HMRC sent closure notices to the Partnership in respect of these enquiries in which they determined that the Partnership's tax returns needed to be amended. On 16 June 2017 BCM LP, BCM LLP and BCM UK LLP wrote to HMRC to appeal against HMRC's determination on the Profit-Sharing Issue. Closure notices for the year ended 5 April 2015 were also issued to BCM LLP and BCM UK LLP on 1 March 2018 and 25 January 2019 respectively. On 16 June 2017 the Partnership wrote to HMRC to appeal against their determination on the Profit-Sharing Issue and on 3 July 2017 the Partnership transmitted its appeals to the FTT.

145. By letter dated 25 May 2017 HMRC wrote to Ms Kerridge (as the nominated partner of the Partnership) setting out their supplementary analysis of the tax position. In that letter they raised the Miscellaneous Income Issue and the Sale of Occupation Issue as alternative arguments for the first time. By letter dated 27 February 2018 Slaughter and May, who were now acting for the Partnership, wrote to HMRC proposing as follows:

> "We have also given some consideration to the question of the partners' appeals, should HMRC intend to pursue the secondary (miscellaneous income) argument in the event that HMRC is unsuccessful with its primary (partnership allocation) argument. As the two arguments essentially involve the same facts, we think that it would be more efficient and a better use of the Tribunal's resources if the primary and secondary arguments were heard by the same Tribunal at the same time. To achieve this, we will need to lodge the partners' appeals with the Tribunal and take the necessary steps to have their appeals joined with the PIP Appeals. We, therefore, suggest submitting the appeals of Andrew Dodd and Amine Benamer and propose that those partners are the representative sample of all partners."

146. By letter dated 3 May 2018 HMRC replied stating that if the liability of the individual partners was going to be tested, it was necessary to have individual partners from a cross-section of roles and functions. By letter dated 31 May 2018 HMRC wrote to Slaughter and May again agreeing that it would be useful to have a sample of individual partner appeals considered at the same time as the PIP Appeals and that they intended to close enquiries of four additional partners whom they considered would constitute a representative sample. Those partners were Ms Braga, Mr Dannatt, Mr Platt and Mr Ward.

147. On 28, 30 and 31 August 2018 HMRC issued closure notices to the six representative partners in respect of tax years ranging from the year ended 5 April 2009 to the year ended 5 April 2015 (although Mr Benamer later agreed with HMRC to stay his appeal for personal reasons) and we will refer to them as the "**Closure Notices**". They reflected HMRC's case that the IP Appellants were

liable to income tax in respect of their PIP Awards either as miscellaneous income under section 687 of ITTOIA 2005 or under section 776 of ITA 2007. For example, in the Closure Notice issued to Mr Dodd for the year ended 5 April 2011 HMRC contended that he had received the final PIP Awards as a reward for services to the Partnership, that the source was the Corporate Partner and that the awards were taxable as miscellaneous income. It was also clear from that statement that HMRC's view was that this income came from a UK source.

(2) The IP Appeals

148. By letters dated 27 September 2018 the IP Appellants notified HMRC of their appeals against the Closure Notices in accordance with section 31A of the Taxes Management Act 1970 (the "**TMA 1970**"). This section requires that notice of an appeal against a Closure Notice must be given to HMRC rather than to the FTT. The notices of appeal asserted that HMRC's position that the final PIP Awards were income not capital was incorrect. They also stated that even if HMRC was found to be correct, the taxpayers disagreed with the quantum of Special Capital assessed as income. The representative partners also disputed HMRC's analysis of the Sale of Occupational Income Issue. The notices reserved the right of the representative partners to raise additional or alternative grounds if the appeals were referred to the FTT. But the notices of appeal contained no challenge to HMRC's conclusion that the source of income was a UK source.

149. On 29 October the IP Appellants transmitted their appeals to the FTT in accordance with section 49D of the TMA 1970. They also filed Grounds of Appeal in accordance with Rule 20 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (the "**FTT Rules**"). Those Grounds of Appeal contained the following statement:

> "The above grounds of appeal are without prejudice to their further elaboration in the course of the preparation and presentation of the Appellants' case or to such further grounds as the Appellants may identify in due course in response to HMRC's case."

150. On 8 February 2019 HMRC filed their Statement of Case. They set out the reasons why they considered the PIP Awards were income in the hands of the IP Appellants within the meaning of section 687 of ITTOIA 2005. They also pleaded that the PIP Awards were made to the IP Appellants by the Corporate Partners as a reward for their services to the Partnership and had the character of income. HMRC took issue with the Grounds of Appeal because they were "briefly stated notwithstanding that the burden is upon the Appellants to show that they have been overcharged to tax by the assessments." They also took issue with the reservation on the basis that the IP Appellants could not unilaterally reserve the right to amend their case. Finally, they stated:

> "The Commissioners request … that the matter be dealt with at a hearing. A decision in principle is requested and thereafter, but only if necessary, a separate hearing should there be any outstanding issues on the figures."

151. In their Reply the IP Appellants maintained their position that the source of the sums which HMRC were seeking to tax were the profits of the Partnership and that there could be no further charge to tax on the individual members of the Partnership by reference to their services. The parties agreed a statement of agreed facts and the issues to be determined. This statement recorded that the ultimate issue for the FTT was whether to set aside the amendments to the IP Appellants' tax returns which HMRC had made in the Closure Notices. But there was no suggestion that the FTT would be asked to determine other issues relating to individual partners depending on the outcome of the IP Appeals and the IP Appellants did not apply for directions for any preliminary issues.

152. The transcript of the first day of the hearing of the IP Appeals records that Mr Gammie told the FTT that consequential issues relating to the source and residence of the IP Appellants would need to be addressed if it were to decide the Miscellaneous Income Issue on the basis that the IP Appellants were chargeable to income tax. The transcript does not contain any suggestion that Mr Baldry objected to this statement and the FTT made no mention of it in the Decision.

(3) The Decision

153. On 9 June 2020 the FTT circulated the Decision in draft. The draft recorded that the IP Appeals were dismissed. On 1 July 2020 the IP Appellants made an application for certain information to be redacted from the final version of the Decision. The application stated:

> "The precise figures in respect of which the Appellants will be liable to tax as a result of the Tribunal's decision are of no consequence to the PIP arrangements, the Tribunal's reasoning or its decision. Its reasoning and decision are the same for all the Appellants, notwithstanding a wide range of different figures represented by the Closure Notices (which figures may or may not correspond to the final figure in respect of which tax is due, depending upon the particular partner's circumstances)."

154. By email dated 6 July 2020 HMRC wrote to Slaughter and May asking for clarification of this statement and, in particular, whether they challenged the figures in the Closure Notices and, if so on what basis. By email dated 7 July 2020 Slaughter and May replied stating as follows:

> "In the case of the individual partner appeals, it is our understanding that the Judge is giving a decision in principle, leaving the figures to be agreed between the parties in the light of his decision.
>
> It was HMRC's primary case that the PIP Awards were part of the profit sharing arrangements of the partnership. It was the individual partners' case (and will be on appeal) that the reallocation of special capital was not income; nor was it derived from any relevant source giving rise to a charge to income tax.
>
> Accordingly, a number of issues needed to be resolved in principle before it could be known whether any further tax would be due, from whom, and on what basis. Thus, it was initially necessary to determine in principle whether additional tax was due from individual partners on the partnership profits (on HMRC's primary argument) and, if so, on what basis that additional tax should properly be computed and for what years. Similarly, before any tax due from individual partners could be accurately computed (should HMRC's primary argument fail, as it has), a decision in principle would be needed to determine: (a) that the amounts were income; (b) that they derived from a taxable source, and (c) in which year the amounts were properly taxable."

155. On 8 July 2020 counsel for HMRC filed objections to the IP Appellants application for redaction expressing the view that the figures were final and that the FTT had indicated that it would dismiss the IP Appeals. He continued as follows:

> "At the hearing, HMRC sought to have the appeals determined in principle, in case the awards of Special Capital were not in the amounts HMRC had believed when issuing the Closure Notices. HMRC's understanding, from the draft Decision, is that the Tribunal has chosen not to do this. The draft Decision does not identify any matters left outstanding for the parties to seek agreement or return before the Tribunal. As the basis on which HMRC have succeeded on the IP Appeals is straightforward (that is, that all awards of Special Capital are income of the recipient in the year in which they are awarded), HMRC no longer see any need for a decision in principle. As far as HMRC are aware the figures correctly reflect the awards made of Special Capital."

156. By email dated 15 July 2020 Slaughter and May responded to these objections. They stated that HMRC were "opportunistically seeking to resile from their earlier assurance that they were merely seeking a decision in principle in the appeal, with the specific amounts of tax due to be calculated by the parties following the Tribunal's decision". They referred to HMRC's Statement of Case and argued that it was improper and inconsistent to seek to resile from this assurance once the appeals had been heard and the FTT was on the point of issuing the Decision. They therefore asked that the FTT proceed on the basis envisaged at the hearing and requested by HMRC, namely, by issuing the Decision in principle.

157. On 17 July 2020 the FTT issued the Decision in final form. The FTT determined the redaction application but it did not deal in terms with the question whether it was an in principle decision or final. Nevertheless, it is clear that that the Decision was intended to be final and to resolve all of the issues on the IP Appeals. The formal sections setting out the summary of conclusions (which remained unchanged from the draft) and the right to apply for permission to appeal provided as follows:

> "In relation to each of the appeals, for the reasons above: (1) The Cayman Appeals are dismissed and the amendments to the closure notices are confirmed as varied according to paragraph 8(44), above; (2) The PIP Appeals are allowed; and (3) The IP Appeals are dismissed."
>
> "This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice."

(4) Permission to Appeal

158. On 10 August 2020 the IP Appellants applied to the FTT for permission to appeal against the Decision to the Upper Tribunal. Paragraph 8 of the application stated as follows:

> "The Tribunal has chosen not to clarify whether it regards the Decision is being given in principle or finally. The IP Appellants have therefore proceeded on the basis that the Decision is in principle only, being the basis on which the IP Appeals were heard, and this application for permission to appeal is made on that basis. The IP Appellants reserve the right to make further submissions on this matter should it be contested by HMRC."

159. It will be noted that the IP Appellants did not apply in the alternative for permission to appeal against the FTT's determination that the Decision was a final decision rather than a decision in principle. Nor did they seek to raise any new grounds of appeal based on the individual circumstances of the IP Appellants. On 14 August 2020 Mr Baldry and Mr Chacko filed a note dealing with the scope of the Decision stating as follows:

> "14. The Appellants' joint Grounds of Appeal of October 2018 sets out the actual Grounds in paragraphs 19 and 20. The grounds are set out briefly, and no challenge to taxation on the basis that the income would be foreign source is made. Similarly, the agreed List of Issues does not include such an issue. Having mentioned the question of foreign source income on Day 15 of the trial, no application was made to amend the Grounds of Appeal. Such an application would have been resisted.
>
> 15. As said above, the Application for Permission does not explain what the Appellants' position is on which issues have been left outstanding, if the decision is in principle, or on how those issues are to be resolved. Their earlier representations suggest that their position is that they are entitled

> to raise new points (possibly any new points whatsoever), as long as those have not been expressly dealt with by the Tribunal: and that they can somehow dispute those outside this Appeal. Even if the Decision had been made in principle (which, as currently released, it has not) that would not allow this: as the only forum in which an amendment or assessment can be challenged is the (single) appeal process, a decision in principle can only set aside issues which have been raised in the appeal.
>
> 16. HMRC ask for a decision in principle. As the Tribunal will be aware, this is often done where there may be complicated, but not contentious, matters of calculation. Here, for example, the Tribunal has held that awards of Special Capital are taxable income: if in fact the amendments and assessments do not accurately reflect those awards, HMRC would still accept that it is a matter that the parties should be directed to agree, with a return before the Tribunal if no agreement is made within a short period. HMRC are not aware that there is any dispute about the amounts awarded.
>
> 17. As there are no issues in the appeal which have not been determined by the Tribunal, there is nothing for the Tribunal to direct the parties to agree, and no scope for a decision in principle.
>
> 18. If, however, the Tribunal is of the view that there are outstanding issues, already within the scope of the appeal, which remain to be determined then HMRC would respectfully suggest that the decision be revised so as to be made in principle explicitly, with those issues identified and appropriate directions given for the parties to seek agreement and return before this Tribunal. In HMRC's view the Tribunal has power to do this under rule 41 of the Tribunal Rules."

160. The FTT did not revise the Decision itself. By a further decision dated 17 August 2020 the FTT granted permission to appeal on the grounds which have been argued before us in the IP Appeals. However, it made no mention of the dispute between the parties over the status of the Decision. On 17 September 2020 the IP Appellants each filed a Notice of Appeal. They were accompanied by Grounds of Appeal in which they identified a number of following consequential points which would arise if this Tribunal concluded (as it has done) that the PIP Awards of Special Capital are taxable as miscellaneous income or under the sale of occupational income provisions. The IP Appellants contended that these issues arise for the following reasons:

> "68. The IP Appellants were selected at the request, and with the concurrence, of HMRC to be representative of the partners generally (of whom there are some 150 in total) and, in particular, to reflect the different roles that partners performed for the purpose of testing HMRC's sale of occupational income argument. Their appeals were not, therefore, designed or intended to address (and at the hearing did not address) any specific issues relating to the liability to tax of a particular partner in respect of their PIP awards in contrast to the liability of partners generally under HMRC's alternative arguments.
>
> 69. Accordingly, the Decision in relation to the IP Appellants was an "in principle" decision on the issues which the Tribunal considered. The IP Appeals proceeded on the basis that HMRC only sought to have the appeals determined in principle and had indicated in their skeleton argument for the hearing (at paragraph 139) that, "HMRC asks that the amendments and assessment are upheld in principle with the specific figures to be calculated by the parties in the light of the Tribunal's decision". This means that, the relevant principles having been determined, it is necessary for the parties to consider how those principles apply to the IP Appellants according to their particular personal circumstances.
>
> 70. If the Upper Tribunal does not accept the IP Appellants' arguments, so that the awards of Special Capital to individual partners are, or are to be treated as, income, there are two particular issues that will have to be resolved (or else remitted to the First-tier Tribunal for consideration): (a) whether any of the income received by the IP Appellants was (having regard to the basis on which it is concluded to be income) foreign-source, such that it is not chargeable to UK income tax in the hands of those partners who were not UK resident in a particular year or was only chargeable to tax on remittance in the case of a resident but non-domiciled partner; and (b) the

> effect of the double taxation agreement concluded between the UK and Switzerland in the case of those partners who were resident in Switzerland in a particular year."

161. In paragraphs 71 to 77 the IP Appellants set out their case that, apart from Mr Dannatt, they had all been foreign-resident from 6 April 2010 or, in the case of Mr Dodd, since 20 April and that their PIP Awards of Special Capital were income from a foreign source. They also advanced the case that the tax treaty between the UK and Switzerland prevented the UK from imposing income tax on their PIP Awards because miscellaneous income ordinarily falls to be dealt with under the "Other Income" Article of the treaty (which conferred taxing rights only on the state of residence). In paragraph 78 the IP Appellants acknowledged that the foreign source issue might require further evidence and it would be for this Tribunal to decide whether to admit that evidence or remit the appeals to the FTT to decide the issue in the light of our conclusion on the issues of principle.

(5) The Procedural Applications

162. On 16 October 2020 HMRC applied to strike out paragraphs 70 to 77 of the Grounds of Appeal (which we have called the Disputed Paragraphs) because the arguments set out in those paragraphs did not form part of the grounds of their appeal against the Closure Notices before the FTT and were not agreed issues for decision. It was their case that permission to appeal was necessary and that the IP Appellants were required to surmount the high threshold for raising new matters on appeal and that the Upper Tribunal should strike out the Disputed Paragraphs or direct that the IP Appellants could not rely on them without permission.

163. On 3 November 2020 the IP Appellants filed submissions in answer to the Strike-Out Application arguing that this Tribunal had jurisdiction to deal with them and that they should not be struck out. The basis for this argument was that the IP Appellants were chosen as a representative sample of the individual partners, the Decision was a decision in principle and that the issues raised in the Disputed Paragraphs were consequential issues which arose out of the Decision. But in the alternative they applied for permission to appeal.

164. On 27 April 2022 the Upper Tribunal (Judge Scott) gave directions for the Procedural Applications to be listed before the Tribunal hearing the substantive PIP and IP Appeals and to determine them (if necessary). The Tribunal also gave detailed procedural directions for disclosure, evidence and Skeleton Arguments. We heard the Procedural Applications immediately after the PIP and IP Appeals and given our decision to dismiss the IP Appeals, it is necessary for us to determine the Procedural Applications.

O. The Strike-Out Application

(1) Jurisdiction

165. The Upper Tribunal's appellate jurisdiction is a statutory one. Section 11 of the Tribunals, Courts and Enforcement Act 2007 (the "**TCEA**") is headed "Right to appeal to Upper Tribunal" and the relevant parts of the section provide as follows:

> "(1) For the purposes of subsection (2), the reference to a right of appeal is to a right to appeal to the Upper Tribunal on any point of law arising from a decision made by the First-tier Tribunal other than an excluded decision.
>
> (2) Any party to a case has a right of appeal, subject to subsection (8).
>
> (3) That right may be exercised only with permission (or, in Northern Ireland, leave).

(4) Permission (or leave) may be given by–

(a) the First-tier Tribunal, or

(b) the Upper Tribunal,

on an application by the party."

166. Section 11 only confers a right to appeal on a point of law with permission of the FTT or the Upper Tribunal itself. We take the view that the Tribunal has jurisdiction to consider and decide the two additional issues raised in the Disputed Paragraphs if we take the view that they fall within the scope of the permission to appeal granted by the FTT either expressly or because they were a necessary consequence of the Decision and the FTT has in substance given permission to appeal.

167. Rule 21(2) of the Tribunal Procedure (Upper Tribunal) Rules 2008 (the "**Tribunal Procedure Rules**") provides that a person may apply for permission to appeal to the Upper Tribunal only if they have made an application to the FTT (which has been refused). In *Whittalls Wines Ltd v HMRC* [2019] UKUT 260 the Upper Tribunal held that Rule 21(2) permits a party to apply to amend the Grounds of Appeal to add new grounds even though no application had been made to the FTT and refused. Judge Thomas Scott stated this at [12]:

> "The second issue is that, for the avoidance of doubt, I consider it clear that the application to add further grounds of appeal was properly made to this Tribunal, and did not fall to be made initially to the FTT. Some confusion appears to have been generated by the obiter comments of Lord Tyre in *Revenue & Customs* Commissioners *v Earlsferry Thistle Golf Club [2014] UKUT 0250 (TCC)* . In that case, the learned judge took the view that a particular argument could not be admitted by the Upper Tribunal because leave to admit it had not been sought from the FTT, and Rule 21(2) of the Upper Tribunal Rules has the effect that a person may apply to the Upper Tribunal for permission to appeal against an FTT decision only if they have first applied to the FTT and been refused. However, Rule 21(2) does not apply in a situation such as this application. In *Earlsferry* the issue was whether the party which had not been granted permission to appeal by the FTT could challenge an element of the FTT decision. Where, as here, permission to appeal has been given, there is nothing to prevent this Tribunal from granting permission, if it so decides, to add new grounds of appeal."

168. With respect, we agree. We consider that, as a matter of procedure, we have jurisdiction to grant permission to appeal in relation to the Disputed Paragraphs even if we were to take the view that FTT was not asked to decide and did not consider whether to grant permission on those issues. It makes no sense to require an appellant to apply for permission to amend to the FTT if there is an outstanding appeal to the Upper Tribunal.

169. Where the appellant wishes to raise a new challenge to the findings which the FTT has already made or a pure point of law, we consider that we have jurisdiction to permit an appellant to apply for permission to amend the Grounds of Appeal and to argue the point on appeal even though it was never taken before the FTT. Whether the Upper Tribunal will grant permission will depend on the kind of considerations set out by Snowden J (as he then was) in *Notting Hill Finance Ltd v Sheikh* [2019] EWCA Civ 1337 at [26] to [28] (which was cited by the Upper Tribunal in *Whittalls* at [22]):

> "26.These authorities show that there is no general rule that a case needs to be "exceptional" before a new point will be allowed to be taken on appeal. Whilst an appellate court will always be cautious before allowing a new point to be taken, the decision whether it is just to permit the new point will depend upon an analysis of all the relevant factors. These will include, in particular, the nature of the proceedings which have taken place in the lower court, the nature of the new

point, and any prejudice that would be caused to the opposing party if the new point is allowed to be taken.

27. At one end of the spectrum are cases such as *Jones* in which there has been a full trial involving live evidence and cross-examination in the lower court, and there is an attempt to raise a new point on appeal which, had it been taken at the trial, might have changed the course of the evidence given at trial, and/or which would require further factual inquiry. In such a case, the potential prejudice to the opposing party is likely to be significant, and the policy arguments in favour of finality in litigation carry great weight. As Peter Gibson LJ said in *Jones* (at [38]), it is hard to see how it could be just to permit the new point to be taken on appeal in such circumstances; but as May LJ also observed (at [52]), there might nonetheless be exceptional cases in which the appeal court could properly exercise its discretion to do so.

28.At the other end of the spectrum are cases where the point sought to be taken on appeal is a pure point of law which can be run on the basis of the facts as found by the judge in the lower court: see e.g. *Preedy v Dunne* d at [43]-[46]. In such a case, it is far more likely that the appeal court will permit the point to be taken, provided that the other party has time to meet the new argument and has not suffered any irremediable prejudice in the meantime."

170. The position is more problematic, however, where an appellant seeks permission to amend the Grounds of Appeal to raise new issues of fact and law which were not determined by the FTT and which are not consequential upon the FTT being found to have made an error of law. Section 12 of TCEA is headed "Proceedings on appeal to Upper Tribunal" and it sets out the powers of the Upper Tribunal to make findings of fact:

"(1) Subsection (2) applies if the Upper Tribunal, in deciding an appeal under section 11, finds that the making of the decision concerned involved the making of an error on a point of law.

(2) The Upper Tribunal–

(a) may (but need not) set aside the decision of the First-tier Tribunal, and

(b) if it does, must either–

(i) remit the case to the First-tier Tribunal with directions for its reconsideration, or

(ii) re-make the decision.

(3) In acting under subsection (2)(b)(i), the Upper Tribunal may also–

(a) direct that the members of the First-tier Tribunal who are chosen to reconsider the case are not to be the same as those who made the decision that has been set aside;

(b) give procedural directions in connection with the reconsideration of the case by the First-tier Tribunal.

(4) In acting under subsection (2)(b)(ii), the Upper Tribunal–

(a) may make any decision which the First-tier Tribunal could make if the First-tier Tribunal were re-making the decision, and

(b) may make such findings of fact as it considers appropriate."

171. Section 12(4) only permits the Upper Tribunal to make any decision which the FTT could have made if it is satisfied that the FTT has made an error of law and it has decided to re-make the decision. The TCEA contains no corresponding power to make findings of fact and to act, as it were, as a

tribunal of first instance where the Upper Tribunal has not found that the FTT made an error of law. However, we have decided that the FTT made no error of law and we have dismissed the IP Appeals. Mr Gammie did not refer us to any statutory provision or authority which suggests that we have the power to decide new issues and find facts in those circumstances and we do not consider that the jurisdiction of the Upper Tribunal extends that far. Section 11(1) confers a statutory right of appeal from the FTT on a point of law and section 12(4) gives the Upper Tribunal power to make findings of fact in re-making the decision but not otherwise.

(2) Is permission required?

172. Accordingly, Mr Gammie has to satisfy us that the FTT reserved the Disputed Paragraphs for further consideration and that they fall within the ambit of the IP Appeals. There is nothing on the face of the Decision to suggest that the FTT reserved them for further consideration. But Mr Gammie submitted that we should interpret the Decision in that way for the following reasons:

(1) Tax appeals are entirely different to civil litigation. A direct tax appeal is commenced by an appeal to HMRC under section 31A of the TMA 1970 and the scope of such an appeal is determined by the grounds which were originally advanced to HMRC under that section. In the present case, those grounds were expressed in very wide terms. In particular, the notices of appeal stated that even if the position put forward by HMRC was found to be correct, the taxpayer disagreed with the quantum of Special Capital assessed as income.

(2) The authorities on the TMA 1970 establish that the grounds addressed to HMRC can be expressed in very wide terms (as they were in the present case) and that the Disputed Paragraphs fell within the scope of the appeal to HMRC because they fell within the notification that HMRC's figures were disputed (even if they were right as a matter of principle).

(3) Although section 50(10) of the TMA 1970 provides that when an appeal is notified to the FTT, the decision of the FTT on the appeal is final and conclusive, that provision is not yet applicable to the IP Appeals because there has been no final computation of the amount for which the individual IP Appellants are liable.

(4) The issues identified in the Disputed Paragraphs are legal issues which arise out of the Decision and are consequential upon the findings of the FTT (and our dismissal of the IP Appeals). They are not new grounds of appeal but additional reasons why the IP Appellants are not liable to tax. The Upper Tribunal can deal with them because it is seized of the Miscellaneous Income Issue generally.

173. We reject those submissions. In our judgment, the Decision was a final decision in which the FTT determined all relevant issues relating to the IP Appeals. We have reached this conclusion for the following reasons:

(1) Section 31(1)(b) of the TMA 1970 governed the notices of appeal against the Closure Notices. The effect of section 31A(1) and 31A(3) of the TMA 1970 is that a notice of appeal under section 31 against a closure notice must be given in writing to the relevant officer of HMRC within 30 days after the date on which the closure notice was issued. Section 31A provided as follows in relation to the notices of appeal:

> "(1) Notice of an appeal under section 31 of this Act must be given–
>
> (a) in writing,

(b) within 30 days after the specified date,

(c) to the relevant officer of the Board.

(2) In relation to an appeal under section 31(1)(a) or (c) of this Act–

(a) the specified date is the date on which the notice of amendment was issued, and

(b) the relevant officer of the Board is the officer by whom the notice of amendment was given.

(3) In relation to an appeal under section 31(1)(b) of this Act–

(a) the specified date is the date on which the closure notice was issued, and

(b) the relevant officer of the Board is the officer by whom the closure notice was given

…..

(5) The notice of appeal must specify the grounds of appeal."

(2) Section 54 makes provision for appeals to be settled by agreement and (as Mr Gammie told us) many appeals are settled in this way. However, where there is no settlement section 49D of the TMA 1970 provided for an appeal to the FTT:

"(1) This section applies if notice of appeal has been given to HMRC.

(2) The appellant may notify the appeal to the tribunal.

(3) If the appellant notifies the appeal to the tribunal, the tribunal is to decide the matter in question."

(3) Section 50 provides for the consequences of the FTT deciding the matter in question and the relevant parts provide as follows:

"(7A) If, on an appeal notified to the tribunal, the tribunal decides that a claim or election which was the subject of a decision contained in a closure notice under section 28A of this Act should have been allowed or disallowed to an extent different from that specified in the notice, the claim or election shall be allowed or disallowed accordingly to the extent that the tribunal decides is appropriate, but otherwise the decision in the notice shall stand good

….

(10) Where an appeal is notified to the tribunal, the decision of the tribunal on the appeal is final and conclusive.

(11) But subsection (10) is subject to—

(a) sections 9 to 14 of the TCEA 2007,

(b) Tribunal Procedure Rules, and (c) the Taxes Acts."

(4) We accept (without deciding) that the position before the General Commissioners and the Special Commissioners might well have been different. However, in our judgment, the position changed fundamentally following the reform of the Tribunal structure. The FTT is a judicial

body with exclusive jurisdiction to determine tax appeals. Once an appellant has notified an appeal to the FTT, HMRC no longer has jurisdiction to act as an appellate body (and, indeed, becomes a party to the appeal). Rule 20 of the FTT Rules governed the commencement of an appeal and the relevant parts of it provide as follows:

> "(1) A person making or notifying an appeal to the Tribunal under any enactment must start proceedings by sending or delivering a notice of appeal to the Tribunal.
>
> (2) The notice of appeal must include—
>
> > (a) the name and address of the appellant;
> >
> > (b) the name and address of the appellant's representative (if any);
> >
> > (c) an address where documents for the appellant may be sent or delivered;
> >
> > (d) details of the decision appealed against;
> >
> > (e) the result the appellant is seeking; and
> >
> > (f) the grounds for making the appeal."

(5) In our judgment, the scope of the appeal to the FTT was governed exclusively by the Grounds of Appeal which the IP Appellants sent or delivered to the FTT. It is common ground that the IP Appellants did not identify either of the additional points in the Disputed Paragraphs. We accept that the IP Appellants attempted to reserve their position to add "such further grounds as the Appellants may identify in due course in response to HMRC's case". But in their Statement of Case HMRC gave fair warning that they did not accept that reservation and that the IP Appellants could not unilaterally reserve the right to amend their case.

(6) In our judgment, the burden was on the IP Appellants to identify any further grounds on which they intended to rely before the FTT and to make an application to amend their Grounds of Appeal. Moreover, although they attempted to reserve the right to amend the Grounds of Appeal, the IP Appellants never did so (despite HMRC's challenge). Indeed, the reservation itself shows that the IP Appellants considered it necessary to apply to amend the Grounds of Appeal and tried to buy time to do so.

(7) Finally, it is clear from Rules 35(2) and (3) of the FTT Rules that the effect of the Decision was final and binding on the parties:

> "(2) The Tribunal must provide to each party within 28 days after making a decision (other than a decision under Part 4) which finally disposes of all issues in proceedings or of a preliminary issue dealt with following a direction under rule 5(3)(e), or as soon as practicable thereafter, a decision notice which—
>
> > (a) states the Tribunal's decision; and
> >
> > (b) notifies the party of any right of appeal against the decision and the time within which, and the manner in which, the right of appeal may be exercised.
>
> (3) Unless each party agrees that it is unnecessary, the decision notice must—
>
> > (a) include a summary of the findings of fact and reasons for the decision; or

(b) be accompanied by full written findings of fact and reasons for the decision."

(8) As Mr Baldry pointed out and Rule 35(2) clearly contemplates, the IP Appellants could have asked the FTT to exercise its case management powers under Rule 5(3)(e) to deal with the Miscellaneous Income Issue and the Sale of Occupation Issue as preliminary issues. But they did not do so and in the absence of such an application, we consider that the Decision finally disposed of all the issues in the IP Appeals.

174. If the parties had reached a clear agreement that the Decision would not be final and that the FTT would decide the Miscellaneous Income Issue and the Sale of Occupational Income as a matter of principle only, it is possible that we might have reached the conclusion that HMRC were estopped from arguing the contrary and that the FTT made an error of law in failing to reserve the Disputed Paragraphs for further decision. However, the IP Appellants did not argue that the conduct of HMRC gave rise to an estoppel or that they had waived compliance with Rule 5(3)(e) of the Tribunal Procedure Rules or that they had made a binding election to proceed on the basis that the Decision was not final and dealt with matters of principle only.

175. Indeed, we are satisfied that there was no binding agreement that the IP Appeals would proceed on the assumption that the FTT would determine preliminary issues which were common to all of the partners by reference to a representative sample and we found nothing in the correspondence which ought to prevent HMRC from relying on the Decision as final before us now. We accept that HMRC's Statement of Case referred to a "decision in principle". But we also accept Mr Baldry's submission that all that was meant by this was that the FTT would not be asked to deal with issues of calculation. Moreover, when HMRC served their Statement of Case the IP Appellants had already filed their Grounds of Appeal to the FTT and they made no reference to the issues raised in the Disputed Paragraphs. If they had wanted the FTT to decide those issues on a representative basis, they could and should have identified which issues of principle the FTT would be asked to decide and which left over for later determination and then sought to agree them with HMRC before asking the FTT to make a direction under Rule 5(3)(e).

176. Finally, we attach little or no weight to Mr Gammie's statement on the first day of the hearing of the IP Appeals. It was no more than a passing reference to the additional issues which at that time had not formed any part of the proceedings before the FTT or had appeared on the agreed list of issues to be determined by the FTT. We do not consider that the fact that neither HMRC nor its Counsel responded to this point is of any significance. This was clearly not a point which was relevant to the issues which were before the FTT at that time and cannot be taken to be any kind of acceptance by HMRC that the FTT would determine those issues in due course.

P. The Permission Application

177. We consider that we have no jurisdiction to grant permission to the IP Appellants to amend the Grounds of Appeal in the IP Appeals to add the two additional issues in the Disputed Paragraphs. We have not found that the FTT made an error of law either in relation to the Miscellaneous Income Issue or in relation to the Sale of Occupational Income Issue and we have not found that the FTT made an error of law in reaching a Final Decision. In those circumstances we do not have the power to make findings of fact to decide the additional issues. For the same reasons, we do not have power to remit those issues to the FTT.

178. But even if we are wrong and there is jurisdiction either to hear and determine the grounds set out in the Disputed Paragraphs ourselves (or to remit them to the FTT), we do not consider that this is a case in which it is appropriate to exercise that discretion applying the principles set out by

Snowden J in *Notting Hill Finance Ltd v Sheikh* (above). We have reached that conclusion for the following reasons:

(1) For the reasons which we have set out above, we do not consider that there was any agreement between the parties that the FTT would make a decision in principle and decide the Disputed Paragraphs. In our judgment, the IP Appellants could and should have applied for permission to amend their Grounds of Appeal (in the FTT) to raise any additional issues and, if necessary, applied to the FTT for a direction for preliminary issues under Rule 5(3)(e).

(2) HMRC will suffer prejudice if we permitted the IP Appellants to amend their Grounds of Appeal (before us) to plead the Disputed Paragraphs and either determine those issues or remit them to the FTT for further hearing. There is little doubt that it will be necessary for the parties to call further evidence of fact and it may also be necessary to call expert evidence. The further delay in time and costs may well be significant.

(3) There is a strong policy in favour of the finality of litigation. This is particularly so where in our view there is no good reason why the IP Appellants could not have raised the additional points at an early stage and in response to HMRC's Statement of Case so that they were properly before the FTT.

Q. Relief

179. For these reasons we grant the Strike-Out Application and order that the Disputed Paragraphs be struck out. We also refuse the Permission Application and do not allow the IP Appellants permission to amend the Grounds of Appeal to rely on the Disputed Paragraphs. In the circumstances, it is unnecessary for us to consider HMRC's alternative application for a direction in relation to those paragraphs.

V. Disposal

180. The PIP Appeals and the IP Appeals are dismissed. The Strike-Out Application is allowed, the Permission Application is refused, and the Disputed Paragraphs will be struck out of the Grounds of Appeal.

Signed on Original

MR JUSTICE LEECH
JUDGE TIMOTHY HERRINGTON
UPPER TRIBUNAL JUDGES

RELEASE DATE: 22 July 2022