Neutral Citation: [2026] UKUT 00036 (TCC)

Case Number: UT/2024/000142

UPPER TRIBUNAL
(Tax and Chancery Chamber)

Rolls Building, London, EC4

Income Tax – Compensation for mis-selling of interest rate hedging products – Financial Conduct Authority compensation principles – correct classification of basic redress payments – whether non-taxable lost opportunity costs – no. Whether chargeable to income tax – yes. Whether First Tier Tribunal's decision invalid for failure to apply logic - no

Heard on 28 and 29 October 2025
Judgment date: 26 January 2026

Before

JUDGE PHYLLIS RAMSHAW
JUDGE GUY BRANNAN

Between
(1) SIMON HACKETT
(2) EDWARD HACKETT

Appellants

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellants: Mr Andrew Bowe, of Rational Tax, and Dr Rupert Macey-Dare, Counsel

For the Respondents: Ms Laura Poots KC, Counsel, instructed by the General Counsel and Solicitor to His Majesty's Revenue and Customs

DECISION

INTRODUCTION

1. The Appellants are brothers, Mr Simon Hackett and Mr Edward Hackett ('the Appellants'). They appeal to the Upper Tribunal ('UT'), with the permission of the First Tier Tribunal ('FTT'), against the decision released on 15 August 2024 [TC/2017/06730/06732] ('the FTT decision'). The FTT dismissed the Appellants' appeals against Closure Notices ('CNs') dated 5 January 2017 issued by the Respondents ('HMRC') under section 28A of the Taxes Management Act 1970 ('TMA') amending each of their tax returns for the tax year 6 April 2014 to 5 April 2015.

2. References to paragraph numbers are to those in the FTT decision unless otherwise indicated. References to paragraphs in the skeleton arguments are referred to as [AS xx] (Appellants' skeleton) and [RS xx] (Respondents' skeleton). References to the hearing bundle are [HB xx].

BACKGROUND

3. The facts are not in dispute in this appeal. In brief, on 27 January 2006 and 15 May 2006 the Appellants jointly purchased two interest-rate hedging products ('IRHPs') from HSBC (products 1 and 2) and paid upfront premiums. In August 2006 they jointly purchased a further IRHP from RBS. In relation to all three products the Appellants received compensation, also referred to as 'basic redress' payments, and interest on the payments received. The basic redress payment made by RBS was not subject to the appeal to the FTT as it was treated as taxable by the Appellants when filing their self-assessment tax returns for the year ended 5 April 2015, however, the interest payment was subject to the appeal. We do not need to refer further to the basic redress payments made to the Appellants by RBS. The Appellants have not appealed against the FTT decision in respect of the interest payments made by either HSBC or RBS and therefore we do not need to consider this further.

4. The following background information is taken from the FTT decision.

5. The IRHPs are complex products, and it is not necessary to consider the detail of each product. Products 1 and 2 were described by the FTT as Libor caps with Knock-in floor.

Products of this type existed to assist customers who had taken out bank loans, such as the Appellants, in managing fluctuations in interest rates on those loans. The IRHPs are generally separate from the loans. In relation to product 1 the impetus for the purchase arose because a condition of the bank loan was that the Appellants purchase an IRHP. The impetus for the subsequent purchase of Product 2 came from the Appellants rather than the bank. The difference in requirements for purchasing the product is not relevant to this appeal.

6. The Financial Conduct Authority ('FCA') describe the relevant type of IRHP as follows:

> 'They enable customers to limit interest rate fluctuations to within a range. However, while the ceiling functions in a similar way, the floor is more complex and customers can end up paying increased interest rates if the base rate falls below the floor. They require a more difficult assessment of the benefits and risks.'[1]

7. Until late 2008, the base rate exceeded the ceiling, and HSBC made payments to the Appellants. However, the base rate then dropped below the floor, and the Appellants made substantial payments to HSBC.[2] Perfectly properly, for calculating the tax owed in the relevant tax year the Appellants deducted the payments made to the bank as expenses of the property business profits.

8. From 2010 onward it became clear that problems existed with the mis-selling of IRHPs such as those that the Appellants had purchased. As a result, the FCA reached agreement with nine banks, including HSBC and RBS, as to how a review of such products would work and provisions for providing redress if mis-selling was shown – we refer to the provisions as the 'redress scheme'. The FCA redress provisions included three elements – basic redress, interest and consequential loss. Only the basic redress element of the redress scheme is in issue in this appeal. The Appellants were automatically entitled to be entered into the redress phase. That redress phase involved a review of the sale including considering the relevant conduct of business rules and Principles for Businesses in force at the time in order to reach final conclusions on mis-selling. This exercise was conducted against the FCA's Sales Review Principles. We consider below specific details of the redress scheme and HSBC's redress determination. In addition to the basic redress payments the Hacketts successfully pursued

[1] FTT Decision [40]
[2] FTT Decision [44]

compensation from HSBC for consequential loss - this payment was outside the scope of the FTT appeal.

PROCEDURAL BACKGROUND

9. The Appellants appealed to the FTT against HMRC's decisions, viz that the basic redress payments were taxable as income in the hands of the Appellants. The FTT dismissed the Appellants' appeals. In relation to the issues in this appeal the FTT decided that the compensation (basic redress payment) was for business expenditure that the Appellants would not have otherwise incurred but for entering into the Mis-sold IRHPs [FTT 178]. It decided that the quantum of compensation included a deduction for the costs that would have been incurred on entering into an alternative product which was entirely in line with the scheme the FCA had set up [178].

10. The Appellants applied to the FTT for permission to appeal against the FTT decision. Permission to appeal was granted by the FTT. Four grounds of appeal had been advanced in the Appellants' application to the FTT. In its notice of appeal to the UT a fifth ground of appeal had been included (without seeking permission). Following directions made by the UT on 23 September 2025 the fifth ground of appeal was withdrawn. By the time of the hearing, the Appellants' grounds of appeal had been streamlined. The skeleton argument, prepared for the hearing, set out grounds 1-3 amalgamated and presented as a single ground with ground 4 argued as a separate ground.

11. The hearing was listed for one and a half days. On the second day of the hearing, at the commencement of the Appellants' reply, Dr Macey-Dare sought to introduce a new ground of appeal. After hearing submissions from Ms Poots and a short adjournment for consideration, we refused permission to amend the grounds of appeal to include the new ground (see below).

12. Before turning to the grounds of appeal we deal with the application to amend the grounds of appeal.

THE APPLICATION TO AMEND THE GROUNDS OF APPEAL

13. As we have mentioned, Dr Macey-Dare raised a new ground of appeal. No application for permission to amend the grounds of appeal had been made and no notice had been given to

either the UT or the Respondents. On reminding Dr Macey-Dare of the need for permission to be sought he requested permission. He submitted that the redress payments might be treated under ESC D33 as a non-taxable capital receipt. He argued that permitting the Appellants to argue this point raised no procedural unfairness.

14. Ms Poots objected to the application arguing that such a late application did prejudice HMRC. The issue was not argued before the FTT.

15. The relevant factors to be considered have been identified in a number of cases. In *ADM International Sarl v Grain House International SA* [2024] EWCA Civ 33 at [95]:

> 'The court has a general discretion as to whether to allow new points of law to be taken on appeal, the ultimate test being whether it is in the interests of justice applying the principles identified in the cases above. That will depend upon an analysis of all the relevant factors, which include 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, especially where it would have required additional evidence.'

16. On a pure point of law in tax cases in *Revenue and Customs v Bluecrest Capital Management (UK) LLP [2025] EWCA Civ 23,* having cited the above paragraph from *ADM International,* the Court of Appeal set out that:

> '107. Salutary though these principles are, they are not in my judgment engaged to any significant extent in the present case… Furthermore, it should always be remembered on both sides that there is a public interest in taxpayers paying the correct amount of tax, such that fresh arguments may be advanced by either side, or by the tribunal of its own motion, subject always to the requirements of fairness and proper case management…
>
> 109…on a question of statutory interpretation, it is our duty to decide for ourselves what the legislation means, and we cannot be bound by any agreement between the parties. There may, however, be procedural issues about the fairness of permitting a party to rely on a new point of law in an appellate court after the facts have been found at first instance…'

17. We refused the application. This was an eleventh-hour application raised towards the end of the hearing at the point the Appellants were commencing their reply. No notice had been given either to the UT or HMRC and no good reason was advanced why this argument had not been raised earlier before the FTT or at an earlier stage of this appeal. This issue is not a pure point of law or a question of statutory interpretation. We consider that such a late application

does cause prejudice to HMRC and could delay the proceedings. There had not been an opportunity for HMRC to take instructions. No application had been made to HMRC in connection with the ESC and no decision made by HMRC. The application of an ESC is within the discretion of HMRC and can only be challenged by way of an application for judicial review. An appeal to the FTT lies against decisions (including closure notices) issued by HMRC. The argument was not raised before the FTT. We decided, in light of the above matters, that it was not in accordance with the overriding objective of dealing with matters fairly and justly to allow the new point to be raised at this late stage.

THE GROUNDS OF APPEAL

The error of law

18. Before turning to the detail of the grounds of appeal we consider the error of law arguments put forward by the Appellants. Mr Bowe submits that the appeal raises the procedural question of whether the FTT's decision is logically valid based upon its findings and, he claimed, that the errors identified are without precedent in a fiscal appeal.

19. The heart of the appeal, as described by Mr Bowe, is that the FTT decision is contrary to (what he described as) 'all valid rules of inference'. We understood the rules of inference to mean the ways of deriving conclusions from premises as a matter of formal logic. It is argued that the FTT decision is based instead on invalid rules of contradiction, incoherence, and/or insufficiency. We will refer to this as the 'validity' issue.

20. The 'validity' issue gives rise to both the parameters of the appeal and to the identification of the asserted error of law. It is argued by the Appellants that it is not logically possible for the conclusions[3] drawn and the findings[4] made by the FTT to be true at the same time. If the findings are assumed to be correct, then (by all valid rules of inference) the conclusions must be false (and vice versa). If the findings are assumed true, then the conclusions ought to follow as a logical formality not as a subjective interpretation. If they do not, then Mr Bowe argued that the decision is not wrong in substance, it is invalid in form and cannot be evaluated further.

[3] According to the Appellant, the 'Conclusions' were any statement of fact or law that has been drawn from the 'Findings', by some rule of inference (whether valid or invalid), as found at [174] to [201].
[4] Similarly, the 'Findings' were all primary findings of fact and law as set out at [32] to [173] of the FTT Decision.

To render the decision logically possible in substance, it is necessary to first correct for its invalid form - there can exist no disputed question of substance in this appeal.

21. The error of law is said to be a breach of Rule 2 of the Tribunal Procedure (First-tier Tribunal (Tax Chamber) Rules 2009 ('FTT Rules'). The FTT's overriding objective implies a duty to provide a decision in a logically valid form so that the parties can understand its substance, even if they do not agree with it. A distinction is drawn by Mr Bowe between validity and soundness. Validity, it is argued, is purely formal and asks whether a conclusion follows if the findings are assumed to be true. There is no role for interpretation. A dispute over validity, according to Mr Bowe, can arise only if a formal rule of inference is itself being questioned. This, it is argued, is possibly unprecedented in a fiscal appeal and entails misconduct by at least one party. Soundness, however, concerns substance and asks whether the findings are in fact true. This is judgment-based, presupposes validity, and constitutes the ordinary subject-matter of most tax appeals.

22. Ms. Poots submitted that the Appellants' grounds of appeal amount to an *Edwards (Inspector of taxes) v Bairstow* [1956] AC 14 ('*Edwards v Bairstow'*) challenge– an argument that a conclusion reached by the FTT is one which '*no person acting judicially and properly instructed as to the relevant law could have come to'.* In answer to the argument that it is not such an error she submitted in that case the Appellants do not appear to have identified anything which is capable of being an error of law.

23. Mr Bowe objected to such a characterisation. There was no issue as to whether the findings were correct in substance but rather a computational procedure as to whether the FTT decision was valid in form. Mr Bowe's argument before us was that unless there was a challenge to the factual findings *Edwards v Bairstow* simply does not apply.

24. In our view this appeal either involves an *Edwards v Bairstow* challenge or an insufficiency of reasons challenge. If neither of those we agree with HMRC that no recognisable error of law has been identified.

25. The FTT is required to provide a sufficiently reasoned decision to enable parties to understand the reasons as to why it has lost or won.

26. In *Flannery v Halifax Estate Agencies Ltd* [2000] 1 WLR 377 Henry LJ set out, at 381:

> 'The duty is a function of due process, and therefore of justice. Its rationale has two principal aspects. The first is that fairness surely requires that the parties especially the losing party should be left in no doubt why they have won or lost. This is especially so since without reasons the losing party will not know (as was said in *Ex p Dave*) whether the court has misdirected itself, and thus whether he may have an available appeal on the substance of the case. The second is that a requirement to give reasons concentrates the mind; if it is fulfilled, the resulting decision is much more likely to be soundly based on the evidence than if it is not.'

27. In *English v Emery Reinbold & Strick Ltd* [2002] EWCA 605 ('*English*') at [16] the court expressed the matter simply by saying that justice will not be done if it is not apparent to the parties why one has won and the other has lost.

28. An *Edwards v Bairstow* challenge can involve a challenge to primary findings of fact and to inferences drawn from those facts. Radcliffe LJ at 36 held:

> '…I do not think that inferences drawn from other facts are incapable of being themselves findings of fact, although there is value in the distinction between primary facts and inferences drawn from them. When the case comes before the court it is its duty to examine the determination having regard to its knowledge of the relevant law. If the case contains anything ex facie which is bad law and which bears upon the determination, it is, obviously, erroneous in point of law. But without any such misconception appearing ex facie, it may be that the facts found are such that no person acting judicially and properly instructed as to the relevant law could have come to the determination under appeal. In those circumstances, too, the court must intervene. It has no option but to assume that there has been some misconception of the law and that this has been responsible for the determination. So there, too, there has been error in point of law. I do not think that it much matters whether this state of affairs is described as one in which there is no evidence to support the determination or as one in which the evidence is inconsistent with and contradictory of the determination, or as one in which the true and only reasonable conclusion contradicts the determination. Rightly understood, each phrase propounds the same test…'

29. For a recent more detailed discussion of *Edwards v Bairstow*, see the judgment of Nugee LJ in *A Taxpayer v HMRC* [2025] EWCA Civ 106 at [72]–[77].

30. To describe a decision as invalid because it is not logically possible for the conclusions drawn and the findings made by the FTT to be true at the same time is, in substance, no different from an argument that '*the true and only reasonable conclusion contradicts the determination'* or '*the facts found are such that no person acting judicially and properly instructed as to the relevant law could have come to the determination under appeal*'. We do not accept the Appellants' argument that there is a new category of 'prior' issues such that the substance of

the decision cannot be challenged. If, as the Appellants argue, the facts are unchallenged, an appellate court can draw what Mr Bowe describes as 'logically possible' conclusions and appropriate inferences itself on the evidence and facts found. In this case the predominant issues raised in the grounds of appeal fall squarely within an *Edwards v Bairstow* challenge.

31. The importance of identifying an *Edwards v Bairstow* challenge arises because of the approach to be taken by an appellate court on appeal (in essence, the exercise of judicial restraint and considering whether the decision under appeal is one that no reasonable judge could have reached). In this case not only do we find that the conclusions reached were ones that were open to the FTT, but we fully endorse them having reached the same conclusions through our own analysis.

Grounds 1-3: The FTT erred since the Decision is not based upon valid rules of inference, but upon invalid rules of contradiction, incoherence, and/or insufficiency.

The Appellants' arguments

32. The amalgamated ground of appeal was prefaced by referring to 'the issue the FTT chose to address - an issue not raised by the Appellants - of what a compensation receipt was paid for.' The issue as to what question the FTT addressed is relevant to ground 4.

33. Mr Bowe argues that if the findings at [35] to [73] are assumed to be true, then (by all valid rules of inference) the conclusions at [178] to [188] must be false. Alternatively, only if the findings at [35] to [73] are assumed to be false, can the conclusions at [178] to [188] be true. Therefore, the FTT decision was invalid, so the argument ran, since it was not based upon any valid rules of inference.

34. Mr Bowe referred to 'Qualitative Consistency' arguing that the following two findings made by the FTT were sufficient to entail what the compensation was for. The two specific findings were identified and labelled by the Appellants as F1-F2:

> (F1) At [51] the FTT found that the compensation was for the purpose of putting the Appellants back into the position they would have been in, but for the mis-selling.
>
> (F2) at [59] and [61] of the decision, the FTT found that

(a) due to the mis-selling, the Appellants entered into two 7-year *'cap and floor'* hedging products (the 'Mis-sold IRHPs'), instead of two short-term *'simple caps'* (the 'Forgone Alternatives').

(b) but for the mis-selling, the Appellants would have entered into the Forgone Alternatives instead of the Mis-sold IRHPs.

35. Mr Bowe argued that the *valid* inferences necessarily entailed were:

(1) If (F1) is assumed to be true, then by rules of equivalence:

The compensation was paid for a loss suffered by the Appellants, the existence of which was conditional (i.e. contingent) upon the mis-selling.

(2) If (F2)(a) is assumed to be true, then by rules of equivalence:

(a) Entering into the Mis-sold IRHPs ('the unsuitable opportunity cost') instead of the Forgone Alternatives ('the suitable opportunity cost') (*due to the mis-selling*) *is* an opportunity cost by definition.

(b) By entering into the Mis-sold IRHPs instead of the Forgone Alternatives:

(i) The Appellants benefited from long-term and material protections against interest rate rises, as well as from some limited interest rate falls. But,

(ii) They missed all opportunity to benefit from interest rate falls below the *floored* level for a period of 7-years.

(3) If (F2)(b) is assumed to be true, then by rules of equivalence:

(a) Had the Appellants entered into the Forgone Alternatives instead of the Mis-sold IRHPs (*but for the mis-selling*):

(i) The Appellants would not have missed any opportunity to benefit from interest rate falls below the *floored* level for a period of 7-years. But,

(ii) They would have *missed the opportunity* to benefit from greater and longer-term protections against rate rises.

(4) Therefore, if (F2) is assumed to be true, the FTT found that:

(a) The mis-selling changed the quality of a necessary opportunity cost (i.e., how much interest rate risk to hedge instead of bear) by inverting the preference order of the choices taken and forgone —i.e., the choice

taken ought to have been the choice forgone, and the choice forgone ought to have been the choice taken.

(5) Thus, if the FTT's own Findings are correct, then the FTT found that:

A predicate-quality of an opportunity cost was conditional upon the mis-selling.

(6) Finally, if both (F1) and (F2) are assumed to be true, then the FTT found that:

(a) The compensation was to put the Appellants back into the position they would have been in, *but for* entering the Mis-sold IRHPs instead of the Forgone Alternatives (i.e. the Unsuitable Opportunity Cost). Which is equivalent to,

(b)The compensation was to put the Appellants back into the position they would have been in, *had they* entered into the Forgone Alternatives instead of the Mis-sold IRHPs (i.e. the Suitable Opportunity Cost). Which can be restated as,

(c) The compensation was for the *missed opportunity* to benefit from falls in market rates, below the *floored* level, for a period of 7 years, caused by entering into the Mis-sold IRHPs instead of the Forgone Alternatives. Which is identical to,

(d) The compensation was for the Unsuitable Opportunity Cost.

36. The 'quantitative consistency' method is a second test of validity in which the same quantifiable result must be preserved. Mr Bowe's argument was that including the method of quantification the findings (labelled as F3) now are:

[F3] at [69], the FTT finds that:

(a) The quantification of the compensation was the difference in value between,

(i) the factual position the Appellants were actually in, given the unsuitable opportunity cost and

(ii) The counterfactual position the Appellants would have been in, but for the unsuitable opportunity cost

37. That computation, unadjusted for time value, set out in a table by the Appellants, was the sum of the difference in monetary value between the total of the premium payments and hedging payments under the Mis-sold IRHPs less the total of the premium paid and the hedging receipts under the foregone alternative.

38. The valid inferences the Appellants argued now included:

> (a) If the hedging payments were assumed to be true, then they were identical to the money of a revenue quality, that was paid under the Mis-sold IRHPs when market interest rates fell below the *floored* level.
>
> (b) If the above identities were assumed to be true, then by equivalence compensating for the Mis-sold IRHPs' hedging payments meant putting the Appellants back into the position they would have been in, *but for* incurring those payments under those products.
>
> (c) Law of Arithmetic - If, the compensation was for the Mis-sold IRHPs hedging payments, then, the quantity of compensation required to put the Appellants back into the position they would have been in, but for incurring those payments, is precisely £0.00. The relevant computation is not 36, but the aggregation of the hedging payments made under the Mis-sold IRHP when interest market rates fell, the hedging payments that would have been made if market rates had not fallen (-£1,019,110.32) and the difference between the interest payments made by the Appellants for the business loan when market rates fell and the interest rates the Appellants would have made for the loan if interest rates had not fallen (£1,019,110.32).

39. Therefore, Mr Bowe argued, the FTT found that the compensation was not for the Mis-sold IRHP's hedging payments because it never found the Mis-sold IRHP's Hedging Payments to possess any overpaid, excessive, or otherwise harmful, quality to begin with.

40. What is described by Mr Bowe as a contradiction was, he suggested, apparent from the proposition in the conclusion found at [186] namely, *'The compensation was paid for the reasons we have given. Not for the opportunity cost of not being able to purchase the simple caps*'.

41. In summary, Mr Bowe submitted that the contradiction could be defined as:

> (1) If the findings are assumed to be true, then - based upon valid rules of inference— the FTT found that the compensation was necessarily for the unsuitable opportunity cost and not for the Mis-sold IRHPs Hedging Payments. But,
>
> (2) If the conclusions are assumed to be true, then —based upon valid rules of inference— the FTT found that the compensation was not for the unsuitable opportunity cost but for the Mis-sold IRHPs Hedging Payments.

> And therefore, the findings and the conclusions cannot both be true at the same time. The only rules of inference that can explain the decision are formally invalid rules *of contradiction*, *incoherence*, and/or *insufficiency*.

42. Mr Bowe made a number of submissions regarding opportunity costs. In essence whenever a choice is made there is an opportunity that was taken up and one or more that are foregone or lost. In respect of the various outcomes identified by the FCA he submitted that (outcome 1) is a choice not to enter into a product and is an opportunity that is lost. We were referred to HM Treasury's consultation document on simple financial products at [HB198] where it was accepted by the Government that choice of products carries an opportunity cost. Mr Bowe argued that if it is accepted that compensation is to put a person back into the position they would otherwise have been in but for the mis-selling, by law it identifies that the compensation is for the opportunity lost. He submitted that the compensation was for the lost opportunity costs and was not taxable.

43. Mr Bowe submitted that logic is necessary to legal reasoning and gave examples of errors of propositional logic. Various economic approaches were referred to. We were referred to Aristotle - *dictum de omni et nullo*, the law of thought and to the universal laws of logic that sharply define the difference between valid and invalid forms of reasoning.

HMRC's arguments

44. Ms Poots set out that HMRC's position was simply that the FTT reached the right conclusion for the right reasons and made no error of law in doing so. She submitted that there appeared to be no challenge to the primary findings of fact or law. The Appellants, she pointed out, stated that there was no issue as to the correct interpretation of (external) evidence, said to concern what a compensation receipt was paid for and also no issue as to the correct interpretation of the authorities of fiscal law. Instead, the Appellants once again sought to rely on matters other than legislation and case law.

45. Ms. Poots referred to *London & Thames Haven Oil Wharves Ltd v Attwooll* [1967] Ch 772 ('*Attwooll'*) [AB 183] submitting that the first question identified by Diplock LJ – what was the compensation paid for? – the FTT [178 – 179] put this correctly into the positive. The compensation was for what actually did occur, not for what had not occurred. The focus of the FCA scheme was on the mis-selling [HB 211, 222, 224]. HSBC's [HB163] letter implementing

the scheme shows the focus was on payments made under the products – this indicated that customers made payments because of the mis-selling and the compensation was for the payments actually made. The alternative product featured as a deduction in calculating the compensation. The compensation was for payments actually made and therefore for payments incurred as part of the business and deducted from profits. Ms. Poots contended that the Appellants' arguments were not relevant to determining the issue – economic theories describe any choices not made and made as opportunity costs, but this does not help in determining what the compensation was paid for. She referred to [HB 212] – the FCA indicated that opportunity costs may be consequential loss.

46. Referring to the FCA identification of 3 possible outcomes she argued that under outcome 1 the redress was for a refund of all payments indicating that the compensation was for payments made. There was no reason why outcome 3 should be any different simply because an alternative product was taken into consideration (reducing the amount of compensation).

Discussion

47. When considering the decision of the FTT, as set out in the authorities (see for example *Volpi & Anor v Volpi* [2022] EWCA Civ 464), we remind ourselves that an appeal court should not subject a judgment to a narrow textual analysis and it should not be picked over or construed as though it was a piece of legislation or a contract. A roving selection of evidence or island hopping is not permissible – the decision needs to be read as a whole.

48. The findings referred to by Mr Bowe were those at [35] to [73] but he submitted that, if they are assumed to be true, then (by all valid rules of inference) the conclusions at [178] to [188] must be false. The analysis of the facts commenced with an assertion that a number of specific findings at [51], [59] and [61] made by the FTT were sufficient to validly ascertain what the compensation was for. It was those findings that were scrutinised and analysed applying an economic, philosophical, mathematical, semantic, logic based linguistic approach.

49. As we set out above, our task is to determine whether the FTT decision was one that no reasonable tribunal could have reached or, to put it another way, whether the FTT's findings cannot support the conclusions reached. To determine this, we need to consider the findings

made by the FTT, the evidence, the relevant statutory material and the authorities. In our view, it is entirely misconceived to simply leap from findings in earlier paragraphs to conclusions which have been arrived at after considering the arguments, the statutory provisions and the authorities. All these matters shape the conclusions, hence the requirement that a decision is read as a whole.

50. In this case the FTT has included all the evidence it was specifically referring to under the heading 'findings of fact'. The pieces of evidence cited and background facts that a tribunal sets out (in this case implicitly accepting them to be true) do not all influence or are significant in the conclusions reached on the central issue it has to decide, many will simply be neutral facts.

The structure of the FTT's decision

51. The structure of the FTT's decision under the heading 'Findings of Fact' commenced with [34] – [45] setting out the factual background including the timeline of events, an explanation of the IRHP products and the effect that the terms of the product had regarding payments made and received by and to the Appellants. At [46] – [47] the FTT set out the background to the FCA's review and the relevant IHRP review principles. At [48] the FTT noted the fact that the Appellants, because they had structured collars and were non-sophisticated, were automatically entered into the redress phase. At [49] – [52] the FTT set out paragraphs from the FCA's documentation reflecting how the mis-selling should be dealt with by way of redress. From [53] it turned to HSBC's implementation of the scheme setting out at [54] – [56] passages from HSBC's letter. From [58] – [62] the review process undertaken by HSBC and its conclusions were summarised. The amounts offered and how they were arrived at by HSBC were set out. From [63] – [65] the reasons HSBC put forward as to why a replacement product would have been entered into are set out. At [66] and [67] the FTT sets out subsequent correspondence between HSBC and the Appellants.

52. At [68] the FTT set out further findings of fact in relation to the FCA basic redress scheme and HBSC's decision.

53. At [69] – [72] details of HSBC's breakdown of the calculation of the amounts to be paid were set out. From [74] – [83] the communications between HMRC and the Appellants leading

to the appeal were set out. The arguments of the parties were set out from [84]-127]. The statutory framework was considered from [132] – [145]. The authorities were considered at [146] – [167].

54. At [170] drawing the threads together the FTT set out principles to be applied and from [174] – [194] it set out its analysis and conclusions on the compensation.

The evidence considered and the facts found

55. The FTT at [51] set out a passage from the FCA's documentation. Mr Bowe has sought to condense the whole paragraph into one sentence as a specific finding. In [AS 29.1] he asserts that:

> '(F1) At [51] the FTT finds that:
>
> The compensation was for the purpose of putting the Appellants back into the position they would have been in, **but for the mis-selling**.' (emphasis in the original)

56. The findings identified at [59] and [61] have a gloss added to them in [AS 29.1] and are taken out of context. The AS identifies the following as the findings made:

> '(F2) At [59] and [61] of the Decision, the FTT finds that:
>
> (a) **Due to the mis-selling**, the Appellants entered into two 7-year *'cap and floor'* hedging products (the "**Mis-sold IRHPs**"), instead of two short-term *'simple caps'* (the "**Forgone Alternatives**"). Such that,
>
> (b) **But for the mis-selling**, the Appellants would have entered into the Forgone Alternatives instead of the Mis-sold IRHPs.' (emphasis in the original).

57. It is from the 3 above asserted findings that Mr Bowe's analysis and application of the valid inferences, by the rules of equivalence, arrive at the asserted only valid conclusions which are that the compensation was for entering into the Mis-sold IRHPs **instead** of the simple caps and that entering into the Mis-sold IRHPs instead of the simple caps is an opportunity cost. The analysis asserts that the FTT must have found that the mis-selling changed the quality of a necessary opportunity cost and the FTT must have found that the compensation was to put the Appellants in the position that they would have been in had they entered into the lost opportunity (the alternative product) such asserted finding restated as the compensation was for the missed opportunity to benefit from falls in market rates caused by entering into the Mis-

sold IRHPs instead of the alternative product. The conclusion at [186] that the compensation was not for the opportunity cost of not being able to purchase the simple caps cannot be true - the only rules of inference that can explain the conclusion are formally invalid rules of contradiction, incoherence, and/or insufficiency.

58. We do not accept Mr Bowe's arguments that the only logical inferences and conclusions from the FTT's findings are those he has identified. His arguments are based on selective findings taken out of context and rely on economic theories, application of logic and linguistic theory and an inappropriate semantic dissection of the FTT's decision. A lost opportunity cost is a theoretical cost which is not an accounting entry. Mr Bowe accepted that such implicit costs are not included in accounts when calculating profits and losses or for calculating tax liability. Opportunity costs are a concept used by economists.

The evidence and findings in respect of the FCA's basic redress scheme and HSBC's implementation

59. We set out in detail the evidence and findings. There is no dispute as to the FTT's analysis of the redress scheme. The Appellants rely on findings made by the FTT as to what the scheme and HSBC provided. At [49] and [51] the FTT set out:

> '49. The FCA set out the following as reflecting how mis-selling should be dealt with by way of redress:
>
> *IRHP: determining the level of redress*
>
> *What you can expect to receive as fair and reasonable redress, including compensation for consequential losses.*
>
> *Fair and reasonable redress means putting the customer back in the position they would have been in had the regulatory failings not occurred, including any consequential loss. What is fair and reasonable redress will vary from case to case and will be determined by a review of evidence and customer testimony. All redress offers will be scrutinised and approved by an independent reviewer.*
>
> *How the banks agreed to calculate redress under the review:*
>
> *Basic Redress*
>
> *The difference between actual payments made on the Interest* Rate *Hedging Product and those that the customer would have made if the breaches of relevant regulatory requirements had not occurred.*

Interest *The opportunity cost (loss of profits or interest) of being deprived of the money awarded as basic redress.*

The banks will either pay 8% a year of simple interest, or an interest level in line with:

1. an identifiable cost that the customer incurred as a result of having to borrow money; or

2. an identifiable interest rate that a customer has not earned as a result of having less money in the bank.

Taking into account the economic environment over the last five years, interest will avoid many customers from having to put together consequential loss claims.

51. The FCA further set out:

Basic redress

The object of the review is to put customers back in the position that they would have been in, had it not been for the mis-sale. Our principles of a fair and reasonable redress give rise to three possible basic redress outcomes for customers:

1. Some customers would never have purchased a hedging product and will receive a 'full tear up' of their interest rate hedging product (IRHP). These customers will receive a full refund of all payments on their IRHP

2. Some customers would have chosen the same product they originally purchased whilst some customers may not have suffered any loss. These customers will receive no redress.

3. Some customers would still have sought or been required to enter into a product that provided protection against interest rate movements, but would have chosen an alternative product. These customers will receive redress based on the difference between the payments they would have made on the alternative product, compared with the payments they did make.' (emphasis added)

60. With regard to the HSBC offer, which was accepted by the Appellants, the FTT at [56] quoted from the letter of 6 June 2014:

'This redress offer is in full and final settlement of any claim to recover part or all of the payments you made under the interest rate hedging products that were considered in the review of your case. If you accept this redress, you would be agreeing that you could not then bring court proceedings against HSBC for any claim to recover part or all of the payments you made under these products. Acceptance of this offer will not affect your ability to pursue a claim for consequential loss against the bank. Once HSBC has determined your consequential loss, you will have the opportunity to either accept or discuss that determination as a separate exercise under the FCA Review.'

61. The FTT set out:

'58. The bank then reviewed products 1 and 2.

59. The bank then concluded its final redress determination on product 1. It determined that the Hacketts would have, but for the mis-selling of product 1, entered into an alternative product at the time 'replacement product 1' namely a base rate 'cap' IRHP of 5% for £1.5m with a maturity date of 27/01/2013.

60. As a result, the Hacketts would be paid £571,071.59 in cash, being the difference between the premium and payments actually made under product 1 and the premium and payments the Hacketts would have made under replacement product 1. There was also a waiver of £78,959.99 which was otherwise owed under product 1 from when payments were suspended, but this gives rise to no relevant tax consequences for our decision, so we say no more about it.'

62. Similar findings regarding product 2 were set out in [61] and [62]

63. At [63] – [65] the FTT set out the reasons given by HSBC

'63. A number of reasons were given by the bank for this. In relation to product 1:

(1) The IRHP was a condition of the original loan

(2) The sale of product 1 did not meet standards required by the FCA's Sales Review Principles, primarily because:

(a) the bank agreed with the FCA to provide fair and reasonable redress for 'non sophisticated' customers who were sold certain complex products such as caps with Knock-in floors

(b) the explanations of the features, benefits and risks of product 1 given at the time of sale were deficient particularly the disclosure of potential exit costs as was the explanations of the features, benefits and risks of alternative products.

64. The bank set out why replacement product 1 would have been entered into:

(1) The balance of the evidence indicated had they been given proper explanation of the features, benefits and risks of replacement product 1 in line with the FCA Sales Review principles (as opposed to the improper explanations in breach of those principles in relation to product 1) it is reasonable to conclude such a purchase would have taken place as:

(a) Base Rate cap was the simplest most flexible product that allowed the customer to benefit if interest rates fell

(b) The Hacketts had considered alternatives including base rate caps and believed at the time base rates could fall

(c) The Hacketts demonstrated a willingness to pay upfront premiums and would have selected a product with such

(d) To mitigate the potential impact of exit costs and to meet the lending requirement, the bank believed the Hacketts would have selected a base rate cap.

(e) The £1.5m hedge represented the minimum required as a condition of lending, the seven year period was the same as product 1 when at the time the Hacketts were presented with both a five and seven year option, the 5.00% cap struck a balance between the bank's requirements and affordability of premium and the replacement product references base rate rather than Libor.

65. In relation to product 2, the Hacketts determined a requirement to hedge rather than it being a requirement of lending. However, for the same reasons as product 1 and replacement product 1, the bank determined a mis-selling of product 2 and that the Hacketts would have purchase replacement product 2.'

64. At [68] the further findings were set out:

'68. Several further findings of fact must be set out:

(1) The FCA put in place a scheme we have set out above. The objective of the review was to put customers back in the position that they would have been in, had it not been for the mis-sale. Several options were given to banks.

(2) HSBC used the FCA's third option in relation to pay basic redress (see paragraph [51] above).

(3) It is not as clear as it might have been that the replacement products were, in fact, available. However, in light of the content of the letter in particular of the simple interest rate products that were available at the time, the Base Rate Cap was the simplest, provided the most flexibility and allowed you to benefit without limitation if interest rates fell we find that replacement products 1 and 2 were available to the Hacketts, as opposed to hypothetical, alternatives. Further, on the material before us, we find that the Hacketts would, for the reasons given by the bank, have purchased replacement products 1 and 2.

….'

65. The above paragraphs set out evidence cited by the FTT and the background facts. As we set out above, many are background facts not all of which are relevant to the determination of the issue that was before the FTT.

66. We refer to additional evidence in the bundle regarding the redress scheme. In the FCA document 'IRHP: Determining the level of redress' at [HB 213] under the section 'Consequential losses (the cost of being deprived of money and other losses suffered)' and sub section 'Loss of Profits' the FCA set out:

> ‘Customers who believe their lost opportunity costs were more than 8% a year per year can make a consequential loss claim for loss of profits. For these claims, customers will need to demonstrate there were concrete opportunity costs that they were likely to have taken if it had not been for the mis-sale….’

67. In the FCA document ‘IRHP: Background to the Review’ a number of frequently asked questions were grouped into topics. At [HB221] under the section on how banks calculate redress the FCA set out:

> ‘Review and Redress determination Process
>
> How to know if you’re due redress as part of the review
>
> …
>
> How banks calculate redress
>
> Redress will be based on what is fair and responsible in each individual case. Redress could include a mix of cancelling or replacing existing products with alternative products, and partial or full refunds of the costs of those products…
>
> Is an alternative product offer ‘fair and reasonable’?
>
> The object of the IRHP review is to put customers back in the position that they would have been in, had it not been for the mis-sale. Our principles of fair and reasonable redress give rise to three possible outcomes for customers:
>
> …
>
> To ensure that alternative products are offered in the right circumstances, banks need to show that this is what the customer would have purchased and support their reasoning with evidence and customer testimony….’

The statutory framework

68. There was no challenge before the FTT to the validity of the issuing of the closure notices [134]. A point was raised before us with regard to section 28A(1) TMA. We deal with this in relation to ground 4.

69. In respect of The Income Tax (Trading and Other Income) Act 2005 (‘ITTOIA’) *sections* 34, 288, 271, and 272 there was no dispute before the FTT as to the correct application of those provisions [143].

The authorities

70. Mr Bowe did not address us in any detail on the authorities which is unsurprising given the way in which the appeal was framed. He referred to Annex B in his skeleton argument submitting that *Attwooll* at p813 C refers to what is set out in Figure B in the annex which separates HMRC's Facts (necessary for identification) from HMRC's representation of those facts as a monetary quantity (necessary for quantification). He argued that the authorities relied on by HMRC related to instances of compensation where the person was put back in the position they would have been in where there was some damage. None of those concern the situation in this case.

71. We do not need to consider all the authorities cited by the FTT. This is not a re-hearing of the appeal. The two most relevant in our view are *Attwooll* and *Deeny and others v Gooda Walker Ltd) in voluntary liquidation) and others (Inland Revenue Commissioners third party) and related appeals* [1996] 1 STC 299 ('*Deeny*').

72. We set out the passages referred to by the FTT in these two cases. We have added wording from the judgment in *Attwooll* that the FTT missed on transposition and correct a typing error it made in setting out the passage from *Deeney*, both identified in bold type below.

73. Commencing with *Attwooll:*

> *'152. In* London & Thames Haven Oil Wharves Ltd v Attwooll [1967] Ch 772 (Attwooll) Willmer LJ gave his judgment in a case where damages had been recovered for a collision with the respondent's jetty. The appeal was allowed from the decision of the High Court. In it he said (at page 803F-G; 804A):
>
> > *The final result of it all was as follows. The respondents recovered in full the physical damage to their jetty, amounting to £83,167. They recovered by way of contribution towards their consequential loss the sum of £21,404, and they also recovered the sum of £2,325 by way of interest, making a grand total of £106,897. The question is whether that sum of £21,404 recovered from the tanker-owners in part satisfaction of the claim for loss of use is taxable as a trading receipt in the hands of the taxpayer company.*
> >
> > *... But it does seem to me that the question which we have to decide is eminently a question of fact, which depends on the answer to the question: What did the sum of £21,404 represent? To adopt a phrase used in one of the authorities to which we have been referred, what place in the economy of the taxpayers' business does this payment take?*
>
> 153. He continued (at page 804E-F):

If there had been no collision, the profits which the taxpayer company would have earned by the use of the jetty would plainly have been taxable as a trading receipt. Why, it may be asked, should not the same apply to the sum of money recovered from the wrongdoer in partial replacement of those profits?

154. Willmer LJ went further (at page 806G; 806A-B):

I repeat, therefore, the question which I asked before: Why should not damages recovered under this head be regarded as a trading receipt, in that they represent the trading profit which the owner would have earned if he had had the use of his ship, or of his jetty? If that is not a correct view of the law, then I would venture to say that there is something very much wrong with the law, for the consequence would be that a jetty- owner, such as the taxpayer company, would be better off by being subjected to a casualty of this sort (that is, by losing the use his jetty and recovering damages therefor) than he would be if he were able to make use of it continuously for the purpose of making profits. That it seems to me would be a very strange result indeed.

156. Diplock LJ concurred. He said (at page 815D-816A-D):

I start by formulating what I believe to be the relevant rule. Where, pursuant to a legal right, a trader receives from another person compensation for the trader's failure to receive a sum of money which, if it had been received, would have been credited to the amount of profits (if any) arising in any year from the trade carried on by him at the time when the compensation is so received, the compensation is to be treated for income tax purposes in the same way as that sum of money would have been treated if it had been received, instead of the compensation.

The rule is applicable whatever the source of the legal right of the trader to recover the compensation. It may arise from a primary obligation under a contract, such as a contract of insurance, from a secondary obligation arising out of non- performance of a contract, such as a right to damages, either liquidated, as under the demurrage clause in a charterparty, or unliquidated, from an obligation to pay damages for tort, as in the present case, from a statutory obligation, or in any other way in which legal obligations arise.

But the source of a legal right is relevant to the first problem involved in the application of the rule to the particular case, namely, to identify what the compensation was paid for. If the solution to the first problem is that the compensation was paid for the failure of the trader to receive a sum of money, the second ***[problem involved is to decide whether, if that sum of money has been received by the trader, it would have been credited to the amount of profits (if any) arising in any year from the trade carried on by him at the date of receipt, that is, would have been]*** *what I shall call for brevity an income receipt of that trade. The source of the legal right to the compensation is irrelevant to the second problem.*

The method by which the compensation has been assessed in the particular case does not identify what it was paid for; it is no more than a factor which may assist in the solution of the problem of identification.

> *In the present case the source of the legal right of the respondent trader was his right to recover from the owners of the tanker damages for the loss caused to him by the negligent navigation of the tanker. Damages for negligence are compensatory. His right was to recover by way of damages a sum of money which would place him, so far as money could do so, in the same position as he would have been in if the negligent act had not taken place.'*

74. The following passage from *Deeney* was cited:

> '157 In *Deeny and others v Gooda Walker Ltd (in voluntary liquidation) and others (Inland Revenue Commissioners third party) and related appeals* [1996] 1 STC 299 *('Deeny')* Lord Hoffman gave the opinion of the House of Lords. In a passage that was agreed to by the rest of the Judicial Committee he said (at page 308E):
>
> > *Although Diplock LJ refers to the trader's failure to receive a sum of money which would have been a revenue receipt, his principle must apply equally to compensation for his liability to pay a sum of money which was a revenue ~~receipt~~ **[expense]** (see Donald Fisher (Ealing) Limited v Spencer (Inspector of Taxes) [1989] STC 256). '*

75. Because of the nature of the way the appeal was framed, we cannot conclude whether or not the Appellants dispute the FTT's conclusions as to the principles to be applied. We concur with the FTT that the following principles are applicable.

76. At [170] the FTT set out:

> '(1) There is to be no gloss or addenda on the words of the statute (Deeny),
> (2) Guidance given in one situation may have little application to another situation (John Lewis[5]),
> (3) In order to characterise a payment, first identify what the compensation was paid for ('the first problem') (Attwooll),
> (4) In doing so, the source of the legal right to compensation is only relevant to that question (Attwooll),
> (5) The method of calculating the compensation is no more than a factor which may assist answering that question (Attwooll),
> (6) Having identified what the compensation was paid for, decide whether the money in respect of which the sum has been paid would have been taxable as an income receipt had it been received ('the second problem') (Attwooll),
> (7) In doing so, the nature of the asset, from which the payment in issue is derived, has a strong influence on the characterisation of that payment. Where a person receives compensation for loss of income, the payment is a true substitute for, and therefore equivalent to, income (John Lewis),

[5] *John Lewis Properties PLC v Inland Revenue Commissioners* [2003] STC 117

> (8) The same is true where a person receives compensation for an expense, which has been incurred as a deductible expense from the profits arising out of a property business, it is chargeable to income tax (Attwooll, Deeny, Spencer).'

What was the compensation paid for and whether taxable as an income receipt

77. Before turning to the FTT's application of the principles we evaluate the evidence and findings.

78. The first question that Diplock LJ identified is to ask - what was the compensation paid for? The HSBC letter quoted by the FTT at [56]– '*this redress offer is in full and final settlement of any claims to recover part or all of the payments you made under the interest rate hedging products…'* is, in our view, is a clear indication that the basic redress was to compensate for the liability to make payments that arose under the Mis-sold IHRP. The FCA's redress scheme, implemented by HSBC, was intended to save customers from having to take legal action [HB 222] hence the reference by HSBC to 'claims' to recover payments made under the IRHP. The scheme also provided for consequential loss claims which we note included 'lost opportunity costs'. In those instances, the FCA required customers *'to demonstrate that there were concrete opportunities that they were likely to have taken if it had not been for the mis-sale'* [HB 213].

79. It is clear that the basic redress scheme was to compensate for the payments made as a result of the mis-selling of the IRHP offering redress in the form of financial compensation only in circumstances where there was a financial loss and where the loss was caused by the mis-selling of the IRHP. That is clear from outcomes 1 and 2 identified by the FCA (see paragraph 59 above where the 3 outcomes are set out). In relation to outcome 1 the basic redress cannot be compensation for the lost opportunity (identified by Mr Bowe) of choosing to not enter into the product otherwise there would need to be evidence that the loss was caused by the mis-selling and an evaluation of the financial loss occasioned by reference to that lost opportunity when determining quantum. The basic redress scheme makes no reference to any such lost opportunity. The compensation is for the customer's liability to make payments under the terms of the Mis-sold product that they would not, but for the mis-sale, have made. The quantum of the redress (under outcome 1) is to refund the IRHP payments made (as calculated on a net basis so as to put the customer back in the position they would have been in). We accept that the method of calculating the quantum of the compensation *'does not identify what*

it was paid for; it is no more than a factor which may assist in the solution of the problem of identification' (Attwooll). In this case the method of calculating the quantum by refunding the payments made fortifies our conclusion that the compensation was paid for the customer's liability to make payments under the Mis-sold IRHPs.

80. In relation to outcome 3 – the situation the Appellants were considered to be in – the compensation is still paid for the liability to make payments under the terms of the mis-sold product that they would not have made. The mis-selling of the IRHP and the compensation relates to the payments made under the IRHP as in outcome 1. The nature of what the compensation was paid for does not alter simply because the banks could take into account whether or not an alternative product would have been entered into. The burden lay with the bank, if they were asserting that the customer would have entered into an alternative product, to '*support their reasoning with evidence and customer testimony'* [HB 221]. If, as Mr Bowe suggests, the redress was to compensate the Appellants for a lost opportunity to enter into the alternative product the burden, in our view, would lie with them to prove that they would have entered into an alternative product. That is the position in relation to consequential loss claims as we set out above.

81. We pause here to comment that the Appellants' insistence to the bank that they would **not** have entered into an alternative product runs entirely counter to the arguments now being made that the redress was compensation for the loss of that opportunity. The FTT noted that the Appellants had argued (with HSBC) that they would **not** have entered into an alternative hedging product – Mr Bowe's 'lost opportunity'. At [66] and [67] the FTT said:

> '66. On 3 July 2014 the bank sent a further letter to the Hacketts. It appears that the Hacketts had replied to the bank's letter of 6 June 2014 making some further observations. HSBC recite:
>
> > *Generally you continue to assert that you did not consider at the time that interest rates would rise or that you would have entered into any interest rate hedging had HSBC met with sales principles identified by the FCA.*
>
> 67. The bank then records their response to suggestions of pressure and other matters remains as previously provided to the Hacketts. In response to a specific suggestion that the bank required product 2 to be entered into as a condition of lending that was considered and refuted. The determinations in the letter of 6 June 2014 were not altered.'

82. Clearly this is not material to determination of the issue but demonstrates that the Appellants, at that time, did not consider they were pursuing compensation for that 'lost' opportunity.

83. As the compensation was to put the Appellants back into the position they would have been in, they cannot be better off so in the outcome 3 scenario anticipates that the calculation of the amount of compensation (for their liability to make payments under the IRHP) is **reduced** by the amount of any net payments that they would have made under an alternative product. If, under the alternative product, net payments would have been nil there would be no reduction. If there would be a gain that is covered by consequential losses not by the basic redress. In our view the foregone or lost opportunity to enter into a different product is eminently not what the basic redress compensates for. The only relevance of the alternative product is in terms of calculation of the amount of compensation – the quantum. It is a deduction from the compensation amount that is payable (calculated by direct reference to the actual IRHP payments that are being compensated for) for the Mis-sold IRHP. This was the conclusion of the FTT at [178] '*That this quantum of compensation included a deduction for the costs that would have been incurred on entering an alternative product was entirely in line with the scheme that the FCA set up and enforced upon those who mis-sold in the first place'.*

84. Mr Bowe has taken elements from the evidence cited by the FTT and analysed those elements by reference to the rules of inference and equivalence to equate to findings the FTT must have made. For example, the Appellants relied on economic analyses[6], to argue that losses caused by adverse interest rate movements are opportunity costs to reach, through the process of valid logic and rules of equivalence, the proposition that if the finding (F2(b)[7]) is true then the FTT found that the compensation was for the missed opportunity to benefit from falls in market rates. We have not set out all the steps in the reasoning. In context the FTT [64(1)(a)]

[6] In this instance, in essence, that a borrower paying a fixed rate of interest suffers an opportunity cost when interest rates fall [HB240-242]) and the FTT at [64(1)(a)] where it set out HSBC's reasons as to why the alternative product would have been entered into one of which was '*base rate cap was the simplest most flexible product that allowed the customer to benefit if interest rates fell'*

[7] I.e. but for the mis-selling, the Appellants would have entered into the foregone alternatives instead of the Mis-sold IRHPs

referred to was HSBC's reasoning as to why the Appellants (contrary to their assertions at the time) would have entered into an alternative product.

85. There is no dispute that there are benefits and disadvantages under the various hedging products. The importation of neutral facts we outline in the preceding paragraph is an example of the point we made earlier that not all facts are influential or significant. The FTT found at [183]:

> 'What might have occurred had rates gone up and not down is nothing to the point. The compensation was paid for what occurred tempered by the banks assessment that the Hacketts would have entered into alternative products. The existence of three options simply allowed the banks to offer fact specific compensation at levels appropriate to the victim of the mis-selling they were dealing with' (emphasis added).

86. This conclusion of the FTT aligns precisely with the point we make above that under the basic redress scheme the nature of what the compensation was paid for does not alter simply because the banks could take into account whether or not an alternative product would have been entered into.

87. The second question identified by Diplock LJ '*is to decide whether, if that sum of money has been received by the trader, it would have been credited to the amount of profits (if any) arising in any year from the trade carried on by him'*. This applies equally to compensation for a liability to pay a sum of money which was a deductible revenue expense (*Deeney*). The payments made by the Appellants were made from income receipts and the IRHPs were entered into as part of the property rental business (and costs were deducted against tax from the profits). The compensation was therefore an income receipt of that trade and in accordance with ITTIOA is chargeable to income tax.

The FTT's determination as to what the compensation was paid for and whether revenue

88. In answer to Diplock LJ's first question – what the compensation was paid for - the FTT concluded that it *'was in no doubt it was compensation for business expenditure that the Hacketts would not have otherwise incurred but for entering into the mis-sold IRHPs. It must be recalled that these IRHPs were entered into as part of the property rental business'* [178]

89. At [179] the FTT considered the source of the legal right was derived from the FCA scheme to compensate those who had been Mis-sold IRHPs something relevant to the answer to the first problem. The Appellants had made significant payments for the products. The FTT concluded that the method of calculation assists in answering the problem as the nuance of considering alternative products provided '*a methodology to cater for individual circumstances'*. The FTT referred to the FCA scheme setting out relevant paragraphs and said:

> '181. It also means that taxpayers like the Hacketts were not put in a better position but for the mis-selling by reference to the product they would have bought (as set out in the FCA's compensation scheme).'

90. At [186] the conclusion (that Mr Bowe asserts is invalid) reached by the FTT was *'the compensation was paid for the reasons we have given. Not for the opportunity cost of not being able to purchase the simple caps'.*

91. At [188] the FTT in answer to the second problem said:

> '…[W]e are again in no doubt as to the answer. Had the money been received it would have been income in the Hacketts' hands and chargeable to income tax. This can be tested by reference to the deductions against profits that the Hacketts properly took on their ITSAs for the sums paid pursuant to the mis-sold IRHPs.'

92. Whilst it is only necessary for us to determine, in accordance with *Edwards v Bairstow*, if the FTT's conclusions were ones that were open to it on the evidence, we consider that the FTT's conclusions are entirely consistent with our own analysis. The conclusions reached by the FTT were 'valid' on the findings it made and on the evidence it considered. The FTT applied the relevant statutory provisions and authorities correctly. The facts contained in the evidence relied on by the FTT are entirely contrary to a conclusion that the compensation was for the lost opportunity as argued by Mr Bowe.

93. We reject Mr Bowe's analysis and his conclusions from facts. They rely, *inter alia*, on HSBC's conclusion that the Appellants would have entered into an alternative product to arrive at the conclusion that the compensation payments were made for that lost opportunity. Similarly, the fact that the Appellants lost an opportunity to benefit from falls in market rates is relied on for their conclusion that the compensation was for that missed opportunity.

94. The financial loss arises because there was a liability to make payments under the Mis-sold IRHP. There is nothing in the basic redress scheme that indicates that the loss is quantified by taking into account, in the calculation of quantum, the loan and the interest payments made. We therefore reject the argument that if the compensation was for the Mis-sold IRHP payments the loss would be nil and consequently we also reject the Mr Bowe's argument that the FTT found that the compensation was **not** for the IRHPs' hedging payments (because it never found the IRHP's hedging payments to possess any overpaid, excessive, or otherwise harmful, quality to begin with).

95. We have not found Mr Bowe's approach at all helpful. The FTT considered that the arguments (similar to those before us) obfuscate the facts of the case and the task of the Tribunal. We agree.

96. It seems to us that much of the confusion in this appeal has been caused by the fact that the Appellants have failed to understand that an opportunity cost is a concept used by economists not used in accounting principles or when determining tax liabilities arising from compensation payments such as those at issue in this case.

97. We dismiss the appeal on Grounds 1-3.

Ground 4

The decision is not based upon answering the question raised.

98. Mr Bowe argues that the question raised by the Appellants before the FTT was – 'Is HMRC's tax assessment logically valid?'

99. He submits that if the FTT decision is based upon the question raised then the findings ought to have concerned the evidence of HMRC's tax assessment, not the evidence of the compensation. The FTT ought to have determined nothing more than whether there exist any *valid* rules of inference by which HMRC's conclusions followed from its findings.

100. Mr Bowe referred to s28A(1) TMA which requires that HMRC must state their conclusions in a closure notice. This means, so the argument ran, that the conclusions must not be formally false. "Conclusion", in Mr Bowe's view, was not just a word, it was something to

be acted on. An officer of HMRC must give effect to his conclusions (28A(2)(b)). He submitted that an appeal lies against a valid conclusion and if the conclusion was invalid the issue to be determined is whether it is a valid conclusion.

101. Ms. Poots submitted that s31 TMA provides the right of appeal. S50 TMA provides for the procedure on appeal – the question for the Tribunal in accordance with s50 was whether the Appellants were overcharged by the CNs. She submitted that an appeal to the Tribunal does not include public law arguments – if arguments were made that the decision was void that would be a public law issue.

Discussion

102. Although Mr Bowe objects to the FTT answering a question not raised by the Appellants it is incumbent on the FTT to identify the issues that it has to decide. In *Weymont v Place* [2015] EWCA Civ 289 it was held that the process of adjudication involves the identification and determination of relevant issues.

103. Section 31 TMA provides:

> '31Appeals: right of appeal
>
> (1) An appeal may be brought against—
>
> …
>
> (b) any conclusion stated or amendment made by a closure notice under section 28A or 28B of this Act (amendment by Revenue on completion of enquiry into return),
>
> …'

104. Section 50(7A) TMA provides:

> '(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.'

105. The Appellants had a right to appeal against the conclusion stated and the amendments made by the closure notices in accordance with s31. There may be many reasons advanced as to why HMRC's conclusions are asserted to be wrong by a taxpayer. An argument that the

conclusion is invalid and/or the decision is void does not, in our view, cause the task of the FTT (a creature of statute) to differ from that set out in s50 TMA.

106. The FTT set out:

> '133. By section 31 TMA a taxpayer has a right of appeal to the Tribunal.
>
> 134. Here there was no challenge to the validity of the raising of the CNs. They were in time, and stated the amendment required to the ITSAs. We say no more about the process as the real challenge by the Hacketts is to the amount of the CNs, said to be excessive, and requesting the Tribunal reduce the amount in them to £NIL (by section 50 (7A) TMA). HMRC ask we dismissal [sic] the appeal. In that case the CNs 'would stand good'.'

107. The FTT correctly identified the issues it had to decide. To decide whether the Appellants had been overcharged by the CNs necessitated an analysis of whether the reasons for the amendments to the CNs were correct by its own analysis of the facts, statutory provisions and authorities. We find that the FTT did deal with the 'question raised'. At [182], [183] and [185] the FTT set out:

> '182. We reject Mr Bowe's attempts to apply economic, philosophical, mathematical, semantic, logic based and linguistic theory at the expense of the law. Those tools may be valuable in certain circumstances, but not where the arguments obfuscate the facts of the case and the task of the Tribunal. Mr Bowe's submissions start off on a wrong footing and continue in that vein.
>
> 183. Contrary to what Mr Bowe said HMRC had not contradicted themselves on their position. This was predicated on Mr Bowe's case being correct that the value of the hedging loss was £NIL (see paragraph [106] above). It is not. The value of the hedging payments was just short of £1m which arose from mis-selling of the IRHPs. What *might* have occurred had rates gone up and not down is nothing to the point. The compensation was paid for what occurred tempered by the banks assessment that the Hacketts would have entered into alternative products. The existence of three options simply allowed the banks to offer fact specific compensation at levels appropriate to the victim of the mis-selling they were dealing with.
>
> 185. Issues such as 'category errors' and further concepts relied upon by the Hacketts do not detract from that finding. Nothing in the submissions, that we have set out at length and referred to, made by Mr Bowe counter's HMRC simple proposition, based upon the facts, and applying the law, that the compensation was paid for the reasons the FCA set out. No more and no less.'

108. The FTT dealt with the arguments raised by Mr Bowe throughout its decision so that its conclusion in [183] that HMRC had not contradicted themselves followed from its detailed analysis of what the compensation was paid for.

109. For the above reasons we find that there were no errors of law in the FTT decision and the appeal on this ground is dismissed.

Conduct issue

110. Ms Poots raised a concern on behalf of HMRC. She stated that HMRC objected to accusations made by the Appellants against HMRC and against individuals. She indicated that the Appellants had written to the Bar Standards Board and the Solicitors Regulation Authority in that connection. Ms. Poots referred to the Appellants' skeleton argument asserting that the Appellants had made various accusations against HMRC of 'misrepresentation', 'mischaracterisation, 'misdirection', 'half-truth', 'false representation' and falsification. She submitted that similar accusations were made during the FTT hearing.

111. She asked us to note that this is not a casual use of language simply indicating disagreement; accusations in these sorts of terms have been relied upon by the Appellants to seek to bar HMRC from proceedings or to strike out their case.

112. Mr Bowe wished to confirm that no formal complaints had been made to regulators. He suggested that there were understandable frustrations, HMRC had wilfully ignored the Appellants' arguments. He said that no allegation of bad faith or malpractice was being made against HMRC.

113. We have noted the use by the Appellants of language that is, in our view, indecorous. We can see nothing in the documents in the proceedings before us that suggest that HMRC have acted in any manner that is other than entirely professional.

DISPOSITION

114. There was no error of law in the FTT decision. The appeal is therefore dismissed.

COSTS

115. Any application for costs in relation to this appeal must be made in writing and served on the Tribunal and the person against whom it is made within one month after the date of release of this decision as required by rule 10(5)(a) and (6) of the Tribunal Procedure (Upper Tribunal) Rules 2008.

JUDGE PHYLLIS RAMSHAW
JUDGE GUY BRANNAN

Release date: 28 January 2026