Neutral Citation Number: [2024] EWCA Civ 365

Case No: CA-2023-001517

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL (TAX AND CHANCERY CHAMBER)
MRS JUSTICE BACON AND JUDGE SWAMI RAGHAVAN
[2023] UKUT 00120 (TCC)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15/04/2024

Before:

LORD JUSTICE PETER JACKSON
LORD JUSTICE NUGEE
and
LADY JUSTICE FALK

- -

Between:

HARGREAVES PROPERTY HOLDINGS LIMITED	**Appellant**
- and –	
THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS	**Respondents**

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Patrick Way KC and Dilpreet Dhanoa (instructed by **Sharpe Pritchard LLP**) for the **Appellant**
Richard Vallat KC and Calypso Blaj (instructed by **HMRC Solicitor's Office and Legal Services**) for the **Respondents**

Hearing date: 12 March 2024

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Approved Judgment

This judgment was handed down remotely at 2.00pm on 15 April 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lady Justice Falk:

Introduction

1. This appeal relates to interest paid by the appellant, Hargreaves Property Holdings Limited ("Hargreaves"), on certain loans between 2010 and 2015. HMRC formed the view that Hargreaves should have deducted and accounted for withholding tax on the interest. Hargreaves disagreed and appealed to the First-tier Tribunal (the "FTT") on four grounds. All four grounds were rejected by the FTT ([2021] UKFTT 390 (TC), Judge Tony Beare). Hargreaves appealed on similar grounds to the Upper Tribunal ("UT"). In a decision of Bacon J and Judge Raghavan, Hargreaves' appeal was dismissed ([2023] UKUT 120 (TCC)). Two of the four grounds are now pursued to this court with the permission of the UT.

2. In outline, the two grounds are (1) whether interest payments made from 2012 onwards to a UK tax resident company, Houmet Trading Limited ("Houmet"), fell within the exception from withholding tax in s.933 Income Tax Act 2007 ("ITA 2007"); and (2) whether interest paid on loans the duration of which was less than a year, but which were routinely replaced by further loans from the same lenders, was "yearly interest" within s.874 ITA 2007. Together the grounds cover a substantial proportion, but not all, of the tax the subject of the original appeal to the FTT.

Factual background

3. The factual background is uncontroversial. In outline, the appellant is a parent company of a property investment group which finances its activities with loans. Following tax planning advice, changes were made to the terms on which the loans were advanced, and thereafter the creditors repeatedly assigned their rights under the loans to third parties shortly before the loans were repaid and then re-advanced by the original lenders.

4. The UT's summary of the background, which cross-refers to paragraphs of the FTT's decision, provides sufficient detail for present purposes:

> "12. The appellant's group acquired property primarily for property investment purposes. In the relevant period the properties held were in the UK, such that the income and capital gains of the group were made in the UK (§16(1)). Some of the group's loan funding took the form of unsecured borrowing from directors of the group, founder family members, Gibraltar-resident trusts of which they were settlors and/or beneficiaries, and the group's FURBS (funded unapproved retirement benefit scheme) ("the lenders") (§16(3)). Before 2004 the loans were provided "somewhat informally". In November 2004 the group restructured its loans with the intention that the loan interest would not be subject to UK tax, but would still generate relief for the UK group companies (§16(6)–(7)).
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> 13. The new arrangements involved the following steps (§§16(7) and (9)):
>
> (1) Shortly before the interest was paid by the group borrowing company, the relevant lender assigned for consideration the right to interest to a third party. This was initially a Guernsey-resident company

[Storrier Trading Limited] ("Storrier"), run by Mercator, a group providing trust and corporate administration services. In subsequent years, this role was fulfilled by one of two Guernsey resident trusts also managed by Mercator (the "Guernsey Trusts").

(2) At the same time, the lender assigned the principal to another company within the appellant's group. In later years after 2009 this step was omitted and both the principal and interest were assigned to the same third party.

(3) One or two days after the assignment, the appellant paid the interest and principal to the relevant third party.

(4) Arrangements were made for the relevant lender to advance an amount generally at least as large as the original loan amount principal to fund the above payment.

14. Interest and principal on the lender's new advance were in turn assigned as in step 1 above. The above process of assignment, repayment by the appellant and re-advance by the original lender continued throughout the period relevant to the appeal (October 2010–March 2015). In relation to interest payments made from 2012 onwards, Storrier [or the relevant Guernsey Trust] assigned the right to interest to a UK-resident company, Houmet Trading Limited ("Houmet"), also managed by Mercator, with the result that the appellant made interest payments to Houmet.

15. The loan documentation also changed to contain terms that (i) the loan was repayable on 30 days' notice by the lender or any time by the appellant; (ii) all payments were to be made in Gibraltar from a source outside the UK; (iii) no assets in the UK were secured; and (iv) Gibraltar law was the governing law and Gibraltar courts had exclusive jurisdiction. The revolving facility agreement with the FURBS contained similar terms, but referred instead to Jersey law and the Jersey courts (§16(12))."

5. There was no dispute that there was a commercial benefit in having access to unsecured finance from the lenders for the purposes of Hargreaves' business, but that "the sole purpose of the refinancing structure itself was to ensure that the interest accruing on the loans fell out of account for tax purposes for the lenders whilst the borrower's corporation tax deduction remained intact and that there was no commercial purpose to the refinancing structure itself other than that tax advantage" (para. 16(8) of the FTT's decision).

The relevant legislation

6. Deduction of tax at source is dealt with in Part 15 of ITA 2007. The basic obligation to deduct tax from payments of yearly interest is contained in s.874, which, as in force in the relevant period, relevantly provided:

"**874 Duty to deduct from certain payments of yearly interest**
(1) This section applies if a payment of yearly interest arising in the United Kingdom is made–

(a) by a company,
(b) by a local authority,
(c) by or on behalf of a partnership of which a company is a member, or
(d) by any person to another person whose usual place of abode is outside the United Kingdom.

(2) The person by or through whom the payment is made must, on making the payment, deduct from it a sum representing income tax on it at the basic rate in force for the tax year in which it is made.

(3) But see–
(a) sections 875 to 888 as to circumstances in which the duty to deduct a sum under this section is disapplied; and
(b) Chapter 11 (payments between companies etc) for a further exception from the duty to deduct under this section."

7. Chapter 15 of Part 15 provides for tax deducted pursuant to s.874 by UK resident companies to be accounted for to HMRC on a quarterly basis.

8. Chapter 11 contains certain exceptions from the obligation to deduct tax under s.874. So far as it concerns exceptions specifically for corporate payees it provides:

"**929 Overview of Chapter**

(1) This Chapter makes provision allowing some payments made by companies, local authorities and qualifying partnerships to be paid gross where they would otherwise be subject to specified duties to deduct sums representing income tax under this Part.

(2) Section 930 disapplies specified duties to deduct where a payment is made by a company, local authority or qualifying partnership which reasonably believes that the payment is an excepted payment.

…

(5) Sections 933 to 937 make provision as to when a payment is an excepted payment.

(6) Section 938 deals with what happens when a company, local authority or qualifying partnership makes a payment without deducting a sum representing income tax under a reasonable but incorrect belief that the payment is an excepted payment.

930 Exception from duties to deduct sums representing income tax

(1) The duties to deduct sums representing income tax mentioned in subsection (2) do not apply to a payment if–
(a) it is made by a company, local authority or qualifying partnership, and
(b) at the time the payment is made, the company, authority or partnership reasonably believes that it is an excepted payment.

(2) The duties to deduct are those under–
(a) section 874(2) (certain payments of yearly interest),
…

933 UK resident companies

A payment is an excepted payment if the person beneficially entitled to the income in respect of which the payment is made is a UK resident company.

934 Non-UK resident companies
(1) A payment is an excepted payment if each of the following conditions is met in relation to the payment.
(2) The person beneficially entitled to the income in respect of which the payment is made must be a non-UK resident company.
(3) The non-UK resident company must carry on a trade in the United Kingdom through a permanent establishment.
(4) The payment must be one that is required to be brought into account in calculating the chargeable profits (within the meaning given by section 19 of [the Corporation Tax Act] 2009) of the non-UK resident company.

938 Consequences of reasonable but incorrect belief
(1) This section applies if–
(a) a payment is made by a company, local authority or qualifying partnership without a sum representing income tax on the payment being deducted from it,
(b) at the time the payment is made, the company, authority or partnership reasonably believes that it is an excepted payment,
(c) one of the duties to deduct sums representing income tax mentioned in section 930(2) would apply to the payment if the company did not so believe, and
(d) the payment is not an excepted payment at the time it is made.
(2) This Part has effect in relation to the payment as if section 930(1) had never disapplied the duties to deduct mentioned in section 930(2)."

9. In summary therefore:

a) The obligation to deduct tax from yearly interest is "switched off" if a corporate payer reasonably believes that the payment is an "excepted payment".

b) The categories of excepted payment include situations where the person "beneficially entitled" to the income is either a UK resident company (s.933) or a non-resident company within the charge to corporation tax in respect of it by reference to a trade carried on through a UK permanent establishment (s.934).

c) If, despite the payer's reasonable belief at the time of the payment, it transpires that the payment was not in fact an excepted payment, then the duty to deduct, and the consequential obligation to account for the tax deducted, are treated as not having been switched off.

10. One effect of this is that, for the purposes of this dispute, the question of Hargreaves' reasonable belief is not in issue. Ground 1 of the appeal turns entirely on whether Houmet fell within s.933 in respect of the payments in question.

Ground 1: s.933 ITA 2007 and "beneficially entitled"

The decisions below in summary

11. The FTT concluded that Houmet was only beneficially entitled to any amount by which the interest payments it received exceeded the amounts it paid to Storrier or the

Guernsey Trusts for the assignments to it. The FTT had insufficient information to determine the quantum of that excess, but thought it would be "extremely small (or perhaps even nil)" in respect of each interest payment (para. 154 of the decision). Rather, the person beneficially entitled to the vast bulk of the interest was the assignor, being Storrier or the Guernsey Trusts.

12. In reaching this conclusion the FTT found as a fact that Houmet's involvement had no business purpose, and that its only role was to secure a tax advantage by ensuring that a UK resident company received the interest (para. 142 of its decision). The aim was to provide an alternative argument based on s.933 that would be available if Hargreaves' other arguments that withholding tax was not due failed.

13. In reaching its conclusions that s.933 did not apply the FTT relied on the approach taken in *Inland Revenue Commissioners v McGuckian* [1997] 1 WLR 991, [1997] STC 908 ("*McGuckian*"), where the House of Lords applied *Ramsay* principles (*WT Ramsay Ltd v Inland Revenue Commissioners* [1982] AC 300) to the assignment of rights to dividends.

14. The UT rejected Hargreaves' appeal on the s.933 issue, essentially on the basis that the FTT was right to apply *Ramsay* principles, although wrong if (contrary to the UT's understanding of the FTT's decision) it had considered that it was compelled to reach its conclusion by the *McGuckian* case, since that had concerned different statutory provisions.

Submissions for Hargreaves

15. Mr Way KC, leading Ms Dhanoa, submitted that "beneficially entitled" should be understood by its ordinary English law meaning as given by Evans-Lombe J in *Indofood International Finance v JP Morgan Chase Bank* [2005] EWHC 2103 (Ch), [2006] STC 192 ("*Indofood*") at [46]-[50]. Instead, the UT had wrongly applied the approach of the Court of Appeal in reversing Evans-Lombe J's decision ([2006] EWCA Civ 158, [2006] STC 1195), which adopted an "international fiscal meaning". That approach was only relevant in a double tax treaty context, which was what *Indofood* concerned.

16. In contrast, the domestic law position was made clear by a long line of UK authorities, in particular *Wood Preservation v Prior* [1969] 1 WLR 1077, 45 TC 112 ("*Wood Preservation*"), *Ayerst v C & K (Construction) Limited* [1976] AC 167, [1975] STC 345 ("*Ayerst*"), *J Sainsbury plc v O'Connor* [1991] 1 WLR 963, [1991] STC 318 ("*Sainsbury*") and *Bupa Insurance Limited v HMRC* [2014] UKUT 262 (TCC), [2014] STC 2615 ("*Bupa*"). Further, the UT's decision conflicted with the approach taken in two recent decisions of this court, *Bostan Khan v HMRC* [2021] EWCA Civ 624, [2021] STC 954 ("*Khan*") and *Thomas William Good v HMRC* [2023] EWCA Civ 114, [2023] STC 301 ("*Good*").

17. Mr Way further submitted that, following *Wood Preservation*, *Ayerst*, *Sainsbury* and *Bupa* the UT should not have adopted a purposive approach in construing "beneficial entitlement". He relied on Lord Hodge's judgment in *R (O) v Secretary of State for the Home Department* [2022] UKSC 3, [2023] AC 255 at [28] and [29], and in particular the citation at [29] from Lord Nicholls' speech in *R v Secretary of State for the Environment, Transport and the Regions, ex p Spath Holme Ltd* [2001] 2 AC 349, 396

that citizens should be able to "understand parliamentary enactments … They should be able to rely upon what they read in an Act of Parliament". Similarly, the FTT was wrong to apply *McGuckian*.

The relevance of purposive construction

18. I cannot accept that the reference to "beneficially entitled" in s.933 ITA 2007 is in any sense immune from the requirement that legislation be construed purposively.

19. The *Ramsay* principle was authoritatively explained in a joint opinion of the Appellate Committee of the House of Lords in *Barclays Mercantile Business Finance Ltd v Mawson* [2005] 1 AC 684, [2005] STC 1 ("*BMBF*"), in the following terms:

> "32. The essence of the new approach was to give the statutory provision a purposive construction in order to determine the nature of the transaction to which it was intended to apply and then to decide whether the actual transaction (which might involve considering the overall effect of a number of elements intended to operate together) answered to the statutory description. Of course this does not mean that the courts have to put their reasoning into the straitjacket of first construing the statute in the abstract and then looking at the facts. It might be more convenient to analyse the facts and then ask whether they satisfy the requirements of the statute. But however one approaches the matter, the question is always whether the relevant provision of the statute, upon its true construction, applies to the facts as found. As Lord Nicholls of Birkenhead said in *MacNiven v Westmoreland Investments Ltd* [2003] 1 AC 311, 320, para 8: 'The paramount question always is one of interpretation of the particular statutory provision and its application to the facts of the case.'"

20. After referring to a number of cases that decided that elements which have been inserted into a transaction without any business or commercial purpose did not prevent tax legislation from being applied to the composite transaction on the basis that the inserted steps had no significance, their Lordships said this:

> "36. Cases such as these gave rise to a view that, in the application of *any* taxing statute, transactions or elements of transactions which had no commercial purpose were to be disregarded. But that is going too far. It elides the two steps which are necessary in the application of any statutory provision: first, to decide, on a purposive construction, exactly what transaction will answer to the statutory description and secondly, to decide whether the transaction in question does so. As Ribeiro PJ said in *Collector of Stamp Revenue v Arrowtown Assets Ltd* [2003] HKCFA 46, para 35:
>
> > 'the driving principle in the *Ramsay* line of cases continues to involve a general rule of statutory construction and an unblinkered approach to the analysis of the facts. The ultimate question is whether the relevant statutory provisions, construed purposively, were intended to apply to the transaction, viewed realistically.'"

21. The Supreme Court has returned to the topic more recently, notably in *UBS AG v HMRC* [2016] UKSC 13, [2016] STC 934 ("*UBS*"), in particular at [61] to [71] (per

Lord Reed), and (in a rating context) *Rossendale BC v Hurstwood Properties (A) Ltd* [2021] UKSC 16, [2022] AC 690 ("*Rossendale*").

22. While *UBS* was included in the authorities bundle we were not referred to *Rossendale*. However, it is the most recent substantive discussion of the relevant principles in the Supreme Court and should be considered for that reason. Further, in my view it does not materially alter the principles derived from the earlier cases culminating in *UBS*, but instead helpfully brings a number of key points together. It also reaffirms the general application of the principles by applying them in a non-tax context.

23. It is also relevant to consider *Scottish Provident Institution v Inland Revenue Commissioners* [2004] 1 WLR 3172, [2005] STC 15 ("*Scottish Provident*"), a case which was decided by the House of Lords at the same time as *BMBF* and which was considered in *UBS*. As it happens both *Rossendale* and *Scottish Provident* consider the concept of "entitled" or "entitlement", albeit in different statutory contexts.

24. *Scottish Provident* concerned a structure aimed at creating a tax loss that involved the grant of cross-options over gilts. In commercial terms the options were essentially self-cancelling, but an element of commercial risk was included with the aim of avoiding them being ignored for that reason. The issue was whether the call option granted to the taxpayer gave it an entitlement to gilts. The House of Lords held that it did not because it could not be viewed in isolation from the larger scheme, the "commercially irrelevant contingency" making no difference.

25. *Rossendale* turned on the meaning of "entitled to possession" in s.65(1) of the Local Government Finance Act 1988. Lord Briggs and Lord Leggatt said:

> "10. There are numerous authoritative statements in modern case law which emphasise the central importance in interpreting any legislation of identifying its purpose."

26. After giving some examples, they went on to explain:

> "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:
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> > '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…

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…"

27. After citing from *BMBF* at [32] and [36] and noting that the *Ramsay* principle applied not just to transactions but to other situations, for example relating to status or property rights, their Lordships went on:

"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."

28. As pointed out in oral argument, the more recent case law has also cautioned against a distinction drawn by Lord Hoffmann in *MacNiven v Westmoreland Investments Ltd* [2003] 1 AC 311, [2001] STC 237 ("*MacNiven*") between legal and commercial concepts, which was relied on by Mr Way. In *Rossendale*, Lord Briggs and Lord Leggatt said this about a similar point raised in that case:

> "53. The description of the concept of entitlement to possession in section 65(1) of the 1988 Act as 'an intrinsically legal one' seems to hark back to a distinction drawn in the speech of Lord Hoffmann in *MacNiven* (at para 58) between 'commercial concepts' and 'purely legal concepts'. Lord Hoffmann took as an example stamp duty payable on 'a conveyance or transfer on sale' and stated:
>
> > 'the statutory language defines the document subject to duty essentially by reference to external legal concepts such as 'conveyance' and 'sale'. If a transaction falls within the legal description, it makes no difference that it has no business purpose. Having a business purpose is not part of the relevant concept.'"

29. Lord Briggs and Lord Leggatt explained that stamp duty was not a good example because *Ramsay* had been applied in that context, referred to other judicial and extra-judicial criticisms of the distinction and then said:

> "56. The opportunity to clarify the position in English law arose in the *Barclays Mercantile* case [2005] 1 AC 684. In its joint opinion (at para 38) the Appellate Committee of the House of Lords explained that Lord Hoffmann's distinction, while "not an unreasonable generalisation" was not intended to provide a substitute for a close analysis of what the statute means. It certainly did not justify the assumption that an answer can be obtained by classifying all concepts a priori as either commercial or legal. That would be the very negation of purposive construction, as Ribeiro PJ had pointed out in *Arrowtown*.
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> 57. We think it important also to note that the conclusions reached in *MacNiven* and in *Barclays Mercantile* itself that the statutory provisions relied on in those cases were intended to apply to particular transactions undertaken solely for the purpose of obtaining tax relief were, in each case, the result of a close analysis of the legislation and the relevant facts, following the *Ramsay* approach, and not of a determination that the *Ramsay* approach did not apply in the first place.

> 58. On the same day as *Barclays Mercantile*, Lord Nicholls also gave the joint opinion of the Appellate Committee, similarly constituted, in *Scottish Provident* [2004] 1 WLR 3172. The question in that case depended on what the taxing statute meant by 'a contract under which … a qualifying company has any entitlement … to become party to a loan relationship', the latter term being defined as including a government security. The concept of 'entitlement' is of course the concept used in section 65(1) of the 1988 Act, which the Court of Appeal in the present case considered to be an 'intrinsically legal one'. In *Scottish Provident*, however, the House of Lords was not deterred by the 'legal' nature of the concept from giving it a practical meaning. It was held that the provision did not apply to a legal entitlement which was intended and expected to be cancelled by an equal and opposite obligation, as there was in these circumstances no entitlement to gilts 'in a practical sense' (para 19). As Lord Reed JSC observed in *UBS* [2016] 1 WLR 1005, para 71, the statutory provision was therefore construed as being concerned with a real and practical entitlement.
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> 59. In a similar way in the present case we consider that the words 'entitled to possession' in section 65(1) of the 1988 Act as the badge of ownership triggering liability for business rates are properly construed as 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."

30. In summary therefore, there is no special category of statutory concept that is immune from purposive construction. It has been applied not only to transactions but to other concepts including "entitlement" and "entitled". In both *Scottish Provident* and *Rossendale* that concept was interpreted as requiring a "real and practical entitlement". Lord Hoffmann's distinction in *MacNiven* between legal and commercial concepts was not intended to "provide a substitute for a close analysis of what the statute means". Rather, in all cases the court or tribunal must consider "whether the relevant statutory provisions, construed purposively, were intended to apply to the transaction, viewed realistically".

The case law on beneficial ownership and beneficial entitlement

31. There is no doubt that the term "beneficial ownership" and the related term "beneficially entitled" have been interpreted in a particular, and now relatively well-established, manner in domestic tax legislation.

32. *Wood Preservation* concerned an agreement to sell shares in the taxpayer companies, which were subsidiaries of a common parent company. The sale was conditional but the relevant condition was eventually waived by the purchasing company, as it was entitled to do under the terms of sale. Shortly before the waiver occurred the parent company (and seller of most of the shares) transferred its business to the subsidiaries. The subsidiaries claimed that this entitled them to benefit from the trading losses that the parent had previously incurred. That depended on the parent retaining beneficial ownership of at least three quarters of the shares at the point that the business was transferred. The taxpayers argued that the existence of the condition meant that this was the case.

33. In the High Court Goff J decided the appeal in favour of the Inland Revenue, based on the purchaser's ability to waive the condition and so render the agreement unconditional, in which case the purchaser could have obtained specific performance. In such a case, based on *Parway Estates Ltd v Inland Revenue Commissioners* (1957) 45 TC 135 ("*Parway Estates*"), beneficial ownership would be regarded as having not only left the sellers but arrived in the hands of the purchaser.

34. The Court of Appeal dismissed the taxpayers' appeal. It was undisputed that an unconditional contract would have resulted in beneficial ownership of the shares having passed to the purchaser ([1969] 1 WLR 1077, 1095C). The Inland Revenue argued that, although the sale was conditional, the parent had not retained beneficial ownership for the purposes of the legislation in circumstances where it was not free to dispose of the shares elsewhere, had agreed not to take a dividend and was bound to transfer the shares at any time if the condition was waived: the shares were "like a tree which the owner could not sell and could not cut down and of which he could enjoy none of the fruit" (pp.1095-1096).

35. Lord Donovan construed beneficial ownership in the context of the legislation in question, which was intended to allow losses to be used following a business transfer "where there was a substantial measure of identity between the two companies". Here the parent was "bereft of the rights of selling or disposing or enjoying the fruits of [the] shares", so it would be a "misuse of language" to say that it still remained the beneficial owner (p.1096). It had "ceased to be able to appropriate to itself any of the benefits of ownership". Lord Donovan made clear that he was not attempting an exhaustive definition, and that he was not saying that the purchaser became the beneficial owner while the condition operated.

36. Both Harman LJ and Widgery LJ agreed. Harman LJ observed that the parent had "parted with everything" apart from legal ownership and that beneficial ownership must include "the right at least to some extent to deal with the property as your own", rather than a "mere legal shell"; the parent was "tied hand and foot" (pp.1096-1097).

37. *Ayerst* concerned the same legislation as *Wood Preservation*. In that case a parent company was placed in compulsory winding up. During the course of the liquidation its business was transferred to a subsidiary, which then claimed to be entitled to use the parent's tax losses. Upholding decisions of Templeman J and the Court of Appeal, the House of Lords concluded that the winding up order had divested the parent of beneficial ownership of its assets, which included the shares in its subsidiaries that were needed to establish the required shareholding relationship.

38. Lord Diplock, with whom other members of the Appellate Committee agreed, noted that the archetype of a situation where legal ownership "did not carry with it the right of the owner to enjoy the fruits of it or dispose of it for his own benefit" was a trust ([1976] AC 167, 177). However, it was not necessary to identify some other person in whom beneficial ownership vested. Examples of that included estates in administration and bankruptcy. Winding up was no different. After referring to earlier case law that had considered the effect of a winding up order on beneficial ownership and the use of that term in tax legislation since 1927, Lord Diplock concluded at p.181 that:

> "… not only was there a consistent line of judicial authority that upon going into liquidation a company ceases to be 'beneficial owner' of its assets as

> that expression has been used as a term of legal art since 1874, but also there has been a consistent use in taxing statutes of the expressions 'beneficial owner' and 'beneficial ownership' in relation to the proprietary interest of a company in its assets which started with the Finance Act 1927, where the context makes it clear that a company upon going into liquidation ceases to be 'beneficial owner' of its assets as that expression is used in a taxing statute."

39. In *Sainsbury* the supermarket chain sought to group relieve losses incurred in what was then a joint venture with a Belgian company in respect of Homebase. In outline, the agreed economic split was 70:30 in favour of Sainsbury, but the legal structure ensured that Sainsbury owned the necessary 75% of the share capital for group relief purposes. The group relief rules required the shares to be beneficially owned by Sainsbury. The Inland Revenue argued that this requirement was not met because Sainsbury had entered into put and call options with its joint venture counterparty pursuant to which either party could require 5% of the share capital to be sold by Sainsbury to the counterparty at a price equal to the amount paid up on the shares plus interest at 1% over base rate, less any dividends paid. The effect of the option pricing was to allow the parties to be placed in a similar economic position to the originally contemplated 70:30 split.

40. The Court of Appeal agreed with Millett J that group relief was available. Lloyd LJ, who gave the lead judgment, considered the statutory framework and then gave detailed consideration to earlier authorities, including but not limited to *Ayerst* and *Wood Preservation*. He noted that the term "beneficial ownership" is "very well established" ([1991] 1 WLR 963, 969H). After considering authorities that included *Parway Estates* he commented that there was "good authority for the view that 'the beneficial owner' of shares, when that term is used in a statute in contrast to the registered holder, means the equitable owner; neither more nor less". That included a purchaser under a specifically enforceable contract, but not the holder of an unexercised option (p.972).

41. Lloyd LJ then considered whether *Wood Preservation* had the effect that Sainsbury had nevertheless lost beneficial ownership, and concluded that it did not. He noted that Goff J had approached *Wood Preservation* much as Lloyd LJ had approached the instant case, by considering whether specific performance was available, but in the Court of Appeal "things took a different turn" (p.973G).

42. *Wood Preservation* was of course binding on the Court. It meant that "we cannot decide the first question on the straightforward ground which I would otherwise favour, that beneficial ownership and equitable ownership are one and the same thing". Instead it was necessary to "look into the nature and extent of the rights retained by the taxpayer" (p.975E-G). However, Lloyd LJ was not persuaded that Sainsbury retained no more than "a mere legal shell", and refused to go further by applying the "balanced judgment" invited by Mr Park for the Revenue. If a dividend was paid it would have been received by Sainsbury, and it made no difference that an equivalent amount would be deducted from the option exercise price (p.976).

43. Nourse LJ's concurring judgment commented as follows about the use of the term "beneficial ownership" in the relevant statutory context, which was a definitional provision (s.532 Income and Corporation Taxes Act 1970):

> "Although I might not, with Lord Diplock, have gone so far as to think that the expression 'beneficial ownership' is a term of art, it is certainly one which has for several centuries had a very well recognised meaning amongst property lawyers. And there can be no doubt that, in enacting a provision such as section 532(3), Parliament must have intended to adopt that meaning. It means ownership for your own benefit as opposed to ownership as trustee for another. It exists either where there is no division of legal and beneficial ownership or where legal ownership is vested in one person and beneficial ownership or, which is the same thing, the equitable interest in the property in another."

44. Nourse LJ referred to *Wood Preservation* as a "difficult decision", in which he considered that Goff J adopted the correct approach in not distinguishing between equitable and beneficial ownership. *Parway Estates* was not referred to by the Court of Appeal in *Wood Preservation* but it was unclear on what basis it could be distinguished, despite the different statutory context. Nourse LJ was "unwilling to apply [*Wood Preservation*] to any case where the vendor retained more than a mere legal shell of ownership" (p.979).

45. *Bupa* turned on another aspect of the group relief regime, namely the requirement that in addition to beneficial ownership of shares, the shareholder would be "beneficially entitled" to the relevant percentage of any distribution of profits or of assets on a winding up. In that case the Bupa group acquired 46.8% of the ordinary shares of a reinsurer and sought consortium relief (an equivalent to group relief in a joint venture context) in respect of its losses. HMRC refused relief on the grounds that Bupa had entered into a contractual commitment to pay earn-out consideration equal to 100% of any distribution received up to a benchmark amount, and 95% thereafter, within 10 business days of a distribution being made to it.

46. The Upper Tribunal considered the purpose of the consortium relief provisions. It approved (at [51]) a submission that "entitlement" was used rather than ownership because the legislation focused on notional future events. (I should mention that, while I understand that observation in the context with which *Bupa* was concerned, as Mr Vallat KC pointed out for HMRC s.933 is different because it looks at actual, not notional, payments.) The Upper Tribunal also considered that the effect of the case law was that beneficial entitlement is not synonymous with equitable entitlement, but the latter may be sufficient to confer the former ([53] to [61]). The Upper Tribunal went on to consider *Ramsay* principles, rejecting HMRC's argument that if the transactions had been effected solely for tax avoidance purposes (which HMRC were not entitled to argue on the facts, see at [21]) they could be disregarded for that reason alone.

47. The Upper Tribunal found at [75] that Bupa had more than a mere legal shell. It could spend any distribution received elsewhere (albeit it would then have to fund the earn out from another source). It was not a trustee of any funds received. It was also entitled to the benefit of, and exposed to, currency fluctuations for the 10 day period, would have been entitled to interest on any deposit of the funds and could have assigned its rights to the distributions. Noting observations in *Sainsbury*, the Upper Tribunal thought it helpful to identify where beneficial entitlement would lie if not with Bupa, the answer being that it was not realistic to treat it as being anywhere else ([76]-[79]). The taxpayer's case was supported by *Piggott v Staines Investment Co Ltd* [1995] STC 114, where dividends paid up a corporate chain were held not to be capable of being

recharacterised as involving a single direct payment ([80]-[82]). The position could have been very different if Bupa had not had access to the benefits of ownership of any cash received: [89].

48. A number of principles can be derived from these authorities.

49. First, while perhaps not strictly a term of art, the concept of beneficial ownership is well established: *Sainsbury*. In essence, it means ownership for the benefit of the person in question: *Wood Preservation*.

50. Secondly, there is a significant degree of overlap between beneficial ownership and equitable ownership. In particular, a purchaser under a specifically enforceable contract can have beneficial ownership of the asset it has agreed to buy: *Parway Estates*. However, the concepts are not entirely co-extensive: *Sainsbury* and *Bupa*. (I note that one reason why this must be so is that the concept of beneficial ownership needs to be capable of operating in legal systems that do not have the same legal traditions, including – as was fairly pointed out in *Bupa* – Scotland.)

51. Thirdly, the fact that the concept of beneficial ownership is well established does not mean that the usual approach to statutory construction is to be ignored. In each of *Wood Preservation*, *Sainsbury* and *Bupa* the term was construed in the context of the legislative scheme in question. As I have already explained, and whatever terminology is used, legislation must be construed purposively to ascertain whether it was intended to apply to the transaction, viewed realistically.

52. Fourthly, consistent with the fundamental requirement of ownership for the benefit of the person in question, or "ownership with benefits", a person who is the legal owner of property will not be its beneficial owner if they do not in fact have any of the benefits of ownership, such that they hold only a "mere legal shell". The facts of *Wood Preservation* provide a good example of this. The parent company could derive no economic benefits from the shares, whether through dividends, disposal or otherwise, but was instead compelled to transfer them to the purchaser as soon as the condition was satisfied or waived at the purchaser's option. (The position would no doubt have been the same if the shares had been registered in the name of a nominee and the parent company's title was therefore equitable. It would still have lost the benefits of ownership as a result of the terms of the sale.)

53. Fifthly, in certain circumstances it is possible for a property owner not to possess, or to lose, beneficial ownership without it vesting anywhere else: *Ayerst*.

54. Finally, I would agree with the Upper Tribunal in *Bupa* that the concept of "beneficial entitlement" should be construed with regard to the authorities that consider the concept of beneficial ownership. In broad terms, therefore, it can be construed as "entitlement with benefits". If the person in question would, in truth, have none of the benefits that entitlement would ordinarily bring, they will not be beneficially entitled.

Application to this case

55. I am satisfied that the FTT and UT correctly concluded that Houmet was not beneficially entitled to the interest assigned to it.

56. In my view the FTT was right to say at para. 130 that the concept of beneficial entitlement in s.933 ITA 2007 should not be interpreted in accordance with the approach taken by the Court of Appeal in *Indofood*. We are concerned with domestic tax legislation and not an "international fiscal meaning".

57. The particular legislation with which we are concerned is Part 15 of ITA 2007. The starting point is the obligation to deduct tax from UK source yearly interest pursuant to s.874 and account for it to HMRC. The aim of that, longstanding, obligation is obvious. It provides a ready tax collection mechanism in respect of UK source income, whereby tax is accounted for on behalf of the recipient of the interest shortly after the payment, in circumstances where it might otherwise not be paid at all, or at least where payment may be substantially delayed. As explained by Patten LJ in *HMRC v Lomas* [2017] EWCA Civ 2124, [2018] STC 385 at [6], the deduction mechanism "gives HMRC the assurance that it will be collected".

58. The obligation in s.874 applies to all payments by companies and certain other entities, and payments to any person whose usual place of abode is outside the UK. That last category provides a good illustration of the tax collection function. HMRC will ordinarily not be in a position to collect tax directly from non-residents.

59. The exception for payments between corporate entities now contained in Chapter 11 of Part 15 was first introduced by s.85 Finance Act 2001. The Explanatory Notes to the Finance Bill explained the purpose of the new exception as being to remove "burdensome requirements" to withhold tax, in particular by putting non-bank lenders "in a similar competitive position to banks", which could already receive interest gross.

60. The fact that the scope of the exception was confined to UK resident companies and UK permanent establishments of non-UK resident companies reflects the intention, apparent from the Explanatory Notes, for the exception to apply only where the recipient was within the charge to UK corporation tax in respect of the interest. This is reinforced by s.934(4) (see [8.] above). Bearing in mind that payees within the charge to corporation tax should in any event make returns of their income to HMRC and account for any tax properly due, the restriction is not surprising.

61. Sections 933 and 934 ITA 2007 require "the person beneficially entitled to the income in respect of which the payment is made" to be a UK resident company or a non-UK resident company trading through a UK permanent establishment. In an ordinary case the scope of the exception might be expected to be co-extensive with the interest being taken into account for corporation tax purposes. In particular, if the payee would not benefit from the income because it receives it in a fiduciary or other representative capacity (for example, as an agent), then it would not meet the requirements of ss.933 or 934 and it would also not be within the charge to corporation tax in respect of it. This is because s.6(1) Corporation Tax Act 2009 provides that a company is "not chargeable to corporation tax on profits which accrue to it in a fiduciary or representative capacity except as respects its own beneficial interest (if any) in the profits".

62. In most cases, therefore, a UK resident company that is legally (or equitably) entitled to interest income and does not receive it on behalf of anyone else would be expected to be able to benefit from the exception in s.933. In that connection, I would not wish to be taken as endorsing the suggestion in para. 28 of the UT's decision that mere payment on by the recipient company to an entity outside the UK may be enough to

disapply s.933 because "there is the same underlying concern that tax on the income will not in practice be able to be collected". In principle, a company subject to corporation tax will be taxable on its profits, which will be computed taking into account both its income and any properly deductible expenses. The fact that expenses may offset part or even the whole of the income will not by itself disapply s.933.

63. Rather, the question here is whether there is anything about the interest payments to Houmet, in the context of the scheme of which they formed part, that makes a difference. The FTT found that, on the facts of this case, there was. In my view it was both entitled and correct to reach that conclusion.

64. Like the UT, I would not decide the case based only on an analogy with *McGuckian*, although the FTT was not wrong to refer to it. Rather, I would first emphasise that, as both *Rossendale* and earlier cases such as *Scottish Provident* illustrate, concepts which have legal meanings cannot be construed and applied in isolation from the statutory context and purpose of the legislation. Just like other concepts they may be amenable to the application of *Ramsay* principles. Secondly, I would repeat that beneficial ownership or entitlement cannot always simply be equated with equitable ownership or entitlement.

65. As is well-established, the statutory provisions, construed purposively, must be applied to a transaction viewed realistically. *Rossendale* reiterates that the result may be to disregard steps that are solely aimed at avoiding tax and confirms that even "legal" concepts like "entitled to possession" can in appropriate cases be construed as requiring a "real and practical entitlement". Both *Scottish Provident* and *Rossendale* considered the concept of "entitlement" or "entitled" rather than beneficial entitlement, but in both the concept was nevertheless construed as requiring a "real and practical entitlement" (see [30.] above). We are concerned with the words "beneficially entitled", which as already discussed broadly means "entitlement with benefits" and cannot simply be equated with equitable ownership. Nothing in the context and purpose of Part 15 ITA 2007 indicates that the words "beneficially entitled" should be confined to a test of equitable entitlement rather than an entitlement which carries at least some of the benefits of ownership (consistently with the previous case law on beneficial ownership and beneficial entitlement). Further, the fact that the legislation refers to "beneficially entitled" makes it a clearer candidate than the legislation in either *Scottish Provident* or *Rossendale* for a construction which focuses on some form of "real and practical entitlement".

66. I do not consider that the fact that Houmet may have been required to bring the interest receipts into account for corporation tax purposes (whether it properly did so being unknown) is sufficient to avoid the need to focus on whether it did, in fact, obtain any benefit from its entitlement to the interest. Put another way, the requirement for the interest to fall within the charge to corporation tax in the hands of the recipient does not negate the need to determine whether the test of beneficial entitlement is met.

67. The FTT was faced with extremely limited evidence about Houmet and its role in the arrangements. As it observed at para. 140, no explanation was provided for its role in the structure or of the reasons for the assignments to it. Taking account of that point, the fact that Houmet as well as Storrier and the Guernsey Trusts were each managed by Mercator, and the fact that "Houmet was invariably assigned the right to interest only a very short time before the interest was paid by the Appellant so that the commercial

reasons for its participation in the refinancing structure are far from obvious", the FTT was driven at paras. 142-143 to the "inescapable conclusion on the facts" that the only reason for Houmet's involvement in the refinancing structure was to provide an alternative argument based on s.933. Its involvement was solely to secure a UK tax advantage.

68. The FTT further found at para. 151 that there was an extremely close correlation between the revenue as shown in the available accounts of Houmet and the amount of interest paid in the years to which those accounts related. This led the FTT to conclude at para. 153 that the interest was not received as nominee or trustee for another person, such that Houmet was beneficially entitled to such part of the interest as exceeded the amount paid for the assignments. However, that amount was likely to be de minimis.

69. The FTT also had very little evidence about the details of the assignments and none about precisely how the funding arrangements worked. That meant that Hargreaves, on whom the burden of proof lay, was unable to do anything more than assert that Houmet did not act as a fiduciary, on the basis that its obligation to pay for the assignment did not result in the interest receipts being impressed with any form of trust.

70. The FTT accepted that Houmet did not act as a trustee, but rightly concluded that that was not enough for Hargreaves to succeed. Hargreaves was unable to establish that, viewed realistically, the transactions conferred any benefit of an entitlement to the interest. There was no evidence to suggest that Houmet could have used the funds received for any other purpose, or that it could benefit from them in any other manner. There was no indication that it derived any meaningful margin or other profit from its participation in the arrangements. Further, Houmet's involvement was entirely ephemeral, being confined to successive assignments of interest very shortly before the loans in question were repaid. There is no suggestion that Houmet was either at risk as to the amount that might be paid, such that it might not be put in funds to pay for the assignment to it, or that it might be able to benefit from the receipt being higher than anticipated. On the former point (risk), I note that the terms of the assignments to Houmet are unknown, the evidence being limited to notices of assignment and demands for the interest (see para. 16(12) of the FTT's decision). It was therefore not established that Houmet's obligation to pay for the assignment was an unconditional one, rather than being entirely dependent on, and co-extensive with, the receipt of the interest.

71. As a result, Hargreaves could not demonstrate that Houmet had any of the benefits that might be derived from any entitlement to, or receipt of, the interest. The fact that Houmet no doubt used (or was treated by the parties as using) the interest to pay for the assignment is, in the circumstances of its entirely tax-motivated and artificial involvement which was not demonstrated to give rise to any risk or meaningful reward, not sufficient to answer the statutory description in s.933.

72. Parliament cannot be taken to have intended that the exception in s.933 should extend to a company in the position of Houmet, which was involved on an ephemeral basis by way of steps that were entirely tax-motivated, and which has not been established as having benefited in any real sense from the interest that it paid away. Houmet's involvement not only had no commercial purpose but had no practical or real effect.

Whether Khan and Good make any difference

73. I also agree with the submissions of Mr Vallat that neither *Khan* nor *Good* affect the conclusion that the tribunals reached.

74. A preliminary point to note is that both cases concerned taxing provisions that impose a charge on the person "receiving or entitled to" income. That is different to the language that we are concerned with. For example, it can include a person who receives income solely as a trustee.

75. In *Khan*, the taxpayer Mr Khan was an accountant who, in an ill-fated attempt to assist some clients, acquired a company with the intention of effecting an orderly winding up and benefiting from profits in the meantime (see Andrews LJ's judgment at [17]). However, following a late change to the proposals Mr Khan sold most of the shares he had acquired back to the company immediately after their acquisition, setting off the buy-back price against a loan that the company had advanced to him to buy the shares.

76. HMRC claimed income tax on the basis that the buy-back involved a substantial income distribution. The charging provision required Mr Khan to be a person "receiving or entitled to" the income, which he said he was not. This court held that the price belonged to Mr Khan, and that (if relevant) he had also derived a real benefit because the distribution extinguished his liability to repay the loan.

77. Mr Way submitted that, similarly in this case, Houmet was enabled to pay the consideration for the assignment. That is so, but in the context of the legislation in issue and the nature of Houmet's role, it is not enough. In *Khan*, both the statutory and factual context was quite different. Andrews LJ, with whom Dingemans and Peter Jackson LJJ agreed, reached the view that the statutory language was concerned with the transaction under which the distribution arose rather than with connected transactions looked at as a whole, and that the legislation applied to the person receiving the distribution or, if different, the person to whom it "belongs" (see at [52] and [57]). There was only one answer to the belonging question: Mr Khan ([83]). However, even if it was necessary to look beyond that and determine whether Mr Khan benefited from the distribution, applying *Bupa*, *Sainsbury* and *Wood Preservation* or *Ramsay* principles, then he had done so. If the transactions could be viewed as a composite whole then they could not be analysed as involving a distribution to the vendor shareholders (who had sold their shares before the distribution was made) rather than to Mr Khan, and Mr Khan derived a real benefit (see at [76] to [81], citing *Piggott v Staines*, a case referred to at [47.] above).

78. *Good* concerned a failed film scheme where the taxpayer argued that he was not liable to income tax on certain payments that were applied in discharging amounts due under a loan taken out as part of the scheme. Again, the charging provision required him to be a person "receiving or entitled to the income". In rejecting that argument Whipple LJ applied the *Ramsay* approach. She noted at [55] that the legislation in question did not incorporate a concept of beneficial entitlement, such that cases such as *Bupa*, *Sainsbury* and *Wood Preservation* were not of much assistance. She preferred to use the term "entitled" rather than the concept of belonging ([56]). She disagreed that the taxpayer had entirely alienated his rights to the payments, observing that the taxpayer derived a clear benefit from the payments and following earlier cases which had held that income could remain taxable where it was used to reduce a liability that the taxpayer had to a

third party. On that basis Mr Good was entitled to the payments. That reasoning was supported by both Snowden LJ and King LJ at [93] and [110] respectively.

79. *Khan* was considered recently in *Clipperton & Anor v HMRC* [2024] EWCA Civ 180, but that does not add anything material for present purposes.

80. Neither *Khan* nor *Good* make a difference to this case. The statutory and factual contexts are different. The concept of "receiving or entitled to" income is a broad one that extends beyond beneficial entitlement, and in any event Mr Khan and Mr Good obtained real benefits from the payments to them, in a way that Houmet was not found to have done. In *Khan* the taxpayer became the owner of the company, as intended, and benefited from the distribution because it enabled him to satisfy a liability that he had undoubtedly taken on. Further, the transaction could not readily be recharacterized as involving a distribution to the sellers who had already transferred their shares. In *Good*, the taxpayer benefited through the reduction of his liability under the loan.

Conclusion

81. In conclusion on ground 1, I would dismiss Hargreaves' appeal. The FTT and UT correctly concluded that Houmet was not beneficially entitled to the interest assigned to it.

Ground 2: yearly interest

82. To recap, ground 2 is whether interest paid on loans the duration of which was less than a year, but which were routinely replaced by further loans from the same lenders, was "yearly interest" within s.874 ITA 2007.

83. Both the FTT and UT correctly relied on the consideration of the concept of yearly interest by the Supreme Court in *HMRC v the Joint Administrators of Lehman Brothers International* [2019] UKSC 12, [2019] STC 661 ("*Lehman*"). In his review of the case law Lord Briggs (with whom the other members of the court agreed) said that *Goslings and Sharpe v Blake (Surveyor of Taxes)* (1889) 23 QBD 324, 2 TC 450 ("*Blake*") established that:

> "… the question whether the interest is 'yearly' or 'short' depends upon a business-like rather than dry legal assessment of [a loan's] likely duration."

84. Lord Briggs went on to endorse at [33] a summary by Lord Anderson in *Inland Revenue Commissioners v Hay* 1924 SC 521, 531, 8 TC 636, 646 ("*Hay*") as remaining the "best convenient summary of the jurisprudence about the meaning of yearly interest". The summary is as follows:

> "Now the authorities referred to by Crown Counsel seem to me to establish these propositions, five in number:- (First), that interest payable in respect of a short loan is not yearly interest … (Second), that in order that interest payable may be held to be yearly interest in the sense of the Income Tax Acts, the loan in respect of which interest is paid must have a measure of permanence. (Third), that the loan—and this is pretty well expressing the second proposition in another form—must be of the nature of an investment... (Fourth), that the loan must not be one repayable on

> demand.... (Fifth), that the loan must have a 'tract of future time'... These propositions are perhaps one proposition expressed in different forms, but they are the result of the authorities."

85. *Blake* concerned a three months' bankers loan, which was held not to give rise to yearly interest in circumstances where it was clearly intended and understood to be a short-term loan. In contrast, an ordinary mortgage would give rise to yearly interest even if it contained a covenant to repay after six months, because it was well known in business that mortgages are very seldom repaid after six months (Lindley LJ's judgment in *Blake*, (1889) 23 QBD 324, 330, cited by Lord Briggs in *Lehman* at [23]).

86. In this case the FTT found that the loans fulfilled an important commercial need for the business, and (being raised from connected parties) both left the borrower's assets free from security and could be raised quickly and at minimal cost (para. 78 of the FTT's decision). They were also repayable on demand (para. 79). However, there was a pattern under which loans were routinely replaced by a further loan from the same lender in the same or a larger amount. The FTT found that the enquiries made of lenders as to whether they wished to carry on lending were formalities, and a new loan was never declined (para. 87).

87. In my view the FTT and UT applied the correct legal approach. The FTT made no legal error in concluding that the interest was yearly interest because the loans were in the nature of long-term funding, were regarded by the lenders as an investment and formed part of the capital of the business, with a permanency that belied their apparent short-term nature (paras. 79, 81 and 82). It makes no difference to this whether an individual loan happened to last for less than a year. On a business-like assessment, those loans could not be viewed in isolation as short-term advances. In reality, as the FTT concluded at para. 86, the lenders provided attractive long-term funding in the nature of an investment.

Conclusion

88. In conclusion, I would dismiss Hargreaves' appeal on both grounds. Houmet was not "beneficially entitled" to the interest assigned to it for the purposes of s.933 ITA 2007, and the interest on the loans was yearly interest even if the loan in question had a duration of less than a year.

Lord Justice Nugee:

89. I agree.

Lord Justice Peter Jackson:

90. I also agree.