[2020] UKTT 191 (TC)

TC07677

VAT – determination of interest by Tribunal under s84(8) VATA 1994 – convention that interest be awarded at base rate plus 1% - evidence adduced that appellants were paying rates in excess of that level – rates available to class of borrowers – RSPCA and Emblaze considered and applied – interest awarded based on evidence of rates available to SMEs during the period

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: MAN/2007/1441

BETWEEN

UNISTAR TRADING LIMITED (IN LIQUIDATION)

UNISTAR GROUP LIMITED **Appellants**

-and-

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS **Respondents**

TRIBUNAL: JUDGE JEANETTE ZAMAN
JO NEILL

Sitting in public at Taylor House, 88 Rosebery Avenue, London EC1R 4QU on 21, 22 and 23 January 2020

Mr Ben Walker-Nolan, counsel, instructed by The Khan Partnership LLP, for the Appellants

Mr James Puzey and Mr Nicholas Macklam, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

INTRODUCTION

1. Unistar Trading Limited ("UTL") and Unistar Group Limited ("UGL") (together, "Unistar") applied to the Tribunal for interest under s84(8) Value Added Taxes Act 1994 ("VATA 1994") on 9 January 2015 and 31 January 2017 respectively (together, the "Applications").

2. HMRC had denied Unistar's entitlement to deduct input tax as follows:

   (1) on 7 December 2007 HMRC denied input tax claimed by UGL of £391,628.65 and £937,723.15 for the VAT accounting periods 04/06 and 05/06 respectively;

   (2) on 7 December 2007 HMRC denied input tax claimed by UTL of £604,939.14 and £328,514.91 for the periods 04/06 and 05/06 respectively; and

   (3) on 24 January 2008 HMRC denied input tax claimed by UGL of £126,781.20 for the period 05/06.

3. The ground for these decisions was that the input tax was incurred by Unistar in a transaction or transactions connected with the fraudulent evasion of VAT and that they knew or should have known of this fact.

4. Unistar appealed against these decisions, and those appeals were heard by the Tribunal in February and November 2012. The Tribunal's decision was released on 19 February 2013 (this being the decision of Judge Porter in *Unistar Group Limited and Unistar Trading Limited v HMRC* [2013] UKFTT 344 (TC) ("*Unistar 2013*")) and allowed the appeals. Since then:

   (1) UGL and UTL received the withheld VAT from HMRC on 25 September 2013;

   (2) HMRC paid repayment supplements of £72,806.65 to UGL and £46,673 to UTL; and

   (3) pursuant to an agreed direction from the Tribunal, HMRC paid interest at 1% above the Bank of England's base rate ("Base Rate") on the sums found to be due to UGL and UTL on 26 July 2017. The rate of Base Rate plus 1% is referred to as the "conventional rate" (and all references in this Decision to rates of interest are expressed on a per annum basis unless otherwise stated).

5. The payment of interest at [4(3)] above should have amounted to £212,049.76 for UTL and £338,090.12 for UGL. Both parties acknowledged that, as a result of a miscalculation by HMRC, the amount actually paid by HMRC by way of interest was an overpayment, amounting to Base Rate plus 2%. HMRC had paid £280,763.41 to UTL and £434,533.48 to UGL. HMRC has not requested repayment of the overpaid amounts (for reasons which are not apparent to us), but does not concede that these additional amounts should be retained by either UTL or UGL, such that when HMRC submits that the appropriate rate of interest has already been paid it refers to the 1% above Base Rate specified in the agreed direction from the Tribunal.

PRELIMINARY ISSUE

6. The Applications made somewhat slow progress towards the hearing before us, in part due to them being stayed until the final determination of *Littlewoods*. There have been various directions issued by the Tribunal during this period, some following joint applications by the parties, others in response to applications by one of the parties.

7. On 9 October 2019 the Tribunal issued directions upon a joint application by the parties (the "October 2019 Directions") relating to the admission of further evidence by UTL and UGL, being two expert reports, two supplemental expert reports and three witness statements

which were served on HMRC on 1, 2 and 3 October 2019 (the "Further Evidence"). It was directed that Unistar may rely upon the Further Evidence but that they "may only rely on any additional evidence in these proceedings with the permission of the Tribunal".

8. On the second day of the hearing we were provided with a supplemental statement dated 21 January 2020 from Ms Wild (the accountancy expert for HMRC which had been provided to Unistar the previous day) and a response by way of supplemental statement dated 22 January 2020 from Mr Drewe (the accountancy expert for Unistar). It was explained that the former was a correction by Ms Wild, and neither party raised any objection to the material being handed up by the other. We accepted this late evidence, being mindful not only of the absence of objections from the parties, but also noting that it was brief, followed on readily from the more detailed evidence in the expert reports and was handed up before either of the accounting experts gave evidence, thus ensuring that both experts could be cross-examined in relation thereto.

9. On the third day of the hearing Mr Walker-Nolan sought to introduce an additional report from Mr Iles (the banking expert for Unistar), this being a second supplementary report dated 22 January 2020 which applied in respect of both UTL and UGL (the "Iles SSR"). Mr Puzey objected to the admission of this new report. He reminded us of the October 2019 Directions, drew attention to the fact that there was no reason why the opinions contained in the Iles SSR could not have been presented earlier (either immediately following the exchange of the report from Ms Paul-McCrossen (HMRC's banking expert) or, at the very latest, following receipt by Unistar of HMRC's skeleton argument).

10. We adjourned the hearing to consider the Iles SSR in the light of the submissions we had received and decided to permit the additional evidence to be adduced. We explained this decision to the parties upon the re-commencement of the hearing.

11. The Iles SSR was 20 pages long. However, upon inspection most of these pages comprised an introduction, definitions, background, expert's declaration, CV and other matters which had been included (in exactly the same terms) in Mr Iles' previous reports (which are considered further below). The new material was:

(1) his Instructions, stating that he had been asked to elaborate on the class of borrower that UTL and UGL would fall into from a banking perspective, and to comment on the borrowing conditions for companies in this class around 2004 to 2006; and

(2) his opinion on the above matters, which was less than one page.

12. In deciding to exercise our discretion in this way we had regard to The Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (the "Tribunal Rules") and the need to deal with matters fairly and justly. Whilst we agreed with Mr Puzey's submission that there was no good reason for the lateness of its introduction, we had particular regard to the brevity of the new material, the fact that it was on a subject-matter which HMRC had themselves addressed and which HMRC should therefore be expected to be capable of considering and responding to, and that whilst this application was made at the beginning of the third day of the three day hearing, neither of the banking experts had yet given evidence. Mr Puzey would therefore be able to cross-examine Mr Iles on the additional evidence and would be able to ask Ms Paul-McCrossen to address the Iles SSR.

13. We were nevertheless frustrated that, in the context of a hearing which has been some years in the preparation, and off the back of many applications to the Tribunal for directions as to timing, Unistar, whose appeal this is, had failed to comply with time limits imposed by the Tribunal. This frustration was reinforced after the hearing when, upon reviewing the bundles before us (which, as the parties were well aware, we had only seen for the first time the day

before the hearing commenced), we saw that the correspondence between the parties had included objections by The Khan Partnership (in a letter dated 16 August 2019) opposing a direction sought by HMRC permitting "yet further evidence" to be served in response to Unistar's evidence, noting "There must be finality of evidence. It will not assist the parties or the Tribunal to have countless rounds of evidence."

RELEVANT LEGISLATION

14. Until 1 April 2009, s84(8) VATA 1994 provided, in so far as relevant, as follows:

> "(8) Where on an appeal it is found
>
> (a) …
>
> (b) that the whole or part of any VAT credit due to the appellant has not been paid,
>
> so much of that amount as is found not to be due or not to have been paid shall be repaid (or, as the case may be, paid) with interest at such rate as the tribunal may determine …"

15. With effect from 1 April 2009, s84(8) was repealed and s85A was inserted into the VATA which provided (and still provides) as follows:

> "(1) This section applies where the tribunal has determined an appeal under section 83 .
>
> (2) Where on the appeal the tribunal has determined that—
>
> (a) the whole or part of any disputed amount paid or deposited is not due, or
>
> (b) the whole or part of any VAT credit due to the appellant has not been paid,
>
> so much of that amount, or of that credit, as the tribunal determines not to be due or not to have been paid shall be paid or repaid with interest at the rate applicable under section 197 of the Finance Act 1996.
>
> …
>
> (5) Nothing in this section requires HMRC to pay interest
>
> (a) on any amount which falls to be increased by a supplement under section 79 (repayment supplement in respect of certain delayed payments or refunds); or
>
> (b) where an amount is increased under that section, on so much of the increased amount as represents the supplement."

16. Section 84(8) VATA 1994 was replaced by s85A by the provisions of the Transfer of Tribunal Functions and Revenue and Customs Appeals Order 2009/56 (the "2009 Order"). Section 84(8) was repealed by paragraph 221(10) of Schedule 1 to the 2009 Order and s85A was inserted by paragraph 223 of Schedule 1. The changes were subject to the transitional and savings provisions contained in Schedule 3 to the 2009 Order.

17. Paragraph 4 of Schedule 3 to the 2009 Order provided as follows:

> "(1) This paragraph applies if, before the commencement date [ie 1 April 2009]
>
> (a) HMRC have notified a decision relating to a matter to which section 83 of the Value Added Tax Act 1994 applies, and
>
> (b) no party has served notice on a VAT and duties tribunal for the purpose of beginning proceedings before such a tribunal in relation to that decision.

> (2) On and after the commencement date, the following enactments continue to apply … as they applied immediately before that date
>
> (a) the Value Added Tax Act 1994,
>
> (b) rule 4(2) of the VAT Tribunals Rules 1986, and
>
> (c) any other enactments that are applicable to the decision."

18. Paragraph 6 of Schedule 3 to the 2009 Order provided that any current proceedings were to continue on and after the commencement date as proceedings before the Tribunal. Paragraph 1(2) of Schedule 3 provided that:

> "… there are "current proceedings" if, before the commencement date
>
> (a) any party has served notice on an existing tribunal for the purpose of beginning proceedings before the existing tribunal, and
>
> (b) the existing tribunal has not concluded proceedings arising by virtue of that notice."

19. Paragraph 7 of Schedule 3 to the 2009 Order applied to proceedings that were continuing proceedings by virtue of paragraph 6. Paragraph 7(3) provided that the tribunal could apply any provision in procedural rules which applied to the proceedings before 1 April 2009 or disapply any provision of the Tribunal procedure rules. Paragraph 7(7) provided that an order for costs could only be made if and to the extent that it could have been made before 1 April 2009 (assuming that costs incurred after that date were incurred before it).

20. Paragraph 9 of Schedule 3 to the 2009 Order provided as follows:

> "(1) This paragraph applies in relation to any decision of a VAT and duties tribunal made before the commencement date.
>
> (2) On and after that date, the following provisions continue to apply as they applied immediately before that date
>
> (a) section 84(8) of the Value Added Tax Act 1994 (VAT);
>
> (b) …"

21. Section 16(1) of the Interpretation Act 1978 ("IA 1978") provides as follows:

> "(1) Without prejudice to section 15 , where an Act repeals an enactment, the repeal does not, unless the contrary intention appears,
>
> …
>
> (c) affect any right, privilege, obligation or liability acquired, accrued or incurred under that enactment;
>
> …
>
> and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed, as if the repealing Act had not been passed."

22. The parties agreed that, notwithstanding the repeal of s84(8), Unistar retain their right to interest under that section, at a rate to be determined by the Tribunal. Those rights accrued before the repeal and benefitted from the protection afforded by s16(1) IA 1978.

EVIDENCE BEFORE THE TRIBUNAL

23. In addition to being provided with a hearing bundle, we heard evidence from the following witnesses:

(1) Mr Joe Case, who has made two witness statements dated 18 January 2019 and 27 September 2019 in support of UTL's application;

(2) Mr Ruarri Spurgeon, who has made two witness statements dated 26 March 2019 and 2 October 2019 in support of UGL's application;

(3) Mr Anthony Hussey, who is currently the sole shareholder and director of UGL, and who has made two witness statements dated 26 March 2019 and 2 October 2019 in support of UGL's application;

(4) Mr Christopher Drewe, an expert in the field of accountancy, instructed by UTL and UGL;

(5) Ms Suzanna Wild, an expert in the field of accountancy, instructed by HMRC;

(6) Mr Mervyn Iles, an expert in the field of banking, instructed by UTL and UGL; and

(7) Ms Mo Paul-McCrossen, an expert in the field of banking, instructed by HMRC.

24. The banking experts (Mr Iles and Ms Paul-McCrossen), and the accountancy experts (Mr Drewe and Ms Wild), have each prepared joint statements setting out their areas of agreement and disagreement for the assistance of the Tribunal in addition to preparing their own reports (and sometimes supplemental reports).

25. We deal at the outset with some of the evidential difficulties and challenges to credibility of the witnesses.

Evidence of fact and credibility of witnesses of fact

26. Much of the evidence before us related to the period 2000 to 2006, ie twenty to fourteen years prior to the hearing. Records from this time were, unsurprisingly, incomplete. The gaps and their potential significance are addressed in relation to both UTL and UGL below, but we do comment at this stage on the evidence adduced by Mr Case which was exhibited to his witness statements.

27. Mr Case is the sole debenture holder of UTL and he stated that he had been authorised by UTL and the liquidators of UTL to make his witness statements. The liquidators of UTL had assigned the right to conduct this litigation to him on 14 November 2014. Other than in respect of publicly available information (in the form of financial statements of UTL and Companies House records) the evidence in the bundles related mainly to the lending arrangements between Mr Case and UTL (including for this purpose both loans he made directly and those he arranged) from 2000 to January 2008. We had several hundred pages of material in relation to these loans, and whilst it was incomplete we did nevertheless consider (as explained further below and relying upon the conclusions of Mr Drewe) that this information presented a fair picture of the arrangements between Mr Case and UTL as to the borrowing process, the amounts borrowed at various times and the interest paid.

28. Mr Puzey challenged the credibility of Mr Case as a witness, referring to:

(1) when giving evidence at the hearing of the appeal against the denials in 2012, Mr Spurgeon described Mr Case as "an unscrupulous lender", by which he said he meant that "he charged us heavily for the benefit of the finance", and confirmed in cross-examination before us that this was still his opinion of Mr Case;

(2) Mr Case had been a director of PNC Telecom Plc ("PNC") at different times, including from 2004, and in *Tricor Plc (formerly PNC Telecom Plc) v HMRC* [2014] UKFTT 241 (TC) the Tribunal concluded (at [494]) that he was not a credible witness and that the appellant knew its transactions were connected with fraud; and

(3) he had not told the whole truth in his witness statements - Mr Case's witness statement had referred to his having been a director of PNC from 2000 to 2002. It did not mention that he was then re-appointed in 2004. We note that Mr Case denied that he was seeking to give only part of the story.

29. Having heard evidence from Mr Case, we do have some concerns about the reliability of this evidence (largely due to the passage of time) but we generally found him to be a credible witness. We have mainly made our findings of fact based on the contemporaneous materials exhibited to his witness statements. The difficulty with Mr Case's evidence was that whilst he had been authorised to give evidence on behalf of UTL, he was not a director or employee of that company at any relevant time, and could only give evidence as to his position as a lender to that company. He was able to recount discussions he had had with Mr Spurgeon in the context of explaining the lending relationship but he was not (understandably) able to give evidence as to other borrowings of UTL.

30. Mr Hussey was authorised by UGL to make two witness statements on its behalf. He was a director of both UTL and UGL at various times, but emphasised that he was a sales director and that Mr Spurgeon was responsible for the financing until 2008. His witness statements addressed many of the same matters as those of Mr Spurgeon (including as to the loans taken out by those companies), sometimes in identical terms, but Mr Hussey was not able to answer many of the questions put to him as to the borrowings of UTL or UGL, expressly stating that Mr Spurgeon would have dealt with those matters, and on other occasions it was apparent that his answer was based not on his own knowledge but on what he had been told (either several years ago or more recently) by Mr Spurgeon.

31. This does limit the usefulness of Mr Hussey's evidence and we have had regard to whether explanations he gave were based on his own knowledge or that of Mr Spurgeon. Where the latter, we placed greater weight on the evidence given by Mr Spurgeon to the Tribunal. Nevertheless, we did find that Mr Hussey was credible in respect of the evidence which was his own.

32. In challenging the credibility of Mr Spurgeon, Mr Puzey identified:

(1) Giving evidence at the hearing before us, Mr Case described him as "untrustworthy". The context of this was that Mr Spurgeon had told Mr Case that he made meticulous due diligence checks – visits to freight forwarders, taking photos of stock, keeping full IMEI details, but the decision in *Unistar 2013* records (at [57]) that at a meeting with HMRC in September 2006 Mr Spurgeon had said that no due diligence checks had been made of the suppliers as they had all been known to him personally for about five years.

(2) Mr Spurgeon had told the Tribunal in 2012 that Mr Case had been lending to both UTL and UGL, whereas Mr Case was adamant that he had only lent to UTL, never to UGL. Giving evidence before us, Mr Spurgeon reiterated that Mr Case had been aware of intercompany behaviour.

33. In *Unistar 2013*, Judge Porter described Mr Spurgeon's evidence as "succinct, informed and detailed" (at [44]) and as "convincing" (at [128]). This was important in the context of an appeal where the matter in issue (whether Unistar knew or should have known that their transactions were connected to fraud) relied heavily on the credibility of the witnesses. Before us, Mr Spurgeon's evidence was similarly succinct, but was certainly not detailed. We consider that this is explained by the significant passage of time since the relevant years, and considered him to be credible.

34. Finally, we note that Mr Spurgeon and Mr Hussey both appeared as witnesses for UGL. However, we also have regard to the fact that Mr Spurgeon and Mr Hussey were directors of UTL and some of the evidence they gave was relevant to the position of UTL as well as UGL and we have had regard to that evidence when making our findings in respect of both companies.

Independence of HMRC's expert witnesses

35. Ms Wild and Ms Paul-McCrossen are both employed by HMRC. A challenge was made on behalf of Unistar that they are not "independent" experts.

36. Before addressing the substance of this challenge, we note at the outset the circumstances in which it was made. This is not a matter which Mr Walker-Nolan addressed in his skeleton argument or in his submissions at the hearing. Instead, this appeared in the second witness statements of all three witnesses of fact – Mr Case stating that "in my view" Ms Wild and Ms Paul-McCrossen cannot claim to be independent witnesses as they are employed by HMRC, and Mr Hussey and Mr Spurgeon also challenging independence. Whilst it is appropriate for such a submission to be made (and we consider it below), we are somewhat surprised that this is included as an opinion of three witnesses of fact whose experiences are not such as to lead us to conclude that they would be familiar with rules of evidence before any court or tribunal. Mr Puzey did challenge Mr Case, Mr Hussey and Mr Spurgeon as to whether they had themselves written the witness statements which they had signed (the response to which was broadly that they had been prepared by The Khan Partnership on the basis of explanations given by them and that they had checked them carefully and made corrections) but did not draw particular attention to these paragraphs in the statements.

37. We treat these opinions as submissions made on behalf of Unistar and note the following:

(1) both Ms Wild and Ms Paul-McCrossen (the "HMRC Experts") state in their reports that their duty is to express an honest and unbiased opinion to assist the Tribunal and that their evidence is addressed to the Tribunal with that in mind;

(2) the HMRC Experts both state that they had no direct involvement in the day-to-day conduct or management and no contact with the case team in relation to UTL or UGL before being contacted to act as an expert in these proceedings;

(3) the HMRC Experts signed a declaration and statement of truth confirming that

(a) they had read and understood Part 35 of the Civil Procedure Rules, the related Practice Direction, the Civil Justice Council's Guidance for the Instruction of Experts in Civil Claims 2014 and the Tribunal Rules (as they apply to experts); and

(b) acknowledging that their duty to the Tribunal overrides any obligation to the person from whom they had received their instructions or by whom they are paid; and

(4) Mr Walker-Nolan did not put any challenge to either of the HMRC Experts in relation to the fact of their employment by HMRC, or to allege that their evidence was untruthful or their opinions were biased.

38. Rule 15 of the Tribunal Rules deals with evidence and submissions before the Tribunal. Rule 15(1)(c) provides that the Tribunal may give directions as to whether the parties are permitted or required to provide expert evidence, and rule 15(2)(a) permits the Tribunal to admit evidence whether or not the evidence would be admissible in a civil trial in the UK.

39. The HMRC Experts are not independent. That does not, however, mean that they cannot be experts in the matters on which they opine. We do envisage that there may be circumstances in which the fact of employment by HMRC affects the weight which a Tribunal may wish to

give to opinions expressed by an expert put forward by HMRC – there might be evidence of bias, or it may well be that in certain circumstances long-term employment by HMRC means that there may be a doubt as to whether that expert remains well-versed in market practice such as to support a challenge to their expertise (although there is of course also the argument that those employed by HMRC can be expected to have seen a wide variety of taxpayer behaviours).

40. In the present circumstances, we were completely satisfied that both HMRC Experts sought to give evidence honestly and answered our questions (and those of Mr Walker-Nolan) openly. Furthermore, Mr Walker-Nolan did not put any challenge to them based on their employment by HMRC. We consider the evidence given by the HMRC Experts below, but at this stage we note that in considering their opinions we give no less weight to them than if they had not been employed by HMRC.

Evidence of fact in the reports of the accountancy experts

41. It is notable that both Mr Drewe and Ms Wild had included in their reports information (notably tables of data) which was drawn from the evidence exhibited by the witnesses of fact – eg, Mr Drewe had produced what were in essence ledgers of the loans from Mr Case to UTL based on the exhibits to Mr Case's witness statement and Ms Wild produced information as to the VAT repayment history. They had both sought to reconcile the information before us with that in the financial statements (which appears to have been a more successful exercise in respect of UTL than with UGL), noting the areas where there were differences they were unable to explain.

42. Their reports did include the experts' opinions on matters that they had been instructed to address, and we summarise and comment on that expert evidence further below. However, we have, in making our findings of fact, benefitted from the work they have done in seeking to pull together the factual evidence.

FINDINGS OF FACT

43. Our findings of fact are set out below. We have addressed the expert evidence separately and made further findings in the Discussion.

UTL

44. UTL was incorporated on 28 January 1999 and traded as a wholesale trader in mobile telephones. Mr Spurgeon was initially the sole director and shareholder. Mr Hussey was appointed as a director on 27 October 2000 and became a shareholder on 29 January 2001.

45. The financial statements of UTL for the period to 31 October 1999 describe its principal activities as the "wholesale distribution and service within the cellular industry", and the accounts were drawn up in accordance with the provisions for small companies under Part VII of Companies Act 1985.

46. At all relevant times UTL maintained a business bank account with Barclays Bank Plc ("Barclays").

Loans from Joe Case to UTL

47. Mr Case had been involved in the consumer electronics industry from 1973, running various businesses, including KJC Mobile Phones ("KJC"), which by 2000 operated around 50 stores in the South of England, as well as a mail order operation. In 2001, he sold KJC to PNC, of which he was a director until 2002 (and was re-appointed in 2004).

48. From 1990, he also lent money to peer group businesses, and from 1993/1994 to mobile telephone traders. His perception was that the opportunity to lend arose out of the fact that many traders in the mobile telephone market had little in the way of fixed assets or stock and found it difficult to secure mainstream funding from established lenders. Mr Case was selective

in that he only lent money to parties with whom he had some degree of familiarity. To his mind, this minimised his exposure to potential loss – he made his assessment as to whether to lend based on his knowledge of the person. He did not ask for financial records, business forecasts or references and he did not advertise his lending business.

49. Mr Case had met Mr Spurgeon in 1999. Mr Case was then still a director of KJC and Mr Spurgeon was working for European Telecom Plc as a salesman. Mr Case had been impressed with Mr Spurgeon's work ethic and talent. They met to discuss finance in mid-2000 and from November 2000 Mr Case began lending to UTL.

50. There is some evidence that the initial arrangement, from November 2000 possibly to December 2002, was that Mr Case would loan funds to UTL for 50% of the profit made from the transaction. Mr Case does not recollect any profit share arrangement but believes the expressions commissions and interest were used interchangeably.

51. The rate of interest agreed was generally a rate of 3.1% per month (ie 36.5% per annum). On occasion, when Mr Case did not himself have available funds to lend, he was able to source funds by himself borrowing from third parties. In those circumstances, the interest rate he charged was typically 5% per month.

52. Between November 2000 and January 2008 Mr Case made a significant number of unsecured loans to UTL, varying in size from £7,000 to £1,900,000. Loans were generally advanced for a specific transaction that UTL were planning to enter into and each is referred to herein as a "Short Term Loan". Mr Case stated that they were typically returned within a one-month trading cycle. However, Mr Case did not know UTL's payment terms and did not ask, as he did not want to run their business. Giving evidence he explained that they were normally repaid within seven to ten days, and that if there was a delay beyond a week or two he would be on the phone to Mr Spurgeon.

53. There were various types of Short Term Loans:

(1) direct loans from Mr Case to UTL, with repayments being made to Mr Case ("Direct Short Term Loans"). These were the most common;

(2) where Mr Case did not have sufficient funds to provide UTL with the requested amount directly then either:

(a) Mr Case borrowed the funds himself from a third party and lent them to UTL, charging a higher rate of interest to cover the borrowing costs ("Funded Short Term Loans"); or

(b) Mr Case arranged for the funds to be provided to UTL directly by the other party, but Mr Case still received the interest on these loans which was also at a higher rate ("Third Party Directly Funded Short Term Loans"); and

(3) sometimes UTL would request a new Short Term Loan before an outstanding loan had been repaid. Mr Case would then agree that UTL should retain the amount borrowed and provide the additional funds to UTL ("Combined Short Term Loans").

54. There was no standard set of written terms and conditions. Loans were generally agreed over the phone, and the process for each Short Term Loan was as follows:

(1) loans were generally advanced based on an initial verbal request by UTL – Mr Case would make a decision in principle and confirm this over the phone;

(2) UTL would provide Mr Case with a Loan Request Form. That form specified the amount requested. It did not typically state a repayment date or the rate of interest charged;

(3) Mr Case would transfer the requested loan amount to UTL that same day – we saw various copies of Mr Case's bank statements, or instruction reports from Barclays (with which Mr Case as well as UTL appears to have banked during some of the relevant time) confirming that payment to UTL had been made;

(4) there was sometimes an invoice from Mr Case to UTL for the interest payable on a loan;

(5) the loan principal and interest were often repaid separately, and in some instances several interest payments were paid as a single lump sum amount; and

(6) when the loan was repaid (or "returned", as Mr Case referred to it), the interest rate and amount of interest would usually be written on the Loan Request Form

55. We had various examples of the above in the exhibits to Mr Case's witness statement:

(1) the Loan Request Forms varied over time, and the copies available to us sometimes had manuscript notes on them, eg paid on a specified date, "return in 40 days", "return [date]":

(a) on 14 February 2001 there was an invoice on UTL letterhead addressed to Mr Case at KJC, and the "product specification" is a request for a loan, referring to purchase of stock, with VAT support on two specified invoices, with a subtotal stating the amount requested. A similar approach was taken in an invoice dated 16 February 2001;

(b) on 9 March 2001 there was an invoice on UTL letterhead, which does not make any reference to a loan but instead describes the product as "Nokia 8210 x 5000 @ 162", with an amount of £951,750. That amount was then transferred by Mr Case to UTL; a similar approach was taken in an invoice dated 14 March 2001;

(c) on 17 August 2001 UTL sent a document to Mr Case headed "LOAN REQUEST". There is no reference on this document to either an invoice or to any product description. It simply requested a loan of £1.9 million;

(d) on 27 February 2002 the document sent by UTL to Mr Case was labelled "LOAN REQUEST", and from this date the requests no longer looked like or were labelled invoices; and

(e) on 28 October 2002 UTL sent a "Loan Request" to Mr Case, identified as request number 0049JC. The description was loan of £400,000 stating "£415,000 to be repaid in 30 days" as part of the initial description (ie this was not added in manuscript);

(2) we saw many examples of Mr Case's bank statements, and copies of instruction reports from Barclays to Mr Case, and noted the following:

(a) the name UNISTAR TRADING appeared frequently in the bank statements, showing both payments made to that company and receipts. The name was sometimes accompanied by a six-digit series of numbers, but we could not identify any consistent pattern to these. If they had been deliberately included as a payment reference, such numbers did not trace back to any numbers shown on Loan Request Forms and nor did the same set of numbers appear on the payment and repayment of the same Short Term Loan; and

(b) there were some receipts from UTL shown in the bank statements where Mr Drewe (who had analysed all of the information exhibited by Mr Case to prepare Appendix 2B to his report, "My analysis of the Short Term Loans", which is

discussed further below) noted that it was not clear as to what the receipt related to. This was the case for receipts at various dates, eg 18 December 2000, several in 13 February 2002 to 12 April 2002, 10 May 2002, 17 May to 28 June 2002, 20 December 2002 to 9 May 2003; and

(3) there were some examples of invoices from Mr Case to UTL for the interest payable on a loan. Where such an invoice was produced, the detail varied:

(a) some (eg 30 May 2003) referred to interest for the stated month (in that case May 2003) and an amount, with no reference to either the loan to which it relates or the rate at which interest was charged;

(b) others (eg 4 November 2003) did specify that it was for interest on a Short Term Loan, referring to the amount of the loan (in that instance, £1 million). Similarly, an interest invoice dated 9 January 2004 for £360, refers to a Short Term Loan of £360,000;

(c) there is some evidence that the invoices became more specific over time – an invoice dated 23 July 2004 refers to amounts for 15 days interest and 2 days interest, referring to the relevant loan reference numbers and specifying the dates for which the loans were outstanding; but

(d) this practice was not consistently adopted, eg an invoice dated 21 August 2006 refers to commission of £500 being payable on a specified loan. Invoices dated 6 September 2006 and 27 September 2006 took a similar approach.

56. UTL began to default on the repayment of some of the Short Term Loans. By May 2003, the aggregate of outstanding loans totalled £1,730,000, representing loans that had been borrowed by UTL between March 2001 and September 2002. Mr Spurgeon told Mr Case that a trader had defaulted on a large consignment and that there was a risk of liquidation unless the loans were consolidated. Mr. Case agreed to consolidate the outstanding amounts into a fixed long term loan (unsecured) at interest of 18% (the "Long Term Loan"), which was intended to be repaid after 12 months. The repayment history of the Long Term Loan was:

(1) on 18 June 2003 Mr Case lent an additional £1,000,000 under the Long Term Loan, which was repaid in equal instalments on 17 October 2003 and 20 October 2003;

(2) UTL repaid £150,000 on 9 December 2003, reducing the balance to £1,580,000;

(3) on 25 February 2004 a further £143,000 was added to the Long Term Loan (this amount having initially been advanced under two Short Term Loans on 13 February 2004 of £100,000 and £185,000, £142,000 of which was repaid on 25 February 2004), increasing the balance to £1,723,000;

(4) in December 2004 the rate was reduced to 10% (and Mr Case stated that this reduction was "strictly on a temporary basis"), the basis for the variation being that Mr Case was persuaded to assist UTL as Mr Spurgeon had indicated he was unable to maintain the interest payments at 18%;

(5) on 25 February 2005 UTL repaid £150,000, reducing the balance to £1,573,000; and

(6) in June 2005 the interest rate was increased from 10% to 12.5%.

57. The most recent interest payment on the Long Term Loan was made on 4 May 2006. No further repayments of principal have been made – the balance of £1,573,000 is still outstanding. Short Term Loans continued to be advanced by Mr Case throughout this period.

58. On 21 October 2005 UTL had executed a debenture in favour of Mr Case. Clause 2 of the Debenture agreed that from time to time Mr Case would lend money to UTL and the consideration repayable by UTL to Mr Case in respect of each loan would be agreed from time to time. Mr Case states that the loans from UTL to UGL were a breach of this debenture. It is not clear whether this is the case – clause 4.1.2 is a covenant by UTL not to "sell, transfer or otherwise dispose of its undertaking and other assets or any part of them, except by getting in and realising them in the ordinary and proper course of its business".

59. On 24 April 2006 UTL made proposals to repay the Long Term Loan over the following 18 months, and an agreement was reached on 1 May 2006.

60. Even after HMRC withheld the input tax repayments, Mr Case made further Short Term Loans to UTL which were repaid. Mr Drewe's Appendix 2B includes:

(1) a loan of £100,000 on 11 August 2006 which was outstanding for 10 days, at an implied interest rate of 18.25%; and

(2) a loan of £100,000 on 5 June 2007 which was outstanding for 29 days. Mr Drewe notes that "It appears that interest was being charged at an implied interest rate of 36.5% per annum. However, the loan was outstanding for 29 days but interest was charged for 31 days."

61. On 1 February 2008 Mr Case placed UTL into administration - up to that point he had continued to provide further Short Term Loans to enable UTL to continue trading. Subsequently, Mr Case placed UTL into creditors' voluntary liquidation on 17 July 2009.

62. The evidence from Mr Case (from both his witness statements and his oral evidence) also included the following information:

(1) He said he lent at "commercial interest rates", by which he meant that the rates were agreed by the person he was dealing with.

(2) Mr Case reported the income he generated from lending in his self-assessment returns and, following an enquiry, in 2011 HMRC accepted that that he was right to declare the results of his "finance commission activities" as the results of a trade. They accepted that although the way he conducts his business was "unusual" for a money lender, it had characteristics of trading.

(3) Mr Case lent to other businesses, including a garage, In Touch Communications (a hi-fi in car company), PNC, European Telecom, De Luni Mobile (the director of which was Peter Scrancher), JAG Telecom and Unique Distribution. Mr Case had also borrowed from PNC on occasion. Unique Distribution was another wholesale mobile telephone dealer and he later found out they had been denied their input tax by HMRC, although he was not aware of this at the time. He was thus lending to businesses which were competing with each other, and described his business model as lending to those in the industry that could not get overdrafts with instant payment.

(4) Mr Case would sometimes borrow from other third parties when he did not have his own funds to lend on to UTL - he had borrowed from Mr Scrancher and a Mr King.

(5) Giving evidence, Mr Case stated at one point that there was a "loan document" for each loan, separate from the Loan Request Form, to which the Loan Request Form was attached. He was not able to identify any examples of such a loan document, or describe its typical contents. However, he later accepted that there was no additional document, and the Loan Request Form was the loan document.

(6) His witness statement stated that for record-keeping each deal was generally recorded onto a separate ledger. However, in cross-examination Mr Case explained that he did not keep a "ledger"; instead he used the loan documents to check what was repaid. This revised explanation is supported by the material before us – there are various manuscript notes on either the Loan Request Forms and/or bank instructions stating when loans were "returned". Sometimes the interest calculation was written on the Loan Request Form.

(7) He had not asked Mr Spurgeon about the assets of the company, or about the dividends and remuneration it paid. Mr Case initially stated that he didn't see UTL's accounts until 2013; he later corrected this and said he did look at them in 2008.

(8) He said he only lent to UTL, not UGL or Resin8. He "later" became aware of the intercompany loans – possibly in 2008, 2009 or 2010, but they were only spelt out in the witness statements of UGL in this appeal. He states that the making of these loans was a breach of the debenture issued to him by UTL.

(9) As to why he kept lending to UTL when it was in default on loans (eg the further advances on the Long Term Loan, and the new Short Term Loans), he stated that he didn't realise in 2007 that the litigation (relating to HMRC's denial of input tax) would take seven or eight years. He wasn't the happiest about it, but on balance they were repaying.

(10) The failure to repay the loans led to stress and financial pressure on him. He had to sell assets and a property portfolio built up over 30 years.

Other borrowings of UTL

63. We were not provided with any loan agreements or direct evidence in relation to other borrowings of UTL from its incorporation until the denial of the input tax. However, there was some evidence before us that UTL had borrowed from others.

64. There was some evidence that UTL had borrowed from Barclays, most notably in its early years of trading:

(1) Mr Case said that, at the beginning of his lending relationship with UTL, he knew from a conversation with Mr Spurgeon that UTL were up to their maximum borrowing limit of £100,000 with Barclays.

(2) The financial statements of UTL include the following:

(a) for the financial period ("FP") 2001 – in creditors, "bank loans and overdrafts" of £177,494. It also refers to trade creditors of over £5 million, with a note that "trade creditors include £1,500,000 secured by way of a floating charge on the stock held by the company";

(b) for FP 2002 – "bank loans and overdraft" of £34,796, "interest payable on bank borrowing" £22,863; and

(c) for FP 2004 (1 November 2002 to 30 April 2004) – "interest payable on bank borrowing" of £13,064, albeit that this was dwarfed by "other similar charges payable" at £496,926, the notes to which state that this includes interest of £471,926 payable on an unsecured loan from an unconnected third party.

(3) The debenture executed in favour of Mr Case includes a Schedule of Pre-existing charges, which included a debenture in favour of Barclays dated 12 April 2000 securing "all monies" and was a fixed and floating charge over all assets and undertaking.

(4) Mr Hussey was initially adamant that UTL had not had an overdraft with Barclays, but later acknowledged that he would not have dealt with this. Instead, he explained that Barclays had a debenture for £100,000 to cover "daylight exposure" under MT100s/MT103s, which were issued by a paying bank when funds were pending into their account but had not yet been credited – this enabled UTL to use these funds before the cash actually arrived.

(5) Mr Spurgeon stated that UTL had never had an overdraft "in the conventional sense". He agreed with Mr Hussey that they had some flexibility with daylight exposure. Mr Spurgeon stated that he didn't think Barclays ever lent them money. On being taken to the financial statements, he wasn't able to explain what this had related to.

65. Mr Walker-Nolan submitted that the entries in the financial statements relating to "bank loans and overdrafts" were consistent with UTL having had an unauthorised overdraft with Barclays. That is one possibility, but others, equally plausible, include that there was an agreed overdraft with Barclays. Both types of overdrafts are borrowings, and we find that UTL did have an overdraft with Barclays, and that this was on the balance of probabilities up to a maximum of £100,000 (based on the evidence from Mr Case and the amount of the debenture) but have no evidence on which to make a finding as to the applicable interest rate.

66. As to the possibility of borrowing from other banks, Mr Spurgeon's witness statement said that "we" tried to obtain finances from banks but were unable to (and in this context we treat "we" as a reference to both UTL and UGL). Mr Hussey made a similar statement. Giving evidence, Mr Hussey could not remember which banks they had approached, referring only to Barclays, and noting that Mr Spurgeon had been managing director at the time. Mr Spurgeon could not confirm that he had ever approached any bank other than Barclays for finance. We find that UTL did not approach any bank other than Barclays for finance.

67. There was also evidence that UTL had borrowed from other sources:

(1) The decision in Unistar 2013 refers to UTL having borrowed from Cairns Investment Holdings Ltd, shareholders in PNC, which had been arranged by Mr Case – this appears to be an example of a Third Party Directly Funded Short Term Loan.

(2) Mr Spurgeon stated that UTL had borrowed from WellTech and from Tony Granger at ToTel. They had been borrowing "substantial amounts" in 2000-2002, some loans being £500,000 or £1 million. The interest rates were not less than 36%.

(3) Mr Case referred to the turnover of UTL and stated that in 2000, prior to him lending to UTL, UTL's gross turnover was £35 million. In 2001, after he was lending money, it increased to £110 million. Whilst this level of turnover more than tripled following the commencement of the lending relationship with Mr Case, it is still an enormous amount in its own right, and the evidence (and indeed submissions) as to how this had been funded were sparse. All we have to go on are the financial statements of UTL. Given the very low equity capital in the company, the only conceivable way in which UTL could have operated to achieve a turnover of £35 million would have involved borrowing. We infer that some of this borrowing was in fact from Barclays; but given the amounts involved we also infer that there were other significant loans.

68. In terms of the cost of borrowing, we have set out above our findings in relation to the interest rates on the loans from Mr Case. However, we also note that in the context of explaining the loans which were made between UTL and UGL (described further below), the interest rate for such loans was initially set at 5%. However, Mr Hussey and Mr Spurgeon both stated that in 2004 the directors agreed to increase the rate to 18%, and that this change was made on the basis that the actual cost of external borrowing for UTL was in fact by then

averaging around 10-15%. Mr Spurgeon's statement added that when UTL was extending credit to UGL in this way it would make a profit against its cost of borrowing.

69. Mr Hussey and Mr Spurgeon were both directors of UTL and UGL at the time the interest rate was increased to 18%; and their evidence as to the rationale for setting it at 18% (rather than a higher or lower rate) is consistent with each other. We do not have the evidence which helps us to understand the statement that UTL's cost of external borrowing was averaging around 10-15%. The evidence adduced on behalf of UTL by Mr Case is that he was lending to UTL at 36.5% (or higher where he sourced the funds from others). If the average cost of borrowing was 10-15%, this suggests that UTL had other sources of funding where it was paying significantly less than 10%.

70. We accept the evidence of Mr Hussey and Mr Spurgeon as to their recollection of their average borrowing cost from around 2004, but this does reinforce our concern as to the gaps in the information available to us as to the other borrowings of UTL.

UGL

Background

71. UGL was incorporated on 16 May 2003. UGL was initially intended to enter the then new market emerging in voice calls between computers. When that venture was not successful, UGL started to trade in the wholesale of mobile telephones, ie the same business as UTL, in order to make use of the losses which had been realised in that company.

72. The directors were initially Mr Hussey and Mr Spurgeon. Georgi Avaliani was also a director from 30 August 2003 until 30 April 2005. Mr Hussey resigned as a director on 1 February 2010, was reappointed on 1 January 2013, resigned on 24 April 2015 and was reappointed on 20 November 2017, on which date Mr Spurgeon resigned.

73. The shareholdings were as follows:

	£1 ordinary shares	**£1 redeemable preference shares (issued 12 December 2003) (the "Preference Shares")**
Mr Spurgeon	270	150,000
Shirley Spurgeon	180	100,000
Mr Hussey	450	250,000
Mr Avaliani	50	0
Rohen Badkar	50	0
Total	1000	500,000

74. UGL's Articles of Association provided that the Preference Shares confer the right to a fixed cumulative preferential dividend at the rate of 7% (net of the imputed tax credit available to shareholders, if any) on the amounts for the time being paid up or credited as paid up thereon.

75. On 1 October 2009 Ms Spurgeon transferred her ordinary shares to Mr Spurgeon, and Mr Avaliani and Mr Badkar transferred their shares to Mr Spurgeon and Mr Hussey, such that Mr Spurgeon and Mr Hussey then each held 50% of the ordinary shares. It was stated that Mr Spurgeon redeemed his Preference Shares on that date.

76. UGL ceased trading in February 2010. At some point (prior to 20 February 2013) Mr Hussey redeemed 28,000 Preference Shares and Ms Spurgeon redeemed 70,000 Preference Shares.

77. On 17 September 2017 Mr Spurgeon transferred his ordinary shares to Mr Hussey, Ms Spurgeon redeemed her remaining Preference Shares and Mr Hussey redeemed 100,000 of his

remaining Preference Shares. UGL also changed its name to Graded Network Limited around that time, but we continue to refer to it as UGL.

Intercompany Loans

78. Mr Spurgeon was also a shareholder and director of Resin8 Ltd ("Resin8"), a distributor of surfboards. UTL, UGL and Resin8 operated from the same business premises and often shared administrative services. Although there were no intercompany shareholdings, the companies supported each other financially through the use of intercompany loans.

79. Intercompany loans usually arose out of a verbal request, with payments subsequently authorised (either by email or verbally) and recorded in a loan schedule at the end of every month. The calculation of interest was based on the previous month's month-end balance and was charged at a single rate agreed between the companies.

80. In 2003 the companies initially agreed to set the interest rate for intercompany loans at 5%. By way of example, on 16 September 2003 UGL requested a loan of £50,000 from UTL, and the terms were that it would be repaid within two months at 5%.

81. In 2004 the companies agreed to increase the interest rate for intercompany loans to 18%. This new rate applied to a loan which was requested by UTL from UGL for £125,000, the terms were that repayment was to be "upon request".

82. Mr Hussey stated that this rate of 18% was considered to be fair and commercial, and his witness statement referred to this intercompany borrowing as being preferable to further external loans. In cross-examination as to what other loans had been entered into by UGL, Mr Hussey referred to loans from Ian Gillespie of Phone Logistics and Tony Granger of ToTel and True Solutions. No documentary evidence was produced in respect of any such loans; and Mr Hussey later couldn't recall whether these loans had been made to UTL or UGL.

83. On 1 May 2005 a loan agreement was entered into between UTL and Resin8 (the "UTL/Resin8 Loan Agreement") which provided that:

(1) loans may be made by agreement of one director of each company where the transfer of money is not detrimental to the other company's trading ability or its viability;

(2) the money advanced can be used for any purpose (subject to it being allowed by the company's memorandum and articles of association);

(3) each company will identify these loans as short term and agree the total amount owed/owing at the end of each month;

(4) interest will be charged at 18% (fixed);

(5) the company that is owed the loan will not be allowed to demand its repayment at any time; and

(6) all outstanding loans become payable immediately upon termination of the agreement.

84. We did not have a copy of a loan agreement between UGL and UTL. Both Mr Spurgeon and Mr Hussey stated that they recalled a similar loan agreement existing between UTL and UGL but that they have not been able to find a copy. There was an email chain from 18 October 2005 to 19 October 2005 showing that a loan agreement between "utl" and "group" was drawn up, referencing the 18% rate. We consider it is more likely than not that a loan agreement was entered into between UTL and UGL on similar terms to the UTL/Resin8 Loan Agreement.

85. We had very little documentation evidencing requests for loans to be made between UTL and UGL:

(1) there were three letters from UGL to UTL dated 16 September 2003, 7 October 2003 and 17 October 2003 requesting loans. They each state that the loan will be "repaid within two months" and the interest rate is 5%. The loans were repaid between 4 and 37 days later. Ms Wild suggests between 4 and 21 days; Mr Drewe between 4 and 37 days. Our finding does not indicate a conclusion that Mr Drewe's opinion is correct – we have insufficient information to decide. It simply reflects that this is the widest range which is agreed, and we do not consider that the difference between 21 days and 37 days is of any significance in this context; and

(2) there were two letters from UTL to UGL dated 4 February 2004 and 9 June 2004 requesting loans. The first letter said the loan will be repaid "upon request" and the second letter that it will be repaid "within two months" and both state an interest rate of 18%.

86. There was no documentation in respect of any other loans. Mr Hussey explained that the paperwork was not always completed for intercompany loans because of how frequently the funds were moving, and the passage of time means that further documentary evidence is not available. Nevertheless, it is clear that many more loans were advanced between UTL and UGL – Ms Wild prepared the following table based on the information as to loan balances at the end of each month:

	UTL's books (£)	
	UGL loans	**UGL total intercompany balances**
30 April 2004	(95,859)	
31 May 2004	(95,859)	
30 June 2004	(155,859)	
31 July 2004	(135,859)	
31 August 2004	(109,859)	
30 September 2004	(99,859)	
31 October 2004	(74,859)	
30 November 2004	(64,859)	
31 December 2004	(44,859)	
31 January 2005	(34,859)	
28 February 2005	(34,859)	
31 March 2005	(34,859)	
30 April 2005	54,762	
31 May 2005	28,955	
30 June 2005	(53,620)	
31 July 2005	(72,925)	
31 August 2005	(72,925)	
30 September 2005	(72,773)	
31 October 2005	(72,773)	
30 November 2005	(72,773)	
31 December 2005	(77,773)	
31 January 2006	164,230	170,816
28 February 2006	207,268	216,406
31 March 2006	1,903,268	1,916,632
30 April 2006	790,631	833,239
30 May 2006		912,258

87. Before the end of 2005, the maximum amount that UGL had owed to UTL was £54,762 (at 30 April 2005). The borrowings went both ways, usually with the amount owing being less than £100,000.

88. Being asked what prompted the sudden increase in the amount of borrowings in March 2006, Mr Spurgeon said that this sum was not large in the context of trading in mobile phones – two pallets would cost around £1million, so this amount may be just one or two deals.

89. The companies also paid invoices on behalf of each other. No interest was charged on these movements in intercompany balances (which are referred to in the expert reports of Ms Wild and Mr Drewe as being the "Recharges").

EXPERT EVIDENCE AS TO ACCOUNTANCY

90. As a preliminary matter we note that Mr Drewe's instructions were to "consider the appropriate rate of interest that would provide [UTL] with an adequate indemnity for the commercial losses it incurred from 2006 to 2013 due to [HMRC's] denial of VAT input tax credits". Mr Puzey drew attention to this and noted that such an instruction based on "adequate indemnity" is not consistent with the decision of the Supreme Court in *Littlewoods*, which emphasised that the approach should be to award interest to provide "reasonable redress" for the monies wrongly withheld. Such criticism is correct. Furthermore, seeking an opinion on the "commercial losses" incurred due to the denial of VAT input tax credits also goes beyond both s84(8) and *Littlewoods*. We had regard to this when considering the opinions expressed by Mr Drewe, but considered that this error in Mr Drewe's instructions did not in this instance adversely affect the reliability or the usefulness of his report or the opinions expressed therein.

91. Whilst we did have the benefit of a joint statement (setting out areas of agreement between the experts), such joint statement was very short and addressed a limited number of the areas on which both experts had expressed opinions. We have therefore set out the approach taken and opinions expressed by each of Mr Drewe and Ms Wild (including any statements of agreement made at the hearing), then the terms of the joint statement and finally drawn our conclusions on the basis of their evidence.

UTL

92. We had the following expert reports:

(1) report of Mr Drewe (instructed on behalf of UTL) dated 18 January 2019, supplemental report dated 1 October 2019 and a supplemental statement dated 22 January 2020. Mr Drewe is a chartered accountant and a partner in the Forensic and Investigation Services department at Mazars LLP;

(2) report of Ms Wild (instructed on behalf of HMRC) dated 28 June 2019, supplemental report dated 8 November 2019, supplemental statement dated 21 January 2020. Ms Wild is a fellow of the ICAEW and an employee of HMRC; and

(3) joint statement of the experts dated 3 December 2019.

93. Mr Drewe had been provided with UTL's financial statements for the periods ending 31 October 1999 to 30 April 2006 (which are sometimes referred to as FP 1999 to FP 2006), and subsequently for the period ending 20 April 2007 and Mr Case's witness statement and the exhibits thereto. Mr Drewe's evidence included:

(1) In the periods ended 31 October 2001 to 30 April 2006, UTL was principally financed via monies made available from an unconnected third party (as described in the financial statements).

(2) UTL was financed by bank loans and overdrafts totalling £177,494 as at 31 October 2001 and £34,706 as at 31 October 2002. These amounts had been paid off by 30 April 2014.

(3) He had analysed the information provided to identify the amounts owed by UTL to Mr Case, or to third parties on loans which Mr Case arranged, in the period from

November 2000 to January 2008 pursuant to the Short Term Loans and the Long Term Loan and had compared the results to the balance of the outstanding Short Term Loans and the Long Term Loan as reported in the financial statements.

(4) The information provided by Mr Case was not complete. Mr Drewe had been instructed that UTL and Mr Case had not agreed which specific Short Term Loans were consolidated into the Long Term Loan, although they had agreed the amounts involved. He had compared the amounts UTL owed to Mr Case from the documentation provided by Mr Case and UTL's audited financial statements (to FP 2006) and found that the amounts were the same. In his opinion it is reasonable to rely on the documentation provided by Mr Case in relation to the loans he provided to UTL.

(5) Mr Drewe was able to track examples of Direct Short Term Loans, Funded Short Term Loans, Third Party Directly Funded Short Term Loans and a Combined Short Term Loan. He considered that there was sufficient information to suggest that Mr Case typically charged an implied interest rate of 36.5% on Direct Short Term Loans and Combined Short Term Loans and 44%-55% on Funded Short Term Loans and Third Party Directly Funded Short Term Loans.

(6) Mr Drewe produced (at Appendix 2B to his first report) his analysis of the Short Term Loans. This sought to identify the amount and dates of loan advances and repayments (both as to principal and interest) and using this information to calculate an implied interest rate for each loan.

(7) The following rates of interest could be considered by the Tribunal:

(a) interest rates on the Short Term Loans, noting that 36.5% was the most common rate and the rate Mr Case applied when he provided the funds directly himself, or 54.75% being the implied rate applied to four loans which were financed by third parties in the seven months prior to the VAT credits being withheld;

(b) interest rates applicable to the Long Term Loan, which had varied between 10% and 18% at various times; and

(c) a combination of the above, considering it could be relevant to consider the specific loans that were outstanding at the date that the credits were denied.

(8) He considered that, as at 22 May 2006 (being 10 working days after the April 2006 VAT input tax credit was submitted), the following three loans represented UTL's extant borrowing:

(a) Loan 0146JOE, a Short Term Loan of £325,000, provided by Mr Case on 5 May 2006 (at a rate of interest of 36.5%);

(b) Loan 0147JOE, a Short Term Loan of £175,000, provided by Mr Case on 8 May 2006 (at a rate of interest of 54.65%); and

(c) The balance of £1,573,000 on the Long Term Loan (at a rate of 12.5% interest).

(9) He considered it was reasonable to assume that UTL would have used the first £500,000 of the VAT repayment to repay the Short Term Loans as they were incurring interest at the highest rates, with the balance (from the 05/06 repayment) and the entirety of the 06/06 repayment being set against the Long Term Loan. He identified an average rate, calculated on the basis that the total sums withheld were split across the interest

rates at which UTL was borrowing when the payments were withheld, as if being used to discharge those loans, so that:

(a) The first £325,000 of the withheld April 2006 amount be applied at 36.5%;

(b) The next £175,000 of the April 2006 sum be applied at 54.65%;

(c) The remaining amount of the April 2006 sum (£104,939.14) and the withheld May 2006 sum (£328,514.91) be applied at 12.5%.

(10) This average rate, the "UTL Combined Rate", was 28.76%:

$$\frac{(325{,}000 \times 36.5\%) + (175{,}000 \times 54.65\%) + ((104{,}939 + 328{,}514) \times 12.5\%)}{(325{,}000 + 175{,}000 + (104{,}939 + 328{,}514))} = 28.76\%$$

(11) Another rate that was available for consideration was the weighted average interest rate on the loans outstanding as at the date that the VAT was withheld (the "UTL Weighted Average Combined Rate") – this uses the total balance on the Long Term Loan. Having regard to the three loans outstanding at that time this was calculated as being 19.8%:

$$\frac{(325{,}000 \times 36.5\%) + (175{,}000 \times 54.65\%) + (1{,}573{,}000 \times 12.5\%)}{(325{,}000 + 175{,}000 + 1{,}573{,}000)} = 19.8\%$$

(12) He had not considered the commerciality of these rates or whether other forms of financing were available to UTL at lower rates.

(13) Addressing the report prepared by Ms Wild:

(a) he did not consider there to be sufficient information to assess whether interest on the loans provided by Mr Case was accurately reflected in the financial statements (see [94(5)]). He remained satisfied that it was reasonable to rely on the documentation adduced by Mr Case; and

(b) as to whether UTL was repaying loans in line with their agreed terms, he drew attention to the significant repayments of principal on the Long Term Loan, noted that the examples given by Ms Wild of loans being re-negotiated all related to the Long Term Loan, and that he had not seen evidence of Short Term Loans being re-negotiated (other than in the context of the Combined Short Term Loans).

94. Ms Wild's evidence was as follows:

(1) Commenting on whether the loans have been accurately described as such in the accounts of UTL, Ms Wild noted that if they are not in nature loans they may be profit-sharing arrangements (as supported by Mr Hussey and Mr Spurgeon's witness statements and narrative in the FP 2004 financial statements) or capital (as suggested by Mr Iles). Even if they are a profit-sharing arrangement, as the principal was repayable and it was not akin to a dividend, in her view it is still a cost of financing the business albeit calculated on an "unusual basis". Even if the loans are considered to be capital or quasi-equity, the correct accounting may still be to treat them as liabilities in the balance sheet, with the cost of financing recognised in the profit and loss account.

(2) Ms Wild had been instructed to take the Analysis of Loans prepared by Mr Drewe at face value. She has done similarly in respect of the Analysis of Short Term Loans (Mr Drew's Appendix 2B) and Analysis of Long Term Loan (other than for interest payments up to October 2002). She has assumed that the Analysis of Loans is a complete and accurate list of the loans provided by Mr Case to UTL and accurately reflects the outstanding loan balances at any date, and that the Analysis of Short Term Loans and

Analysis of Long Term Loan accurately record the dates and amounts of loans, repayment and interest paid (from November 2002 onwards). She tested some samples to confirm her understanding of the transactions and content and from the samples she confirmed that Mr Drewe's schedules accurately reflected the supporting documentation.

(3) For FP 2002, FP 2004, FP 2005 and FP 2006, the loans are recognised in the financial statements at the same amounts as in the Analysis of Loans provided by Mr Drewe. There is a discrepancy for FP 2007, but she concludes that it is most likely that in the FP 2007 statements the loan has been offset against the amounts owed to UTL by UGL and Resin8 (albeit that such offsetting is not in accordance with Companies Act 1985).

(4) Until December 2002 Mr Case charged a commission which was calculated on the margins achieved in the deals. After that he charged interest at the rates identified by Mr Drewe.

(5) Ms Wild prepared a comparison of the interest/commission shown in the financial statements and that from Mr Drewe's reports, showing considerable inconsistency:

	Financial statements (£)	**Mr Drewe's analysis (£)**	**Summary of Ms Wild's comments**
FP 2001	Not Disclosed ("ND")	7,000	Does not know how much commission was charged. Assumes this £7,000 is incomplete.
FP 2002	1,191,452	712,000	Mr Drewe's analysis incomplete as Mr Case did not keep a record of commission
FP 2004	559,474	500,806	Amounts broadly reconcile. Interest appears to omit that on the Short Term Loans which were rolled up to become Long Term Loan
FP 2005	ND (insufficient data)	480,145	Considers figure in Mr Drewe's analysis to be broadly correct
FP 2006	539,476	494,529	Figures appear to be broadly correct
FP 2007	128,813	92,397	Figures broadly agree. Financial statements do not appear to include accrued but unpaid interest.

(6) UTL generated gross profit of £11,786,467 in the five periods to 30 April 2004. Gross profit is sale price of the mobile phones less purchase price and does not take account of other costs, eg operating costs, directors' remuneration, dividends and tax. (This £11m was referred to by Judge Porter.) Ms Wild summarised the profit and loss account for these five periods as follows:

	Total to 30 April 2004 (£)	Ms Wild's notes
Gross profit	11,786,467	
Operational costs	(6,583,423)	
Interest/commission payable on loans provided by Mr Case	At least (2,197,617)	doesn't include commission for FP 2001
Directors' remuneration	(1,860,346)	
Dividends	(1,057,594)	
Tax	(246,787)	

Other	(12,445)	Eg other income, bank interest received, less bank charges and bank interest paid
Adjustment to reserves	(27,272)	In respect of new preference shares issued
Retained loss at 30 April 2014	(199,017)	

(7) It is not clear what the agreed terms of the loans were from Mr Case (particularly interest rates or repayment terms). She disagrees that prior to April 2006 UTL had been returning the loans within those terms:

(a) noting the repayments of £150,000 in both December 2003 and February 2005, and the repayment of the additional £1 million which had been advanced, UTL has never made any significant repayments on the Long Term Loan;

(b) Mr Case has provided three examples of loans being re-negotiated as they were not being repaid on time;

(c) Mr Spurgeon had indicated that the company was close to liquidation in May 2003;

(d) almost since the outset the loan balance has been at least £1 million and at least £1.5 million since September 2002;

(e) the outstanding loan balance had gradually increased in the months immediately prior to the VAT being withheld; and

(f) in the eight months prior to April 2006 there were three loans taking three months or more to repay

(8) Ms Wild initially described the UTL Combined Rate as the weighted average interest rate applicable to the three extant loans identified by Mr Drew, but stated that she was unable to conclude as to whether the UTL Combined Rate, or indeed any rate based on the interest rates paid on loans by Mr Case provides an adequate indemnity for losses as she considered this to be outside of her expertise as an accountant. Ms Wild subsequently corrected her description of the UTL Combined Rate as a weighted average, and this prompted the use of two alternative average interest rates as set out by Mr Drewe.

(9) She did not know what UTL would have done with the VAT repayments if it had received them at the usual time, but did set out the information she received based on HMRC records of when payments had been made in respect of VAT claims for the periods April 2005 to March 2006.

VAT period	Date VAT repayment paid (*or authorised)	Days from end of VAT period to VAT repayment	Loan transactions
04/05	1 June 2005*	32	3 June 2005 repayment
	13 July 2005	74	15 July 20005 repayment and new loan on same date
05/05	17 July 2005	43	15 July 2005 repayment and new loan on same date
	28 July 2005	58	1 August 2005 repayment and new loan on 29 July 2005
	26 August 2005	87	No repayments within a month and new loan on 7 September 2005
	29 September 2005*	121	14 October 2005 repayment

06/05	12 August 2005	43	17 August 2005 repayment
07/05	6 September 2005	37	No repayments within a month and new loan on 7 September 2005
	7 October 2005*	68	14 October 2005 repayment
08/05	29 September 2005*	29	14 October 2005 repayment
09/05	31 October 2005	31	No repayments or new loans within a month
10/05	24 November 2005	24	9 December 2005 repayment
11/05	4 January 2006	35	No repayments within a month and new loan on 23 January 2006
12/05	30 January 2006	30	23 February 2006 repayment and new loan on 17 February 2006
01/06	2 March 2006	30	8 March 2006 repayment
02/06	27 March 2006	27	18 April 2006 repayment
03/06	4 May 2006	34	17 May 2016 repayment and new loans on 5 May 2006 and 8 May 2006

(10) On the basis of the information above, Ms Wild notes that seven VAT repayments were followed by a loan repayment within a week, of which three had received a new loan around the same date. If UTL was specifically using the VAT repayments to repay the loans she would have expected each VAT repayment to be followed soon after by a loan repayment. This does not appear to be the case. Thus, in her view, there is nothing to suggest that UTL was specifically using the receipts of the VAT repayments to repay the loans.

(11) Ms Wild observed that in the five accounting periods to FP 2004, Mr Spurgeon and Mr Hussey took remuneration and dividends of £2,917,940, and sought to calculate what she described as the "hypothetical savings" that UTL could have made if Mr Spurgeon and Mr Hussey had taken more modest amounts of £150,000 each per annum for these five years. She assumed that cash saved would be used to reduce UTL's borrowing, which in turn would reduce the interest charge for subsequent years. Acknowledging that this was only approximate, she considered that by 30 April 2004 UTL would have saved £2,112,232 and by 30 April 2007 it would have saved £2,858,543. The consequence was that from October 2003 the revised loan balance would have regularly dropped below zero, indicating that whilst UTL would still have needed short term financing in order to fund the deals that it did actually make, these would have been regularly repaid in full. Between January 2005 and February 2006 and from May 2006 onwards, the revised loan balance would have been below zero. This indicates that UTL would have been able to fund its trade from its own resources without having to borrow. We note that in cross-examination Mr Drewe did not disagree with the calculation of these savings.

(12) She considers the intercompany loans (between UTL, UGL and Resin8) in detail in her report on UGL. Her key points relevant to UTL are that the terms of the loan were not clear as to the repayment terms. Interest was initially charged at 5% and later at 18%, and was charged on the amount described as loans and not on the total intercompany balance which included recharges in respect of the sales ledger.

(13) Ms Wild summarised the information as to the intercompany loans from the documentation exhibited by Mr Hussey. At 30 April 2006, UTL was owed £914,816 by UGL and £467,961 by Resin8. All of the intercompany balance with UGL and half of that with Resin8 had arisen since December 2005. At the same time UTL was borrowing from Mr Case (via his associates) at an interest rate of 55%. If UTL had not lent money

to, or paid costs on behalf of, UGL and Resin8, or if the intercompany balances had been settled promptly, UTL could have reduced its borrowing from Mr Case.

(14) Whilst Mr Case blames the failure of UTL on HMRC's decision to withhold the VAT, he had not addressed other factors including bad debts, high level of directors' remuneration and dividends, intercompany lending and legal action by a customer. She considered the most significant factors contributing to UTL's decline to be the high level of directors' remuneration and dividends and the intercompany lending in 2006. Without this, UTL could have built up significant cash reserves to fund its trade, such that from January 2005 onwards UTL would not have needed to borrow from Mr Case.

95. In the joint statement (which we have treated as supplemented to the extent referred to below by the supplemental statements which address the calculation of average rates) Mr Drewe and Ms Wild agreed:

(1) Even if the loans are considered to be capital or quasi-equity, the correct accounting may still be to treat them as liabilities in the balance sheet, with the cost of financing recognised in the profit and loss account.

(2) Both interest and commission relating to loans provided by Mr Case would fall under the FRS4 definition of a finance cost.

(3) At the beginning of FP 2004, UTL had an accumulated profit in its profit and reserve account of £155,122. At the end of that period, it had an accumulated deficit of £199,017, which arose as a result of a significant reduction in turnover (which led to a decrease in gross profit), operating costs not decreasing in line with turnover, which together then led to a reported loss after tax, and dividends were then paid.

(4) It is not clear from the available information what the precise "terms" of the loans were. They understand from the available witness evidence that the Short Term Loans were intended to provide short term funding.

(5) The movements in the outstanding balance on the Long Term Loan were as set out at [56] above.

(6) While noting that the appropriate rate of interest is outside her expertise, Ms Wild agrees the calculations underpinning the range of interest rates advanced by Mr Drewe.

(7) The withholding of the VAT tax credits "would have had a significant impact on UTL's ability to continue to trade". There were other contributing factors - bad debts could have contributed to UTL's failure (although they had not seen any further evidence of UTL suffering from bad debts other than a potential bad debt in April 2003), if the directors' remuneration or dividends had been less in FP 2001 to FP 2007 there would have been more funds available in the business and the legal action by a customer could have contributed to UTL's failure.

96. We found the reports prepared by both Mr Drewe and Ms Wild to be very useful and their evidence at the hearing was clear and informative, and their joint statement is very helpful. If anything, we considered that such joint statement understates the level of agreement between them. We accept the evidence contained in the joint statement and also note the following:

(1) To reiterate the obvious, Mr Drewe and Ms Wild prepared their reports on the basis of the evidence adduced by the witnesses of fact, which was supplemented by additional records Ms Wild obtained from HMRC as to the VAT repayment history. Their opinions on the level of actual borrowings therefore focused on the loans from Mr Case to UTL, albeit that the reconciliations conducted by Mr Drewe between the records available and the financial statements showed that at each balance sheet date from FP 2002 to FP 2006

the only loans to UTL were those advanced by Mr Case or arranged by him (whether directly funded or otherwise).

(2) Appendix 2B demonstrates the evidential difficulties faced in seeking to compile a complete record of the loans, although Ms Wild confirmed that, by conducting a sampling exercise, she was able to agree that this analysis is an accurate representation of the information which Mr Case had produced. But it is clear that producing even this required Mr Drewe to take decisions as to how to allocate payments – the final column of the appendix he produced contains notes recording the decisions he had to take or difficulties faced, and we note that for loan requests made from 2000 to 2003 a common comment is that it is not clear as to what a receipt shown in Mr Case's bank statement from UTL relates. The potential significance of this is that this Appendix 2B was a key part of Mr Drewe's conclusions as to what loans were outstanding as at May 2006. However, we do note that after 2003, whilst there continued to remain significant gaps in the documentation, the Loan Request Forms and invoices did sometimes include more information than earlier records as to the rate of the loan, or as to the total interest charged on a particular loan, which did reduce the need for the exercise of discretion in seeking to allocate payments shown on bank statements.

(3) This Appendix is used to support Mr Drewe's conclusion that loans 0146JOE (of £325,000) and 0147JOE (of £175,000) were outstanding as at May 2006. Mr Drewe produced the UTL Combined Rate on the basis of what it is "reasonable to assume" that UTL would have done with the VAT repayment. However, the appendix showed repayments against loan 0146JOE (which had an implied interest rate of 36%) as having been made from 16 June 2006 to 6 March 2008, whereas loan 0147JOE, with an interest rate of 54.65%, is shown as still outstanding. Given that this loan carries a higher rate of interest, it is not at all clear to us why UTL did not repay this loan first (and we note that other sums were advanced and repaid after the August 2006 on loans bearing lower rates of interest). Furthermore, this is not supported by the unchallenged evidence from Ms Wild (see [94(9)] and [94(10)]) as to the pattern of new loans and loan repayments following a VAT repayment. We do not accept Mr Drewe's opinion that it is "reasonable to assume" that had the VAT been repaid then it would have first been applied against loan 0147JOE.

(4) The table prepared by Ms Wild showing the differences between the interest/commission shown in the financial statements and that from Mr Drewe's reports illustrates the deficiencies in the information before us as to the borrowings of UTL. It may well be that the "missing" interest was interest payable on other loans from Mr Case (or on loans which he arranged) in respect of which records were not available. But it may also be that this related to loans from other sources.

(5) We consider the timing of VAT repayments in the context of discussing the period for which the interest should be awarded. We do however note that there was no information as to when the VAT return was submitted in each period, and the day count is therefore from the end of the VAT period rather than from the date of submission of the relevant return.

UGL

97. We had the following expert reports:

(1) report of Ms Wild (instructed on behalf of HMRC) dated 27 June 2019;

(2) report of Mr Drewe (instructed on behalf of UGL) dated 1 October 2019; and

(3) joint statement of the experts dated 3 December 2019.

98. Ms Wild had reviewed the financial statements of UGL for the 18 month period ended 31 October 2004 through to and including the year ended 31 October 2016 (ie FP 2004 to FP 2016). Her report states:

(1) Mr Hussey and Mr Spurgeon describe the intercompany loans as short terms arrangements repayable within a week or a month respectively, but this is not supported by the documents:

(a) loan requests she had seen refer to some loans as repayable in 2 months and another as repayable on demand. There must have been other requests based on the movements in the balances, but she had not seen these;

(b) an agreement to "formalise the approach and procedure" regarding loans between UTL and Resin8 states that the lender "will not be allowed to demand repayment". Ms Wild notes that the witness evidence was that a similar document existed between UTL and UGL; and

(c) the loan balances per the management intercompany schedules appear to show loans being repaid over a 12 month period.

(2) Interest was charged on the loan part of intercompany balances, initially at 5% and later at 18%. No interest was charged on the movements in intercompany balances which relate to recharging.

(3) Ms Wild produced a table of intercompany balances based on the management information available (see [86] above). She noted that the balances shown in the financial statements do not match these figures, and does not know why.

(4) Mr Spurgeon and Mr Hussey state that they received regular dividends from UGL until the VAT was withheld by HMRC. Ms Wild disagreed. UGL did not pay regular dividends and was not able to do so:

(a) UGL's financial statements do not show a surplus in the profit and loss reserve in any period up to FP 2006;

(b) the FP 2010 financial statements include a contingent liability for the accumulated preference dividends at 31 October 2009 of £198,042. If no preference dividends had been paid, the accumulated preference dividends to that date would be £204,750. Assuming the accumulated dividend in the financial statements is calculated correctly, preference dividends of £6,708 had been paid between 2003 and 2009, which is roughly 2.5 months of preference dividends; and

(c) UGL cannot pay dividends on the ordinary shares until the accumulated preference dividends have been paid in full.

(5) Ms Wild was asked to consider whether and how the dividend rate of 7% on the Preference Shares would affect the overall cost of borrowing on the basis that Mr Spurgeon and Mr Hussey had each stated that the preference shares were "essentially a loan" provided to UGL (and used the rate to lower the cost of borrowing claimed by UGL). Ms Wild agreed that this would reduce the cost of borrowing below the 18% on the intercompany debt. Assuming that the market value of the Preference Shares was their nominal value and that interest was only charged on the part of the intercompany balance representing cash loans, the cost of borrowing based on the intercompany loans and intercompany balances at 30 April 2006 (see [86] above) was 13.3%:

$$\frac{(500{,}000 \times 7\%) + (790{,}631 \times 18\%)}{(500{,}000 + 833{,}329)} = 13.3\%$$

(6) Mr Spurgeon and Mr Hussey state that it would not have made commercial sense to borrow from external lenders when funds were available within the group structure. Ms Wild was asked whether in her opinion funds were available. She considered that "funds available" would be surplus cash that was not required by the potential lender for the purposes of funding its own trade and which it was not prohibited from onward lending. UTL was funded by Mr Case. On the basis of her understanding that loans provided by Mr Case to UTL were intended to provide short term financing to fund particular trading transactions, UTL would not be in a position of having surplus funds.

(7) UGL redeemed £378,000 preference shares between 2009 and 2017 when it did not appear to have sufficient distributable reserves or cash to do so. Funds appear to have been used for the redemption in preference to repaying the intercompany borrowing from UTL.

99. Mr Drewe's report included:

(1) Interest was only charged on the loans between UTL and UGL, rather than on the total indebtedness (ie interest was not charged on the recharges). At face value, he does not consider this to be unusual.

(2) He notes that the documentary evidence relating to the intercompany loans does not appear to be complete and there are certain inconsistencies in the information. However, the documents he has seen support that interest on the loans was initially being charged at 5% and from 2004 at 18%.

(3) Looking at the cost of debt of UGL, and treating the Preference Shares as debt for this purpose, he considers that it is 13.7% (using only that part of the intercompany balance which consists of loans):

$$\frac{(500{,}000 \text{ x } 7\%) + (790{,}631 \text{ x } 18\%)}{(500{,}000 + 790{,}631)} = 13.7\%$$

100. The joint statement recorded that it is agreed as between the experts that the rate of interest at which UGL was borrowing, based on UGL's balances of 30 April 2006, was:

(1) 13.7% if amounts relating to recharges are not included – this was Mr Drewe's calculation and in his experience a company's trade creditors would not be included in an assessment of its cost of debt; and

(2) 13.3% if amounts relating to recharges are included – this was Ms Wild's calculation, basing the calculation upon the total indebtedness of UGL.

101. As with their reports in respect of UTL, we found the reports of Mr Drewe and Ms Wild to be very helpful. The key point of disagreement between them was as to whether the cost of funding of UGL should take account of the intercompany balances relating to recharges, and we prefer Mr Drewe's conclusions in this regard, accepting his evidence that in his experience a company's trade creditors would not be included in an assessment of its cost of debt.

EXPERT EVIDENCE AS TO BANKING

UTL

102. We had the following expert witness reports:

(1) report of Mr Iles (instructed on behalf of UTL) dated 18 January 2019, supplementary report dated 2 October 2019 and second supplementary report dated 22 January 2020 (prepared in respect of both UTL and UGL). Mr Iles had spent more than 40 years working in mainstream banking with Barclays in various roles including as branch manager, operations manager, credit risk director and chief risk officer. He was

involved with lending money to business customers throughout his career. He had been a Credit Risk Director from 2003 to 2005 (across all industry sectors);

(2) report of Ms Paul-McCrossen (instructed on behalf of HMRC) dated 28 June 2019. Ms Paul-McCrossen is an employee of HMRC, currently a transfer pricing economist but previously a corporate finance specialist. She joined HMRC in around December 2003, and prior to that had worked in investment banking (for JP Morgan Fleming and Salomon Brothers), where her roles involved managing transactional teams in global debt capital markets; and

(3) joint statement of the banking experts dated 3 December 2019.

103. Mr Iles' evidence included:

(1) Working capital finance is available from a wide range of providers. He had experience of the business models and operations of private moneylenders through them being customers of Barclays and in turn through customers of that bank who had borrowed money from such sources. Private moneylenders tend to be discreet about their businesses so there is little public data available as to the extent of their activities but he is aware of their presence in the market from his banking experience both through them being clients of banks (with whom some borrow to fund their activities) and from clients who have been recipients of their loans. They have very diverse operating models.

(2) Commenting on UTL's potential ability to raise finance from traditional sources (in the period 1999 to 2007) he considered that mainstream banks would not have assessed lending by way of overdraft or short-term loan as being attractive without the provision of tangible security from a third party such as a director. This opinion was based on its lack of fixed assets, its need to grant credit to purchasers of phones whilst paying suppliers on delivery and minimal equity.

(3) Mr Case's due diligence appears to have been limited to his assessment of Mr Spurgeon's ability coupled with his own knowledge of the type of market. This is not unusual with private moneylenders. His loan facilities to UTL were high risk and could also be considered to be quasi capital or substitute equity.

(4) UTL would not have been able to borrow from a mainstream bank, certainly not at the levels which Mr Case provided, but for comparison purposes a bank is likely to have charged "something like" 4% over its base rate or over LIBOR for an overdraft. Additionally, a bank would charge an arrangement fee, typically around 1%. In cross-examination, Mr Iles confirmed that these opinions were not based on data but on his experience at Barclays and on loan offers from other banks. His report did not give any further information as to the type or class of borrowers, but at the hearing he said that this would be for companies of the type of UGL or UTL. In cross-examination on his report on UGL, where he also refers to a rate of "something like" 4% over a bank's base rate or LIBOR, but had indicated that a bank would need to be satisfied there were sufficient assets to charge by way of debenture, he was asked why it was that he considered UGL would need to provide such security but UTL would not. He corrected the opinion he had expressed in his report on UTL and stated that a bank may have asked for a debenture from UTL.

(5) When asked if he had checked if UTL had had an overdraft with a mainstream bank, or the interest rates on such an overdraft, he said it was "not particularly relevant" that it already had an overdraft.

(6) Reliable market data on lending rates outside of mainstream lenders is not available but in his experience he has seen examples where short-term bridging loan providers

have charged 2% per month plus fees of 3% (so an annual rate of 27%) even where security has been taken over residential property.

(7) His conclusion in his report is that he did not consider that UTL would have been able to obtain credit facilities from mainstream providers, certainly not at the level and with the later degree of forbearance with which Mr Case provided financial support. In view of the substantial risk Mr Case exposed his funds to, it was justifiable and reasonable for him to charge interest at a rate well above that of less risky traditional working capital finance such as provided by mainstream banks.

(8) Commenting on Ms Paul-McCrossen's report he disagreed with her classification of UTL as a small business. He considered it would be preferable to say how banks and finance providers would have viewed UTL as a potential borrowing risk – he thought they would not have considered it to be a small business, but would place it within their corporate/commercial banking divisions. He agreed that a business such as UTL could not have borrowed the sums in question in 2006 on an unsecured basis from mainstream commercial lenders.

(9) Referring to her contention that the average rate for small businesses in 2006 was 0.6% (he assumes over a reference rate such as Base Rate or LIBOR), in his opinion, "even the best rated multi-national businesses would have found it difficult to find a lender willing to provide overdrafts at this pricing, let alone a small business or for that matter a business the size of [UTL] and with its lack of available security".

(10) He has not offered a rate or range of rates that might have been appropriate for the risk profile of UTL. He was unable to do so, as the risk profile of UTL precluded any mainstream debt funding. "Mr Case was justified in charging a rate higher than mainstream lenders would have done for a less risky borrower. The rates charged by Mr Case were commercially negotiated with [UTL] in circumstances where it appears, the latter had no alternatives." In cross-examination as to the reference to the rate being negotiated, Mr Iles confirmed he did not know if the rate was discussed in detail – this would include two parties speaking to each other to agree a rate.

(11) In the Iles SSR produced at the hearing, Mr Iles stated that:

(a) a customer of the "type and size" of UTL would be managed in corporate or commercial banking divisions of a bank, and such divisions were usually segmented by industry. UTL would have been segmented as "wholesale" meaning it would be allocated a relationship manager with experience of managing a portfolio of similar customers. In the largest banks, there would be critical mass to segment further, eg wholesale of electrical and telecommunications equipment. A bank would allocate the same relationship manager to UGL because of the common directors. If a customer of this type and size had met the lending criteria of a mainstream bank then a rate of 4% over its base rate would have been the likely interest charge plus a fee of 1%, and

(b) in his experience at Barclays, he became aware of what was known as "carousel fraud" involving VAT in particular relating to mobile phones "around 2005". Whatever the timing, he recalled that any credit facilities to existing customers which had been granted for this type of activity were withdrawn and no new ones approved.

104. Ms Paul-McCrossen's evidence included:

(1) She considered that the general characteristics that are most pertinent in identifying the class of borrower into which UTL falls are profit margin, liquidity and number of

personnel with decision-making power. Having considered the operating margin of UTL, its liquidity (as indicated by the Acid Test ratio) and having just one or two personnel with significant decision-making power (ie Mr Spurgeon and Mr Hussey) she considered that the "class" of borrowers into which UTL falls is that of "small businesses" or small and medium-sized enterprises ("SMEs"), the latter because small businesses are included in that group. In cross-examination she accepted that this was a broad category, but stated that this was unimportant as funding will always depend on the specific borrower. The split of businesses between financial, non-financial and sovereign would matter in terms of credit risk, but sectors would not make much difference.

(2) Considering the sources of funding that could have been available to small businesses or SMEs if they had sought to borrow £933,454.05 (being the total amount of input tax credits denied to UTL for the periods 04/06 and 05/06) in May/June 2006, Ms Paul-McCrossen referred to economic conditions in the UK being buoyant with abundant capital from 2002-2006. In this period, and contrary to Mr Case's view, many loans were offered quickly and on short notice (approved within 24 hours), subject to business revenue and affordability checks. In her experience, "banks and similar financial institutions (eg building societies)" would have been the principal group of lenders for small businesses in 2006. Lending decisions would have been driven by credit risk assessments by potential lenders.

(3) Ms Paul-McCrossen referred to studies undertaken by Warwick University and BIS into debt for small businesses (which we describe further at [105]). Those showed that rejection of applications made by SMEs for invoice financing, credit cards, overdrafts and loans were at less than 5% of applications from 2001 to 2006. Thus, generally, more than 95% of applications were accepted. No further granularity of the "less than 5%" is available – it is possible that a subgroup may have included some wholesale mobile phone businesses.

(4) Unsecured lending such as overdrafts usually offers smaller amounts to small businesses, usually £100,000 or less. Other types of truly unsecured loans for smaller businesses are extremely rare. In her opinion, a small business with the general characteristics of UTL could not have borrowed £933,454.05 in 2006 on an unsecured basis. Such an amount could potentially have been borrowed on a secured basis.

(5) She set out historical data on interest rates using data sourced from a report "Evaluating Changes in Bank Lending to UK SMEs over 2001-2012 – Ongoing Tight Credit?" from April 2013 produces by the National Institute of Economic and Social Research, assisted by Warwick University Business School, for the Department of Business Innovation and Skills ("BIS") (the "BIS SME Report"). We also had a copy of that report, described further at [105] below. That report set out SME overdraft annual margins above Base Rate.

(6) Having been asked to consider the rate at which borrowers with the general characteristics of UTL could have borrowed these amounts, Ms Paul-McCrossen reiterated that there is no rate of interest at which those sums could have been borrowed on an unsecured basis. She considered the most relevant type of short-term lending to small businesses or SMEs would have been a revolving credit facility – such a revolver could be agreed for up to five years, but involves lending over shorter periods as funds are drawn down as required and interest is only charged on the amount drawn down. Addressing interest rates from 2006 to 2013, and based on the data in the BIS SME Report, the rate of interest charged would have been no more than 0.6% (the credit spread

for this group of borrowers) above Base Rate. Revolvers are secured debt and are generally priced lower than the annualised rates available on unsecured overdrafts, which is why she considered that data relevant to overdrafts was more relevant than that for term loans. By 2011, the rate of interest charged under a revolver would have been around 3.7% above Base Rate (again, using the data from the BIS SME Report), but by this time there would have been five years of previous history to rely upon as regards credit worthiness.

(7) Explaining the basis for this opinion, Ms Paul-Crossen explained that SMEs are generally regarded as medium to very bad risk. The data in the BIS SME Report is the source of her opinion that lending would be at 0.6% above Base Rate, as that is the annual margin at the time the VAT reclaims were submitted. Whilst the margin shown in that report does increase after that period, she has used the margin at the beginning of the period to set or fix a rate (by reference to a fluctuating Base Rate). These annual margins are themselves averages, and she had no further information as to the breadth of that range but she noted that this data is based on actual lending to SMEs in the period and so would have included businesses with very poor ratings.

(8) She did not consider the borrowing arrangements with Mr Case to be in accordance with usual and standard commercial practice from her experience:

(a) no evidence was submitted in the documents to support the pricing, and the apparent lack of risk assessments is highly unusual;

(b) the interest rates charged appear to be decided without any reference to prevailing market rates or accepted benchmarks;

(c) interest rates appears to remain the same regardless of amounts or maturities of loans – this paid not heed to the impact on a borrower's credit risk profile from different amounts and maturities;

(i) the magnitudes and draw-downs were not always clearly agreed and could change during the transaction period, and

(ii) the maturities were not always clearly agreed and could change during the transaction period;

(d) the rates charged by Mr Case were unusually very high;

(e) rates could change depending the on the funding source of the lender, as opposed to purely reflecting the credit risk of the borrower; and

(f) loans to Resin8 were charged at very different rates without any apparent reference to credit risk.

(9) She found the contractual aspects to be very informal in content and execution, and this is not characteristic of commercial loans.

(10) Looking at the stated business experience of Mr Spurgeon and Mr Hussey (including the fact that over about 9 years Mr Hussey had been employed by 10 different employers), she considered many lenders would view the directors as offering insufficient sector experience and/or familiarity of senior business management to convince them that the business could grow. Given these facts, it is surprising that a lender continued to lend to UTL beyond October 2002 without considering the likelihood of repayment through risk assessment.

(11) She disagreed with Mr Iles' conclusion that the rates charged by Mr Case were commercially justified and so reasonable. She notes that his report lacks significant detail as regards pricing and dates.

(12) Her report does not deal with private money lenders. In cross-examination she confirmed that she had (at the time of preparing her first report) read Mr Iles' report and seen his express references to private money lenders as a source of funds.

105. We reviewed the BIS SME Report ourselves and note that the introduction states that BIS commissioned this project to develop an understanding of the changes in lending to SMEs from 2001 to 2012, to identify the extent to which bank lending has contracted since 2008 and to identify whether SMEs were disproportionately affected in their ability to access finance. An important focus was also to identify SME characteristics associated with greater difficulties in accessing finance. The report includes the following:

(1) The project used data from a series of SME surveys that provide detailed information on the characteristics of a sample of UK SMEs, their owners and experiences of obtaining finance. The surveys were based on what were described as large representative samples of UK businesses with less than 250 employees. 3,964 businesses were covered by these surveys, 43% of which were observed in two or more of the surveys. There were 6,250 observations in total.

(2) One of the key findings was that margins for both overdrafts and term loans were significantly higher in the period from 2008-2009 onwards, even controlling for risk, as cuts in the Base Rate were not fully transferred on to SME borrowers.

(3) The report charted bank rejection rates (including renewals), defined as the proportion of firms which applied for credit and were either refused outright or received less credit than they requested, as a proportion of firms applying. (The BIS SME Report presented this information as a bar chart, but it is set out in tabular form below.)

	Overdrafts (%)	Term loans (%)
2001-2004	11	5
2005-2007	8	6
2007-2008	15	9
2008-2009	16	14
2010-2011	14	18
2011-2012	19	23

(4) The chart of bank debt margins, ie the difference between interest rates charged on overdrafts and terms loans and Base Rate at various times set out the following information:

	Overdrafts (%)	Term loans (%)
2001-2004	2	2.3
2005-2007	0.6	1.3
2007-2008	0.7	1.8
2008-2009	3.6	5.3
2010-2011	3.7	4
2011-2012	3.7	4.2

(5) The note to the chart indicates that it includes data on SMEs with bank debt, but excludes SMEs with margins greater than 30 percentage points.

106. The joint statement dated 3 December 2019 records that Mr Iles and Ms Paul-McCrossen agree that under usual and standard commercial practice, a full due diligence exercise would have been undertaken with respect to any potential borrower. Such an exercise would have included detailed attention to assessing the potential borrower's credit risk profile. Following

such assessment, UTL would have failed such standard commercial due diligence requirements on several counts, including its minimal capital, operating margin, the nature of its stock and the nature of its debtors. As a result, UTL could not have obtained any funds from a standard commercial lender.

107. They identified the following areas of disagreement (but noting that this did not mean that they otherwise agreed, as they had been asked to opine on different issues):

(1) Mr Iles' comments that had lending been provided by a standard commercial lender then an interest margin of 4% in addition to the lender's base rate plus a 1% fee would have been expected, based on Mr Iles' previous employment experience.

(2) Ms Paul McCrossen's comments that had lending occurred then interest rate charges on unsecured short-term borrowing, such as an overdraft, would have been charged at around a margin of 0.6% (above Base Rate), based on research evidence referenced in her report and her previous employment experience.

(3) Mr Iles considers that in addition to standard commercial lenders, private money lenders exist in the market place who are prepared to lend on terms negotiated between the parties.

(4) Ms Paul-McCrossen considers that standard commercial lending comprises lending transactions that are undertaken by professional and expert lending companies and institutions. She does not consider private moneylending transactions as representative of usual standard commercial lending.

108. We found the reports of Mr Iles and Ms Paul-McCrossen to be very helpful, and we have had regard to the opinions expressed therein (as well as their oral evidence) in reaching our own conclusions on the matters on which they disagreed. We discuss the BIS SME Report further in the Discussion on the determination of the appropriate interest rate (including the opinions of Ms Paul-McCrossen and submissions received from Mr Walker-Nolan in relation thereto) but at this stage note the following on the other evidence:

(1) We accept Mr Iles' opinion that, in addition to standard commercial lenders, private money lenders exist in the market place. This is to say no more than that those who seek to borrow money may choose to approach a wide variety of potential lenders, which may include unregulated individuals or companies which have money available (either their own resources or which they themselves borrow from others) to lend and seek to do so on terms which are profitable for them. These lenders may or may not conduct a business of making such loans. Mr Case was such a lender, and the evidence before us was that there were others in the industry.

(2) The fact that we accept that private money lenders exist in the market place does not mean that loans from such persons are representative of what might be regarded as usual standard commercial lending – either as to credit checks performed, the levels of risk involved for the lender, or the terms on which such funds are advanced.

(3) Mr Iles did not produce any data to support his opinion that if a customer of the type and size of UTL had met the lending criteria of a mainstream bank then a rate of 4% over its base rate would have been the likely interest charge for a short-term loan plus a fee of 1%. This opinion was based on his long career at Barclays. However, his reports for UTL and UGL initially differed in that he stated that this would need to be secured (in the context of UGL) but added no such qualification for UTL. In cross-examination, he revised this opinion and concluded that security would be needed for both companies. Whilst we do not doubt Mr Iles' experience, the absence of data and the change of opinion in respect of the requirement for security were of concern to us. We were also not

convinced by Mr Iles' opinion that it would not be relevant that UTL already had an overdraft. We did therefore prefer the evidence of Ms Paul-McCrossen on rates available to SMEs based on the BIS SME Report, albeit that we note that the data from such report is also imperfect.

UGL

109. We had the following expert witness reports:

(1) report of Ms Paul-McCrossen dated 28 June 2019;

(2) report of Mr Iles dated 2 October 2019 and the Iles SSR; and

(3) joint statement of the experts dated 3 December 2019.

110. Ms Paul-McCrossen's report on UGL refers to much of the same data and reaches similar conclusions to her report in respect of UTL. She was not taken to this UGL report in cross-examination. Her report thus records her opinion that:

(1) The class of borrowers into which UGL falls is "small businesses" or "SMEs", noting in particular that UGL only had full financial accounts available for one period prior to May/June 2006, operating margin was a large negative number, liquidity levels and only one or two people had significant decision-making power. Such businesses could not have borrowed the sums in question on an unsecured basis in 2006 but could potentially have borrowed the sums in question on a secured basis in 2006. The latter could have involved borrowing pursuant to a revolving credit facility, the rate of which in 2006 would have been 0.6% above Base Rate.

(2) The Preference Shares were a significant drain on the company's resources, and if a lender viewed them as debt then the credit risk of UGL as a borrower would rise and further hinder access to debt.

(3) She does not consider the borrowing arrangements to have been in accordance with usual and standard commercial practice for obtaining external debt, noting that interest rates charged appear to be decided without any reference to prevailing market rates or accepted benchmarks, and appear to remain the same regardless of amounts or maturities. As with the borrowing of UTL from Mr Case, she considers that the contractual aspects were very informal in content and execution. She did however state the internal lending within a group does not need to comply with usual and standard commercial practice applicable to third party or arm's length commercial lending practice.

111. Mr Iles' report includes:

(1) As with his UTL report, private money lenders operate in the market and are a source of funds.

(2) Mainstream banks would not have assessed lending by way of overdraft or short-term loan as being attractive without the provision of tangible security from the company itself and also sometimes a third party such as a director.

(3) Noting that UTL made loans to UGL, and that there were no intercompany shareholdings between UTL and UGL, nor were they fellow subsidiaries of a holding company, Mr Iles states "thus in my view, the loans were not made as intra-group loans which are very common in the business world". In this case Mr Spurgeon and Mr Hussey would have known the details of UGL's transactions and thus were able to make their own assessment as to the risk to which they were exposing UTL's money.

(4) Noting that the interest rate was up to 18%, he said if a company such as UGL had been able to prove to a bank it had sufficient financial strength and suitable current assets

to charge by way of a fixed and floating debenture then for comparison purposes it is likely to have charged something like 4% over its base rate (or LIBOR) for an overdraft or short-term loan. Additionally, a bank would charge an arrangement fee, typically of around 1%.

(5) In his opinion UTL would have been justified in charging interest by taking into account its own borrowing costs coupled with an additional premium for the perceived risk. Charging more than the secured bank rate is not unreasonable given UGL's thin capitalisation base, lack of assets for security and apparent lack of any profits being retained in the business.

(6) UGL could not have accessed loans from mainstream banks. It may have been able to access funds from a private money lender, just as UTL had from Mr Case. He does not agree with Ms Paul-McCrossen's opinion that businesses of the same type as UGL could have borrowed by way of a revolver on a secured basis at no more than 0.6% above Base Rate. Even if the security offered provided a good margin of safety, interest rates would be in the range of 4% over the bank's base rate. Borrowing by way of a revolver, or for that matter an overdraft, at rates at less than 1% over Base Rate would have been very unusual, unless it was against cash collateral, even for highly rated quoted companies, albeit they may have had access to short term money market credit lines at fine pricing. In his view and experience, such lending terms would not have been available to UGL.

(7) The opinions set out in the Iles SSR (see [103(11)]) applied to UGL as they did to UTL.

112. It was agreed as between the experts that UGL could not have obtained funds from a standard commercial lender during the material periods.

113. The areas of disagreement are recorded as follows:

(1) Ms Paul-McCrossen comments that had lending been provided by a standard commercial lender then interest rate charges on unsecured short-term borrowing, such as an overdraft, would have been charged at around a margin of 0.6% above Base Rate, based on research evidence referenced in her report and her previous employment experience.

(2) She comments that, in the absence of any standard commercial lending, the magnitude of a potential rate of interest chargeable on standard commercial lending is not calculable since there would not be an exposure to credit risk.

(3) Mr Iles comments that had lending been provided by a standard commercial lender then an interest margin of 4% in addition to the lender's base rate plus a 1% fee would have been expected, based on his previous employment experience.

(4) Ms Paul-McCrossen considers that standard commercial lending comprises lending transactions that are undertaken by professional and expert lending companies and institutions. She does not consider private money lending transactions as representative of standard commercial lending.

(5) Mr Iles considers that in addition to standard commercial lenders, private money lenders exist in the market place who are prepared to lend on terms negotiated between the parties.

(6) Ms Paul-McCrossen comments that any arm's length standard commercial lending decision would incorporate appropriate due diligence to assess the credit risk of a borrower. Such a standard commercial lender would, as a matter of normal business

operations, consider any costs it faces (associated with obtaining capital with which to undertake lending activities) when making lending decisions.

(7) Mr Iles also considers that it was not unreasonable for UTL to consider its own borrowing costs when making loans to UGL.

114. The conclusions we reached in relation to the evidence of Mr Iles and Ms Paul-McCrossen on the borrowings of UTL (see [108] above) apply similarly to their evidence on UGL.

SUBMSSIONS ON BEHALF OF UNISTAR

115. The case for both UTL and UGL is framed around the costs and rates of their actual and extant borrowing at, or around, the time HMRC withheld the payments of VAT input tax:

(1) in the case of UTL, the rates of interest it was paying on extant borrowing as at the dates payments were withheld was 28.76%, this being the UTL Combined Rate as explained at [93(10)] above, or alternatively the UTL Weighted Average Combined Rate (see [93(11)] above);

(2) in the case of UGL, the rates of interest it was paying on extant borrowing as at the dates payments were withheld was either 13.3% or 13.7% depending on whether one considered the total intercompany balances (as set out by Ms Wild and Mr Drewe at [98(5)] and [99(3)] above);

(3) these rates had been agreed before HMRC's decision to refuse payment in December 2007, before the subsequent Notices of Appeal to the Tribunal, and before the decision in February 2013. The rates are consistent with rates of interest charged and interest paid on earlier loans obtained by UTL and UGL (from the same sources). There can be no tenable suggestion that the rates are a late contrivance for the benefit of this litigation;

(4) there is no dispute as between the parties' banking experts that at the material times UTL and UGL were unable to obtain borrowing from mainstream lenders;

(5) the source of UTL's borrowing was from a private lender (Mr Case) and the source of UGL's borrowing was from preference shares and intercompany lending from UTL;

(6) Unistar submit the combined rates of borrowing should be awarded by the Tribunal because:

(a) those were the rates available to companies within Unistar's class at the time, both UTL and UGL being unsecured borrowers, within a class of company trading in the wholesale mobile telephone market;

(b) those were the rates available to companies with the general characteristics of the Appellants, which included:

(i) low profit margin,

(ii) poor liquidity,

(iii) dealing in stock which was unsuitable as security for lending,

(iv) limited fixed assets, and

(v) principal debtors who were other commodity traders; and

(c) alternatively, in circumstances where they were unable to borrow from mainstream lenders and did borrow at the said rates, a specific departure from the conventional rate is warranted; and

(7) in the alternative, if the Tribunal does not agree that the Combined Rates should be awarded, the appropriate rate is that identified by Mr Iles as being that of Base Rate plus 4% plus a 1% arrangement fee.

116. While the authorities emphasise the breadth of the Tribunal's discretion under s84(8), Mr Walker-Nolan submitted that the following propositions apply in assisting the Tribunal to determine the rate of interest to be awarded in the instant applications:

(1) the overall aim is to determine a fair rate to compensate Unistar for having to fund the loss vindicated by the finding on appeal - broadly speaking the purpose of the exercise is to restore Unistar to the position it would have been in had no loss been inflicted ("restitutio in integrum");

(2) in achieving that end, the (former) conventional practice in commercial cases applies - an interest rate of Base Rate plus 1% forms the starting point;

(3) that practice may be displaced by evidence;

(4) one good reason for displacing the conventional practice is that the taxpayer has, in fact, borrowed at higher rates; another is that since the credit crunch, it has not been possible to borrow at Base Rate plus 1%;

(5) the broad brush question is: what rates of borrowing were available to a taxpayer of the general class and with the general attributes or characteristics of the taxpayer in the case?

(6) the actual borrowing rates of the taxpayer may be adduced to support a particular departure from the conventional rate, or as "a self-generated comparable";

(7) unlike a claim for damages, there is no duty on the taxpayer to mitigate its loss; and

(8) the award of interest should be made on a simple rather than a compound basis.

SUBMISSIONS ON BEHALF OF HMRC

117. Unistar are requesting that the Tribunal award to them further sums in respect of interest which are extraordinarily high - using the calculations provided by Mr Drewe:

(1) UTL is seeking the total amount of interest of £1,967,841, which is £1,755,791.24 more than the conventional rate which UTL has been awarded by the Tribunal to date; and

(2) UGL is seeking the total amount of interest of £1,450,766, which is £1,112,675.88 more than the conventional rate which UGL has been awarded by the Tribunal to date.

118. HMRC submitted that (as explained further below):

(1) the basis of the Applications, and the manner in which they have been advanced by UTL and UGL, is directly contrary to the relevant legal principles and are thus misconceived; and

(2) UTL and UGL have already received interest at the conventional rate. In the circumstances, there is no proper basis for the Tribunal to award any further interest to UTL or UGL.

Applications are misconceived

119. The Applications are being advanced on a footing, and in a manner, which is contrary to authority:

(1) the approach taken is the very antithesis of the "broad brush" approach that is required to be taken to applications for interest; and

(2) the evidence of UTL and UGL does not address, or attempt to address, the key principles to be applied by the Tribunal in applications of this nature (i.e. by awarding interest by reference to the general class of borrowers into which UTL and UGL fall). Instead, they advance their Applications solely by reference to their own special or peculiar characteristics, which is directly contrary to authority.

120. As regards the approach taken:

(1) UTL relies upon two witness statements from Mr Case, two expert reports, and two supplemental reports - around 1,745 pages in total; and

(2) UGL relies upon two witness statements from Mr Hussey, two witness statements from Mr Spurgeon, an expert report from Mr Drewe and an expert report from Mr Iles - around 550 pages in total.

121. This has necessitated the need for HMRC to call two expert witnesses and to list this matter for a four day hearing before the Tribunal, to allow sufficient time for pre-reading, oral evidence from 7 witnesses, and oral submissions.

122. UTL and UGL are inviting the Tribunal to ignore the need for the Tribunal to take a "broad brush" approach to the Applications which does not amount to a full-blown trial and does not involve the minute examination of UTL and UGL's own special or peculiar circumstances in order to attempt to arrive at a figure which will precisely compensate the recipient for any and all losses alleged.

123. As regards the footing on which the Applications are advanced, UTL and UGL are inviting the Tribunal to award further interest to them under s84(8) on a basis which is fundamentally contrary to authority, because the reality of the matter is that they are asking the Tribunal to award further interest solely by reference to their own peculiar circumstances.

124. The application by UTL is being advanced by reference to the particular rates of interest on "borrowing" undertaken by UTL, ie on the basis of UTL's own special or peculiar circumstances (cf *Tate & Lyle*). The application is not being advanced by reference to a properly evidenced general class of borrowers to which UTL belongs, nor is the evidence of the rates of "interest" payable by UTL to Mr Case being used as the "sort of self-generated comparable" to which Mann J referred in *Sycamore*.

125. The position is the same for UGL. Mr Hussey and Mr Spurgeon each summarise the basis of UGL's application as taking into account UGL's actual cost of borrowing and providing an adequate indemnity for the financial losses incurred by UGL based on its costs of borrowing.

126. In contrast, HMRC's evidence is directed to the relevant principles to be applied by the Tribunal (in addition to addressing various points made in the evidence of UTL and UGL). More particularly, the expert evidence given by Ms Paul-McCrossen is that UTL and UGL, as small businesses or SMEs, would not have been able to borrow the sums in question on an unsecured, short-term basis. This appears to be common ground between the banking expert witnesses, at least so far as any standard commercial lender is concerned. Ms Paul-McCrossen concludes that the loan arrangements of Unistar were not consistent with bona fide arms-length commercial practice. It is not, therefore, possible for UTL or UGL to justify a rate higher than the conventional rate of 1% above Base Rate by reference to genuinely commercial lending to a class of borrowers to which they belong.

No further interest should be awarded

127. The burden is on UTL and UGL to persuade the Tribunal that it would be unjust for that conventional rate to apply to them. HMRC's submission is that UTL and UGL have not, and will not, discharge that burden:

(1) the only appropriate means by which UTL and UGL could persuade the Tribunal to depart from that conventional rate would be if UTL and UGL satisfied the Tribunal that their general characteristics place them within a class of borrowers for which a higher rate of interest is appropriate. However, UTL and UGL have not even attempted to provide evidence of such a class of borrowers. That is the beginning and the end of the matter;

(2) UTL and UGL are inviting the Tribunal to award interest by reference to the interest rates applicable to their actual "borrowing" on the basis that the law requires that they are compensated for "having to fund the loss" caused by the withholding of the input tax so as "to restore the Appellants to the position they would have been in had no loss been inflicted". This approach is without merit, as it is based on the judgment of Henderson J in *Littlewoods* and the Supreme Court overruled the decision of the Court of Appeal on that point;

(3) the "lending" arrangements between UTL and Mr Case, and between UTL and UGL, were highly unorthodox, atypical and uncommercial in nature. They cannot form a proper basis even for a "self-generated comparable". Mr Walker-Nolan attempts to address these uncommercial and atypical loan arrangements by the submission that there is a recognised market of private money lenders into which Mr Case's lending activity may be placed and, in that context, the borrowing of UTL and UGL was "commercial". There is no evidence of the rates of lending or terms of lending for such private moneylenders, either from Mr Iles or anyone else, and so the claim that the loans from Mr Case were "commercial" is meaningless in the present context.

Mr Case was the director of PNC and was responsible for its wholesale trade in mobile phones in 2005-2006. PNC was the source of monies loaned by Mr Case to UTL in May 2006. The supplier to PNC, Aircall Ltd, was also an important supplier to UTL in the deals that were subject of the denial decisions. PNC's appeal against the denial of input tax on its transactions in periods 12/05 to 06/06 inclusive was dismissed by the Tribunal. Mr Case gave evidence and was found to be an untruthful witness and a knowing participant in a fraudulent scheme to defraud the revenue. Thus the attempt to position Mr Case in this appeal as part of a legitimate and recognised private lending fraternity is misconceived. Mr Case personally participated in MTIC fraud but also enabled its continuation by means of the very large loans to UTL, which, as a matter of agreed fact was involved in MTIC fraud, even though its director was unaware of such involvement. Mr Case's activities are the very antithesis of genuine commercial practice;

(4) given that the "lending" arrangements between UTL and Mr Case, and between UTL and UGL, were highly unorthodox, atypical and uncommercial in nature, they cannot properly provide an appropriate benchmark for a rate of interest under section 84(8). In *Emblaze* Judge Sinfield awarded interest to the taxpayer at a rate of 1.75% above Base Rate because this represented "a realistic rate of interest in that it is a commercial rate set by a third party that was actually applied to Global [i.e. the taxpayer in question]". Moreover, Judge Sinfield expressly declined to award interest by reference to the taxpayer's intercompany borrowing at the rate of LIBOR plus 2.55%, which Judge Sinfield described as "excessive", noting that it was "much higher than the commercial rate of interest charge by HSBC in relation to Global's borrowing by way of overdraft".

128. If the Tribunal is going to depart from the conventional rate of Base Rate plus 1%, it should do so only by reference to a genuinely commercial rate of interest which actually applied to arm's length lending between the taxpayer and an independent third party. There is no such rate in the present case.

DISCUSSION

129. Section 84(8) provides that the VAT credit shall be repaid "with interest at such rate as the tribunal may determine". We are mindful that the applications are made in respect of two companies, UTL and UGL, and that whilst their applications have been heard together we may decide to award interest at rates which are the same or different from each other. Indeed, Mr Walker-Nolan submits that we should determine that interest should be awarded at different rates, whereas Mr Puzey disagrees.

Determination of Interest Rate

130. We were taken to various authorities which set out the principles to be applied when considering how to apply our discretion in determining the rate of interest to be awarded under s84(8). It was common ground that the award should be of simple interest.

131. The leading case on the award of interest under s84(8) is the decision of Lawrence Collins LJ in the High Court in *HMRC v Royal Society for the Prevention of Cruelty to Animals; HMRC v ToTel Ltd* [2007] EWHC 422 (Ch), which was recently considered by the Upper Tribunal in *Emblaze Mobility Solutions Ltd v HMRC* [2018] UKUT 373 (TCC). We draw our approach from the principles set out in those cases, but were referred to several additional cases which illustrated the exercise of discretion in relation to the award of interest in other contexts. We have approached the case law chronologically as that enables us to consider how the principles which we should apply have developed, but this does not detract from *RSPCA* and *Emblaze* being the leading authorities which are binding upon us.

132. In *Tate & Lyle Food and Distribution Ltd v Greater London Council* [1982] 1 WLR 149 Forbes J stated:

> "I do not think the modern law is that interest is awarded against the defendant as a punitive measure for having kept the plaintiff out of his money: I think the principle now recognised is that it is all part of the attempt to achieve restitutio in integrum. One looks, therefore, not at the profit which the defendant wrongfully made out of the money he withheld — this would indeed involve a scrutiny of the defendant's financial position — but at the cost to the plaintiff of being deprived of the money which he should have had. I feel satisfied that in commercial cases the interest is intended to reflect the rate at which the plaintiff would have had to borrow money to supply the place of that which was withheld. I am also satisfied that one should not look at any special position in which the plaintiff may have been; one should disregard, for instance, the fact that a particular plaintiff, because of his personal situation, could only borrow money at a very high rate or, on the other hand, was able to borrow at specially favourable rates. The correct thing to do is to take the rate at which plaintiffs in general could borrow money. This does not, however, to my mind, mean that you exclude entirely all attributes of the plaintiff other than that he is a plaintiff. There is evidence here that large public companies of the size and prestige of these plaintiffs could expect to borrow at 1 per cent. over the minimum lending rate, while for smaller and less prestigious concerns the rate might be as high as 3 per cent. over the minimum lending rate. I think it would always be right to look at the rate at which plaintiffs with the general attributes of the actual plaintiff in the case (though not, of course, with any special or peculiar attribute) could borrow money as a guide to the appropriate interest rate. If commercial rates are appropriate I

> would take 1 per cent. over the minimum lending rate as the proper figure for interest in this case."

133. In that case, it was therefore emphasised that the court should not look at any special position in which the plaintiff may have been, but look at the rate at which plaintiffs in general could borrow money, albeit without excluding entirely all attributes of the plaintiff. We note that in that case:

(1) there was no evidence before the court as to whether Tate & Lyle had actually borrowed money or the rate at which it did so;

(2) when identifying attributes of the actual plaintiff Forbes J drew a very broad distinction, between large public companies (with the size and prestige of Tate & Lyle) and smaller, less prestigious concerns;

(3) Forbes J referred to there being evidence that the rates at which these groups could expect to borrow was 1% over the minimum lending rate and 3% over the minimum lending rate respectively. We do not know how extensive that evidence was. Nevertheless, it is clear that in awarding interest at 1% over what was described as "bank rate", which we assume is what we have defined as Base Rate, this was not on the basis that this was the convention, but that it accorded with the evidence as to the rate at which a group such as Tate & Lyle could borrow.

134. In *Banque Keyser Ullman SA v Skandia (UK) Insurance Co Ltd & others* (unreported) Steyn J stated (according to the official transcript):

> "The purpose of the award of interest is to achieve restitutio in integrum. The enquiry does not focus, in a case such as the present, on the profit to the defendant of the use of the money. It is directed to an estimation of the cost to the plaintiff of being deprived of the money which he should have had. But for practical reasons courts will not allow an enquiry into the plaintiff's actual loss. To do so might sometimes involve enquiries, in relation to the ancillary relief of interest, approximating the length of the trial. Instead, in cases such as the present, the courts award a commercial rate of interest or the rate which some-body in the position of the plaintiff would have had to pay to borrow the money. In the interests of a cost effective administration of civil justice, the courts must adopt a fairly broad brush approach to the award of interest. On the other hand, in the light of the over-riding criterion of fairness, the courts are vigilant to ensure that the broad brush approach does not become too blunt an instrument."

135. Steyn J then considered two submissions as to characteristics of the plaintiffs:

(1) Skandia submitted that Chemical Bank, a US prime bank, was in a position to borrow money at a rate lower than the other plaintiff banks and that this reality must be reflected in the rates of interest to be adopted. Steyn J referred to the judgment of Forbes J in *Tate & Lyle* and said:

> "Bearing in mind that the selection of an appropriate rate of interest is a discretionary matter, it seems to me entirely consistent with the pragmatic approach of our courts to rule that in this particular case, my ruling as to interest rates should reflect that a prime bank, such as Chemical Bank, was at all times able to borrow significantly more cheaply than small banks. In doing so I am not enquiring into Chemical Bank's special position but I am simply recognising the reality that market leaders such as Chemical Bank have a well established advantage over other banks when they borrow money. It is, as Forbes J so lucidly explained, a question of categorisation of the plaintiff in an objective sense. And, I regard it as essential to a fair decision in this case

> to recognise Chemical Bank's dominant position when compared with that of the other plaintiff banks."

(2) It was argued that one of the small banks, Kusa, was in a weak position during the relevant period, and there was evidence that Kusa was perceived as having problems with the Swiss banking authorities. Steyn J stated:

> "… although Kusa was undoubtedly in a weak borrowing position, that is a matter peculiarly affecting Kusa which I must ignore. It follows that I am not prepared to distinguish between Kusa and the other smaller banks."

136. In *Baltic Sea & Baltic General Insurance Co Ltd v Baker* [1996] LRLR 353 Otton LJ (with whom Staughton and Millett LJJ agreed) said:

> "Although there may be some uncertainty to what extent the personal circumstances of the plaintiff may be relevant, the pragmatic approach of the Courts has certainly been reflected in the practice of the Commercial Court. The practice whereby interest is normally awarded at 1% over Base Rate amounts to a presumption which can be displaced if its application would be substantially unfair to either party. That rate represents something of a compromise (albeit weighted in favour of the plaintiff) between what a plaintiff kept out of his money might have earned on it and what he might have had to pay by way of interest... It does not preclude evidence as to the rate at which persons with the general attributes of the plaintiff could have borrowed money: see the test in *Tate and Lyle Food and Distribution v Greater London Council* [1982] 1 WLR 149 at 154–5.
>
> Thus I am satisfied that the general approach of the judge was correct. He started with the overriding principle that interest should be awarded to compensate the plaintiff for having been kept out of his money. He acknowledged that the plaintiff had not in fact borrowed in the amount or over the period at the rate to which the witness had deposed. He was correct, in my view, in holding that it was not essential to do so. The plaintiff adduced evidence of the rate at which a person with his general attributes (but ignoring his particular position) could have borrowed money over the period. The evidence of Mr Bettinson did constitute such evidence and was uncontradicted.
>
> In my view, the basic principle or practice in the Commercial Court should be to award interest at Base Rate plus 1%. The judge's decision in this case did not abrogate or undermine the basic principle. There was evidence upon which the judge could properly award interest at 2%. The uplift to 2% was not in any sense contrary to principle, immoderate or unreasonable in the circumstances. He neither erred in principle nor in the exercise of his discretion."

137. In that case there was no evidence that the syndicate of plaintiffs (being Mr Baker and others who had been members of a specified Lloyds syndicate) had in fact borrowed. Mr Bettinson, to whose evidence Otton LJ referred, was a syndicate accountant who had suggested a rate of 2% above the Citibank US$ base rate on the grounds that Lloyds Syndicates, when they need to do so, as a matter of practice borrow US dollars from Citibank because that bank administers the Lloyds American Trust Fund. Such loans, if long term, are effected at 2% above this base rate. Thus in that case regard was had to the rate at which Lloyds Syndicates might borrow.

138. *Jaura v Ahmed* [2002] EWCA Civ 210 was a decision of the Court of Appeal and Rix LJ (with whom Potter and Mummery LJJ agreed) referred to the underlying facts as having included that Mr Jaura, having at some point been paying interest at 3.5% above Base Rate on an overdraft and a fixed 14.5% on a loan (both from National Westminster Bank), by the time

of the forfeiture of the lease, was paying the same interest on both, namely 4.5% over Base Rate (being 11.25% in total). Rix LJ referred to the practice of the Commercial Court to award 1% above Base Rate, noting that this was only a presumption and citing *Tate & Lyle*. Rix LJ considered the variations in Base Rate over the period in question and concluded that the appropriate rate should be 3% over Base Rate, adding that he strongly suspected that that figure did insufficient justice to Mr Jaura but "I do not think that this court has enough evidence to support the case that the rate charged to Mr Jaura (4.5% above Base Rate) was typical of small businessmen in his position", and then adding at [26] that:

> "It is right that defendants who have kept small businessmen out of money to which a court ultimately judges them to have been entitled should pay a rate which properly reflects the real cost of borrowing incurred by such a class of businessmen. The law should be prepared to recognise, as I suspect evidence might well reveal, that the borrowing costs generally incurred by them are well removed from the conventional rate of 1% above base (and sometimes even less) available to first class borrowers."

139. It has to be said that, whilst Rix LJ expressed himself unconvinced that the court had enough evidence to support 4.5% over Base Rate, it is not apparent to us quite what supported the 3% uplift which he decided was appropriate to award. However, it is at least clear that regard was had to a distinction between the rates available to small businessmen compared to "first class borrowers", and that the rate awarded was less than that which Mr Jaura was charged by a mainstream bank.

140. In *RSPCA* the Court of Appeal concluded that there was no evidence to justify departing from Base Rate plus 1% in respect of either RSPCA or ToTel. It was clear from the submission made on behalf of the parties that:

(1) there was no evidence before the Tribunal that the RSPCA was a net borrower or that it had incurred any specific financial loss as a result of the delayed payment by HMRC. No evidence was adduced as to what rates might have been payable by the RSPCA had it been a borrower; and

(2) ToTel had not borrowed, although there was evidence before the Tribunal as to the rate that ToTel would have had to pay had it borrowed the amount withheld over the period, which was apparently a letter from Barclays indicating the rates at which ToTel could borrow.

141. Lawrence Collins LJ stated as follows in relation to the discretion of the Tribunal under s84(8):

> "111. The starting point is that section 84(8) gives the Tribunal a discretion, and contains no guidance as to how it is to be exercised or what factors are relevant in the exercise of the jurisdiction.
>
> 112. As will appear, I have detected some errors of principle in the Decisions under appeal, in relation to the award of compound interest and in relation to the award of a higher than conventional rate of interest in the ToTel Decision.
>
> 113. In my judgment it would be wrong for me to attempt to fetter the discretion by attempting to lay down guidelines as a gloss on the legislation. But I will say that it would not be easy to criticise a Tribunal if it applied principles commonly applied in cases involving commercial entities, even if the relationship between the trader and the Commissioners is not a commercial one. In civil cases, the overriding principle is that interest should be awarded to the claimant not as compensation for the damage done but for being kept out of money which ought to have been paid to him: *London, Chatham and*

> *Dover Ry. Co. v. South Eastern Ry. Co.* [1893] A.C. 429 at 437; *Deeny v. Gooda Walker (No. 3)* [1996] LRLR 168 .
>
> 114. Conventional practice in commercial cases (under section 35A of the Supreme Court Act 1981) is to award simple interest at base rate plus 1% (described by the Law Commission, Pre-Judgment Interest on Debts and Damages, Law Com No 287, 2004, para 3.41, as "relatively low").
>
> 115. I do not consider that there is any overriding reason of principle why a higher rate should not be adopted by the Tribunal in the circumstances of a particular case, either because that rate is reasonably considered too low, or because on the facts the taxpayer has had to borrow at a higher rate. The former case would no doubt be rare. In the latter case there must be some evidence on which the Tribunal can act.
>
> 116. In commercial cases, although a rate higher than the conventional rate may be justified, any such claim is normally dependent on evidence that a claimant has in fact borrowed funds at a higher rate: *Shearson Lehman Hutton Inc v Maclaine Watson and Co Ltd (No 2)* [1990] 3 All ER 723; *Ahmed v Jaura* [2002] EWCA Civ 210 at paras [12], [20]; *R (Mobile Export 365 Ltd and another) v. Commissioners of Her Majesty's Revenue and Customs* [2006] EWHC 311 (Admin), [2006] STC 1069, at paras [35] to [38]. In *Ahmed v Jaura* [2002] EWCA Civ 210 at [26] (in which the rate which was applied was 3% above base rate) Rix LJ said:
>
> "It is right that defendants who have kept small businessmen out of money to which a court ultimately judges them to have been entitled should pay a rate which properly reflects the real cost of borrowing incurred by such a class of businessmen. The law should be prepared to recognise, as I suspect evidence might well reveal, that the borrowing costs generally incurred by them are well removed from the conventional rate of 1% above base (and sometimes even less) available to first class borrowers."
>
> 117. The rate will normally reflect the cost of borrowing rather than the return on lending: *Sempra Metals v Inland Revenue Commissioners* [2004] EWHC 2387 (Ch) (Park J), at para. 30, approved by the Court of Appeal: *Sempra Metals Ltd v Inland Revenue Commissioners* [2005] EWCA Civ 389, [2006] QB 37, at para 47."

142. Lawrence Collins LJ concluded that it was an error of principle in the ToTel decision to award a rate of 3% above Base Rate (rather than the conventional rate) when the evidence was that ToTel had not borrowed, and the only evidence relied on was a letter from Barclays indicating the rates at which ToTel could borrow.

143. At [116] cited above, Lawrence Collins LJ refers to evidence that a claimant has in fact borrowed funds at a higher rate before citing from [26] of *Ahmed v Jaura*. Mr Walker-Nolan drew our attention to the reference (in that same paragraph) to [20] of *Ahmed v Jaura*, noting that in that paragraph Rix LJ had cited from *Tate & Lyle* (the same paragraph which we have quoted at [132] above), submitting it is therefore clear that Lawrence Collins LJ had in mind both of these decisions when setting out principles which a Tribunal might seek to apply when exercising its discretion.

144. In *Fiona Trust v Privalov* [2011] EWCA 664 (Comm) Andrew Smith J noted that the court's jurisdiction to award interest, whether under statute or in equity, is discretionary and the purpose is fairly to compensate the recipient of interest for being deprived of money which he should have had. He then went on to say at [16]:

> "16. A "broad brush" is taken to determine what rate of interest is just and appropriate: it would be neither practical nor proportionate (even in a case

involving as large sums as these) to attempt a minute assessment of what will precisely compensate the recipient. In particular, the courts do not have regard to the rate at which a particular recipient of compensation might have borrowed funds. This policy is adopted in order to control the extent of the inquiry to ascertain an appropriate rate: see the *Banque Keyser Ullman* case (cit sup). The court will, however, consider the general characteristics of the recipient in order to decide whether to assess interest at a rate that is higher or lower than is conventional…."

145. Andrew Smith J then took the following approach:

(1) He considered the evidence as to how interest was set on funds borrowed by the claimants – accepting evidence that, unless they borrowed at fixed rates, their rates were calculated by reference to LIBOR. He noted that rates of interest on loans to shipping companies are often expressed by reference to LIBOR, referring to a report approved by the Committee of the London Maritime Arbitrators Association ("LMAA") in 2003 to this effect.

(2) When considering the appropriate uplift above LIBOR, he noted that the report approved by the LMAA Committee provides a useful starting point. He quoted from that report, which included:

> "A "spread" or margin is normally added to LIBOR financing operations. A typical uplift for a long-term secured loan might be 1.25%. To give effect to the principle that arbitrators are to ascertain the cost of a short-term unsecured loan we recommend that members should award 2.5% over LIBOR as this would be a reasonable average rate to charge a reasonably creditworthy company for an unsecured loan. In special cases (depending on the credit worthiness depending on the plaintiff) a higher or lower uplift may be appropriate."

(3) He referred to an appropriate rate being determined by reference to what might be charged for a short-term and unsecured loan, and also considered that it is appropriate to take an uplift of 2.5% as a starting point because it involves little departure from the conventional US Prime Rate.

(4) It was argued that an uplift of 2.5% would be excessive in view of evidence about what interest the claimants in fact paid on their borrowings. The defendants said it was appropriate to examine the personal circumstances of the claimants as:

(a) the court had already received evidence during the trial about what interest Sovcomflot paid between 2002 and 2005 – Andrew Smith J acknowledged there was some evidence about this, but in itself this does not justify departing from the usual practice of disregarding the actual borrowing rates of the particular party. This case demonstrated that (i) such evidence is likely to be too fragmentary to provide a properly complete picture for determining the appropriate rate at which to award interest, and (ii) even if evidence has been heard, it can readily become protracted and time-consuming to examine it with a view to deciding an appropriate interest rate; and

(b) the defendants identified general characteristics of the claimants that should be taken into account in determining the rate that "companies of their kind" would have to pay on their borrowings – they are shipping companies, members of a large group with substantial turnover and assets, Russian or subsidiaries of Russian companies, state-owned and likely to be supported by the state if in financial difficulties. In the circumstances of this case, there is no real distinction between what rates Sovcomflot and NSC paid upon their borrowings and the rates generally

paid by businesses with these attributes: there is no reason to think that they shared them with any other companies or groups (apart, possibly, from Primorsk Shipping Company). Therefore, if he declined to consider evidence about what borrowing rates Sovcomflot and NSC pay and have paid for borrowings, the defendants effectively would be deprived of any evidence upon which they might argue for departing from the conventional rates.

(5) The "overall purpose is to determine a fair rate to compensate the claimants" and he accepted that the defendants were entitled to rely upon evidence of the claimants' borrowing rates.

(6) The evidence was that one of the claimants was borrowing from banks at an uplift of around 1.125% over US$ LIBOR and that the uplift on most loans was reduced to 0.75% following a re-financing in 2005 (and this was supported by the expert witnesses on ship finance). The defendants also referred to the annual accounts, which had some evidence as to borrowing rates; the claimants also referred to those accounts. (The other claimant was borrowing at a margin a little more than this, thus evidence in relation to that claimant would not assist the defendants.) Having set out the various rates which were identified by both parties, Andrew Smith J continued:

> "30. In my judgment the evidence upon which the defendants rely does not support their contention that the claimants could have borrowed funds for as little as LIBOR plus 0.85% over the relevant period. First, the evidence largely relates only to the period between 2002 and 2005, and no evidence has been produced about what rates were paid in later years. In any case, such evidence as there was is too fragmentary even about the earlier years to support any conclusion about the rates that the claimants would have had to pay generally for borrowings.
>
> 31. However that might be, the defendants' contention faces a more fundamental difficulty. They rely generally (although not wholly) upon evidence about the rates for secured and medium term borrowings. They submit that it is appropriate and just to determine a rate for the interest to be awarded on the claimants' equitable compensation by reference to the rate charged for such borrowings because shipping companies such as Sovcomflot and NSC, being "asset rich", are typically funded by medium-term secured borrowings. I am not persuaded by these submissions: there is no cogent evidence that Sovcomflot and NSC at the relevant times had assets available to secure borrowings, and indeed, that is why Sovcomflot raised funds in 2002 through the SLB transactions. In any case, the reason that the court generally considers how much the recipient of an interest award would pay for short-term unsecured borrowings in order to determine the rate of interest on awards is not that it is supposed companies such as the recipients would usually raise funds by way of short-term unsecured borrowing in the course of their business, but because it is generally a just and fair basis upon which to determine the interest rate. The purpose is to compensate them for being deprived of funds to which they were entitled. If they had not been so deprived, they would have received the funds without encumbering their assets and any equity in them would have remained available to provide security for further borrowings were they needed. I can see no justification for determining a fair rate of interest on the assumption that the claimants would have used their assets as security for borrowings…"

(7) He concluded that:

> "32. I conclude from the evidence relied upon by the defendants that the interest paid by Sovcomflot and NSC was not less, or certainly not

> significantly less, than what the LMAA Report described "As a typical uplift [over LIBOR] for a long-term secured loan". There is no reason to think that the further uplift to 2.5% suggested by the LMAA to recognise that it is appropriate to assess a rate for an unsecured loan of a shorter term should not be adopted, and I conclude that the appropriate rate of interest is that for which the claimants contended in their alternative submission, three month US$ LIBOR with an uplift of 2.5%. For the reasons that I have explained, I consider that in this case it is appropriate to depart from the conventional US Prime Rate to this extent, but there is no evidence that justifies any further departure from what is conventional."

(8) He awarded interest at the rate of three months US$ LIBOR plus 2.5% compounded with three monthly rests.

146. In *Sycamore Bidco Limited v Breslin* [2013] EWHC 174 (Ch) Mann J noted that there are a number of cases which indicate that the court's approach can be more flexible than applying one standard rate across the board, and took the following approach:

(1) He considered *Tate & Lyle* and *Baltic Sea*:

> "46. It should be noted that the exercise envisaged by Otton LJ [in *Baltic Sea*] and by Forbes J in *Tate & Lyle*, in order to consider whether to depart from what was perceived as the commercial norm, does not involve simply looking at the actual claimant. It involves looking at the class to which the claimant belongs and, if the circumstances require it, awarding that sort of generalised rate to the claimant in view of an assumed or standardised rate…
>
> 47. This approach has been adopted in a number of cases. However, in some of those cases, and despite the fact that the personal borrowing characteristics of the claimant are per se irrelevant, and that the rates at which the claimant actually borrowed are not per se relied on, it was nonetheless held that those rates can be used as evidence of what borrowers of that class would pay – a sort of self-generated comparable. This approach was apparently adopted in *Fiona Trust v Privalov* [2011] EWHC 664 (see the general approach described by Andrew Smith J at para 16, and his particular approach in that case at paras 24-5); and *Bridge UK.Com Ltd v Abbey Pynford plc* [2007] EWHC 728 at para 146…"

(2) Mann J rejected the submission that cases in which the court departed from the presumed rate of 1% above Base Rate as being exceptional cases involving small businesses, stating:

> "50. There is no reason to treat that class differently from other classes that can be identified. It is therefore open to Sycamore to establish that it is a member of a class whose borrowing rates would be more than the conventional (presumed) rate and to argue that fairness requires that it should receive that rate."

(3) He then considered that one factor which is capable of making it fair to depart from the presumption is the effect on interest rates of the credit crunch, and added:

> "51. … It was, however, recognised in *Persimmon Homes (South Coast) Ltd v Hall Aggregates (South Coast) Ltd* [2012] EWHC 2429 (TCC), where Ramsey J recognised that since the credit crunch (marked by the lowering of Bank of England base rate to 1% in February 2009 and 0.5% in March 2009) 1% above base rate was no longer a rate at which borrowing could be obtained. He awarded 1% over base rate until 5th February 2009 and 2.5% overall (2% above base rate) for the period thereafter. He did not have any evidence of the rate that companies like Persimmon would have paid to borrow money (see

paragraph 16 of his judgment) and doubtless that is why he applied 1% above base rate. It is, however, implicit in his remarks that had he had such evidence he might well have ordered a rate in accordance with what it showed if it had been greater than 1% over base rate."

(4) He set out the evidence before him at [52] as:

"(i) In this case, Sycamore actually borrowed from Allied Irish Bank at 2.5% over LIBOR (not base rate) on £6m borrowing on a capital and interest repayment basis, and 3.5% above LIBOR for a £1m interest repayment only 6 year term. It was granted an overdraft at 2% over AIB's base rate.

(ii) Other banks had made indicative offers at broadly similar rates.

(iii) A publication on the private equity market, published by the ICEAW, shows the sort of borrowing rates payable in buy-outs for similar types of loan over the period 2004 to 2008. It shows rates comparable to those obtained by Sycamore were the sort of rates applicable to buy-out/private equity transactions at the end of 2007.

(iv) In the relevant period LIBOR rates were higher than base rate.

(v) A Bank of England publication, Trends in Lending, published in October 2012 shows that the Indicative median interest rates on new SME variable rate facilities were, in 2008 (there are no figures for 2007 in the report) something over 3% above base rate."

(5) Mann J considered the submissions of the parties and concluded:

"56. In the circumstances I consider that enough has been done to displace the presumption. It has been demonstrated that persons of the class to which Sycamore belongs would have to borrow at rates greater than 1% above base rate and that that rate should be taken to be 3% above base rate for what I will call the first part of the period. Taking base rate rather than LIBOR works slightly in the defendants' favour, because for that period LIBOR was slightly greater than base rate.

57. However, that is only from the first period. In my view it would be appropriate to reflect the fact that interest rates were significantly reduced from February/March 2009, and at the same time to acknowledge that borrowing at 1% above base rate was, from that time, pretty well impossible. In doing so I follow the approach of Ramsey J in *Persimmon Homes v Hall*. If I differentiate for this period (which I do) Mr Smith says that I should award 2% above base rate, which he says yields a rate of 2.5% across the period. That is right if one takes the period from the date when base rate hit 0.5% in March, rather than February when it went down to 1%. Striking an appropriate balance, I find that it is appropriate to step the interest down from 5th February 2009 and to allow interest at 2.5% from that date, rather than take 3.5% for the month between the February and March changes."

147. In *Emblaze Mobility Solutions v HMRC* [2014] UKFTT 0679 (TC), Judge Sinfield cited the decision in *RSPCA*, in particular [113] to [117] thereof, and approached the matter as follows:

(1) The expert witnesses agreed that, as at 31 December 2006, Global (the company which was denied the VAT repayment by HMRC, the claim in relation to which was assigned to Emblaze) owed £3 million to its majority shareholder at LIBOR plus 2.55% and had an overdraft facility of £500,000 with HSBC at HSBC's base rate plus 1.75%.

(2) Although he did not receive any specific evidence on the point, he assumed that the HSBC base rate was the same as Base Rate.

(3) Judge Sinfield then proceeded as follows (and this is set out in full as this extract was then cited by Marcus Smith J on appeal to the Upper Tribunal):

> "100. When determining what would be an appropriate rate of interest, I only take account of the actual costs of borrowing incurred by Global before the assignment of the right to the repayment and the hypothetical costs that Global would have incurred after that time. I do not accept Mr Lasok's submission that I should determine a rate of interest according to a class of borrowers and determine the conventional rate for that class. Even if I considered that I should determine a rate for a class of borrowers, I was not provided with any evidence to enable me to do so. I consider that I must determine an appropriate rate of interest for Global in the circumstances of this case. An appropriate rate of interest is one that provides an adequate remedy for the financial losses incurred by Global based on its cost of borrowing.
>
> 101. It seems to me that the appropriate rate of interest in this case must lie between base rate plus 1% and LIBOR plus 2.55%. I consider that base rate plus 1% is too low to be an appropriate rate of interest for Global in the circumstances of this case. It is much lower than the lowest rate at which Global was able to borrow commercially, namely base rate plus 1.75%, and does not reflect the fact that the interest charged to Global would be calculated on a compound basis. Having decided that I am only concerned with Global's costs of borrowing, I do not consider that there is any reason to award interest at a rate higher than LIBOR plus 2.55%. That was the highest rate at which Global borrowed money during the period before it went into administration. In my opinion, a rate of LIBOR plus 2.55% would be excessive for the following reasons. First, it is much higher than the commercial rate of interest charged by HSBC in relation to Global's borrowing by way of overdraft. Secondly, the amount borrowed by Global at LIBOR plus 2.55% was much less than the repayment withheld so applying that rate to the whole repayment would result in Emblaze receiving an amount far greater than the financial losses that were and would have been incurred by Global. However, the fact that Global borrowed less than the repayment withheld does not mean that Global is not entitled to any compensation for being kept out of that money by HMRC.
>
> 102. In the circumstances of this case, I consider that interest at the Bank of England base rate plus 1.75%, calculated on a simple basis, for the periods from 28 April 2006 until 21 July 2011 in respect of £6,911,434 and from 28 April 2006 until 9 May 2012 in respect of £1,533,217 is an appropriate rate of interest. I consider that it is a realistic rate of interest in that it is a commercial rate set by a third party that was actually applied to Global. It also, conveniently, falls between the inadequate compensation produced by applying base rate plus 1% and the over generous award produced by using LIBOR plus 2.55%. The fact that it exceeds the conventional rate might be seen to reflect some element of compounding as Collins LJ recognised in *RSPCA*.
>
> Decision on calculation and rate of interest
>
> 103 In summary, I have concluded that interest is payable from 28 April 2006 until 21 July 2011 in respect of £6,911,434 and from 28 April 2006 until 9 May 2012 in respect of £1,533,217. Although I consider that the FTT can and must direct that interest under section 84(8) should be calculated on a compound basis where that is required in order to provide an adequate indemnity, I concluded that simple interest at an appropriate rate would provide an adequate indemnity in this case. In my opinion, interest at the Bank of England base rate plus 1.75%, calculated on a simple basis, is broadly

commensurate with the loss suffered by Global, which was assigned to Emblaze, and provides an adequate indemnity under EU law."

148. Judge Sinfield thus determined the appropriate rate of interest as Base Rate plus 1.75%, this being described as "a realistic rate of interest in that it is a commercial rate set by a third party that was actually applied to Global". No evidence was provided as to interest rates for a class of borrowers, but in any event Judge Sinfield stated he did not accept the submission that he should determine a rate of interest according to a class of borrowers and determine the conventional rate for that class. He "must determine an appropriate rate of interest for Global in the circumstances of this case".

149. On appeal to the Upper Tribunal, Marcus Smith J considered the principles to be applied by the Tribunal in determining the rate of interest to be awarded under s84(8):

> "31. The *Littlewoods* decisions — that is, of the CJEU and the Supreme Court — make clear the primacy of national law in determining questions of interest. Provided the requirements of effectiveness and equivalence are observed, the former being characterised by the need for "reasonable redress", which is a flexible standard, it is national law and not EU law that governs."

150. Marcus Smith J cited Lawrence Collins LJ at [111] and [113] to [116] of RSPCA and continued:

> "35. I agree that the conventional practice in section 35A cases represents a good guide and structure to the manner in which the section 84(8) discretion should be exercised. In *BritNed Development Ltd v ABB AB* [2018] EWHC 2913 (Ch) at [17], I summarised the discretion under section 35A in the following propositions:
>
> (1) An award of interest is not punitive and the use to which the party paying interest would have put the funds (and the returns that such party may or may not have made) is irrelevant.
>
> (2) There is a convention that at least the starting point for the award of simple interest (at least where the award is in £ sterling) is Bank of England base rate plus 1%.
>
> (3) This conventional rate will, usually, be less than what a claimant would have to pay as a borrower, but more than a claimant could earn as a lender. The appropriate benchmark, however, is not to regard the claimant as the lender of monies (inferentially, to the defendant), but rather as having had to borrow money in order to fund the loss that has been vindicated by the award of damages in the judgment. It is this that informs the court's departure from the conventional starting point: the overall aim is to determine a fair rate to compensate the claimant.
>
> (4) When considering the departure from the conventional starting point, a broad brush approach must be taken. In *Fiona Trust*, Andrew Smith J put the point as follows:
>
> "A "broad brush" is taken to determine what rate of interest is just and appropriate: it would be neither practical nor proportionate (even in a case involving as large sums as these) to attempt a minute assessment of what will precisely compensate the recipient. In particular, the courts do not have regard to the rate at which a particular recipient of compensation might have borrowed funds. This policy is adopted in order to control the extent of the inquiry to ascertain an appropriate rate…The court will, however, consider the general characteristics of the recipient in order to decide whether to assess interest at a rate that is higher or lower than is conventional."

(5) Specific evidence (eg as to the claimant's borrowing rates) may be adduced to support a particular departure from the conventional rate or as regards the particular circumstances of the claimant."

151. Marcus Smith J then went on to consider the approach taken by Judge Sinfield:

> "36. The FTT considered the question of the rate of simple interest that should be awarded in conjunction with the repayment supplement point. The reasoning in relation to these two (separate) issues is intertwined. Given the two distinct grounds of appeal, I have done my best to separate the FTT's reasoning, so as to distinguish between the reasoning going to Ground 1 and the reasoning going to Ground 2. So far as the rate of simple interest (Ground 1) is concerned:
>
> (1) The FTT began by noting what Lawrence Collins LJ said in *RSPCA*: Decision at [86]. I have set out the relevant passages in paragraph 34 above. At [88], the FTT noted that "[b]oth parties agreed that the conventional rate of base rate plus 1% was the starting point". That is clearly right.
>
> (2) The FTT considered that "it would not be correct to use the rates of borrowing of persons other than Global in determining the interest rate to be applied": Decision at [91]. Neither party took issue with this approach before me, and I respectfully agree that the fact that Global's claim was assigned to Emblaze cannot result in a higher rate of interest being paid by HMRC. It is trite law that an assignment cannot prejudice the position of the debtor.
>
> (3) The FTT then summarised the expert evidence on interest that was before it (Decision at [94] to [99]). Having done so, the FTT then stated its conclusions. It is appropriate to set these out in full (with emphasis supplied):
>
> …[[100] to [103] cited] …
>
> 37. I regard this reasoning as unimpeachable, and certainly well within the discretion conferred on the FTT by section 84(8). The FTT properly directed itself on the law — the *RSPCA* decision was and remains the leading case, in this regard — and properly considered whether the conventional rate of Bank of England base rate plus 1% should be departed from. The FTT considered that it should — to Emblaze's advantage — but preferred (for the reasons it gave) the commercial rate that Global borrowed from HSBC of Bank of England base plus 1.75% to the inter-company rate of LIBOR plus 2.55%. I can quite understand why the FTT did so. Furthermore, the FTT considered that — given the repayment on which interest was being awarded was greater than Global's actual borrowing, there was a particular risk of over-compensation in awarding a rate higher than the commercial rate."

152. Judge Sinfield's reasoning was thus endorsed by Marcus Smith J. The parties emphasised different aspects of this decision:

(1) Mr Puzey submitted:

(a) Marcus Smith J had effectively acknowledged that the award of the conventional rate will usually be less than what a claimant would have to pay as a borrower;

(b) the reference to "broad brush" has been ignored in Unistar's approach, where there has been a minute assessment of available information; and

(c) whilst there is a reference to the general characteristics of the claimant, Mr Puzey emphasised the lack of evidence adduced by Unistar as to its general characteristics and the borrowing available to such persons.

(2) Mr Walker-Nolan observed there was arguably a tension between [35(4)] and [35(5)] of Marcus Smith J's decision, but submitted that the actual rates paid by Global had been of substantial importance in determining the appropriate rate, and indeed that HMRC's approach in this appeal is a departure from their previous practice.

153. We need to apply this case law (and in particular the principles set out in *RSPCA* and *Emblaze*) to the facts before us. The overriding principle is that interest should be awarded to UTL and UGL for being kept out of the money, the VAT repayment, which ought to have been paid to them. We may award a rate higher than the conventional rate, either because that rate is reasonably considered too low or because on the facts the taxpayer has had to borrow at a higher rate (in which scenario there must be evidence on which we can act). The overall aim is to determine a fair rate to compensate Unistar. For the reasons explained in *Fiona Trust*, we should determine a rate based on rates available for short-term unsecured borrowings.

154. The parties have both addressed (by way of submissions and evidence) the actual borrowings of UTL and UGL and (to differing extents) the general characteristics or "class" of such companies as potential borrowers. Mr Walker-Nolan submitted that the conclusion in *RSPCA* demonstrates that evidence of the actual interest paid is of vital importance – ToTel could not prove it had actually borrowed at the higher rate and that was fatal to its case. Mr Puzey argued that the only appropriate means by which UTL and UGL could persuade the Tribunal to depart from the conventional rate would be if UTL and UGL satisfied the Tribunal that their general characteristics place them within a class of borrowers for which a higher rate of interest is appropriate.

155. We have considered whether, in light of the fact that UTL and UGL did have actual borrowings as at the time they submitted their VAT returns for the periods under appeal, the evidence as to rates available to borrowers with the same general characteristics as UTL and UGL is relevant: that is, could it be said that the only situations in which the rates available to a "class" have determined the appropriate rate for the Tribunal to award is if either the claimant did not have any actual borrowings at the relevant time or if no evidence was adduced as to the rates of such borrowings. We have concluded that the authorities do not require that, where evidence of actual borrowing is before us, we award interest in line with the rates of such borrowing without further consideration of all the circumstances. The exercise of discretion is more nuanced than that:

(1) in *Emblaze*, Judge Sinfield determined a rate based on the actual borrowing rates of Global from a mainstream bank, preferring that rate to actual borrowing rates from the majority shareholder. We note that in that case the intra-group borrowing was of an amount significantly higher than the bank overdraft, and was closer in quantum to the amount of VAT withheld;

(2) the conventional rate was awarded in *Tate & Lyle* (on the basis that this was in line with the evidence as to the rates at which borrowers of that class, being described as large public companies with the size and prestige of Tate & Lyle rather than smaller, less prestigious concerns, could borrow) and in *RSPCA* to both RSPCA (where there was no evidence that it had borrowed or evidence as to the commercial rate which would have been available to it) and (in that same case) to ToTel (which had not borrowed); and

(3) there are several examples of rates being awarded based on those available to a class of borrowers in differing scenarios:

(a) *Banque Keyser Ullman* – where Steyn J proceeded on the basis that the plaintiffs, as banks, would necessarily have had borrowings, and awarded different rates to Chemical Bank (as a "prime bank" rather than a small bank) but was not

prepared to have regard to the fact that one of the small banks, Kusa, was in a particularly weak position;

(b) *Baltic Sea* – the plaintiffs had not in fact borrowed, and the class was regarded as being Lloyds Syndicates;

(c) *Jaura* – awarded at 3% above Base Rate where there was evidence that the actual borrowing rate was higher, on the basis that there was insufficient evidence that the rate actually charged to Mr Jaura was typical of small businessmen in his position. Rix LJ drew a distinction between the rates available to small businessmen and first class borrowers;

(d) *Fiona Trust* – where it was considered that the actual interest rate was "not less, or not significantly less" than that awarded; and

(e) *Sycamore* – at stepped rates during the period, in circumstances where there was actual borrowing at what was described as comparable rates. Mann J considered rates available to the private equity market and median rates available to SMEs on new facilities.

156. We therefore look further at the borrowings of UTL and UGL, consider the submissions and evidence relating to general characteristics and class and consider how, in the light of this, to exercise our discretion having regard to the principles set out in the authorities.

157. We do not have a complete picture of the funding of UTL (or indeed UGL). The fact that the evidence was led by that produced by Mr Case meant that we have a fuller picture of the loans he made to UTL. The information as to the loans between UTL and Mr Case was incomplete, but more than fragmentary, and we are satisfied that this information fairly reflects the lending arrangements between Mr Case and UTL. Mr Puzey challenged the commerciality of the loans from Mr Case (an issue which we discuss further at [160] below). On the basis of our review of the evidence, we accept that the arrangements are surprising in their informality and, more significantly, in their lack of certainty as to terms. Even if lengthy loan agreements were not thought appropriate for these loans, we would still have expected that a one-page term sheet could have been produced specifying dates for draw-down and repayment, interest rates and what would happen if there was a default or extension of time requested. Nevertheless, we do accept that Mr Case is, as regards UTL, an unconnected third party, that he did lend money to UTL, and these loans were at the implied interest rates set out in Mr Drewe's report.

158. Information as to other borrowings of UTL is drawn in part from the financial statements of UTL (which refer to bank loans and overdrafts), the decision of the Tribunal in Unistar 2013 and the evidence from Mr Spurgeon. Such information, described further at [63] to [70] above, is sparse.

159. UGL's main source of funding was the intercompany loan, the interest rate on which was 18% by the time of the denial. The submission is that in considering the actual borrowing costs of UGL at the time of the denial we should have regard to the "cost" of the dividends on the Preference Shares. That is not to suggest that they should be treated as debt, rather to note that the subscription proceeds were a source of funds and the cost of such funds should not be ignored. As with UTL, there was some evidence (see [82] above) that UGL had other sources of funding, but this evidence was scant.

160. As noted above, a key challenge by Mr Puzey was as to whether the loans (in particular those from Mr Case to UTL, but also those between UTL and UGL) were "commercial" on the basis that:

(1) none of the arrangements accorded with bona fide, arms-length commercial practice - absence of proper credit risk assessments; the interest rates charged did not accord with prevailing market rates or accepted benchmarks (as accepted by Mr Case) and they were not commercial or fair; the interest rates were "unusually very high"; and the terms were not always clearly agreed, with contractual aspects very informal in content and execution, demonstrative of "irresponsible operation of a commercial business";

(2) all of the experts had questioned whether the arrangements between UTL and Mr Case can properly be described as borrowing/lending;

(3) Ms Paul-McCrossen and Mr Iles agree that "usual and standard commercial lending practice" was not followed in respect of loans made to both to UTL and UGL and that if it had been, in terms of due diligence, no funds would have been lent to either company by a standard commercial lender;

(4) in Unistar 2013, the following exchange is recorded:

> "Judge Porter asked why in view of the fact that Trading appears to have achieved a profit in excess of £11,000,000 over the earlier period, it had been necessary for the Companies to borrow any money. Mr Spurgeon replied:
>
> "I didn't need to, no. It would have made more sense not to borrow the money, not to pay all the interest. But again, that is hindsight.""

The Tribunal found the evidence relating to the lending arrangements "unsatisfactory", stating at [143] that:

> "The evidence with regard to the loans is unsatisfactory. We fail to understand why the Companies needed to take the loans nor, indeed, why they would be prepared to pay such large sums by way of commission for the use of the money. We have not been provided with a copy of the debenture and it is peculiar that Mr Case appears to have been prepared to advance further sums to the Companies when he was aware of the litigation with DRT."

161. Mr Walker-Nolan submitted that the agreed inability to access mainstream borrowing is critical in determining whether the loans UTL and UGL did borrow are commercial.

162. In the circumstances of this case, we are not persuaded that that we should award interest based solely on the rates payable by UTL and/or UGL. We are not required to do so by the authorities, nor do we consider it would be appropriate to exercise our discretion in this way on the facts before us. We have set out our findings as to the lending arrangements between Mr Case and UTL. However, as already noted, there are significant gaps in the information before us as to UTL's overdraft with Barclays, the absence of any evidence that UTL or UGL approached any bank (let alone a mainstream bank) other than Barclays for finance, evidence which we consider is significant given the evidence of Mr Hussey and Mr Spurgeon as to UTL's cost of borrowing (being 10-15%) which was used in setting the intercompany lending rate.

163. There is some reference to commerciality in the case law – eg, in *Emblaze*, Judge Sinfield at [101] described the conventional rate as "much lower than the lowest rate at which Global was able to borrow commercially" and said (at [102]) that Base Rate plus 1.75% was a "realistic rate of interest" in that it was a commercial rate set by a third party that was actually applied. We do not accept that this means that "commerciality" is a standalone test in assessing the appropriate rate. Having said that, several of the features which Mr Puzey draws attention to in this context are relevant when looking at the way in which the businesses of UTL and UGL were operated. They are separate companies, but the directors effectively ran them together,

and the only acknowledgement of their separate legal personality was in the context of the arrangements for the intercompany loans and deciding that that portion of any intercompany balance should carry interest. The directors were prepared to pay the rates of interest charged by Mr Case as this gave them access to same or next day advances of large sums of money without being required to give anyone any control or oversight over the way in which they ran their business (either as to the suppliers and customers they chose to deal with or the payment terms they agreed to), and enabled them not only to enter into transactions quickly but also to maintain very high levels of salary and dividend payments. As acknowledged by Mr Spurgeon, with the benefit of hindsight, a more restrained approach in the early years would have enabled them to fund transactions from retained profits and not borrow from Mr Case. They continued operating in this manner even though the circumstances were such that by May 2003 UTL was already defaulting on repaying Short Term Loans. This was the way Mr Hussey and Mr Spurgeon chose to run their businesses. That was their decision to take. That is not to say that the costs they chose to incur should necessarily be expected to be passed on to HMRC by way of an award of interest at a matching rate in the present appeal.

164. We look also at the submissions and evidence on the general characteristics and class of UTL and UGL as borrowers. Mr Walker-Nolan sought to identify Unistar as mobile telephone wholesalers with characteristics including high turnover and low profit margin. He stated that the evidence of the rates available to such a class was provided by the rates available to UTL and UGL themselves, and the evidence of the witnesses of fact before us. Addressing the BIS SME Report, Mr Walker-Nolan submitted that each of the companies surveyed fit into a class of borrowers able to access mainstream borrowing and had turnover of less than £25 million. Furthermore, whilst Global (the subject-matter of the decision in *Emblaze*) was also a mobile telephone wholesaler, he submitted that the rates available there were not comparable due to the size of that company compared to Unistar (it was a public limited company with over 100 employees).

165. These submissions illustrate a difficulty involved in looking at the class of borrowers. Mr Walker-Nolan submits that we need to look at mobile telephone wholesalers (including the difficulties they face in obtaining finance), but rejects Global as comparable on the basis of size and leaves us in the position that the only mobile phone wholesalers in respect of which we have evidence is that of UTL and UGL. Mr Puzey refers to the evidence adduced by Ms Paul-McCrossen, in particular the BIS SME Report, but whilst that covers businesses of the same size as Unistar, it applies across all sectors and looks at borrowing from banks generally (and the data ends at 2012).

166. Having carefully considered the discussions in the authorities which look at the relevance of the general characteristics and the class of borrower, as well as the way in which the appropriate class was described in those cases, we consider that it is clearly acknowledged that evidence of class is not going to be a perfect match to the position of the taxpayer in question. It cannot be if the court is looking at the position of borrowers which are "large and prestigious" (in *Tate & Lyle*), "small" (in *Jaura*) or Lloyds Syndicates (in *Baltic Sea*) as a group. *Banque Keyser Ullman* illustrates that a court may be prepared to distinguish between US prime banks and small banks, but not separate out further small banks which are in a particularly weak position. This is very much in line with the "broad brush" approach referred to in *Fiona Trust*, which was cited by Marcus Smith J in *Emblaze*.

167. We accept the opinion of Ms Paul-McCrossen, by reference to the criteria she set out, that UTL and UGL are "small" companies, and that as such they fall within the class of company which was the subject-matter of the BIS SME Report. We note that this accords with the basis on which the audited financial statements of UTL were prepared. Having regard to

the authorities, we have concluded that the evidence as to the interest rates available to SMEs in that report forms a fair basis on which to depart from the conventional rate.

168. The BIS SME Report identifies overdraft margins and term loan margins during various periods. In the context of seeking to award interest for unsecured short-term loans, the margins on overdrafts are more appropriate than those for term loans. We do not, however, accept Ms Paul-McCrossen's opinion that we should assume that the margin is "locked-in" at the 2006 level for a five year period, akin to some form of revolver – this is not supported by data in the report, and assumes that a form of longer-term committed funding is agreed by Unistar. This is contrary to the clear guidance that we should award interest based on short-term lending. Instead, and having regard to the evidence in the BIS SME Report which demonstrates the significant changes to the cost of funding as a result of the credit crisis, we consider it appropriate to award interest at a rate which reflects the changes to the margin throughout the period for which Unistar was kept out of its money.

169. We note that the BIS SME Report identifies an average margin in 2006 of 0.6% above Base Rate (and 0.7% in 2007-2008), ie lower than the conventional rate. This raises the question as to whether we should award interest (for the first part of the period in issue) at such a rate. However, our view is that the guidance given by Lawrence Collins LJ in *RSPCA* proceeds on the basis that departures from the conventional rate would be made to award interest at a higher rate. This approach seems to us to be fair, given that otherwise taxpayers who had not borrowed at all would be in a better position than those who had borrowed at a rate lower than the conventional rate. Therefore, notwithstanding that Andrew Smith J in *Fiona Trust* contemplated that a court may assess interest at a rate that is lower than the conventional rate, we prefer to treat the conventional rate as a "floor" for this purpose.

170. The overdraft margins identified in the BIS SME Report are set out at [105(4)] above. They are stated to apply across various time periods, identified using sometimes overlapping years rather than by reference to specific dates. We have therefore considered the dates at which we should adjust the margin above Base Rate. In the light of all of the evidence before us, we consider the appropriate margin to be as follows (these being the "Determined Rates"):

(1) from the start date (see [172] to [182] below) to 7 October 2008 – Base Rate plus 1%, this being the floor at a time when the BIS SME Report shows margins for the class being at 0.6%, increasing to 0.7%. We have decided to end this period at 7 October 2008. The Base Rate had been at 5% since 10 April 2008, the collapse of Lehman Brothers occurred in September 2008 and 8 October 2008 was the date on which the Bank of England decided to reduce the Base Rate (to 4.5%), this being the first of several reductions over the ensuing months. This date is thus a marker of the effect of the credit crisis on lending, albeit that we appreciate that there are also plausible earlier and later dates;

(2) from 8 October 2008 to 31 December 2009 – Base Rate plus 3.6%, in line with the margin identified in the BIS SME Report; and

(3) from 1 January 2010 to the end of the period – Base Rate plus 3.7%. We are conscious that the evidence relating to class does not go beyond 2011-2012, whereas the period for which Unistar are claiming compensation extends into 2013. In the absence of any evidence to the contrary, we have applied this margin to the end of the period, considering that it would not be fair to assume that, after 2012, the margins available to SMEs plummeted from 3.7% above Base Rate to 1%.

Period for which interest payable

171. It was agreed that the end date for calculating interest was the date of payment of the withheld VAT. For both UTL and UGL this was 25 September 2013. Unistar and HMRC did not agree as to the appropriate starting date.

172. UTL and UGL filed their 04/06 returns on 8 May 2006 and their 05/06 returns on 12 June 2006. The accountancy experts agreed that interest is due in principle from the date on which the VAT input tax credit should have been paid, albeit that they differ as to when this was:

(1) Mr Drewe expressed the view that ten working days from submission of the returns is appropriate, ie 22 May and 27 June 2006. This was based on paragraph 5.1 of Public Notice 700/58 (dated March 2002) which states that a taxable person can expect HMRC to authorise payment of at least 90% of correct repayment claims within ten working dates. He confirmed in cross-examination that the dates for repayment of VAT claims was not within his expertise; and

(2) Ms Wild referred back to information she set out in her report on UTL (see [94(9)] above) which gave a range of between 24 and 121 days from the end of the VAT period to the VAT repayment (which does not specify when the returns in question were submitted). This was based on information provided by HMRC in respect of the periods 04/05 to 03/06. Mr Drewe acknowledged that there was no consistent practice revealed by this day count. She stated that she did not regard it as within her expertise to conclude whether the start date of the interest calculation should be ten working days from the submission of the VAT return or some later date.

173. The start date is for us to determine, albeit that we do rely on the evidence of fact before us.

174. In *RSPCA* Lawrence Collins LJ stated:

> 97. Paragraph 5.1 of Notice 700/58 Treatment of VAT repayment returns and VAT repayment supplement sets out a code of practice to which repayment traders can expect Customs to adhere when processing their Form 100 VAT Returns. It states that traders can expect Customs to "authorize payment of at least 90% of correct repayment returns within 10 working days of their receipt in the VAT Central Unit". This Notice was accepted as the best basis for selecting a starting date in *Olympia Technology Ltd*, para 22.
>
> 198. The *Garage Molenheide* case was a case on the proportionality of the Belgian legislation and not a case of general application, and does not lay down any general rule of law that interest must be paid from the date that the sums would normally have been paid. The starting date is a matter within the discretion of the Tribunal, and I accept that it can take into account the policy in Notice 700/58. But it can also take account of a reasonable period for Customs to make enquiries.

175. In *Emblaze* Mr Lasok, counsel for Emblaze, submitted that *Enel Maritsa* and *Rafinaria Steaua* showed that when Global made the claim for repayment of input tax, it became entitled to interest if payment of the amount properly claimed were delayed beyond the date on which it would have been repaid in the normal course of events. Emblaze's expert witness, James Gilbey, took the normal date for repayment to be 28 April 2006 on the basis that the VAT return was made on 13 April and HMRC try to make payment within ten working days which meant that HMRC should have paid the claimed input tax to Global on 28 April. Judge Sinfield found at [77]:

> "I note that the comments of Lightman J in *Tradecorp* and Collins LJ in *RSPCA* quoted above were made before the CJEU's rulings in *Enel Maritsa*

> and *Rafinaria Steaua*. It is clear from the CJEU's comments in *Enel Maritsa* and *Rafinaria Steaua* that a repayment of VAT may be withheld for a reasonable period in order to carry out a tax investigation. I consider that it is also clear from those cases that, where the investigation concludes that the repayment is due, interest must be calculated from the date on which the excess VAT would have had to be repaid in the normal course of events. Applying, as I must in a case such as this, the approach required by EU law, I consider that any interest should be calculated from the date on which the VAT would have been repaid to Global in the normal course of events. HMRC did not provide any evidence to contradict Mr Gilbey's view that, in the normal course of events, HMRC would have repaid the disputed VAT to Global on 28 April 2006. I conclude that interest is payable from 28 April 2006 until 21 July 2011 in respect of £6,911,434 and from 28 April 2006 until 9 May 2012 in respect of £1,533,217."

176. Having regard to the principles (that we consider is clearly established by the CJEU) that a repayment of VAT may be withheld for a reasonable period in order to carry out a tax investigation, and that interest should be calculated from the date on which the excess VAT would have had to be repaid in the normal course of events, we have considered carefully the pattern of timing of repayments in the periods leading up to those in issue.

177. The evidence adduced by Ms Wild in her report on UTL as to the dates on which the VAT had been repaid or authorised was not challenged or contradicted by any other information available to us and, in the absence of any additional information, for the four repayments where we only have the date of authorisation rather than repayment we treat that date of authorisation as if it were the date of repayment. We had no information as to when returns were submitted in any of these periods. This evidence was included only in Ms Wild's report on UTL. We had no equivalent information as to UGL.

178. The only information we have as to the date of submission of returns is in respect of the periods under appeal, where the returns were submitted 8 and 12 days after the end of the VAT period in question. This is a relatively prompt submission of returns for those periods, and, albeit that this is a tiny sample, we infer this was typical of the usual timing. If, therefore, returns were generally submitted on average 10 days after the end of the VAT period, the information adduced by Ms Wild does not support a conclusion that UTL or UGL were generally receiving repayments within ten working days of submission of the returns.

179. Mr Walker-Nolan referred to the date from which the legislation provides that a repayment supplement is payable by HMRC and submitted that, if we were not persuaded that we should adopt a start date of ten working days from submission of the returns, then we ought to regard this 30 days as a ceiling on the appropriate start date.

180. This may well be the date from which HMRC is effectively penalised for failing to deal with returns sufficiently quickly, but we do not consider it should override the practice which developed in the normal course of events. We consider that we should seek to use the information as to the previous history of timing of repayments in order to determine the start date.

181. The table at [94(9)] sets out the repayment history for twelve monthly returns for UTL. We consider we should look at the average time for repayment across this period and apply this in respect of both UTL and UGL (as no different information is available in respect of UGL and given that the businesses were operated together it is reasonable to proceed on the basis that this pattern would have applied similarly to both companies). There were three periods (04/05, 05/05 and 07/05) where the repayment was made in more than one tranche. For each of those periods, we have first calculated the average time for repayment (without any

weighting as to the amount repaid on each date). The average days from the end of the VAT period to the VAT repayment was therefore 53 for 04/05, 77.25 for 05/05 and 52.5 for 07/05. Using the days as stated for each of the other nine months, the average for the year is thus 38.8125 days, which rounds up to 39 days from the end of the VAT period.

182. We conclude that interest is payable from 8 June 2006 for the period 04/06 and from 9 July 2006 for the period 05/06.

Receipt of repayment supplement

183. Both UTL and UGL have received an amount by way of repayment supplement from HMRC. It was not argued by HMRC, correctly we consider in the light of the decision of the Upper Tribunal in *Emblaze*, that we should adjust the amount of interest payable to reflect the receipt of this repayment supplement.

184. In *RSPCA* Lawrence Collins LJ stated:

> "136. Repayment supplement is a statutory penalty levied against the Commissioners for failing to deal with VAT Returns expeditiously, and as was pointed out in Olympia Technology Ltd , para 10, it does not produce an interest formula of the sort required for the application of section 84(8) . I do not consider that as a matter of principle the section 84(8) interest should be adjusted in order to take account of a section 79 repayment supplement. Again, it is section 84(8) which applies, and not section 79.
>
> 137. But that does not mean that there may not be circumstances in which the Tribunal can take account of, or have regard to, the fact that repayment supplement has been made. It would not normally be a reason for departing from a conventional rate if the Tribunal considered that a conventional rate was appropriate. But if on the basis of evidence the trader claimed that it was entitled to a rate higher than a conventional rate, it may be unrealistic and unjust not to have regard to the receipt of the repayment supplement. I therefore consider that the Tribunal may have regard to the fact that there has been a section 79 repayment supplement, especially where the trader claims on the basis of evidence that interest should be higher than a conventional rate."

185. We have awarded interest at a rate higher than the conventional rate for some of the period claimed. However, we are mindful that, as explained by Marcus Smith J at [48] of *Emblaze*, *RSPCA* does not require an adjustment to the interest to reflect the repayment supplement in every case where the rate of interest ordered to be paid exceeded the conventional rate. Rather, it articulates a discretion, that must be exercised for a reason, which may (or may not) be triggered by the rate of interest ordered.

186. We consider that the interest rate awarded above, in the light of a careful assessment of the evidence available, represents reasonable redress to Unistar. No reason has been put to us by HMRC to seek to justify adjusting the amount awarded downwards, and we have not identified such a good reason. On that basis, no adjustment shall be made to the amount of interest calculated to reflect the receipt of the repayment supplement.

CONCLUSION

187. HMRC shall pay interest to:

(1) UTL on £604,939.14 from 8 June 2006 to 25 September 2013 and on £328,514.91 from 9 July 2006 to 25 September 2013 at the Determined Rates (as set out at [170] above); and

(2) UGL on £391,628.65 from 8 June 2006 to 25 September 2013 and on £1,064,504.35 (being £937,723.15 plus £126,781.20) from 9 July 2006 to 25 September 2013 at the Determined Rates.

188. The parties shall agree the calculation of this amount (and in the absence of agreement they shall apply to this Tribunal) and it shall be paid by HMRC less, in both cases, the amount of interest which has already been paid by HMRC to the relevant company (which includes both the Base Rate plus 1% directed to be paid by the Tribunal and the additional amounts agreed to have been mistakenly paid).

COSTS

189. The October 2019 Directions included that the determination of HMRC's costs application of 2 October 2019 and the costs of Unistar's application dated 19 July 2019 are reserved to the final hearing on 20 to 23 January 2020.

190. Neither party addressed these costs applications in their skeleton arguments or in oral submissions before us.

191. The application dated 19 July 2019 did not relate to costs. HMRC's application of 9 October 2019 was an application pursuant to rule 10(1)(b) of the Tribunal Rules for Unistar to pay HMRC's costs of and occasioned by Unistar's application dated 19 July 2019 (which application had been scheduled to be heard by the Tribunal on 9 October 2019 but was vacated upon the October 2019 Directions being agreed). The basis for that application was stated to be that Unistar's conduct of these proceedings has been manifestly unreasonable.

192. Any party seeking to apply for its costs shall do so within 28 days of this decision. We dispense with the requirement imposed by Rule 10(3)(b) of the Tribunal Rules that such costs application be accompanied by a schedule of the costs claimed.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

193. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

JEANETTE ZAMAN
TRIBUNAL JUDGE

RELEASE DATE: 16 APRIL 2020