UT Neutral citation number: **[2024] UKUT 00404 (TCC)**

UT (Tax & Chancery) Case Number: UT/2023/000098

Upper Tribunal
(Tax and Chancery Chamber)

INCOME TAX AND NICs – PAYE – payment to an EBT, loan of same amount to a director - FTT found purpose of payment was to enable the loan to be made and the purpose of the loan was to reward the director; it was inevitable at the time of payment to the EBT that the loan would be made; there was a genuine repayment obligation - held - FTT made an error of law in concluding that in vast majority of cases a loan confers a taxable benefit and that the loan made to the director conferred such a benefit - decision of FTT set aside - re-made - neither payment to the EBT nor the principal of the loan to the director was earnings - appeal allowed

Hearing venue: The Rolls Building
London
EC4A 1NL

Heard on: 15 and 16 October 2024
Judgment date: 06 December 2024

Before

MR JUSTICE RICHARD SMITH
JUDGE JEANETTE ZAMAN

Between

M R CURRELL LIMITED

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Ben Elliott, counsel, instructed by Haslers Business Services LLP

For the Respondents: Edward Waldegrave, counsel, instructed by the General Counsel and Solicitor for His Majesty's Revenue and Customs

DECISION

INTRODUCTION

1. M R Currell Limited (the "Appellant") has appealed against the decision of the First-Tier Tribunal ("FTT") (*M R Currell Limited v HMRC* [2023] UKFTT 613 (TC)) (the "Decision") in which the FTT dismissed the Appellant's appeal against:

> (1) a determination issued under regulation 80 Income Tax (Pay as You Earn) Regulations 2003 in the sum of £320,000 dated 15 March 2015; and
>
> (2) a decision issued under s8 Social Security Contributions (Transfer of Functions, etc.) Act 1999 in the sum of £113,427.33 dated 10 March 2015 (together, "the determinations").

2. The facts are set out in our summary of the Decision below, but essentially concern a payment of £800,000 (the "Payment") which was made by the Appellant to the trustee (the "Trustee") of the M R Currell Limited Employee Benefit Trust (the "EBT") in November 2010 and which was then lent (the "Loan") by the Trustee to Mark Currell ("MC"), a director and shareholder of the Appellant. The FTT concluded that there were taxable earnings in the amount of £800,000 (although before us the parties disagreed as to whether it was the Payment or the Loan which had been found to be earnings) and the Appellant's appeal was dismissed.

3. The FTT granted the Appellant permission to appeal on the ground that "the Tribunal erred in law in concluding that the Payment constituted earnings in the amount of £800,000 under s62(2)(b). In particular, the FTT has erred in law in holding that the principal of the loan constituted a reward or benefit within the meaning of s62(2)(b)".

4. We are grateful to Mr Elliott and Mr Waldegrave for their written and oral submissions, which we found most helpful. We have not referred expressly to all of those submissions in this decision but we have taken them all into account.

5. References below in the form [x] are to paragraphs of the Decision unless the context otherwise requires.

RELEVANT LEGISLATION

6. All references to sections, Chapters or Parts are to sections, Chapters or Parts of the Income Tax (Earnings and Pensions) Act 2003 unless otherwise stated.

7. Section 6(1) provides that the charge to tax on employment income is a charge to tax on "general earnings". Section 7(3) then provides that "general earnings" means earnings within Chapter 1 of Part 3. Chapter 1 of Part 3 contains a single section, s62, which defines "earnings" for the purposes of calculating employment income.

8. Section 62 provides:

> "Section 62 - Earnings
>
> (1) This section explains what is meant by "earnings" in the employment income Parts.
>
> (2) In those Parts "earnings", in relation to an employment, means -
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> (a) any salary, wages or fee,
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> (b) any gratuity or other profit or incidental benefit of any kind obtained by the employee if it is money or money's worth, or
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> (c) anything else that constitutes an emolument of the employment.

> (3) For the purposes of subsection (2) "money's worth" means something that is -
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> (a) of direct monetary value to the employee, or
>
> (b) capable of being converted into money or something of direct monetary value to the employee."

9. Section 9(2) provides that in the case of general earnings, the amount charged is the "net taxable earnings from an employment" in the year. Section 15 applies to general earnings for a tax year in which the employee is resident, ordinarily resident and domiciled in the UK and provides that the full amount of any general earnings which are received in a tax year is an amount of "taxable earnings" from the employment in that year.

10. "Earnings" are defined separately for the purposes of national insurance contributions ("NICs"). Section 3(1) Social Security Contributions and Benefits Act 1992 provides:

> "3. "Earnings" and "earner"
>
> (1) In this Part of this Act and Parts II to V below –
>
> (a) "earnings" includes any remuneration or profit derived from an employment; and
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> (b) "earner" shall be construed accordingly."

FTT DECISION

Background

11. MC established a painting and decorating business in the early 1980s, initially as a sole trader. His wife, Kimberly Currell ("KC"), joined him as a partner in the business at a relatively early stage. The business grew and its success increased; most profits of what was then a partnership were reinvested ([15(1)-(3)]).

12. In 2002 the Appellant was incorporated and took over that business. The Appellant achieved substantial success and in the years ending 30 April 2009, 2010, and 2011 generated profits of (respectively) £440,000, £330,000, and £750,000 ([15(4)]).

13. Between 2002 and November 2010 MC and KC were the directors of the Appellant. MC was "a driving force" and "any significant decisions" would have been approved by MC but the success was not achieved by his efforts alone; KC was extremely important in assisting him ([15(5)-(6)]). By 2010, MC and KC's two sons were becoming increasingly involved in the business ([15(7)]).

14. By November 2010 the Appellant employed contract managers (along with other employees) who were "essential to the success of the business". The Appellant had a "culture" of paying "sizeable bonuses" to its contract managers when targets were hit. Those bonuses on average approximated to 10% of an employee's basic salary. This practice continued in all of the years following the setting up of the arrangements ([15(8)-(9)]).

15. As at November 2010, the Appellant had five shareholders. MC and KC held about 31% of the shares each, their two sons each held about 5%, and a share incentive plan owned approximately 28% ([15(10)]).

16. For the three tax years ended 30 April 2009, 2010 and 2011, MC took a salary of £4,800. For the period between 30 April 2009 and 30 April 2019, the maximum salary that he took from the Appellant was £10,800. In that period, the Appellant declared dividends (payable to all shareholders not just to MC) of between £50,000 and £160,000, most payments being in the region of £60,000-£80,000. MC also received dividends from other sources, and for the year ended 30 April 2009, his income from salary and dividends

amounted to £34,750, and for the period 30 April 2009 to 30 April 2019, ranged between £14,599 and approximately £41,000 ([15(11)]).

17. If the Appellant had not made the Payment, the Appellant would not have paid MC £800,000 as remuneration for his work for the Appellant ([15(12)]).

18. The Payment did not replace remuneration which MC had sacrificed or reduced in anticipation of receiving it ([15(13)]).

Arrangements concerning the EBT

19. Documents establishing the EBT were tabled at a board meeting of the Appellant on 17 November 2010. The trust deed establishing the EBT is dated 18 November 2010 (the "Trust Deed") and the Beneficiaries were the "bona fide employees" of the Appellant together with their relatives ([15(15)-(16)]).

20. On 22 November 2010:

(1) the Appellant issued a memorandum to all staff, telling staff that the Appellant had decided to implement a new employee incentive arrangement;

(2) the directors wrote to the Trustee sending it a copy of the Appellant's board minutes approving the contribution of £800,000 to the EBT and "drawing the Trustee's attention" to the possibility that the Trustee might use the contribution to make loans on appropriate terms to employees or directors and pay bonuses and provide other benefits; and

(3) MC wrote to the Trustee applying for a loan of £800,000 to buy 261,437 "A" shares in the Appellant (the "A Shares"). That letter stated he appreciated that the Trustee would require security for this loan ([15(17)-(19)]).

21. By a letter dated 23 November 2010 the Trustee informed MC that his request for a loan had been approved ([15(20)]).

22. On 25 November 2010:

(1) MC signed a loan agreement with the Trustee (the "Loan Agreement"). The terms were that the Trustee would lend £800,000 to MC (the "Loan"), which was repayable on the fifth anniversary date of the Loan Agreement. It was to be secured by a charge on MC's interest in the A Shares and the Loan was interest-free (save if MC was a bad leaver).

(2) MC and the Trustee entered into a share charge deed which referred to the Loan Agreement and charged the A Shares held by MC ([15(21)-(22)]).

23. On 26 November 2010 MC and KC entered into a share sale agreement by which MC agreed to purchase the A Shares from KC, and this was completed by a stock transfer form ([15(23)-(24)]).

24. By the time that the arrangements were implemented in November 2010, it had been agreed that the funds contributed to the EBT would be lent to MC and that he would use them to purchase shares from KC ([16(2)]). Prior to making the Loan and entering into the share charge deed the Trustee had valued the A Shares at £800,000 ([16(6)]).

25. There were various bank transfers on 26 November 2010, which included a transfer of £800,000 into KC's bank account with reference "EBT…Mark Currell" and a transfer from KC to the Appellant ([15(25)]. This transfer from KC was treated as a loan from KC to the Appellant which could be repaid to her whenever she wanted ([16(3)]).

26. MC's evidence was that he understood that the Loan was repayable in accordance with the terms of the Loan Agreement ((15(28)]). His personal bank account showed that had the Loan been called in in 2015, MC had personal resources to settle it ([15(29)]). The FTT accepted that the Loan was a genuine loan with a real repayment obligation, that MC had the independent funds to settle it on the repayment date and that MC was fully conscious of his obligation to repay on that date ([36(10)]).

27. Witness evidence (including that of MC) was that the reason why the Trustee did not ask MC to repay the Loan in November 2016 (which we assume should read November 2015 based on the repayment date under the Loan Agreement and the finding made by the FTT at [16(8)]) was because of a concern about double taxation. HMRC had already opened an enquiry into the arrangements and had issued the determinations in March 2015. The Trustee and the Appellant were concerned that if the money had been repaid and then used to pay bonuses there would have been tax on the payment of those bonuses ([15(31)]). The FTT accepted that the reason why the Trustee made no demand for repayment in November 2015 was because of the concern about double taxation ([16(8)]).

28. During 2019 MC repaid £50,000 of the Loan and this has been used to pay bonuses ([15(35)-(36)]).

Approach and conclusions of the FTT

29. Our analysis of the FTT's reasoning is set out in the Discussion. At this stage we record the structure of the FTT's approach:

(1) The FTT stated it would use the expression "reward or benefit" as shorthand for the provisions of s62 as interpreted by the Supreme Court in *RFC 2012 plc (in liquidation) (formerly The Rangers Football Club plc) v Advocate General for Scotland* [2017] UKSC 45 ("*Rangers SC*").

(2) The FTT set out the issue as:

> "14. The main issue for determination in this appeal, therefore, is whether the sole or a substantial reason why the Payment was paid by the company to the EBT as part of the arrangements was because it was a reward or benefit for MC for his exertions as an employee/director of the company."

(3) The FTT stated that the focus of its enquiry must be to establish the reason or substantial reason why the Payment of £800,000 was made by the Appellant to the EBT. When considering this enquiry, they can also consider subsequent events. This is simply viewing the facts realistically and applying a purposive approach to the interpretation of the relevant legislation ([22] - [23]). The proposed approach was then set out:

> "24. We start therefore by looking at the reasons why the company made the Payment, and then move on to consider the reasons why the EBT made the Loan to MC."

(4) The substantial reason for the Appellant making the Payment on 26 November 2010 was to enable the Trustee to fulfil the commitment it had made to MC to lend him £800,000 ([30]). The making of the Loan to MC was "prewired" ([31(8)]). The Appellant required that £800,000 of working capital in its business and it was inevitable that it would find its way back into the Appellant once it had been paid to the EBT ([31(15)]).

(5) A genuine loan of money with real repayment obligations can, as a matter of legal principle, comprise a reward or benefit; and here the Loan was a reward or benefit ([36]).

(6) The only reason for the Trustee exercising its discretion to provide the Loan of £800,000 to MC was because of the work which MC had done over the years in building up the business, as a sole trader then in partnership and then via the Appellant ([52] to [53]).

(7) The FTT then set out its conclusion:

> "56. We have found that it was inevitable, at the time at which the Payment was made by the company to the EBT, that it would be paid by the Trustee to MC by way of the Loan. We have also found that it was more likely than not that the Loan was paid to MC as a reward for the services which he had provided to the company. In our view there is no legal principle which prevents a genuine money loan on commercial terms with a real repayment obligation from being a reward or benefit.
>
> 57. In these circumstances [it] is our view that the Payment, therefore, was paid by the company as a reward for the services supplied by MC to the company. It therefore comprises earnings and thus taxable as asserted by HMRC."

(8) This was followed by a brief discussion of what were defined as "the Baxendale Walker cases" and addressing the Appellant's submissions on double taxation.

GROUND OF APPEAL

30. In the Appellant's application for PTA (the "PTA Application") it described the sole issue in the appeal as having been "whether the payment of £800,000 (the Payment) constituted earnings of MC because it was a "gratuity or other profit or incidental benefit of any kind" obtained by MC within the meaning of s62(2)(b) (which the FTT abbreviated to a "reward or benefit"…)". The PTA Application then stated that:

> "6. The Appellant's sole ground for appeal is that the Tribunal erred in law in concluding that the Payment constituted earnings in the amount of £800,000 under s62(2)(b). In particular, the FTT has erred in law in holding that the principal of the loan constituted a reward or benefit within the meaning of s62(2)(b)."

31. The FTT granted permission to appeal to the Upper Tribunal (the "UT") on that ground.

32. In their Respondents' Notice HMRC's position was as follows:

(1) The FTT was right to dismiss the appeal for the reasons given in the Decision.

(2) The Appellant's ground of appeal asserts that the FTT concluded that the Payment fell within s62(2)(b). HMRC does not accept that this is an accurate characterisation of the Decision. HMRC contends that the FTT decided that the Payment constituted earnings within s62(2) generally. To the extent that the FTT did decide that the Payment constituted earnings within s62(2)(b) specifically, HMRC will submit the appeal should be dismissed on the basis that the Payment constituted earnings within s62(2) generally.

(3) If the UT concludes that there is an error of law in the Decision, HMRC will submit that any such error was not material and the UT should not set aside the Decision. If the UT decides to set aside the Decision, HMRC will make further submissions as to what further steps the UT should take (ie whether the UT should remake the Decision or remit the case to the FTT).

33. At the hearing Mr Elliott drew to our attention the fact that s62(2)(b) is the only category of earnings within s62(2) to which the FTT had referred expressly. Mr Waldegrave re-iterated HMRC's position that the FTT had decided that the Payment constituted earnings

within s62(2) generally, and that, if HMRC were required to rely on a particular category within that sub-section, then their submission would be that the Payment was earnings within s62(2)(c), ie "anything else that constitutes an emolument of the employment".

34. To the extent that the Appellant requires further permission to appeal the Decision by reference to s62(2) generally, we consider it is in accordance with the overriding objective to grant such permission.

FTT's consideration of whether the Loan was a reward or benefit

35. The FTT addressed the reason(s) for the making of the Payment at [29] to [32] and the reason(s) for making the Loan to MC at [38] to [55]. The Appellant's submissions as to the Decision having involved an error of law were based on the FTT's consideration of the intervening question the FTT had posed as "Was the loan a reward or benefit?" at [33] to [37] and we set out those paragraphs in full:

> "Was the Loan a reward or benefit?
>
> 33. Before we consider the reasons why the Loan was paid to MC, we first need to consider whether, as a matter of law, a genuinely repayable loan can be a reward or benefit in the first place (whatever the reasons for its payment), and more importantly whether the Loan was a reward or benefit in this case.
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> 34. Mr Elliott submitted that a genuinely repayable loan could not be a reward or benefit as a matter of legal principle, and this was demonstrated by the Baxendale Walker cases. However, later in his submissions he accepted that the Loan was of temporary benefit to MC.
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> 35. He also submitted, contrary to the submission made by Mr Waldegrave, that Rangers did not show that a repayable loan could be a reward or benefit.
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> 36. It is our view that a genuine loan of money ("a money loan") with real repayment obligations can, as a matter of legal principle, comprise a reward or benefit. And in this particular case, the Loan was a reward or benefit. We say this for the following reasons:
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> (1) In nearly all cases a money loan is sought by the borrower. It is not imposed by the lender. This of itself suggests that the borrower considers a money loan to be of benefit to it. And this is the case whatever terms of that money loan. Consider someone buying a house with a mortgage. That person will, over the term of the mortgage, pay back considerably more than the capital borrowed. The borrower receives a considerable benefit since without it he or she could not afford to buy the house for which it is borrowed. That mortgage is a benefit even though it is on full commercial terms.
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> (2) In general terms, a money loan provides money which the borrower would not otherwise be able to access. Or it provides money as an alternative source of funds which the borrower considers a more attractive proposition to using alternative funds. For example, if one can borrow at 2% but then invest at 5% a person might borrow even if it was sitting on cash which it could also invest. Indeed, borrowing might be a simple way of gearing up to increase investment return.
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> (3) It seems to us that whilst it is impossible to describe the infinite number of reasons why a borrower might seek a loan, a common denominator is that the borrower benefits from that loan. And this is true whatever the terms of the loan.
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> (4) Mr Elliott suggested that the Loan was only a temporary benefit. We will consider whether five years is temporary in a moment, but a money loan

even for a short time can confirm a permanent benefit or advantage on the borrower. Consider a company in cash flow difficulties which is about to go into an insolvency process. A money loan repayable a month later might solve those cash flow difficulties and enable the company to survive. That is a permanent benefit. A person might seek a money loan in order to exploit a commercial opportunity, which, once exploited, might provide benefits well into the future. In this case the Loan was used, as always intended, as working capital in the company's business as it was paid into the company by KC as a director's loan account. That was a permanent benefit to the company.

(5) There is also a semantic point. It is no coincidence that someone who benefits from a trust is called a beneficiary. It is because that person benefits from the trust fund. A payment out of the trust fund confers a benefit on the recipient, and a money loan, on whatever terms, to a beneficiary is just such a benefit.

(6) As far as case law is concerned, we do not think that it is clear from either Rangers, or the Baxendale Walker cases, that a repayable loan cannot be a reward or benefit.

(7) In Rangers the loans were repayable, and Lord Hodge found that they were a component of the redirected earnings. However, it is certainly not authority for the proposition that a repayable loan can never, as a matter of law, be a reward or benefit.

(8) Nor do we think the same is true of the Baxendale Walker cases. In those cases, the judges, in our view, elided the analysis of whether a loan could be, as a matter of principle, a reward or benefit, with their analysis of whether in those particular circumstances, it provided a reward or benefit for services supplied by the relevant director. If the ratio of those cases was that as a matter of legal principle a genuinely repayable loan could not be able to benefit, we disagree with it for the reasons set out above. In our view such a money loan can as a matter of law be a reward or benefit.

(9) Turning now to the Loan. This was repayable only after the fifth anniversary, and provided MC was not a bad leaver, carried no obligation to pay interest. Whilst it was repayable after that date, repayment was not demanded by the Trustee save as regards the £50,000 in 2019.

(10) We accept it was a genuine loan with a real repayment obligation. We also accept that MC had the independent funds to settle it once that five year period ended. We also accept that he was fully conscious of his obligation to repay on that date.

(11) That notwithstanding, it clearly conferred a benefit on him. This is true both subjectively and objectively. It is clear from the evidence that the possibility of making a loan to MC once the EBT had been established had been discussed for some months before it was set up in November 2010. It was MC's evidence that taking a loan from the EBT was something that was attractive to him, and that it was financially advantageous compared with borrowing from a commercial lender. Indeed, we ask ourselves, if MC did not think it was of benefit to him, why did he apply for a loan in the first place.

(12) We have no doubt that an employee of the company, such as a contract manager, who applied for a loan from the EBT would consider that if a loan was made in his or her favour, that would be a benefit.

> (13) But objectively too, the Loan conferred a benefit on MC. It provided him with the sum of £800,000. Although the ostensible purpose of the Loan was to purchase the shares from KC, the reinvestment of that money into the company, and the ability to draw it out of KC's directors loan account cash free, had been prewired into the arrangements. The Loan had to be reinvested in the company which needed it as working capital. But the benefit to MC was that it could then be withdrawn and used as he wished. There was no fetter on the use of the money withdrawn from KC's loan account.
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> (14) There was no obligation on MC to repay the Loan for five years. We do not consider this to be a mere temporary benefit. Indeed, as at the date of the hearing, only £50,000 of that £800,000 had been repaid. Whilst we have accepted that one reason for that is the double tax concern, it still means that MC has had the benefit of £750,000 for almost 13 years. Again, we do not consider that to be a temporary benefit.
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> (15) There is also benefit in that there was no obligation to pay interest. It is clearly better not to pay interest than to pay tax on interest foregone. A payment of interest of 10 is greater than a tax charge of 4. And indeed, the arrangements meant that there was no obligation to pay tax at all as the Loan was used, initially, to purchase KC's shares. However, as we have already found, it was always intended that the money would find its way back into the company and be used as working capital. And to be available for withdrawal without a tax drag. When considering the facts realistically we find that this ultimate use of the Loan was also an objective benefit to MC.
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> 37. In summary, therefore, it is our view that as a matter of law there is nothing which prevents a genuine money loan on commercial terms conferring a benefit on the borrower. It is our view that in the vast majority of cases in practice, such a loan will confer a benefit. And in the context of this case, the Loan conferred a benefit on MC. Its payment to MC, therefore, was potentially within the ambit of section 62 ITEPA Whether it was earnings depends on the substantial reason for its payment."

36. The FTT referred above to what it had defined as "the Baxendale Walker cases" and both parties referred us to those cases in the context of their submissions on re-making the decision. For convenience, we reference them here. Those cases are *Marlborough DP Ltd v HMRC* [2021] UK FTT 304 (TC) ("*Marlborough FTT*"), which on this issue has been upheld by the UT since the date of the Decision in *HMRC v Marlborough DP Ltd* [2024] UKUT 98 (TCC) ("*Marlborough UT*"), *Strategic Branding Ltd v HMRC* [2021] UKFTT 474 (TC) ("*Strategic Branding*") and *CIA Insurance Services Ltd v HMRC* [2022] UKFTT 144 (TC) ("*CIA*").

Appellant's submissions

37. In his written submissions Mr Elliott had described the FTT as having concluded that the transactions gave rise to earnings on the grounds that the Loan conferred a benefit on MC, and that the amount of the taxable earnings was the amount of the principal of the loan (ie £800,000). The Appellant's position was that this conclusion is contrary to the statutory regime and the principles established in the case law.

38. At the hearing Mr Elliott's approach was to address:

> (1) the principles relevant to the exercise of discretion by the Upper Tribunal (the "UT") to set aside a decision under s12 Tribunals, Courts and Enforcement Act 2007 ("TCEA 2007");

(2) the reasoning and conclusion in the Decision, submitting that the error of law made by the FTT was material;

(3) the error of law made by the FTT at [33] to [37] when it concluded that in the vast majority of cases a "genuine money loan on commercial terms" will confer a "benefit" on the borrower and in the context of this case the Loan conferred a benefit on MC such that its payment to MC was potentially within the ambit of s62; and

(4) what was submitted to be the correct outcome on re-making the Decision. On re-making a decision the UT may make any decision which the FTT could make if the FTT were re-making the decision and may make such findings of fact as it considers appropriate. The UT should reach the conclusion that neither the Payment nor the Loan are earnings within s62(2).

Exercise of discretion under s12 TCEA 2007

39. Mr Elliott submitted that whilst the UT has a broad discretion under s12 TCEA 2007 (with s12(1) and (2) providing that if the UT finds that the making of the decision involved the making of an error on a point of law the UT "may (but need not)" set aside the decision), the need to consider materiality narrows this discretion.

40. Mr Elliott relied on the judgment of Henderson LJ in *Degorce v HMRC* [2017] EWCA Civ 1427 ("*Degorce*") at [93] to [95] and the principle that where an error of law is detected which is material (in the sense that the error "might (not would)" have made a difference to the decision), justice will normally require nothing less than that the decision be set aside. Mr Elliott submitted that in the present case the error of law made by the FTT was a crucial step in its reasoning and was material.

Reasoning of the FTT in the Decision

41. Mr Elliott accepted that the FTT had set out the issue correctly at [14] and in its proposed approach at [22] to [24], identifying that the focus must be to establish the reason or substantial reason why the Payment was made by the Appellant to the Trustee, but also explaining that when considering this enquiry the FTT could look at subsequent events.

42. However, Mr Elliott submitted that the focus of the FTT then shifted and it asked itself a different question, namely whether the principal of a "genuinely repayable loan" could constitute earnings (or, in the terminology used by the FTT, a "reward or benefit"). The FTT made an error of law at [33] to [37], in particular in its overall conclusion that "the Loan was a reward or benefit" ([36]), and in its summary of this issue at [37] that "Its payment to MC…was potentially within the ambit of section 62 …Whether it was earnings depends on the substantial reason for its payment." Here, Mr Elliott submitted that "its" and "it" were referring to the Loan.

43. Mr Elliott submitted that this error was part of the reasoning of the FTT in reaching its conclusion, referring to:

(1) In its conclusions at [56] to [57] the FTT referred back to its conclusion in [33] to [37]. The FTT's reference to "In these circumstances…" in [57] then brings in its conclusions on all three of the questions which it asked itself which had included whether a loan could be a reward or benefit.

(2) There was a conflation between the Payment and the Loan in these concluding paragraphs. In [57] the FTT expressed its view that the Payment was paid by the Appellant as a reward for the services supplied by MC to the Appellant, but there had been no finding of fact that the Payment to the Trustee was a reward for MC's services.

(3) The FTT considered the Baxendale Walker cases at [58] to [61] and at [61] said that "By parity of reasoning…" and referred again to the loans being capable of being a reward or benefit.

44. Mr Elliott submitted that the FTT's conclusion about the Loan being a reward or benefit was a critical part of its reasoning. It was not the case that the FTT had simply decided that the Payment itself was earnings. The error of law was material to the Decision and the Decision should be set aside.

Whether the Decision involved the making of an error of law at [33] to [37]

45. Mr Elliott framed the identification of whether there are earnings within s62(2) as raising three questions:

(1) whether the transaction has a sufficient connection with an employee's employment such that it is from an employment – there is a significant body of case law on this issue, including eg *Hochstrasser v Mayes* 38 TC 673 and *Kuehne + Nagel Drinks Logistics Ltd v HMRC* [2012] EWCA Civ 34 ("*KNDL*");

(2) whether it is a transaction of a type that gives rise to earnings – this was the issue in, eg *Rangers SC*, addressing whether a payment to a third party is taxable as earnings; and

(3) once these two conditions are satisfied, what is the quantum of such earnings, ie is there an amount of earnings at all within s62(2).

46. Mr Elliott referred to the statutory regime which has been established by Parliament:

(1) There is a "benefits code" in Chapters 3 to 7 and 10 of Part 3, in which s64 provides that if the same benefit would give rise to both earnings under s62 and an amount to be treated as earnings under the benefits code, in such a case the earnings charge under s62 effectively takes priority. The amount which would otherwise be earnings under s62 will constitute such earnings, and the excess (if any) is treated as earnings under the benefits code.

(2) Within the benefits code is a "loan benefits code" in Chapter 7 of Part 3, which applies to "employment-related loans" (as defined in s173 and s174). Section 175 then treats as earnings the difference between the amount of interest that would have been payable on the loan for that year at the official rate and the amount of interest (if any) actually paid on the loan for that year. There are exceptions to this charge in s176 to s179, and it is s178 (exception for loans where the interest qualifies or would qualify for tax relief) that applies here.

(3) Section 188 applies where the whole or part of an employment-related loan is released or written off in a tax year and at the time when it is released or written off the employee holds the employment in relation to which the loan is an employment-related loan. In that situation, s188 treats the amount released or written off as earnings from the employment for that year.

(4) Section 455 Corporation Tax Act 2010 ("CTA 2010") imposes a charge to tax if a close company makes a loan to a participator or an associate of a participator.

(5) Part 7A, which was introduced by Finance Act 2011, has since come into force. Part 7A provides that where the relevant conditions are satisfied then the value of the relevant step counts as employment income (s554Z2). Section 554A prescribes the conditions for the application of this Part, and s554A(1)(c) expressly refers to "rewards or recognition or loans" in connection with a person's employment.

47. Mr Elliott submitted that a "genuine loan" to an employee is not taxable earnings. It may be treated as such by a particular statutory provision, eg the difference in interest rates under the loan benefits code, a corporation tax charge under s455 CTA 2010 or when a loan is released or written off; or the principal of the loan may be treated as employment income by Part 7A. Mr Elliott submitted that it would undermine the benefits code, and the exceptions which form part of it, if Parliament had intended that the principal of loans would be taxable as general earnings, and s188 and Part 7A would be superfluous.

48. Mr Elliott referred us to several authorities in support of his submission that the principal of a loan to an employee is not an amount of taxable earnings. His submission was that such loan may well be provided from or by reason of the employment, but the principal of such loan is not taxable (essentially the third of the conditions which he had set out). We do not refer here to all of those authorities, but they included the following examples:

(1) An employee is not taxable on a saving that they make as a result of being provided with the use of something by their employer, eg *Tennant v Smith* [1892] AC 150, where the House of Lords held that the yearly value of accommodation in which the taxpayer resided in his capacity as bank manager was not taxable under Schedule E. Lord Macnaghten expressly identified that the appellant received a benefit from having a rent-free house provided to him by the bank, but re-iterated that a person is charged to income tax "not on what saves his pocket, but on what goes into his pocket".

(2) An employee is not taxable under s62 by reference to the cost to the employer but only on the money's worth of a benefit which is capable of being turned to account, eg *Wilkins v Rogerson* 39 TC 344.

(3) Even if an amount is from an employment, the courts have consistently held that where a person provides full consideration in return for the use of an asset then there are no earnings. In *HMRC v Apollo Fuels Ltd* [2016] EWCA Civ 157 ("*Apollo Fuels*") the group leased cars to employees on arm's length terms, which included lease charges at full market value. The decision of the Court of Appeal concerned whether the "cash equivalent" of the leased car, calculated in accordance with Chapter 6, was to be treated as part of the employee's earnings. David Richards LJ said at [3] "Goods or services supplied to an employee for full value would not ordinarily be regarded as conferring a benefit on the employee or as involving the receipt of income by him". He subsequently confirmed, obiter, at [80] that as the cars were leased to the employees at full market value no charge to income tax would arise under s62.

(4) In *O'Leary v McKinlay* [1991] STC 42, which concerned the source of payments from a settlement which were made to the taxpayer, Vinelott J held that income from the settlement was an emolument arising from his employment, and said at pg 51e "So also I think if an employer were to lend money to an employee free of interest but on terms that the loan would be employed by placing it on deposit at an agreed bank and charged as security for repayment of the loan on demand. The benefit to the employee would then be the interest earned on the deposit and nothing else".

(5) The conclusion that the principal of a loan is not earnings was confirmed by the Upper Tribunal in *Murray Group Holdings Ltd v HMRC* [2014] UKUT 292 (TCC) ("*Rangers UT*"). HMRC subsequently advanced a different argument before the Inner House of the Court of Session and the Supreme Court, which means that the decision of the UT on this issue was final. HMRC's position in this appeal is inconsistent with the decision in *Rangers UT* where the findings of fact which had been made in relation to the loans, including that the parties expected that the loans would not be repaid at term but would be extended and form part of their estate on death, were stronger for HMRC.

49. Mr Elliott addressed the reasons given by the FTT in the Decision for its conclusions that a genuine loan of money with real repayment obligations can, as a matter of legal principle, comprise a reward or benefit, and the reasons given for concluding in this case that the Loan was a reward or benefit. Mr Elliott's submissions included:

(1) The FTT used the phrase "reward or benefit" throughout the Decision for earnings. However, the FTT repeatedly identified in the reasons it gave throughout the sub-paragraphs at [36] that the loan was of "benefit" to MC, ie he had wanted it, eg in [36(1)] and [36(3)]. Similarly, the FTT made at [36(5)] what it described as the "semantic point" that someone who benefits from a trust is called a beneficiary, and a payment out of the trust fund confers a benefit on the recipient and a money loan, on whatever terms, to a beneficiary is just such a benefit. Mr Elliott submitted that a loan may be of benefit in a colloquial sense, but this does not determine whether there were taxable earnings. This can be seen from the authorities in relation to savings, eg *Tennant v Smith*, where it was held that an employee is not taxable on what is saved, only on the money's worth.

(2) The reasons given by the FTT conflate the positions of MC and KC in respect of the various transactions. This can be seen from [36(13)] – this refers to it being prewired that the money lent under the Loan would be reinvested in the Appellant, and to the ability to draw it out of KC's loan account, but goes on to say that "the benefit to MC was that it could then be withdrawn and used as he wished. There was no fetter on the use of the money withdrawn from KC's loan account". Mr Elliott emphasised that MC had an obligation to repay the Loan; it was KC that had no fetter on her right to call on the Appellant to repay the amount outstanding on her director's loan account.

50. The FTT's error of law is evident from its summary of its conclusion at [37], where it concluded that in the "vast majority" of cases a loan will confer a benefit on the borrower. Mr Elliott submitted that this was a highly problematic conclusion given the number of loans made to directors, in circumstances where there was no indication that Parliament intended this outcome, and showing that, in contrast to HMRC's submissions in this appeal, the FTT did not regard the conclusion as fact-sensitive or limited. The FTT also made an error of law when it concluded that the Loan conferred a benefit on MC such that its payment was potentially within the ambit of s62 (depending on the substantial reason for its payment). This set up an erroneous question as to whether the Loan was earnings, in contrast to the issue which had been set out by the FTT at [14] and [22] as whether the Payment was earnings.

Correct outcome on re-making the decision

51. Mr Elliott submitted that where the UT re-makes a decision, it is not limited to addressing the specific error of law which has been identified. The UT may make new findings of fact, and reach new conclusions from the facts as found. Here, Mr Elliott submitted that we should "correct" or "smooth over" the findings made by the FTT in relation to KC's director's loan account.

52. Mr Elliott relied in particular on the following findings of fact which had been made by the FTT:

(1) The Payment did not replace remuneration that had been sacrificed or reduced in anticipation of receiving it and, had the Appellant not made the Payment, then it would not have paid £800,000 to MC as remuneration for his work for the Appellant ([15(12)] to [15(13)]).

(2) The substantial reason for the Appellant making the Payment to the Trustee was to enable a loan of the £800,000 to be made to MC ([30]). Mr Elliott submitted that HMRC sought and needed the finding that this was a reward for services of MC.

(3) The loan was a real loan with a genuine obligation to repay ([36(10)]).

53. The FTT had then addressed the reason for the Loan, setting out its conclusion that "the only reason was because of the work which MC had done over the years…" ([53]). Mr Elliott submitted that this had not been controversial before the FTT – the Appellant had set up an EBT, and any benefit (not using that term as used by the FTT) from an EBT established by an employer is a reward for services. The Loan may be from the employment, but its value was nil because of the obligation to repay.

54. Further, Mr Elliott addressed the outcome for MC of the arrangements, submitting:

(1) MC had to use the proceeds of the Loan to buy the Shares from KC;

(2) after the transactions, MC held the Shares which had been valued at £800,000 and had an obligation to repay £800,000 to the Trustee; and

(3) it was KC, not MC, who was owed £800,000 by the Appellant. At [50] the FTT referred to this £800,000 as having been put at the "unfettered disposal" of KC and said it saw no reason why, in purchasing the shares from KC, MC had any misgivings that KC would not draw down on her loan account for their mutual benefit. But the FTT then said at 54(11) that "it is precisely because MC has been "under rewarded" that the Trustee considered that MC should be granted a loan which the Trustee knew would be introduced into the company in a form which MC could access without payment of tax". Yet KC lent the money to the Appellant, and it was KC who could access that money.

55. Mr Elliott submitted that the decision of the Supreme Court in *Rangers SC* only addressed one of the three conditions which he had identified, the second, namely whether the transaction was of a type that can give rise to earnings. It had been agreed before the Supreme Court that there was remuneration, and the issue was whether it was necessary that the employees themselves should receive the remuneration for it to be taxable. He referred to the decision itself and to the subsequent consideration of that decision in *Marlborough FTT*, which had been approved in *Marlborough UT*. Mr Elliott submitted that there is a need for some form of entitlement to exist, although not necessarily a contractual entitlement. He referred to Lord Hodge's judgment (with whom Lord Neuberger, Lady Hale, Lord Reed and Lord Carnwath agreed) at [41] where he had said "As a general rule, therefore, the charge to tax on employment income extends to money that the employee is entitled to have paid as his or her remuneration whether it is paid to the employee or a third party." Mr Elliott submitted that the decision in *Rangers SC* does not assist HMRC in the present case.

56. Mr Elliott submitted that we should follow the approach taken by the FTT in *Strategic Branding* and *CIA*. He submitted that the facts in those cases were stronger for HMRC, but the amounts paid to the relevant trust were nevertheless found not to be earnings within s62 (but were employment income within Part 7A).

57. There is no basis to conclude that MC had earnings of £800,000, either on the basis of the Payment or the Loan:

(1) Payment to Trustee – If the FTT had accepted HMRC's submission that this was itself a reward for services, the FTT would have been entitled to conclude that this was earnings, following the approach in *Rangers SC* at [41]. Here, the sole reason for the Payment was to make the Loan. MC had not entered into a side letter with the

Appellant, there was no entitlement to a bonus, and no expectation that the loan would be extended. Absent the required findings in relation to the Payment, Mr Elliott submitted that the Payment cannot be earnings.

(2) Loan to MC – The FTT did find that this was a reward for MC's services, but the FTT erred in failing to consider the amount of earnings, which are nil. The arrangements were pre-wired, and that included not only that the Loan would be made, but that MC would use the money to acquire the Shares, which were then charged as security for MC's obligation to repay the Loan.

HMRC's submissions

58. HMRC's written submissions set out their position that the FTT had concluded that the Payment constituted earnings of MC. Mr Waldegrave referred to the Appellant's challenge in its written submissions as being a very narrow one, namely that the FTT erred in law in concluding that the principal of the Loan fell to be regarded as earnings. HMRC submitted this was misconceived and aimed at the wrong target - the FTT had decided that the Payment to the Trustee comprised earnings; it was then immaterial what happened "downstream". At the point at which the Loan was made, there were already earnings.

59. At the hearing Mr Waldegrave took the following approach:

(1) HMRC's headline response was that the FTT had found that the Payment was a payment of MC's earnings and the Loan was irrelevant, or alternatively that the Loan was a loan of MC's earnings – neither of these involved an error of law;

(2) he drew attention to key findings of fact made by the FTT, including that the arrangements were prewired and that the Payment was made to enable the Trustee to make the Loan and that Loan was a reward for MC's services;

(3) he set out his submissions on the legal principles relevant to earnings, including HMRC's position on when a loan may comprise a payment of earnings;

(4) he addressed the reasoning of the FTT, submitting that the FTT's discussion at [33] to [37] was obiter; and

(5) he submitted that if we were to set aside and re-make the decision we should conclude that the Payment was earnings on the basis set out by Lord Hodge in *Rangers SC*.

Headline response to ground of appeal

60. Mr Waldegrave submitted that the FTT had made a finding that the Payment to the Trustee was a payment of MC's earnings; the FTT was entitled to do so based on the evidence before it. It is clear from *Rangers SC* that such Payment is taxable notwithstanding that it was paid by the Appellant to the Trustee and not directly to MC. The subsequent Loan, ie what happened downstream, is irrelevant.

61. If HMRC are wrong on this and the Appellant is correct that the FTT found that the Loan (not the Payment) was earnings, then HMRC's position is that the Loan was a loan of MC's earnings. The earnings were not paid outright but were lent to him. There was no error of law.

62. We should beware of the risk of artificial dissection of the transactions which had taken place; there was a single sum of £800,000 which was paid by the Appellant to the Trustee and then to MC. The FTT found that this sum was a reward for MC's services as a director; it does not matter for this purpose that there was no direct payment from the Appellant to MC.

Facts as found by the FTT

63. Mr Waldegrave drew our attention to what he submitted were key findings of fact by the FTT (which are relevant both to his submissions as to whether there is an error of law and as to the approach to be taken if we were to set aside and re-make the decision):

64. HMRC regarded the following as critical:

(1) The FTT found that the reason why the Payment was made by the Appellant to the Trustee was to enable the Trustee to make the Loan to MC ([30] and [32]). As the FTT put it (at [31(16)]) the arrangements were "prewired" - there was never any doubt that the funds comprised in the Payment would be lent by the Trustee to MC.

(2) The FTT concluded that the Loan was made to MC because of the services which he had rendered (in his role as a director) to the Appellant over many years ([53] and [55]).

(3) Although the £800,000 was in fact lent back to the Appellant, it could be withdrawn and used as MC wished, with there being "no fetter" on such use ([36(13)]). Whilst Mr Elliott had submitted that MC did not have unfettered access to the funds, Mr Waldegrave submitted that the FTT has found that he did have such unfettered access, and these were findings which were open to the FTT to make. The finding at [36(13)] that the "benefit to MC was that it could then be withdrawn and used as he wished. There was no fetter on the use of the money withdrawn from KC's loan account" (emphasis added) is consistent with the finding at [50] that "It is clear from the evidence that KC and MC acted together in building up the business of the company and we see no reason why, in purchasing the shares from KC (who was inevitably going to contribute the proceeds to the company) MC had any misgivings that KC would not draw down on her loan account for their mutual benefit".

65. In addition to the above, Mr Waldegrave made the following submissions in relation to the findings of fact:

(1) At [15(9)], having found that the business had a culture of paying sizeable bonuses to its contract managers, the FTT also found that bonuses were paid by the Appellant to its employees in all of the years following the setting-up of the arrangements. Mr Waldegrave submitted that this undermines any submission that the EBT was a general bonus pot for employees as a whole.

(2) At [15(11)] the FTT made findings as to the salary and dividends received by MC. Mr Waldegrave submitted that these were modest, and this supports the FTT's conclusion at [54(11)] that MC had been "under rewarded". The findings at [15(12)] and [15(13)] (that the Appellant would not have paid £800,000 as remuneration to MC and it didn't replace remuneration which MC had sacrificed) do not really matter - HMRC's position was that it is not necessary to show that there is first remuneration payable to MC which is then diverted.

(3) On cash movements, Mr Waldegrave took us to MC's bank statement which shows a payment in of £800,000 and a payment out of £800,020 (with the £20 being identified as a charge for a CHAPS transfer). Mr Waldegrave submitted that there is a missing link in the findings of fact by the FTT at [15(25)]; but this does not mean that the money by-passed MC.

(4) The FTT's finding at [16(8)] that the reason why the Trustee made no demand for repayment in November 2015 was because of the concern about double taxation needs to be viewed in the context of the FTT's other findings. In particular, the FTT had also found that the Trustee would not consider paying bonuses to employees of the

Appellant unless approached to do so ([16(9)]); the Trustee was effectively reactive as regards applications to pay bonuses ([15(34)]); and any significant decisions which the business had to make would have been approved by MC ([15(6)]). Read as a whole, Mr Waldegrave submitted that MC drove the decision-making and effectively had control over the extent to which the loan would ever be repaid.

Legal principles relevant to test for earnings

66. There was no dispute between the parties about the applicable legal principles relevant to the test for earnings, with it being agreed that the key test is that set out by Lord Hodge at [58] in *Rangers SC*. We do not need to look further at other cases, but Mr Waldegrave recognised that in *Marlborough UT* the UT had endorsed the analysis in *Marlborough FTT*.

67. It is also relevant (and possibly not controversial):

(1) As emphasised by Lord Hodge in *Rangers SC* at [11] "the courts at the highest level have repeatedly warned of the need to focus on the words of the statue and not on judicial glosses…".

(2) Whether an amount is earnings is fact-sensitive, and as a consequence an appellate court or tribunal should be slow to interfere with the conclusion of the fact-finding tribunal. This can be illustrated by the decision of the UT in *Marlborough UT*. The FTT had concluded that the relevant sums were not paid to Dr Thomas as a reward for his services as director but were distributions made as a return on his shareholding in MDPL. The UT at [67] recorded that Mr Ghosh for HMRC had mounted what was, effectively, an *Edwards v Bairstow* challenge regarding some of the FTT's findings of fact. The UT said that the FTT had been faced with an evaluative judgment, and made an evaluative decision in the light of all the relevant evidence with which the UT should be reluctant to interfere.

(3) Referring to Lord Hodge in *Rangers SC* at [13] to [15], the approach to statutory construction is that we should decide, on a purposive construction, exactly what transaction would answer to the statutory description and then decide whether the transaction in question did so. There was no suggestion that any part of the arrangements was a sham, but Lord Hodge said that this was not the point ([16]). Lord Hodge referred at [65] to the chance that the trust company might not agree to set up a sub-trust, and the chance that the trustee of a sub-trust might not lend the money to the footballer; but that chance did not alter the nature of the payments to the trustee of the principal trust.

(4) For an amount to constitute diverted or redirected earnings it was not necessary for there to be a pre-existing contractual entitlement. Mr Waldegrave submitted that this was apparent from Lord Hodge's analysis of the position in relation to the executives (where there was no side letter) at [66].

(5) *KNDL* shows that it is open to a tribunal to conclude that a payment is "from the employment" even if there are other reasons. Patten LJ at [56] said "Employment does not have to be the sole cause but it does have to be sufficiently substantial as to characterise the payment as one from employment."

68. The key question is whether the Payment to the Trustee is one of earnings. In answering the question, a tribunal can look downstream. However, once the Payment is earnings, it is irrelevant whether amounts paid out by the Trustee are paid out as loans or as gifts.

69. Mr Waldegrave explained HMRC's position in relation to whether a loan can be taxable as earnings as follows. A loan is taxable earnings if it is earnings or is a payment of

an amount of earnings. There must be an amount which is earnings within s62(2) and that amount must be received:

(1) For the earnings limb, to be earnings an amount must be a reward or remuneration for services, in line with the principles summarised in *Rangers SC*.

(2) As to whether an amount is received, Mr Waldegrave referred us to the legislative provisions and authorities:

(a) Section 15 applies to general earnings for a tax year in which the employee is UK resident, and s15(2) provides that the full amount of any general earnings within s15(1) which are received in a tax year is "taxable earnings" from the employment in that year.

(b) Section 18 then contains the rules determining when money is treated as received, and Rule 1 is that this is the "time when payment is made of or on account of the earnings". This makes it clear that there is a requirement for payment.

(c) In *Rangers SC* Lord Hodge referred at [52] to the decision of Walton J in *Garforth v Newsmith Stainless Steel Ltd* [1979] 1 WLR 409. A taxpayer company voted to award bonuses and credited the sums to accounts with the company from which the employees were free to draw. The directors did not draw on those sums. Walton J held that there was no need for the directors to withdraw the money for there to have been a payment by the company; when money is placed "unreservedly at the disposal" of directors, that is equivalent to payment. Lord Hodge considered that this gloss on "payment" was a practical and sensible one. Lord Hodge also referred at [53] to *Aberdeen Asset Management plc v HMRC* [2014] SC 271 ("*Aberdeen Asset Management*") where Lord Drummond Young at [34] identified the crucial question as "whether funds have been placed in a position where as a practical matter they may be spent by the employee as he wishes; it is at that point that the employee can be said to obtain the benefit of those funds". There, the issue was whether the money in an Isle of Money company, whose shares the employee had acquired through the scheme, was to be treated as being received by the employee so that there was "payment". Mr Waldegrave submitted that this interpretation of "payment" did not answer the question in *Rangers SC,* but it does show that the question of payment is a practical one, which must be viewed realistically.

70. HMRC's position is that whilst it is fact-sensitive, a loan could amount to a payment of earnings. That would, most obviously, be the case where, although the loan is a "genuine loan", viewing the facts realistically, it is unlikely ever to be repaid. That does not mean that every time a company makes a loan to an employee there would be taxable earnings.

71. Mr Waldegrave also gave the example of an employee working for national minimum wage but also being lent an additional sum that is calculated by reference to hours worked in a year. Mr Waldegrave described this loan as a genuine loan (explaining that it was accepted to have the legal character of a loan), but also submitted that there would be a clear understanding that it is not going to be repaid and as a practical matter can be spent by the employee as he wishes.

72. In submitting that, if there are earnings, the payment of them can be achieved in a multitude of ways, and one of those can be the making of a loan, Mr Waldegrave recognised that this would have to be the "right kind of loan" and this will depend on the facts. In this

case, HMRC's position was that the Loan was the right kind of loan and the principal of the Loan was the taxable earnings of MC.

Reasoning of the FTT in the Decision

73. Mr Waldegrave set out HMRC's position as to whether the FTT had made an error of law in the alternative:

(1) the FTT did not decide that it was the Loan that was taxable earnings of MC, or this was not part of its reasoning; or

(2) the analysis in [33] to [37] is correct for this Loan.

74. Mr Waldegrave drew attention to the structure of the Decision:

(1) At [22], the FTT states expressly that the focus of its enquiry is to establish "the reason or substantial reason why the Payment of £800,000 was made by the company to the EBT". This reflected the agreed position between the parties as to the approach to be adopted being that set out by Lord Hodge at [58] of *Rangers SC*. It also makes it clear that the FTT's discussion and subsequent conclusions are about the Payment to the Trustee, not the subsequent loan. At [23] the FTT explained why it looks at subsequent events (including the making of the Loan).

(2) The FTT deals separately with the reasons for the making of the Payment and the Loan. The FTT concluded that the Payment was made to provide the funds to the Trustee to enable the Trustee to make the Loan to MC. Whilst Mr Elliott had submitted that this was a conclusion that the Payment was not made to reward MC, Mr Waldegrave submitted that this is an artificial reading of the Decision. The FTT was saying that the Payment was to enable the Loan so we then need to look at why the Loan was made to understand why the Payment was made; the substantial reason for the making of the Payment takes its colour from what happens next.

(3) The reasons why the Loan was made to MC are addressed at [38] to [55], and at [53] the FTT concluded that "the only reason was because of the work which MC had done over the years in building up the business…"; and this is repeated at [55] where the FTT records that "the reason why the Trustee made the Loan to MC was because of the services that he had provided to the company, and the Loan was a reward for those services".

(4) The FTT then, in its conclusion at [57], answers the question which it had set itself, by saying that "the Payment…was paid by the company as a reward for the services supplied by MC to the company".

75. Mr Waldegrave submitted that the FTT had set out its building blocks, identified the key question as the reason for the Payment, considered it was to enable the Loan, so then considered why the Loan was made to decide why, in substance, the Payment was made, concluding that the Loan was to reward the director. This is a factual and evaluative conclusion reached by the FTT. There is no challenge to the facts found or to the FTT's evaluation. The Payment was earnings, and it doesn't matter that it was paid to a third party. Mr Waldegrave submitted that this is the central logic to the FTT's decision, and it is unimpeachable.

76. The Appellant's ground of appeal is based on its challenge to the FTT's analysis at [33] to [37]. The heading used by the FTT is "Was the Loan a reward or benefit?" and at [37] the FTT answered this question in the affirmative. Mr Waldegrave submitted that this discussion was obiter, as was the final sentence in [56] where the FTT referred back to this discussion in its conclusion.

77. In any event, if we were to disagree and conclude that the FTT did decide that the Loan was a payment of earnings, Mr Waldegrave submitted that that would not be an error. It is still possible for there to be a loan of an employee's earnings and for that loan to satisfy the requirement that there is a payment of earnings. In this context Mr Waldegrave described the Loan as a soft loan, and referred to the FTT's findings in relation to unfettered control through KC's loan account. Such a conclusion is entirely consistent with the decision of the Supreme Court in *Rangers SC* – there were "real loans" to the employees in that case, and a chance that the trustee might not establish sub-trusts; none of this had mattered because of the conclusion that the payment into the trust comprised earnings.

Correct outcome on re-making the Decision

78. If we conclude that there is an error of law and we decide to set aside the Decision, HMRC's position is that we should re-make the decision and conclude that the Payment was taxable earnings of MC. Mr Waldegrave submitted that we are equipped to make that decision and we should make that decision, relying in particular on the three findings of fact identified as critical by HMRC at [64] above (as to the purpose of the Payment and the Loan, prewired and unfettered control). Mr Waldegrave submitted that the legal analysis is then identical to that in *Rangers SC*.

79. Mr Waldegrave recognised that we may go further, and look at the facts in more detail. Mr Waldegrave took us to the summary of his submissions to the FTT, which were recorded at [20], and emphasised:

> (1) Apart from MC's role as director of the Appellant, there is no other competing explanation for why the money was provided to him. He is a shareholder (31%), but the other shareholders did not receive anything.
>
> (2) Conversely, as set out at [20(29)] to [20(37)], MC was the driving force of the business, had worked extremely hard, yet most profits were reinvested – it was unsurprising that MC should seek some substantial reward. There is no need for HMRC to show that MC would have received £800,000 as salary, or had sacrificed that amount.

80. Mr Waldegrave submitted that we should not follow the approach adopted in *Strategic Branding* or *CIA*. Those are decisions of the FTT and not authoritative and in any event they are fact-sensitive. Addressing the decision in *Strategic Branding*, Mr Waldegrave drew attention to [194] of the FTT's decision in which the FTT had referred to HMRC pursuing arguments on general earnings and Part 7A in the alternative, but that "it was clear that their primary submission was that the loans …were employment income within Part 7A"; Mr Waldegrave submitted that this may have influenced the approach taken by the FTT. Furthermore, whilst it is clear from the summary of HMRC's submissions at [199] that HMRC were arguing that the contributions to the trust were earnings, the conclusion of the FTT at [206] is framed by reference to the loans not being earnings. Mr Waldegrave submitted that the FTT had not engaged with HMRC's submission in that case that the payment to the trust was earnings; and if the FTT was saying that a contribution to a trust cannot be earnings because there is then a genuine loan from the trust, that must be wrong based on *Rangers SC*. Mr Waldegrave submitted that similar points arose in relation to the FTT's decision in *CIA*.

81. There is a single amount of money, placed at the unfettered control of MC, that was referable to his work as a director. Mr Waldegrave submitted that it is difficult to see that it should not be taxed in these circumstances.

DISCUSSION AND CONCLUSION

82. Earnings are defined differently for the purposes of income tax and NICs. Income tax is chargeable on earnings under Chapter 1 of Part 3, which consists of s62 as set out at [8] above and which is an exhaustive definition (using "means"). For NICs purposes, earnings are defined in s3 SSCBA 1992, as set out at [10] above, and which is an inclusive definition. Nevertheless, it was common ground, and we agree, that there should be no difference in outcome between the two determinations which have been issued by HMRC. Other than in our summary of the Decision at [11] to [29] above where we have used the terminology which was used by the FTT, we use "earnings" to refer to earnings within s62(2) and s3 SSCBA 1992.

83. As is clear from the summary of the parties' submissions above, Mr Elliott and Mr Waldegrave differed as to the conclusion that was reached by the FTT – both as to whether the FTT had found that it was the Payment or the Loan that was earnings, and the applicable limb of the definition in s62(2) which had been found to apply. We are able to deal with those aspects of their submissions briefly.

84. The FTT had identified the issue at [14] as "whether the sole or a substantial reason why the Payment was paid by the company to the EBT as part of the arrangements" was because it was a reward or benefit for MC, set out its intended approach at [22] to [23], and having carried out that exercise, records its conclusion at [57] that "the Payment, therefore, was paid by the company as a reward for the services supplied by MC to the company".

85. We consider it to be clear that the conclusion reached by the FTT was that it was the Payment that comprised earnings. We do not accept Mr Elliott's submissions to the contrary: most of those submissions, including those by reference to the FTT having asked itself the question whether the Loan was a reward or benefit (at [33] to [37]) and then having referred to the conclusion it had reached at [56], relate to the reasoning of the FTT in reaching its conclusion, and thus whether any error of law was material such that the Decision should be set aside and we address them in that context.

86. We also agree with Mr Waldegrave that the FTT decided that the Payment comprised earnings within s62(2) generally, and did not find that it was within any particular limb of that sub-section. Mr Elliott was correct to observe that s62(2)(b) is the only limb to which the FTT referred expressly, having stated at [12] that "In our view too, any benefit falling within s62(2)(b) ITEPA is also highly relevant in this case". This statement by the FTT is not explained further, and no further reference is made by the FTT thereto. Section s62(2)(b) provides that "any gratuity or other profit or incidental benefit of any kind obtained by the employee if it is money or money's worth" constitutes earnings. It is the only limb where, as observed by Lord Hodge at [45] in *Rangers SC*, Parliament has required that the benefit be obtained by the employee, in contrast to the more open definitions in s62(2)(a) and (c). In the context of the Payment, which was made to the Trustee and not directly to MC, the FTT's identification of limb (b) as "highly relevant" is difficult to explain. However, the FTT then stated it would use the expression "reward or benefit" as "shorthand for the provisions of s62 ITEPA as interpreted in Rangers" and thereafter uses that phrase, and sometimes just "benefit". The FTT thus moved away from any focus on any particular limb of s62(2), and the conclusion the FTT reached was then expressed in general terms as the Payment being "earnings" at [57]. Accordingly, we reject Mr Elliott's submission that the FTT had decided that there were earnings within s62(2)(b).

Whether the Decision involved the making of an error of law

87. The Appellant's ground of appeal is based on the FTT having made an error of law at [36] and [37] when it held that a genuine loan of money with real repayment obligations can

comprise earnings in the amount of the principal, and that the Loan to MC comprised earnings.

88. We have set out [33] to [37] in full above, but repeat the FTT's summary at [37]:

> "37. In summary, therefore, it is our view that as a matter of law there is nothing which prevents a genuine money loan on commercial terms conferring a benefit on the borrower. It is our view that in the vast majority of cases in practice, such a loan will confer a benefit. And in the context of this case, the Loan conferred a benefit on MC. Its payment to MC, therefore, was potentially within the ambit of section 62 ITEPA Whether it was earnings depends on the substantial reason for its payment."

89. HMRC's written submissions were based on this part of the FTT's reasoning not being "of central importance" to its conclusions. HMRC did not, at that stage, put forward any reasons why these paragraphs did not involve an error of law by the FTT. At the hearing this had prompted Mr Elliott in opening to suggest that it appeared that HMRC did not contest that these paragraphs involved an error of law. However, Mr Waldegrave made it clear in his oral submissions that it was HMRC's position that these paragraphs did not involve an error of law (with their alternative submission being that they were *obiter* and not part of the reasoning of the FTT such that any error of law was not material). As set out more fully in our summary of Mr Waldegrave's submissions above, it was HMRC's position that, whilst it is fact-sensitive, a loan could amount to a payment of earnings and the Loan to MC did amount to such a payment. In setting out that only certain loans would constitute earnings, Mr Waldegrave gave the example of a loan that was "genuine" but, viewing the facts realistically, was unlikely ever to be repaid.

90. Mr Elliott took us through the statutory regime relevant to the identification and taxation of amounts as earnings, which includes the benefits code (and within that the loan benefits code), s188 and s455 CTA 2020. We agree with Mr Elliott that these provisions would be unnecessary, and the exemptions contained therein ultimately ineffective, if it were the case that Parliament intended that any or the vast majority of loans by an employing company to an employee would constitute taxable earnings in the amount of the principal of such loan. As David Richards LJ stated at [3] in *Apollo Fuels*, when addressing whether the cash equivalent of the leased car, calculated in accordance with Chapter 6, was to be treated as part of the employee's earnings, "Goods or services supplied to an employee for full value would not ordinarily be regarded as conferring a benefit on the employee or as involving the receipt of income by him…Of course, it is open to Parliament to deem the value of such goods or services, or indeed anything else, to be income, but one would expect Parliament to do so in clear terms…".

91. Mr Waldegrave relied on the decision of the Supreme Court in *Rangers SC*, whereas Mr Elliott submitted that this decision was of no assistance to HMRC for this purpose and relied instead on the decision in *Rangers UT*.

92. The Rangers appeals concerned the consequences of a trust arrangement which had been used by several companies within a group for the remuneration of footballers and other employees (sometimes referred to as executives). In outline, the arrangement operated as follows (and references to paragraphs are to paragraphs of the decision in *Rangers SC*):

> (1) When the relevant employer wished to benefit an employee, it made a payment to a principal trust, recommended the trustee to resettle the sum on to a sub-trust and asked that the income and capital of the sub-trust should be applied in accordance with the employee's wishes. The trustee had a discretion whether to comply with those requests but, without exception, the trustee created the requested sub-trust. The

relevant employee was appointed as protector of the sub-trust with the power to change the trustee and the beneficiaries ([19]).

(2) The decisions dealt with the position in relation to footballers in more detail than the other employees.

(3) As regards footballers:

(a) When RFC 2012 plc ("RFC"), the only employer which appealed to the Supreme Court, negotiated the engagement of a footballer, the discussions focused on the figure net of tax which the footballer would receive. A senior executive explained the mechanism of creating a sub-trust in the name of the footballer and the benefits of the trust mechanism, in particular, that he could obtain a loan of the sum paid to the sub-trust from its trustee which would be greater than a payment net of tax deducted under PAYE if he were to be paid through payroll. The loan was to be repayable on an extended term of ten years on a discounted basis. Both RFC and the footballer expected that the loans would not be repaid at term but would be renewed, as the executive explained to the footballer or his agent that the arrangement had the additional tax advantage that the loans would be repayable out of the footballer's estate on death, thereby reducing its value for inheritance tax purposes ([21]).

(b) On recruitment of a footballer, the terms of his engagement were recorded in (i) a contract of employment which set out the terms of employment and the footballer's remuneration which would be paid subject to deduction of PAYE and NICs, and (ii) a side-letter in which a senior executive of RFC undertook that it would (a) recommend to the trustee of the principal trust (i) to include the footballer as protector of a sub-trust and (ii) to fund the sub-trust with the sum or sums which had been agreed in the recruitment negotiation, and (b) fund the principal trust to enable the trustee to carry out those recommendations ([22]).

(c) It is clear from documents which were before the FTT and were made available to the Supreme Court that the sums paid to the principal trust and to the sub-trusts represented remuneration for employment ([23]).

(4) RFC used the same trust mechanisms in making termination payments to players and in the payment of guaranteed bonuses. The other companies in the group, which were respondents before the Court of Session, used the same trust mechanisms and loans when paying discretionary annual bonuses to senior executives. These bonuses differed from the footballers' bonuses, which were agreed on their engagement. The senior executives had no contractual right to the bonuses before they were awarded. But the bonuses were paid as a reward for the work which the employees had carried out as employees. RFC used the same mechanisms in paying discretionary bonuses to its senior executives ([31]).

93. HMRC assessed the taxpayer companies to income tax and NICs on the sums which were paid into the trust and lent to employees.

94. In *Murray Group Holdings Ltd v HMRC* [2012] UKFTT 692 (TC) ("*Rangers FTT*") the FTT held, by majority, that the scheme was effective. The majority decision recorded at [186] that the issue before the FTT was whether the term earnings (or emoluments) extends to the loans made to the executives and footballers under the trust arrangements. The majority concluded that the steps were not a sham, and the employees had received only a loan of the moneys which had been paid to the trusts.

95. That decision was upheld by Lord Doherty sitting as the UT in *Rangers UT*. The UT recorded at [18] that the primary position for HMRC was that the composite transaction resulted in payment of earnings being made when moneys were transferred to the sub-trust; in the alternative that it resulted in payment of earnings when loans were advanced to employees. Lord Doherty set out his conclusion as:

> "64. In my opinion it is clear that the FTT did not accept the conclusions which the appellants urged upon them. The majority … held that the end result was that the employees received loans, not earnings. There was neither payment of earnings, nor was there an equivalent of payment in the form of moneys being at the unreserved disposal of the employee. The employees could not, without the intervention and co-operation of beneficiaries, obtain absolute entitlement to the moneys. The majority held that the loans were recoverable, and that recovery was not a remote contingency of the sort that ought to be ignored. … Read in the context of the decision as a whole I think the fair reading of the final sentence of para [226] is that, taking a realistic view of all the facts, the end result is a loan and nothing more. The FTT had indicated at a number of points that a 'purposive', 'commercial', and 'realistic' approach was being taken. They concentrated on whether there was more than a loan: whether there was there some further arrangement. They accepted there was an element of orchestration between employer and employee but they held that such orchestration as there was did not result in it being within the employee's power to obtain anything greater than a loan. That appears to me to be a conclusion which was open to the FTT."

96. Having addressed the decision in *Aberdeen Asset Management*, Lord Doherty then stated:

> "67 Given the FTT's findings that the reality of the transaction was that the employees had loan access to the funds, but not more, their conclusion that there was not unreserved disposal cannot be faulted."

97. The Advocate General for Scotland on behalf of HMRC then appealed to the Inner House of the Court of Session, the decision of which is *Murray Group Holdings Ltd v HMRC* [2015] CSIH 77 ("*Rangers CS*"). Lord Hodge subsequently recorded at [3] of *Rangers SC* that the argument advanced for HMRC before the Court of Session was "a legal argument which had not been presented to, or at least had not been developed before, the tribunals, namely that the payment of the sums to the remuneration trust involved a redirection of the employee's earnings and accordingly did not exclude those earnings from the charge to income tax". The decisions in *Rangers CS* and *Rangers SC*, allowing HMRC's appeal in *Rangers CS* and upholding that decision in *Rangers SC*, were then reached on the basis of that argument. This is clear from Lord Hodge's decision where he had stated at the outset in [1] that the fundamental question raised is "whether an employee's remuneration is taxable as his or her emoluments or earnings when it is paid to a third party in circumstances in which the employee had no prior entitlement to receive it himself or herself", referred to the legal argument which was made by HMRC at [3] and [34], and at [36] stated that "The central issue in this appeal is whether it is necessary that the employee himself or herself should receive, or at least be entitled to receive, the remuneration for his or her work in order for that reward to amount to taxable emoluments". Having examined the provisions of the primary legislation, and addressed the wider purpose of the legislation, Lord Hodge then set out the "general rule" at [41] that "the charge to tax on employment income extends to money that the employee is entitled to have paid as his or her remuneration whether it is paid to the employee or a third party".

98. Whilst we need to consider the detailed reasoning further below, we agree with Mr Elliott that the decision in *Rangers SC* does not support HMRC's position on this issue. The Supreme Court was addressing whether the payment which was made to the principal trust constituted earnings; although we do recognise that the Supreme Court's decision on this issue was made in the context of a trust arrangement where the funds were then lent to the employees, ie the fact that the employees received a loan "and nothing more" (Lord Doherty at [64] in *Rangers UT*), albeit one which was not expected to be repaid at term but would be renewed and repayable out of the estate on death (Lord Hodge at [21] in *Rangers SC*), did not on the facts prevent the payment to the trust being found to be earnings.

99. We have concluded that HMRC's submissions in support of [33] to [37] of the Decision are not supported by the legislative regime or the authorities (including for this purpose not only decisions such as *Apollo Fuels* but also the decision in *Rangers UT*).

100. We recognise that Mr Waldegrave sought to characterise the issue of whether the making of a loan constitutes a payment of earnings as being "fact-sensitive", and identified that this may be determined by asking whether, viewing the facts realistically, the loan is unlikely ever to be repaid. The difficulties with these submissions in the present appeal are:

(1) the FTT did not take a narrow, fact-sensitive approach – the FTT's conclusion on this issue was that in the "vast majority of cases" a "genuine money loan" will confer a benefit on the borrower such that it is potentially earnings (depending on the substantial reason for the payment); and

(2) the findings of fact made by the FTT do not support a conclusion that the Loan was unlikely ever to be repaid - the Loan was repayable in five years, and whilst only £50,000 had been repaid by MC at the time of the hearing before the FTT, the FTT recorded at [15(28)] MC's evidence that he understood that the Loan was repayable in accordance with the terms of the Loan Agreement, subsequently accepted at [36(10)] that MC was fully conscious of his obligation to repay on that date, found at [15(29)] that if repayment had been required in 2015 MC had personal resources to settle it and at [16(8)] that the reason the Trustee made no demand for repayment in November 2015 was because of the concern about double taxation. Whilst Mr Waldegrave submitted that these findings need to be seen in the context of the FTT's findings as to the Trustee being reactive and any significant decisions which the business had to make would have been approved by MC, the FTT did not draw any inference that the Loan was unlikely ever to be repaid and had instead made the finding as to the reason for repayment not being demanded in 2015, which did not depend on MC's role in decision-making.

101. We do not consider that viewing the facts realistically to determine whether the making of the Loan to MC constitutes a payment of earnings assists HMRC. Whilst warning against misplaced reliance on judicial glosses in relation to the concept of "payment", in *Rangers SC* Lord Hodge described at [52] and [53] the gloss of "money placed unreservedly at the disposal" as a practical and sensible one. In *Aberdeen Asset Management* the money held by each cashbox company was at the employee's unreserved disposal, and they could have taken the steps required to obtain absolute entitlement to the money, even though what they owned was shares in the relevant company. Here, MC has an obligation to repay the Loan, and even when taking account of the findings of fact made by the FTT as to the arrangements being prewired (which included the purchase of the Shares and the loan by KC to the Appellant) and the finding that the loan from KC to the Appellant was repayable to her whenever she wanted, and the FTT's conclusion that this could be used for their "mutual

benefit", the position remains that MC owns the Shares and has a liability to the Trustee. The money lent to him was not placed unreservedly at his disposal.

102. The making of the Loan to MC was not a payment of earnings to him. The FTT made an error of law in concluding at [37] that in the vast majority of cases in practices a loan will confer a "benefit" on the borrower, that this Loan conferred a benefit on MC and that its payment to MC was potentially earnings (depending on the substantial reason for its payment).

Whether to exercise discretion to set aside the Decision

103. Section 12(2) TCEA 2007 provides that if the UT finds that the making of the decision under appeal involved the making of an error on a point of law then the UT "may (but need not)" set aside the decision of the FTT. This discretion was considered by Henderson LJ in *Degorce* where he said:

> "95. I would accept the submission of Mr Gibbon that, if the Upper Tribunal finds an error of law to have been made, it then has a broad discretion whether or not to set aside the decision of the FTT. That is the clear import of the words "may (but need not) set aside", and in my view it would be wrong in principle to interpret the scope of this discretion by reference to the previous law on tax appeals under TMA 1970 . TCEA 2007 set up a new tribunal structure, and the provisions of section 12 apply to all chambers of the Upper Tribunal, not merely to the Tax & Chancery Chamber. That said, however, I consider that a test of materiality will still have a crucial, and usually decisive, role to play in the decision of the Upper Tribunal whether or not to set aside the decision of the FTT, and likewise in the decision of this court if an error of law by the Upper Tribunal is established. At least in cases of the present type, I find it difficult to envisage circumstances in which the Upper Tribunal could properly leave the decision of the FTT to stand, once it is satisfied that the error of law might (not would) have made a difference to that decision. As a taxpayer, Mr Degorce is entitled to be taxed according to the law, and if an error of law is detected in the FTT's decision, which is material in the sense I have mentioned, justice will normally require nothing less than that the decision be set aside. Conversely, if an error of law is made, but the Upper Tribunal is satisfied that it was immaterial, there will be no injustice to Mr Degorce in allowing the decision of the FTT to stand. Similarly, if we were to take the view that the Upper Tribunal erred in law in the task which it had to perform, but that the errors could have made no difference to its decision to dismiss Mr Degorce's appeal, there would again be no injustice if his appeal to this court were in turn dismissed."

104. Applying this guidance, the question for us to consider is whether we are satisfied that the error of law "might (not would) have made a difference" to the Decision. We consider the reasoning of the FTT in reaching its conclusion to assess whether we are so satisfied. In conducting this exercise, we are mindful of the warnings of the higher courts that we should read the Decision "fairly and as a whole, without focusing merely on individual phrases or passages in isolation, and without being hypercritical" (Popplewell LJ in *DPP Law v Greenberg* [2021] EWCA Civ 672 at [57]).

105. It was common ground that the FTT correctly identified the issue at [14] and, having made its findings of fact and set out the parties' submissions in some detail, set out its proposed approach at [22] to [24]. It is notable that at [24] the FTT said it would start by looking at the reasons why the Appellant made the Payment and then move on to consider the reasons why the EBT made the Loan to MC. At this stage the FTT was drawing a clear distinction between the Payment and the Loan, and explaining why it would be addressing

the reasons for the Loan, namely that when considering the reason why the Payment was made the FTT could also consider subsequent events (including the Loan, the purchase of the Shares and the introduction of £800,000 into the Appellant by KC).

106. Having set out its consideration of the reason for making the Payment at [29] to [32], the FTT then considered the additional question it posed at [33] to [37], namely whether the Loan was a reward or benefit, before then addressing at [38] to [55] the reasons for the making of the Loan.

107. Mr Waldegrave submitted that the discussion at [33] to [37] was *obiter*, or what he described as a "sideshow". We consider that, superficially at least, there was some force in this submission given the overall structure of the Decision. The FTT did immediately revert, at [38] to [55], to what it had set out as its proposed approach, even referring to this as the "second stage of the enquiry" (at [38]) and then expressed its conclusion by reference to the Payment at [57].

108. There are, however, difficulties with Mr Waldegrave's characterisation of this part of the Decision:

(1) At [33] the FTT had said that before considering the reasons why the Loan was paid to MC "we first need to consider" whether a genuinely repayable loan can be a reward or benefit in the first place. Whilst this is not explained further, this does suggest that the FTT thought it was necessary to consider the issue in these terms. There is nothing in the language used in these paragraphs to indicate that the FTT considered that its analysis of this point was *obiter*.

(2) In its summary of this discussion at [37] the FTT, having stated that the payment of the Loan was potentially within the ambit of s62, the FTT said whether "it" was earnings depends on the substantial reason for "its" payment. We agree with Mr Elliott that "it" and "its" are referring here to the Loan, and that this paragraph suggests that the FTT was potentially re-framing the issue it had previously identified.

(3) Whilst [38] is the first paragraph of the part of the Decision addressing why the Loan was made to MC, and accords with the FTT going back to what it had said at the outset it would do, in one of three preliminary points which are then made by the FTT they refer at [44] to their conclusion that a real loan with a genuine obligation to repay can be earnings. The discussion and conclusions at [33] to [37] are thus being re-introduced into other parts of the Decision.

(4) The FTT's conclusion is set out in [56] and [57]. At [56] the FTT refers to it being inevitable at the time the Payment was made that it would be paid to MC by way of Loan and that this Loan was a reward for his services and then includes the final sentence "In our view there is no legal principle which prevents a genuine money loan on commercial terms with a real repayment obligation from being a reward or benefit", again bringing in the conclusion from [33] to [37]. [57], which sets out the FTT's conclusion that the Payment was earnings, starts "In these circumstances…". It seems to us, as submitted by Mr Elliott, that this opening must be referring to all the circumstances recorded in [56].

(5) The conclusion is not the end of the Decision. The FTT then went on to address other submissions which had been made, including in relation to the Baxendale Walker cases. Explaining why it disagreed with the decisions in *Strategic Branding* and *CIA*, the FTT set out at [61] its view that the reason for the payments being made to the trusts in those cases was to enable the trustees to pay the loans to the relevant individuals and then reiterated that "Those loans were legally capable of being a reward

or benefit…". The FTT was thus again relying on its conclusion in [33] to [37] in other parts of the Decision.

109. We recognise that some of these points could be said to arise from too close a scrutiny of individual words and phrases used by the FTT, in particular those made above in relation to the use of "it" and "its" in [37]. However, reading the Decision as a whole, we have come to the conclusion that the error of law might have made a difference to the decision reached by the FTT. We are particularly concerned by [44] and the way in which the FTT explained its conclusion at [56] and [57]. We have concluded that the error of law is material in the sense described by Henderson LJ and that justice requires that the decision be set aside.

110. We therefore set aside the Decision.

Disposition

111. As we have set aside the decision of the FTT, we must decide whether to re-make it or remit it.

112. Whilst HMRC had initially reserved their position as to whether we should remit the case to the FTT or re-make the decision, at the hearing both Mr Elliott and Mr Waldegrave agreed that we should re-make the decision. We agree that this is the appropriate approach in circumstances where the Appellant's ground of appeal had not identified any challenge to the FTT's findings of fact.

113. Section 12(4) TCEA 2007 provides that in re-making the decision the UT (a) may make any decision which the FTT could make if the FTT were re-making the decision, and (b) may make such findings of fact as it considers appropriate. At the hearing Mr Elliott did submit that there were areas where the UT should, if we decided to set aside the Decision and re-make it, "smooth over" or correct the findings of the FTT. Those related to what both parties accepted was a correction to, or completion of, the finding at [15(25)] in relation to the cash movements on 26 November 2010, and (which was opposed by HMRC) to the findings in relation to KC's loan account with the Appellant and in particular to what was said to be the finding that MC had unfettered access to the money withdrawn on that account.

114. Our starting-point is that the ground of appeal did not identify any challenge on *Edwards v Bairstow* grounds to the findings of fact made by the FTT. Furthermore, it is well-established that an appellate court or tribunal should be slow to interfere with conclusions of a fact-finding tribunal that involve elements of evaluation and judgment. However, such evaluative decisions cover a wide spectrum and in some tax appeals the evaluative exercise contains a much smaller factual component and in such cases it is much easier for an appellate court or tribunal to interfere (Lord Drummond Young in *Rangers CS* at [47]).

115. Addressing the two specific matters identified by Mr Elliott:

(1) On the basis of the evidence of MC's bank statement and this being common ground between the parties, the FTT's finding at [15(25)] is amended by the addition of the words underlined below:

> "15(25) … On 26 November 2010, a number of transactions took place. £800,000 was transferred into the company's bank account from KC's bank account. £800,020 was transferred from the company's bank account as an "EBT contribution". This appears to have been the Payment the £20 being the transfer fee. <u>£800,000 was transferred into MC's bank account, and £800,000 was transferred from his account, with the £20 being the transfer fee.</u> £800,000 was paid into KC's bank account reference "EBT… Mark Currell"."

(2) The FTT found in the sections of the Decision headed "The Facts" and "Findings of Fact" that £800,000 was transferred from KC's bank account to the Appellant's bank account ([15(25)]) and that this payment was treated as a loan from KC to the Appellant which could be repaid to her whenever she wanted ([16(3)]). Having made these findings the FTT then referred to this loan account in various contexts throughout the Discussion, including:

(a) At [31(14)] the FTT referred to MC's evidence in relation to why KC paid the money back to the Appellant, and that his evidence was the KC was lending money to the Appellant and would be able to obtain repayments whenever she wanted.

(b) At [36(13)], addressing whether the Loan conferred a benefit on MC, the FTT said that the reinvestment of the £800,000 into the Appellant, and the ability to draw it out of KC's loan account "cash free" (which we infer from [50] and [54] should have been "tax free") had been prewired into the arrangements. The benefit to MC was that it could be "withdrawn and used as he wished. There was no fetter on the use of the money withdrawn from KC's loan account."

(c) At [50] the FTT referred to the £800,000 which had been paid to the Trustee and lent to MC as having been "put at the unfettered disposal of KC. It is clear from the evidence that KC and MC acted together in building up the business of the company and we see no reason why…MC had any misgivings that KC would not draw down on her loan account for their mutual benefit".

(d) At [52] the FTT posed the question "So why did the Trustee exercise its discretion to provide £800,000 to MC which they knew would become available to MC to draw from the company without a tax liability?".

(e) At [54(11)] the FTT said "it is precisely because MC has been "under rewarded" that the Trustee considered that MC should be granted a loan which the Trustee knew would be introduced into the company in a form which MC could access without payment of tax".

116. Mr Elliott submitted that the loan account was KC's loan account with the Appellant and that, as KC and MC are separate individuals, we should make a finding that MC did not have unfettered access to the money withdrawn or repaid from that account. We are wary of seeking to re-draft findings of the FTT on specific issues but conclude that such an exercise is unnecessary in any event.

117. We are able to re-make the decision on the basis that the FTT's findings of fact are undisturbed save in relation to [15(25)] (which is amended as set out above); and such findings include the FTT's conclusions, based on the evidence before the FTT, as to the reasons for the Payment and the Loan.

118. The Appellant had appealed to the FTT against the determinations and the FTT had expressed the issue as being "whether the sole or a substantial reason why the Payment was paid by the company to the EBT as part of the arrangements was because it was a reward or benefit for MC for his exertions as an employee/director" (at [14]). Mr Elliott accepted that the Appellant's appeal against the determinations would be dismissed if we conclude that either the Payment or the Loan comprised the payment of earnings of MC.

119. We have already set out our analysis in relation to the Loan and concluded that the making of the Loan by the Trustee to MC did not constitute a payment of earnings of MC.

120. We address here whether the Payment to the Trustee constituted a payment of earnings of MC.

121. Mr Waldegrave submitted that the legal analysis in relation to the Payment is identical to that in *Rangers SC*, which sets out the approach we should adopt in re-making the decision. We have already summarised the parties' submissions in relation to *Rangers SC*, outlined the facts and set out the issue which was addressed by Lord Hodge.

122. Having set out at [36] that the "central issue" is whether it is necessary that the employee himself or herself should receive, or at least be entitled to receive, the remuneration for his or her work in order for that reward to amount to taxable emoluments, Lord Hodge set out his conclusion as follows:

> "41. As a general rule, therefore, the charge to tax on employment income extends to money that the employee is entitled to have paid as his or her remuneration whether it is paid to the employee or a third party. The legislation does not require that the employee receive the money; a third party, including a trustee, may receive it. While that is a general rule, not every payment by an employer to a third party falls within the tax charge. It is necessary to consider other circumstances revealed in case law and in statutory provisions which fall outside the general rule. Those circumstances include: (i) the taxation of perquisites, at least since the enactment of ITEPA, (ii) where the employer uses the money to give a benefit in kind which is not earnings or emoluments, and (iii) an arrangement by which the employer's payment does not give the intended recipient an immediate vested beneficial interest but only a contingent interest…."

123. Lord Hodge's summary of the analysis then included the principle that "income tax on emoluments or earnings is due on money paid as a reward or remuneration for the exertions of the employee" ([58]) and set out the following:

> "59. Parliament in enacting legislation for the taxation of emoluments or earnings from employment has sought to tax remuneration paid in money or money's worth. No persuasive rationale has been advanced for excluding from the scope of this tax charge remuneration in the form of money which the employee agrees should be paid to a third party, or where he arranges or acquiesces in a transaction to that effect…."

124. Lord Hodge then applied this purposive construction to the facts in the appeal:

(1) The payment of money into the principal trust was a component of the remuneration of the footballers and other employees ([61]).

(2) For the footballers, the arrangement which led to the two contracts were negotiated between senior managers of RFC and the footballers or their agents. The focus of the discussions was on the net remuneration which would be made available to the footballer. Every time a footballer wanted to use the money provided to his sub-trust he was given a loan by the sub-trust. The footballer was able to gain access to the cash when he wanted it, and the expectation of both employer and the employee was that the employee would not have to repay the loan while he lived ([61]). The relevant provisions for the taxation of emoluments or earnings were and are drafted in deliberately wide terms to bring within the tax charge money paid as a reward for an employee's work. The scheme was designed to give each footballer access without delay to the money paid into the principal trust, if he so wished, and to provide that the money, if then extant, would ultimately pass to the member or members of his family whom he nominated. Having regard to the purpose of the relevant provisions, the sums

paid to the trustee for a footballer constituted the footballer's emoluments or earnings ([64]).

(3) The bonuses which RFC and the other employers gave their executives were made available through the same trust mechanisms. The employees had no contractual entitlement to the bonuses before their employers decided to give them but that does not alter the analysis of the effect of the scheme. The fact that bonuses were voluntary on the part of the employer is irrelevant so long as the sum of money is given in respect of the employee's work as an employee. For the same reasons as those which cause the footballers' remuneration paid to the principal trust to be subject to taxation, the bonuses which were paid to the employees though the trust mechanism fall within the tax charge as emoluments or earnings when paid to the principal trust ([66]).

125. This decision of the Supreme Court not only sets out the applicable general principles (including at [41] and [58]) but also includes Lord Hodge's application of the law to the facts as found by the majority of the FTT. However, this decision must be understood and applied by reference to the issue that was before the Supreme Court in that appeal.

126. The decision of the Supreme Court in *Rangers SC* establishes that a payment to a trust (or another third party) may itself comprise taxable earnings in that amount, and it is not precluded from being such by the fact that the employee receives such amount from the trust by way of loan rather than outright gift. However, it was accepted by the taxpayers that the payments to the trust were remuneration for services provided by the employees (including for this purpose the footballers and the executives). This is apparent from the summary of taxpayers' counsel's submissions at [34], where he was said to assert that it is not sufficient that the payment of money arises from the performance of the duties of an employment and that the payment to a third party does not amount to a payment of earnings unless the employee already has a legal right to receive the payment and it is paid at his direction to a third party, and was reflected in Lord Hodge's description of the issue before the Supreme Court at [1] and [36].

127. The role then played by whether there was an entitlement to the relevant remuneration is more difficult. Lord Hodge set out the issue at [1] as involving the circumstance that the employee had "no prior entitlement to receive it himself or herself" and then set out the general rule as being that the charge to tax "extends to money that the employee is entitled to have paid as his or her remuneration whether it is paid to the employee or a third party" ([41]). He was rejecting the taxpayers' counsel's submission that a payment to a third party can only be earnings if the employee had a legal right to receive the payment and it was paid at his direction to a third party. The facts then involved two different situations. For the footballers, the focus of the discussions before their engagement was on the net remuneration which would be made available ([61]), and the side letter between RFC and the relevant footballer then included a commitment by RFC to fund the principal trust ([22]). There was thus a contract providing for the amount to be paid by RFC to the trust. There was no equivalent to this side letter for the executives. For those employees, Lord Hodge said that there was no contractual entitlement to the bonuses before their employer decided to give them ([66]). We agree with Mr Elliott's submission that this should not be read as saying there was never any entitlement at all; rather, that there was no entitlement to these bonuses which had been agreed upon engagement, but that during the employment the employer decided to award the bonus and decided that this would be delivered through the trust arrangements.

128. It is not agreed between the parties to this appeal that the Payment was remuneration for MC's services, and we therefore reject Mr Waldegrave's submission that this appeal involves a straightforward application of the decision in *Rangers SC*.

129. The FTT has found:

(1) The substantial reason for the Appellant making the Payment on 26 November 2010 was to enable the Trustee to fulfil the commitment it had made to MC to lend him £800,000 ([30]).

(2) The making of the Loan to MC was "prewired" ([31(8)]). In addition, the Appellant required that £800,000 of working capital in its business and it was inevitable that it would find its way back into the Appellant once it had been paid to the EBT ([31(15)]).

(3) The only reason for the Trustee exercising its discretion to provide the Loan of £800,000 to MC was because of the work which MC had done over the years in building up the business, as a sole trader then in partnership and then via the Appellant ([52] to [53]).

(4) If the Appellant had not made the Payment, the Appellant would not have paid MC £800,000 as remuneration for his work for the Appellant ([15(12)]). The Payment did not replace remuneration which MC had sacrificed or reduced in anticipation of receiving it ([15(13)]).

130. We agree with Mr Waldegrave that it would be artificial to focus only on the finding made by the FTT as to the substantial reason for the Payment rather than going on to take account of the subsequent finding as to the reason for the making of the Loan, given that the reason for the first was to make the second, and the FTT found this was prewired. However, we conclude that these findings do not support a conclusion that the Payment itself was money paid as a reward or remuneration for MC's exertions as an employee. We need to consider the full picture, and that includes:

(1) The Payment was made as part of an arrangement in which the £800,000 would be lent to MC, used to acquire the Shares from KC and then lent back to the Appellant by KC, the result of which was that the Appellant continued to have use of this money as part of its working capital.

(2) For MC himself, the result was that he acquired the Shares from KC but had an obligation to repay £800,000 to the Trustee. Unlike in *Rangers SC*, there were no findings that there was any expectation that the Loan would not be repaid at term but would be renewed and only ultimately repayable out of his estate on death. We recognise that, as set out by the FTT at [50], KC and MC had acted together in building up the business and there was said to be no reason why MC would have any misgivings that KC would not draw down on her loan account with the Appellant for "their mutual benefit", but such a benefit does not undermine or override MC's obligation to repay the Loan.

(3) MC was said to have been "under rewarded" ([54(11)]) over the years, but the FTT also found that MC had no entitlement to a salary or bonus of £800,000 that he had sacrificed in anticipation of the Payment being made and then the Loan being made to him, and that the Appellant would not have paid this amount to him as remuneration. This contrasts with *Rangers SC*, where RFC did focus on the net remuneration that would be made available to the footballers and entered into two contracts to record how those amounts would be delivered.

131. Whilst not stated in these terms, it is clear that the FTT considered there to be a link or connection between the Appellant's decision to make the Payment to the Trustee and MC's position as a director of the Appellant. This is evident from the FTT's conclusions as to the reasons for the Payment and the Loan, and as to the arrangements being prewired. The Appellant knew that when it paid £800,000 to the Trustee, that amount would be lent to MC, and this did in fact occur. However, the existence of such a link or connection is not sufficient for the amount of the Payment to constitute earnings of MC, as it takes no account of the character of what was received by MC, namely the Loan, and MC's resulting obligation to repay that loan. We have identified above the areas of key difference with the facts in *Rangers SC*, being not only the agreement between the parties in that appeal as to the payments to the principal trust being remuneration, but also the facts in relation to the side letters for footballers which were agreed alongside the employment contracts and the expectation that the terms of the loans would be extended throughout each employee's lifetime such that they would only be repayable out of their estate.

132. We have concluded that the Payment was not earnings of MC.

133. The Appellant's appeal is allowed, we set aside the Decision and re-make it to allow the Appellant's appeal against the determinations.

MR JUSTICE RICHARD SMITH
JUDGE JEANETTE ZAMAN

Release date: 09 December 2024