Neutral Citation Number: [2024] EWCA Civ 652

Case No: CA-2023-002219

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL
(TAX AND CHANCERY CHAMBER)
Upper Tribunal Judge Swami Raghavan and Upper Tribunal Judge Guy Brannan
[2023] UKUT 00194 (TCC)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 13/06/2024

Before:

LORD JUSTICE LEWISON
LORD JUSTICE NEWEY
and
LORD JUSTICE BAKER

- -

Between:

JTI ACQUISITION COMPANY (2011) LIMITED	**Appellant**
- and -	
THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS	**Respondents**

- -
- -

Nicola Shaw KC and Harry Winter (instructed by **DLA Piper**) for the **Appellant**
Elizabeth Wilson KC and Rebecca Sheldon (instructed by **The General Counsel and Solicitor to HM Revenue and Customs**) for the **Respondents**

Hearing dates: 15 and 16 May 2024

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Approved Judgment

This judgment was handed down remotely at 10.30am on 13 June 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Newey:

1. The question raised by this appeal is whether the appellant, JTI Acquisition Company (2011) Limited, can bring into account for corporation tax purposes debits in respect of interest payable on loan notes which it issued to Joy Technologies Inc ("JTI"). HM Revenue and Customs ("HMRC") contend that the appellant was a party to the loan relationship for an "unallowable purpose" within the meaning of section 442 of the Corporation Tax Act 2009 ("CTA 2009") and so that the debits fall to be disallowed. The First-tier Tribunal (Judge Heidi Poon) ("the FTT") agreed and the Upper Tribunal (Judge Swami Raghavan and Judge Guy Brannan) ("the UT") upheld that decision. The appellant, however, now appeals to this Court.

The facts

2. This section of this judgment is generally derived from the decision of the FTT, which was released on 19 April 2022 ([2022] UKFTT 166 (TC)).

3. During the relevant period, Joy Global Inc ("JGI"), a United States corporation, was the ultimate parent of a group headquartered in the United States which manufactured mining machinery and equipment. The group had significant operations in various countries, including the United Kingdom. JGI's president and chief executive officer was Mr Edward Doheny. Mr Michael Olsen was executive vice president, treasurer and group chief financial officer. Mr Patrick O'Brien was group vice president of tax.

4. On 6 April 2011, Bank of America Merrill Lynch made a presentation to JGI in which it set out the business and commercial case for the acquisition of LeTourneau Technologies Inc ("LTT"), a Texas corporation which manufactured machinery and equipment. On 13 May 2011, JGI entered into a stock purchase agreement by which it agreed to buy LTT for $1.1 billion. By entering into this agreement, the FTT observed in paragraph 152(1) of its decision, "JGI was 'locked into' the LTT acquisition".

5. On 2 June 2011, Deloitte made a presentation to JGI with the heading "LeTourneau Acquisition Structure". This outlined what became known as the "9-step plan" or "Skinny". It envisaged that:

   i) JGI would borrow about $500 million from a bank;

   ii) JGI would contribute $550 million to JTI, a United States subsidiary of JGI, as equity and a further $550 million by way of an interest-bearing loan;

   iii) JTI would in turn contribute $50 million to a new United Kingdom company ("UK Ltd") as equity, provide UK Ltd with $500 million interest-free as "quasi-equity" and lend UK Ltd another $550 million on the basis of interest-bearing notes capable of being issued as a Eurobond;

   iv) UK Ltd would effect the acquisition of LTT for $1.1 billion;

   v) JTI would form a finance company in the Cayman Islands; and

   vi) JTI would contribute to the Cayman Islands finance company the $550 million notes issued by UK Ltd.

6. On 3 June 2011, in emails discussing a fee of $280,000 to $290,000 proposed by Deloitte, Mr O'Brien told Mr Olsen, "The first full year anticipated income tax savings in the UK would be approximately 13 times their fee quote (conservatively computed as follows: $500 million *4% *23%)". The "4%" and "23%" will have referred to anticipated interest and tax rates.

7. On 6 June 2011, Mr O'Brien informed Mr Wayne Kisten, the chief financial officer of the United Kingdom part of the group ("Joy UK"), that, "With the acquisition of LeTourneau we have identified an acquisition structure that will provide Joy UK with some fairly substantial prospective tax savings". Mr O'Brien further explained that a new United Kingdom entity was being incorporated with Mr Kisten, Mr Olsen and Mr Mike Mannion, the chief executive officer of Joy UK, as directors. The attachments to the email included Deloitte's presentation slides.

8. On 7 June 2011, in response to a suggestion from Deloitte that "it would be beneficial if there could be someone available at the meeting [at which UK Ltd's board approved the acquisition of LTT] (i.e. via telephone) who could answer any questions the Board members may raise", Mr Robbin Krueger of Joy US corporate legal said:

> "Are you aware that all of the board members of [UK Ltd] are employees of ours? They are well informed on our intentions and, as a matter of fact, one is Joy Global's CFO and a contributing architect of this plan. He is one of the two 'senior management' that is updated by Pat [i.e. Mr O'Brien] on a nightly basis."

9. Also on 7 June 2011, Mr O'Brien sent an email to, among others, Mr Olsen, Mr Mannion and Mr Kisten in which he said this:

> "**Tax Planning Matrix - LeTourneau Acquisition - Estimated Tax Savings Using 5% interest rate**
>
> As a follow up to today's call, attached is the summary of the tax planning and 'the math' supporting estimated annual global tax savings which would inure to the benefit of our organization as long as the debt structure remains in place. Of course the actual tax savings will hinge on the interest rate that is used for the intercompany transactions. For now we are estimating the interest rate to be 5%."

A schedule containing the "math" projected a net reduction in United Kingdom tax of $6.325 million a year.

10. On 8 June 2011, Ms Vicki Willis, group accountant for Joy UK, said in an email to Mr Kisten, "This appears to be being done solely for tax planning and therefore may impact our low risk rating".

11. The appellant was incorporated on 8 June 2011 as a subsidiary of JTI with Mr Olsen, Mr Mannion and Mr Kisten as its directors.

12. On 10 June 2011, Ms Catherine Hodgetts, the company secretary of Joy Mining Machinery Limited, emailed Mr Olsen, Mr Mannion and Mr Kisten about the "board pack" for the appellant's first board meeting. The pack was to include the "Tax Planning Matrix" which Mr O'Brien had prepared. However, Mr Paul Wagner of JGI Tax responded:

> "I do not think we should include the 'Tax Planning Matrix' from Pat O'Brien … in this correspondence. Assuming Deloitte agrees I will ask that you please re-send this email without that attachment."

13. A letter addressed to Mr Olsen, Mr Mannion and Mr Kisten dated 16 June 2011 from Mr Doheny said:

> "As you are aware, [the appellant] has been presented with the opportunity to acquire the shares of [LTT]. As you contemplate this opportunity, and the benefits this acquisition could provide to [the appellant], it is important that you consider this transaction on its own merits only and not give consideration to any broader benefits that may be derived by the group of the companies owned by Joy Technologies Inc."

14. Mr Olsen, Mr Mannion and Mr Kisten met as the appellant's board on 20 June 2011. The minutes of the meeting record that the directors had each received "a letter from the Company's shareholder, [JTI], wherein they were asked to consider the Acquisition [of LTT] on its own merits, and without consideration of any broader benefit to the group of companies owned by [JTI]". The board resolved to approve the allotment of 49,999 shares to JTI, the borrowing of $500 million from JTI under a loan agreement on an interest-free basis, the borrowing of $550 million from JTI by the issue of loan notes, the assignment to it of the stock purchase agreement which JGI had entered into on 13 May and the acquisition of LTT.

15. When giving oral evidence to the FTT, Mr Olsen accepted that he knew at the time that the other directors of the appellant relied on him because he "had done a lot of thinking and considering and analysis" and had spoken to Mr O'Brien about the Deloitte acquisition structure. He also confirmed that it did not matter whether the "Tax Planning Matrix" was included in the board pack for the 20 June 2011 meeting because he had already read it and understood it. He said, too, that Mr Kisten "certainly would have been aware of the Deloitte material".

16. On 21 June 2011, in pursuance of what had been resolved at the previous day's board meeting, the appellant authorised $550 million loan notes to be constituted, with interest payable at 3.5% per annum above one-year LIBOR. Also on that day, JTI transferred $1.1 billion to the appellant in three tranches, designated as $50 million (share capital), $500 million non-interest bearing loan (quasi-equity), and $550 million interest-bearing loan.

17. On 22 June 2011, the stock purchase agreement relating to the acquisition of LTT was both assigned to the appellant and completed.

18. On 8 August 2011, the $550 million loan notes which the appellant had issued were transferred from JTI to Joy Global Cayman Finance Limited ("JGCF"), a newly-formed Cayman Islands subsidiary of JTI. The loan notes were subsequently listed on the Channel Islands Stock Exchange.

19. A diagram depicting the relevant transactions is to be found as an appendix to the UT decision.

20. In the accounting periods from 2012 onwards, the appellant claimed debits representing interest payable under the $550 million loan notes it had issued. The debits were surrendered to other United Kingdom group companies which had taxable profits.

21. Both the appellant and JGCF were disregarded ("check the box") entities for United States tax purposes so that the interest deductions in the United Kingdom were not matched by taxable receipts in the United States. Neither was the interest taxable in the Cayman Islands. As the FTT observed in paragraph 131(10) of its decision, "Whilst these debits would arise for UK tax, there would be no matching taxable receipt in the Cayman Islands, or in the US, or for UK tax purposes".

22. The FTT noted in paragraph 2 of its decision that the interest debits claimed by the appellant totalled just over £40 million and that the corporation tax at stake was about £9 million.

The legislative framework

23. As section 292(1) of the Corporation Tax Act 2009 ("CTA 2009") explains, part 5 of the Act, which comprises sections 292 to 476, "sets out how profits and deficits arising to a company from its loan relationships are brought into account for corporation tax purposes". Part 5 provides for interest payable by companies to be brought into account as debits, and a non-trading company whose debits exceed its credits will have a "non-trading deficit" which can potentially be surrendered by way of group relief to offset United Kingdom profits of other group members. However, chapter 15 of part 5, which extends from section 440 to section 455D, contains anti-avoidance provisions.

24. Sections 441 and 442 are concerned with loan relationships for "unallowable purposes". They provide:

> "**441 Loan relationships for unallowable purposes**
>
> (1) This section applies if in any accounting period a loan relationship of a company has an unallowable purpose.
>
> …
>
> (3) The company may not bring into account for that period for the purposes of this Part so much of any debit in respect of that relationship as on a just and reasonable apportionment is attributable to the unallowable purpose.

…

(5) Accordingly, that amount is not to be brought into account for corporation tax purposes as respects that matter either under this Part or otherwise.

(6) For the meaning of 'has an unallowable purpose' and 'the unallowable purpose' in this section, see section 442.

442 Meaning of 'unallowable purpose'

(1) For the purposes of section 441 a loan relationship of a company has an unallowable purpose in an accounting period if, at times during that period, the purposes for which the company—

(a) is a party to the relationship, or

(b) enters into transactions which are related transactions by reference to it,

include a purpose ('the unallowable purpose') which is not amongst the business or other commercial purposes of the company.

…

(2) If a company is not within the charge to corporation tax in respect of a part of its activities, for the purposes of this section the business and other commercial purposes of the company do not include the purposes of that part.

(3) Subsection (4) applies if a tax avoidance purpose is one of the purposes for which a company—

(a) is a party to a loan relationship at any time, or

(b) enters into a transaction which is a related transaction by reference to a loan relationship of the company.

(4) For the purposes of subsection (1) the tax avoidance purpose is only regarded as a business or other commercial purpose of the company if it is not—

(a) the main purpose for which the company is a party to the loan relationship or, as the case may be, enters into the related transaction, or

(b) one of the main purposes for which it is or does so.

(5) The references in subsections (3) and (4) to a tax avoidance purpose are references to any purpose which consists of securing a tax advantage for the company or any other person.”

25. By section 1139 of the Corporation Tax Act 2010, which is applied in this context by section 476 of CTA 2009, “tax advantage” includes:

“(a) a relief from tax or increased relief from tax,

…

(c) the avoidance or reduction of a charge to tax or an assessment to tax,

(d) the avoidance of a possible assessment to tax”.

26. In *Travel Document Service v Revenue and Customs Commissioners* [2018] EWCA Civ 549, [2018] 3 All ER 60, in a judgment with which Arden and Bean LJJ agreed, I said this in paragraph 41 in relation to predecessor legislation which had been found in paragraph 13 of schedule 9 to the Finance Act 1996:

“(i) A company had an ‘unallowable purpose’ if its purposes included one that was ‘not amongst the business or other commercial purposes of the company’ (see para 13(2) of Sch 9 to FA 1996);

(ii) A tax avoidance purpose was not necessarily fatal. It was to be taken to be a ‘business or other commercial purpose’ unless it was 'the main purpose, or one of the main purposes, for which the company is a party to the relationship' (see para 13(4));

(iii) It was the company’s subjective purposes that mattered. Authority for that can be found in the decision of the House of Lords in *IRC v Brebner* [1967] 1 All ER 779, [1967] 2 AC 18, which concerned a comparable issue, viz whether transactions had as ‘their main object, or one of their main objects, to enable tax advantages to be obtained’. Lord Pearce concluded ([1967] 1 All ER 779 at 781, [1967] 2 AC 18 at 27) that ‘[t]he “object” which has to be considered is a subjective matter of intention’, and Lord Upjohn (with whom Lord Reid agreed) said ([1967] 1 All ER 779 at 784, [1967] 2 AC 18 at 30) that ‘the question whether one of the main objects is to obtain a tax advantage is subjective, that is, a matter of the intention of the parties’; and

(iv) When determining what the company’s purposes were, it can be relevant to look at what use was made of the shares.

> As the Upper Tribunal (Barling J and Judge Charles Hellier) noted in *Fidex Ltd v Revenue and Customs Comrs* [2014] UKUT 454 (TCC), [2015] STC 702 (at [110]):
>
> > 'what you do with an asset may be evidence of your purpose in holding it, but it need not be determinative of that purpose. The benefits you hope to derive as a result of holding an asset may also evidence your purpose in holding it.'"

27. The principles relating to "unallowable purposes" have more recently been considered by this Court in *BlackRock HoldCo 5, LLC v Revenue and Customs Commissioners* [2024] EWCA Civ 330, [2024] STC 740 ("*BlackRock*") and *Kwik-Fit Group Ltd v Revenue and Customs Commissioners* [2024] EWCA Civ 434 ("*Kwik-Fit*"). In *BlackRock*, Falk LJ, with whom Peter Jackson and Nugee LJJ agreed, summarised some key points relating to "unallowable purposes" in these terms in paragraph 124:

> "a) Save in 'obvious' cases, ascertaining the object or purpose of something involves an inquiry into the subjective intentions of the relevant actor.
>
> b) Object or purpose must be distinguished from effect. Effects or consequences, even if inevitable, are not necessarily the same as objects or purposes.
>
> c) Subjective intentions are not limited to conscious motives.
>
> d) Further, motives are not necessarily the same as objects or purposes.
>
> e) 'Some' results or consequences are 'so inevitably and inextricably involved' in an activity that, unless they are merely incidental, they must be a purpose for it.
>
> f) It is for the fact finding tribunal to determine the object or purpose sought to be achieved, and that question is not answered simply by asking the decision maker."

28. Earlier in her judgment in *BlackRock*, having noted that it was not disputed that what mattered was the company's subjective purpose or purposes in being a party *to the loan relationship in question*, Falk LJ had said in paragraph 107:

> "The parties were quite right not to dispute the fact that what matters is the company's subjective purpose or purposes in being a party to the loan relationship in question. The purpose or purposes for which a company is a party to a loan relationship may or may not be the same as, for example, the purpose or purposes for which the company exists, or the purpose or purposes of a wider scheme or arrangements of

> which the loan relationship forms part. Those other purposes may, for example, encompass the purposes of other actors."

29. In *Kwik-Fit*, Falk LJ, with whom Andrews LJ and Sir Launcelot Henderson agreed, reproduced in paragraph 54 the summary of key points she had given in paragraph 124 of *BlackRock* and also, in paragraph 53, explained that:

> "it is uncontroversial that what matters is the company's subjective purpose or purposes in being a party to the loan relationship in question, and that for a corporate entity it is necessary to consider the subjective purpose of the relevant decision makers, generally the board of directors".

The FTT and UT decisions

The FTT decision

30. The FTT concluded in paragraph 141 of its decision that, "by being party to the loan relationship, the Appellant secured a UK tax advantage for other UK group companies". Turning to whether securing the tax advantage was a purpose, the FTT said in paragraph 143, "The specific question I ask … is: What was the purpose for the Appellant in issuing the $550m loan notes to JTI?" After explaining that it derived "two guiding principles" from observations of Lord Pearce in *Inland Revenue Commissioners v Brebner* [1967] 2 AC 18 ("*Brebner*") (as to which, see paragraphs 56 to 60 below), the FTT set out a number of findings of fact in paragraph 152, including these:

> "(8) By the time Joy UK was informed of the 9-step Skinny on 6 June 2011, the decision to implement the Deloitte scheme was already taken by its US parent. The scheme was presented by O'Brien to Joy UK as 'an acquisition that will provide Joy UK with some fairly substantial prospective tax savings' (§42).
>
> (9) Despite the grave reservations of Joy UK as summarised by Willis' jot-down list of concerns (§53), which included dividend block and rendering the reserves negative for the UK group of companies, there was no option for Joy UK but to go along with the decision to implement the scheme. Joy UK was fully aware of the scheme being 'a more aggressive structure' (§54) as acknowledged by Willis' counterpart in the US.
>
> (10) The Doheny memo of 16 June 2011 to the Board of Directors of [the appellant] was issued as directed by Tither of Deloitte UK (§50(1)) to give the impression that the directors were given leave 'to make a fully informed decision to proceed with the acquisition'.
>
> (11) The withdrawal of O'Brien's Tax Planning Matrix with its 'math' from the Board Pack was a gesture to remove the transparent record that securing the UK tax advantage was a

> driver for the decision to implement the Deloitte scheme that would involve the Appellant entering into the loan relationship by issuing the $550m loan notes.
>
> (12) The Board Meeting of [the appellant] convened on 20 June 2011 was to impart a veneer of formality to suggest that genuine decision making had taken place at the UK level. The minutes for that board meeting was pre-drafted by Eversheds for adoption by the board, and Kisten and Mannion as the UK directors were to follow the lead from Olsen in the chair, who had been through the thinking process from the inception of the 9-step Skinny as the blueprint that would lead to the Appellant becoming party to the loan relationship."

31. The FTT then said in paragraph 153:

> "From the above findings of fact, I conclude that there was no genuine decision making at the UK level as regards the resolution to issue the $550m loan notes to JTI. The decision makers were at JGI level, and their object in implementing the Deloitte scheme was to bring into existence the loan relationship of which the Appellant would be a party, thereby securing a UK tax advantage by generating the free-standing loan relationship debits for the UK members of the JGI group. Pursuant to subsection 442(5), that object was 'a tax avoidance purpose', and an 'unallowable purpose' in terms of section 441."

32. In paragraph 176, the FTT concluded that "to obtain the UK tax advantage was the main purpose for which the Appellant was party to the loan relationship in question". The FTT discounted non-tax-advantage purposes for which the appellant had contended. It said in paragraphs 165 and 166:

> "165. The Appellant relies on Olsen's evidence to establish that there were business and/or commercial purposes for the issue of the loan notes of $550m. Olsen's evidence in this respect was subject to extensive cross-examination. However, despite [counsel for HMRC's] repeated questions from different angles to elicit the putative non-tax-advantage purposes for the Appellant being party to the loan relationship, I have found Olsen's evidence to be vague, elusive, lacking in substance, contradictory to the factual matrix, and ultimately unconvincing.
>
> 166. For the Appellant, it was submitted that 'overwhelmingly', the only important factor in considering where to hold the acquisition was where to place and repay debt as the non-tax-advantage purpose. I can make no finding of fact to that effect, nor can I find any bona fide commercial or business purposes for the Appellant being party to the loan relationship. The negative condition under section 442(4) does

> not obtain, and the tax avoidance purpose that has been established in terms of section 442 means that the Appellant had an 'unallowable purpose' for being party to the loan relationship for the purposes of section 441."

33. In paragraph 157, the FTT had said:

> "Olsen said that the commercial reason to acquire LTT preceded the decision to place the debt in the UK. I accept that there was a bona fide commercial reason to acquire LTT, and the business case was eloquently set out in Project Longhorn by the Merrill Lynch on 6 April 2011 …. However, as admitted by Olsen, the Appellant contributed nothing to the negotiation with Rowan [i.e. the seller of LTT] in closing the purchase of the LTT, or to the due diligence exercise in the interim period between 6 April 2011 and 13 May 2011. Crucially, the sinews between the commercial case to acquire LTT by the group and the formation of the Appellant in order to be the 'purchaser' of LTT by assignment are absent to enable any finding of fact that the commercial case to acquire LTT could necessarily be extended to making the Appellant the purchaser, (which entailed the assumption of the loan from JTI) a commercial purpose without more."

34. Addressing "whether there is … a positive case that tax avoidance purpose was the (or a) main purpose" (see paragraph 166), the FTT observed in paragraph 167 that "JGI was already 'locked in' to complete the Stock Purchase Agreement as at 2 June 2011" and "[t]he Deloitte scheme was bolted on to the LTT purchase agreement, for no other reason but to obtain the UK tax advantage". Mr O'Brien's workplan, the FTT said in paragraph 169, "was a complete package from Steps 1 to 9 for the sole purpose of creating the annual debit estimated at \$6.8m initially from the \$550m loan notes issued by the Appellant to JTI on 21 June 2011". "[T]he hoped-for UK tax advantage was large in absolute terms" and, "[i]n the final analysis, 'the prospective advantage was of such significance in the context that gaining it must have become a main purpose'": see paragraph 174.

35. Having noted in paragraph 177 that "the Tribunal is required to assess how much of the debit arising in each accounting period was, on a just and reasonable apportionment, attributable to the unallowable purpose", the FTT said this in paragraphs 179 and 180:

> "179. From [counsel for the appellant's] submissions, there is a suggestion that if the tax avoidance purpose is a main purpose and not *the* main purpose, then apportionment will have to follow. On the basis that I have found that to obtain the UK tax advantage was the main purpose for the Appellant being party to the loan relationship, no apportionment of the debit arising in each accounting period is in point. Even if I had found that to obtain the tax advantage was one of the main purposes, and not the main purpose for the Appellant being party to the loan relationship, the attribution issue would still be

> determined as wholly attributable to the unallowable purpose in line with *Fidex* [i.e. *Fidex Ltd v Revenue and Customs Commissioners* [2016] EWCA Civ 385; [2016] 4 All ER 1063]: but for the avoidance scheme encapsulated by the 9-step Skinny, there would have been no debit at all.
>
> 180. I conclude that the loan relationship debits were wholly attributable to an 'unallowable purpose' pursuant to section 441 CTA 2009, and there is no need for any just and reasonable apportionment to be applied."

The UT decision

36. The appellant appealed to the UT, but without success. The UT's decision was released on 7 August 2023 ([2023] UKUT 00194 (TCC)).

37. As the UT explained in paragraph 28 of its decision, the appeal to it raised these questions of statutory interpretation:

> "(1) Are the existence of the company (here the appellant) and the loan relationship 'givens' in the analysis of the purpose for which the company is a party to the loan relationship?
>
> (2) Are commercial asset purchases bought with borrowing at arm's length outside the scope of ss 441 and 442?
>
> (3) Is the use to which the proceeds of the borrowing are put … determinative?"

38. The UT summarised its answers to these questions as follows in paragraph 68:

> "In conclusion we reject the appellant's three fundamental arguments on the statutory interpretation of ss441 and 442. That means:
>
> (1) A tribunal is able to, and should, look at all the facts and circumstances in determining the 'main purpose for which the company is a party to the loan relationship….'. That consideration of purpose may include examining the reasons why that particular company (as opposed to another) was chosen to be a party to the loan relationship. That is because those reasons may inform the company's purpose in being a party to the loan relationship. It is also because such reasons fall within the words 'main purpose for which the company…is a party' (while the loan relationship is referred to as being 'of the company' in s441(1) and s442(1), the wording of those provisions is such that the purposes in question need not necessarily be those exclusively of the company - see [37] above).

> (2) There is no rule that, as a matter of law, the unallowable purpose provisions are inapplicable to arm's length finance costs for a commercial acquisition.
>
> (3) The use to which the borrowing is put is relevant to the purpose of the borrowing, but not determinative."

39. The UT had said in paragraph 42:

> "there is no indication in the statutory wording that when assessing the company's purposes it will be irrelevant to consider the circumstances in which the company was chosen to enter into the relationship, or the parent company or group benefit-related reasons for that company entering into that relationship. That is not the same as saying another company, or 'the group's purpose' is viewed as determinative. Rather, the other company's / group's perspective is relevant to the taxpayer company's purpose because it informs the determination of the particular taxpayer company's purpose."

40. In the course of its decision, the UT addressed, and rejected, challenges to certain findings which the FTT had made. With regard to whether the FTT had been wrong to find that there was no bona fide commercial or business purpose for the appellant being party to the loan relationship, the UT said in paragraph 148 after quoting from paragraph 157 of the FTT's decision:

> "In other words it did not necessarily follow, without evidence of why that was the case, that the group's bona fide business reason for the acquisition meant there was the same bona fide commercial reason for why the appellant was made the purchaser of the acquisition. The question for the tribunal was the purpose for which the appellant was a party to the borrowing – it was open to the FTT to find that that was for purpose of securing the UK tax advantage."

41. When considering the FTT's comment that "there was no genuine decision making at the UK level as regards the resolution to issue the $550m loan notes to JTI", the UT said:

> "139. The FTT sought to establish the appellant's reasons for undertaking the borrowing. The appellant's position was that its purpose was to acquire LTT; HMRC's case was that that decision had already been made and there was no real possibility that the appellant would not make the same decision as JTI did (that the appellant should undertake the borrowing and did so for the same tax-motivated reasons). It is in that sense that the FTT considered that there was no genuine decision making. The reference to 'genuine' was perhaps not the most apposite term to capture what the FTT meant to express. The FTT was not saying the decision lacked validity or was ineffective in company law; nor that it was not formally

> possible for the appellant's board to say 'no'. Nor, accordingly, was it saying the decision-makers were wrong to think they were making a valid decision in accordance with their fiduciary duties as directors. All the FTT, we think, was seeking to convey was that the decision to acquire LTT using the appellant was effectively a 'done deal' and that there was no real possibility the appellant would not decide to acquire LTT. In addition, from a presentational point of view, the decision-making was depicted by others to look like the appellant was making a de novo decision to acquire LTT, in circumstances where it might realistically have said no, and with a view to giving the impression the decision was not for tax reasons.
>
> 140. The appellant's submissions, that matters such as Mr Doheny's exhortation to look at the matter from the appellant's point of view, and the Tax Planning Matrix being pulled from the board pack, were irrelevant to the genuineness of the appellant's decision, are thus misdirected. In our view, that might be right in terms of the narrow question of whether the decision was valid, but the matters were relevant to the wider question of whether, looking at all the facts, there was a real function to the appellant's 20 June decision, beyond the appellant fulfilling its role in the Deloitte plan."

42. Of course, the UT and FTT both made their decisions before this Court decided *BlackRock* and *Kwik-Fit*.

The issues

43. The issues to which the present appeal gives rise can, I think, be conveniently addressed under the following headings:

 i) Was there an "unallowable purpose"?

 ii) Was there a commercial purpose?

 iii) Apportionment.

Was there an "unallowable purpose"?

The appellant's case

44. Ms Nicola Shaw KC, who appeared for the appellant with Mr Harry Winter, argued that the FTT and UT both asked themselves the wrong question. Instead, she said, of focusing on the purposes for which the appellant borrowed the $550 million, they asked why the appellant was the group entity selected to effect the acquisition of LTT. JGI may have chosen the appellant for tax reasons, but it is the appellant's purposes that matter, and the appellant entered into the loan relationship because it needed the money to buy LTT. The appellant may have known that a tax advantage for the group would be generated, but simply knowing that something will have a consequence does not mean that it is done for that purpose: as Falk LJ pointed out in *BlackRock*,

"[e]ffects or consequences, even if inevitable, are not necessarily the same as objects or purposes". Ms Shaw accepted that, in ascertaining the appellant's purposes, it could be appropriate to have regard to the intentions and purposes of other group companies, but only with a view to identifying the appellant's purposes in being a party to the loan relationship. The relevant purposes are those for which the appellant incurred the borrowing, not those of the group in deciding that the appellant should be the borrower. What matter, moreover, are the subjective intentions of the appellant's decision-makers: the members of its board. Had the FTT and UT asked themselves the correct question, Ms Shaw argued, the only conclusion they could reasonably have come to was that the (or at the very least a) purpose for which the appellant was a party to the loan relationship was to acquire LTT.

BlackRock

45. *BlackRock* featured prominently in the argument. In that case, when acquiring the US business of Barclays Global Investors ("BGI US"), the BlackRock group adopted a structure which involved:

    i) the formation of three new entities, referred to as "LLC4", "LLC5" and "LLC6";

    ii) an existing company in the group becoming the sole member of LLC4;

    iii) LLC4 becoming the sole member of LLC5;

    iv) LLC4 and LLC5 becoming members of LLC6;

    v) LLC5 borrowing money from LLC4 and issuing preference shares to LLC6; and

    vi) LLC6 effecting the acquisition of BGI US.

    The arrangements were such that LLC5 would be entitled to the vast majority of distributions from LLC6, but LLC6 was controlled by LLC4. The dispute concerned claims by LLC5 to make deductions in its corporation tax returns in respect of interest on the loans made to it by LLC4.

46. The Court of Appeal concluded that the deductions were disallowed by the unallowable purpose rule. In the words of Falk LJ in paragraph 187, LLC5 "had a tax advantage main purpose in entering into the Loans" and, although it "also had a commercial main purpose", "the UT was correct to decide that 100% of the debits in respect of the Loans should be attributed to the tax advantage main purpose".

47. Ms Shaw drew out differences between *BlackRock* and the present case. She pointed out that, whereas the FTT recognised in paragraph 131(1) of its decision in this case that "[t]here was a funding shortfall within the group to meet the $1.1 billion purchase price for LTT", the BlackRock group did not need to borrow to fund the acquisition of BGI US. Further, while the appellant was the purchaser of LTT, LLC5 neither acquired BGI US nor even gained control of LLC6. LLC5, Ms Shaw said, was "a commercially redundant conduit inserted into the acquisition structure solely to introduce unnecessary debt in order to generate loan relationship debits".

48. Ms Shaw also stressed paragraph 107 of Falk LJ's judgment in *BlackRock*, quoted in paragraph 28 above, where Falk LJ explained that "[t]he purpose or purposes for which a company is a party to a loan relationship may or may not be the same as, for example, the purpose or purposes for which the company exists, or the purpose or purposes of a wider scheme or arrangements of which the loan relationship forms part". Likewise, in paragraph 153 Falk LJ criticised the UT for having "made references to the purpose of LLC5's existence and inclusion in the transaction … without making it clear that the statutory test requires a focus on LLC5's purpose or purposes for being a party to the Loans" since, "[w]hile one may of course impact on the other, it is important to recognise that the purposes for which an entity exists and its purposes in entering into a transaction may be different". Such passages confirm, Ms Shaw argued, that what matter are the purposes for which the taxpayer is a party to the loan transaction, not the purposes of any wider scheme or arrangement of which the loan transaction forms part.

49. While, however, Falk LJ's judgment shows that a company's purposes in being a party to a loan relationship cannot necessarily be equated with the purposes for which it exists or those of a wider scheme, she did not dismiss the latter as always irrelevant. To the contrary, she observed in paragraph 164 that, "[a]lthough … the purpose or purposes of being a party to a loan relationship cannot simply be elided with the purpose for which the relevant entity exists, in this case LLC5 had no other function", "its sole raison d'être" having been "to enter into the Loans to obtain tax advantages for the BlackRock group". Further, Falk LJ said in paragraph 166 that "[i]t would be artificial to seek to divorce what occurred at the board meeting from its context", adding in paragraph 169 that "the fact that LLC5 had a tax avoidance main purpose is not inconsistent with board members properly putting the tax benefits out of their minds when deciding whether the transaction was in LLC5's best interests on a standalone basis".

50. In paragraph 162, Falk J said that, as Nugee LJ had suggested in argument, "a simple starting point in ascertaining a person's purpose for doing something is to consider 'why' they did it". In a concurring judgment of his own with which Peter Jackson LJ also expressed agreement, Nugee LJ noted in paragraph 191 that "the purpose of LLC5 in entering into these transactions was to take its place in the structure that had been devised to enable the acquisition to take place". He continued in paragraph 192:

> "But its place in that structure was entirely driven by tax considerations, or, to use the language of the statute, in order to secure a tax advantage for other persons. That was what its participation in the structure was designed to achieve. In those circumstances if one asks what was its purpose in agreeing to the transactions, I do not think there is really any doubt that its purpose was to play the part that had been devised for it so as to obtain that advantage. As Falk LJ nicely puts it at [164] above, LLC5's sole raison d'être was to enter into the Loans to obtain tax advantages for the BlackRock group. When the board were presented with the proposal that it should do just that, they no doubt had to satisfy themselves, as Mr Kushel said, that it was in the interests of LLC5 itself to enter into the transactions (and, as Falk LJ explains, in considering that question they

> quite rightly put out of their minds the tax advantages, which would accrue not to LLC5 but to other members of the group), but I do not think that means that there was no tax advantage purpose in LLC5 being a party to the Loans. That was why the board were asked to sign up to the transactions, and that was I think plainly why they did. That as Falk LJ says does not involve an attack on Mr Kushel's (or Mr Fleming's) evidence; indeed I regard it as following from what Mr Kushel said."

51. The upshot, as I see it, is that:

    i) Even where a company entering into a loan relationship was brought into being to further a wider scheme, the company's purposes in becoming a party to the relationship are not necessarily those for which it was created or those of the wider scheme;

    ii) On the other hand, the context, and in particular the purposes of the wider scheme which the company was intended to advance, may, depending on the facts, bear on the company's purposes in entering into the loan relationship;

    iii) The company will have a "tax avoidance purpose" within the meaning of section 442 of CTA 2009 if it is seeking to play its part in a scheme which, to the knowledge of the relevant decision-makers, was designed to secure a tax advantage;

    iv) If it can be said that the company wishes to go along with such a scheme *whatever* its purposes might be, it may well be that the company has an unallowable purpose regardless of whether it appreciates that the scheme was designed to secure a tax advantage. It may suffice that those promoting the scheme have that intention;

    v) The fact that the decision-makers consider that entering into the loan relationship is in the company's interests for other reasons does not preclude them from having a "tax advantage purpose"; and

    vi) A Tribunal determining whether a company had a "tax avoidance purpose" is not required to adopt a "tunnel-visioned" approach looking simply at how the company was proposing to use the money it was borrowing.

Brebner

52. There was also reference in the course of argument to *Brebner*.

53. *Brebner* did not concern the rules relating to loan relationships, but it raised an issue comparable to that in the present case: whether certain transactions had as "their main object, or one of their main objects, to enable tax advantages to be obtained". The Special Commissioners concluded that they did not, and the House of Lords upheld that decision, stressing that the question was one of fact. Thus, Lord Pearce said at 28:

> "I am of opinion that the Special Commissioners came to a reasonable conclusion on the evidence before them. They could have reached a contrary conclusion, which would have been

> equally unassailable, had they taken a different view of the evidence. But it was they who heard the witnesses, and I see no reason to suppose that their decision was not just and sensible."

In a similar vein, Lord Upjohn said at 30:

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

54. Ms Shaw focused on the quotation from Lord Upjohn. Consistently with Lord Upjohn's remarks, she argued, it can be legitimate for a company making an acquisition to elect to fund it by means of debt rather than equity because of the deductibility of loan interest for tax purposes. Likewise, she said, the fact that the appellant was chosen for reasons of tax efficiency to be the vehicle by which the acquisition of LTT was carried out does not mean that the loan which the appellant took out to fund it had an unallowable purpose. Ms Shaw referred in this connection to *BlackRock*, where Falk LJ said at paragraph 171:

> "I should emphasise that my conclusion that LLC5 had a tax main purpose is a conclusion reached on the particular facts of this case. It does not follow that other debt incurred in connection with a commercial acquisition – as the acquisition of BGI US undoubtedly was – would fall foul of the unallowable purpose rule even if the decision to borrow had regard, as it often would, to tax considerations."

55. What I think emerges from these passages from *Brebner* and *BlackRock* is the importance of the specific facts. As Lord Upjohn indicated, the fact that a genuine commercial transaction has been carried out in a tax efficient way does not *necessarily* mean that one of the main objects was to avoid tax. Similarly, the fact that regard was had to tax considerations when deciding to borrow will not *necessarily* involve falling foul of the unallowable purpose rule. The rule will be in point *if*, *in the particular circumstances*, a main purpose was securing a tax advantage.

56. The FTT quoted a passage from Lord Pearce's speech in which he said this, at 27:

> "The 'object' which has to be considered is a subjective matter of intention. It cannot be narrowed down to a mere object of a

> company divorced from the directors who govern its policy or the shareholders who are concerned in and vote in favour of the resolutions for the increase and reduction of capital. For the company, as such, and apart from these, cannot form an intention. Thus the object is a subjective matter to be derived in this case from the intentions and acts of the various members of the group. and it would be quite unrealistic and not in accordance with the subsection to suppose that their object has to be ascertained in isolation at each step in the arrangements."

57. As it explained in paragraphs 146 and 147 of its decision, the FTT derived from these observations "two guiding principles for [its] findings of fact in relation to the 'unallowable purpose' test". The first was that, "whilst the nexus of the unallowable purpose test is anchored to the act of the Appellant in issuing the $550m loan notes, thereby entering into the loan relationship, it would be 'unrealistic', and not in accordance with subsection 442(1)(b) to suppose that the object of the directing minds of the Appellant has to be ascertained in isolation at each step in the arrangements". The second was that "the object (i.e. the purpose) is 'a subjective matter to be derived from the intentions and acts of the various members of the group'". The FTT continued:

> "In the instant case, the directing minds were not confined to the three directors of the Appellant who were supposedly the decision makers approving the resolution that made [the appellant] a party to the loan relationship. As a corollary of the first guiding principle, the object of the directing minds necessarily included the key personnel who were directing the affairs of JGI and JTI in relation to the interconnected transactions in the 9-step 'Skinny', which had come to assume an organisational status as being an integral group plan encompassing Step 6."

58. It was common ground before the UT that the FTT had been mistaken in referring to section 442(1)(b) of CTA 2009. The UT commented in paragraph 74 of its decision, "the FTT misinterpreted the reference to 'related transactions' because it did not appear to appreciate the term was further defined in s304". However, the UT did not consider any error by the FTT to have been material. It said in paragraph 78 that the FTT "was not suggesting that what the directing minds of other entities thought was relevant purely in its own right" and accepted that "read in context the FTT was saying (at [147]) that consideration of other 'directing minds' outside of the company was relevant to ascertaining the purposes of the directing minds <u>of the company</u>". The UT went on in paragraph 79:

> "In our view, both guiding principles effectively amounted to the FTT saying it should not restrict itself to looking simply at the loan relationship or what the directors said about their purposes in isolation but rather ascertain the purpose for which the company was a party to the loan relationship with the benefit of facts from the wider context of the company's borrowing. The FTT was correct to adopt that approach."

59. Ms Shaw took issue with both the FTT's "guiding principles". What matter, she argued, are the purposes for which a taxpayer's directing minds enter into a loan relationship, not either the purposes of wider arrangements of which the loan relationship forms part or the purposes of directing minds of entities elsewhere in the group.

60. For my part, I would agree that the focus should be on the intentions of the taxpayer's decision-makers and that the purposes of a wider scheme are relevant only if they inform those intentions. However, I agree with the UT that, reading its remarks in their context, the FTT would not appear to have been suggesting that what the directing minds of other entities thought was relevant purely in its own right. At any rate, the FTT's comments on *Brebner* cannot provide a basis for impugning its decision if it can be seen from other parts of its decision that the FTT found that the relevant decision-makers had a main tax avoidance purpose.

What did the FTT decide?

61. What, then, did the FTT decide?

62. Paragraphs 142 to 153 of the FTT's decision were headed "Was securing the tax advantage a purpose?". In the second paragraph of that section, the FTT identified the "specific question" it asked itself as "What was the purpose for the Appellant in issuing the $550m loan notes to JTI?" On the face of it, the final paragraph of the section, paragraph 153 (which is quoted in paragraph 31 above), can be expected to have provided the FTT's answer to the question it had posed itself. If so, the FTT was addressing what it considered the *appellant's* purpose to have been when it said in paragraph 153 that "that there was no genuine decision making at the UK level as regards the resolution to issue the $550m loan notes to JTI", "[t]he decision makers were at JGI level" and "their object in implementing the Deloitte scheme was to bring into existence the loan relationship of which the Appellant would be a party, thereby securing a UK tax advantage by generating the free-standing loan relationship debits for the UK members of the JGI group".

63. As the UT observed in paragraph 139 of its decision, the FTT's use of the word "genuine" in paragraph 153 "was perhaps not the most apposite term to capture what the FTT meant to express". I agree with the UT that the FTT "was not saying that the decision lacked validity or was ineffective in company law" or "that it was not formally possible for the appellant's board to say 'no'". It was incumbent on the appellant's directors to satisfy themselves that the transactions which they were approving were in its interests, and there is no reason to dispute that they did so. As, however, *BlackRock* shows, it does not follow that there was no tax advantage purpose.

64. It is plain, and Ms Shaw accepted, that JGI brought the appellant into being, and wished it to enter into the transactions which were approved at the 20 June 2011 board meeting, with a view to securing a tax advantage. It is evident, too, that all three members of the appellant's board were well aware when it met on 20 June that the loan from JTI which it approved formed part of a wider scheme which was for tax reasons being "bolted on" to a purchase to which the group was already "locked in" (to use expressions found in the FTT's decision, at paragraphs 152(1) and 167). One of the three, Mr Olsen, was described as a "contributing architect" of the plan and

apparently "updated … on a nightly basis". Another, Mr Kisten, had been told in advance of the appellant's incorporation that it was to have a role in "an acquisition structure that will provide Joy UK with some fairly substantial prospective tax savings" and had subsequently been sent an email in which Ms Willis had observed that "[t]his appears to be being done solely for tax planning". All three directors had been sent a "summary of the tax planning and 'the math' supporting estimated annual global annual tax savings". Mr Krueger noted that all the directors were "well informed on our intentions".

65. Not only were all the appellant's directors alive to what was expected of the appellant, and why, but Mr Mannion and Mr Kisten were depending on Mr Olsen, one of JGI's leaders and a "contributing architect" of the overall scheme. Mr Olsen himself said in evidence that Mr Mannion and Mr Kisten relied on him because he "had done a lot of thinking and considering and analysis" and had spoken to Mr O'Brien about the Deloitte acquisition structure. The FTT found in paragraph 152(12) of its decision that Mr Mannion and Mr Kisten "were to follow the lead from Olsen in the chair, who had been through the thinking process from the inception of the 9-step Skinny as the blueprint that would lead to the Appellant becoming party to the loan relationship".

66. As I read its decision, the FTT concluded that the appellant's directors went along with the scheme which, to their knowledge, the group had adopted for tax reasons. It was in that sense that the "decision makers were at JGI level". The appellant's directors were seeking to fulfil the company's role in a plan which those "at JGI level" had decided on to secure a tax advantage.

Conclusion

67. To echo Nugee LJ in *BlackRock*, the appellant's purpose was "to play the part that had been devised for it so as to obtain [a tax] advantage". That being so, the appellant had a main "tax avoidance purpose".

Was there a commercial purpose?

68. The FTT said that it was unable to find "any bona fide commercial or business purposes for the Appellant being party to the loan relationship" (paragraph 166 of its decision). It recognised that "there was a bona fide commercial reason to acquire LTT", but considered that "the sinews between the commercial case to acquire LTT by the group and the formation of the Appellant in order to be the 'purchaser' of LTT by assignment are absent to enable any finding of fact that the commercial case to acquire LTT could necessarily be extended to making the Appellant the purchaser, (which entailed the assumption of the loan from JTI) a commercial purpose without more" (paragraph 157). It also found Mr Olsen's evidence as to the existence of non-tax-advantage purposes "vague, elusive, lacking in substance, contradictory to the factual matrix, and ultimately unconvincing" (paragraph 165).

69. The UT rejected a challenge to this assessment of Mr Olsen's evidence, explaining in paragraph 156 of its decision that "[h]aving reviewed Mr Olsen's statement and the transcript of the cross-examination we consider that characterisation was one that was open to the FTT". Further, the UT did "not consider that any of the points of evidence raised by the appellant demonstrate the FTT made an error of law" in finding that the appellant was not a party to the loan relationship for a business or commercial reason:

see paragraph 145. The FTT's approach, the UT said in paragraph 150, was "nothing more than the critical evaluation of the evidence by an expert tribunal".

70. Ms Shaw argued that the appellant's purpose in being a party to the loan relationship was to part-fund the acquisition of LTT. If, she said in her skeleton argument, the FTT and UT had asked themselves the correct question, "the only conclusion they could reasonably have reached was that the (or at the very least a) purpose for which the Appellant was a party to the loan relationship was to acquire LTT". Ms Shaw said that "[t]he FTT's failure to identify a commercial purpose for the borrowing … and the UT's (erroneous) endorsement of that conclusion … means that their approach to assessing the importance of the tax purpose … was inevitably flawed". In the same vein, Ms Shaw said:

> "at the very least, if the UT and the FTT had asked themselves the right question, then they would have concluded that the Appellant had a commercial purpose for being party to the loan relationship, namely to fund the acquisition of LTT".

71. In my view, however, the UT was right to decline to interfere with the FTT's finding. There are, of course, only limited circumstances in which an appellate Tribunal or Court should interfere with either a finding of fact or an evaluative assessment: see e.g. *Edwards v Bairstow* [1956] AC14, *Henderson v Foxworth Investments Ltd* [2014] UKSC 41, [2014] 1 WLR 2600, especially at paragraph 67, *R (R) v Chief Constable of Greater Manchester* [2018] UKSC 47, [2018] 1 WLR 4079, at paragraph 64, and *In re Sprintroom Ltd* [2019] EWCA Civ 932, [2019] 2 BCLC 617, at paragraphs 76 and 77. Like the UT, I do not think there is any sufficient basis for interfering with the FTT's conclusion that it could not find the appellant to have had a commercial purpose in issuing the loan notes to JTI. A differently constituted FTT might have taken a different view, but that is not to the point.

72. The premise underlying Ms Shaw's challenge to the FTT's conclusion seems to me to have been that the appellant must have had as a purpose in issuing the loan notes using the money it was borrowing as intended. It was doubtless open to the FTT so to conclude, but it did not, and I have not been persuaded that its finding is open to challenge. Ms Elizabeth Wilson KC, who appeared for HMRC with Ms Rebecca Sheldon, suggested that the appellant was seeking to "shutter" the fact-finding Tribunal to prevent it looking at anything other than what the money was spent on. As, however, I have already said, a Tribunal is not required to adopt a "tunnel-visioned" approach looking simply at how the company was proposing to use the loan.

Apportionment

73. Where a company is a party to a loan relationship for an unallowable purpose, it "may not bring into account … so much of any debit in respect of that relationship as on a just and reasonable apportionment is attributable to the unallowable purpose": see section 441(3) of CTA 2009.

74. In *BlackRock*, Falk LJ said this about apportionment:

> "[179] I agree with Mr Prosser that what the legislation requires is a just and reasonable apportionment by reference to the relevant purposes. Those purposes are identified using a subjective approach …. The statutory test requires the identification and disallowance of 'so much of' any debit that is 'attributable' to the unallowable purpose: s 441(3). That is the enquiry that the tribunal must undertake. While the determination of a just and reasonable apportionment is an objective exercise, it is not necessarily the same as the consideration of 'all the facts and circumstances' referred to by the UT, if by that the UT did not intend to have regard to the requirement to apportion by reference to the relevant purposes. The framework for the apportionment is the purposes that have been identified by the fact-finding tribunal. Subject to that point, however, I agree that all relevant facts and circumstances should be considered.
>
> [180] The position is straightforward if all the debits, or perhaps a defined part of them, are properly attributable solely to a tax avoidance main purpose. Conversely, if they are properly attributable to a purpose which is not an unallowable purpose then there will be no disallowance under s 441. Where debits are attributable to more than one purpose then an apportionment is required. As to the precise mechanism by which this is done, the legislation is not prescriptive. The answer to that question will inevitably be fact specific."

75. On the FTT's findings in the present case, the appellant issued the loan notes for the main purpose of securing a tax advantage and had no commercial purpose in doing so. On that basis, no apportionment can be necessary. As the FTT itself said in paragraph 179 of its decision, having "found that to obtain the UK tax advantage was the main purpose for the Appellant being party to the loan relationship, no apportionment of the debit arising in each accounting period is in point".

76. The FTT went on to say this:

> "Even if I had found that to obtain the tax advantage was one of the main purposes, and not the main purpose for the Appellant being party to the loan relationship, the attribution issue would still be determined as wholly attributable to the unallowable purpose in line with *Fidex*: but for the avoidance scheme encapsulated by the 9-step Skinny, there would have been no debit at all."

77. *Fidex Ltd v Revenue and Customs Commissioners* [2016] EWCA Civ 385, [2016] 4 All ER 1063 ("*Fidex*") concerned a tax avoidance scheme called Project Zephyr whose object was to create a loss in the hands of Fidex which would be available for group relief by "derecognising" bonds which constituted a "loan relationship". The UT held that the debit corresponding to the claimed loss arose because of the Project Zephyr transaction and this constituted an unallowable purpose: see paragraph 3 of the judgment of Kitchin LJ, with whom Arden LJ and Sir Stephen Richards agreed.

The UT further held that the debit could only be attributed to that purpose: see again paragraph 3.

78. In the Court of Appeal, it was accepted that Fidex "had three main purposes for holding the bonds (and so being party to the loan relationships they embodied)": see paragraph 71. The purposes were:

> "(i) the commercial purpose of having a right to the cash flows they generated;
>
> (ii) the purpose of furthering its policy of conducting an orderly disposal of its whole bond portfolio; and
>
> (iii) the tax avoidance purpose inherent in Project Zephyr."

79. The Court of Appeal nonetheless agreed with the UT that, "[o]n a just and reasonable apportionment, the debit was wholly attributable to an unallowable purpose": see paragraph 75. Kitchin LJ had said in the preceding paragraph:

> "The UT was required to assess how much of the *debit* was, on a just and reasonable apportionment, attributable to the unallowable purpose for which the bonds were held. I am content to assume that Fidex would have held the bonds from the start of 2005 irrespective of the unallowable purpose but that is nothing to the point. The question is whether and to what extent the *debit* was attributable to the unallowable purpose for which they were held. I agree with the UT that the answer to this question is quite clear. The debit arose from and was entirely attributable to Project Zephyr. But for this tax avoidance scheme there would have been no debit at all."

80. Seeking to distinguish *Fidex*, Ms Shaw argued that in the present case the debits are entirely attributable to the need for the appellant to accept funding in order to acquire LTT. "But for" the acquisition of LTT, Ms Shaw said, there would have been no borrowing and thus no debit. That being so, it was submitted, no part of the debits should have been attributed to the unallowable purpose.

81. In my view, however, *Fidex* points in the opposite direction. In *Fidex*, it was held that the debit was wholly attributable to the unallowable purpose despite the company also having had other purposes because "[b]ut for this tax avoidance scheme there would have been no debit at all". If, contrary to the FTT's view, the appellant had a commercial purpose in issuing the loan notes, the present case is analogous to *Fidex*. It would remain the case that, but for the scheme to secure a tax advantage which was "bolted on" to the purchase of LTT, there would have been no loan relationship and so no debit.

82. In the circumstances, it seems to me that that the FTT was entitled to conclude that the debits at issue are wholly attributable to the unallowable purpose and, accordingly, that there is no need for any apportionment.

Conclusion

83. I would dismiss the appeal.

Lord Justice Baker:

84. I agree.

Lord Justice Lewison:

85. I also agree. My only surprise was that the appeal was argued on both sides as though *Rossendale BC v Hurstwood Properties (A) Ltd* [2021] UKSC 16, [2022] AC 690 ("Another aspect of the *Ramsay* approach is that, where a scheme aimed at avoiding tax involves a series of steps planned in advance, it is both permissible and necessary not just to consider the particular steps individually but to consider the scheme as a whole. Again, this is no more than an application of general principle.") had never been decided.