



Neutral Citation: [2022] UKFTT 144 (TC)

Case Number: TC 08475

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

Taylor House
88 Rosebery Avenue, London EC1R 4QU

Appeal reference: TC/2018/01518

CORPORATION TAX, INCOME TAX and NICs – Appellant resolved to make contributions to a remuneration trust – whether expenses incurred wholly and exclusively for the purposes of the Appellant’s trade – whether contributions were taxable as diverted remuneration – whether payments made to individuals who were both indirect shareholders and employees of Appellant were within Part 7A ITEPA 2003 – held – expenses not deductible –Part 7A applies and the payments are earnings with the exception of one contribution

Heard on: 21 March to 1 April 2022

Judgment date: 04 MAY 2022

Before

TRIBUNAL JUDGE JEANETTE ZAMAN

Between

CIA INSURANCE SERVICES LTD

Appellant

and

THE COMMISSIONERS FOR HER MAJESTY’S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Robert Venables QC and Harriet Brown, counsel, instructed by Griffin Law

For the Respondents: Julian Ghosh QC, Barbara Belgrano, Sarah Black and Laura Ruxandu, together with Mark Herbert QC and Ruth Jordan, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs

DECISION

INTRODUCTION

1. CIA Insurance Services Limited (“CIAISL”) made contributions to the CIA Insurance Services Limited Remuneration Trust (the “Trust”). Those contributions were used to make loans to three individuals, Lee Callaby (formerly Lee Martin), Eliot Blundell and Martin Sheppard who were the sole shareholders of CIAISL’s immediate parent company and were also employees of CIAISL (and, in the case of Ms Callaby and Mr Blundell, directors of CIAISL). Those three individuals are referred to together as the “Shareholders”. This arrangement of making contributions to a remuneration trust and then those funds being used to make loans is one which had been designed by Paul Baxendale-Walker and entities connected with him and his firm, Baxendale Walker LLP (together referred to as “Baxendale Walker”).

2. HMRC have issued closure notices and discovery assessments to CIAISL, denying the corporation tax deductions claimed for the contributions to the Trust and fees paid by the company for the accounting periods ended 31 December 2011 to 31 December 2014. HMRC have also issued determinations under regulation 80 Income Tax (Pay As You Earn) Regulations 2003 (“Regulation 80 Determinations”/ “the PAYE Regulations”) and decisions under s8 Social Security (Transfer of Functions, etc.) Act 1999 (the “Section 8 Decisions”/ “SS(ToF)A 1999”) for the tax years 2011-12 to 2013-14. CIAISL have appealed against the amendments made by HMRC to their corporation tax returns, the discovery assessments and the determinations and decisions made by HMRC.

3. CIAISL established the trust and made the first contributions in the accounting period ended 31 December 2010 (in December 2010). Only the deductions claimed in the accounting periods ended 31 December 2011 to 31 December 2014 are currently before this Tribunal. The contributions into the Trust from its establishment to 31 December 2014 total £9,655,000. This sum includes the contributions made in December 2010 – whilst the deductibility of those contributions is not covered by this appeal, they funded loans which are covered by the Regulation 80 Determinations and Section 8 Decisions.

4. The issues are described more fully below, but CIAISL’s position is that the contributions were paid wholly and exclusively for the purposes of its trade and that, accordingly, they and the fees paid to Baxendale Walker and related entities are deductible. They submit that the loans advanced to Shareholders are not taxable.

5. One issue relevant to the corporation tax treatment has already been stayed, namely whether contributions to the Trust should have been recognised as an expense in CIAISL’s profit and loss account under UK GAAP. HMRC requested that I reach a decision on liability in principle, following which the parties can seek to agree the correct calculations, and CIAISL have not disagreed with this approach. I agree that this is the most efficient approach (and the parties are at liberty to apply if they cannot reach an agreement on quantum).

6. For the reasons set out below, CIAISL’s appeals are dismissed (save as regards the income tax and NICs treatment of one purported contribution). I have concluded that the contributions to the Trust and the fees were not incurred wholly and exclusively for the purposes of CIAISL’s trade and that the loans made to the Shareholders are employment income of the Shareholders.

CASE MANAGEMENT ISSUES

7. I dealt with various matters by way of case management, and gave my decision on those matters during the hearing. I explained my reasons for those decisions, which I had made

having regard to the overriding objective in rule 2 of The Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (the “Tribunal Rules”).

8. Three matters had been the subject of applications made to the Tribunal before the hearing, and I had received written representations from both parties in each instance. I did hear some oral submissions during the morning of day one of the hearing, but against the background that I had the benefit of full applications which had been made in advance. The applications made and decisions reached were as follows:

(1) HMRC had applied on 10 January 2022 to make further amendments to their statement of case, which had previously been amended in January 2019. CIAISL had agreed some of these amendments in correspondence, and given qualified agreement to other changes. However, by the time of the hearing CIAISL had further narrowed down the areas of disagreement, and in certain instances indicated that it was prepared to accept further amendments, albeit that Mr Venables was critical of (inter alia) the timing of the application. Having considered the detailed changes sought to be made by HMRC and the position of CIAISL (both in its initial objections of 2 February 2022, and as put by Mr Venables at the hearing), I decided to allow the amendments to be made.

(2) HMRC had applied for additional documents to be admitted in addition to those which it had specified in its list of documents. That application was formally made on 8 March 2022, but had been preceded by various correspondence between the parties. HMRC had prepared a supplementary bundle of these documents. CIAISL had objected to these documents being admitted at what it submitted was a very late stage. Having regard to the facts that the documents were largely those which had been provided to HMRC by CIAISL, HMRC had told CIAISL in 2020 that it would be seeking to include many of these documents in the bundle, and most of the additional documents were contained in a supplementary bundle which had been provided to CIAISL in January 2022, I considered it was in accordance with the overriding objective to admit the documents.

(3) CIAISL applied on 8 March 2022 for evidence in relation to what was termed “Type A insurance” to be heard in private, and for any reference to such insurance in my decision to be referred to similarly, on the basis that some of the evidence was commercially sensitive. The sensitivity was explained as resulting from the combination of the identification of the type of business and the evidence as to CIAISL’s business model. There was no application for the hearing to be conducted entirely in private, or for the decision to be anonymised. HMRC objected, and its reasons included that the type of business was not secret and they did not consider it constitutes sensitive information for these purposes. I decided, taking account of the evidence in the witness statements of Ms Callaby, that I was satisfied that restricting access to part of the hearing, namely the evidence of Ms Callaby, was justified to maintain the confidentiality of sensitive information (within rule 32(2)(c) of the Tribunal Rules) and that my decision should not disclose information which was referred to only in the part of the hearing that was held in private (in accordance with rule 32(6)).

9. In addition, in his oral submissions on day three of the hearing, Mr Venables raised arguments as to the validity of contributions made to the Trust, and whether MEL had the right to make loans of money contributed to the Trust to the Shareholders.

10. These submissions, which I refer to generally as the Trust Arguments, took various forms and were posed in differing ways throughout the hearing (and when setting out his detailed submissions, after Ms Callaby’s evidence had completed, Mr Venables expanded this to

include a challenge as to the capacity in which moneys were received by Baxendale Walker). One iteration only operated as an alternative submission (as it was effectively a concession of the appeal against the assessments, as there can be no deduction for expenses not incurred), but all had in common that they were raised to defeat HMRC's arguments on the Regulation 80 Determinations and the Section 8 Decisions. CIAISL was thus seeking to introduce a new ground of appeal during the course of the hearing itself. I asked for representations as to whether this new ground should be admitted. Mr Venables explained that the Trust Arguments had arisen at a late stage as they were preparing for the hearing.

11. Mr Ghosh objected to the Trust Arguments being admitted. HMRC's position was that they were a complete ambush, and introduced the risk of the hearing (which had been listed for ten days) being part-heard, as admission would involve additional time for preparation and cross-examination.

12. I took time to consider the matter overnight. At the beginning of day four I informed the parties that I would give permission for CIAISL to run the Trust Arguments. I agreed with Mr Ghosh that the Trust Arguments were being raised extraordinarily late – not only had they not been set out in any of the written submissions, but also they had not even been identified on day one of the hearing. The timing weighed heavily against allowing the Trust Arguments to be made. However, my reasons for allowing the Trust Arguments were based on the interests of justice suggesting that new arguments should be heard, particularly where they were based on law and should not require significant additional factual evidence; moreover, and particularly significant in the context of this appeal, HMRC had reserved their position on sham throughout (having done so in their various statements of case) and had been directed (by me prior to the commencement of the hearing) that they would need to set out their position on sham following conclusion of the witness evidence. I considered that if HMRC did decide to pursue an argument that some or all of the documents were a sham (a matter which would not be known until around day six), then all or part of the Trust Arguments might be expected to be raised as a response to such a position and it would be unfair to CIAISL to refuse to allow them at that stage to make such arguments by way of a response to HMRC. I considered it would be inefficient and make preparation even more difficult if I were to defer making a decision on the Trust Arguments until HMRC's position on sham was known, and I did note that CIAISL had alluded in their skeleton argument to an argument being made that no relevant step was taken by any relevant third person (albeit with no further information by way of explanation). Whilst the position was finely balanced, I thus decided to give permission.

13. HMRC instructed additional counsel, Mr Herbert and Ms Jordan, to address the Trust Arguments, and I was most grateful for their assistance, particularly given the absence of notice.

FACTS

14. I did not have the benefit of an agreed chronology or a statement of agreed facts. This section sets out my findings of fact in relation to CIAISL and certain other parties to the documentation, the provisions of the transaction documents (including the resolutions made by the directors of CIAISL), the payment flows involved and the use of money by the Shareholders. They are findings that those documents on those terms were entered into and that the payment flows occurred; they do not address at this stage the submissions of Mr Venables in relation to the validity of the acts involved (ie the Trust Arguments), including the submissions there was no "payment" for relevant purposes. I have made additional findings of fact throughout the Discussion.

15. CIAISL was incorporated on 3 December 2001 in England and Wales. Its principal activity is that of insurance and re-insurance brokers.

16. Between 2001 and 2006 CIAISL was one of the main providers in the motorcycle insurance business; however, between 2005 and 2010 it experienced a significant downturn in this market.

17. CIAISL looked at other forms of insurance, and identified two other niche areas – caravan insurance and Type A insurance. The caravan insurance line was not successful. They began transacting Type A insurance in October 2007 and saw immediate and significant growth in this area.

18. In January 2006, LEM Limited (“LEM”) had acquired all of the shares in CIAISL. LEM is a holding company, whose sole activity is the holding of shares in CIAISL. The shares in LEM (which are all of the same class) are owned by Mr Sheppard, Ms Callaby and Mr Blundell (as to 3,334, 3,333 and 3,333 shares each respectively).

19. From 1 January 2010 to 31 December 2014, Mr Blundell and Ms Callaby were directors of CIAISL. They also had employment contracts with CIAISL. Mr Sheppard was an employee of CIAISL throughout this period.

20. MEL Management Services Ltd (“MEL”) was incorporated on 28 October 2010 in England and Wales. It has issued three ordinary shares, one of which is held by each of the Shareholders. The directors of MEL are Ms Callaby and Mr Blundell. MEL did not have any other activities other than those described herein.

Resolution to make contributions to a trust scheme

21. On 6 December 2010, by a written resolution, the directors of CIAISL set out the following:

(1) They resolved to make contributions to a scheme established under irrevocable trust (referred to as “the Scheme”) for the purpose of funding the provision of discretionary benefits to providers of services, products, custom or finance to CIAISL and of finance to the Trustees and their respective wives, widows and dependants. They also resolved that providers of finance to the Trust and their respective wives, widows and dependants be included as discretionary beneficiaries. The resolution noted that the establishment of the Scheme provides a means for the trade of CIAISL to thereby be benefited.

(2) They referred to responses which the directors had collectively agreed to a Questionnaire, attached to the resolution, and resolved that the responses continued accurately to reflect the purpose of CIAISL in establishing the proposed Scheme.

(3) Contributions may be made on a weekly, monthly, annual or other periodic basis as may be appropriate for the commercial cashflow circumstances of the company. It was noted that such periodic contributions “would reflect part of the economic cost to the company of earning its profits for that period”.

(4) They approved the list of persons other than employees who have provided services, products, custom or finance to CIAISL in the last accounting period, which list (the “Providers List”) was attached to the resolution. A separate resolution resolved that the Trustees be provided with the Providers List.

(5) A contribution of £250,000 was resolved to “be paid to the said Trustees of the Scheme to be held on the trusts of the Scheme”.

22. The Providers List named six businesses, including SSP Ltd and Moneysupermarket.
23. The Questionnaire includes:
- “1. Has the Company’s trade been conducted in such a way as to place a commercial obligation on the Company to provide benefits for consultants and other suppliers? *Yes but the Company does not want to recognise any liability to pay or provide benefits to any particular person, because that could create an actual legal liability.*
- ...
3. Are the directors taking independent professional advice on the creation of the incentive arrangement? *Yes*
- ...
5. It is intended that the trust be discretionary. That means that no beneficiary can order the trustees to make a payment to him. Why do the directors think this is a good idea? *Because the obligation to contribute funds arises from commercial, but not legal liability. If fixed benefits were provided, this could constitute an admission of a specific legal liability upon the Company to pay particular persons. By putting monies into a trust, the Company discharges its commercial liability and does not have to take any further action. It allows time for the trustees to consider the provision of specific benefits to specific persons.*
- ...
7. The discretionary trust will prohibit the refund of contributions to the Company. Why do the directors think this is a good idea? *Because otherwise the Company could be said to have not in reality discharged its commercial liabilities.*
- ...
10. Do the directors consider that they or any other employee has an interest in any of the Trust funds? *Since all employees are excluded from benefit in the Trust, it is recognised that none of the initial or future Trust funds can be said to belong in any way to any director or other employee of the Company.”*

The Trust

24. On 9 December 2010 the Trust was established by trust deed (the “Original Trust Deed”) entered into between CIAISL (as “Founder”) and Bay Trust International Limited (“BTIL”) as Trustees. The Original Trust Deed is governed by English Law.
25. Key definitions in the Original Trust Deed are as follows:
- (1) The Beneficiaries are defined as:

“...the wives husbands widows widowers children step-children and remoter issue of past and present Providers and the spouses and former spouses (whether or not remarried) of such children and remoter issue and also means...future Providers and the wives husbands widows widowers children step-children and remoter issue of future Providers and the spouses and former spouses (whether or not remarried) of such children and remoter issue and “Beneficiary” has a corresponding meaning PROVIDED THAT no Excluded Person shall be a Beneficiary AND PROVIDED FURTHER THAT the Trustee shall not have power under the trusts hereunder to provide and shall not (whether directly or indirectly) provide any benefit to or for any Excluded

Person and nor shall the Trustee participate in any trust, scheme or arrangement which is an “employee benefits scheme” for the purposes of Schedule 24 Finance Act 2003...AND FURTHER PROVIDED THAT the Trusts hereunder shall not have effect so as to constitute an arrangement such that the Trust Fund from time to time falls to be accounted for as an asset of the Founder”.

(2) A “Provider” is defined as:

“...(i) a person who provides or has provided or may in future provide to the Founder services or custom or products or finance (save for items of a capital nature), and (ii) a person who provides or has provided or may in future provide finance to the Trustees or any manager from time to time of the Trust Fund”.

(3) “Excluded Person” means any of the persons named in Schedule 2 to the deed, and that schedule states that “Participant” and “connected with” have the meanings ascribed to them in the Income and Corporation Taxes Act 1988 (“ICTA 1988”):

“1.1 the Founder;

1.2 any person connected with the Founder;

1.3 any Participant in the Founder;

1.4 any person connected with the Participant.

1.5 each and every person who presently or at any future time falls within the definition of “present or former employee” for the purposes of Section 143 and Schedule 24 Finance Act 2003 and section 245 Finance Act 2004.

2. Any person who is or becomes an Excluded Person shall cease to be an Excluded Person if such person for any reason ceases to fall within the categories of description specified in paragraph 1 above and from the date of such cessation.”

26. The Shareholders were named the Protectors of the Trust.

27. By clause 2, the Trust is declared as a discretionary trust in favour of the Beneficiaries in such shares and in such manner as the Trustee shall in its absolute discretion think fit.

28. Clause 3.8 enables the Trustee to exercise its administrative and investment powers to make loans to an Excluded Person, provided that the same does not constitute a gift of the principal amount of the loan, nor the use of money, nor form part of any trust, scheme or arrangement which is an “employee benefits scheme” for the purposes of Schedule 24 Finance Act 2003 (“FA 2003”), or which participation would have the consequence that the provisions of Schedule 24 FA 2003 apply so as to restrict the deductibility for corporation tax purposes of Founder contributions to the Trust.

29. Clause 9 provides that the Protectors may with the consent of the Trustees amend the Original Trust Deed in any respect, but this power cannot be exercised “in any manner which does or would give rise to any fiscal liability upon any person”. (This power was exercised in 2013, as described below.)

30. The Original Trust Deed then contains limitations on the Trustee’s powers:

(1) Clause 10.1 provides that “no power or discretion...shall be exercisable nor exercised by the Trustees in such manner as to cause any part of the Trust Fund or the income thereof to be used to provide a Prohibited Benefit or to become payable to or applicable for the benefit of the Founder...”. “Prohibited Benefits” means “(1) any

holding or use of the Trust Fund for or in connection with the provision of benefits to or in respect of present or former employees of the Founder...(4) any money or benefit in kind which would otherwise fall within paragraph 1(2) Schedule 24 Finance Act 2003...”.

(2) Clause 10.2 provides that no power or discretion shall be exercisable nor exercised by the Trustee to permit any settlement of property by the Founder unless such settlement constitutes a Permitted Contribution. A “Permitted Contribution” is a payment which does not constitute an employee benefit contribution as defined in s143 and Schedule 24 FA 2003.

(3) Clause 11.1 provides that the Trustee shall not have power to pay or apply any of the trust in the provision of any “emolument” as defined in ICTA 1988.

Amendment of Trust Deed

31. A deed of amendment was executed between the three Shareholders (in their capacity as Protectors) and BTIL on 13 March 2013 (the “Deed of Amendment”). That deed purports to amend the Original Trust Deed with retrospective effect, but Mr Venables accepted that it can only apply prospectively.

32. Clause 2 of the Deed of Amendment provides that the form of the deed set out at Schedule 2 thereto is to replace the Original Trust Deed “as on and from the date” of the original deed. I refer to this as the “Amended Trust Deed”, and the Original Trust Deed and the Amended Trust Deed are together the “Trust Deeds”.

33. The Amended Trust Deed includes the following definitions:

(1) Clause 1.1.6 defines “the Beneficiaries” as:

“(a) any individual who during the Trust Period is or has been a Provider (but not including a person who was a Provider but has died before the execution of this Deed);

(b) any spouse or civil partner of any person who falls within category (a) above;

(c) any person who was the spouse or civil partner of any person who fell within category (a) above immediately before the death of the latter;

(d) the children and remoter issue of any person, living or dead, who falls, or during his lifetime fell, within category (a) above;

(e) any person who is a spouse or civil partner of any person falling with category (d) above;

(f) any person who was a spouse or civil partner of any person falling with category (d) above immediately before the death of the latter (whether or not such person has subsequently entered into marriage or civil partnership with a third party);

and “Beneficiary” has a corresponding meaning PROVIDED THAT no Excluded Person shall be a Beneficiary.”

(2) A “Provider” is defined, by clause 1.1.7(a)(i), as:

“an individual who is or has been employed in the Particular Trade and who, while so employed, himself has provided or has been involved, whether as principal, partner, employee, independent contractor or otherwise, in the provision of, in either case in the course of the Particular Trade and during the

Trust Period, finance to the Founder or to the Trustees or to any manager of the Trust Fund or any part thereof”.

(3) Clause 1.1.7(b) defines “the Particular Trade” as “the trade or profession of lending money”.

(4) Schedule 2 defines Excluded Persons as “the Founder”, ie CIAISL.

34. The declaration of trust in clause 2 is expressly subject to clauses 10, 11, 12 and 13 of the Amended Trust Deed:

(1) Clause 10 is an indemnity from the Trustee to the Founder.

(2) Clause 11 relates to inheritance tax.

(3) Clause 12 is headed “Overriding Clause: Employee Benefit Contributions Rules and Trust Fund not to become Employee’s Remuneration”. Clause 12.1 provides that the trust shall not constitute an “employee benefit scheme” within s1291(2) Corporation Tax Act 2009 (“CTA 2009”) in relation to the Founder; and that it shall not constitute a trust, scheme or arrangement for the benefit of present or former employees of the Founder. Clause 12.2 then provides that no part of the trust fund shall be payable in circumstances such that it would become employee remuneration, construing that phrase in accordance with s1289(1) CTA 2009.

(4) Clause 13 is headed “Overriding Clause: Employment Income provided through Third Parties”.

(a) Clause 13.1 provides that the trust shall not be an arrangement which (wholly or partly) covers or relates to any person who is an employee, or a former or prospective employee of the Founder. The stated intent is that “no benefit conferred by, or other action taken or concurred in by, the Trustees of this trust, or by any other person in relation to or in connection (direct or indirect) with this trust, shall give rise to a charge to income” under Part 7A Income Tax (Earnings and Pensions) Act 2003 (“ITEPA 2003”).

(b) Clauses 13.2 to 13.4 each begin “Without derogating from the generality of the foregoing”, and go on to provide that the Trustees shall have no power to take, or to concur in any other person taking, any “relevant step” within s554B, the Trustees shall have no power to take, or to concur in any other person taking, any “relevant step” in relation to any person within s554C and the Trustees shall have no power to take, or to concur in any other person taking, any “relevant step” within s554D.

(c) Clause 13.5 provides that these provisions do not restrict the trusts or powers in any way if and to the extent that the trust or exercise of power would not give rise to a charge to income tax under Part 7A.

MSB Holdings

35. MSB Holdings Ltd (“MSB”) is referred to in the context of two agreements signed in December 2010 (which are together the “MSB Documents”).

36. There is a document on BTIL letterhead headed “Appointment of Delegated Manager and Custodian”. That document was signed by BTIL on 10 December 2010 and states that BTIL delegates to MSB, described as a company registered under the laws of Belize, the execution or exercise of all or any of the Trust’s powers and discretions conferred upon it as

Trustee as regards the management and custody of the Trust Fund. The document also states that MSB accepts that delegated authority.

37. This document was not executed by MSB (by which I refer not only to the absence of a signature on its behalf, but there is also no signature block for that company to indicate that it had been intended that it execute this document).

38. A fiduciary services agreement was executed that same day between MSB (as Principal) and MEL (as Fiduciary) (the “Fiduciary Services Agreement”). The Fiduciary Services Agreement defines the Property as being “all and any property real and personal granted by the Principal to the Fiduciary”. Clause 2, headed “Declaration of Bare Trust and Fiduciaryship” provides at 2.1:

“During the Period of Appointment the Fiduciary shall have all rights to apply and deal with the Property and the income and capital thereof ... as if it were the beneficial owner thereof...”.

Resolutions to make contributions and resulting payment flows

39. CIAISL resolved to make contributions of the following amounts to the Trust: £250,000 on 6 December 2010, £350,000 on 16 December 2010, £510,000 on 13 May 2011, £750,000 on 29 September 2011, £200,000 on 29 November 2011, £200,000 on 8 December 2011, £255,000 on 17 May 2012, £255,000 on 24 May 2012, £255,000 on 30 May 2012, £375,000 on 24 September 2012, £375,000 on 2 October 2012, £450,000 on 5 December 2012, £120,000 on 14 March 2013, £400,000 on 19 August 2013, £400,000 on 27 August 2013, £500,000 on 14 November 2013, £500,000 on 20 November 2013, £240,000 on 9 December 2013, £375,000 on 9 May 2014, £375,000 on 15 May 2014, £450,000 on 4 August 2014, £450,000 on 18 August 2014, £870,000 on 9 October 2014 and £750,000 on 2 December 2014.

40. HMRC’s skeleton argument included a schedule setting out the details of the resolutions of CIAISL to make contributions to the Trust and subsequent steps that occurred in relation thereto. That schedule, as produced, included references to relevant pages of the bundles which were the source of the information included therein. In the light of all of the evidence before me, I am satisfied that such schedule is an accurate record of the payments that were made by CIAISL in connection with the Trust arrangement from 6 December 2010 to 31 December 2014. The substance of that document is set out as the Schedule hereto and I find as a fact that the information recorded therein is accurate, ie that the resolutions were made by CIAISL, payments were made, letters were sent and loan agreements were entered into as set out therein.

41. It is apparent from this, as was acknowledged by the Assumed Chronology prepared on behalf of CIAISL and handed up during the hearing, that the following steps generally occurred in relation to each contribution:

(1) CIAISL resolved (by written resolution of its directors) to make a contribution to the Trust. Each resolution of CIAISL to make a contribution was in the same form, with the exception of the specification of the amount of the contribution and the accounting period in respect of which it was made. Each resolution:

- (a) states that the proposed amount “reflects part of the economic cost to the company of earning its profits for that period”;
- (b) approved a “non-exhaustive list” of providers (the “Providers List”); and
- (c) resolved that the “contribution of £[x] (being one of a series of such contributions) be paid to the said Trustees of the Scheme to be held on the trusts of

the Scheme” and that the Trustee be provided with a copy of the resolution and the Providers List.

(2) CIAISL (in a fax stated as being from Richard Wayman, the Finance General Manager of CIAISL but signed by the two directors) instructed Lloyds Bank (“Lloyds”) to transfer that amount to “Baxendale Walker LLP Clients Premium Deposit Account”, stating the sort code and account number and giving reference “CIA Remuneration Trust Contribution”.

(3) Such amounts were transferred from CIAISL’s bank account at Lloyds to the bank account of Baxendale Walker or (for contributions made from August 2014 onwards) Buckingham Wealth, and I infer (as invited by Mr Venables) that Buckingham Wealth was related to Baxendale Walker. (The exception to this was the contribution of £350,000 in December 2010 which was paid from CIAISL to MEL.)

(4) A letter was sent from the three Shareholders to BTIL (the “Request Letter”) asking that BTIL give consideration to transferring a specified amount (always equal to the amount of the contribution, with the exception of the first contribution) to MEL.

(5) The money was transferred from Baxendale Walker (or Buckingham) to MEL.

(6) Loan agreements were entered into between MEL and one or more of the three Shareholders (each a “Finance Agreement”). Under the Finance Agreements, MEL is said in the recitals to be “acting in its capacity as a nominee of [BTIL], who are the Trustees of the [Trust]”. MEL agreed to lend the specified amount for a period of ten years plus one day. There are various events of default, eg if the borrower becomes subject to an insolvency event, but otherwise no right of the lender to require early repayment.

(7) Payment is made from MEL to the relevant Shareholders.

42. There were some differences in the pattern – eg:

(1) The contribution of £350,000 in December 2010 was paid from CIAISL to MEL to LEM (this being the only occasion on which LEM had any involvement in the steps).

(2) There is no record of any Request Letter being sent in respect of some of the transfers that were in fact made to MEL (eg in respect of the contribution resolved to be made of £510,000 on 13 May 2011). The drafting of the Request Letters changed part way through the periods in issue – the first in the revised format was that of 29 November 2011.

(3) Steps sometimes took place in a different order (eg MEL agreed to lend £255,000 to Mr Sheppard on 17 May 2012, the same date on which CIAISL resolved to make a contribution of that amount, but before any money had been transferred from CIAISL to Baxendale Walker or from them to MEL; and on 13 March 2013 CIAISL transferred £120,000 to Baxendale Walker before it had resolved to make a contribution of that amount).

(4) Amounts were not always lent to the Shareholders in equal amounts (eg on 18 March 2013 MEL agreed to lend £40,000 to Ms Callaby and £80,000 to Mr Sheppard).

(5) Starting on 12 May 2014, BTIL did respond to some (but not all) of the Request Letters, authorising approval for the funds to be transferred to MEL.

43. The steps are recorded in the Schedule. However, I go through some of the contributions below in order to address the documents, and some of the differences in the steps.

Contribution of £250,000 resolved to be made on 6 December 2010

44. The first contribution (of £250,000) was resolved to be made by CIAISL on 6 December 2010, when it resolved to make contributions to what it described as the scheme. The contribution was to “be paid to the said Trustees of the Scheme to be held on the trusts of the Scheme”. The following steps then occurred.

- (1) £250,000 was paid from CIAISL to Baxendale Walker’s client account on 13 December 2010.
- (2) On 16 December 2010 the Shareholders sent a Request Letter to BTIL. That letter asks the Trustee to give consideration to taking “the balance of the OWAO Engagement fee of £3,350 and the Minerva fee of £25,000” from the funds held in the Baxendale Walker client account and transferring the balance of £221,650 to “the following FIDCO bank account”, with details then being given of MEL’s account at Lloyds.
- (3) MEL received £221,650 from Baxendale Walker on 17 December 2010.
- (4) MEL entered into a Finance Agreement with each of the Shareholders on 17 December 2010, agreeing to lend them £73,883.33 for a period of ten years plus one day.
- (5) MEL transferred £73,883.33 to each Shareholder on 17 December 2010.
- (6) On 20 December 2010 each Shareholder transferred £73,863.33 to CIAISL by way of loan.

45. This was the first contribution, but had the following differences from the pattern which emerged:

- (1) The Request Letter asks that fees be paid from the funds held in the client account of Baxendale Walker. This is the only occasion on which fees were paid out of the amount which had been resolved to be contributed. CIAISL usually paid the fees separately and in addition to the amount resolved to be contributed.
- (2) The Shareholders lent the money they had been lent by MEL to CIAISL (less £20 each).

Contribution of £350,000 resolved to be made on 16 December 2010

46. On 16 December 2010 CIAISL resolved to make a further contribution to the Trust, and resolved that £350,000 “be paid to the said Trustees of the Scheme to be held on the trusts of the Scheme” and to provide the Trustees with a copy of the resolution and the Providers List.

47. However, I am not satisfied that any contribution was made to the Trust of this amount:

- (1) There was no evidence of any payment being made to Baxendale Walker or BTIL of this amount. Instead, the bank statements of CIAISL, and payment instructions sent by Mr Wayman to Lloyds, demonstrate that this sum of money was transferred from CIAISL to MEL to LEM and then to CIAISL on a single day.
- (2) There was no evidence of any Request Letter being sent to BTIL in respect of this contribution.
- (3) Although MEL did enter into Finance Agreements with each Shareholder, agreeing to lend each of them £116,666.66, there is no evidence that such loans were made, nor that MEL had any funds available to it to make such loans, given that the amount transferred to it from CIAISL was immediately transferred by MEL to LEM and MEL had no other source of funds.

48. The money started and ended with CIAISL, and these transfers all occurred on the same day, in accordance with CIAISL's instructions to Lloyds. This movement of £350,000 was funded by a loan advanced from JHL Management Limited (acting on behalf of Countrywide Legal Services Limited Remuneration Trust) ("JHL") which CIAISL entered into on 13 December 2010 (the "JHL Loan"). The JHL Loan was for the amount of £350,000, with a repayment date of 16 December 2010. I am satisfied that these funds were advanced to and repaid by CIAISL in accordance with the terms of the JHL Loan.

49. I refer to this as the "Purported Contribution".

Contribution of £510,000 resolved to be made on 13 May 2011

50. This was the third contribution that was resolved to be made, and the first where at the end of the series of transactions the funds had been lent by MEL to the Shareholders (in that there was both a Finance Agreement and the funds were transferred) in circumstances where the Shareholders did not then lend the money back to CIAISL. As can be seen from the Schedule, it illustrates the general pattern but is not without its own quirks:

(1) CIAISL resolved to contribute £510,000 to the Trust on 13 May 2011. This amount was transferred by CIAISL to Baxendale Walker's client account in three tranches of £170,000 each, on 19 May, 1 June and 21 June 2011. However, MEL had entered into a Finance Agreement with each Shareholder for £170,000 on 23 May 2011, at a time when only £170,000 had been transferred to it by Baxendale Walker. No Request Letter had been sent to BTIL by the Shareholders in respect of any of this £510,000, yet not only was the amount transferred to MEL but MEL had expected the subsequent payments to be transferred to it even though they had not been paid by CIAISL to Baxendale Walker at that stage.

(2) MEL had agreed to lend £170,000 to Mr Sheppard (as with the other two Shareholders) but only transferred £169,500 to him.

Contributions of £200,000 resolved on both 29 November and 8 December 2011

51. CIAISL resolved to make contributions of £200,000 to the Trust on each of 29 November and 8 December 2011. These amounts were paid to Baxendale Walker and separate Request Letters were sent by the Shareholders in respect of each, asking that the funds be transferred to MEL. Those transfers were made (on 2 and 13 December 2011). It was only on 13 December 2011 that MEL entered into Finance Agreements with each of the Shareholders (for £133,333 each) and then transferred the funds to the Shareholders.

52. As noted above, Request Letters were sent by the Shareholders to BTIL on 29 November 2011 and 8 December 2011. The Request Letter of 29 November 2011 is expressed slightly differently from those sent previously. It is still framed as a request, and reaffirms the Shareholders' understanding that BTIL is not bound to follow their wishes, but is headed "Re. CIA Insurance Services Ltd Remuneration Trust ("the Scheme")" and starts "As the founder of the Trust, I am writing to request...". It then requests the transfer of £200,000 of trust assets "to be managed by the FIDCO, MEL Management Services Limited upon commercial terms to be agreed, for the purposes of general Investment". There is no reference in this form of letter to the money being held in the Baxendale Walker client account.

53. Subsequent Request Letters are in this same format.

Contribution of £255,000 resolved to be made on 17 May 2012

54. The resolution of 17 May 2012 is in the same form as all of the others. However, the Providers List attached to each resolution had previously identified only five or six providers. This one lists more than 60.

55. On 17 May 2012 CIAISL resolved to make the contribution, a Request Letter was sent and MEL agreed to lend the full amount to Mr Sheppard. This Finance Agreement was entered into by MEL before any money had been transferred by CIAISL to Baxendale Walker.

Contributions from May 2014 onwards.

56. For prior contributions the evidence before me included bank statements of both CIAISL and MEL (albeit that there had been one month missing), and those statements identified the relevant transferor and transferee, such that payments could be tracked from CIAISL out to Baxendale Walker and then into MEL from Baxendale Walker and out to a named Shareholder. However, there were no bank statements available for MEL from May 2014 onwards. I find that the amounts transferred by CIAISL to Baxendale Walker were transferred to MEL (relying on this being the pattern of earlier transactions, this was in accordance with available Request Letters and Ms Callaby not having given evidence to the contrary) and that MEL lent this money to the Shareholders in accordance with the Finance Agreements which it entered into (which were before me).

57. However, there was one further change which occurred from May 2014 (albeit not on every occasion that a contribution was resolved to be made), which was that BTIL sometimes wrote to the Shareholders in response to the Request Letters (these being “Acknowledgement Letters”).

58. On 9 May 2014 CIAISL resolved to contribute £375,000. That amount was transferred to Baxendale Walker that same day. On 12 May 2014 a Request Letter was sent by the Shareholders to BTIL. The Acknowledgement Letter was sent by BTIL that same day. The letter is addressed to the Shareholders and states “Further to your request with contents of which we have noted and given consideration, we hereby authorize approval for the funds of £375,000.00 held in the Baxendale Walker client account to be transferred to the bank account of MEL Limited for management.”

59. A similar Acknowledgement Letter was sent by BTIL on 16 May 2014 in response to a Request Letter of 16 May 2014. There was no evidence that BTIL responded to all Request Letters after this time – they didn’t in August 2014, but did in October 2014.

Contributions from August 2014 onwards

60. CIAISL resolved to contribute £450,000 to the Trust on 4 August 2014. CIAISL transferred this amount in two tranches that day, the payee being “Buckingham” rather than Baxendale Walker. Buckingham was elsewhere referred to as Buckingham Wealth and I was invited to infer that this was related to Baxendale Walker.

61. From this point onwards, the documentary evidence indicates that CIAISL made payments to Buckingham Wealth rather than Baxendale Walker.

Loans to Shareholders and Use of Money

62. With the exception of the Purported Contribution, all of the contributions were made by CIAISL transferring the funds to a Baxendale Walker or Buckingham Wealth client account, and the entirety of those funds (less, in the case of the first contribution of £250,000 made in December 2010, some fees) were transferred directly from that account to a bank account of MEL at Lloyds.

63. All of the amounts received by MEL were then lent to the Shareholders (save that there is £500 which is not accounted for, and which I do not address further). The loans made by MEL to the Shareholders under the Finance Agreements were for the period of ten years plus one day. As at the date of the hearing, none of these loans have been repaid or interest paid thereon even though some are now due for repayment.

64. The Shareholders have provided lists of assets that were funded by these loans, and these include jewellery, artwork (in the case of Ms Callaby), cars, property and cash/shares. I find that they used the money as they wished, acquiring personal assets:

(1) the jewellery includes diamond rings, Cartier bracelets, a Rolex watch, dive watches; and

(2) the properties include the private residence of each Shareholder (and both Mr Sheppard and Ms Callaby are registered owners with their partner). Some of the properties are rented out, and two of the properties that were acquired by Ms Callaby are registered in the sole name of her husband and the rent is paid to Mr Callaby.

65. The Shareholders have made loans to CIAISL. As at December 2014, Mr Sheppard, Ms Callaby and Mr Blundell were owed £235,362, £240,650 and £244,064 by CIAISL respectively. I infer that these amounts were funded from the loans advanced to them by MEL.

66. The Shareholders acted consistently with this being their own money, rather than assets belonging to or being subject to the Trust. This is reflected both in the choice of assets acquired and, in the case of the properties, the SDLT returns which stated that the purchaser(s) was/were not acting as a trustee.

Trading loan agreements

67. On 25 August 2011 each Shareholder entered into an agreement with MEL to lend MEL £1,200 per calendar year, such sum bearing interest at 10% per year. Such loans were to be repayable on demand. Each loan agreement is headed "Trading Loan Agreement". The Shareholders did make such loans to MEL.

Fees paid by CIAISL in respect of the trust arrangements

68. The engagement letter from Baxendale Walker to CIAISL dated 25 October 2010 sets out the fees payable by CIAISL as £12,500 plus VAT to Baxendale Walker plus "Minerva fees" of 10% of each contribution made to the Trust.

69. CIAISL has paid those fees on every contribution it has made. These have usually been paid directly by CIAISL, although the fee payable in respect of the first contribution made to the Trust was paid (at the request of the Shareholders) out of the amount contributed.

ISSUES

70. The following matters were in issue between the parties:

(1) Corporation tax – whether contributions to the Trust are deductible in calculating CIAISL's taxable profits. There are three sub-issues:

(a) whether contributions to the Trust should have been recognised as an expense in the company's profit and loss account under UK GAAP; this issue has been stayed by agreement between the parties, to be heard at a subsequent hearing if necessary;

(b) whether contributions to the Trust (which, for the first contribution, included fees payable by CIAISL) were wholly and exclusively for the purposes of the company's trade; and

- (c) whether any deductions for contributions are disallowed by s1290 CTA 2009;
- (2) Corporation tax - whether fees payable by CIAISL to Baxendale Walker, or any other participant in the arrangements, were incurred wholly and exclusively for the purposes of the company's trade. Mr Venables accepted that the answer to this question should logically follow from the Tribunal's conclusions on the corresponding question in relation to contributions to the Trust;
- (3) Discovery assessments – whether the discovery assessments issued for the accounting periods ended 31 December 2011 and 31 December 2012 (the “December 2011 Discovery Assessment” and the “December 2012 Discovery Assessment” respectively, and, together, the “Discovery Assessments”) were valid; and
- (4) Income tax and NICs – in the alternative:
- (a) whether the arrangements give rise to a tax charge by virtue of Part 7A ITEPA 2003; or
- (b) whether the contributions to the Trust were redirected or diverted earnings of the three Shareholders under the principles set out in *RFC 2012 plc (in liquidation) (formerly Rangers Football Club plc) v Advocate General for Scotland* [2017] UKSC 45.

71. It is for HMRC to establish, on the balance of probabilities, that the Discovery Assessments were valid. CIAISL has the burden of proof in respect of all of the remaining issues, also on the balance of probabilities.

72. CIAISL did not challenge the validity of the Regulation 80 Determinations or the Section 8 Decisions (and this was confirmed by Mr Venables at the hearing).

73. Mr Ghosh confirmed at the hearing, after Ms Callaby had finished giving her oral evidence, that HMRC would not be pursuing an argument that any or all of the documents were a sham (having reserved their opinion on this matter in their statement of case).

EVIDENCE

74. I was provided with extensive electronic bundles, as well as skeleton arguments from both parties and an Assumed Chronology prepared on behalf of CIAISL. Both parties handed up additional papers (including various cases and explanatory notes to Finance Bills) during the hearing, which I admitted.

75. The bundles included witness statements from Ms Callaby of CIAISL (dated 5 August 2019 and 15 March 2021) and Damian Midwinter of HMRC, both of whom attended the hearing and were cross-examined on their evidence.

RELEVANT LEGISLATION

76. The relevant legislation for the periods in issue is set out below.

Corporation tax

77. The requirement that expenses are wholly and exclusively for the purposes of the trade is set out in s54(1) CTA 2009, which provides:

“In calculating the profits of a trade, no deduction is allowed for -

(a) expenses not incurred wholly and exclusively for the purposes of the trade,
or

(b) losses not connected with or arising out of the trade.”

78. The limitation on deductions for “employee benefit contributions” is set out in s1290 to s1296 CTA 2009. Section 1290 relevantly provides:

“(1) This section applies if, in calculating for corporation tax purposes the profits of a company (“the employer”) of a period of account, a deduction would otherwise be allowable for the period in respect of employee benefit contributions made or to be made (but see subsection (4)).

(2) No deduction is allowed for the contributions for the period except so far as -

(a) qualifying benefits are provided, or qualifying expenses are paid, out of the contributions during the period or within 9 months from the end of it, or

(b) if the making of the contributions is itself the provision of qualifying benefits, the contributions are made during the period or within 9 months from the end of it.

(3) An amount disallowed under subsection (2) is allowed as a deduction for a subsequent period of account so far as—

(a) qualifying benefits are provided out of the contributions before the end of the subsequent period, or

(b) if the making of the contributions is itself the provision of qualifying benefits, the contributions are made before the end of the subsequent period.

...

(4) This section does not apply to any deduction that is allowable-

(a) for anything given as consideration for goods or services provided in the course of a trade or profession,

(b) for contributions under a registered pension scheme or under a superannuation fund to which section 615(3) of ICTA applies,

(c) for contributions under a qualifying overseas pension scheme in respect of an individual who is a relevant migrant member of the pension scheme in relation to the contributions,

(d) for contributions under an accident benefit scheme,

(e) under Chapter 1 of Part 11 (share incentive plans),

(f) under section 67 of FA 1989 (qualifying employee share ownership trusts),
or

(g) under Part 12 (other relief for employee share acquisitions).”

79. Section 1291 CTA 2009 was amended during the periods in issue. It was enacted as follows:

“(1) For the purposes of section 1290 an “employee benefit contribution” is made if, as a result of any act or omission -

(a) property is held, or may be used, under an employee benefit scheme, or

(b) there is an increase in the total value of property that is so held or may be so used (or a reduction in any liabilities under an employee benefit scheme).

(2) For this purpose “employee benefit scheme” means a trust, scheme or other arrangement for the benefit of persons who are, or include, present or former employees of the employer.”

80. However, with effect in relation to acts or omissions occurring on or after 6 April 2011, s1291 was amended. The language “or persons linked with present or former employees of the employer” was added at the end of s1291(2), and s1291(3) and (4) were introduced as below:

“(3) Section 554Z1 of ITEPA 2003 applies for the purposes of subsection (2) but as if references to A were to a present or former employee of the employer.

(4) So far as it is not covered by subsection (2), “employee benefit scheme” also means—

(a) an arrangement (“the relevant arrangement”) within subsection (1)(b) of section 554A of ITEPA 2003 to which subsection (1)(c) of that section applies, or

(b) any other arrangement connected (directly or indirectly) with the relevant arrangement.”

Income tax – General earnings

81. Section 9 ITEPA 2003 relevantly provides:

“(1) The amount of employment income which is charged to tax under this Part for a particular tax year is as follows.

(2) In the case of general earnings, the amount charged is the net taxable earnings from an employment in the year.”

82. Section 62 ITEPA 2003 provides:

“(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 -

(a) any salary, wages or fee,

(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

(c) anything else that constitutes an emolument of the employment.

(3) For the purposes of subsection (2) “money's worth” means something that is -

(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.

(4) Subsection (1) does not affect the operation of statutory provisions that provide for amounts to be treated as earnings (and see section 721(7)).”

Income tax – Part 7A ITEPA 2003

83. Section 554A ITEPA 2003 relevantly provides:

“(1) Chapter 2 applies if -

(a) a person (“A”) is an employee, or a former or prospective employee, of another person (“B”),

(b) there is an arrangement (“the relevant arrangement”) to which A is a party or which otherwise (wholly or partly) covers or relates to A,

(c) it is reasonable to suppose that, in essence—

(i) the relevant arrangement, or

- (ii) the relevant arrangement so far as it covers or relates to A,
 - is (wholly or partly) a means of providing, or is otherwise concerned (wholly or partly) with the provision of, rewards or recognition or loans in connection with A's employment, or former or prospective employment, with B,
- (d) a relevant step is taken by a relevant third person, and
- (e) it is reasonable to suppose that, in essence—
 - (i) the relevant step is taken (wholly or partly) in pursuance of the relevant arrangement, or
 - (ii) there is some other connection (direct or indirect) between the relevant step and the relevant arrangement.
- (2) In this Part “relevant step” means a step within section 554B, 554C or 554D.
- (3) Subsection (1) is subject to subsection (4) and sections 554E to 554Y.
- ...
- (5) In subsection (1)(b) and (c)(ii) references to A include references to any person linked with A.
- (6) For the purposes of subsection (1)(c) it does not matter if the relevant arrangement does not include details of the steps which will or may be taken in connection with providing, in essence, rewards or recognition or loans as mentioned (for example, details of any sums of money or assets which will or may be involved or details of how or when or by whom or in whose favour any step will or may be taken).
- (7) In subsection (1)(d) “relevant third person” means -
 - (a) A acting as a trustee,
 - (b) B acting as a trustee, or
 - (c) any person other than A and B.
- ...
- (11) For the purposes of subsection (1)(e) -
 - (a) the relevant step is connected with the relevant arrangement if (for example) the relevant step is taken (wholly or partly) in pursuance of an arrangement at one end of a series of arrangements with the relevant arrangement being at the other end, and
 - (b) it does not matter if the person taking the relevant step is unaware of the relevant arrangement.
- (12) For the purposes of subsection (1)(c) and (e) in particular, all relevant circumstances are to be taken into account in order to get to the essence of the matter.”

84. Section 554B sets out the circumstances in which a person takes a relevant step and relevantly provides:

- “(1) A person (“P”) takes a step within this section if -
 - (a) a sum of money or asset held by or on behalf of P is earmarked (however informally) by P with a view to a later relevant step being taken by P or any

other person (on or following the meeting of any condition or otherwise) in relation to -

- (i) that sum of money or asset, or
 - (ii) any sum of money or asset which may arise or derive (directly or indirectly) from it, or
- (b) a sum of money or asset otherwise starts being held by or on behalf of P, specifically with a view, so far as P is concerned, to a later relevant step being taken by P or any other person (on or following the meeting of any condition or otherwise) in relation to -
- (i) that sum of money or asset, or
 - (ii) any sum of money or asset which may arise or derive (directly or indirectly) from it.

(2) For the purposes of subsection (1)(a) and (b) it does not matter -

- (a) if details of the later relevant step have not been worked out (for example, details of the sum of money or asset which will or may be the subject of the step or details of how or when or by whom or in whose favour the step will or may be taken),
- (b) if any condition which would have to be met before the later relevant step is taken might never be met, or
- (c) if A, or any person linked with A, has no legal right to have a relevant step taken in relation to any sum of money or asset mentioned in subsection (1)(a)(i) or (ii) or (b)(i) or (ii) (as the case may be).

(3) For the purposes of subsection (1)(b) it does not matter whether or not the sum of money or asset in question has previously been held by or on behalf of P on a basis which is different to that mentioned in subsection (1)(b).”

85. Section 554C sets out other circumstances in which a person takes a relevant step and relevantly provides:

“(1) A person (“P”) takes a step within this section if P -

- (a) pays a sum of money to a relevant person,
- (b) transfers an asset to a relevant person,
- (c) takes a step by virtue of which a relevant person acquires an asset within subsection (4),
- (d) makes available a sum of money or asset for use, or makes it available under an arrangement which permits its use -
 - (i) as security for a loan made or to be made to a relevant person, or
 - (ii) otherwise as security for the meeting of any liability, or the performance of any undertaking, which a relevant person has or will have, or
- (e) grants to a relevant person a lease of any premises the effective duration of which is likely to exceed 21 years.

(2) In subsection (1) “relevant person” -

- (a) means A or a person chosen by A or within a class of person chosen by A, and

(b) includes, if P is taking a step on A's behalf or otherwise at A's direction or request, any other person.

(3) In subsection (2) references to A include references to any person linked with A.”

86. The charge under Part 7A then arises by virtue of s554Z2, which provides:

“(1) If this Chapter applies by reason of a relevant step, the value of the relevant step (see section 554Z3) counts as employment income of A in respect of A's employment with B -

(a) if the relevant step is taken before A's employment with B starts, for the tax year in which the employment starts, or

(b) otherwise, for the tax year in which the relevant step is taken.

(2) If the relevant step gives rise to -

(a) an amount which (apart from this subsection) would be treated as earnings of A under a provision of the benefits code, or

(b) any income of A which (apart from this subsection) would be dealt with under Chapter 3 of Part 4 of ITTOIA 2005,

subsection (1) applies instead of that provision of the benefits code or Chapter 3 of Part 4 of ITTOIA 2005 (as the case may be).

(3) In particular, in a case in which the relevant step is the making of an employment-related loan (within the meaning of Chapter 7 of Part 3), the effect of subsection (2)(a) is that the loan is not to be treated for any tax year as a taxable cheap loan for the purposes of that Chapter.”

87. Section 554Z3 deals with the determination of value:

“(1) If the relevant step involves a sum of money, its value is the amount of the sum.

(2) In any other case, the value of the relevant step is—

(a) the market value when the relevant step is taken of the asset which is the subject of the step, or

(b) if higher, the cost of the relevant step.”

88. The interpretation clause, s554Z, includes:

“(3) "Arrangement" includes an agreement, scheme, settlement, transaction, trust or understanding (whether or not it is legally enforceable)”

NICs

89. Section 6 Social Security Contributions and Benefits Act 1992 (“SSCBA 1992”) imposes a liability for Class 1 NICs in respect of an employed earner’s employment. Section 8 provides for the calculation of that liability. Section 3(1) gives the definition of earnings and earner as follows:

“(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

(b) “earner” shall be construed accordingly.”

90. Section 25 provides that Schedule 3 to SSCBA 1992 specifies payments which are to be disregarded in the calculation of earnings from an employed earner's employment for the purpose of earnings-related contributions. Part X of Schedule 3 lists payments that are to be disregarded, and includes at paragraph 5:

“5 Gratuities and offerings

- (1) A payment of, or in respect of, a gratuity or offering which -
 - (a) satisfies the condition in either sub-paragraph (2) or (3); and
 - (b) is not within sub-paragraph (4) or (5).
- (2) The condition in this sub-paragraph is that the payment -
 - (a) is not made, directly or indirectly, by the secondary contributor; and
 - (b) does not comprise or represent sums previously paid to the secondary contributor.
- (3) The condition in this sub-paragraph is that the secondary contributor does not allocate the payment, directly or indirectly, to the earner.
- (4) A payment made to the earner by a person who is connected with the secondary contributor is within this sub-paragraph unless -
 - (a) it is -
 - (i) made in recognition for personal services rendered to the connected person by the earner or by another earner employed by the same secondary contributor; and
 - (ii) similar in amount to that which might reasonably be expected to be paid by a person who is not so connected; or
 - (b) the person making the payment does so in his capacity as a tronc-master.
- (5) A payment made to the earner is within this sub-paragraph if it is made by a trustee holding property for any persons who include, or any class of persons which includes, the earner.

In this sub-paragraph “trustee” does not include a tronc-master.

- (6) A person is connected with the secondary contributor for the purposes of this paragraph if his relationship with the secondary contributor, or where the employer and secondary contributor are different, with either of them, is as described in subsection (2), (3), (4), (5), (6) or (7) of section 839 of the Taxes Act (connected persons).”

91. Regulation 22B Social Security (Contributions) Regulations 2001 (“SSC Regulations 2001”), which applies with effect from 6 December 2011, provides that amounts treated as employment income by Part 7A ITEPA 2003 are also treated as remuneration derived from an employed earner’s employment for the purposes of s3 SSCBA 1992.

Procedure – enquiries, discovery assessments, decisions and determinations

92. Enquiries were opened into CIAISL’s company tax returns for the accounting periods ended 31 December 2013 and 31 December 2014 under paragraph 24 of Schedule 18 Finance Act 1998 (“FA 1998”) which relevantly provides:

- “(1) An officer of Revenue and Customs may enquire into a company tax return if they give notice to the company of their intention to do so (“notice of enquiry”) within the time allowed.

(2) If the return was delivered on or before the filing date, notice of enquiry may be given at any time up to twelve months from the day on which the return was delivered (subject to sub-paragraph (6)).

(3) If the return was delivered after the filing date, notice of enquiry may be given at any time up to and including the 31st January, 30th April, 31st July or 31st October next following the first anniversary of the day on which the return was delivered.

(4) If the company amends its return, notice of enquiry may be given at any time up to and including the 31st January, 30th April, 31st July or 31st October next following the first anniversary of the day on which the amendment was made.

...”

93. Discovery assessments were issued in respect of the accounting periods ended 31 December 2011 and 31 December 2012 under paragraph 41 of Schedule 18 FA 1998 which relevantly provides:

“(1) If an officer of Revenue and Customs discovers as regards an accounting period of a company that -

(a) an amount which ought to have been assessed to tax has not been assessed, or

(b) an assessment to tax is or has become insufficient, or

(c) relief has been given which is or has become excessive,

they may make an assessment (a “discovery assessment”) in the amount or further amount which ought in their opinion to be charged in order to make good to the Crown the loss of tax.

...”

94. Paragraph 42 provides that HMRC may only issue a discovery assessment for an accounting period for which the company has delivered a company tax return if the circumstances in paragraphs 43 or 44 are met. They provide:

“43 Loss of tax brought about carelessly or deliberately

A discovery assessment for an accounting period for which the company has delivered a company tax return, or a discovery determination, may be made if the situation mentioned in paragraph 41(1) or (2) was brought about carelessly or deliberately by –

(a) the company, or

(b) a person acting on behalf of the company, or

(c) a person who was a partner of the company at the relevant time.

44 Situation not disclosed by return or related documents

(1) A discovery assessment for an accounting period for which the company has delivered a company tax return, or a discovery determination, may be made if at the time when an officer of Revenue and Customs -

(a) ceased to be entitled to give a notice of enquiry into the return, or

(b) in a case where a notice of enquiry into the return was given

(i) issued a partial closure notice as regards a matter to which the situation mentioned in paragraph 41(1) or (2) relates, or

(ii) if no such partial closure notice was issued, issued a final closure notice, they could not have been reasonably expected, on the basis of the information made available to them before that time, to be aware of the situation mentioned in paragraph 41(1) or (2).

(2) For this purpose information is regarded as made available to an officer of Revenue and Customs if -

(a) it is contained in a relevant return by the company or in documents accompanying any such return..."

95. The time limits for issuing a discovery assessment are set out in paragraph 46 of Schedule 18 FA 1998. There is no dispute that the discovery assessments (if valid) were issued in time. Paragraph 47(1) sets out the assessment procedure and provides:

"(1) Notice of an assessment to tax on a company must be served on the company stating -

(a) the date on which the notice is issued; and

(b) the time within which any appeal against the assessment may be made."

96. The Section 8 Decisions were made pursuant to s8 Social Security (Transfer of Functions, etc.) Act 1999. Rules relating to the making of decisions are set out in the Social Security Contributions (Decisions and Appeals) Regulations 1999, regulation 4(1) of which provides:

"A decision which, by virtue of section 8 of the Transfer Act or Article 7 of the Transfer Order, falls to be made by an officer of the Board under or in connection with the Social Security Contributions and Benefits Act 1992, the Social Security Administration Act 1992, the Social Security Contributions and Benefits (Northern Ireland) Act 1992, the Social Security Administration (Northern Ireland) Act 1992, the Jobseekers Act 1995 or the Jobseekers (Northern Ireland) Order 1995-

(a) must be made to the best of his information and belief, and

(b) must state the name of every person in respect of whom it is made and-

(i) the date from which it has effect, or

(ii) the period for which it has effect."

97. The Regulation 80 Determinations were made under regulation 80 of the PAYE Regulations 2003, which relevantly provides:

"(1) This regulation applies if it appears to HMRC that there may be tax payable for a tax year under ... regulation 68 by an employer which has neither been -

(a) paid to the Inland Revenue, nor

(b) certified by the Inland Revenue under [various regulations].

...

(2) HMRC may determine the amount of that tax to the best of their judgment, and serve notice of their determination on the employer.

...

(4) A determination under this regulation may -

- (a) cover the tax payable by the employer under regulation ... 68 for any one or more tax periods in a tax year, and
- (b) extend to the whole of that tax, or to such part of it as is payable in respect of–
 - (i) a class or classes of employees specified in the notice of determination (without naming the individual employees), or
 - (ii) one or more named employees specified in the notice.
- (5) A determination under this regulation is subject to Parts 4, 5, 5A and 6 of TMA (assessment, appeals, collection and recovery) as if -
 - (a) the determination were an assessment, and
 - (b) the amount of tax determined were income tax charged on the employer, and those Parts of that Act apply accordingly with any necessary modifications.”

98. Section 113(1B) Taxes Management Act 1970 (“TMA 1970”) deals with delegation of some tasks to other officers:

“Where the Board or an inspector or other officer of the Board have in accordance with section 29 of this Act or paragraph 41 of Schedule 18 to the Finance Act 1998, or any other provision of the Taxes Acts, decided to make an assessment to tax, and have taken all other decisions needed for arriving at the amount of the assessment, they may entrust to some other officer of the Board responsibility for completing the assessing procedure, whether by means involving the use of a computer or otherwise, including responsibility for serving notice of the assessment on the person liable for tax.”

DISCUSSION

99. The issues before me and the burden of proof in relation thereto are set out above. Those issues require me to make additional findings of fact and, in particular, to assess the evidence given by Ms Callaby. However, it is helpful first to set out a very brief overview of the position taken by Mr Venables in his submissions on behalf of CIAISL.

100. There were several themes to Mr Venables’ submissions – the documentation was poorly drafted, and it was not easy to identify why some of the transactions had been entered into; the MSB Documents appear to be ineffective (as the Appointment of Delegated Manager was not executed by MSB so there was no evidence of how MSB could have accepted this appointment, and whilst MSB had executed the Fiduciary Services Agreement there was no evidence of any property being granted by MSB to MEL thereunder); that what mattered was evidence as to the subjective intentions of CIAISL and not the views of Baxendale Walker or other users of these arrangements; the significance of the three Shareholders being both employees of CIAISL and indirect shareholders of that company (as they were the sole shareholders of its holding company LEM); and that if the documentation did not have effect as set out on its face then I would need to consider the Trust Arguments (noting that whilst the CIAISL resolutions referred to the contributions being paid to the Trustee, in fact no payment was ever made directly to BTIL).

Evidence of Lee Callaby

101. There was no dispute between the parties as to what the resolutions of CIAISL said, the payment flows, or the use of the money by the Shareholders. The areas of disagreement included the intentions of the parties (CIAISL in particular), control over the Baxendale Walker client account, and whether the loans were advanced from MEL to the Shareholders in their

capacity as indirect shareholders of CIAISL or as employees. There was some documentary evidence to assist on these matters, but my findings would need to be based on my conclusions as to the evidence of Ms Callaby and by making inferences (from both the documentation and the witness evidence).

102. Ms Callaby was a director and employee of CIAISL throughout the periods under appeal. There was no evidence from either Mr Blundell (her fellow director) or Mr Sheppard. It was her evidence on which CIAISL relied.

103. Ms Callaby's witness statements included the following:

(1) CIAISL had been incorporated in December 2001 and initially its business was a combination of motorcycle and car insurance risks. It had particular expertise in the motorcycle insurance business and this grew significantly. Until around 2006 this was seen as a niche business – there were a small number of insurance intermediaries who specialised in this area and CIAISL was one of them. They had access to competitive underwriting rates, and designed an insurance solution with Honda and Virgin. They had access to a small pool of money which allowed CIAISL to “soften” the rates it offered to potential customers. The motorcycle business was very price sensitive – a very small difference in premium would be enough to win the business.

(2) By January 2006 the motorcycle business accounted for about 85% of CIAISL's turnover. Margins were small but there was a high turnover. However, other bigger players joined this market. CIAISL's usual underwriters no longer appeared competitive. They discovered that one particular competitor was cornering the market – it had a deal with overseas underwriters and had a large cash fighting fund. A cash fighting fund is important as when premiums increase, CIAISL can allocate a discount from the fighting fund to offer a lower price to customers.

(3) CIAISL experienced significant falls in motorcycle new business income and renewals between 2005 and 2010. Towards the end of 2007 it had become apparent that they could not recover their position in this market.

(4) CIAISL looked at other forms of insurance, and identified two other niche areas – caravan insurance and Type A insurance. The former never got off the ground. They began transacting Type A insurance in October 2007 and saw immediate and significant growth in this area. They ensured they kept a healthy fighting fund available to help if there was any fluctuation in premiums.

(5) Type A insurance premiums have fluctuated and they have had to give online discounts to price match their competitors. They became aware that a number of larger insurers and household names were looking at entering the Type A insurance market; this was worrying given their experience with motorcycle business. They considered they would need a substantial fighting fund.

(6) They were also concerned about having large sums of cash on deposit with banks, referring to the collapse of Northern Rock. Further, they were concerned about the bank's security measures being sufficient to prevent fraudulent attacks on their accounts. In July 2009 CIAISL's bank account with Lloyds had been the subject of two attempts to extract sums fraudulently.

(7) They needed to maintain a fund that would allow them to ensure customer premiums were maintained at a competitive level; it did not all have to be liquid cash but it had to be accessible and it had to be secure.

(8) They did not consider a trust until 2010. It was suggested by Ben Reynolds, a partner at their accountants, TGFP. Mr Reynolds told them that funds would be placed within the trust and there would be beneficiaries listed who would be entitled to benefit from it at appropriate times. They were told they could control how the money was invested on behalf of the trust – it need not be held in cash, but they could invest in capital and other assets.

(9) The trust was set up in late 2010 and CIAISL made contributions out of “spare funds”. Decisions to contribute were made based on periodic reviews of expenses; and cash resources were already being used to soften premiums.

(10) The use of discounts to soften premiums has prevented erosion of CIAISL’s Type A business.

(11) She was not aware if there were any tax benefits to creating a fighting fund within the trust, and it was not discussed by the directors. If there are tax benefits, they are a side issue to the commercial point of having an asset-protected fighting fund.

(12) The assets bought by the Shareholders using the loans from MEL could be sold if required, or the shares they held in CIAISL could be sold if funds were required.

(13) CIAISL continues to use the trust structure, and believes in it for the commercial purpose for which it was intended.

104. Ms Callaby’s evidence was that CIAISL’s purpose of establishing the Trust and making each contribution to it was to establish a fighting fund for CIAISL so that it could protect its business by offering discounts to customers, and that they were worried about the security of banks (in that they were concerned about the risk of insolvencies and of fraudulent attacks on their accounts). She denied that there was a connection between the loans and the Shareholders’ employment by CIAISL.

105. Mr Ghosh did not challenge Ms Callaby’s evidence relating to the change in fortunes of the motorcycle insurance business, or that there was a concern that their Type A business could be vulnerable to greater competition in the market. I therefore accept that evidence. He did, however, challenge much of her remaining evidence, including whether this was a reason for the establishment of the Trust or making contributions to the Trust, and whether there was a link between the loans and the Shareholders’ employment by CIAISL.

106. Mr Venables acknowledged that I may conclude that Ms Callaby failed to understand the precise effect of certain documents, but submitted that this was understandable as the drafting was poor. He invited me to conclude that Ms Callaby had trusted CIAISL’s advisers to get the documentation right. He noted that such trust might well have been misplaced; but the test is “wholly and exclusively”, not reasonably.

107. Much therefore depends on my conclusions as to Ms Callaby’s credibility. I was taken to *Gestmin SGPS S.A. v Credit Suisse* [2013] EWHC 3560 and *Kogan v Martin* [2019] EWCA Civ 1645.

108. HMRC relied on *Gestmin SGPS S.A. v Credit Suisse* [2013] EWHC 3560 (in particular at [15]- [23]) for the correct approach in assessing witness evidence in cases such as the present one, namely “to place little if any reliance at all on witnesses’ recollections of what was said in meetings and conversations, and to base factual findings on inferences drawn from the documentary evidence and known or probable facts”. HMRC noted in particular the following observations from the judgment of Leggatt J:

“18. Memory is especially unreliable when it comes to recalling past beliefs. Our memories of past beliefs are revised to make them more consistent with our present beliefs. Studies have also shown that memory is particularly vulnerable to interference and alteration when a person is presented with new information or suggestions about an event in circumstances where his or her memory of it is already weak due to the passage of time.

19. The process of civil litigation itself subjects the memories of witnesses to powerful biases. The nature of litigation is such that witnesses often have a stake in a particular version of events. This is obvious where the witness is a party or has a tie of loyalty (such as an employment relationship) to a party to the proceedings...

20. Considerable interference with memory is also introduced in civil litigation by the procedure of preparing for trial. A witness is asked to make a statement, often (as in the present case) when a long time has already elapsed since the relevant events. The statement is usually drafted for the witness by a lawyer who is inevitably conscious of the significance for the issues in the case of what the witness does nor does not say. The statement is made after the witness's memory has been “refreshed” by reading documents. The documents considered often include statements of case and other argumentative material as well as documents which the witness did not see at the time or which came into existence after the events which he or she is being asked to recall...”

109. In the recent case of *Kogan*, there was evidence from two witnesses of fact, which was contradictory. The judge had placed little reliance on the witnesses’ recollections and instead based his factual findings on inferences drawn from documentary evidence and known or probable facts. Floyd LJ, giving the judgement of the Court of Appeal, set out the following when criticising the judge’s approach to the evidence and making findings:

(1) *Gestmin* is not to be taken as laying down any general principle for the assessment of evidence. It emphasises the fallibility of human memory and the need to assess witness evidence in its proper place alongside contemporaneous documentary evidence and evidence upon which undoubted or probable reliance can be placed. But awareness of the fallibility of memory does not relieve judges of the task of making findings based upon all of the evidence. Where a party’s sworn evidence is disbelieved, the court must say why that is; it cannot simply ignore the evidence (at [88]).

(2) The observations in *Gestmin* were addressed to commercial cases. In *Kogan*, by contrast, the two parties were private individuals living together for much of the time. That made it inherently improbable that details of all their interactions would be fully recorded in documents (at [89]).

110. As regards *Kogan*, Mr Ghosh emphasised that HMRC was not inviting me to ignore Ms Callaby’s evidence. HMRC’s position was that I should disbelieve it; noting that this is a commercial case, there are documents relating to the transactions and the purposes of the company, and those documents are the basis for the claiming of tax deductions worth millions of pounds.

111. I do not accept all of Ms Callaby’s evidence. My reasoning is as follows:

(1) It was apparent that Ms Callaby had not properly understood the documentation which had been signed by CIAISL or MEL. She acknowledged that she had not understood, eg, the definitions of “Beneficiaries” in the Trust Deeds. Also, whilst she said she had understood the Fiduciary Services Agreement between MSB and MEL, her

explanation of that document was that if monies were lent they had to be repaid. That might well be an apt description of the Finance Agreements; it is not of the Fiduciary Services Agreement.

(2) More troubling, she had clearly not thought carefully about the language used in the resolutions of the directors of CIAISL which, with the exception of the first (as that dealt also with the decision to enter into the Trust arrangements) were all in the same terms. Ms Callaby did not understand the language which she and her fellow director were using on each occasion between 2010 and 2018 to describe the purpose of making contributions. Notably, when giving her evidence, Ms Callaby did not say that she had ever asked about this language; or ask anyone why the resolutions did not refer to what she says were CIAISL's reasons for making contributions.

(3) She had not paid any attention to the parties involved. She didn't know the role of MSB, yet BTIL had invoiced CIAISL on 12 January 2016 for \$3,500, which included "registry fees" for MSB. This had not prompted her to ask questions or concern herself with who this company was.

112. The above matters could simply be indicative of a lack of understanding of the documentation, and do not of themselves require a conclusion that her evidence as a whole is not credible. However, I also took account of the following:

(1) During cross-examination there were many areas where Ms Callaby's evidence was that she did not know or could not remember. Sometimes she explained this by reference to the events in question having been a long time ago. I accept that would be a reasonable explanation for, eg, not remembering the making of specific resolutions, or points of detail about the timing of sending particular Request Letters to BTIL. However, this was less understandable when she was not able to explain, eg, why the Shareholders had lent more than £220,000 to CIAISL from the first contribution (when the company had only just resolved to pay that amount to the Trust) or why the JHL Loan had passed through CIAISL to MEL to LEM and back to CIAISL, or how the loans totalling £350,000 from MEL to the Shareholders were to be funded given that the relevant Finance Agreements were dated 16 December 2010 and CIAISL had already instructed Lloyds that the funds were to be transferred from MEL to LEM. These were transactions involving very large sums of money, the companies of which she was a director and contracts to which she was a party personally.

(2) I considered that Ms Callaby was reluctant to offer a complete explanation of some matters. This was notable in the context of the questions relating to the advice which had been taken by CIAISL. Her witness statements set out that the idea of entering into the trust arrangements was suggested by TGFP, CIAISL's accountant and auditor. The bundle included an engagement letter from Baxendale Walker, setting out various matters including the scope of advice and fees payable. CIAISL had entered into an array of documentation. Yet Ms Callaby provided very little explanation as to how this had all come about. She was reluctant to confirm that the company had taken advice. Whilst Mr Venables' submissions included that I may well conclude that CIAISL had wrongly placed their trust in advisers who produced poor documents, in fact Ms Callaby did not give evidence that they had relied on advisers. She briefly referred to the trust enabling them to have a fighting fund, but did not explain how CIAISL had been told this would operate in any detail. Overall, I considered that there was a lack of candour in her responses to some questions. This does raise an issue as to the credibility of her evidence.

(3) This was reinforced by some of her answers being contradicted by other evidence. A notable example was in relation to the Questionnaire. As set out under Facts, this Questionnaire was referred to in CIAISL's resolution of 6 December 2010 to establish the trust arrangement. Her evidence was that the answers given were CIAISL's own answers. She was told (by Mr Ghosh) that they were materially identical to answers given by other users of corporate remuneration trusts promoted by Baxendale Walker (and Mr Ghosh offered to take her to published decisions recording such answers) and her only explanation was that it was a long time since she had seen the Questionnaire. When she was unable to explain the meaning of answers recorded in the Questionnaire, she still maintained that these were CIAISL's answers. Mr Ghosh put it to her that the company wrote what someone had told them to for these answers, and she said she wouldn't be able to comment. I have no doubt in finding that the answers to the Questionnaire were provided to them (from Baxendale Walker, potentially through TGFP as there was insufficient evidence as to any direct contract between Baxendale Walker and CIAISL), and were not prepared by the directors of CIAISL. I find that Ms Callaby knew this. Her refusal to explain how the documentation had been prepared, and her initial insistence that these were CIAISL's answers (despite her not understanding what they meant when she was one of just two directors at all relevant times) left me concerned that her evidence was not candid and truthful.

113. Overall, my conclusion was that Ms Callaby was not a credible or reliable witness. It was notable that, despite Mr Venables having carefully set out in his detailed opening submissions the scenario of poorly drafted documents which were difficult to understand, use of standard forms which did not accurately reflect CIAISL's own position, and a misplaced reliance on advisers, this was not supported by the evidence she gave. She refused to acknowledge that the resolutions were in the same form, that they had been provided to them by their advisers, and was reluctant to confirm that tax advice had been taken at all. I do not consider that my concerns can be explained by reference to the fallibility of human memory, even bearing in mind that it is now more than ten years since the Trust was established. Instead, I place little weight on Ms Callaby's evidence where it is unsupported by documentary evidence or inferences from other facts. This is significant in the context of my consideration of CIAISL's purposes in making the contributions and whether the loans were connected with the Shareholders' employment by CIAISL or remuneration for such employment.

Corporation tax – wholly and exclusively

114. Section 54 CTA 2009 provides that a deduction is only allowed for expenses incurred "wholly and exclusively for the purposes of the trade".

115. The Court of Appeal considered the wholly and exclusively test in *Vodafone Cellular Ltd v Shaw* [1997] STC 734, and Millett LJ set out the following propositions at [742e] to [743a]:

"The leading modern cases on the application of the "exclusively" test are *Mallalieu v Drummond* [1983] AC 861 and *Mackinlay v Arthur Young McClelland Moores & Co.* [1990] 2 AC 239. From these cases the following propositions may be derived:

1. The words "for the purposes of the trade" mean "to serve the purposes of the trade". They do not mean "for the purposes of the taxpayer" but for "the purposes of the trade", which is a different concept. A fortiori they do not mean "for the benefit of the taxpayer."
2. To ascertain whether the payment was made for the purposes of the taxpayer's trade it is necessary to discover his object in making the payment.

Save in obvious cases which speak for themselves, this involves an inquiry into the taxpayer's subjective intentions at the time of the payment.

3. The object of the taxpayer in making the payment must be distinguished from the effect of the payment. A payment may be made exclusively for the purposes of the trade even though it also secures a private benefit. This will be the case if the securing of the private benefit was not the object of the payment but merely a consequential and incidental effect of the payment.

4. Although the taxpayer's subjective intentions are determinative, these are not limited to the conscious motives which were in his mind at the time of the payment. Some consequences are so inevitably and inextricably involved in the payment that unless merely incidental they must be taken to be a purpose for which the payment was made.

To these propositions I would add one more. The question does not involve an inquiry of the taxpayer whether he consciously intended to obtain a trade or personal advantage by the payment. The primary inquiry is to ascertain what was the particular object of the taxpayer in making the payment. Once that is ascertained, its characterisation as a trade or private purpose is in my opinion a matter for the Commissioners, not for the taxpayer. Thus in *Mallalieu v Drummond* the primary question was not whether Miss Mallalieu intended her expenditure on clothes to serve exclusively a professional purpose or partly a professional and partly a private purpose; but whether it was intended not only to enable her to comply with the requirements of the Bar Council when appearing as a barrister in Court but also to preserve warmth and decency.”

116. Mr Venables submitted that:

(1) The test is purely subjective and looks at the intentions of CIAISL, not anyone else – the purposes of Baxendale Walker (and affiliates) are irrelevant to this question. This test is to be applied at the time the contributions are made, and it is irrelevant whether the directors of CIAISL were naïve or made an unreasonable decision which arguably did not achieve their purposes in the best possible way.

(2) The core argument was that CIAISL did benefit from the contributions as they established a fighting fund which could be used for the business in the future, in case of attack on pricing from competitors. There was nothing complex or artificial about the way in which the contributions were made.

(3) The Shareholders did not and could not benefit from the loans (as they were Excluded Persons). The way the assets were invested by them cannot affect the answer to this question.

(4) There was no duality of purpose. It was denied that there was any tax avoidance purpose at all. Mr Venables referred me to three authorities which consider the meaning of “tax avoidance”:

(a) *Commissioner of Inland Revenue v Challenge Corporation Ltd* [1987] AC 155 is a decision of the Privy Council on appeal from the Court of Appeal of New Zealand and concerned whether the New Zealand GAAR applied to a loss-buying transaction. Lord Templeman gave the speech of the majority. He drew a distinction between a transaction which mitigates tax and one which avoids tax, referring to Lord Tomlin in *IRC v Duke of Westminster* [1936] AC 1. Lord Templeman said as follows (at 167H and 168E):

“Income tax is mitigated by a taxpayer who reduces his income or incurs expenditure in circumstances which reduce his assessable income or entitle him to reduction in his tax liability...

Income tax is avoided and a tax advantage is derived from an arrangement when the taxpayer reduces his liability to tax without involving him in the loss or expenditure which entitles him to that reduction. The taxpayer engaged in tax avoidance does not reduce his income or suffer a loss or incur expenditure but nevertheless obtains a reduction in his liability to tax as if he had.”

(b) In *Ensign Tankers (Leasing) Ltd v Stokes* 64 TC 617 Lord Templeman considered the authorities dealing with tax avoidance schemes, and referred to the distinction he had drawn in *Challenge Corporation* between tax avoidance and tax mitigation, adding (at page 676C) “There is nothing magical about tax mitigation whereby a taxpayer suffers a loss or incurs expenditure in fact as well as in appearance.” Lord Goff had also approached the case on the basis that there is a fundamental difference between tax mitigation and unacceptable tax avoidance.

(c) *CIR v Willoughby* (1997) 70 TC 57 is another decision of the House of Lords, this time on the transfer of assets abroad provisions. In the speech of Lord Nolan (with which the remainder of their Lordships agreed) at page 116E, he described the hallmark of tax avoidance as that the taxpayer reduces his liability to tax without incurring the economic consequences that Parliament intended to be suffered by any taxpayer qualifying for such reduction in his tax liability, whereas the hallmark of tax mitigation is that the taxpayer takes advantage of a fiscally attractive option afforded to him by the tax legislation and genuinely suffers the economic consequences that Parliament intended to be suffered by those taking advantage of the option. He went on to state that where the taxpayer’s chosen course is seen upon examination to involve tax avoidance (as opposed to tax mitigation) it follows that tax avoidance must be at least one of the taxpayer’s purposes in adopting that course, whether or not the taxpayer has formed the subjective motive of avoiding tax.

117. Mr Ghosh agreed that the test is the subjective intention of CIAISL but emphasised that it is for the Tribunal to determine what that was. He relied on:

(1) the principle established by the authorities that some consequences are so inevitably and inextricably involved in the payment that unless merely incidental they must be taken to be a purpose for which the payment was made. Even if I were to take the fighting fund purpose at face value (which he submitted I should not), there was a duality of purpose. There was a purpose of delivering cash to Shareholders for their private use, and some of the steps involved (the making of payments to BTIL and from BTIL to MEL) are not explicable by reference to any commercial purpose; and

(2) the evidence might show that what they are saying is not true. Here, each contribution funded a loan to the Shareholders to buy private assets, or to make loans back to CIAISL, and they knew that would be the case. The fighting fund explanation had not been referred to in previous explanations given to HMRC or in pleadings; it only emerged in Ms Callaby’s witness statements. It is incoherent when considered commercially. Nor does HMRC accept that the contributions were made because of concerns about holding money in bank accounts; or that they wanted to benefit Providers (as defined in either of the Trust Deeds). That just leaves tax, namely the purpose of obtaining a corporation tax deduction and extracting funds without tax being paid on the receipt.

118. Mr Ghosh submitted that there was a duality of purpose, albeit not involving a commercial purpose and a tax purpose, but a private purpose and a tax purpose.

119. Whilst the parties both made their submissions consistent with *Vodafone*, they diverged as regards *Scotts Atlantic Management Limited v HMRC* [2015] UKUT 66 (TCC). *Scotts Atlantic* had involved contributions to an employee benefit trust. HMRC had denied deductions for those contributions. The FTT held that Schedule 24 FA 2003 did not apply but that the claimed expenses had the purpose, alongside any purpose of remunerating directors and employees, of ousting Schedule 24, and that the dual objective meant that none of the claimed expenses were incurred wholly and exclusively for the purposes of the trade. The Upper Tribunal concluded that the deductions were within the scope of Schedule 24, but then went on to consider whether there was duality of purpose.

120. In considering whether there was duality of purpose, the Upper Tribunal took the following approach:

(1) The word “exclusively” means that if the expense was also incurred for some other purpose, it is not deductible (at [47]).

(2) Citing Millett LJ in *Vodafone* at [742] (and as set out more fully above), the object of the expenditure must be distinguished from its effect. If the sole object of the expenditure was the promotion of the business, the expenditure is deductible, even though it necessarily involves other consequences. Thus, the existence of a private advantage does not necessarily mean that the expenditure is disallowable. A merely incidental effect of expenditure is not necessarily an object of a taxpayer in making it. What the FTT must not do is to conclude that merely because there was an effect, that effect was an object (at [51] and [52]).

(3) In addition, at [53], some results are so inevitably and inextricably involved in particular activities they cannot but be said to be a purpose of the activity and as a result the conscious motive of the taxpayer is not decisive.

(4) Neither the statutory provision nor any of the cases indicate that the way in which an expense is incurred will determine whether the expense is deductible. The question is what is the object of the expense, not what was the object of the means of incurring it. A trader may have a choice of the way in which it achieves an end which is exclusively for the benefit of the trade. The mere fact that a choice is influenced or dictated by the tax consequences does not necessarily mean that the choice involves a duality of purpose as regards the expense (at [54] and [55]).

(5) Expenditure is not disqualified because the nature of the activity necessarily involved some other result, in other words that the mere existence or knowledge of that result is not enough to give a dual purpose. But if the fact-finding tribunal concludes that its inquiry into the mind of the taxpayer revealed that the taxpayer actually had that other purpose as an object of the expenditure, then the fact that that result is a natural consequence of the expenditure will not cause that finding to be perverse (at [74]).

121. On the facts in *Scotts Atlantic* the Upper Tribunal concluded that a deduction was not available because “one purpose was to implement a pre-arranged scheme in order to obtain a tax deduction; the purpose was not simply to benefit employees and directors through the medium of an employment benefit scheme” (at [81]).

122. Both parties addressed in submissions the emphasis that the Upper Tribunal had placed on distinguishing between the object of the expense and the object of the means of incurring it

(and Mr Venables drew attention to the fact that the appellant in that case had not cited the authorities on the meaning of tax avoidance).

123. In the light of the authorities, I need to consider whether the contributions were for the purpose of enabling CIAISL to carry on and earn profits in the trade. When conducting this exercise:

- (1) this assessment must be based on the subjective intentions of the directors at the time of making the payments, which must include consideration of what they thought they were doing – these are not limited to their conscious motives, as some consequences are so inevitably and inextricably involved that (unless merely incidental) they must be taken to be a purpose for which the contributions were made;
- (2) if the expense was also incurred for some other (non-trade) purpose, it is not deductible;
- (3) the object must be distinguished from its effect - payments may be exclusively for the purposes of the trade even though they also secure a private benefit, if the securing of the private benefit was not the object but merely a consequential and incidental effect of the contributions; and
- (4) the question is not what was the object of the means of incurring the expense. The mere fact that a choice is influenced or dictated by the tax consequences does not necessarily mean that the choice involves a duality of purpose as regards the expense.

Purpose(s) of establishing the Trust and making contributions

124. The contemporaneous documentation sets out CIAISL's purposes using the following language:

- (1) CIAISL's resolution to enter into the Trust arrangement refers to contributions being made for the purpose of funding the provision of discretionary benefits to providers of services, products, custom or finance to the Company and of finance to the Trustees and their respective wives, widows and dependants. The resolution noted that the establishment of the arrangement provides a means for the trade of CIAISL to thereby be benefited.
- (2) The resolution to make each contribution states that the relevant amount "reflects part of the economic cost to the company of earning its profits for that period".
- (3) The Questionnaire (which accompanied the first resolution) said that CIAISL's trade had been conducted in such a way as to place a commercial obligation on the company to provide benefits for consultants and other suppliers.
- (4) CIAISL produced Providers Lists, stating that these persons were potential discretionary beneficiaries.
- (5) The Trust Deeds carefully defined the Beneficiaries and Providers, the class of which was narrowed significantly by the Amended Trust Deed.

125. Ms Callaby's explanation in her witness statements and in her oral evidence was that CIAISL's reasons for making the contributions were to establish a fighting fund from which they could provide discounts to customers and concerns relating to the security of banks (both in terms of the risk of insolvencies and the risk of fraud). She did not disavow the reasons stated in the resolutions.

126. HMRC asked the Tribunal to find that:

- (1) CIAISL had entered into a marketed tax avoidance scheme, introduced to it by TGFP and Countrywide Tax and Trust Corporation;
- (2) that scheme had the dual objectives of securing a corporation tax deduction for CIAISL and the obtaining of tax-free sums for persons who were employees by way of loan; and
- (3) these were the only purposes of CIAISL, as no other (business) purposes were credible.

127. I assess the proposition surrounding marketed tax avoidance schemes and then the purposes put forward by CIAISL.

Marketed tax avoidance scheme

128. On the basis of the evidence before me, I am satisfied that CIAISL had entered into a scheme which had been marketed to it in a fairly standard form. That was apparent from the documentation (including the Trust Deeds, resolutions, Questionnaire, Request Letters and Finance Agreements) being very similar to those that were used by appellants in other published decisions of the FTT (including the decision of Judge Morgan and Mr Woodman in *Marlborough DP Limited v HMRC* [2021] UKFTT 0304 (TC) and my decision in *Strategic Branding Ltd v HMRC* [2021] UKFTT 474 (TC)).

129. The transactions involved a series of pre-ordained steps taking place. When resolving to make each contribution to the Trust, and instructing Lloyds to make the payment to the Baxendale Walker client account, CIAISL knew that the remaining steps would happen on each occasion, ie that the Shareholders would ask BTIL to transfer the funds received to MEL and MEL would then lend the money to some or all of the Shareholders. There was no evidence of decisions being taken by MEL which could have the potential (even if theoretical) to disrupt this chain of events. MEL did enter into the Finance Agreements but there was no evidence of any consideration of the decision to enter into such agreements.

130. The only divergence from this pattern was in respect of the Purported Contribution, but even though I have already concluded that this was not contributed to the Trust, nevertheless CIAISL knew when resolving to make this contribution what would then happen – this was evident from the terms of the JHL Loan and the emailed instructions to Lloyds.

131. The basis on which CIAISL decided to enter into the arrangements and make contributions to the Trust involved it agreeing to pay sizeable fees, notably a fee of 10% of each contribution made to the Trust. Mr Ghosh submitted that these fees cannot be explained in any other way other than that CIAISL was paying for a tax avoidance scheme; the Shareholders could simply have borrowed the money from CIAISL and that would not have involved paying these fees.

132. This submission requires me to assess what CIAISL knew about the tax treatment of the arrangements at the outset. A difficulty with the evidence was that Ms Callaby was not forthcoming in response to questions about the advice (particularly tax advice) which CIAISL had received when entering into the scheme.

133. It is clear from Baxendale Walker's engagement letter that they did give tax advice to CIAISL. There was no direct evidence as to what that advice was; and Ms Callaby did not offer any evidence as to how CIAISL had engaged with Baxendale Walker. I infer that they were introduced to CIAISL by TGFP. There was other evidence that CIAISL had taken some tax advice (placing no weight for this purpose on the answer to the Questionnaire which said they had taken independent professional advice, as I am not satisfied that this was CIAISL's

own answer) – in the accounts of CIAISL for the year ended 31 December 2010 the contributions are included as administrative expenses. The notes include that “No taxation liability arose to the company as a result of such transaction”. This illustrates that they had taken some tax advice, or reached their own conclusion as to the tax treatment. Furthermore, it is apparent that CIAISL expected to be able to claim a deduction for corporation tax purposes for the contributions it made to the Trust – they were included as administrative expenses in the accounts and this was used as a starting-point for self-assessing their tax liability.

134. I agree with Mr Ghosh’s submission that it is not credible that CIAISL were not aware of the tax advantages purportedly offered by the Trust arrangements. CIAISL were willing to pay significant fees to enter into transactions which they did not fully understand, in circumstances where there was a simple comparator transaction namely a direct loan from CIAISL to the Shareholders.

135. I conclude that a purpose of CIAISL founding the Trust and making contributions was to secure a tax advantage in the form of deductions for CIAISL for the amount of the contributions in circumstances where it was not expected that the Shareholders would have any tax liability in respect of the loans to them from MEL. The question then becomes whether this was the only purpose of CIAISL, ie whether and how this needs to be considered alongside other (business) purposes of CIAISL.

Fighting fund

136. In her witness statement and oral evidence Ms Callaby explained that making contributions to the Trust enabled CIAISL to set up a fighting fund, which was of benefit to their customers (as it reduced the price they would pay for insurance) and benefitted the business of CIAISL. Where insurers are quoting a rate for an insurance product that is too high, ie CIAISL would lose the customer’s business at that price, key managers within CIAISL have authority to offer and approve a discount to that rate being offered. The premium payable to the insurer remains the same. Mr Ghosh referred to this as CIAISL “subsidising” the rate, whereas Ms Callaby resisted this term and preferred “discounting”. Either way, this discount is offered to the customer at the point of sale, but CIAISL pays the full price to the insurer (although this could be several weeks later). Ms Callaby’s evidence was that CIAISL needed a fighting fund to be able to do this, and this protected their business.

137. I accept that CIAISL benefits from having the resources to offer such discounts and retain existing new customers or win new customers. However, I am not satisfied that this was the reason for making any of the contributions to the Trust. There are several reasons for reaching this conclusion:

(1) This reason was not referred to in the documents to which the directors of CIAISL would be expected to pay close attention (as they are not lengthy legal documents), namely the resolutions of CIAISL which were resolved upon and signed each and every time they made a contribution to the Trust. Each individual contribution was of a substantial amount, yet there was not a single sentence setting this out as the reason why CIAISL was making the payments. CIAISL is still making contributions to the Trust, and even a resolution of 28 June 2018 to pay £990,000 to the Trust uses the language about “economic cost” and does not refer to the fighting fund.

(2) The fighting fund was not mentioned prior to Ms Callaby’s first witness statement. I place no weight on its absence from the grounds of appeal and amended grounds of appeal (as the level of detail included in such documents can vary enormously and they are not intended to set out the evidence on which an appellant will rely). However, it is questionable at the very least that there was no reference to what CIAISL now says was

the reason for contributing over £9 million to the Trust in any of the correspondence with HMRC prior to the issue of the assessments, decisions and determinations; and TGFP had specifically informed HMRC (inferentially on the basis of instructions from CIAISL) that “the trust was not intended to deal with any problem/matter”.

(3) CIAISL’s existing business model included providing discounts to customers. They funded this from existing reserves, and Ms Callaby had referred to this as reducing the cash available to be contributed to the Trust. They do not therefore need a separate fighting fund established through a trust to do this.

(4) Instead, by making the contributions to the Trust, CIAISL paid away most of its profits each year. I have already referred to the fact that the contributions were recorded within “administrative expenses” of the company in its accounts, and for each of the periods ended 31 December 2010 to 31 December 2014 the notes to the accounts state that a very large part of these expenses are the contributions, which is consistent with my findings as to the contributions made by CIAISL. For these periods, the profits of CIAISL were reduced from £3 million to £100,000 (for the period ended December 2010) and from £7.8 million to £235,000 (for the period ended December 2014), with a similar pattern in intervening years.

(5) CIAISL could have set money aside to provide a fighting fund available to it by making other investments directly, and this would not have involved incurring a 10% fee on each occasion.

(6) The Trust was established in December 2010 and CIAISL has never used any of the assets of the Trust to provide discounts to customers. I note that under the Trust Deeds CIAISL cannot benefit from the Trust, but place no weight on that (as I am not satisfied that CIAISL was aware of this restriction, even though it is particularly apparent from the Amended Trust Deed, and do not therefore take it into account when assessing their purposes). CIAISL was already providing discounts to customers before it founded the Trust, and has continued to do so from its own resources.

(7) Furthermore, the assets of the Trust consist entirely of loans advanced to the Shareholders on ten year repayment terms with no right to call for early repayment. (The first contribution of £250,000 was lent to the Shareholders who then lent the money to CIAISL.) Those loans have (with the exception of some amounts lent back to CIAISL) been spent on personal assets of the Shareholders, some of which are held in joint names with others, and some are held solely in another person’s name. Ms Callaby’s evidence that these are assets of the Trust is wrong in law and not credible.

138. The explanation that the contributions were made to provide a fighting fund to protect CIAISL’s business is not credible on the basis of all of the evidence available.

Security of banks

139. Ms Callaby’s evidence included that the decision to establish the fighting fund was prompted by a loss of confidence in banks. After the attempted frauds on CIAISL’s business account they had considered changing banks but decided to stay with Lloyds. The banking crisis had also left them concerned about the security of cash held in bank accounts.

140. These are potentially valid commercial concerns. The difficulty is that Ms Callaby offered little explanation as to how she had understood that the Trust arrangement would reduce this risk, and I do not accept that they were the reasons for making contributions to the Trust.

141. Concerns over the security of money held in bank accounts could potentially explain the choice of assets (eg investments in property) but does not explain the making of payments to a trust. Furthermore, the Shareholders each held substantial amounts of the funds they had borrowed from MEL in bank accounts (between £74,000 and £609,000 each), although Ms Callaby sought to draw a distinction between the vulnerability of business accounts and personal accounts - I infer she had in mind the FSCS protection scheme for personal accounts.

142. There was no explanation as to why holding money in personal accounts, or investing in non-cash assets, could not have been achieved by CIAISL making loans to the Shareholders directly or acquiring such assets itself. Mr Venables emphasised that the question is not whether the Shareholders' beliefs or reasoning was reasonable; I agree, but unreasonable decisions do still need some form of explanation and I found that to be lacking. The lack of full explanation of the advice they had received (which might have explained what the Shareholders had understood by the arrangements) was problematic in this respect.

Benefitting providers

143. The Trust Deeds provide that the Beneficiaries of the Trust are Providers and their families. The definition of Providers is wider in the Original Trust Deed than in the Amended Trust Deed. Under the Original Trust Deed, they include persons who provide services, custom, products or finance to CIAISL, whereas under the Amended Trust Deed they are persons who have provided finance to CIAISL (together with their families, under both deeds).

144. The first resolution of CIAISL dated 6 December 2010 states that the purpose of making contributions was "funding the provision of discretionary benefits to providers of services, products, custom or finance" to CIAISL and of finance to the Trustees and various family members.

145. Ms Callaby was asked if this was the true purpose of the company, and she confirmed it was. She confirmed that those businesses on the Providers List were beneficiaries and the purpose of the Trust was to benefit them. I do not accept that evidence. In reaching this conclusion I do bear in mind Mr Venables' submission that some purposes can sit alongside each other, and that benefitting third parties may still be a means of benefitting the trade (a submission with which I agree in principle, but not on the facts):

(1) That response is inconsistent with her evidence in her witness statements and given orally about the fighting fund, the tenor of which was that the money contributed would be available to be used by CIAISL. This would not be the case if money was used to benefit providers of services or finance to CIAISL or of finance to the Trustees. Notably, Ms Callaby did not say that she had not understood this language used in the resolutions (although she did emphasise that she was not a lawyer and had not read the Trust Deeds in any detail), and my conclusion from her other responses was that either she had not paid attention to this language or had not understood it if she had read the resolution and the Trust Deeds. It was apparent that she was not aware of the significance of the changes which were made to the definitions in the Amended Trust Deed.

(2) CIAISL was contributing substantial sums of money to the Trust each year, and it is not credible that it was doing so for the purpose of benefitting a very short list of businesses named on a Providers List, where there was no evidence of the value they were providing to the company. Whatever approach the directors took to reading the detailed documentation, the Providers List is straightforward to understand (and was initially incredibly short). This is the only information that CIAISL provided to the Trustee as to the identity of potential beneficiaries of the Trust.

(3) The directors knew that all of the funds they were contributing to the Trust were being lent to the Shareholders. There was nothing available in the Trust to benefit those on the Providers List.

146. All of the resolutions of CIAISL also state that the proposed contribution reflects part of the economic cost to the company of earning its profits for that period. Ms Callaby did not understand this phrase and could not explain what was meant by it.

147. I do not accept that the purpose, or one of the purposes, of making contributions to the Trust was as stated in CIAISL's resolutions.

Making of loans to Shareholders

148. I have already found that the Trust arrangements involved a series of pre-ordained steps taking place. One such step was the making of loans by MEL to the Shareholders, with that money then being able to be used by the Shareholders as they wished (as with any personal loan). CIAISL knew that this would happen (implicit in my finding that this was pre-ordained) and I have concluded that advancing the funds to the Shareholders was one of the purposes of CIAISL in making contributions to the Trust.

Conclusions

149. I accept that CIAISL wanted to be able to offer discounts to customers, and that it needed cash available to do this. I also accept that CIAISL needed to consider mitigating its exposure to risks in the banking sector. However, for the reasons set out above I am not satisfied that the making of contributions to the Trust was for these commercial purposes.

150. On the basis of the evidence before me, CIAISL paid contributions to the Trust such as had the result of reducing its profits to between £100,000 and £235,000 for each of the years in issue. There was no credible evidence as to the determination of the level of contributions to be made – Ms Callaby referred to the contributions as being made out of spare cash, but the evidence in respect of the Purported Contribution of £350,000 in December 2010 supports a conclusion that this was not money that CIAISL had spare or available to it in any event. I do not need to decide whether the £600,000 resolved to be contributed to the Trust in December 2010 is deductible (as that accounting period is not the subject of this appeal). However, these contributions (or purported contributions) do provide some context to subsequent transactions (and funded some of the loans to Shareholders which are the subject of the Regulation 80 Determinations and Section 8 Decisions). The steps taken in relation to the first two contributions do show that CIAISL's resources were such that it did not want to, or could not, divest itself of £600,000.

151. I agree with HMRC that the only reason then left is the inevitable and inextricably linked consequence, namely obtaining a deduction for corporation tax for such contributions, part of which involved ensuring that the money was then in the hands of the Shareholders without incurring income tax liabilities themselves.

152. This conclusion means that, irrespective of whether or not CIAISL's purposes are best described as tax avoidance or tax mitigation, or whether that is a valid distinction to be making in this context, the making of the contributions cannot be expenses incurred wholly and exclusively for the purposes of its trade.

153. CIAISL's appeal against HMRC's denial of corporation tax deductions for the contributions paid to the Trust is dismissed. Mr Venables accepted that the deductibility of the fees paid to Baxendale Walker (and others) in connection with the arrangements would follow the decision reached in relation to the contributions. I agree, and such appeal is similarly dismissed.

Corporation tax – employee benefit schemes

154. Section 1290 CTA 2009 restricts any deductions that would otherwise be allowable for an accounting period in respect of “employee benefit contributions” made or to be made. These provisions are only relevant if a deduction would otherwise be allowable for contributions to the Trust or the fees paid. On the basis of my conclusions above, these provisions are not relevant. However, I have set out below my conclusions on these provisions as both parties addressed this restriction in their submissions.

155. The issue is whether the contributions made to the Trust by CIAISL were “employee benefit contributions”, which involves considering whether the Trust was an “employee benefit scheme”.

156. As enacted, “employee benefit contributions” and “employee benefit scheme” were defined in s1291(1) and (2) CTA 2009. However, with effect in relation to acts or omissions occurring on or after 6 April 2011, s1291 was amended - the language “or persons linked with present or former employees of the employer” was added at the end of s1291(2), and s1291(4) was introduced providing specifically that, so far as not covered by s1291(2), “employee benefit scheme” also means an arrangement within s554A(1)(b) to which s554A(1)(c) applies.

157. HMRC’s position was that there was an employee benefit scheme within s1291(2) throughout the periods in issue, relying on s1291(4) in the alternative in relation to contributions made to the Trust from 6 April 2011. Mr Ghosh submitted that when considering whether there was an arrangement for the benefit of persons who are employees within s1291(2), the arrangement being considered includes the whole scheme, involving both contributions to the Trust and loans to Shareholders. The contributions have been used for the benefit of persons who are employees of CIAISL, and it is irrelevant that such persons are not and cannot be Beneficiaries under the Trust Deeds.

158. Mr Venables submitted that there was no employee benefit scheme as defined, either before or after the amendments to that definition came into effect. His submissions on s554A ITEPA 2003 are considered further below, but on the definition as enacted he submitted that the Shareholders were Excluded Persons under the Trust Deeds by virtue of their employment by CIAISL and could not therefore benefit from the Trust. Mr Venables submitted that HMRC’s position involves ignoring the legal effects of the documentation; yet they have expressly confirmed that they are not running a sham argument. The loans made to the Shareholders by MEL were commercial loans; and if such loans were found not to be commercial, then the making of such loans was a breach of trust and void as a matter of trust law.

159. I have concluded, as set out under “Income Tax – Part 7A” below, that the Trust arrangements are ones within s554A(1)(b) ITEPA 2003 to which s554A(1)(c) applies. They are therefore an “employee benefit scheme” for the purposes of s1291 by virtue of s1291(4).

160. Both parties approached their submissions on the basis that this would not be a complete answer to the issue before me because of the commencement date of the introduction of s1291(4). I disagree, but decided that, in the light of my conclusions reached on s54 CTA 2009 above, it would not be proportionate to seek further written submissions on this point after the hearing. The reason for my disagreement is that CIAISL’s appeal against the corporation tax assessments relates to the accounting periods ended 31 December 2011 to 31 December 2014. Whilst the first such period does include a period of just over four months before this change in law was effective, CIAISL did not make any contributions to the Trust during this period. It had made contributions (or purported to make them) in December 2010 but the deductibility of those amounts was not in issue before me. The first contribution in the accounting period

ended 31 December 2011 was not resolved to be made until 13 May 2011 (and then paid in three tranches, the first of which was on 19 May 2011). All of these were thus acts occurring on or after 6 April 2011, to which s1291(4) applied.

161. I do however briefly set out my conclusions on s1291(2) in any event. Section 1291(2) provides that “employee benefit scheme” means a trust, scheme or other arrangement “for the benefit of” persons who are, or include, present or former employees of the employer. (The additional language which was added, also in relation to acts on or after 6 April 2011, is not relevant.)

162. Looking at the Trust Deeds alone, the Trust does not meet that definition, as employees are Excluded Persons and cannot be Beneficiaries. However, I agree with Mr Ghosh that s1291(2) requires consideration of the whole arrangement, as all of the transactions were pre-ordained and the definition contemplates that the scheme may be a “trust, scheme or arrangement”. On the facts, CIAISL did not understand the terms of the Trust Deed and I also find that CIAISL did not know that employees could not be Beneficiaries under the Trust Deed (notwithstanding the responses given in the Questionnaire). Instead, the scheme or arrangement which was actually implemented involved payments being made by CIAISL which could then be lent to the Shareholders, and such loans were made by a company they controlled. The arrangement was for the benefit of persons who are employees of CIAISL. The arrangement is within s1291(2).

163. Finally, I am mindful that the restriction does not apply if qualifying benefits have been provided out of the contributions during the period or within nine months from the end of it (for the purpose of s1290(2)(a)).

164. Qualifying benefits are provided if there is a payment of money or a transfer of assets which meets one of four conditions (s1292(1)), one of which is that the payment or transfer gives rise both to an employment income tax charge and to an NIC charge (s1292(2)). Section 1292(6) provides that these conditions are not met if the payment or transfer is by way of loan. As the benefits to the Shareholders were the loans under the Finance Agreements, these conditions are not satisfied. However, s1292(6A) was subsequently enacted and that provides that qualifying benefits are provided if a relevant step within Part 7A is taken and Chapter 2 of that Part applies by reason of the step. I have concluded that there was a relevant step within Part 7A and that Chapter 2 applies. On this basis, in principle there would appear to have been qualifying benefits such that the restriction does not apply. The relevant transitional provisions were not before me and at the hearing the parties agreed that if the application of s1290 mattered (ie the contributions would otherwise be deductible), they could provide further written submissions. As I have concluded that no such deduction would otherwise be available, and I am only reaching conclusions on the employee benefit scheme rules so far as the points were argued before me, I considered it would not be proportionate to seek further submissions on the transitional arrangements.

Discovery assessments

165. HMRC issued Discovery Assessments for two of CIAISL’s accounting periods, those ended 31 December 2011 (the assessment being issued on 15 December 2015) and 31 December 2012 (the assessment being issued on 3 November 2016). The burden of proof is on HMRC to establish, on the balance of probabilities, that the required conditions for issuing the Discovery Assessments were met.

166. HMRC’s position was that:

(1) A “discovery” within paragraph 41(1) Schedule 18 FA 1998 was made by Damian Midwinter in respect of both accounting periods.

(2) The assessing officer may pass on the responsibilities of completing the administrative tasks of the assessing procedure to another officer. Mr Midwinter had done this in respect of the accounting period ended 31 December 2012; this did not affect the validity of the December 2012 Discovery Assessment.

(3) As a company tax return had been filed for the relevant periods, HMRC needed to satisfy the conditions in either paragraph 43 or paragraph 44. The Discovery Assessments had been issued on the basis that paragraph 44 was satisfied, ie the insufficiency had not been disclosed by the return or other information made available to HMRC. Alternatively, Mr Ghosh submitted that the conduct was at least careless and that it was open to the Tribunal to reach that conclusion (referring to *Hankinson v HMRC* [2012] 1 WLR 2322 at [30]).

(4) The Discovery Assessments were issued within the required time limits in paragraph 46. These are the only applicable time limits, as the Supreme Court has confirmed in *HMRC v Tooth* [2021] UKSC 17 that there is no concept of staleness.

167. Mr Venables’ challenge in his oral submissions was twofold:

(1) For the accounting period ended 31 December 2012, whilst there may have been a discovery, the assessment must be issued by the person who made the discovery and on the facts this had not occurred. The language of paragraph 41(1) is clear that the person who makes the discovery must be the person issuing the assessment.

(2) For both accounting periods, any discovery was stale by the time the assessment based on it was issued. Mr Venables submitted that I should not follow the obiter dicta of the Supreme Court in *Tooth*, and should instead follow the ratio of the Court of Appeal in *Tooth v HMRC* [2019] EWCA Civ 826, in which they had held there is a doctrine of staleness.

168. Before considering the evidence of Mr Midwinter, I remind myself of the authorities on what constitutes a discovery. This was considered by the Upper Tribunal in *Charlton & ors v HMRC* [2013] STC 866 at [37]:

“In our judgment, no new information, of fact or law, is required for there to be a discovery. All that is required is that it has newly appeared to an officer, acting honestly and reasonably, that there is an insufficiency in an assessment. That can be for any reason, including a change of view, change of opinion, or correction of an oversight. The requirement for newness does not relate to the reason for the conclusion reached by the officer, but to the conclusion itself.”

169. This description was approved by the Supreme Court in *Tooth* at [63] to [65]. It is apparent from this that there must be a new conclusion reached by an officer, and that the officer must be “acting honestly and reasonably”. As recently confirmed by the Upper Tribunal in *Hargreaves v HMRC* [2022] UKUT 34 (TCC) at [41], a mere awareness that HMRC should prudently ask further questions is not enough to constitute awareness of an actual insufficiency.

170. Mr Midwinter provided a witness statement and was cross-examined on his evidence. He has been with HMRC (and its predecessor) for a number of years, but first specialised in tax avoidance in 2012. Between July 2012 and April 2015 he was primarily involved in investigating users of employee benefit trusts. Since April 2015, he has specialised in investigating users of schemes sold by Baxendale Walker entities, primarily the corporate remuneration trust scheme.

171. I found his evidence to be clear and reliable; he explained the actions he had taken and the conclusions he had reached, and those explanations were consistent with the documentary evidence. On the basis of his evidence, I find as follows:

(1) Around April 2015 he attended a meeting at which Malcolm Cree, the technical lead within HMRC for corporate remuneration trust schemes, gave an overview of these schemes. Mr Midwinter understood from that overview that those using these arrangements expected to obtain a tax advantage in the form of a deduction for contributions and not be liable to income tax or NICs on the loans which were made. He had not been familiar with remuneration trusts before then.

(2) Following that meeting he reviewed a number of existing enquiries into other corporate remuneration trust scheme users with a view to taking over those enquiries, including looking at the stated purposes and what the trust had done with the money.

(3) He opened an enquiry into CIAISL's corporation tax return for the accounting period ended 31 December 2013 in relation to the Trust on 11 June 2015. He had first looked at CIAISL no more than two months before that time. That enquiry was extended to the subsequent accounting period (ie that ended 31 December 2014) on 9 December 2016.

(4) He wrote to CIAISL on 4 September 2015 enclosing a formal notice requiring them to provide information and produce documents. That letter set out that "In HMRC's opinion the Remuneration Trust arrangement is a tax avoidance scheme", and enclosed policy documents, noting that not all of their content may apply to CIAISL's circumstances. Mr Midwinter acknowledged that at that time he had at least a suspicion that the company was not entitled to a corporation tax deduction for contributions.

(5) He was aware that the time limit for assessing any additional corporation tax for the accounting period ended 31 December 2011 would expire on 31 December 2015. The approaching time limit prompted him to conduct a review of the position for that accounting period, and he conducted a review on 14 December 2015. That review involved considering HMRC's published guidance on discovery assessments, looking at the evidence they held (noting that it mainly related to the period ended 31 December 2013 rather than the period with which he was concerned), he drew inferences from that evidence (as to the trust being the same, contributions being used in the same way), concluded that the information he had did not seem consistent with the suggested trade purpose, and noted that the advisers were Baxendale Walker (concluding that it was reasonable to assume that features seen in schemes of other users would be the same here).

(6) The outcome of that review was that he concluded that the self-assessment for the period ended 31 December 2011 was insufficient – he concluded that contributions had been made at least partly for the purpose of tax avoidance. He relied on the condition in paragraph 44 being met. He entered assessment details onto HMRC's COTAX computerised system and COTAX automatically issued the notice of assessment the following day, on 15 December 2015.

(7) Mr Midwinter received further information from TGFP in June and October 2016 in response to the Schedule 36 notices he had issued on 4 September 2015 and 26 November 2015.

(8) On 1 November 2016 Julie Chadbourne, another HMRC officer, emailed Mr Midwinter, stating the subject as CIAISL and saying "The above is on my list to issue a

Discovery Assessment for APE 31/12/2012. Can you let me know if you wish a Discovery raised. The contribution is £1,965,000.”

(9) Ms Chadbourne was also on the team investigating users of corporate remuneration trusts. Mr Midwinter understood from the email that if he confirmed then Ms Chadbourne would enter the discovery assessment on COTAX adding back the £1,965,000 deduction which had been claimed.

(10) Mr Midwinter considered whether the information and documents which had been received since his review on 14 December 2015 suggested that the position regarding the deduction claimed in 2012 was any different from that claimed in 2011. He concluded that the fundamental position was much the same, and concluded that the £1,965,000 deduction claimed in 2012 was not allowable and that the self-assessment was therefore insufficient.

(11) He replied by email to Ms Chadbourne that same day to say that he did want a discovery assessment issued. He later saved a note on that email exchange, which included that “the situation re 2012 is pretty much the same as for 2011”.

(12) On 2 November 2016 Ms Chadbourne entered assessment details for the period ended 31 December 2012 onto the COTAX system. COTAX automatically issued the notice of assessment the following day, on 3 November 2016.

(13) On 4 November 2016 Ms Chadbourne wrote to CIAISL informing them that an assessment was being issued for the period ended 31 December 2012. In that letter she referred to “my checks” and “I consider that...the assessment for the above period is therefore insufficient”. That letter reads as if it was Ms Chadbourne who had reached a conclusion that the self-assessment was insufficient.

172. On the basis of the above findings, I am satisfied that Mr Midwinter made a discovery within paragraph 41 that an assessment to tax was or had become insufficient, and that for the accounting period ended 31 December 2011 that discovery was made on 14 December 2015 and that for the accounting period ended 31 December 2012 that discovery was made on 1 November 2016. In this regard:

(1) Mr Midwinter acknowledged that he had a suspicion that no deduction was available for contributions by the time he requested additional information in September 2015, and I infer that such suspicion applied to both periods. At that time he had been briefed on how the corporate remuneration trust schemes were thought to work, including HMRC’s position on them, and had opened an enquiry into CIAISL’s position. However, suspicion falls short of reaching a conclusion that an amount which has been assessed is insufficient. It was not put to him that this suspicion amounted to a conclusion or a discovery, and I find that it was not.

(2) When he conducted his review on 14 December 2015 into the period ended 31 December 2011, he had about the same level of information for the subsequent period as well. Logically and efficiently, he could have considered the position for both years at the same time. It was put to him that if he had grounds to make a discovery and issue an assessment for the period ended 31 December 2011 in December 2015, he also had grounds to make a discovery and issue an assessment for the period ended 31 December 2012 at that time as well. Mr Midwinter’s response was that he wouldn’t have known that at that time as he had not reviewed the period ended 31 December 2012. He agreed that when he did review the position in November 2016 his perception had not changed, and added that he had received further information in relation to 2012 (but did not say

that the additional information had made any difference). Whilst this process appears objectively to be somewhat inefficient, I accept that each review involved an examination of information held for the relevant period, alongside other information that was considered to be potentially relevant, and that Mr Midwinter did not reach a conclusion that the amount assessed to tax in respect of the period ended 31 December 2012 was insufficient when he conducted his review in December 2015. That accounting period had quite simply not been the subject of his review at that time.

(3) That Mr Midwinter's review was prompted on both occasions (by the impending time limit and by Ms Chadbourne) does not mean that he had already reached a conclusion. His evidence was that he had not done so, and I accept that evidence.

(4) It is entirely possible that Ms Chadbourne also made a discovery for the year ended 31 December 2012 but I make no finding as to that on the evidence before me.

173. One of Mr Venables' challenges to the validity of the Discovery Assessments (and the only challenge that applied to both) was that the discoveries had become stale by the time the assessments were issued in December 2015 and November 2016.

174. On the basis of the facts as I have found them, there can be no question of the discoveries made by Mr Midwinter having become stale. Furthermore, following the decision of the Supreme Court in *Tooth*, it is clear that there is no doctrine of staleness.

175. I accept Mr Venables' submission that the ratio of the decision of the Court of Appeal in *Tooth* was that the officer must have newly discovered that an assessment to tax is insufficient, ie they accepted the taxpayers' submission that a discovery, or a new conclusion, can become stale if an assessment is not made within a reasonable period. It is also evident that the decision of the Supreme Court in *Tooth* that there is no place for the idea that a discovery which qualifies as such should cease to do so by the passage of time was obiter. The Supreme Court had decided the appeal in favour of the taxpayer on the basis that there was no deliberate inaccuracy.

176. Mr Ghosh acknowledged that statements by the Supreme Court in *Tooth* were obiter, but drew my attention to the decision of the Court of Appeal in *Barton and Booth v The Queen* [2020] EWCA Crim 575 where the Court of Appeal said at [104] that where the Supreme Court itself directs that an otherwise binding decision of the Court of Appeal should no longer be followed and proposes an alternative test, the Court of Appeal is bound to follow what amounts to a direction from the Supreme Court even though it is strictly obiter. In *Tooth* the Supreme Court had heard lengthy submissions on staleness and recognised that the submissions made on behalf of HMRC around staleness had wider significance than the present case (at [65]).

177. I have no hesitation in following the reasoning (albeit obiter) of the Supreme Court in *Tooth*.

178. As regards the December 2012 Discovery Assessment, Mr Venables challenged the process by which this had been issued, submitting that paragraph 41(1) requires that the person who makes the discovery must be the person issuing the assessment and that the various statutory provisions dealing with delegation of tasks to other officers do not assist and cannot override the specific requirements of paragraph 41. He submitted that for a valid discovery, the taxpayer must be told who made the discovery and raised the assessment to the best of their opinion. I do not accept those submissions:

(1) It is well established that paragraph 41(1) is concerned with the state of mind and knowledge of the particular officer who claims to have made a relevant discovery (by way of contrast with paragraph 44 which considers a hypothetical officer).

(2) Paragraph 41(1) empowers an officer who makes a discovery to make an assessment in the amount which ought in their opinion to be charged to make good the loss of tax. Ms Chadbourne informed Mr Midwinter of the quantum of the contributions for which deductions had been claimed. Mr Midwinter then reached the conclusion that no deduction should be available, and confirmed by email to Ms Chadbourne that a discovery assessment should be issued and she entered the details on COTAX. This process was completed in accordance with s113(1B) TMA 1970, which provides that where an officer has, in accordance with paragraph 41, decided to make an assessment to tax, and has taken all other decisions needed for arriving at the amount of the assessment, they may entrust to some other officer responsibility for completing the assessing procedure, whether by means involving the use of a computer or otherwise, including responsibility for serving notice of the assessment on the person liable for tax.” The only decisions required to be taken were to disallow the deductions; the computation was performed by COTAX.

(3) I do not accept Mr Venables’ submission that for a valid discovery the taxpayer must be told who made the discovery and raised the assessment to the best of their opinion. No such requirement is set out in paragraph 41 or in the assessing procedure in paragraph 47. I do accept that where the validity of a discovery assessment is challenged, as HMRC bear the burden of proof they will generally be expected, when meeting that burden, to provide this information; but that need not form part of the assessment procedure. The fact that the December 2012 Discovery Assessment and the letter which accompanied it does not refer to Mr Midwinter having made the discovery does not invalidate that assessment.

179. For there to be a valid discovery, HMRC must establish that the conditions in either paragraph 43 or paragraph 44 were satisfied. Mr Midwinter had relied on paragraph 44, and Mr Ghosh submitted that in addition I should find that paragraph 43 was satisfied. I am mindful that Mr Venables did not challenge HMRC’s position that paragraph 44 was satisfied, and did not make any submissions on paragraph 43.

180. Paragraph 44(1) requires that at the time when HMRC ceased to be entitled to give a notice of enquiry into the return, they could not reasonably have been expected, on the basis of the information made available to them before that time, to be aware of the insufficiency. On the basis of the evidence before me, I agree that this requirement was satisfied. It is clear that the question posed by this condition is whether a hypothetical officer, on an objective analysis, is made aware of an actual insufficiency in the assessment by the matters disclosed in the information made available. The information available, namely the returns of CIAISL for each relevant accounting period, would not permit such an awareness in respect of either accounting period.

181. As to whether the insufficiency was brought about carelessly by CIAISL for the purposes of paragraph 43, I do not need to reach a conclusion on that matter, but if I were required to decide the point I would be minded to conclude that HMRC had satisfied their burden of proof. Ms Callaby had not understood the documentation which CIAISL was entering into, the reasons for entering into the transactions set out in CIAISL’s resolutions make no reference to what are now said to be the purposes of the arrangement and, against this background, there was insufficient explanation of the advice taken and relied upon by CIAISL (in circumstances where reliance on advice, even on bad advice, might otherwise assist with demonstrating that CIAISL had not been careless notwithstanding its lack of understanding of the transactions it was entering into).

182. I am satisfied that the Discovery Assessments are valid.

Income tax – redirected earnings

183. Section 9(2) ITEPA 2003 provides that the “net taxable earnings from an employment” in the year is the amount of employment income which is charged to tax under that Part for the particular tax year.

184. Section 62 then explains what is meant by “earnings” and at s62(2) states that earnings, in relation to an employment, means:

“(a) any salary, wages or fee,

(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

(c) anything else that constitutes an emolument of the employment.”

185. HMRC’s position was that contributions to the Trust were “redirected earnings”, ie amounts which represent earnings due to employees/directors but which instead of being paid directly to the employees as wages are being paid to someone else with the employee’s consent or at the employee’s behest. Mr Ghosh accepted that the principle of redirected earnings can only apply if and to the extent that the amounts paid by CIAISL to the Trust were a reward for work done. However, it was HMRC’s case that this was the position.

186. Mr Venables denied that any of the amounts were redirected earnings of any of the Shareholders. He accepted that where a person is entitled to earnings but directs that they are paid to a third party, they still remain his earnings when paid to that third party. By contrast, when a payment is made to a third party which the employee was not entitled to require to be paid to him, the payment is not a payment of earnings. On the facts, he submitted that the payments made to the Trust were not due to the employees; there is a difference between earnings due and earnings merely paid; furthermore, the employees are Excluded Persons under the Trust and thus prohibited from benefitting from the contributions.

187. I consider first some of the authorities to which I was referred, before then considering the facts before me.

188. Mr Venables took me to the decision of the Supreme Court in *Forde & McHugh Ltd v HMRC* [2014] UKSC 14 in some detail. Lord Hodge delivered the judgement with which the remainder of their Lordships agreed. That appeal concerned NICs (rather than income tax) and the treatment of payments to an unapproved retirement benefits scheme. Mr McHugh became a member of the scheme and the company made a contribution to the scheme for his benefit. When the contributions were made Mr McHugh was 54 years old and did not have a vested interest in the assets of the scheme under the terms thereof, as his retirement age was specified to be 60.

189. In *Forde & McHugh* it was recorded that it was agreed between the parties (at [4] of the decision) that the payment was for Mr McHugh’s benefit; the question was whether the payment was “earnings” for the purposes of SSCBA 1992. Earnings was defined by s3 of that Act as including any remuneration or profit derived from an employment (ie it does not use the word emoluments). The Supreme Court held it was not.

190. Lord Hodge described HMRC’s position as “remarkable” (at [15]) and said that counsel for HMRC had to submit that earnings are paid to an earner both when assets are transferred to a pension scheme and also when payments are made from the trust fund. On this approach double-counting was avoided only by the regulations which disregard payments by way of

pension and payments by way of relevant benefits pursuant to an unapproved retirement benefits scheme. Lord Hodge gave three reasons why HMRC's position was wrong:

(1) The principal reason is that the ordinary man would consider it to be counter-intuitive that a person would earn remuneration both when his employer paid money into a trust to create a fund for his benefit and again when at a later date that trust fund was paid out to him. He was reluctant to attribute such a view to Parliament absent clear words or necessary implication, of which there are neither. He would characterise the payment from the trust or escrow fund as deferred earnings. It follows that the payment into the trust or escrow fund would not be earnings (at [16]).

(2) It is only by looking exclusively to what was paid and ignoring what the earner received that HMRC's view can be sustained, but such an interpretation denudes the word "earnings" of any meaning. The use of the word "earnings" points the reader towards what the employee obtains from his employment (at [17]).

(3) The subordinate reason relates to the method of computation – HMRC's approach fails to take into account the existence of the contingency (at [18]).

191. Mr Venables noted that this case had involved strong facts for HMRC (as the contributions were made for Mr McHugh's benefit and related to his services). He submitted that the subsequent decision of the Supreme Court in *Rangers* had to be considered in the light of this decision (drawing attention to the decision in *Rangers* being just three years later, and Lord Hodge also giving the leading judgement).

192. Mr Ghosh's submissions (on both *Forde & McHugh* and *Rangers*) acknowledged that it will be a question of construction of the facts in each case, but pointed out that in *Forde & McHugh* no argument had been advanced as to whether a payment into a pension or bonus fund might properly be analysed as a payment out of the earner's salary as in *Smyth v Stretton* (1904) 5 TC 36, a point which was made by Lord Hodge at [20].

193. In *Rangers* Lord Hodge set out the question before the Supreme Court at [1] as "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". The sums paid to the trust were agreed to be part of each employee's remuneration.

194. Lord Hodge's consideration of the facts included:

(1) A company which wished to benefit one of its employees made a cash payment to the trust in respect of that employee and recommended that the trustee re-settle that sum on to a sub-trust (at [19]).

(2) The negotiations with footballers and their agents involved them being told that they could obtain a loan of the sum paid to the sub-trust (at [21]). Their terms of engagement were recorded in a contract of employment and a side letter. It was clear from those documents that the sums paid to the trust and the sub-trusts represented remuneration for employment (at [23]).

195. Having set out the question at [1], Lord Hodge then described the central issue in the appeal as "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" (at [36]). He concluded that there is no such requirement. His reasons included that the primary legislation taxes the employee whose work gives rise to the remuneration, not the recipient of the earnings (at [37]) and that the concept of emoluments is

not generally restricted by requiring payment to a specific recipient (at [38]). He could see nothing in the wider purpose of the legislation, which taxes remuneration from employment, which excludes from the tax charge or the PAYE regime remuneration which the employee is entitled to have paid to a third party (at [39]). From this, he set out the general rules as being:

“41. ... 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.”

196. Lord Hodge referred to *Forde & McHugh* and said that in that case (and others on which the taxpayer had relied), the court was not concerned with the identity of the recipient of the benefit; the focus was on the source or nature of the right which the employee received (at [49]).

197. It is clear from the authorities that the contributions paid by CIAISL to the Trust (or to the Baxendale Walker client account) are not prevented from being taxable as earnings by the fact that they were not paid directly to the Shareholders themselves. That was not disputed between the parties. The question is whether on the facts the amounts paid by CIAISL are earnings derived from employment, ie a reward for their work as employees.

198. Mr Ghosh submitted that the contributions were all such a reward, as nothing else explains why this money was received by the Shareholders to spend on private assets. Mr Ghosh accepted that this argument posed a higher threshold for HMRC than the connection which was required by Part 7A ITEPA 2003; but submitted nevertheless that it was met (albeit that the burden of proof remains on CIAISL). Mr Ghosh referred to the Shareholders having reduced their salaries following advice and that they had not previously taken dividends from LEM when explaining his submission that the contributions must therefore be reward for work done rather than connected to their indirect shareholdings.

199. I make findings on some of these matters in the context of Part 7A below. Whilst my conclusions on the facts are that there is a connection or link between the contributions to the Trust and the Shareholders' employment by CIAISL (for the reasons explained below), I do not accept HMRC's submission that the contributions are earnings on general principles.

200. As acknowledged by Mr Ghosh, earnings includes a connotation of a reward for services. In *Forde & McHugh* the Supreme Court focused on what was received by the employee in the context of a contingent rather than a vested interest in the fund. Here, all of the amounts paid to the Shareholders were paid to them under the Finance Agreements, pursuant to which they have an obligation to repay those amounts to MEL. Whilst the Shareholders control MEL, and they have not repaid those sums which are already due, HMRC have not argued that the Finance Agreements do not have legal effect in accordance with their terms, and accordingly I find that the Shareholders do have an obligation to repay the amounts lent to them. I am not satisfied that receiving such a loan is a reward or benefit, even though I have found that there is a connection with their employment. For this reason, I agree with Mr Venables that the contributions are not earnings on general principles.

Income tax – Part 7A

201. The charge under Part 7A ITEPA 2003 arises under s554Z2, which provides that if Chapter 2 applies by reason of a relevant step, the value of the relevant step counts as employment income of A (as defined in s554A(1)) in respect of A's employment with B (also as defined in s554A(1)).

202. The conditions for Chapter 2 to apply are set out in s554A(1):

“(1) Chapter 2 applies if—

(a) a person (“A”) is an employee, or a former or prospective employee, of another person (“B”),

(b) there is an arrangement (“the relevant arrangement”) to which A is a party or which otherwise (wholly or partly) covers or relates to A,

(c) it is reasonable to suppose that, in essence—

(i) the relevant arrangement, or

(ii) the relevant arrangement so far as it covers or relates to A,

is (wholly or partly) a means of providing, or is otherwise concerned (wholly or partly) with the provision of, rewards or recognition or loans in connection with A's employment, or former or prospective employment, with B,

(d) a relevant step is taken by a relevant third person, and

(e) it is reasonable to suppose that, in essence—

(i) the relevant step is taken (wholly or partly) in pursuance of the relevant arrangement, or

(ii) there is some other connection (direct or indirect) between the relevant step and the relevant arrangement.”

203. The submissions of Mr Ghosh, Mr Herbert and Mr Venables are considered more fully as I address each of the required conditions, but at the outset I note the key points as follows.

204. For HMRC it was submitted that all of these conditions were satisfied:

(1) The relevant arrangement does not need to be legally enforceable, and can encompass all of the steps which in fact took place and which were expected to take place, ie the contributions and the loans. The Shareholders were party to those arrangements (as they were party to the Finance Agreements) and the arrangements related to them.

(2) It is reasonable to suppose that this arrangement was a means of providing loans in connection with the Shareholders' employment with CIAISL.

(3) It is irrelevant whether any of the actions involved were in breach of trust, and in any event there was no such breach.

205. Mr Venables position was as follows:

(1) He acknowledged that the Shareholders are employees of CIAISL thus condition (a) applies.

(2) Whilst he submitted that the Shareholders were not party to an arrangement, he recognised that when the arrangement was construed broadly (and included both the making of contributions to the Trust and the loans from MEL), it was plausible to conclude that the arrangement “relates to” the Shareholders. He did not concede this.

(3) He primarily relied on condition (c) not being satisfied, and there being no relevant step within (d).

(4) Whilst the arrangement includes the making of loans to the Shareholders, it is not enough that they happen to be employees. The loans must be made in connection with their employment. Here, the loans were made to them because they are shareholders.

They are loans of what would otherwise be assets of the company available for distribution.

(5) There was no relevant step as any actions taken by third parties were in breach of trust.

(6) In the alternative, the value of any relevant step is nil, as the Shareholders cannot have acquired beneficial ownership of the monies transferred to them, either because they held as (constructive) trustee for CIAISL or because they held as bare trustee for the Trustee.

Section 554A(1)(a)

206. It was common ground that condition (a) is met because the Shareholders (“A” for this purpose) are employees of CIAISL (“B”).

Section 554A(1)(b)

207. Condition (b) applies if there is an arrangement to which A is a party or which otherwise “covers or relates to” A. Section 554Z(3) provides that “arrangement” includes an agreement, scheme, settlement, transaction, trust or understanding (whether or not it is legally enforceable). This is thus widely drawn.

208. On the basis of the facts as I have found them, there is an arrangement which involved CIAISL making contributions to the Trust, which amounts were then transferred to MEL and lent to the Shareholders. The Shareholders were party to that arrangement (as borrowers under the Finance Agreements). I also conclude that the arrangement “covers or relates to” the Shareholders for this purpose as the contributions to the Trust were to be provided to them by way of the loans.

Section 554A(1)(c)

209. Condition (c) will be met if it is reasonable to suppose that, in essence, the relevant arrangement, or the relevant arrangement so far as it covers or relates to the Shareholders, was:

- (1) (wholly or partly) a means of providing loans; and
- (2) those loans were provided “in connection with” their employment with CIAISL.

210. On the basis of the facts as I have found them, in particular that the steps were pre-ordained in that it was known by CIAISL at the time it resolved to make the contributions that the funds would be transferred to MEL and MEL would make loans to the Shareholders, I am satisfied that, with the exception of the Purported Contribution, it is reasonable to suppose that the relevant arrangement was a means of providing loans to the Shareholders.

211. I have concluded that the Purported Contribution was not made to the Trust, but was borrowed from and repaid to JHL. Whilst MEL did enter into Finance Agreements with the Shareholders, such loans were not in fact made. In consequence, to the extent that these amounts are included in the Regulation 80 Determinations (and the Section 8 Decisions), CIAISL’s appeal is allowed. (Neither party offered detailed submissions on quantum and it was not clear to me whether or not the £350,000 or the loans purported to be made out of this contribution were included in the Determinations or Decisions. As this decision is on the principle of liability only, it is appropriate for this to be resolved between the parties, applying to the Tribunal if they are unable to reach agreement.)

212. The main issue to be addressed in the context of this condition is whether the loans were provided “in connection with” their employment with CIAISL.

213. Mr Venables submitted that the loans to the Shareholders were made in connection with their indirect shareholdings in CIAISL. At worst, he submitted, the Trust arrangement is a profit extraction scheme for the benefit of shareholders in their capacity as shareholders; not a disguised remuneration scheme for the benefit of directors and employees.

214. Mr Ghosh referred to *Barclays Bank plc v HMRC* [2007] EWCA Civ 442 at [18] to [26] and submitted that there was a clear and visible connection between the loans and the Shareholders' employment.

215. I take the following from the decision of the Court of Appeal in *Barclays*, noting that different statutory provisions were in issue in that case:

(1) The phrase "*in connection with*" needs to be construed by reference to other parts of the provision in which it appears and the surrounding provisions of the legislative scheme (at [18] and [19]).

(2) A connection can be both direct or indirect, and this is likely to be the case whenever the phrase "*in connection with*" is used (at [19] to [20]).

(3) Something can be in connection with more than one other thing, in which case it is necessary to see if the connections can co-exist or whether one will actually exclude the other (at [20] and [25]).

(4) Once a connection has been established, it is unlikely to be displaced by other factors or connections (at [22] to [23]).

(5) A payment made to every member of a class of people is likely to be made in connection with that class (at [22] and [26]).

216. All three Shareholders were employed by CIAISL at all relevant times, and Mr Blundell and Ms Callaby were also directors of CIAISL. Equally, the Shareholders were the shareholders of LEM, which was the sole shareholder of CIAISL, and they were thus indirectly the sole shareholders of CIAISL. There are thus potentially competing claims for connection. I do, however, agree with the principle set out in *Barclays* that something, ie the loans in this case, can be connected with more than one thing - the connection required by s554A(1)(c) does not need to be an exclusive connection.

217. For the purpose of assessing whether the loans are made in connection with the Shareholders' employment I was referred to various evidence, albeit that some of those matters were acknowledged to be neutral. I make the following findings:

(1) Shareholdings – The Shareholders have almost identical shareholdings in LEM, broadly one-third each. They had not previously taken dividends from LEM.

(2) Working hours – The only evidence as to comparative level of work was provided orally by Ms Callaby, who said that the Shareholders worked pretty equal hours at the relevant time. This was not challenged by HMRC and I accept that evidence.

(3) Form of Request Letters sent to BTIL. Mr Ghosh submitted that it was CIAISL that asked for the money to be transferred to MEL, in the knowledge that the money would then be lent to the Shareholders. In his submission, the Shareholders could only have been signing these Request Letters as employees of CIAISL, as that was the only direct relationship they had with CIAISL. Addressing this:

(a) I have already accepted that when the Shareholders sent the Request Letters to BTIL it was known that MEL would lend the money to the Shareholders. (I

have found that CIAISL knew this when it resolved to make the contributions, which was the prior step.)

(b) The question relates to the basis on which the Request Letters were sent. There were two forms of letter: both listed the three Shareholders in the letterhead (ie they were not printed on CIAISL letterhead). However, the initial letters (prior to 29 November 2011) were silent as to the capacity in which the Shareholders were writing to the Trustees. The Request Letters sent by the Shareholders from 29 November 2011 onwards began “As the founder of the Trust...”. Ms Callaby confirmed in cross-examination that there was nothing different about these later transactions; she also agreed that the request was coming from CIAISL, and that they had signed the Request Letters as employees of CIAISL. Mr Ghosh submitted that as the Founder was CIAISL, these letters were from CIAISL rather than the three Shareholders personally and the only connection which they had with CIAISL was as employees. I agree that the Request Letters were, in substance, from CIAISL (as the person who had contributed the money to the Trust) requesting (whilst knowing that this request would be actioned) that the money be transferred to MEL.

(4) Use of money – The Shareholders could use the money borrowed as they wished, and this included acquiring assets for their private use.

(5) Salary reductions - After CIAISL started making contributions to the Trust, the salaries of the Shareholders were reduced. In the tax year ending 5 April 2020 the Shareholders had each been paid £63,600 by CIAISL (and in the previous three years this had been between £32,000 and £69,000). However, in the tax year ending 5 April 2011 they were paid around £7,690, then £7,500 in the years ending 5 April 2012 and 2013, £7,644 in the years ending 5 April 2014 and 2015. CIAISL generated substantial operating profits in these years (ie once the administrative expenses, which mainly comprised the contributions, are added back).

(6) Amount of loans – Initially MEL lent equal amounts to each of the Shareholders, either out of a single contribution or when two closely proximate contributions are viewed together. However, throughout 2013 the loans were not advanced equally. By the end of the periods under appeal, the disparity had reduced, with £3,268,883 being lent to both Ms Callaby and Mr Sheppard, but Mr Blundell had been lent £3,088,883.

218. Some of these facts are neutral when considering whether there was a connection with the Shareholders’ employment – notably the use of the money to acquire personal assets.

219. Furthermore, I agree that there is a connection between the making of the loans and their shareholdings in LEM, following the approach in *Barclays* that a payment made to every member of a class is likely to be made in connection with that class. However, this does not preclude the existence of a connection with employment as well.

220. Mr Ghosh placed significant weight on the drafting of the Request Letters, and the reference in the later versions to the Founder. I have agreed that the Request Letters were, in substance, from CIAISL. I do not consider that this provides a complete answer as to capacity, as it is plausible that the Shareholders were making their request as indirect shareholders of the company. Furthermore, the capacity in which the transfer was requested (or even directed or authorised) does not necessarily dictate the capacity in which the Shareholders were then advanced the loans.

221. However, against the background that LEM had not paid dividends to the Shareholders (such that there was no pattern of assets available for distribution being paid out by way of dividend), the Shareholders agreed to take significant salary reductions (taking account of the percentage cut for this purpose, acknowledging that the reduction is small compared to the amount of the loans) with no evidence of a reduction in their duties, loans were made of unequal amounts on different occasions notwithstanding that they are (almost) equal shareholders in LEM, I have concluded that the loans were provided to the Shareholders in connection with their employment with CIAISL. I am reinforced in this conclusion by Ms Callaby's own evidence that the only connection the Shareholders had to CIAISL was as employees, which she described as a "serious connection".

Section 554A(1)(d)

222. This condition requires that "a relevant step is taken by a relevant third person", and a "relevant step" is defined as a step within s554B, s554C or s554D.

223. HMRC's written submissions took the position that there were many such steps taken by relevant third persons (with such persons including BTIL, MEL and Baxendale Walker). In his oral submissions Mr Ghosh focused on the relevant step being a payment of money within s554C(1)(a). Accordingly, he submitted that the following were relevant steps taken by relevant third persons:

- (1) transfer of funds from the Baxendale Walker account to MEL; and
- (2) the loans by MEL to the Shareholders pursuant to the Finance Agreements.

224. Mr Ghosh submitted that it was irrelevant whether the action was taken in breach of trust, led to a resulting trust or the loan not being one the lender had power to make. An arrangement does not need to be legally enforceable and it follows from this that each relevant step does not need to be legally enforceable.

225. Mr Venables relied on the changes made to s554A(2) by Finance Act 2017 ("FA 2017") with effect for relevant steps taken on or after 6 April 2017, and submitted that the actions relied upon by HMRC were not relevant steps as they were not a payment for this purpose.

226. Section 554C(1)(a) provides that a person takes a step within this section if that person "pays a sum of money to a relevant person". A relevant person means A or a person chosen by A or within a class of persons chosen by A and includes, if a person is taking a step on A's behalf or otherwise at A's direction or request, any other person (s554C(2)). Section 554Z(7) provides that references to the payment of a sum of money include (in particular) references to the payment of a sum of money by way of a loan.

227. This language is straightforward. Absent any arguments around validity and trusts, I would have no doubt in concluding that the arrangements involved relevant steps being taken, being (at the very least) the transfer from Baxendale Walker's client account to MEL's account and the loan of that money by MEL to the Shareholders. They were visible steps, between relevant persons, and money moved enabling the Shareholders to have access thereto and to spend it as they wished. The question is therefore whether Mr Venables' submissions as to the actions involving breach of trust are made out on the law or on the facts. I set out below the changes made to the definition, the Trust Arguments and the requirement that there be a "payment" and consider these in the context of the relevant condition.

228. Section 554A(2) was amended by FA 2017 to read:

- "(2) In this Part "relevant step" means a step within section 554B, 554C or 554D, or paragraph 1 or 1A of Schedule 11 to F(No. 2)A 2017]4 (including

such a step where the taking of the step, or some aspect of the taking of the step, constitutes a breach of trust or is a constituent part of a breach of trust, and even if the step or aspect is void as a result of breach of trust)”

229. The Explanatory Notes to Finance (No 2) Bill 2017 set out that the changes made to the definition of “relevant step” were “to put beyond doubt that a relevant step still occurs where the underlying transaction is void or in breach of trust”. Mr Venables submitted that I should not rely on the Explanatory Notes when interpreting the provision as in force during the periods in issue - the changes introduced by FA 2017 did make a substantive difference to the application of Part 7A.

230. The Trust Arguments put forward by Mr Venables were in the alternative – Mr Venables acknowledged that the first submission was inconsistent with CIAISL’s position that it was entitled to a deduction for the contributions; the second did not have that inconsistency. Those arguments were:

(1) No contributions were effectively made to the Trust. The sums transferred to the Baxendale Walker client account were held on resulting trust for CIAISL, such that when they were transferred to MEL, MEL also held that money on trust for CIAISL. MEL had no power to lend CIAISL’s money to the Shareholders, and they also held on trust for CIAISL (Mr Herbert clarified that MEL and the Shareholders would, on this argument, hold on constructive trust by reason of their knowing receipt, but both parties agreed that nothing turned on this difference between resulting and constructive trusts). Mr Venables submitted that where the true analysis is that MEL is a legal owner (with only bare legal title) holding on trust for CIAISL, the Shareholders equally only acquired bare legal title, and this is not a payment of money. (Alternatively, and this is considered separately below, if it is a relevant step, the value of bare legal title is nil, such that the amount taxable under Part 7A is nil.)

(2) Even if the Trust was validly constituted, MEL had no power to make the loans – the MSB Documents were inadequate to confer such power. The result is that MEL held the money as bare trustee for BTIL in its capacity as Trustee of the Trust, and the loans made to the Shareholders were void such that the Shareholders also held the money on the trusts of the Trust. These actions do not involve a payment (or alternatively the value of the step is nil).

231. I have already allowed the appeal to the extent it relates to the Purported Contribution. The discussion below does not address that different fact pattern.

232. I accept Mr Herbert’s submissions that the remaining contributions were validly made by CIAISL to the Trust:

(1) CIAISL had resolved to make such contributions to the Trust.

(2) The instructions from CIAISL to Lloyds to make the transfer expressly referred to the Trust.

(3) CIAISL transferred the money to a bank account of Baxendale Walker (later Buckingham Wealth). That account was the “Baxendale Walker LLP Clients Premium Deposit Account”. The payment reference was “CIA Remuneration Trust Contribution”.

(4) The Trust Deeds conferred power on BTIL to delegate the power to hold assets to a nominee.

(5) The Request Letters signed by the Shareholders were in substance from CIAISL and asked BTIL to exercise its discretion to transfer the trust assets to MEL.

(6) From 12 May 2014 BTIL sent some Acknowledgement Letters. The terms of those letters authorised the transfer of funds in the Baxendale Walker client account to MEL.

(7) The payments were made from the Baxendale Walker client account to MEL in accordance with these requests.

233. Mr Venables submitted that:

(1) Each resolution was that a contribution “be paid to the said Trustees of the Scheme to be held on the trusts of the Scheme” yet all payments were made to Baxendale Walker (or Buckingham Wealth).

(2) The Baxendale Walker account was a client account, and the relevant client was CIAISL (not BTIL), such that although the payment is identified as being referable to the Trust it is not a payment to the Trustee.

(3) The fact that all of the parties acted under the misapprehension that the money had been transferred to BTIL, or that BTIL controlled the money once it had been received by Baxendale Walker, does not make it so.

234. I agree that a shared mistake does not change the underlying facts; but on balance the evidence supports the conclusion that not only did everyone consider that a contribution had been made to the Trustee as trustee of the Trust, but this was also the reality. Once CIAISL had instructed Lloyds to make the payment and such payment was made to the Baxendale Walker client account, CIAISL had done all that was necessary to give BTIL control over that money, and that transfer was binding upon CIAISL. BTIL did then exercise control over that money, directing how it was to be transferred.

235. Mr Venables’ alternative submission was that even if the Trust had been validly settled, MEL did not have authority to make the loans to the Shareholders. He submitted that:

(1) The MSB Documents were effectively a nullity and could not confer this power on MEL. MSB had not accepted appointment as Delegated Manager; and even if it had, MSB had no power to delegate to MEL the right to deal with the trust assets as if it were beneficial owner thereof (which is what the Fiduciary Services Agreement purports to do).

(2) Their existence cannot be ignored, such that their existence leaves no room to infer that there must have been another document conferring authority on MEL.

(3) An oral delegation is unlikely.

236. Whilst I agree that there is no valid documentary evidence of BTIL appointing MEL as its nominee, the evidence does support a conclusion that it had in fact done so. The Request Letters sent to BTIL asked that the trust assets be transferred to MEL for management, MEL entered into the Finance Agreements with the Shareholders expressly as nominee of BTIL, BTIL directed that the funds in the Baxendale Walker client account be transferred to MEL, and this was the pre-ordained series of steps which all parties knew would happen. I conclude that BTIL did agree to MEL taking possession of the trust assets.

237. Furthermore, the Trust Deeds permit the making of loans to the trust assets, even to Excluded Persons (such as the Shareholders). I am therefore satisfied that the loans were valid.

238. These conclusions mean that I am satisfied that there was no breach of trust in any event, and that there was a payment of a sum of money from the Baxendale Walker client account to MEL and from MEL to the Shareholders within s554C(1)(a).

239. Even if I had accepted Mr Venables' submissions that the Trust had not been validly constituted or that the loans by MEL to the Shareholders were invalid, I would still have concluded that there had been a "relevant step" for the purpose of s554A(1)(d). I agree with Mr Ghosh that the changes that were made by FA 2017 did not change the position. There is nothing in the legislation as in force prior to that time (ie that with which this appeal is concerned) that requires that the steps taken must be legally enforceable; and I do not consider this is required by the definition of a relevant step as a payment of a sum of money.

240. I was referred to the decision of the Court of Appeal in *Clark v HMRC* [2020] EWCA Civ 204 for guidance on the interpretation of the word "payment". Henderson LJ set out the issue as follows:

"1. This appeal involves two distinct questions of principle. The first concerns the meaning of the word "payment" in the definition of the term "unauthorised member payment" in section 160(2) of the Finance Act 2004 , and the consequential charges to income tax in respect of such payments contained in sections 208 to 210 . The question, in short, is whether the word "payment", construed in its statutory context, is apt to include a transfer of money (in the tax year 2009/10) from one registered pension scheme to another, in circumstances where it later transpired that the trusts of the recipient scheme were void for uncertainty. The agreed consequence of this is that the transfer was in law effective to transfer only bare legal title to the money, the beneficial interest in which was held on a resulting trust for the transferor."

241. Before addressing the detailed submissions in relation to the statutory language and the authorities, Henderson LJ observed that:

(1) It was deeply unrealistic to approach the question whether the transfer was a "payment" for the purposes of s160(2) on the basis that the failure of the trusts should, without more, prevent the subsection from applying. As a matter of practical reality, the money left the Suffolk Life SIPP and was credited by means of a CHAPS transfer to an LML Pension bank account with National Westminster Bank in Bristol. The money therefore passed from the direct control of Suffolk Life, and was then used to implement (with some variations) the subsequent stages of the scheme (at [39]).

(2) The natural reaction to the question whether there had been a payment of the £2.115 million by Suffolk Life to the LML Pension would surely be that of course there had. The money was intended to pass from the control and supervision of one registered pension scheme to another, the Suffolk Life SIPP was left apparently defunct, and legal title (at least) to the money had passed from Suffolk Life to the LML Pension. From a practical and common-sense perspective, why should it make any difference to this analysis if it later transpired that, unknown to everybody at the time, the transfer was in fact defective and gave rise to a resulting trust? In the context of the carefully designed scheme of the 2004 Act, one would not expect the meaning of an everyday word like "payment" to depend on legal niceties of that kind (at [40]).

(3) The charge to tax would be self-defeating in many cases where it is most needed were his argument on this appeal to prevail (at [41]).

242. Henderson LJ considered various authorities, including the decision of Arden J in *Hillsdown Holdings plc v IRC* [1999] STC 561. *Hillsdown* concerned a transfer between two exempt approved pension schemes which then led to an extraction of surplus from the transferee by the employing group (on which tax was paid). Several years after the transfer the Pension Ombudsman ordered the employer to repay this surplus to the fund. The company

then took action against HMRC to recover the tax which had been paid. The question before the High Court was whether the tax had been due to HMRC, which in turn depended on whether there had been a payment to the employer. HMRC's argument was that money had actually moved, the language was clear and unambiguous and there was no need to apply a purposive construction.

243. Arden J concluded that the monies had never in reality left the scheme. The charging provision was looking at the real transfer of an asset, and referred to a payment being "out of" the fund, which indicated that the payment must result in funds effectively leaving the fund, rather than a payment which does not have the effect of changing the ownership of the monies paid and is in fact reversed.

244. Henderson LJ set out in *Clark* that a "critical difference" between the two factual situations was that in *Hillsdown* the sums paid were authorised amounts intended to reduce a scheme surplus whereas *Clark* concerned unauthorised sums transferred to or in respect of a scheme member. The charge to tax on unauthorised member payments "would become self-defeating" if it did not apply to cases where the payment was made in breach of trust (at [62]).

245. As both Mr Ghosh and Mr Venables recognised, the context in which the word "payment" was used and the legislative scheme in question permeates the reasoning in *Clark*. I consider that the present situation is akin to that in *Clark*. The practical reality of the pre-ordained steps which took place is that the Shareholders have use of the funds which CIAISL had resolved to contribute to the Trust. I agree with Mr Ghosh that Part 7A is anti-avoidance legislation which seeks to prevent individuals from extracting cash tax-free in circumstances where the monies are advanced in connection with their employment. The legislation is clear that the arrangements with which these provisions are concerned does not need to be legally enforceable, and I consider that there is no basis for a conclusion that I should construe the word "payment" in such a way as to introduce this requirement.

Section 554A(1)(e)

246. Section 554A(1)(e) will be satisfied if it is reasonable to suppose that, in essence, the relevant step was taken (wholly or partly) in pursuance of the relevant arrangement.

247. On the basis of my findings in relation to pre-ordained steps and the purpose of making the contributions, this condition is satisfied.

Consequences of conditions being satisfied

248. Where the conditions in s554A(1) are satisfied, the value of any relevant steps taken on or after 9 December 2010 is taxable as employment income under s554Z2.

249. Mr Venables submitted that the transfer of bare legal title to money does not "involve" a sum of money for the purposes of s554Z3(1) – a relevant step involves such a sum only where it involves a transfer of beneficial ownership.

250. Mr Ghosh submitted that the value can only be the principal amount of the loans, irrespective of whether the loans are legally enforceable or were the product of steps that are legally unenforceable.

251. I accept Mr Ghosh's submissions. Section 554Z3(1) provides that if the relevant step involves a sum or money, its value is the amount of the sum; s554Z3(2) provides that "in any other case" the value is market value or cost (if higher). The relevant steps in this appeal involved a sum of money, including the payments from MEL to the Shareholders, and s554Z3(1) is clear and unambiguous.

252. I have therefore concluded that Chapter 2 of Part 7A applies to each of the loans made by MEL to the Shareholders, with the result that the value of those steps (being the amount lent) counts their employment income.

253. Whilst HMRC's written submissions state that the December 2010 contributions fund transactions which are covered by the PAYE/NIC aspects of the appeals, it is not clear to me whether the Regulation 80 Determinations have assessed any amounts in respect of the Purported Contribution. To the extent that such amounts are included, the appeal is allowed as I am not satisfied that this funded any loans to the Shareholders. In respect of all other loans made to the Shareholders, the appeals are dismissed.

NICs

254. It was common ground that, subject to one specific provision, the question as to whether CIAISL was liable to account for NICs would follow the income tax treatment.

255. The specific area where the parties disagreed was as to whether the contributions to the Trust fell within the exception in paragraph 5 of Schedule 3 SSCBA 1992.

256. Paragraph 1 of Part X of Schedule 3 provides that the payments listed in that Part are disregarded in the calculation of earnings. Paragraph 5 lists a payment of or in respect of a "gratuity or offering" which satisfies the condition in either 5(2) or 5(3) and is not within 5(4) or 5(5).

257. Regulation 22B SSC Regulations 2001 (which applies with effect from 6 December 2011) provides that amounts treated as employment income by Part 7A ITEPA 2003 are also treated as remuneration derived from an employed earner's employment for the purposes of s3.

258. Mr Venables submitted that the exception provided by paragraph 5 could apply to exempt the contributions, albeit that the reasoning differed according to whether I found against CIAISL on the basis that the contributions were redirected earnings (on *Rangers* principles) or taxable under Part 7A:

(1) If I were to conclude that the contributions were redirected earnings, the sums paid by CIAISL were voluntary payments, were within paragraph 5(3) (as CIAISL did not allocate the payments, directly or indirectly, to the relevant Shareholders), and neither 5(4) nor 5(5) was satisfied.

(2) If the loans were within Part 7A, the position is more complex, as a loan made on commercial terms cannot be a gratuity; but HMRC's position is that the loans were not commercial and that there is an element of gratuitous intent. On that basis, the loans can be within paragraph 5(1) and the condition in 5(3) is satisfied. He did however recognise that the loans would be likely to be within 5(4) and 5(5) in this scenario. He also submitted that Regulation 22B does not override this exception.

259. Mr Ghosh's primary position was that the amounts lent to the Shareholders were simply not gratuities or offerings, they were sums advanced either as reward for work done or in connection with their employment. It did not matter for this purpose that they were voluntary. Alternatively, neither of the conditions in 5(2) or 5(3) were satisfied – the amounts were paid indirectly by CIAISL, and as the steps were pre-ordained, the amounts were allocated, as CIAISL and MEL knew how the amounts were to be lent as regards each Shareholder.

260. Whilst I accept that CIAISL was not legally required to make these payments to the Shareholders, my finding that they were made in connection with their employment means that I have concerns as to whether it is realistic to regard the payments as gratuities or offerings. I

do not therefore rely on the opening requirements of paragraph 5(1) in reaching my conclusion. Instead, I agree with Mr Ghosh that neither of the conditions in 5(2) or 5(3) were satisfied:

(1) 5(2) - the payment by MEL was made indirectly by the secondary contributor, CIAISL. CIAISL had made a contribution to the Trust which transferred the funds to MEL. There was no evidence that the Trust or MEL had any other source of funds, and I find that they did not; and

(2) 5(3) – this requires that CIAISL does not allocate the payment, directly or indirectly, to the Shareholder. I consider that there was such an allocation – the arrangement involved a series of pre-ordained steps, and CIAISL knew when it made each contribution not just that the funds would be transferred to MEL and MEL would make loans, but the proportions in which those loans would be made. There were common directors of CIAISL, and no evidence of separate decision-making by MEL. This is illustrated by occasions when Finance Agreements were entered into on the same day on which CIAISL resolved to make a contribution (eg on 17 May 2012, 25 May 2012).

261. I have therefore concluded that the exception in paragraph 5 does not apply, and therefore the payments were part of the Shareholders' earnings and liable to NICs.

262. It is not therefore necessary for me to consider Regulation 22B. However, I would briefly note that as I have concluded that the loans made by MEL to the Shareholders are treated as employment income by Part 7A, I accept Mr Ghosh's submission that those loans made from and including 6 December 2011 are to be treated as remuneration derived from an employed earner's employment for the purposes of s3 SSCBA 1992 irrespective of my conclusions on paragraph 5. If I had concluded that the payments were within paragraph 5 and thus disregarded in the calculation of earnings, Regulation 22B would operate to override this by providing expressly that the payments are treated as remuneration derived from employment.

263. As with the Regulation 80 Determinations, it is not clear to me whether the Section 8 Decisions include amounts in respect of the Purported Contribution. To the extent that such amounts are included, the appeal is allowed. In respect of all other loans made to the Shareholders, the appeals are dismissed.

CONCLUSION

264. This decision is made in principle only, and not on quantum:

(1) CIAISL's appeals against the corporation tax assessments are dismissed; and

(2) as regards the appeals against the Regulation 80 Determinations and the Section 8 Decisions, the appeals are allowed in so far as they relate (if at all) to the £350,000 resolved to be contributed to the Trust in December 2010. In respect of all other loans made to the Shareholders, the appeals are dismissed.

265. In the event that the parties are not able to agree quantum of the assessments, determinations and decisions within 56 days of this decision becoming final, a further application shall be made to this Tribunal.

266. The question of the correct accounting treatment of the contributions to the Trust has been deferred to be heard, together with any relevant evidence, if necessary, at a subsequent hearing. On the basis of my decision, no such further hearing is necessary. If that ceases to be the case, the parties shall apply to the Tribunal for further directions.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

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

**JEANETTE ZAMAN
TRIBUNAL JUDGE**

Release date: 04 MAY 2022

SCHEDULE

Dates	Company Resolutions	Bank Statements of CIAISL and MEL	Fees	Request Letters	Loans agreed between MEL and the Shareholders	Loan from Shareholders to CIAISL or MEL	Bank Statements Payments from MEL to Shareholders
06/12/2010	£250,000						
13/12/2010		£250,000 from CIAISL to BW					
16/12/2010	£350,000	£350,000 from CIAISL to MEL		£221,650	£116,666.66 to EB £116,666.66 to LC £116,666.66 to MS		
17/12/2010		£221,650 from BW to MEL	£28,350		£73,883.33 to EB £73,883.33 to LC £73,883.33 to MS		£73,863.33 to EB £73,863.33 to LC £73,863.33 to MS
20/12/2010						£73,863.33 from EB to CIAISL £73,863.33 from LC to CIAISL £73,863.33 from MS to CIAISL	
APE 30/12/10	£600,000		£49,150 + £28,350 out of the Trust contributions	£221,650	£571,650	£221,650	
13/05/2011	£510,000						

Dates	Company Resolutions	Bank Statements of CIAISL and MEL	Fees	Request Letters	Loans agreed between MEL and the Shareholders	Loan from Shareholders to CIAISL or MEL	Bank Statements Payments from MEL to Shareholders
19/05/2011		£170,000 from CIAISL to BW					
23/05/2011		£170,000 from BW to MEL			£170,000 to EB £170,000 to LC £170,000 to MS		
25/05/2011							£170,000 to LC
01/06/2011		£170,000 from CIAISL to BW					
03/06/2011		£170,000 from BW to MEL					
08/06/2011							£170,000 to EB
21/06/2011		£170,000 from CIAISL to BW					
23/06/2011		£170,000 from BW to MEL					£169,500 to MS
25/08/2011						£1200 per year from each Shareholder to MEL	

Dates	Company Resolutions	Bank Statements of CIAISL and MEL	Fees	Request Letters	Loans agreed between MEL and the Shareholders	Loan from Shareholders to CIAISL or MEL	Bank Statements Payments from MEL to Shareholders
29/11/2011	£200,000	£200,000 from CIAISL to BW		£200,000			
02/12/2011		£200,000 from BW to MEL					
08/12/2011	£200,000	£200,000 from CIAISL to BW		£200,000			
13/12/2011		£200,000 from BW to MEL			£133,333 to EB £133,333 to LC £133,333 to MS		£133,333 to EB £133,333 to LC
14/12/2011							£133,333 to MS
APE 31/12/11	£1,660,000		£166,000	£1,150,000	£1,660,000	£1200 per year from each Shareholder to MEL Although this year, because it started in September as a Standing Order of £100 it is £400 each TOTAL £1,200	
17/05/2012	£255,000			£255,000	£255,000 to MS		

Dates	Company Resolutions	Bank Statements of CIAISL and MEL	Fees	Request Letters	Loans agreed between MEL and the Shareholders	Loan from Shareholders to CIAISL or MEL	Bank Statements Payments from MEL to Shareholders
21/05/2012		£255,000 from CIAISL to BW £255,000 from BW to MEL					
23/05/2012							£255,000 to MS
24/05/2012	£255,000	£255,000 from CIAISL to BW		£255,000	£255,000 to LC		
25/05/2012		£255,000 from BW to MEL					
28/05/2012							£255,000 to LC
30/05/2012	£255,000	£255,000 from CIAISL to BW		£255,000	£255,000 to EB		
07/06/2012		£225,000 from BW to MEL £30,000 from BW to MEL					
08/06/2012							£255,000 to EB
24/09/2012	£375,000	£375,000 from CIAISL to BW		£375,000			

Dates	Company Resolutions	Bank Statements of CIAISL and MEL	Fees	Request Letters	Loans agreed between MEL and the Shareholders	Loan from Shareholders to CIAISL or MEL	Bank Statements Payments from MEL to Shareholders
26/09/2012		£375,000 from BW to MEL					
27/09/2012					£250,000 to LC		£250,000 to LC
02/10/2012	£375,000	£375,000 from CIAISL to BW		£375,000, BTIL replied			
04/10/2012					£250,000 to EB £250,000 to MS		
05/10/2012		£375,000 from BW to MEL					£250,000 to MS £250,000 to EB
05/12/2012	£450,000			£450,000	£100,000 to EB £100,000 to LC £250,000 to MS		
06/12/2012		£450,000 from CIAISL to BW					
Not specified		£450,000 from BW to MEL					£100,000 to EB £100,000 to LC £250,000 to MS
APE 31/12/12	£1,965,000		£196,500	£1,965,000	£1,965,000	£1200 per year from each Shareholder to MEL TOTAL £3,600	

Dates	Company Resolutions	Bank Statements of CIAISL and MEL	Fees	Request Letters	Loans agreed between MEL and the Shareholders	Loan from Shareholders to CIAISL or MEL	Bank Statements Payments from MEL to Shareholders
27/08/2013	£400,000	£200,000 from CIAISL to BW £200,000 from CIAISL to BW		£400,000, BTIL replied			
29/08/2013		£400,000 from BW to MEL			£140,000 to EB £280,000 to LC		£140,000 to EB £280,000 to LC
14/11/2013	£500,000						
15/11/2013		£250,000 from CIAISL to BW £250,000 from CIAISL to BW £500,000 from BW to MEL		£500,000			
18/11/2013					£430,000 to LC		£300,000 to LC £130,000 to LC
20/11/2013	£500,000	£250,000 from CIAISL to BW £250,000 from CIAISL to BW £500,000 from BW to MEL					
21/11/2013				£500,000	£430,000 to EB £140,000 to MS		£430,000 to EB £140,000 to MS

Dates	Company Resolutions	Bank Statements of CIAISL and MEL	Fees	Request Letters	Loans agreed between MEL and the Shareholders	Loan from Shareholders to CIAISL or MEL	Bank Statements Payments from MEL to Shareholders
09/12/2013	£240,000						
10/12/2013		£240,000 from CIAISL to BW					
11/12/2013		£240,000 from BW to MEL		£240,000			
12/12/2013					£80,000 to EB £80,000 to LC £80,000 to MS		£80,000 to EB £80,000 to LC £80,000 to MS
APE 31/12/13	£2,160,000		£218,501	£2,160,000	£2,160,000	£1200 per year from each Shareholder to MEL TOTAL £3,600	
09/05/2014	£375,000	£300,000 from CIAISL to BW £75,000 from CIAISL to BW					
12/05/2014				£375,000, BTIL replied			
13/05/2014					£250,000 to EB		

Dates	Company Resolutions	Bank Statements of CIAISL and MEL	Fees	Request Letters	Loans agreed between MEL and the Shareholders	Loan from Shareholders to CIAISL or MEL	Bank Statements Payments from MEL to Shareholders
15/05/2014	£375,000	£300,000 from CIAISL to BW £75,000 from CIAISL to BW					
16/05/2014				£375,000, BTIL replied			
19/05/2014					£250,000 to LC		
21/05/2014					£250,000 to MS		
04/08/2014	£450,000						
05/08/2014				£450,000			
06/08/2014		£300,000 from CIAISL to Buckingham £150,000 from CIAISL to Buckingham					
07/08/2014					£300,000 to EB		

Dates	Company Resolutions	Bank Statements of CIAISL and MEL	Fees	Request Letters	Loans agreed between MEL and the Shareholders	Loan from Shareholders to CIAISL or MEL	Bank Statements Payments from MEL to Shareholders
18/08/2014	£450,000	£300,000 from CIAISL to Buckingham £150,000 from CIAISL to Buckingham					
19/08/2014				£450,000			
20/08/2014					£300,000 to LC £300,000 to MS		
09/10/2014	£870,000						
10/10/2014		£300,000 from CIAISL to Buckingham £300,000 from CIAISL to Buckingham £270,000 from CIAISL to Buckingham		£870,000, BTIL replied			
14/10/2014					£290,000 to EB £290,000 to LC £290,000 to MS		

Dates	Company Resolutions	Bank Statements of CIAISL and MEL	Fees	Request Letters	Loans agreed between MEL and the Shareholders	Loan from Shareholders to CIAISL or MEL	Bank Statements Payments from MEL to Shareholders
02/12/2014	£750,000	£300,000 from CIAISL to Buckingham £300,000 from CIAISL to Buckingham £150,000 from CIAISL to Buckingham					
03/12/2014				£750,000			
05/12/2014					£250,000 to EB £250,000 to LC £250,000 to MS		
APE 31/12/14	£3,270,000		£329,002	£3,270,000	£3,270,000	£1200 per year from each Shareholder to MEL TOTAL £3,600	
TOTAL	£9,655,000				£9,626,649: £3,088,883 to EB £3,268,883 to LC £3,268,883 to MS	£12,000+ £221,650	

