Neutral Citation: **[2023] UKUT 00107 (TCC)**

Case Number: UT/2021/000202

UPPER TRIBUNAL
(Tax and Chancery Chamber)

Royal Courts of Justice, Rolls Building,
Fetter Lane, London EC4A

CORPORATION TAX – chargeable gain on disposal of property – whether payment made by disposing company to controlling party was a deductible loan relationship debit – whether such payment was a distribution – whether FTT decided issues on basis of arguments which had not been pleaded – raising "new" issues in an FTT hearing – appeal dismissed

Heard on: 6 and 7 February 2023
Judgment date: 15 May 2023

Before

JUDGE THOMAS SCOTT
JUDGE ASHLEY GREENBANK

Between

SHINELOCK LIMITED

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Patrick Boch, Counsel

For the Respondents: Michael Ripley, Counsel, instructed by the General Counsel and Solicitor to His Majesty's Revenue and Customs

DECISION

INTRODUCTION

1. Shinelock Limited ("Shinelock" or the "Company") appeals against the decision of the First-tier Tribunal (Tax Chamber) (the "FTT") reported at [2021] UKFTT 320 (TC) (the "Decision").

2. The FTT dismissed Shinelock's appeal against amendments made by HMRC to Shinelock's self-assessment for the accounting period ended 31 March 2015. Those amendments increased the corporation tax payable for that period by £18,854. The corporation tax arose in respect of a chargeable gain which HMRC considered had arisen to Shinelock in respect of the disposal of a property.

3. The arguments between the parties changed considerably in the course of their dispute. By the time of the hearing before the FTT, the issues related to whether Shinelock was entitled to set off against the gain on the property disposal a payment which had been made by Shinelock. Shinelock argued that the payment was a deductible deficit under the loan relationships code. HMRC applied to strike out that argument on the basis that the FTT had no jurisdiction to consider it. HMRC argued in the alternative that the payment by Shinelock was not a loan relationship deficit because it was a distribution.

4. The FTT decided that:

   (1) The FTT did have jurisdiction to consider the loan relationship argument.

   (2) The payment by Shinelock was not a distribution.

   (3) Nevertheless, that payment was not deductible as a loan relationship deficit to offset the chargeable gain. As a consequence, Shinelock's appeal was dismissed.

5. Shinelock appeals against the decision at (3). By way of Respondents' Notice HMRC challenges the decisions at (1) and (2).

FACTUAL BACKGROUND

6. The following summary is taken from the Statement of Agreed Facts[1] annexed to the Decision (the "Statement of Agreed Facts"), together with additional findings of fact made by the FTT.

7. References below to paragraphs in the form [x] are to paragraphs of the Decision, unless stated otherwise.

8. Shinelock was a private limited company. Its business was "other letting and operating of own or leased real estate". As at 16 December 2008 its annual return showed that all but one of its shares were held by Mr Ayaz Ahmed ("Mr Ahmed"), who was also the sole director of the Company. He resigned as a director on 31 December 2014.

9. The property acquired and sold by Shinelock was 8 Trumpsgreen Road, Virginia Water (the "Property").

10. The Property was purchased at auction on 31 March 2009 for £725,000. Mr Ahmed was the successful bidder, and he paid the deposit from his own bank account, but Shinelock was registered as owner of the Property.

11. For the purposes of the transaction relating to the sale of the Property, Mr Ahmed was non-UK resident.

[1] Curiously, this is divided into "Agreed Facts" and "Disputed Facts".

12. Under a contract in the form of a verbal agreement (the "Contract"), Shinelock had to pay Mr Ahmed any "capital gain" on disposing of the Property in return for certain financing or guarantees provided by Mr Ahmed. The FTT noted that the verbal agreement was lacking in detail, particularly as to calculation of any capital gain. Also, although Shinelock's obligation was stated to be "in return for financing or guarantees" provided by Mr Ahmed, there were no direct guarantees provided by Mr Ahmed.

13. On 16 April 2009 Habib Bank Limited (the "Bank") (of which Mr Ahmed was the Chief Financial Officer) offered a loan facility of £950,000 to Shinelock (the "Loan Facility"), which was accepted by Shinelock on that date. The purpose of the facility was to enable Shinelock to purchase the Property and to redeem existing mortgages over two other properties owned by Helptravel, another company of which Mr Ahmed was a director. The loan was limited to 75% of the market value of the secured properties. The terms of the Loan Facility were identical to those which had been offered by the Bank to Mr Ahmed on 9 April 2009.

14. The total amount required to complete the purchase of the Property was £792,000.

15. Shinelock drew down £843,875 from the Loan Facility on 13 May 2009.

16. Mr Ahmed provided cash of approximately £280,000 to Shinelock as follows:

(1) £72,500 paid on exchange of contracts for the Property from the personal account of Mr Ahmed on the day of the auction.

(2) On 12 May 2009, a loan of £175,000 to purchase another property.

(3) On 2 June 2009, £30,000 for Stamp Duty Land Tax.

17. The FTT found that Mr Ahmed had lent £277,500 to Shinelock[2].

18. Over the period when Shinelock owned the Property, it was rented for commercial purposes, with a period of vacancy. The rental income was paid into a bank account specified by Mr Ahmed and not directly controlled by Shinelock[3]. In relation to all properties owned by companies under the control of Mr Ahmed, including Shinelock, Mr Ahmed decided how expenses, including loan expenses, and income would be distributed amongst various bank accounts.

19. Shinelock was the legal and beneficial owner of the Property throughout the relevant period.

20. The Property was sold on 4 December 2014 for £1,030,000.

21. The gain on sale of the Property before expenses and CGT indexation allowance was £305,000. Shinelock paid that amount to Mr Ahmed (the "Payment").

22. The chargeable gain attributable to Shinelock was £94,270, and the resultant corporation tax due was £18,854. Shinelock did not declare the chargeable gain on its tax return for the period ended 31 March 2015. Mr Ahmed reported it in his personal tax return for the year ended 5 April 2015, but no tax was due because he was a non-UK resident.

23. The Property was shown in Shinelock's accounts for the year ended 31 March 2010, as was the loan from the Bank. The accounts for that and other years contained an entry in relation to related party disclosures stating that all asset purchases were financed by or guaranteed by the Company's ultimate controlling party (Mr Ahmed) in exchange for the capital gains thereon.

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[2] [60]-[64].

[3] Statement of Agreed Facts paragraph 69.

24. The parties disagreed as to when and if the £277,500 found by the FTT to have been lent by Mr Ahmed to Shinelock was repaid. The FTT found that Shinelock repaid £118,000 to Mr Ahmed in November 2009[4], but that it was "not satisfied that the full amount of the £277,500 loan from Mr Ahmed to Shinelock had already been repaid prior to the sale of the Property and the making of the Payment": [69].

PROCEDURAL BACKGROUND

25. HMRC opened an enquiry into Shinelock's corporation tax return for the year ended 31 March 2015. The Company's argument was that the beneficial owner of the Property was in fact Mr Ahmed. HMRC did not accept that, and issued a closure notice to Shinelock in May 2018 assessing a chargeable gain of £94,270.

26. In June 2018 Shinelock raised a new argument, namely that the Contract created a loan relationship for tax purposes, and the Payment therefore gave rise to a loan relationship debit which could be used to offset the chargeable gain.

27. Shinelock accepted HMRC's offer to undertake a review of its conclusion. On 17 September 2018, HMRC set out in a letter its "view of the matter", and on 1 November 2018 HMRC sent a review conclusion letter which upheld the amendments in the closure notice.

28. Shinelock appealed to the FTT. Shinelock's grounds of appeal were that it was not taxable on the capital gain on the sale of the Property because either (1) an amount equal to the gain was a deductible cost (under the loan relationship regime or otherwise), or (2) Mr Ahmed was the beneficial owner of the Property so the gain was taxable only in his hands.

29. The parties entered ADR and that process concluded without resolution in June 2019.

30. Prior to the FTT hearing, Mr Boch (who also appeared for Shinelock before the FTT) had applied for a direction that HMRC not be permitted to rely on the loan relationship jurisdiction argument which he said they had raised at too late a stage. The FTT refused that application, but wished to hear further submissions from the parties. In the event, the hearing took place in January 2021 of the issues in the appeal other than jurisdiction, and the hearing was then adjourned to enable any submissions on jurisdiction to be made. The hearing resumed in July 2021 and the FTT subsequently issued the Decision, deciding all issues in the appeal.

ISSUES IN THE APPEAL

31. The issues in this appeal are as follows:

    (1) Did the FTT have jurisdiction to consider the argument that the Payment gave rise to a loan relationship debit? The FTT decided that it did have jurisdiction.

    (2) Was the Payment prevented from being a loan relationship debit because it was a distribution? The FTT decided that the Payment was not a distribution.

    (3) Did the Payment give rise to a loan relationship debit, and, if so, of what amount? The FTT decided that the Payment gave rise to no such debit.

32. In relation to each of these issues, one party or the other challenges a number of the points decided by the FTT in reaching its conclusions. Shinelock's grounds of appeal include that there were procedural irregularities, because, it is said, the FTT decided issues on the basis of particular points which had not been pleaded and/or in respect of which Shinelock was not given an opportunity to make submissions.

33. The fact that this is Shinelock's appeal would suggest that we should first determine issues (2) and (3). However, we begin by considering issue (1). That is because it is a

[4] See [67].

"knockout blow": if HMRC's challenge on that issue succeeded, it would follow from the absence of any jurisdiction in the FTT to hear Shinelock's appeal that its appeal to this Tribunal must fail.

(1) DID THE FTT HAVE JURISDICTION?

Legislation

34. HMRC submitted that the FTT did not have jurisdiction for two reasons. First, they said, Shinelock had not made the claim which was required to be made under the loan relationship rules to set any non-trading loan relationship deficit ("NTLRD") against the chargeable gain, so there was no claim which had been refused by HMRC and which could form the subject of an appeal. Second, said HMRC, Shinelock's grounds of appeal fell outside the ambit of the "matter in question" which the FTT had jurisdiction to determine.

35. For these reasons, submitted HMRC, the appeal must be struck out by the FTT for lack of jurisdiction.

36. The legislation set out below is that in force during the relevant period, and so far as material to the appeal.

Enquiries and closure notices

37. Paragraph 24 of Schedule 18 Finance Act 1998 ("Schedule 18") provides that HMRC may, if they give notice, enquire into a company's tax return within the time allowed. Such an enquiry is brought to an end by the issue of a closure notice.

38. Paragraph 32 of Schedule 18 provides:

> (1) An enquiry is completed when [HMRC] by notice (a "closure notice") inform the company that [they have] completed their enquiry and state [their] conclusions.
>
> The notice takes effect when it is issued.

39. Paragraph 34 sets out the requirements as to a closure notice:

> (1) This paragraph applies where a closure notice is given to a company by an officer.
>
> (2) The closure notice must—
>
> (a) state that, in the officer's opinion, no amendment is required of the return that was the subject of the enquiry, or
>
> (b) make the amendments of that return that are required—
>
> (i) to give effect to the conclusions stated in the notice, and
>
> (ii) in the case of a return for the wrong period, to make it a return appropriate to the designated period.
>
> …
>
> (3) An appeal may be brought against an amendment of a company's return under sub-paragraph (2) …

HMRC reviews and appeals to the FTT

40. The relevant provisions dealing with the review procedure and appeals to the Tribunal are set out in the Taxes Management Act 1970 ("TMA") as follows:

> **49B Appellant requires review by HMRC**
>
> (1) Subsections (2) and (3) apply if the appellant notifies HMRC that the appellant requires HMRC to review the matter in question.

(2) HMRC must, within the relevant period, notify the appellant of HMRC's view of the matter in question.

(3) HMRC must review the matter in question in accordance with section 49E.

(4) The appellant may not notify HMRC that the appellant requires HMRC to review the matter in question and HMRC shall not be required to conduct a review if—

(a) the appellant has already given a notification under this section in relation to the matter in question,

(b) HMRC have given a notification under section 49C in relation to the matter in question, or

(c) the appellant has notified the appeal to the tribunal under section 49D.

(5) In this section "relevant period" means—

(a) the period of 30 days beginning with the day on which HMRC receive the notification from the appellant, or

(b) such longer period as is reasonable.

49C HMRC offer review

(1) Subsections (2) to (6) apply if HMRC notify the appellant of an offer to review the matter in question.

(2) When HMRC notify the appellant of the offer, HMRC must also notify the appellant of HMRC's view of the matter in question.

(3) If, within the acceptance period, the appellant notifies HMRC of acceptance of the offer, HMRC must review the matter in question in accordance with section 49E.

(4) If the appellant does not give HMRC such a notification within the acceptance period, HMRC's view of the matter in question is to be treated as if it were contained in an agreement in writing under section 54(1) for the settlement of the matter.

(5) The appellant may not give notice under section 54(2) (desire to repudiate or resile from agreement) in a case where subsection (4) applies.

(6) Subsection (4) does not apply to the matter in question if, or to the extent that, the appellant notifies the appeal to the tribunal under section 49H.

(7) HMRC may not notify the appellant of an offer to review the matter in question (and, accordingly, HMRC shall not be required to conduct a review) if—

(a) HMRC have already given a notification under this section in relation to the matter in question,

(b) the appellant has given a notification under section 49B in relation to the matter in question, or

(c) the appellant has notified the appeal to the tribunal under section 49D.

(8) In this section "acceptance period" means the period of 30 days beginning with the date of the document by which HMRC notify the appellant of the offer to review the matter in question.

…

49E Nature of review etc

(1) This section applies if HMRC are required by section 49B or 49C to review the matter in question.

(2) The nature and extent of the review are to be such as appear appropriate to HMRC in the circumstances.

(3) For the purpose of subsection (2), HMRC must, in particular, have regard to steps taken before the beginning of the review—

(a) by HMRC in deciding the matter in question, and

(b) by any person in seeking to resolve disagreement about the matter in question.

(4) The review must take account of any representations made by the appellant at a stage which gives HMRC a reasonable opportunity to consider them.

(5) The review may conclude that HMRC's view of the matter in question is to be—

(a) upheld,

(b) varied, or

(c) cancelled.

(6) HMRC must notify the appellant of the conclusions of the review and their reasoning within—

(a) the period of 45 days beginning with the relevant day, or

(b) such other period as may be agreed.

(7) In subsection (6) "relevant day" means—

(a) in a case where the appellant required the review, the day when HMRC notified the appellant of HMRC's view of the matter in question,

(b) in a case where HMRC offered the review, the day when HMRC received notification of the appellant's acceptance of the offer.

(8) Where HMRC are required to undertake a review but do not give notice of the conclusions within the time period specified in subsection (6), the review is to be treated as having concluded that HMRC's view of the matter in question (see sections 49B(2) and 49C(2)) is upheld.

(9) If subsection (8) applies, HMRC must notify the appellant of the conclusion which the review is treated as having reached.

49F Effect of conclusions of review

(1) This section applies if HMRC give notice of the conclusions of a review (see section 49E(6) and (9)).

(2) The conclusions are to be treated as if they were an agreement in writing under section 54(1) for the settlement of the matter in question.

(3) The appellant may not give notice under section 54(2) (desire to repudiate or resile from agreement) in a case where subsection (2) applies.

(4) Subsection (2) does not apply to the matter in question if, or to the extent that, the appellant notifies the appeal to the tribunal under section 49G.

49G Notifying appeal to tribunal after review concluded

(1) This section applies if—

(a) HMRC have given notice of the conclusions of a review in accordance with section 49E, or

(b) the period specified in section 49E (6) has ended and HMRC have not given notice of the conclusions of the review.

(2) The appellant may notify the appeal to the tribunal within the post-review period.

(3) If the post-review period has ended, the appellant may notify the appeal to the tribunal only if the tribunal gives permission.

(4) If the appellant notifies the appeal to the tribunal, the tribunal is to determine the matter in question.

(5) In this section "post-review period" means—

(a) in a case falling within subsection (1)(a), the period of 30 days beginning with the date of the document in which HMRC give notice of the conclusions of the review in accordance with section 49E(6), or

(b) in a case falling within subsection (1)(b), the period that—

(i) begins with the day following the last day of the period specified in section 49E (6), and

(ii) ends 30 days after the date of the document in which HMRC give notice of the conclusions of the review in accordance with section 49E (9).

…

49I Interpretation of sections 49A to 49H

(1) In sections 49A to 49H—

(a) "matter in question" means the matter to which an appeal relates;

(b) a reference to a notification is a reference to a notification in writing.

50 Procedure

…

(6) If, on an appeal notified to the tribunal, the tribunal decides–

(a) that the appellant is overcharged by a self-assessment;

(b) that any amounts contained in a partnership statement are excessive; or

(c) that the appellant is overcharged by an assessment other than a self-assessment,

the assessment or amounts shall be reduced accordingly, but otherwise the assessment or statement shall stand good.

…

(7A) If, on an appeal notified to the tribunal, the tribunal decides that a claim or election which was the subject of a decision contained in a closure notice under section 28A of this Act should have been allowed or disallowed to an extent different from that specified in the notice, the claim or election shall be allowed or disallowed accordingly to the extent that the tribunal decides is appropriate, but otherwise the decision in the notice shall stand good.

(8) Where, on an appeal notified to the tribunal against an assessment (other than a self-assessment) which–

(a) assesses an amount which is chargeable to tax, and

(b) charges tax on the amount assessed, the tribunal decides as mentioned in subsection (6) or (7) above,

the tribunal may, unless the circumstances of the case otherwise require, reduce or, as the case may be, increase only the amount assessed; and where any appeal notified to the tribunal is so determined the tax charged by the assessment shall be taken to have been reduced or increased accordingly.

…

(10) Where an appeal is notified to the tribunal, the decision of the tribunal on the appeal is final and conclusive.

…

Loan relationships

41. We set out further provisions in the legislation below when we discuss the substantive analysis of the loan relationship issues in the appeal, but in relation to the jurisdiction issue we need only be concerned with the provisions dealing with claims. Those provisions are contained in the Corporation Tax Act 2009 ("CTA 2009"), as follows:

457 Basic rule for deficits: carry forward to accounting periods after deficit period

(1) The basic rule is that the deficit must be carried forward and set off against non-trading profits of the company for accounting periods after the deficit period in accordance with subsection (3) and section 458.

(2) That rule does not apply to so much of the deficit as–

(a) is surrendered as group relief under Part 5 of CTA 2010 [Corporation Tax Act 2010], or

(b) is the subject of a claim by the company under section 459 (claim to set off deficit against profits of deficit period or earlier periods).

(3) So much of the amount carried forward from the deficit period as is not the subject of a claim under section 458(1) must be set off against the nontrading profits of the company for the next accounting period after the deficit period.

(4) Those profits are reduced accordingly.

(5) In this Chapter "non-trading profits", in relation to a company, means so much of the company's profits as does not consist of trading income for the purposes of section 37 of CTA 2010 (deduction of trading losses from total profits of the same or an earlier period).

458 Claim to carry forward deficit to later accounting periods

(1) The company may make a claim for so much of the amount carried forward from the deficit period as is specified in the claim to be excepted from being set off against non-trading profits of the first accounting period after the deficit period ("the first later period").

(2) Any such claim must be made within the period of 2 years after the end of the first later period.

(3) Subsection (4) applies if any amount is carried forward from the deficit period under section 457(1) which–

(a) cannot be set off under section 457(3) against non-trading profits of the first later period, or

(b) is the subject of a claim under subsection (1).

(4) That amount is treated for the purposes of this Part as if it were–

(a) an amount of non-trading deficit from the company's loan relationships for the first later period, and

(b) an amount which falls to be carried forward and set against non-trading profits of later accounting periods under section 457(1).

(5) Accordingly, section 457 and this section apply as if the first later period were the deficit period.

459 Claim to set off deficit against profits of deficit period or earlier periods

(1) The company may make a claim for the whole or part of the deficit–

(a) to be set off against any profits of the company (of whatever description) for the deficit period, or

(b) to be carried back to be set off against profits for earlier accounting periods.

(2) No claim may be made under subsection (1) in respect of a deficit which is surrendered as group relief under Part 5 of CTA 2010.

(3) Subsection (1) does not apply if the company is a charity.

(4) For time limits and other provisions applicable to claims under subsection (1), see section 460.

(5) For what happens when a claim is made under subsection (1)(a), see section 461.

(6) For what happens when a claim is made under subsection (1)(b), and for the profits available for relief where such a claim is made, see sections 462 and 463.

460 Time limits and procedure for claims under section 459(1)

(1) A claim under section 459(1) must be made within–

(a) the period of 2 years after the deficit period ends, or

(b) such further period as an officer of Revenue and Customs allows.

(2) Different claims may be made in respect of different parts of a nontrading deficit for any deficit period.

(3) But no claim may be made in respect of any part of a deficit to which another such claim relates.

The FTT's decision on jurisdiction

42. HMRC's arguments before the FTT on jurisdiction constituted an application for Shinelock's appeal to be struck out pursuant to Rule 8(2)(a) of the FTT Rules, under which the FTT must strike out proceedings in relation to which it does not have jurisdiction.

43. HMRC's argument was in the alternative. First, it was argued that at the time when the closure notice was issued, Shinelock had not made the claim required by section 459 CTA 2009, meaning that the closure notice could not reject such a claim, and no claim was made subsequently before the expiry of the two year period specified in section 460(1). The HMRC review which was carried out could not broaden the scope of "the matter in question" within section 49I TMA, and there was, therefore, no appealable decision. Second, it was argued

that there was no jurisdiction under section 50 TMA, because none of the circumstances in subsections (6), (7) or (7A) of section 50 applied.

44. For Shinelock, Mr Boch argued before the FTT as follows:

(1) Shinelock had admittedly not made a claim under section 459 within the two year period. However, it had effectively made the necessary claim in correspondence with HMRC during the enquiry and HMRC had, by its conduct, allowed the claim to be made late, albeit that they continued to reject the substantive arguments as to the availability of the loan relationship deficit.

(2) The correspondence after the closure notice was issued was relevant to the meaning of "the matter in question". That correspondence dealt with the loan relationship issues.

(3) Alternatively, the review conclusion letter had widened the scope of HMRC's view of the matter.

(4) The FTT had jurisdiction under section 49G TMA and so section 50 was irrelevant.

45. The FTT considered the scope of "the matter in question" by reference to the principles approved by the Supreme Court in *Tower MCashback LLP 1 v HMRC* [2001] UKSC 19 ("*Tower MCashback*"), as summarised and explained by Kitchen LJ in *Fidex Ltd v HMRC* [2016] EWCA Civ 385 ("*Fidex*"). Having determined that the closure notice consisted of two HMRC letters, dated 14 May and 15 May 2018, taken together, the FTT then stated as follows, at [112]:

> Nevertheless, having considered the two documents comprising the closure notice in the present appeal, it is readily apparent that HMRC's conclusion was that Shinelock had realised a chargeable gain of £94,270 on the disposal of the Property and that this amount was a profit chargeable to corporation tax, ie that there were no losses or reliefs to offset this amount. That was the conclusion to which the amendments gave effect.

46. In discussing the HMRC review process, the FTT stated that the requirement in section 49C(2) TMA that HMRC must notify the appellant of "HMRC's view of the matter in question" was significant because in addition to imposing a statutory obligation it was relevant in determining what is "the matter in question": [114].

47. The FTT concluded as follows, at [115]:

> Considering the principles established by the authorities, and noting that Mr Vallis accepted the distinction between HMRC's reasoning and conclusions but argued that no conclusion had been reached on the question of whether there was a NTLRD because of the history of the matter, I have concluded that:
>
> (1) the closure notice set out a clear conclusion by HMRC that there were no reliefs or losses of any description available to offset the chargeable gain;
>
> (2) their reasoning had not included any consideration of whether there was a NTLRD (either in respect of a loan relationship between Shinelock and Habib Bank or between Shinelock and Mr Ahmed);
>
> (3) in setting out their view of the matter in September 2018 HMRC did address arguments raised that there was such a NTLRD in respect of the loan between Shinelock and Habib Bank;

> (4) the existence of such a NTLRD was thus squarely within the "matter in question" and the Tribunal should not be deprived of jurisdiction to hear arguments that represent an alternative ground of appeal by an appellant – this includes arguments in the alternative relying on different loan relationships; and
>
> (5) whilst the Tribunal does not have jurisdiction to allow a late claim to be made to use a NTLRD under s459, HMRC does have such jurisdiction, and the question of whether a late claim has been allowed by HMRC is one which Shinelock should be permitted to raise as part of its argument that there was a NTLRD available to set off against the chargeable gain.

48. The FTT did not accept HMRC's alternative argument that there was no jurisdiction under section 50 TMA for the FTT to hear the appeal, preferring Mr Boch's submission that jurisdiction arose by virtue of section 49G(4) TMA.

49. The FTT therefore refused HMRC's application for the appeal to be struck out for lack of jurisdiction.

HMRC's submissions

50. For HMRC, Mr Ripley referred to the discussion of the relevance to the scope of any appeal of "the matter in question" by the Upper Tribunal in *Daarasp LLP and another v HMRC* [2021] UKUT 87 (TCC) ("*Daarasp*"). He repeated the submission that since, even on Shinelock's case, no claim for a NTLRD was made until after the issue of the closure notice, the closure notice could not have rejected a claim which had not then been made.

51. He also argued that a claim made outside the return, even if allowed late by HMRC, could not have formed part of the enquiry and closure notice, because it would have fallen to be dealt with under the separate legislative code (in Schedule 1A TMA) to enquire into such claims.

52. Mr Ripley repeated HMRC's argument before the FTT that the HMRC review process could not have retrospectively expanded the conclusions in the closure notice.

53. He also argued that in any event the FTT had been wrong to decide that Shinelock had made a late claim which had been allowed by HMRC, with the result that the FTT had no jurisdiction at all to consider the loan relationships argument.

54. HMRC no longer sought to maintain their argument that in the alternative there was no jurisdiction because the situation fell outside section 50 TMA.

Discussion

55. In addition to *Tower MCashback* and *Fidex*, leading authorities in relation to closure notices and appeals from closure notices include *Bristol & West plc v HMRC* [2016] EWCA Civ 397 ("*Bristol & West*"); *B & K Lavery Property Trading Partnership v HMRC* [2016] UKUT 525 (TCC) ("*Lavery*"), and *Investec Asset Finance plc v HMRC* [2020] EWCA Civ 579 ("*Investec*").

56. In *Daarasp*, the Upper Tribunal helpfully summarised the essential workings of the enquiry and closure notice process in the following terms, with which we agree:

> 22. An enquiry, begun by way of an enquiry notice, is concluded by a closure notice. The closure notice comprises two elements:
>
> (1) A statement of the officer's conclusions; and
>
> (2) A statement of what, if anything, must be done to give effect to those conclusions.

> 23. The whole point of tax returns and enquiries into them is to ensure that the public interest in taxpayers paying the correct amount of tax is met. To that end, HMRC must have an appropriate ability to examine the return, but the taxpayer must have a fair opportunity to challenge (by way of appeal) either (i) the conclusions of HMRC or (ii) the manner in which those conclusions have been given effect to (by way of amendments to the return). As can be seen from section 28A of the Taxes Management Act 1970, a closure notice quite clearly contains – and must contain – both elements; equally, as section 31(1)(b) of the same Act provides, an appeal lies against both "any conclusion stated" or any "amendment made".
>
> 24. It is important to appreciate that the conclusions of a closure notice are distinct from the amendments that may arise out of those conclusions. Obviously, there is a nexus between the two – the amendments implement the conclusions reached – but they are very different things. The conclusions in a closure notice consist of a statement why the taxpayer's return is incorrect (if it is), whereas the amendments set out how the return must be corrected in order to give effect to those conclusions. A closure notice must state the officer's conclusions; and having issued a closure notice, HMRC has no power to amend the relevant return other than to give effect to the conclusions: *Bristol & West* at [24]; *Investec* at [51].

57. The Tribunal in *Daarasp* then set out ten principles which it considered could be drawn from the leading authorities. Relevantly to this appeal, these included the following, at [25] of that decision:

> (1) There is no obligation on the officer to set out or state the reasons which have led him to his conclusion(s). What matters is the conclusion that the officer has reached upon the completion of his investigation, not the process of reasoning by which he has reached those conclusions: *Tower MCashback* at [15]; *Fidex* at [45]. This means that, on any appeal, the conclusions in the closure notice may be justified by reasons that were not articulated either at the time the closure notice was issued or during the enquiry that preceded it.
>
> (2) It follows that when justifying a conclusion that has been reached by the officer and stated in the closure notice, reasons other than those in play at the time of the closure notice may be relied upon to justify it. On any appeal, the FTT will form its own view on the law, without being restricted to what HMRC state in their conclusion or the taxpayer states in the notice of appeal. Either party can change its legal arguments, but such changes in argument cannot be used as an ambush, and the FTT must be astute to prevent this, by using its case management powers: *Tower MCashback* at [15], [18].
>
> (3) That does not, however, mean that an appeal against a closure notice opens the door to a general roving inquiry into the return. The scope and subject matter of the appeal will be defined by the conclusions stated in the closure notice and by the amendments (if any) made to the return (as well as the overriding question of fairness): *Tower MCashback* at [15].
>
> …
>
> (6) It is not appropriate to construe a closure notice as if it were a statute: *Fidex* at [51]; *Lavery* at [28]. The ordinary rules of construction apply to closure notices, and the question of construction is a mixed question of fact and law: the identification of the relevant circumstances and context in which the document is to be construed is a question of fact, whilst the meaning of the document – construed within that context, as found – is a

> question of law: *Lavery* at [36]. Essentially, when approaching the question of construction, it is appropriate to consider how the reasonable recipient of the notice, standing in the shoes of the taxpayer, would have construed it: *Lavery* at [42].
>
> …
>
> (8) "[T]he matter to which the appeal relates" for the purposes of section 49I(1)(a) must be the [conclusion and/or] the amendment and either the conclusion or the amendment is therefore the "matter in question" which the FTT is required to determine by section 49I(1) of the Taxes Management Act 1970. That then restricts the ambit of the appeal at the conclusion of which the FTT may decide that there has been an overcharge or an undercharge and so make a reduction or an increase in the assessment pursuant to section 50(6) or (7) of the Taxes Management Act 1970 as appropriate. There is a limit on the jurisdiction of the FTT which is not simply a matter of ensuring procedural fairness. Any purported exercise by the FTT of a broader power to consider matters beyond that would be an error of law: *Investec* at [70].
>
> (9) The authorities do not support a narrow construction of the key phrase in section 49I of the Taxes Management Act and they establish that the FTT is the appropriate stage at which the scope of "the matter in question" in the appeal is to be determined. The FTT is a specialist tribunal and an appellate court should not interfere with that decision unless it is clearly outside the scope of the statutory provisions. There are likely to be boundary issues whatever the test to be applied. Those issues are much more likely to be problematic and time-consuming if a narrow view is adopted. Such a construction of the provisions would simply multiply the number of appeals: *Investec* at [71].
>
> (10) There are other checks and balances in the legislative scheme designed to protect the taxpayer. Those protections are the time limit imposed on HMRC in opening an enquiry, the fact that only one enquiry can be opened into any one tax return and the ability of the taxpayer to seek a direction for the issue of a closure notice. A narrow confinement of the subject matter of the appeal is not intended to be one of the protections conferred on the taxpayer. The "venerable principle" – that taxpayers should pay the right amount of tax – is also an important underlying factor in any tax matter. Proceedings before the FTT are not simply a dispute between two private parties and the venerable principle has a role to play here: *Investec* at [72].

58. We consider that the question of jurisdiction raised by HMRC's strike-out application turned on a determination of whether Shinelock's ability to set against the chargeable gain any NTLRD was within "the matter in question" as regards that appeal.

59. By the time when the FTT came to consider that application, in July 2021, it had already heard submissions on the question of whether Shinelock had made a late claim which had been accepted by HMRC. As the FTT recorded at [105], that question was determined in Shinelock's favour. As the FTT correctly set out at [105], the strike-out application, and the question of jurisdiction, therefore fell to be resolved on the basis that a valid claim had been made, but not within the statutory two-year period. The question of whether the FTT erred in its conclusion regarding the making of a late claim is therefore relevant only in relation to the substantive issue of Shinelock's entitlement to set a NTLRD against the chargeable gain, which we discuss below.

60. The closure notice was found by the FTT to be contained in HMRC's letters of 14 May and 15 May, taken together. The correspondence of 15 May 2018 was described by the FTT as follows, at [15]:

> HMRC issued what was labelled as a closure notice to Shinelock on 15 May 2018. The computation on that notice set out the income of Shinelock (unamended), being the trading profit and an equal amount of trading loss brought forward. It also included the chargeable gains showing total profits of £94,270, profits chargeable to corporation tax of that amount and corporation tax payable (at 20%) of £18,854.

61. Although we heard numerous arguments from each of the parties, we consider that the jurisdiction issue before the FTT essentially boiled down to one question; did the conclusion in the closure notice to which the amendments gave effect encompass a conclusion that there were no losses or reliefs to offset the gain on the disposal of the Property?

62. As we have described above, the FTT's decision on this, at [112], was that it was "readily apparent that HMRC's conclusion was that Shinelock had realised a chargeable gain of £94,270 on the disposal of the Property and that this amount was a profit chargeable to corporation tax, ie that there were no losses or reliefs to offset this amount". At [115(4)], the FTT found that the closure notice "set out a clear conclusion by HMRC that there were no reliefs or losses of any description available to offset the chargeable gain".

63. We consider that the FTT was entitled to interpret the closure notice (which it found to be in the letters of 14 and 15 May 2018 taken together) in this way and to reach this decision. We are mindful of the clear guidance given by the Supreme Court in *Tower MCashback* and the Court of Appeal in *Fidex* as to "the importance of leaving it to the fact-finding tribunal to determine the subject matter of the closure notice"[5].The FTT clearly understood the distinction between the conclusion in a closure notice and the reasons for that conclusion, and the distinction between a right of appeal against a conclusion and the amendments made to give effect to it. The FTT did not misdirect itself as to the law, referring extensively to the guidance in *Tower MCashback* and *Fidex*, and it took into account all the facts and evidence in reaching its decision.

64. To the extent that the FTT additionally considered, at [115(3) and (4)], (set out above), that the scope of "the matter in question" could be altered by the subsequent review process, we would disagree. The scope of the closure notice was to be determined, in context, at the time it was issued, on the basis of the understanding of a reasonable recipient standing in the shoes of the taxpayer. Subsequent discussions between the parties of the loan relationship position might conceivably be relevant as shedding light on the nature of such an understanding at that time but they would not retrospectively extend the scope of the matter in question. However, we consider that any error in this respect made by the FTT did not vitiate its central conclusion, which was that the closure notice contained a conclusion that there were no losses or reliefs available to offset the corporation tax assessed.

65. We do not accept Mr Ripley's submission that the FTT could never have had jurisdiction in relation to the appeal because no claim had been made by Shinelock for a NTLRD by the date when the closure notice was issued. It would have followed from that fact that, as the FTT found explicitly at [115(2)], HMRC's reasons for the conclusion in the closure notice did not include the absence of such a claim, or indeed any consideration of whether there was a NTLRD. However, Mr Ripley's submission ignores both the fundamental difference between the conclusion in a closure notice and the reasons for it, and the right of appeal given to Shinelock against the amendments made in the closure notice. In

[5] *Tower MCashback* at [17], endorsing the judgment of Moses LJ in the Court of Appeal.

light of the FTT's conclusion that the availability of a loss to reduce the chargeable gain was within the "matter in question", which we have found to be a conclusion which was open to it, the position regarding any claim was an issue which Shinelock was entitled to have determined by the FTT as part of its appeal. To the extent that this argument relies on the position under section 50(7A) TMA, which deals with appeals against claims, we agree with the FTT's conclusion, at [117], that in view of the FTT's decision regarding "the matter in question", jurisdiction exists in relation to the appeal under section 49G(4).

66. Mr Ripley also argued that no jurisdiction existed because an enquiry into a claim outside Shinelock's return would have had to have been made by HMRC under schedule 1A TMA. We agree that an enquiry into a "standalone" claim would normally fall to be made under Schedule 1A. However, we do not accept Mr Ripley's argument. As we suggested to Mr Ripley in the hearing, this is a technical argument which one might have expected a taxpayer to raise, since it would appear to follow that if it were correct, no valid enquiry has ever been opened by HMRC into the relevant return, and so the purported closure notice would have been invalid. Mr Ripley's response to this was that any consequences of HMRC having chosen an incorrect enquiry route was a matter "outside the scope of this appeal". However, Mr Ripley's submission was effectively inviting us to allow him to have his cake while eating it, an invitation which we decline. More importantly, this was not an argument which HMRC appear to have raised before the FTT, in which case there can have been no error of law by the FTT in failing to consider it. Insofar as the submission was asking the Tribunal to permit a new argument to be run in this appeal, we refuse such a request. If it had been argued before the FTT, Shinelock would have had the opportunity to respond to it in the proper forum, namely before the FTT, including in relation to matters of evidence relevant to whether HMRC might be estopped from now taking the point. We therefore reject this submission.

67. For the reasons given, HMRC's challenge to the FTT's refusal of its strike-out application is dismissed.

(2) WAS THE PAYMENT A DISTRIBUTION?

68. We turn next to whether or not the Payment was a distribution for tax purposes. The FTT determined that it was not, and HMRC challenge that decision. Shinelock also challenges certain conclusions reached by the FTT in relation to the distribution analysis which would become relevant if HMRC's challenge on this issue were to succeed.

69. We consider the distribution issue before we consider the loan relationship position because if the Payment was a distribution, it could not give rise to a deficit under the loan relationship code.

Legislation

70. Distributions are prevented from giving rise to loan relationship deficits by section 465(1) CTA 2009, which provides as follows:

> **465 Exclusion of distributions except in tax avoidance cases**
>
> (1) Credits or debits relating to any amount falling, when paid, to be treated as a distribution must not be brought into account for the purposes of this Part, except, in the case of credits, so far as they are avoidance arrangement amounts (see subsection (4)).

71. The meaning of "distribution" is contained in Chapters 2 to 5 of Part 23 of the Corporation Tax Act 2010 ("CTA 2010"). The provisions relevant to this appeal, so far as material and at the relevant time, are as follows:

> **1000 Meaning of "distribution"**

(1) In the Corporation Tax Acts "distribution", in relation to any company, means anything falling within any of the following paragraphs.

A Any dividend paid by the company, including a capital dividend.

B Any other distribution out of assets of the company in respect of shares in the company, except however much (if any) of the distribution—

(a) represents repayment of capital on the shares, or

(b) is (when it is made) equal in amount or value to any new consideration received by the company for the distribution.

For the purposes of this paragraph it does not matter whether the distribution is in cash or not.

C Any redeemable share capital issued by the company—

(a) in respect of shares in, or securities of, the company, and

(b) otherwise than for new consideration (see sections 1003 and 1115).

D Any security issued by the company—

(a) in respect of shares in, or securities of, the company, and

(b) otherwise than for new consideration (see sections 1004 and 1115).

E Any interest or other distribution out of assets of the company in respect of securities of the company which are non-commercial securities (as defined in section 1005), except—

(a) however much (if any) of the distribution represents the principal secured by the securities, and

(b) however much (if any) of the distribution represents a reasonable commercial return for the use of the principal.

F Any interest or other distribution out of assets of the company in respect of securities of the company which are special securities (as defined in section 1015), except—

(a) however much (if any) of the distribution represents the principal secured by the securities, and

(b) however much (if any) of the distribution falls within paragraph E.

…

1005 Meaning of "non-commercial securities"

For the purposes of paragraph E in section 1000(1) securities of a company are non-commercial securities if the consideration given by the company under the securities for the use of the principal secured by them represents more than a reasonable commercial return for the use of that principal.

…

1015 Meaning of "special securities"

(1) Securities of a company are special securities for the purposes of paragraph F in section 1000(1) if they meet any of conditions A to E.

(2) Condition A is that the securities are issued as described in paragraph D in section 1000(1) (securities issued otherwise than for new consideration).

(3) Condition B is that—

(a) the securities—

(i) are convertible (directly or indirectly) into shares in the company, or

(ii) carry a right to receive shares in or securities of the company, and

(b) the securities are neither listed on a recognised stock exchange nor issued on terms which are reasonably comparable with the terms of issue of securities listed on a recognised stock exchange.

(4) Condition C is that under the securities the consideration given by the company for the use of the principal secured depends (to any extent) on the results of—

(a) the company's business, or

(b) any part of the company's business.

…

1113 "In respect of shares"

…

(3) For the purposes of this Part a thing is regarded as done in respect of a share if it is done to a person—

(a) as the holder of the share, or

(b) as the person who held the share at a particular time.

(4) For the purposes of this Part a thing is also regarded as done in respect of a share if it is done in pursuance of a right granted, or an offer made, in respect of a share.

…

1114 "In respect of securities"

…

(3) For the purposes of this Part, except where the context otherwise requires—

(a) interest paid by a company on money advanced without the issue of a security for the advance, or

(b) other consideration given by a company for the use of money so advanced,

is treated as if paid, or given, in respect of a security issued for the advance by the company.

(4) For the purposes of this Part a thing is regarded as done in respect of a security if it is done to a person—

(a) as the holder of the security, or

(b) as the person who held the security at a particular time.

> (5) For the purposes of this Part a thing is also regarded as done in respect of a security if it is done in pursuance of a right granted, or an offer made, in respect of a security.
>
> …
>
> **1117 Other interpretation**
>
> (1) In this Part, except where the context otherwise requires—
>
> > "security" includes securities not creating or evidencing a charge on assets, and
> >
> > "share" includes stock, and any other interest of a member in a company.
>
> …
>
> (3) For the purposes of this Part a distribution is treated as made out of assets of a company if the cost falls on the company.

The FTT's decision

72. HMRC argued that the Payment was a distribution to Mr Ahmed under one of paragraphs B, E or F of section 1000(1) CTA 2010.

73. The FTT noted that all of those paragraphs apply only to an amount paid "out of assets of the company". The FTT found some support in the arrangements for HMRC's position that the Payment was made out of Shinelock's assets. However, it noted that the Payment was made pursuant to a liability to Mr Ahmed under the Contract, and concluded as follows, at [123]:

> I do not accept that a payment to discharge a contractual obligation can be said to be made "out of the assets" of a company for the purposes of any of the paragraphs of s1000(1). Once the liability crystallised, Shinelock had, according to the agreed facts, a liability to pay £305,000 to Mr Ahmed. The making of that payment did not deplete the assets of the company, as this discharged the liability to pay that amount. For this reason, I consider that the Payment cannot be a distribution within s1000(1).

74. This was sufficient for the FTT to reach a conclusion on the distribution issue, but it went on to deal briefly with submissions made by Mr Boch as to the requirements of paragraphs B, E and F. The FTT's conclusions can be summarised as follows (at [124]):

(1) Paragraph B –

Were it not for its conclusion that the Payment was not out of assets, the FTT would have concluded that it fell within paragraph B as being made "in respect of shares".

(2) Paragraph F –

HMRC's primary submission on the distribution position was that the Payment fell within paragraph F. The FTT rejected this submission for three reasons. First, it held that there was no "security" of Shinelock. Second, it was not persuaded that the Payment was "in respect of" the loan from Mr Ahmed. Third, it did not consider that the Payment depended on the results of Shinelock's business.

(3) Paragraph E—

Again, the FTT considered that there was no "security", so that paragraph E could not apply. In any event, the FTT considered that there was no evidence as to what a "reasonable commercial return" might have been in the circumstances. It therefore did not accept that paragraph E applied.

Discussion

Out of assets

75. The overarching reason for the FTT's decision that the Payment did not fall within any of paragraphs B, E or F was that it was not made "out of assets of the company". HMRC strongly challenged that conclusion. Mr Boch stated in the hearing that Shinelock now concedes this point. We have therefore proceeded on the basis of the position as agreed between the parties, namely that the Payment was made "out of assets" of Shinelock, and we make no comment on the FTT's analysis or its conclusion to the contrary.

Paragraph F: Special securities

76. Paragraph F treats as a distribution any "distribution out of assets of the company in respect of securities of the company which are special securities", except for the principal secured and any part of the distribution falling within paragraph E. "Special securities" are securities which meet any of conditions A to E in section 1015. The condition which is potentially relevant to the Payment is C, which applies to securities under which "the consideration given by the company for the use of the principal secured depends (to any extent) on the results of…the company's business, or…any part of the company's business".

77. As we have summarised, the FTT considered that there was no "security", that the Payment was not "in respect of" the loan from Mr Ahmed, and that the Payment did not depend on the results of Shinelock's business.

78. In relation to the significance of whether there was a "security", the FTT erred in law. Section 1114(3) treats there as being a security for this purpose where any consideration is given by a company for the use of money advanced without the issue of a security. On the facts found, this provision, which was not referred to by the FTT, would clearly apply to the arrangements. Shinelock also conceded this point, in our view correctly.

79. In relation to whether the Payment was made "in respect of" securities of Shinelock as required by paragraph F, the FTT stated as follows, at [124(2)(b)]:

> The agreed fact records that the gain was to be paid "in return for financing or guarantees provided by AA". This does not go so far as to record that it was a term of the loan from Mr Ahmed to Shinelock that this amount be paid, ie is not of itself sufficient to conclude that the Payment was made "in respect of" that loan (if it were a security). That is significant in the context of the fact that the guarantee to which reference was made can only be a reference to the security granted by Helptravel over 9 West Court.

80. It is possible that the FTT's failure to take into account section 1114(3) infected its reasoning regarding whether the Payment was "in respect of" securities of Shinelock. In any event, we consider that the FTT erred in law in opining that the Payment was not made "in respect of" the security deemed to arise by section 1114(3). That phrase is given a wide meaning by section 1114(4) and (5), effectively asking whether the Payment was made to Mr Ahmed *qua* holder of that security. The meaning of the words, in the context of shares rather than securities, was recently considered in detail by the Upper Tribunal in *Clipperton v HMRC* [2022] UKUT 351 (TCC) at [41]-[76] of that decision. At [58] the Tribunal stated:

> We consider that the FTT correctly identified and described the purpose of the distribution provisions in the tax code…being to tax shareholders on value which a company delivers to them out of its assets, directly or indirectly, by some non-prescribed means. We also agree that as defined the requirement for a distribution out of assets to be "in respect of shares" refers to a situation where the relevant asset or value is put into the hands of a shareholder *in his capacity as such*, in effect, as a return on or by reference

> to his shareholding as an investment in the company, and not in some other capacity and for some other reason.

81. That passage is addressing the meaning of "in respect of shares". Applying it to the security treated as arising by section 1114(3) in this case, we consider it clear on the facts found that the Payment was made to Mr Ahmed in his capacity as holder of the security. Indeed, that is consistent with Shinelock's primary case in relation to the loan relationship debit which it claimed, namely that the Payment was consideration for the loans received by Shinelock.

82. We therefore consider that the Payment was a "distribution out of assets of the company in respect of securities of the company" within paragraph F. The remaining question is whether the consideration given by Shinelock for the use of the principal secured depended (to any extent) on the results of Shinelock's business, or any part of its business, as set out in Condition C in section 1015.

83. The FTT's view on this issue was contained in the following paragraph, at [124(2)(c)]:

> I do not consider that the Payment depended on the results of Shinelock's business, or any part of its business. To the extent that Shinelock was carrying on any business, it was a property rental business, benefitting from the pooling arrangement which was operated rather than the actual rents received. I do not consider that a one-off disposal of a Property, which had been owned for several years, is sufficient to constitute a property investment business. The Payment was made by reference to the "gain" realised on disposal of a single asset, whereas the results of the business related to the rents and share of the pool.

84. Mr Ripley challenged this conclusion on a number of grounds. He said that the Property was held as a business asset, and that property rental businesses often expect to make a gain from the appreciation in value of property which they hold. He argued that paragraph F ensures that shareholders cannot circumvent distribution treatment on the distribution of any such gain by purporting to lend the company money in return for a "financing charge" equal to the gain made. In Mr Ripley's submission, the Property was bought by a property rental company as a business asset with a view to resale at a profit, and the realisation of the gain was a business activity. As such, the Payment fell within paragraph F.

85. Mr Boch defended the FTT's conclusion on this issue, and argued as follows :

(1) The FTT's findings as to Shinelock's business and whether the disposal of the Property was part of that business were findings of fact which could not be disturbed on appeal.

(2) To the extent that the Payment represented a reasonable commercial return, it fell outside paragraph F.

(3) Case law supports the FTT's narrow approach to the scope of the term "business" in Condition C.

86. We will consider Mr Boch's second argument before considering the first and third together.

87. Paragraph F applies to a distribution out of assets of the company in respect of special securities "except…however much (if any) of the distribution falls within paragraph E". Paragraph E applies to interest or distributions out of assets which exceed a reasonable commercial return in respect of "non-commercial securities", which are (broadly) securities carrying more than a reasonable commercial return.

88. Mr Boch argued that the wording beginning "except" in paragraph F (the "exception") has the effect that consideration which represents a reasonable commercial return does not fall within paragraph F. His skeleton argument acknowledged that "this interpretation does not sit well with the literal meaning of the provisions", but he submitted that it was consistent with the purpose of the distribution provisions, and that the only possible reason for the exception was to exempt any part of a deemed distribution which represented a reasonable commercial return.

89. We have no hesitation in rejecting this argument. The intent and effect of the exception is that if a payment exceeds a reasonable commercial return and is also results-dependent, then the excess over a reasonable commercial return is to be treated as falling within paragraph E in priority to paragraph F. The wording is clear and unambiguous. In terms of the purpose of paragraph F, its purpose is (broadly) to deny treatment as a deductible borrowing cost for payments which are in substance a distribution of profit. It is, to that extent, an example of a dividing line between returns on debt and returns on equity. Its concern is not with whether a payment represents a reasonable return, but with whether it depends on the profits or results of the company's business. If it does so depend, then the entire amount is treated as a distribution. To take a straightforward example, if a reasonable commercial return on a security was 10%, but that 10% return was expressed to be contingent on the availability of distributable reserves, or the profitability of part of the business, then the entirety of the payment would fall within paragraph F, whereas on Mr Boch's construction it would fall entirely outside the distribution provisions. We therefore reject this argument.

90. In relation to results-dependency, the building blocks of the FTT's decision on this issue were that (a) Shinelock carried on a property rental business, (b) the results of that business related to rental income and income from the pooling arrangement, and (c) a one-off disposal of a property owned for several years was not "sufficient to constitute a property investment business".

91. We consider that in reaching this conclusion the FTT erred in law. Its finding as to the nature of Shinelock's business was indeed a finding of fact, and is not challenged by HMRC. However, in reaching its conclusion on the basis of that finding of fact, we consider that the FTT misdirected itself in law as to the construction of Condition C.

92. Condition C is widely framed in a number of important respects. It applies to a company's business, which is a wider concept than trade. It applies to any part of that business. The words "results of" are wider than profits, and encompass both income and capital items. Finally, it applies where the consideration depends "to any extent" on those results.

93. The FTT failed to take into account the breadth of the provision. The facts that the Property had been owned by Shinelock for several years, and that the disposal was "one-off", which were relied on by the FTT, were not sufficient to prevent Condition C from applying. The results of an isolated disposal of "a single asset" held for several years are not outside the scope of "the results" of the business. Where, as here, it was not in issue that the Payment depended on the gain resulting from the disposal of the asset, Condition C would only fail to bite if the disposal was not part of Shinelock's business.

94. The second error into which the FTT appears to have fallen was to "ring-fence" Shinelock's activities so as to leave out of account the acquisition, holding and disposal of the Property in determining whether the gain formed part of the results of any part of its business. The FTT framed the question as being whether or not the acquisition, holding and disposal of the Property were sufficient to constitute a property investment business. That was the wrong

approach. The question relevant to Condition C in this case was whether the gain on which the Payment depended was a result of any part of Shinelock's business activities. Unless the acquisition, holding and disposal of the Property were non-business activities, they would have been relevant in determining that question.

95. We did not find the case law to which Mr Boch referred us regarding the meaning of "business" in other statutory contexts to be of any real assistance in interpreting that term in Condition C. We will not attempt a comprehensive definition of the meaning of "business" for the purpose of paragraph F, but it is clear to us that it must be given a broad meaning consistent with the purpose of paragraph F as a whole. We would be reluctant to exclude from its ambit any commercial activity of a company that is capable of generating a profit. The acquisition and disposal of a property at a profit, as in this case, must in our view be treated as part of the company's business.

96. We therefore conclude that the FTT erred in law in relation to the results-dependency of the Payment.

97. As a consequence, we may (but need not) set aside the decision of the FTT on this issue: section 12(2)(a) Tribunals, Courts and Enforcement Act 2007. If we do set aside the decision, we must either remit it to the FTT with directions for its reconsideration, or re-make it: section 12(2)(b).

98. The error was clearly material, since it led the FTT to conclude that the Payment was not a distribution. We therefore set aside the FTT's decision on this issue. We consider that we have the necessary findings of fact to remake the decision, and we have had the benefit of detailed submissions from both parties. We therefore remake the decision.

99. As we have said, a profit or gain on a disposal of a capital asset forms part of "the results" of a company's business, or part of its business, unless that disposal fell outside any part of the company's business activities.

100. In this case, the Property was beneficially and legally owned by Shinelock throughout its period of ownership and at the time of disposal. The existence of the Contract indicated that the Property was acquired with a view to profit. A chargeable gain arose on the disposal. The Property was shown in Shinelock's accounts. The rental income, interest charge and expenses in relation to the Property (as determined by Mr Ahmed using a pooling arrangement consisting of all related companies) were included in Shinelock's accounts and in calculating its profits[6]. Shinelock's business ignoring the Property related to property; indeed, until the hearing before the FTT, Shinelock had maintained as one of its arguments that the Payment was a deductible business expense under the property income rules in Part 4 CTA 2009[7].

101. We consider that the gain on which the Payment depended clearly formed part of the results of Shinelock's business, or a part of that business. Its business included the acquisition, holding and disposal of the Property. The Payment therefore depended to an extent on the results of Shinelock's business or part of it. As a consequence, it was a distribution within Condition C.

Disposition

102. The Payment was a distribution under paragraph F of section 1000 CTA 2010. As a result of section 465(1) CTA 2009, Shinelock could not claim a loan relationship debit in respect of the Payment. Shinelock's appeal must therefore be dismissed.

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[6] Statement of Agreed Facts paragraphs 54, 59, 60.

[7] Shinelock sought unsuccessfully to revive this argument in its application to the Upper Tribunal for permission to appeal.

103. Our decision makes it unnecessary for us to decide the remaining issues in the appeal[8]. Nevertheless, since we heard argument on those issues we will comment on them, but only to the extent that we consider it appropriate to do so.

Paragraphs B and E

104. The FTT decided that none of the heads in section 1000 CTA 2010 could apply because the Payment was not made "out of assets". However, as explained above, the parties now agree that the Payment was made out of assets, and we have proceeded on that basis.

105. In relation to paragraph B (distributions out of assets in respect of shares), the FTT would have decided, but for its decision on the "out of assets" point, that this paragraph applied. In relation to paragraph E (payments exceeding a reasonable commercial return), the FTT appears to have decided (in our view, erroneously) that this could not apply in the absence of a "security", and, in any event, would not apply because (1) there was no evidence as to what a reasonable commercial return might have been, and (2) the Payment was not only made as consideration for the loan: [124(3)(b)].

106. Shinelock appeals against the FTT's conclusion in relation to paragraph B, and HMRC challenge its conclusion in relation to paragraph E.

107. In relation to both paragraphs B and E, Mr Boch argued that HMRC's case before the FTT under those paragraphs amounted to a procedural ambush, and the FTT should not have proceeded to consider those issues without first having given Shinelock time to prepare its submissions. He said that HMRC's skeleton argument for the FTT hearing identified HMRC's case that paragraph F applied, but HMRC only invoked paragraphs B and E during the actual hearing. We did not understand Mr Ripley to challenge Mr Boch's description of how and when HMRC had presented its case in relation to paragraphs B and E, although we note that a footnote to HMRC's skeleton argument suggested that if the FTT found that paragraph F did not apply, paragraph E would.

108. We consider that Mr Boch is justified in describing HMRC's case in relation to paragraph B as an ambush, and that in relation to it case regarding paragraph E the single footnote was probably insufficient to put Shinelock on notice that HMRC intended to make detailed submissions on this paragraph. Procedural fairness would normally require that in a situation where one party raises an argument for the first time in the hearing, the other party is given the opportunity to object, and to make submissions as to the need for an adjournment or the opportunity to make further submissions following the hearing. Even where no such objection or submissions are made, the FTT should consider what, if anything, might be appropriate to ensure procedural fairness to both parties. That is particularly important where in responding to the new argument the other party might wish to adduce further evidence. The questions of whether the Payment was made "in respect of shares" and particularly of whether it was a reasonable commercial return, were in our view questions where further evidence might well have been relevant.

109. If we had not decided that the Payment was a distribution under paragraph F, in relation to paragraphs B and E we would have found that the FTT's decisions were vitiated by procedural unfairness. Given the potential relevance of evidential matters, we would then have set aside the decisions on those issues and remitted them to the FTT for reconsideration.

[8] While the exception in paragraph F for amounts falling under paragraph E might suggest that we would need to determine whether any part of the Payment falls within paragraph E, that is not the case in this appeal, as section 465(1) CTA 2009 applies to an amount which is a distribution under any paragraph of section 1000 CTA 2010.

110. In those circumstances, we do not consider it appropriate to express any view on the substantive legal issues raised by the parties in relation to paragraphs B and E, and do not do so.

(3) TREATMENT OF THE PAYMENT UNDER THE LOAN RELATIONSHIP RULES

Legislation

111. We have already set out at paragraph 41 above the provisions in CTA 2009 dealing with claims for NTLRDs. Further relevant provisions in CTA 2009 were, during the applicable period, as follows:

> **295 General rule: profits arising from loan relationships chargeable as income**
>
> (1) The general rule for corporation tax purposes is that all profits arising to a company from its loan relationships are chargeable to tax as income in accordance with this Part.
>
> …
>
> **296 Profits and deficits to be calculated using credits and debits given by this Part**
>
> Profits and deficits arising to a company from its loan relationships are to be calculated using the credits and debits given by this Part.
>
> …
>
> **300 Method of bringing non-trading deficits into account**
>
> (1) Any non-trading deficit which a company has from its loan relationships must be brought into account in accordance with Chapter 16 (non-trading deficits).
>
> (2) For the meaning of a company having such a deficit and how it is calculated, see section 301.
>
> …
>
> **301 Calculation of non-trading profits and deficits from loan relationships: non-trading credits and debits**
>
> (1) Whether a company has non-trading profits or a non-trading deficit from its loan relationships for an accounting period is determined as follows, using the non-trading credits and non-trading debits given by this Part for the accounting period.
>
> (2) In this Part—
>
> (a) "non-trading credits" means credits for any accounting period in respect of a company's loan relationships that are not brought into account under section 297(2), and
>
> (b) "non-trading debits" means debits for any accounting period in respect of a company's loan relationships that are not brought into account under section 297(3).
>
> …
>
> (6) A company has a non-trading deficit for an accounting period from its loan relationships if the non-trading debits for the period exceed the non-trading credits for the period or there are no such credits.
>
> (7) The non-trading deficit is equal to those debits, less any such credits.
>
> **302 "Loan relationship", "creditor relationship", "debtor relationship"**

(1) For the purposes of the Corporation Tax Acts a company has a loan relationship if—

(a) the company stands in the position of a creditor or debtor as respects any money debt (whether by reference to a security or otherwise), and

(b) the debt arises from a transaction for the lending of money.

…

307 General principles about the bringing into account of credits and debits

(1) This Part operates by reference to the accounts of companies and amounts recognised for accounting purposes.

(2) The general rule is that the amounts to be brought into account by a company as credits and debits for any period for the purposes of this Part are those that are recognised in determining the company's profit or loss for the period in accordance with generally accepted accounting practice.

(3) The credits and debits to be brought into account in respect of a company's loan relationships are the amounts that, when taken together, fairly represent for the accounting period in question—

(a) all profits and losses of the company that arise to it from its loan relationships and related transactions (excluding interest or expenses),

(b) all interest under those relationships, and

(c) all expenses incurred by the company under or for the purposes of those relationships and transactions.

(4) Expenses are only treated as incurred as mentioned in subsection (3)(c) if they are incurred directly—

(a) in bringing any of the loan relationships into existence,

(b) in entering into or giving effect to any of the related transactions,

(c) in making payments under any of those relationships or as a result of any of those transactions, or

(d) in taking steps to ensure the receipt of payments under any of those relationships or in accordance with any of those transactions.

…

308 Amounts recognised in determining a company's profit or loss

(1) References in this Part to an amount recognised in determining a company's profit or loss for a period are references to an amount recognised in—

(a) the company's profit and loss account, income statement or statement of comprehensive income for that period,

(b) the company's statement of total recognised gains and losses, statement of recognised income and expense, statement of changes in equity or statement of income and retained earnings for that period, or

(c) any other statement of items taken into account in calculating the company's profits and losses for that period.

…

The FTT's decision

112. The FTT set out the respective positions of the parties at [126]-[127]:

> 126. Mr Boch submitted that the Payment gave rise to a debit of £305,000, and submitted that this debit was required to be brought into account either as a loss (under s307(3)(a)) arising from the loan relationship between Mr Ahmed and Shinelock or an expense under s307(3)(c) incurred in bringing that loan relationship into existence (relying on s307(4)(a)) or as an expense incurred under or for the purposes of the loan relationship between Shinelock and Habib Bank (under s307(4)(a) or (c)).
>
> 127. HMRC's position was:
>
> > (1) it accepted that the accounts of Shinelock had been prepared in accordance with GAAP;
> >
> > (2) there was agreed to be a loan relationship between Mr Ahmed and Shinelock (of £175,000) and between Shinelock and the bank, but the Payment, if it was a debit, was not a loss or expense within s307(3) in relation to either of those loan relationships; and
> >
> > (3) alternatively, it not being agreed by HMRC that the £72,500 or £30,000 were loans from Mr Ahmed to Shinelock or that the loan (which they did accept had been made) of £175,000 had been repaid, the loss (or expense) arising to Shinelock was £27,500.

113. The FTT's decision can be summarised as follows:

(1) Section 307(2) refers to debits "recognised in determining the company's profit or loss for the period in accordance with [GAAP]", which is defined by section 308. This raised the question of what was recognised in Shinelock's profit and loss account for the period ended March 2015. The FTT had not been presented with those accounts, but made various findings of fact in relation to those accounts, largely by inference. These included that "there was no line item labelled sale of the Property (or similar) but…instead adjustments were made on the balance sheet to fixed assets/bank loans". It concluded on the basis of those findings that a debit of £305,000 was *not* recognised in determining Shinelock's profit and loss for the purpose of section 307(2). The FTT accepted that if two gross amounts were shown in the accounts as a net amount then both gross amounts could be said to have been "recognised", but in this case nothing at all had been recorded in the relevant sections of the accounts. It acknowledged that it had reached this conclusion without the benefit of expert evidence as to the accounting treatment.

(2) That conclusion was sufficient to dismiss Shinelock's appeal: [134].

(3) Section 307(3) additionally required that credits and debits for a period "taken together, fairly represent" loan relationship items for that period. HMRC argued in the alternative for a lower NTLRD on the basis of this restriction. The FTT stated that "[h]owever, I have concluded that there is a more fundamental problem faced by Shinelock", which arose from the reference in the opening words of section 307(3) to debits being brought into account "in respect of a company's loan relationships"[9]. The FTT considered that this imposed an additional requirement and that the Payment was, on the facts, not "in respect of" any loan relationship of Shinelock. Therefore, no debit was available, and the FTT did not need to consider HMRC's alternative argument.

[9] [136].

(4) Mr Boch had argued in the alternative that the Payment was an expense falling within section 307(3)(c) as being incurred for the purposes of Shinelock's loan from Habib bank. The FTT rejected this argument on the basis that the Payment was not incurred directly in bringing that loan into existence.

(5) In relation to whether or not Shinelock had made a late claim for the NTLRD, the FTT held that Shinelock had made such a claim in a letter to HMRC of 22 June 2018, and that HMRC had, by their conduct, allowed the claim to be made out of time, as they had power to do under section 459(1)(b) CTA 2009. The FTT noted that this conclusion did not assist Shinelock as the FTT had concluded that no NTLRD arose.

Shinelock's appeal

114. Shinelock has permission to appeal on the following grounds:

(1) The question of whether the Payment was "recognised" in Shinelock's accounts ("Issue 1") was not in issue before the FTT. The point was neither pleaded nor argued and so was not within the scope of the appeal. In the alternative, Shinelock was not given the opportunity to make submissions.

(2) The FTT's decision on the recognition issue was wrong in law.

(3) The question of whether the Payment was brought into account "in respect of" Shinelock's loan relationships ("Issue 2") was not in issue before the FTT. The point was neither pleaded nor argued and so was not within the scope of the appeal. In the alternative, Shinelock was not given the opportunity to make submissions.

(4) The FTT's decision on the "in respect of" issue was wrong in law.

115. Before we consider these grounds, we reiterate that we are doing so only because we heard argument on them; our decision that the Payment was a distribution is sufficient to dispose of Shinelock's appeal.

New points in an FTT hearing

116. We consider first the submission that neither Issue 1 nor Issue 2 was in scope in the appeal before the FTT, and that as a consequence either the FTT lacked jurisdiction to decide those issues, or its decisions on those issues were vitiated by procedural unfairness.

117. It may be helpful to set out some general observations on the raising of "new" points in an FTT hearing before we consider the specific grounds in this appeal. What follows relates only to hearings before the FTT.

118. During a hearing before the FTT, either one of the parties or the tribunal of its own volition may wish to raise an argument which has not been identified in the grounds of appeal, Respondents' notice (if any), skeleton arguments or statement of case. Where a party who wishes to raise a new argument has applied to the FTT for permission to make a late amendment to its case before the hearing, then the FTT should consider that application taking into account the principles set out in *Quah v Goldman Sachs International* [2015] EWHC 759 (Comm). However, what if the new argument arises for the first time in the hearing, or is raised for the first time by the FTT itself?

119. The adversarial system applying in the civil courts strongly discourages a court from conceiving and deciding an issue not raised by the parties. In the Court of Appeal's judgment in *Satyam Enterprises v Barton* [2021] EWCA Civ 287 Nugee LJ set out the position as follows:

> 36. The present case however is not one of a party seeking to depart from his pleaded case, but one where the parties addressed in their evidence and

> submissions the cases that had been pleaded, but the Judge decided the case on a basis that had neither been pleaded nor canvassed before him. In our system of civil litigation that is impermissible, and a misunderstanding of the judge's function which is to try the issues the parties have raised before him. The relevant principles were stated by this Court in *Al-Medenni v Mars UK Ltd* [2005] EWCA Civ 1041…:
>
> > "…It is fundamental to our adversarial system of justice that the parties should clearly identify the issues that arise in the litigation, so that each has the opportunity of responding to the points made by the other. The function of the judge is to adjudicate on those issues alone. The parties may have their own reasons for limiting the issues or presenting them in a certain way. The judge can invite, and even encourage, the parties to recast or modify the issues. But if they refuse to do so, the judge must respect that decision. One consequence of this may be that the judge is compelled to reject a claim on the basis on which it is advanced, although he or she is of the opinion that it would have succeeded if it had been advanced on a different basis. Such an outcome may be unattractive, but any other approach leads to uncertainty and potentially real unfairness."
> >
> > …
>
> 38. In the present case, the possibility that the Croydon Properties were held on trust for Mr V Sharma does not appear to have been even canvassed by the Judge during the hearing, but, as far as we know, first emerged fully-formed in the Judgment. That, for the reasons given by Dyson LJ in *Al-Medenni*, was not a course that was open to him. Judges may sometimes think – and may even sometimes be right – that their own theory better fits the facts than that of either party, but if it is wholly outside the scope of the pleaded issues, that is nothing to the point, and to decide a case on a basis that has not been explored in evidence or addressed in submissions is likely to leave at least one, if not both, parties with a profound and justified sense of unfairness.

120. In the tribunals, including the FTT, there is room in appropriate circumstances for a more inquisitorial approach, particularly where the taxpayer is a litigant in person. However, the FTT must still exercise restraint. In *HMRC v Liam Hill* [2018] UKUT 0045 (TCC), the Tribunal said this in relation to a series of arguments raised by the FTT of its own volition in an application by HMRC to strike out the taxpayer's appeal:

> 55. While it is appropriate for the FTT to adopt a more inquisitorial role in relation to a striking out application against an unrepresented appellant, care must be taken in identifying and objectively evaluating grounds of appeal not raised by the appellant. Any such grounds should be based on or derived from facts discernible from the evidence before the tribunal, including at the hearing, and should be arguments which, as a matter of law, the tribunal considers to have a reasonable prospect of success.

121. The possibility of the FTT adopting a more inquisitorial role is consistent with section 50 TMA, which gives the FTT wide powers on an appeal to reduce or increase assessments and adjust claims. As we have discussed above, that is confirmed by *Tower MCashback* and *Fidex*. It is also consistent with the more informal character of the tribunal system, and with the FTT's obligations to have regard to the overriding objective in the FTT Rules.

122. This power and duty of the FTT has been described as a "venerable principle". This refers to the observations of Henderson J (as he then was) in *Tower MCashback LLP 1 v HMRC* [2008] EWHC 2387 (Ch) which were approved by Lord Walker in the Supreme Court in that case ([2011] UKSC 19), where he said at [15]:

He [Henderson J] also observed (again, in my view, entirely correctly), at paras 115–116:

> "115…There is a venerable principle of tax law to the general effect that there is a public interest in taxpayers paying the correct amount of tax, and it is one of the duties of the commissioners in exercise of their statutory functions to have regard to that public interest… For present purposes, however, it is enough to say that the principle still has at least some residual vitality in the context of section 50, and if the commissioners are to fulfil their statutory duty under that section they must in my judgment be free in principle to entertain legal arguments which played no part in reaching the conclusions set out in the closure notice. Subject always to the requirements of fairness and proper case management, such fresh arguments may be advanced by either side, or may be introduced by the commissioners on their own initiative."

123. So, in principle the FTT may raise a new argument of its own volition, or permit either party to raise a new argument, in reaching its decision. However, there is a critical overarching restriction on those powers. The requirements of procedural fairness include the avoidance of ambushes and the rights of all parties to know the case which they face. In determining whether to take into account a new argument in reaching its decision, the FTT must always consider what might be appropriate in the particular circumstances to ensure procedural fairness. The FTT has wide case management powers, and there is no set procedure or course of action which would be appropriate in every case. In some situations, it may be sufficient in terms of fairness for the parties to be offered the right to make submissions on the new argument following the hearing. In other cases, particularly where the new argument not only raises issues of law but might also impact on the evidence adduced by one or both parties in response to the argument, the FTT may decide to seek the views of the parties on whether an adjournment might be needed. Where it is one of the parties which seeks to raise a new argument, the FTT might decide that fairness requires that it is not admitted at all. A helpful discussion of these issues is contained in *HMRC v William and Hazel Ritchie* [2019] UKUT 0071 (TCC) at [34]-[43].

124. In any event, the parties should be able to understand why the FTT has reached the decision it has reached to consider (or refuse to consider) the new argument.

125. It will generally not be acceptable for the FTT to identify a new argument for the first time when writing its decision, and then base that decision in whole or part on that new argument, without having given the parties any opportunity to make further submissions. While it may be tempting to see such a course as simply an example of the "venerable principle", it is in principle procedurally unfair for a party to learn that one of the reasons it has lost its case is a reason which is identified for the first time in the FTT's decision and which that party has not had a fair opportunity to address.

Discussion: were Issues 1 and 2 new arguments?

126. The FTT decided that Shinelock was not entitled to the NTLRD for two reasons: it was not "recognised" in the relevant accounts (Issue 1) and the Payment was not made "in respect of" Shinelock's loan relationships (Issue 2).

Issue 2

127. In relation to Issue 2, we agree with Mr Boch that this was a new argument identified by the FTT of its own volition. It was not part of HMRC's pleaded case and Shinelock was not given a fair opportunity to respond to it.

128. The first mention of the argument is at [136]. The FTT there described HMRC's alternative submission (arguing for a lower NTLRD) based on the "fairly represents"

requirement in section 307(3) CTA 2009. Rather than considering that argument, the FTT then stated:

> However, I have concluded that there is a more fundamental problem faced by Shinelock, which becomes evident in the context of the parties' submissions on the various limbs of s307(3), and which results from the opening lines of s307(3) taken together with those limbs.

129. Mr Ripley argued that the FTT's decision on Issue 2 was actually a decision on HMRC's "fairly represents" argument, and that the applicability of the conditions in section 307(3) was "undoubtedly a live issue" which Shinelock had an opportunity to address in submissions and evidence. We do not agree. The "fairly represents" argument was in issue, but the FTT decided it did not have to determine that argument, because it had identified "a more fundamental problem" resulting from the opening lines of section 307(3). That more fundamental problem was a new argument, conceived by the FTT itself, and it was procedurally unfair for the FTT to have denied Shinelock the opportunity to respond to it. As the FTT's discussion of the new argument demonstrates, whether or not the Payment was "in respect of" Shinelock's loan relationships was largely a question of fact, so it is possible that Shinelock would have produced evidence to rebut the argument if it had been given an adequate opportunity to do so.

130. If we had not decided that the Payment was prevented from giving rise to a NTLRD because it was a distribution, we would have allowed Shinelock's appeal in relation to Issue 2 and set aside the FTT's decision on that issue as being vitiated by procedural unfairness. Given that Issue 2 turns largely on the facts, if it had been material to the outcome of Shinelock's appeal given our decisions on the other issues in the appeal, we would have remitted Issue 2 for reconsideration by the FTT. We do not need to decide whether the FTT was correct in law in relation to the distinct issue which it considered arose from the use of the words "in respect of" in section 307(3), and we consider it appropriate to leave that question to a case where the point is dispositive.

Issue 1

131. In relation to Issue 1, Mr Boch says that this issue was not pleaded or argued, and that HMRC's skeleton argument and statement of case "raised no issues as to the accounts". The reason why the FTT had not been presented with Shinelock's 2015 accounts was because "the accounting was never in issue". In raising and considering Issue 1, he says, the FTT was therefore raising a new point and it denied Shinelock the opportunity to make submissions or produce expert evidence, particularly as to GAAP.

132. Mr Ripley accepted that HMRC's statement of case and skeleton argument before the FTT did not raise the accounting treatment of the Payment.

133. However, we have concluded that, unlike Issue 2, Issue 1 was sufficiently in play in the hearing before the FTT, and its consideration by the FTT should not have amounted to an ambush from Shinelock's perspective. We reach that conclusion for two reasons.

134. First, it was clear from Shinelock's appeal and its skeleton argument that the Payment was claimed to give rise to a debit under the loan relationship provisions. The skeleton asserted that the Payment gave rise to such a debit, and in a section headed "The Loan Relationship Code" recorded that as a result there must be relevant loan relationships of Shinelock and the Payment must come within section 307(3) and be a loss or expense. Shinelock chose in framing its case to focus on those two requirements. However, while section 307(3) does operate to define further the debits and credits to be brought into account, section 307(2) sets out what is described in that subsection as "the general rule", namely that the debits and credits to be brought into account are "those that are recognised in determining

the company's profit or loss for the period in accordance with generally accepted accounting practice". The recognition in Shinelock's accounts for 2015, in accordance with GAAP, was therefore what Mr Ripley described as an "inherent element" of Shinelock's argument. The burden of proof (to the normal civil standard) was on Shinelock in its appeal to establish that a NTLRD arose for the period. Shinelock should not, therefore, have been ambushed when the FTT probed the treatment in the 2015 accounts and tested whether the Payment satisfied the general rule in section 307(2).

135. Second, we agree with Mr Ripley that Mr Ahmed's evidence further operated to put the accounting issue in play. He discussed the actual and potential accounting entries which were or might have been made in relation to the transactions. The FTT set out in some detail at [81] what was explained by Mr Ahmed in his written and oral evidence in this regard. HMRC were entitled to take issue with that evidence, leaving the FTT in the position of having to consider the competing views. As the FTT recorded at [129]:

> …Mr Vallis was clear that HMRC was not challenging whether or not the accounts of Shinelock were GAAP-compliant, this did not mean that HMRC accepted that there was a debit of £305,000 within s307(2) or, if there was such a debit, that such amount fairly represented Shinelock's losses or expenses within s307(3). Indeed, Mr Vallis relied on the £305,000 not being shown in the accounts of Shinelock and challenged Mr Ahmed's evidence as to the alternative accounting treatments (submitting that I should treat the evidence of Mr Ahmed on accounting with extreme care as he was not an independent expert witness).

136. We therefore reject Shinelock's argument that the FTT's decision on Issue 2 was vitiated by procedural unfairness.

137. We turn to whether or not the FTT erred in law in deciding that the Payment was not "recognised" in the accounts, as that requirement is defined by section 308(2). Mr Boch raised a number of arguments why the FTT was wrong, which we do not accept. In summary, they were as follows:

(1) HMRC accepted that the accounts were GAAP compliant, and in order to be GAAP compliant the 2015 accounts must have recognised the Payment.

This argument is misconceived. The issue was whether the payment was recognised in the manner set out in section 308(2), typically by being recognised in the profit and loss account. The FTT asked itself the right question. As Mr Ripley suggested, it is possible that the accounts did not so recognise the Payment because when they were prepared it was Shinelock's position that Mr Ahmed was the beneficial owner of the Property.

(2) The FTT was wrong to decide that the Payment was not recognised solely because there was no "line item".

The FTT did not reach its decision on such a basis. It noted that there was no line item, and that finding is not challenged, but it then went on to consider whether the accounts recognised the Payment in some form of net entry.

(3) It was impossible to make a "line entry" because Companies' House standard format for small company accounts could not, to the best of Mr Boch's knowledge, incorporate such a change.

This is pure speculation, and does not appear to have been argued before the FTT. It does not demonstrate any error of law in the FTT's reasoning.

(4) The FTT failed to explain why this transaction required a line item when others (such as a global figure for administrative expenses) apparently do not.

The issue, correctly identified by the FTT, was whether the Payment was recognised in the accounts in a way which satisfied the requirement of section 307(2) read with section 308(2). Those provisions are specific to loan relationship credits and debits.

(5) The FTT's approach precluded Shinelock from making both the beneficial ownership argument and the loan relationship argument, meaning Shinelock could not make alternative legal arguments "because its statutory accounts can only take one form".

This argument is wholly misconceived. It was Shinelock's decision at each stage how to frame it case, and once it had decided to concede the beneficial ownership argument and argue before the FTT that the Payment gave rise to a NTLRD, that necessarily raised the question of whether section 307 was satisfied.

(6) If Shinelock had been given proper notice of this issue, it could have altered its accounts so as to recognise the payment.

We have concluded that Shinelock was on notice of this issue, but, more fundamentally, an amendment to its 2015 accounts could not have been made with retrospective effect for corporation tax purposes.

138. Stepping back, the FTT correctly directed itself in law as to the issues raised by Issue 1. In considering whether the statutory requirements were met on the facts found by the FTT, the FTT was in our view taking an approach to Shinelock's case which was generous, in attempting to make the necessary findings by inference in the absence of the relevant accounts. Bearing in mind that the burden was on Shinelock to establish that a NTLRD was due, the FTT might have simply concluded that Shinelock had failed to discharge that burden. We do not think it can now be said to have erred in law by taking that more generous approach. What matters is the FTT's finding, at [132], that this was a case where it was concluded in preparing the accounts that *no entry* needed to be made, so *nothing* was recorded as required by section 308(2). In those circumstances, the FTT reached the right decision on Issue 1.

139. We would therefore have rejected Shinelock's appeal on Issue 1, with the result that its appeal against HMRC's amendments to the 2015 assessment would have been dismissed.

140. It is not necessary for us in view of this decision to consider (1) HMRC's challenge to the FTT's decision that Shinelock had made a late claim for the NTLRD, or (2) HMRC's alternative argument for a reduced deficit.

DISPOSITION

141. Shinelock's appeal is dismissed.

JUDGE THOMAS SCOTT
JUDGE ASHLEY GREENBANK

Release date: 15 May 2023