Neutral Citation: **[2024] UKUT 00103 (TCC)**

Case Number: UT/2022/000041

UPPER TRIBUNAL
(Tax and Chancery Chamber)

Hearing venue: The Rolls Building
7 Rolls Buildings
Fetter Lane
London
EC4A 1NL

INCOME TAX – tax avoidance scheme – whether amounts paid by respondent under trust arrangements taxable as earnings from employment under s62 ITEPA 2003 – whether taxable as earnings under Part 7A ITEPA 2003 because paid "in connection with" employment — UT deciding that loan made "in connection with" directorship – draft UT decision circulated to parties – Respondent challenged the UT decision on the grounds of procedural unfairness – further hearing – held: no procedural unfairness – observations on need for the parties to make submissions on remaking or remitting –

Heard on: 6 and 7 November 2023
With further written submissions on
24 January 2024
Further heard: 27 March 2024
Judgment date: 12 April 2024

Before

MR JUSTICE EDWIN JOHNSON
JUDGE GUY BRANNAN

Between

THE COMMISSIONERS FOR HIS MAJESTY' S REVENUE AND CUSTOMS
Appellants

and

MARLBOROUGH DP LIMITED
Respondent

Representation:

For the Appellants: Julian Ghosh KC and Barbara Belgrano, Sarah Black and Colm Kelly, Counsel, instructed by the General Counsel and Solicitor to His Majesty's Revenue and Customs

For the Respondent: Michael Firth KC, Counsel, instructed by Morr & Co LLP

SUPPLEMENTAL DECISION

Introduction

1. This decision is supplemental to our decision on the appeal ("the appeal") of the Commissioners for His Majesty's Revenue and Customs ("HMRC") against the decision of the First-tier Tribunal published on 1 September 2021, as subsequently amended ("the Decision").

2. On 29 January 2024 we circulated our draft decision on the appeal to the parties, on the usual confidential basis, for the submission of suggested corrections. In the draft decision ("the Draft UT Decision") we decided, amongst other matters, that the First-tier Tribunal ("the FTT") had been wrong, as a matter of law, to decide that the test of connection in section 554A(1)(c) of the Income Tax (Earnings and Pensions) Act 2003 ("ITEPA") was not met in relation to the payments made by MDPL through the RT arrangements to Dr Thomas. Pursuant to our powers under section 12 of the Tribunals, Courts and Enforcement Act 2007 we decided that this part of the Decision should be set aside and re-made as a decision that these payments were taxable under the provisions in Chapter 2 of Part 7A ITEPA.

3. In response to our circulation of the Draft UT Decision we received a list of minor suggested typing corrections from counsel for HMRC. Mr Firth KC, counsel for the Respondent ("MDPL"), did not have any typing corrections to add, but did submit a document described as "Respondent's Query on the Draft Judgment". In this document, which we shall refer to as "the Query Document", Mr Firth contended that, in our re-making of the relevant part of the Decision, we had decided matters which had not been argued before us and which were not the subject matter of the appeal. Mr Firth asserted that procedural fairness required us to allow the parties to make submissions on these matters, before finalisation of our decision on the appeal.

4. In response to the Query Document HMRC contended that there had been no procedural unfairness and that MDPL should not be permitted to make any further submissions. They argued that the opportunity to make submissions had come and gone with the original hearing of the appeal, on 6 and 7 November 2023.

5. We had some difficulty in understanding what procedural unfairness there had been in our decision on the question of whether the connection test was met, on the facts of this case, so as to render the payments taxable as income in the hands of Dr Thomas. We will refer to this question as "the Connection Issue". We also had some difficulty in understanding what further submissions, over and above those made at the original hearing on 6 and 7 November 2023, MDPL wished to make. In these circumstances we concluded that we had no option but to list a further hearing, prior to finalisation of the Draft UT Decision, in order to determine whether there had been a procedural unfairness and in order to identify and, if appropriate, consider the further submissions which MDPL had said that it wished to make.

6. The further hearing took place on 27 March 2024. We had the benefit of sequential skeleton arguments for the further hearing, with MDPL going first. At the further hearing itself, which was held in private given the continuing confidentiality of the Draft UT Decision, we heard from Mr Firth on behalf of MDPL who provided us with a further written Reply to HMRC's skeleton argument for the further hearing ("the Reply Document"). In the event we did not find it necessary to call on Mr Ghosh KC for HMRC, in response to Mr Firth's submissions.

7. This supplemental decision sets out our decision on the question of whether there was a procedural unfairness in relation to the Connection Issue. For the reasons which we shall explain we have decided that there was no procedural unfairness. For the reasons which we shall also explain, if we had come to the conclusion that there had been a procedural unfairness, we would not have been persuaded to change our decision on the Connection Issue, as it is now set out in the finalised version of the Draft UT Decision.

8. This supplemental decision should be read with our decision on the appeal; meaning the finalised version of the Draft UT Decision as now published ("the UT Decision"). It is assumed that a reader of this supplemental decision will be familiar with the UT Decision and the issues in the appeal. Unless otherwise indicated, this supplemental decision makes use of the same defined expressions as in the UT Decision.

9. It is convenient to continue to make reference to the Draft UT Decision in this supplemental decision, because it was the relevant part of the Draft UT Decision which was the subject of the allegation of procedural unfairness. Given that our decision on the question of procedural unfairness is set out in this supplemental decision, only very minor changes have had to be made, as between the Draft UT Decision and the UT Decision, as a consequence of the further hearing. It has only been necessary, in the UT Decision, to make brief reference to the further hearing and this supplemental decision. Where we set out paragraphs from the Draft UT Decision, we set them out as corrected following receipt of HMRC's suggested typing corrections.

The allegation of procedural unfairness

10. The starting point is the section of the Draft UT Decision in which we analysed Ground 1 of the Appeal. Ground 1 of the Appeal was the argument of HMRC that the contributions made by MDPL and the loans made by the RT to Dr Thomas were taxable under section 554A of Part 7A ITEPA. Section 554A(1) set out the circumstances in which Chapter 2 of Part 7A applied. For ease of reference we set out paragraph (c) of section 554A(1) which was the provision in issue in relation to Ground 1:

> "(c) it is reasonable to suppose that, in essence—
> (i) the relevant arrangement, or
> (ii) the relevant arrangement so far as it covers or relates to A,
> is (wholly or partly) a means of providing, or is otherwise concerned (wholly or partly) with the provision of, rewards or recognition or loans in connection with A's employment, or former or prospective employment, with B,"

11. Our analysis of Ground 1, including the authorities to which we made reference and the competing arguments of the parties, was set out in paragraphs 122-152 of the Draft UT Decision. In paragraphs 147 and 148 we concluded that the FTT had made the following error of law in relation to their statement of the test of connection in section 554A(1)(c):

> "147. The FTT's reasoning in the key passage at [137] is very compressed and could usefully have benefited from greater elaboration. However, in our view, the FTT at [137] did not state, as HMRC contended, that the test contained in section 554A(1)(c) ITEPA ("connected with A's employment") was *the same* as that found in sections 10 and 62 ITEPA i.e. "from" employment. What the FTT said was that the employment "must be *part* of the reason for the reward" (emphasis added). When the FTT then stated that the section 554A(1)(c) ITEPA issue required "essentially the same analysis" as that in relation to general earnings, we consider that it was intending to indicate that it had to look again at the various facts and circumstances which it took into account in determining whether the payments by MDPL

constitute a general earnings for the purposes of section 62 ITEPA but applying the "part of the reason for the reward" test.

148. In our judgment, however, the FTT erred in law in stating the test as being that the employment had to be part of the reason for the reward. That is not the statutory test. The words used by Parliament involve a test of connection not one of causation. As we have said, we consider that there must be a strong or direct connection between the employment/directorship and the loan. Section 554A(12) ITEPA provides "all relevant circumstances are to be taken into account in order to get to the essence of the matter". We consider that this reinforces the need to identify which (if any) of the various facts found by the FTT constitute the sufficiently close connection required by section 554A(1)(c) ITEPA."

12. We then turned to apply the test, or requirement of "a strong or direct connection between the employment/directorship and the loan" to the facts, as found by the FTT in the Decision. Our analysis, and consequential conclusion were set out in paragraphs 149-152 of the Draft UT Decision:

"149. In the present case, Dr Thomas, acting as the director of MDPL resolved to make contributions to the RT. Shortly thereafter, Dr Thomas would write to BTIL on MDPL headed paper asking it to consider advancing a loan to him. A loan would subsequently be made by the RT, via MTL as nominee for the Trustees, to Dr Thomas. In our view, that, of itself, is an insufficient degree of connection to Dr Thomas' directorship for the loans to be regarded as made in connection with that office. A company can only act through the agency of its directors and employees, unless it acts in general meeting. We consider that resolving to make the contribution and requesting the loan were not sufficiently closely connected with Dr Thomas' directorship to cause section 554A(1)(c) ITEPA to be engaged.

150. The profits of MDPL, paid as contributions to the RT and then on-lent to Dr Thomas, reflected the profits of the dental practice carried on by MDPL. Dr Thomas was actively engaged in the practice as a dentist and was assisted by a hygienist and an associate dentist (see [52]). At all material times, Dr Thomas was the sole director of MDPL and, therefore, the guiding mind of the company solely responsible for the conduct and direction of its business from which the profits were derived. In our view, this is a sufficiently direct and close connection with Dr Thomas' directorship (treated by section 5 ITEPA as an employment) to ensure that section 554A(1)(c) applied. We are satisfied that treating the profits of MDPL contributed to the RT and on lent to Dr Thomas as connected with his directorship accurately reflects the essence of the overall arrangement.

151. We have therefore come to the conclusion that the loans from the RT to Dr Thomas were connected with his employment/directorship for the purposes of section 554A(1)(c) ITEPA.

152. We therefore allow HMRC's appeal on Ground 1."

13. Given the above analysis and conclusion, there was no difficulty in our re-making the relevant part of the Decision. As we explained in paragraph 175 of the Draft UT Decision:

"175. We must then decide whether to remit the case to the FTT or remake the Decision, so far as it deals with the subject matter of Grounds 1; that is to say the question of whether the loans made to Dr Thomas are taxable as employment income under Part 7A ITEPA. Given the terms of our decision on Ground 1 we consider that it would be both disproportionate and unnecessary to remit the case to the FTT. We refer back to our analysis and conclusions on Ground 1. Applying our own conclusions on the correct application of the provisions of Part 7A ITEPA to the facts of the present case, as those facts are recorded and determined by the FTT in the Decision, we are able to decide that Part 7A ITEPA did apply to treat the loans to Dr

Thomas as employment income in the hands of Dr Thomas. There is no need for a remission to the FTT for any further or different findings of fact to be made. Accordingly, we have decided to remake the relevant part of the Decision, finding that the loans/contributions in respect of the relevant years were chargeable to income tax under Part 7A (and the anti-forestalling provisions in respect of any loan/contributions made on or after 9 December 2010 but before 6 April 2011).

14. The complaint of MDPL can be summarised as follows:

(1) The test of strong or direct connection, as the test of connection in section 554A(1)(c), was not a test for which either of the parties had contended at the hearing of the Appeal.

(2) In the result MDPL was deprived of the opportunity to make the submissions which it would have wished to make on the application of this strong or direct connection test to the facts of the present case.

(3) This was procedurally unfair. MDPL was entitled to be heard on the question of whether the strong or direct connection test was satisfied on the facts of the case.

The relevant law

15. Mr Firth drew our attention to several authorities in which procedural unfairness was found to have occurred. He did not claim that the facts of these authorities were on all fours with the present case. His argument was that the principles which emerged from these authorities were engaged and applicable in the present case.

16. The first of these authorities was *Egan v Motor Services (Bath) Ltd* [2007] EWCA Civ 1002. The case concerned a dispute over the sale of a motor car which was alleged to have been sold with faulty steering. The claim failed. The judge found that the car was of satisfactory quality and that there had been no breach of the implied condition in Section 14 of the Sale of Goods Act 1979. For present purposes the relevance of the case lies in the fact that the judge at first instance reserved his judgment on the trial and, in accordance with the usual practice, sent a draft of the judgment to the parties for suggested corrections. Counsel for the claimant then wrote to the judge raising a large number of points on which he disagreed with the judge's conclusions and invited the judge to reconsider these points. When the judge came to hand down his judgment some changes had been made to the previous draft of the judgment, but the overall result remained the same.

17. The claimant appealed. The appeal failed, for the reasons set out in the judgment of Smith LJ, with which Arden and Ward LJJ agreed. In an addendum to her judgment, at [49]-[51], Smith LJ added the following comments on the attempt by counsel to re-argue the case, following receipt of the draft judgment:

> "49. I wish to add a few words to deprecate the practice which was adopted in this case of counsel writing to the judge, after a draft judgment has been provided, to ask him to reconsider his conclusions. It is a growing practice and in my view it should happen only in exceptional circumstances.
>
> 50. The purpose of the judge providing a draft of the judgment before hand down is to enable the parties to spot typographical, spelling and minor factual errors which have escaped the judge's eye. It is also to give the parties the opportunity to attempt to reach agreement on costs and to consider whether they wish to appeal. Consideration of such matters before hand down

can save costs. Circulation of the draft is not intended to provide counsel with an opportunity to re-argue the issues in the case.

51. Only in the most exceptional circumstances is it appropriate to ask the judge to reconsider a point of substance. Those circumstances might be, for example, where counsel feels that the judge had not given adequate reasons for some aspect of his/her decision. Then it may be appropriate to send a courteous note to the judge asking him/her to explain the reasons more fully. By way of further example, if the judge has decided the case on a point which was not properly argued or has relied on an authority which was not considered, the appropriate course will be to ask him/her either to reconvene for further argument or to receive written submissions from both sides. Letters such as the one sent in this case, which sought to reopen the argument on a wide variety of points, should not be sent."

18. In the Query Document Mr Firth stressed what was said by Smith LJ in [51]; namely that it is appropriate to ask the judge to reconsider a point of substance where a judge has decided a case on a point which was not properly argued. We of course accept this. We would add the following three points, which emerge from the addendum to Smith LJ's judgment. First, circulation of a draft judgment is not intended to provide counsel with an opportunity to re-argue the issues in the case. Second, it is only in the most exceptional circumstances that it is appropriate to ask the judge to reconsider a point of substance. Third, the guidance provided by Smith LJ draws a clear dividing line between attempting to re-argue the issues, which is not permitted, and exceptional circumstances such as a judge deciding a case on the basis of a point which was not properly argued or an authority which was not considered.

19. The next authority was *Re M (Fact-Finding Hearing: Burden of Proof)* [2008] EWCA Civ 1261. The case was concerned with a fact-finding hearing in family proceedings, where a judge had found, on the balance of probabilities, that a mother was responsible for a set of injuries suffered by her baby. The judgment did not exclude the possibility that the father had perpetrated the injuries. An appeal against the judge's findings was unsuccessful, but the case was remitted to the judge so that the relevant part of her judgment, which dealt with the question of who had perpetrated the injuries, and was considered to be ambiguous, could be explained. In the final part of his judgment in the Court of Appeal, with which Sir Mark Potter P and Arden LJ agreed, Wall LJ took time to explain that an appeal might well have been avoided if the ambiguity in the judgment had been raised with the judge at the point when she circulated the draft of her judgment for corrections. The relevant passage from the judgment, at [36]-[40] is rather lengthy, but is best set out in full:

"English v Emery Reimbold & Strick Ltd; DJ & C Withers (Farms Ltd) v Ambic Equipment Ltd; Verrechia v Commissioner of Police of the Metropolis (Practice Note) [2002] EWCA Civ 605, [2002] 1 WLR 2409, [2002] UKHRR 957

[36] It is high time that the Family Bar woke up to the first of these cases, and to the fact that it applies to family cases: – see (inter alia) *Re B (Appeal: Lack of Reasons)* [2003] EWCA Civ 881, [2003] 2 FLR 1035, where Thorpe LJ cited from the judgment of Arden LJ in *Re T (Contact: Alienation: Permission to Appeal)* [2002] EWCA Civ 1736, [2003] 1 FLR 531. In her judgment in the latter, Arden LJ specifically considered whether the principle identified in a civil appeal should equally apply to quasi-inquisitorial proceedings under the Act. She saw no reason why not, and went on in the following paragraph to offer some general guidance:

'In a complex case, it might well be prudent, and certainly not out of place, for the judge, having handed down or delivered judgment, to ask the advocates whether there are any matters which he has not covered. Even if he does not do this, an advocate ought immediately, as a matter of courtesy at least, to draw the judge's attention to any material omission of which he is then aware

> or then believes exists. It is well established that it is open to a judge to amend his judgment, if he thinks fit, at any time up to the drawing of the order. In many cases, the advocate ought to raise the matter with the judge in pursuance of his duty to assist the court to achieve the overriding objective …; and in some cases, it may follow from the advocate's duty not to mislead the court that he should raise the matter rather than allow the order to be drawn. It would be unsatisfactory to use an omission by a judge to deal with a point in a judgment as grounds for an application for appeal if the matter has not been brought to the judge's attention when there was a ready opportunity so to do. Unnecessary costs and delay may result.'
>
> **[37]** I respectfully agree. What should plainly have happened in the instant case is that, following receipt of the judgment, counsel should have raised with the judge any queries which arose and invited her to deal with them. Had this occurred, I doubt very much if the matter would have reached this court – certainly the query which we are sending back to the judge would not have done so.
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> **[38]** I wish to make it as clear as possible that after a judge has given judgment, counsel have a positive duty to raise with the judge not just any alleged deficiency in the judge's reasoning process but any genuine query or ambiguity which arises on the judgment. Judges should welcome this process, and any who resent it are likely to find themselves the subject of criticism in this court. The object, of course, is to achieve clarity and – where appropriate – to obviate the need to come to this court for a remedy.
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> **[39]** This process applies in cases involving children in both public and private law as much as it applies in any other case. I very much hope that in the future this court will not be faced with matters which are plainly within the province of the judge, and are properly capable of being resolved at first instance, and immediately after the relevant hearing.
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> **[40]** The present case is a particularly blatant example because it is plain that counsel received the judgment in advance of it being perfected, and proposed corrections, some of which at least the judge incorporated. There were, moreover, attendances before the judge on 30 July 2008. Quite why the question of the father as perpetrator was not raised at the time I do not understand. I did not find the explanation proffered convincing. Henceforth, however, I hope that *Re B (Appeal: Lack of Reasons)* and *Re T (Contact*: *Alienation*: *Permission to Appeal)* will be followed. Advocates who fail to do so are likely to find themselves in some difficulty."

20. As Wall LJ made clear, it is the duty of counsel to raise with the judge, when a draft judgment is circulated, matters of the kind referred to by Wall LJ. We would respectfully suggest that it is important to read the reference, at [38], to "any alleged deficiency in the judge's reasoning process" in its proper context. We do not read anything said by Wall LJ as undermining the clear dividing line, drawn by Smith LJ in *Egan*, between attempting to re-argue the issues, on the one side, and addressing a procedural failing such as the judge deciding a case on the basis of a point not properly argued or an authority which was not considered.

21. Further useful guidance on where the dividing line is to be drawn can be found in *Murphy v Wyatt* [2011] EWCA Civ 408. The case was concerned with a claim for possession of land which included a mobile home. A question which arose in the possession proceedings was whether the Mobile Homes Act 1983 applied to the tenancy. The claimant landlord contended that the Act only applied to the site of the mobile home, and not to the remainder of the land held on the relevant tenancy. The defendant tenant contended that the Act applied to the entirety of the land. The judge decided that the Act did not apply to the tenancy at all; which was a result more favourable to the claimant than the claimant had contended for. The judge reached this conclusion on two grounds. The first ground was that when the tenancy had originally been granted, there had been no planning permission for the caravan (the predecessor of the mobile home which was later placed on the land) to be located on the land. The second ground was that the tenancy was not confined to the site of the mobile home, but included a considerable amount of additional land, comprising nearly

two acres. It was these two grounds which were the subject of the appeal to the Court of Appeal.

22. What is not clear from the report of this case is whether there had been any argument on these two grounds at the hearing of the possession claim. What appears to have happened is that the judge at first instance reached his conclusion, that the Act did not apply to the tenancy at all, on the basis of the two grounds identified in our previous paragraph, without those grounds being argued. In his judgment on the appeal Lord Neuberger MR recorded, at [20], that there was disagreement between the parties as to the extent to which the judge had raised these two grounds at the hearing.

23. In any event, in his judgment on the appeal Lord Neuberger MR took some time, before considering the two grounds for the judge's decision, to set out the proper approach for a judge to adopt "when he is proposing to decide a case on the basis of a point which was not argued, or in a way, or to an extent, which is more favourable to a party than the case which that party advanced in court."; see the judgment at [13]. At [14]-[18] Lord Neuberger MR gave the following guidance:

> **"[14]** The first point to make is that, at least as a matter of principle, a judge is entitled to take such a course. After all, a judge must decide a case according to the facts and the law as he believes them to be. Accordingly, subject to any particular reason to the contrary in the particular case, there is no reason for objecting in principle to a judge taking such a course.
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> **[15]** Secondly, however, there may be particular reasons why such a course is not open to the judge in a particular case. For instance, the course he wishes to take may not be open on the pleadings, or it may be precluded by virtue of a concession which has not been, or cannot be, withdrawn. Equally, a finding of primary fact, or even a finding of secondary fact or an assessment of a witness or expert evidence, may simply not, on analysis, be open to the judge on the evidence before him.
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> **[16]** Thirdly, whether or not the point turns out to be open to the judge, it is clear that, save perhaps in very exceptional circumstances (which I find it very hard to envisage), he must ensure that the parties are given a fair opportunity to deal with the point. If the point is, on analysis, a bad one, it is fairer to the parties and less embarrassing for the judge that this is established before the judgment is available, rather than the parties either having a hearing at which the judge has to withdraw or amend the judgment or suffering the delay and expense of an appeal.
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> **[17]** But there is an even more important reason for the requirement that the parties are given a proper opportunity to deal with the judge's point, namely procedural fairness. It is simply unfair on a party if she loses a case because of a point thought up by the judge, which she or her representatives have not properly been able to address. In this case, a major factor which (if I may say so, correctly) influenced Mummery LJ when giving the Defendant permission to appeal, was that her representatives stated that they had not been given a proper opportunity of dealing with the two reasons advanced by the Judge for holding that the 1983 Act did not apply.
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> **[18]** How a judge ensures that parties have an opportunity to deal with a point which he has thought of must depend on the circumstances. If the point occurs to him before or during the hearing, he should obviously raise it in court in clear terms with the parties, ideally ensuring that it is reduced to writing, and give the parties a fair opportunity to deal with it. Sometimes it can be fully disposed of at the hearing; on other occasions, it may be only fair to give the parties time, and subsequent written submissions may be the appropriate course. If the point occurs to the judge after the hearing, it would, I think, normally be sufficient if he writes to the parties or their representatives, giving them the opportunity of dealing with the point in written

submissions (sometimes with the opportunity for counter-submissions). Occasionally, a further hearing may be appropriate, but it would normally be disproportionate."

24. In terms of how a judge should ensure that the parties have the opportunity to deal with a point thought of by the judge, Lord Neuberger gave the following further guidance at [19]:

> **"[19]** Where (as here) the judge's point is crucial in the sense that, without it, the decision would be different, it is obviously of particular importance that the parties are given a full opportunity to deal with it. Where the point represents a further reason to those which have been advanced and accepted by the judge as reasons for finding for the successful party, it would still normally be fair and sensible to give the parties an opportunity to deal with it, but, in such a case, a relatively short procedure may be justifiable."

25. The final authority to which we were referred by Mr Firth was *Potanina v Potanin* [2024] UKSC 3. This case was concerned with a practice which had developed in dealing with applications under section 13 of the Matrimonial and Family Proceedings Act 1984. The applicant, who was involved in extensive litigation with her former husband in relation to the division of their assets, applied for leave to make an application under this section. The application was initially heard by the judge at a without notice hearing, so that the respondent husband had no notice of the application or the hearing. The judge granted leave to the applicant at the without notice hearing. The judge's order permitted the respondent to apply to set aside the grant of leave. The respondent duly made an application to set aside the judge's order granting leave. The judge acceded to this application, set aside his previous order and dismissed the application for leave. The Court of Appeal reversed this order, on the basis that the law was that the grant of leave could only be challenged if certain narrow conditions were satisfied. By a majority, the Supreme Court allowed an appeal against the decision of the Court of Appeal, on the basis that the practice adopted by the courts in applications for leave under section 13 had no basis in law and was fundamentally unfair. The decision of the majority, for the reasons set out in the judgment of Lord Leggatt JSC (with whom Lord Lloyd-Jones and Lady Rose JJSC agreed), was that the right to apply to set aside the initial order of the judge had been unconditional.

26. In his judgment Lord Leggatt devoted considerable time to explaining the importance of a party, adversely affected by an order, having an opportunity to say why the order should not have been made. For present purposes it is sufficient to quote what Lord Leggatt said at [1] and [31]:

> "1. Rule one for any judge dealing with a case is that, before you make an order requested by one party, you must give the other party a chance to object. Sometimes a decision needs to be made before it is practicable to do this. Then you must do the next best thing, which is - if you make the order sought - to give the other party an opportunity to argue that the order should be set aside or varied. What is always unfair is to make a final order, only capable of correction on appeal, after hearing only from the party who wants you to make the order without allowing the other party to say why the order should not be made."

> "31. First and foremost, to deny the party adversely affected by an order any opportunity to say why the order should not be made is patently unfair. It is contrary to what I referred to at the start of this judgment as rule one for judges."

27. The circumstances of the present case are very different to *Potanina*, but we accept that the principles of fairness identified by Lord Leggatt are clearly applicable, by analogy, to a case where a court or tribunal is said to have made a decision on the basis of a point or an authority on which the parties have not had the opportunity to make submissions.

28. With the above guidance in mind, we turn to the question of whether there was, as alleged by MDPL, procedural unfairness in the present case.

Was there procedural unfairness?

29. As we have explained, Mr Firth's essential complaint is that we decided on a test of strong or direct connection, as the test of connection under section 554A(1)(c), for which neither party had contended. In the result, so it is said, MDPL was deprived of the opportunity to make submissions on the facts of the case.

30. There are a number of difficulties with this case.

31. The first is that Mr Firth made it quite clear, in his written and oral submissions at the original hearing, that the test of connection could not be satisfied in the present case, on the facts as found by the FTT, whatever the test of connection. This was made clear in paragraphs 60 and 113 of Mr Firth's skeleton argument for the original hearing:

> "60. The Respondent submits that the FTT applied the correct test and did not "ignore evidence". Even if a different test should have been applied (and it is not apparent what HMRC say that test is), the UT cannot conclude that it would not have been satisfied here."

> "113. Accordingly, even if a different test is identified by this UT, it would not avail HMRC. The findings of fact of the FTT were entirely open to it on the evidence, no ground of appeal has demonstrated otherwise. There is, accordingly, no basis for the UT to find that the arrangement was a means/concerned with providing rewards/loans in connection with the employment and that that was part of the essence of the matter."

32. Mr Firth repeated this point in his oral submissions (Transcript of the original hearing: Day 2/page 76/lines 16-21):

> "So with that background in mind, I turn to my submissions on part 7A in this case. As I say at paragraph 60, our submission is the FTT applied the correct test, did not ignore evidence, and even if it should have applied a different test, this tribunal cannot conclude it would have been satisfied."

33. Given this position we found it difficult to understand how our formulation of the test for connection left MDPL in a position where it had been unfairly deprived of the opportunity to make its case on the facts. On the basis of Mr Firth's submissions, MDPL's case on the facts remained the same, as put at the original hearing, whatever the correct formulation of the test of connection.

34. This leads on to the second difficulty with MDPL's case. The case proceeds on the footing that our formulation of the test of connection is one which was new, and lay outside the scope of the arguments of the parties at the original hearing. In fact, the opposite is the case. The reason for this is that our formulation of the test of connection was derived from a case which was at the centre of the submissions of the parties on the Connection Issue at the original hearing. The case in question was the decision of the Court of Appeal in *London Luton Hotel BPRA Property Fund LLP v HMRC* [2023] EWCA Civ 362. We analysed the case in some detail in paragraphs 129-131 of the Draft UT Decision. In particular we quoted from the joint judgment of Whipple and Falk LJJ, at [69]:

> "[69] These cases show that the meaning of "on, or in connection with" is heavily dependent both on context and policy. The phrase might require what Robert Walker LJ in *Coventry*

> *Waste* referred to as "a strong and close nexus" or it might require "a weak and loose one". *Ben-Odeco v Powlson* introduces the concept of remoteness, which is another way of considering the same question."

35. At paragraph 131 of the Draft UT Decision we drew a number of propositions from *London Luton* and from one other case which was at the centre of the argument on the Connection Issue. The other case was *Barclays Bank plc v HMRC* [2007] STC 747. The overall result of our analysis of these cases was our decision that section 554A(1)(c) required a strong or direct (or close) connection between the employment/directorship of Dr Thomas and the loans to Dr Thomas. The words "strong or direct connection" (paragraph 148 of the Draft UT Decision) or "strong direct nexus" (paragraph 146 of the Draft UT Decision) or "strong and close nexus" (paragraph 146 of the Draft UT Decision), all of which formulations were intended to convey the same essential meaning, did not come out of the blue. They were derived from the reference to "a strong and close nexus" in *London Luton* and were contrasted (in paragraph 146 of the Draft UT Decision) with:

> "…loans where the relationship between the loan and the employment was merely incidental or peripheral – merely part of the background, so to speak."

36. Mr Firth's submissions at the original hearing, on the Connection Issue, were also based upon *London Luton*. In his skeleton argument for the original hearing Mr Firth quoted *London Luton*, at [69], and stressed the conclusion of the Court of Appeal that a strong and close nexus with the physical work of conversion was required in that case. With this guidance in mind Mr Firth then turned to MDPL's case on the facts. In its essentials, this case was that the required degree of connection could not be found between the employment/directorship of Dr Thomas and the loans, because the one was incidental to the other. The required degree of connection, as connection was explained in *London Luton*, did not exist.

37. It is fair to say that HMRC did not argue that the test of connection was a strong or direct connection. HMRC argued that the test of connection was looser than this. This was hardly surprising. *London Luton* admits of the possibility of a test of connection having a spectrum of meanings, from a strong and close nexus to a weak and loose one. Our decision that a strong and close nexus was required, for the purposes of section 554A(1)(c), was at the end of the spectrum most favourable to MDPL. The relevant point for present purposes is however that the arguments of the parties over the correct test of connection and over the application of that test to the facts of the present case took place by reference to the spectrum of possible meanings of connection in *London Luton*. MDPL's case on the facts was put by reference to and against the backdrop of that spectrum. In these circumstances we do not accept that we have come up with a new test of connection, which was not addressed in the submissions of the parties at the original hearing. Even if MDPL had not addressed the test of connection that we adopted (and which was in MDPL's favour), the strong or direct connection test and its application to the facts was plainly in issue before us. In fact, and for the reasons which we have just explained and which we shall explain further when we come to consider the next difficulty with MDPL's case, this question was addressed by MDPL. If however it is assumed that there was a failure by MDPL to address this question, there would not, in the circumstances, have been a procedurally unfair deprivation of the right to be heard.

38. Putting the matter another way, the present case does not fit into the category of cases where one party argues for construction A of a statutory test, the other party argues for construction B of a statutory test, and the court or tribunal comes up with its own

construction C of the statutory test, with construction C being neither addressed nor anticipated in the submissions of the parties. The argument over the test of connection in the present case bears no resemblance to this situation.

39. This leads on the third and related difficulty with MDPL's case. MDPL's case proceeds on the basis that MDPL was deprived of the opportunity to make submissions on the application of the strong or direct test of connection to the facts of this case. This case was however put by Mr Firth in his written and oral submissions at the original hearing. In essence, this case was that the required connection between the employment and the loans could not be made. There was no causal connection between the two. In support of this case Mr Firth directed us to the findings of fact made by the FTT in the Decision, in particular at [127-131]. Mr Firth stressed the point that the sums paid to Dr Thomas comprised the totality of the overall profits of MDPL's business, which did not derive from the work of Dr Thomas alone, but included the work of other fee earners in the business. The loans represented the profits of the business of MDPL, not the earnings of Dr Thomas as an employee of MDPL. The profits represented a return on the investment by Dr Thomas as shareholder in MDPL which, if they had not been paid as loans, would have been payable by way of dividends. As such, the required connection between the employment of Dr Thomas and the loans could not be made. This argument on the facts of the case was put in a number of ways by Mr Firth, and ranged broadly over those facts, but it is well illustrated and encapsulated by the following extract from Mr Firth's oral submissions at the original hearing (Transcript of the original hearing: Day 2/page 108/line 24 – page 109/line 4):

> "We reach a similar conclusion, in my submission, when we apply the concept of essence. The essence of this arrangement was to deliver the company's profits to its shareholder in a way it believed to avoid tax. That's the essence. Without those elements, it's not the same arrangement."

40. This third difficulty with MDPL's case is one which can be tested further, by reason of the course which we decided to take following receipt of the Query Document. As we have said, the purpose of the further hearing which we directed was to determine whether there had been a procedural unfairness and to identify and, if appropriate, consider the further submissions which MDPL had said that it wished to make. In the result, we had the benefit of the further submissions which MDPL wished to make on the application of the strong or direct test of connection to the facts of this case. These further submissions were set out in Mr Firth's skeleton argument for the further hearing. They were further elucidated in Mr Firth's oral submissions. We also had the Reply Document, but it is fair to say that the Reply Document was more concerned with meeting the arguments of HMRC that MDPL was barred, for procedural reasons, from making further submissions.

41. We intend no disrespect to Mr Firth in saying that there appeared to us be nothing new in the further written and oral submissions. They put the same case on the facts as was put at the original hearing. The following examples will suffice to demonstrate this identity between the original and the further submissions.

42. First, Mr Firth's skeleton argument for the further hearing stressed, repeatedly, that the source of the profits of the business of MDPL was the work of all the workers/employees of MDPL, and not just of Dr Thomas. As such, there was no direct or strong connection between the employment of Dr Thomas and the loans. The same argument was put to us at the original hearing. By way of example only, paragraph 112 of Mr Firth's original skeleton argument made the following assertions:

"112. HMRC's argument based on the source, for the company, of the profit is contrary to the FTT's findings of fact and wrong.

112.1. On the FTT's findings of fact, the arrangement was concerned only with the profit, not the source of the profit (see above, §44 and FTT, §41(2)). The arrangement did apply and would have applied to the profit irrespective of the source of the profit. There is no basis for dissecting the sums – they had a single character.

112.2. By HMRC's logic, anything a company does with the profit of the business is connected with the director's employment – dividend, charitable donation, etc.

112.3. Attributing the income generated by other staff to the director of the company dilutes the relevant concept to such an extent that it is meaningless. By that logic, one can attribute the work/income generation of any employee to their manager, and their manager's manager and so on all the way up the corporate pyramid. Notably, on the present facts, it means that the loans were in connection with the employment of every employee of the Respondent. That plainly cannot be the intended test.

112.4. Further, if the source of the funds used to make a payment means the payment can be connected with employment, it would follow that distributions on a winding up of a close company are connected with the termination of the directors' employments (as director) and thus within ITEPA, s.401 (rather than within the capital gains tax regime). Nobody, including HMRC, believes that to be the case.

112.5. HMRC's argument was that "*taking it as profits and then declaring and paying a dividend would have severed this connection*" (HMRC FTT Skeleton, §94 [2112]), but it is clear that the mechanism used does not change the character of the payment."

43. It is notable that this paragraph of the original skeleton argument was followed, in paragraph 113, by Mr Firth's point that the required connection did not exist, whatever the correct test of connection. It seems to us that Mr Firth was right to say that his argument on the facts, by its very nature, did not change whatever the correct test of connection.

44. Second, paragraphs 17 and 25 of Mr Firth's skeleton argument for the further hearing asserted that the loans had a strong and direct connection only with Dr Thomas' shareholding. No such strong and direct connection existed with the status of Dr Thomas as one of a number of people whose activities produced a profit. The same argument was put to us at the original hearing. An example of this is, again, paragraph 112 of Mr Firth's original skeleton argument, which we have quoted above. Another example is paragraph 36 of the original skeleton argument, which contained the following assertions:

"36. Fourth, HMRC say that the FTT "was focused on whether the payments made…were distributions made 'in respect of shares'" (§53). That is a severe mischaracterisation of the FTT's analysis. The UT is invited to re-read §§127 – 131. The FTT was plainly considering whether the payments had an employment or a non-employment source (as it said it would, at §128). Given that the non-employment source suggested by the Respondent was Dr Thomas's being a shareholder, the FTT had to consider that [.] HMRC's problem was that they had no real evidence to support their contention that there was an employment source (§129(1), §131, §131(5)(a)) and there was good evidence from Dr Thomas, accepted by the FTT, indicating that the purpose was to provide the sums to him as shareholder (§129(4))."

45. Third, paragraph 8 of Mr Firth's skeleton argument for the further hearing asserted that our identification of facts in the Draft UT Decision was incomplete and inaccurate in important respects. By way of example, the following assertion was made in paragraph 8.5:

"8.5. It is inaccurate to say that Dr Thomas was "solely responsible for the conduct and direction of" the business. As already referred to, the hygienist and associate dentist conducted their own respective parts of the business. Further, there was a practice manager who, logically, had responsibility for the conduct and direction of the business."

46. For the record, we do not accept this criticism of our identification of the facts. Our identification (if this is the correct expression) of the relevant facts in the Draft UT Decision was based on the findings of fact made by the FTT, in particular at [131(1)] of the Decision. The same applies to the other criticisms made in paragraph 8 of Mr Firth's skeleton argument for the further hearing. We do not regard our characterisation of the facts as any different from that of the FTT. Indeed it could not be, given the failure of the various attempts by HMRC, in the appeal, to challenge the findings of fact made in the Decision. Where we have differed from the FTT is in the test of connection to be applied to the facts.

47. This is however all beside the point, for present purposes. It is no part of our role to debate or defend the merits of what is now the UT Decision. That is for the Court of Appeal, if permission to appeal can be obtained. The relevant point for present purposes is that, in the original hearing, we were made well aware of the fact that Dr Thomas did not operate as a sole practitioner. We were made well aware of the fact that the fees earned by MDPL were not generated by Dr Thomas alone, but also by the other practitioners mentioned in paragraph 8. The reason we were made well aware of these facts was because Mr Firth, quite properly, stressed these facts in his submissions at the original hearing. Once this is appreciated, it can be seen that the submissions in paragraph 8 essentially amount to a second go at submissions which belonged in the original hearing and were made in the original hearing. We point to paragraph 8 by way of example, but the same applies to all the submissions made on the facts by MDPL at the further hearing.

48. The fourth difficulty with MDPL's case is a procedural difficulty. The Tribunal's powers on the appeal are contained in section 12 of the Tribunals, Courts and Enforcement Act 2007. Section 12 works in the following way. Assuming an error on a point of law in the relevant decision of the First-tier Tribunal, the Upper Tribunal has the power to set aside the relevant decision. If the Upper Tribunal decides that it is appropriate to set aside the relevant decision, by reason of the error on the point of law, the Upper Tribunal must either remit the case to the First-tier Tribunal with directions for its reconsideration or re-make the decision.

49. In the absence of a direction to this effect, this is not normally a two stage process. As a general rule, and assuming no direction to the contrary, the relevant appeal is heard in a single hearing at which the Upper Tribunal will decide (i) whether there is an error on a point of law and (assuming such an error), (ii) whether the relevant decision of the First-tier Tribunal should be set aside and (iii) whether there should be a remission or a re-making of the decision. As a general rule it is not open to a party to have a second go at the question of whether there should be a remission or a re-making of the decision. To borrow the memorable phrase of Lewison LJ, albeit in a different context, in *Fage UK Ltd v Chobani UK Ltd* [2014] EWCA Civ 5 (at [114]), the hearing of the appeal is "the first and last night of the show". To decide otherwise would run the risk of undermining the conventional appeal process.

50. This is not of course always the case. In some cases there may be a direction which divides up the hearing of the appeal so that the question of remission or rehearing is dealt with at a subsequent hearing. In some cases it may be that the Upper Tribunal will decide that the question of remission or rehearing requires separate consideration. As a general rule however the question of whether there should be a remission or a re-making is one which the parties should address on the hearing of the relevant appeal. If there are grounds for saying that the question of remission or re-making should be left over to a further hearing or for further consideration on paper, after the Upper Tribunal has made its decision on whether the

decision at first instance should be set aside, it is incumbent upon the parties or the relevant party to make the Upper Tribunal aware of this at the hearing of the relevant appeal, so that the Upper Tribunal can consider whether it is necessary to take this bifurcated and more expensive course.

51. In the present case the complaint of MDPL is that we have proceeded to re-make the Decision without giving MDPL the opportunity to be heard on the application of the strong or direct connection to the facts of the present case. As we have said, there are procedural difficulties with this complaint. In paragraph 45 of their skeleton argument for the original hearing counsel for HMRC said this in relation to their case on Part 7A of ITEPA:

> "45. The FTT applied the wrong test, and did not take into account relevant evidence. HMRC submit that the UT should remake this decision, finding that the payments were within Part 7A. Should the UT not be so minded, this point should be remitted to a differently constituted FTT."

52. MDPL was therefore on notice that the case of HMRC was that we should proceed to re-make or remit, if we accepted that the FTT had applied the wrong test. MDPL's case in response to this part of appeal featured, prominently, the submission that HMRC had failed to identify what the correct test of connection was. In these circumstances we are bound to say that it seems to us that it was for MDPL to put us on notice, at the original hearing, that it might be necessary for MDPL to be heard further (assuming the setting aside of the Decision), before we remitted or re-made the Decision.

53. In fairness to MDPL and to Mr Firth, it should be recorded that a proviso of this kind was included in MDPL's written submissions in the appeal. The proviso can be found in paragraph 26 of the submissions which MDPL filed in response to our invitation to the parties to make further submissions on the authorities which were not cited to us at the original hearing but which we regarded as relevant to the appeal. The proviso assumed however a situation where the Tribunal decided on a different test of connection, in respect of which MDPL would not have had the opportunity to make submissions as to the application of that test "because it does not know what it is". For the reasons which we have explained, this is not the position in the present case. The test of strong or direct connection derives from *London Luton*, and was an integral part of the arguments on the Connection Issue at the original hearing.

54. In these circumstances we have considerable difficulty in seeing how it would have been procedurally fair to permit MDPL to make further submissions on the Connection Issue, in the absence of this question being canvassed and considered in the original hearing.

55. In the Reply Document and in his submissions at the further hearing, Mr Firth made a forceful argument to the effect that the procedural arguments deployed by HMRC, in resisting the ability of MDPL to make further submissions, effectively reduced appellate court advocacy to a game of guesswork. Mr Firth's point was that if HMRC were right, respondents to appeals would be required, in a case of the present kind, to make speculative protective submissions, going through all of the possible tests which the Upper Tribunal might land upon.

56. Forcefully though this argument was put, we do not accept it. It seems to us that the argument takes an unrealistic view of the position in an appeal to the Upper Tribunal. This is because the question of procedural fairness is acutely fact sensitive. This can be illustrated by an example. Assume a case where the Upper Tribunal decides an appeal on the basis of a

statutory provision which has not been referred to by either party at the hearing of the appeal and on which the Upper Tribunal has heard no argument. Applying the guidance in the authorities cited to us by Mr Firth, which we have reviewed above, it seems inevitable that the decision of the Upper Tribunal would be procedurally unfair, unless the Upper Tribunal invited further submissions from the parties before making its decision. In such a case, it could not be said that either party should have sought to reserve its position in any way at the original hearing. Neither party would have had any idea of the basis on which the decision would be made. Neither would either party have had any reason to have anticipated the basis of the decision. In such a case the correct procedural course would have been to invite further submissions from the parties, which would have included any submission which the parties wished to make on the application of that statutory provision to the facts of the case.

57. The above example bears no relation to the circumstances of the present case. In the present case MDPL's case on the Connection Issue was that, on the facts as found by the FTT, the required connection could not be shown, whatever the correct test of connection. In addition to this, MDPL's case was that HMRC had failed to identify what the correct test was. In a case of this kind we do not regard it as unreasonable for MDPL to have sought to reserve its position, at the original hearing, on the question of re-making or remitting if, contrary to its argument that the correct identity of the test did not matter, it considered that it might need to make further submissions on the facts if we disagreed with the FTT on the correct test of connection. Whether the same will apply in another case will depend upon the particular facts of that other case. The overriding consideration is that it is the responsibility of the parties, at the hearing of the relevant appeal, to address the question of remission or re-hearing, in the event of a decision to set aside the decision at first instance. The addressing of that question includes the need to think through the issues in the appeal and to address the Upper Tribunal on what it can and should do, in terms of remission and re-making. This, in turn, includes the need to alert the Upper Tribunal to the possibility of further submissions being required, in circumstances where it is reasonable for the parties or either of them to anticipate this possibility.

58. The fifth and final difficulty which we see as confronting MDPL's case is the absence of any authority to support this case. It will be apparent, from our analysis of the relevant circumstances of the present case, that the present case bears no relation to any of the authorities cited to us by Mr Firth as examples of procedural unfairness. The gap between the circumstances considered in those authorities and the circumstances of the present case is one which we regard as material. It seems to us that the guidance on procedural unfairness which can be found in those authorities, when applied to the circumstances of the present case, provides a clear negative answer to the question of whether there has been procedural unfairness in the present case.

59. Drawing together all of the above analysis, we conclude that there has been no procedural unfairness in the present case. MDPL is not entitled to make further submissions on the question of whether the strong or direct connection test was satisfied on the facts of this case.

The further submissions

60. The merits of the further submissions do not fall to be considered, in the light of our decision that MDPL is not entitled to make the further submissions.

61. The procedural course we have taken does however have the consequence that we have received and considered the further submissions, in Mr Firth's skeleton argument, in the Reply Document (so far as the Reply Document is concerned with the further submissions) and in Mr Firth's oral submissions at the further hearing. Given this position, we consider it appropriate to explain, briefly, what we would have decided in relation to the further submissions, if we had decided that there had been procedural unfairness.

62. On this hypothesis we would not have been minded to make any change to our decision, in the relevant part of the Draft UT Decision, on the question of whether the test of connection in section 554A(1)(c) was satisfied. The reason for this will be apparent from the analysis set out in the previous section of this supplemental decision. The further submissions seemed to us to be repeating the submissions which MDPL had already made on the question of whether, on the facts as found by the FTT, the test of connection was satisfied. We repeat that we intend no disrespect to Mr Firth in what we have just said. Nevertheless, just as we were not persuaded by MDPL's original submissions on the question of whether the test of connection was satisfied, on the facts as found by the FTT, so we were also not persuaded by MDPL's further submissions on this question.

63. There is one other point which we should make in relation to the further submissions. It did seem to us that the further submissions betrayed some misunderstandings, on the part of MDPL, as to elements of our reasoning in the relevant paragraphs of the Draft UT Decision. Although we did not consider that any revision was required to the Draft UT Decision in this respect, it may be helpful to dispel these misunderstandings.

64. First, in relation to the question of whether there was a strong or direct connection between the loans and Dr Thomas' office as a director of MDPL, Mr Firth submitted that it was relevant to bear in mind that this Tribunal rejected a connection based on the identity of the decision-maker within MDPL, because a company could only act through the agency of its directors and employees. This apparent reference to paragraph 149 of the Draft UT Decision is not correct. That paragraph records that Dr Thomas, acting as a director of MDPL, resolved to make contributions to the RT and that he would write to BTIL on MDPL stationery asking it to consider advancing a loan to him. We then simply make the point that that "*of itself*" was an insufficient degree of connection for the purposes of section 554A ITEPA. We did not reject the possibility of a connection based on "who [was] the decision-maker within the company."

65. Second, Mr Firth argued that the connection identified by the Tribunal was "one in terms of the source of funds when they arose to the company". In this context, Mr Firth disagreed with what he described as the identification of the facts by the Tribunal at paragraph 150 of the Draft UT Decision. It was not correct, in Mr Firth's submission, to say that Dr Thomas was "assisted" by a hygienist and an associate dentist. They carried out their own work independently of Dr Thomas' work as a dentist. There were seven employees, including four dental nurses and a practice manager. Accordingly, when seeking to characterise the underlying source of the profits of MDPL, the profits constituted the blended results of the overall activities of the individuals, not just Dr Thomas (whether as a dentist or a director). Mr Firth referred to [131(1)] of the Decision which stated:

> "The overall profits from MDPL's business arises from the work done on its behalf by all its employees and not just that of Dr Thomas (whether as dentist or director)".

66. It seemed clear to us that Mr Firth had misinterpreted our decision at paragraph 150 of the Draft UT Decision. We refer in that paragraph to Dr Thomas being actively engaged in the dental practice and the fact that he was assisted by others. However, the essential point that paragraph 150 is making comes in the next sentence:

> "At all material times, Dr Thomas was the sole director of MDPL and, therefore, the guiding mind of the company solely responsible for the conduct and direction of its business from which the profits were derived."

67. It appears from his submissions, that Mr Firth understood the "conduct" of MDPL's business to refer to the day-to-day operations of the dental practice. This is a misunderstanding. At one point in his submissions when referring to paragraph 150, Mr Firth omitted the words "the guiding mind of the company", words which qualify and colour the whole of the remainder of the sentence. The essential point that is being made at paragraph 150 is that, as the director of MDPL, Dr Thomas was responsible for the management of MDPL's business, as the FTT acknowledged at [131(1)] when it accepted that the management of MDPL's business was necessarily conducted by its director. Dr Thomas *ran the business* of MDPL in his capacity as a director and the profits, which effectively financed the loans, were derived from that business – that was the essence of the matter. Dr Thomas did not run the business *qua* shareholder but as a director. That is the most important point made at paragraph 150. It was this feature that was central to our conclusion that the loans were connected to Dr Thomas' directorship and, therefore, fell within section 554A ITEPA.

68. Finally, Mr Firth referred to the issues relating to the source of the payments by MDPL which were discussed, in relation to section 62 ITEPA, in the context of general earnings. For example, Mr Firth emphasised the FTT's findings in relation to the "reason" for the loans, citing the Decision at [129], [131] and [137]. That approach, in our view, betrays a further misunderstanding. In relation to Part 7A ITEPA, the issue is not one of "source" (of the payments made by MDPL – whether the source was from the shares or from the employment) nor one of causality ("from" employment), but rather of *connection*. It is clear from the authorities cited at paragraph 131 of the Draft UT Decision that a connection can exist in relation to more than one thing. The loans could be connected with Dr Thomas' shareholding but they could also be connected, as we have concluded, with his role as the director of MDPL. Moreover, [137] of the Decision contains the very error of law, in relation to Part 7A ITEPA, which founds the jurisdiction of this Tribunal to remake the Decision pursuant to section 12 of the Tribunals, Courts and Enforcement Act 2007.

CONCLUSION

69. We have decided that there was no procedural unfairness. In addition, even if there had been a procedural unfairness, we do not consider that the arguments put forward on behalf of the Respondent would have changed our decision.

COSTS

70. So far as costs are concerned, there are two matters we should record. First, at the further hearing Mr Ghosh reserved the position of HMRC on the question of costs. Second, it seems to us that the costs of the further hearing are subject to the same regime as the remaining costs of the appeal. While it may not be necessary to spell this out, any application for costs in relation to the costs of the further hearing, whether made as part of an application for costs in relation to the appeal or as costs to be dealt with separately from the remaining

costs of the appeal must be made in writing and served on the Tribunal and the person against whom it is made within one month after the date of release of the UT Decision and this supplemental decision, as required by rule 10(5)(a) and (6) of the Tribunal Procedure (Upper Tribunal) Rules 2008.

MR JUSTICE EDWIN JOHNSON
JUDGE GUY BRANNAN

UPPER TRIBUNAL JUDGES
Release date: 16 April 2024