[2017] UKFTT 692 (TC)

TC06111

Appeal numbers: TC/2014/05941
TC/2015/07234
TC/2016/03502
TC/2014/05945

Income tax, PAYE, NICs and corporation tax – Employee Benefit Trusts – whether contributions to sub-funds established for individual employees or loans from sub-funds to those employees constituted earnings for income tax and NIC purposes – whether corporation tax deduction available

FIRST-TIER TRIBUNAL
TAX CHAMBER

(1) LANDID PROPERTY LIMITED **(2) ALLEN (CONCRETE) LIMITED** **(3) LA VITA PIZZERIA LIMITED**	**Appellants**

- and -

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS	**Respondents**

TRIBUNAL: JUDGE SARAH FALK
RUTH WATTS DAVIES MIH FCIPD

Sitting in public at The Royal Courts of Justice, The Strand, London WC2A 2LL on 11, 12 and 14 to 19 May 2017

David Ewart QC and Bibek Mukherjee, Counsel, instructed by EDF Tax Defence Limited, for the Appellants

Richard Vallat and Charles Bradley, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

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DECISION

1. These appeals relate to Employee Benefit Trust ("EBT") arrangements established by the appellants between 2007 and 2008. The appellants contend that the arrangements did not give rise to earnings for the relevant employees for the purposes of income tax or National Insurance Contributions ("NICs"), but that the appellants are entitled to a corporation tax deduction for the amounts charged in their accounts in respect of the arrangements. HMRC disagree and consider that the appellants should have accounted for both PAYE and NICs in respect of the arrangements on the basis that the amounts in question were earnings, and that the appellants' entitlement to a corporation tax deduction was dependent on the amounts being treated as such.

2. The arrangements put in place by each of the appellants were very similar. The structure was designed by Premier Strategies Limited ("PSL"), then a member of the Tenon group of companies. In the case of two of the appellants the Tenon group provided the relevant tax advice and (with some assistance from solicitors) comprehensive pro forma documentation. A sister company of PSL also acted as the corporate trustee of the EBTs. For one appellant, La Vita Pizzeria Limited, there was a slight difference in that tax advice was provided by EDF Tax LLP ("EDF"), which was established by ex-PSL employees in April 2008 to take on lower value work.

3. HMRC made determinations under regulation 80 of the Income Tax (Pay As You Earn) Regulations 2003 SI 2003/2862 ("the PAYE Regulations") and decisions under section 8 Social Security Contributions (Transfer of Functions, etc.) Act 1999 against each appellant (referred to in this decision as "Regulation 80 determinations" and "Section 8 decisions" respectively). Following corporation tax enquiries HMRC also issued closure notices denying the deductions claimed by the appellants. Details of the amounts in dispute are set out in Appendix 1.

4. For ease of reference, we will refer to the individual appellants as "Landid", "Allen" and "La Vita" respectively. We will also refer throughout to "employees" although in the majority of cases the individuals were also directors and shareholders.

The transaction steps in outline

5. The basic transaction steps were common to all three appellants and can be summarised as follows:

(1) An EBT was established by the relevant appellant by a deed (the "Trust Deed") with an initial trust fund of £100. The EBT had a single Isle of Man based corporate trustee, Tenon (IOM) Corporate Services Limited ("the Trustee"). At this stage, under the terms of the EBT, the funds would revert to the appellant unless a remote contingency occurred or the appellant chose to pay £100 to a specified charity.

(2) The Trustee executed a supplemental deed (the "Deed of Appointment") establishing sub-funds within the EBT with an initial

amount of £10 each. Each sub-fund related to a named employee and their family.

(3) The appellant and Trustee executed a further deed (described as a "Deed of Addition and Contribution Agreement" and referred to below as the "Deed of Addition") by which the appellant contributed the desired amount to each sub-fund.

(4) The Board of the appellant resolved to pay £100 to a specified charity, and made that payment. Under the terms of the EBT the amounts added to the sub-funds ceased to be liable to revert to the appellant.

(5) One or more interest-free loans were made from the sub-funds to the relevant employees.

Issues for determination

6. The parties agreed a number of issues for determination, which are summarised in the following paragraph. Each of Issues 1 to 5 are in the alternative, as are Issues 6 to 8. At the time of the hearing the Supreme Court had heard the appeal by one of the appellants, RFC 2012 plc, from the Court of Session decision in *Murray Group Holdings Limited & others v HMRC* [2015] CSIH 77, [2016] STC 77 but had not issued its decision. Following the release of the Supreme Court decision, *RFC 2012 Plc (in liquidation) (formerly The Rangers Football Club Plc) v Advocate General for Scotland* [2017] UKSC 45 ("*Rangers*"), we requested additional written submissions from the parties which we have taken into account in our decision. We are grateful to both Mr Ewart and Mr Vallat for their clear and helpful submissions, both at the hearing and subsequently.

7. The issues for determination were as follows:

Earnings

Issue 1: whether the payment made by the appellant into each sub-fund was earnings of the relevant employee for the purposes of income tax and NICs, in the form of a bonus which had been "redirected" to the sub-fund.

Issue 2: whether it was the intention of the relevant parties that the amount contributed to the sub-fund should be at the absolute disposal of the employee, such that what purported to be a discretionary trust was in reality a bare trust, and the sum paid into the sub-fund was earnings on that basis.

Issue 3: whether the amount paid was earnings on a realistic view of the facts and a purposive approach to construction of the relevant statutory provisions, under *Ramsay* principles.

Issue 4: whether the loan agreement with the employee was never intended to operate as such, the payments made under it being unconditional payments rather than amounts that could be required to be repaid, and earnings on that basis.

Issue 5: whether the funds advanced under the loan agreement with the employee were earnings on a realistic view of the facts and a purposive approach to construction (*Ramsay*).

The appellants maintained that Issues 2 and 4 amounted to an allegation of sham involving dishonesty which had not been pleaded by HMRC. HMRC disagreed and made it clear that dishonesty was not being alleged.

(A further issue, namely whether the payment to a sub-fund was an "employment-related benefit" within section 201 of the Income Tax (Earnings and Pensions) Act 2003, was not argued before us but was reserved by HMRC for any appeal.)

Corporation tax deduction

The following issues arise only if HMRC do not succeed on any of Issues 1 to 5. If the amounts in question are earnings then HMRC accept that a deduction is available, although if HMRC succeeds on Issue 4 or 5 then the timing of the deduction would be affected. Again, each of the Issues below was put in the alternative.

Issue 6: whether the deductions were disallowed by section 43 Finance Act 1989 ("FA 1989"), on the basis that "provision" was made in the accounts for the amount in question "with a view to" it becoming employees' remuneration.

Issue 7: whether the contributions to the EBTs were contributions to an "employee benefit scheme" within Schedule 24 Finance Act 2003 ("FA 2003") in respect of which no "qualifying benefits" were paid within nine months of the end of the relevant accounting period. On this issue the appellants accepted that HMRC should succeed before this Tribunal, but reserved the point for appeal. Both parties also sought certain findings of fact that would be relevant to the determination of this issue.

Issue 8: whether the amounts in question were not wholly and exclusively laid out or expended for the purposes of the appellant's trade, within the meaning of section 74(1)(a) Income and Corporation Taxes Act 1988 ("ICTA 1988").

(The initial list of issues included the question whether the deductions claimed were in accordance with GAAP. However, as discussed below there was no dispute on this point at the hearing.)

Evidence

8. We heard oral evidence from seven witnesses, including two experts who gave evidence on accounting aspects. The five witnesses of fact each produced witness statements, and all witnesses were cross-examined.

9. Evidence was given in respect of La Vita by Charles Burton. Mr Burton is an accountant who had been a partner in a small Glasgow firm of chartered accountants which was taken over by the Tenon group in 2002. At the relevant time he was a

director in Tenon's Glasgow office. He left Tenon in 2013 and is now employed as a consultant to another small firm. Mr Burton has acted since 1978 for the owner of La Vita, Marco Arcari, and his family, and is effectively Mr Arcari's long term "trusted adviser". We were satisfied that Mr Burton has an intimate knowledge of La Vita, its business and the affairs of Mr Arcari, and that he had a very close involvement in the implementation of the EBT structure. He was also clearly closely involved in business planning and Mr Arcari sought his opinion on all major business decisions. We found Mr Burton to be an entirely honest witness, and whilst at times we got the impression that he was slightly defensive in cross-examination we did not find this particularly surprising in the circumstances, given that he had introduced the EBT proposal to La Vita. Although Mr Vallat questioned why Mr Burton and not Mr Arcari was giving evidence, we did not see anything particularly sinister in that. Mr Arcari left school at 15 to work in the family business. We got the impression that although he is an entrepreneur and is used to making business decisions he relies heavily on Mr Burton for advice. Mr Arcari understood the EBT arrangements at a high level but relied fully on Mr Burton in relation to their detail.

10. Evidence in relation to Allen was given by Peter Farenden, its Finance Director. Mr Farenden has worked at Allen since 1990, when it was the subject of a management buy-out, and he became a shareholder at that time. He trained as an accountant although he did not fully complete the qualification. We found Mr Farenden to be an entirely straightforward, helpful and candid witness.

11. Evidence in relation to Landid was given by Trevor Silver and Christopher Routh. Mr Silver is one of the two founders and principal shareholders of Landid, as well as being a director. His background is in civil engineering. Although HMRC sought to suggest otherwise, we found Mr Silver to be an essentially genuine witness. He is clearly someone whose strengths are in negotiating business deals rather than in handling the finer details, and whilst not always entirely straightforward in his answers we do not consider that he was attempting to give dishonest or misleading evidence. He clearly did not have an independent recall of most of the events or steps in the structure, and had relied on the contemporaneous documents in order to prepare his witness statement.

12. Mr Routh is now retired but at the relevant time was a director and employee of Landid, with a 5% shareholding. Like Mr Silver his background is in civil engineering. We found Mr Routh to be an honest, clear and impressive witness, with a good recollection and significant command of the detail. It is also worth noting here that Mr Routh has reached a settlement with HMRC in relation to his own participation in the EBT which involved winding up his sub-fund, and so will not be directly affected by the outcome of the dispute.

13. Evidence on behalf of the Trustee was given by Mark Schofield. Mr Schofield is a Chartered Certified Accountant based in the Isle of Man. Mr Schofield has been the managing director of Tenon (Isle of Man) Limited ("Tenon IOM") since 2002 (the company was renamed Optimus Fiduciaries Limited following a management buy-out in 2012). The Trustee is, and continues to be, a 100% subsidiary of this company, with Mr Schofield as one of its directors. Mr Schofield developed a strong

relationship with the directors and management team of PSL, which at the relevant time was part of the same group. Tenon IOM was initially created to manage and provide administration services for offshore trusts and companies established by clients of PSL. We found Mr Schofield's evidence to be honest and candid, although at times his knowledge or recollection of the detail was somewhat less than we might have expected.

14. The expert appointed by the appellants was Phil Crooks. Mr Crooks is a partner in Grant Thornton UK LLP and a Fellow of the Institute of Chartered Accountants in England and Wales. He has over 35 years' experience in accounting, auditing and investigations. HMRC's expert was Perry Cooper, a Fellow of The Association of Chartered Certified Accountants who has been employed by HMRC (previously the Inland Revenue) since 1998. Although employed by HMRC Mr Cooper had not otherwise been involved in the investigation and his opinion was not questioned on that basis.

15. Mr Crooks produced a separate written report in respect of each appellant. Mr Cooper produced a single report. There was also a helpful joint statement covering the substantial areas of agreement between them and the small point of detail on which the experts took a different approach. We found the evidence of both experts to be helpful and clear.

16. Documentary evidence included comprehensive transaction documentation, including related Board minutes, tax and legal advice received by the appellants and bank account entries.

Findings of fact

17. The transaction documents used by all three appellants were very similar, and it is therefore convenient to consider them together rather than by appellant. The same applies to the principal written advice provided or arranged by PSL or EDF. We have also adopted the approach taken at the hearing of referring primarily to the documentation relating to the Allen EBT, on the basis that any material differences were highlighted to us.

18. It is also worth noting at this stage that for each appellant minutes of relevant Board meetings were provided by PSL or EDF in a standard form, subject to necessary adaptations for the company in question, mainly to add names and amounts. We accept that, for each appellant, the Board meetings did occur on the dates indicated by the minutes, and that the decisions stated to be taken in those minutes were in fact taken on those dates.

19. Our findings in respect of the principal documentation are followed by specific findings in respect of each appellant, and then by our findings in respect of Mr Schofield's evidence and the expert accounting evidence. We conclude the findings of fact with a summary of certain findings relevant to all three appellants (see [150] below). Appendices 2 to 4 also set out the limited statements of agreed facts in respect of each appellant, although we should point out that HMRC added a caveat to each of

these to the effect that its agreement was limited to the relevant documents being signed on or around the dates stated, rather than that the documents accurately recorded the facts or had the legal effects they purported to have.

20. We should also record here that both the Trust Deed and the Deed of Addition are expressed to be governed by the laws of the Isle of Man. (The Deed of Appointment is silent on the point, but is clearly supplementary to the Trust Deed and so highly likely also to be governed by Isle of Man law.) However, both parties proceeded on the basis that there are no relevant differences between those laws and English law.

The Trust Deed

21. The Trust Deed was provided by Browne Jacobson LLP, a firm of solicitors in Nottingham clearly initially instructed by PSL, but who in due course gave advice to scheme participants. Slightly oddly their advice states that they did not draft the trust documentation and disclaims liability for it, although the firm's name appears on the front of the Trust Deed.

22. The document is in the form of a Deed of Settlement entered into between the appellant as settlor and the Trustee, and, subject to the provisions referred to below relating to the Initial Period, is drafted as a discretionary trust in favour of a class of beneficiaries (the "Beneficiaries"). The class is defined as current or past employees of the appellant, certain types of relative (spouses, children or remoter issue, parents or remoter ancestors and any of their spouses) and dependents. The initial settled property is stated to be £100. There is provision for a protector, and clause 14 of the Trust Deed expressly provides that the protector's powers are vested in him in a fiduciary capacity. The initial protectors were Mr Farenden in the case of Allen, Mr Silver for Landid and Mr Arcari for La Vita.

23. The key operative trust provisions, contained in clause 5, are a little involved due to provisions included with a view to avoiding the application of Schedule 24 FA 2003. Clause 5(1) provides for an "Initial Period", which as discussed below is a maximum of 85 days. During this period the property is held on trust to accumulate the income but with power, subject to protector consent, to apply the income in favour of one or more Beneficiaries. Subject to that the trust property is to be held on trust for the settlor absolutely if the "Specified Contingency" is satisfied, and in that event clause 5(3) provides that the Trustee is no longer entitled to apply any income which has arisen in favour of any Beneficiary.

24. The Initial Period is defined as the period of 85 days following the date of the Trust Deed, but this period is shortened and terminates immediately if the settlor makes a payment of at least £100 to a specified charity within 40 days. The Specified Contingency is defined as the survival to the expiration of the Initial Period of at least one of HRH Prince William and the President of the USA, but the Specified Contingency is deemed not to be satisfied if the Initial Period has been shortened by the settlor.

25. Leaving to one side the remote likelihood that both Prince William and the US President would die in the 85 day period, the net effect of this is that the settlor can make sure that the property in the trust does not revert to it, and instead is held for the benefit of the Beneficiaries, by making a modest payment to a charity within 40 days of setting up the trust.

26. If the Specified Contingency is not satisfied then the property is held on more conventional discretionary trust terms, under clause 5(2). The Trustee must accumulate income for so long as permitted by law, but with power to appoint all or part of the income in its absolute discretion in favour of one or more Beneficiaries (including income that arose during the Initial Period), and after the expiration of the permitted accumulation period must apply the income in favour of one or more of the Beneficiaries as the Trustee thinks fit. The consent of the protector is not required in respect of applications of income. At the end of the Trust Period (a maximum of 100 years, unless shortened by the Trustee with the protector's consent), the capital and income is to be held for one or more of the Beneficiaries in such shares as the Trustee determines in its discretion, subject again to consent of the protector. Clause 5(6) expressly provides that the Trustee is not required to consider all possible objects of its discretionary powers (that is, all potential Beneficiaries), and has absolute discretion to consider only those that it thinks fit.

27. Clause 6 of the Trust Deed contains broad powers of appointment and advancement. Clause 6(2) makes detailed provision permitting the Trustee to appoint new trusts, powers or provisions in respect of any part of the trust fund for the benefit of any one or more Beneficiaries, clause 6(3) permits the Trustee to advance capital to or for the benefit of one or more of the Beneficiaries, and clauses 6(4) and (5) permit the Trustee to transfer property to the trustees of another trust or create a new settlement, in each case for the benefit of one or more Beneficiaries. Under clause 7(7) each of these powers is exercisable only with the consent of the protector. Clause 7(8) again makes clear that the Trustee is not required to consider all possible objects of its discretionary powers, but only those that it thinks fit. Clause 7(9) provides that the powers in clause 6 can be exercised during the Initial Period, but not in a way that derogates from the terms of the trusts in clause 5(1). So, for example, any appointment under clause 6(2) would take effect subject to the terms of clause 5(1), under which the trust property would revert to the settlor if the Specified Contingency is satisfied.

28. Clause 8 contains a default trust in favour of a named "Default Beneficiary", who in each case was an employee of the appellant who did not otherwise benefit from the arrangements.

29. Schedule 1 to the Trust Deed contains broad and detailed powers of investment and management. These include, in Part IV of the Schedule:

> "Power to lend the whole or any part of the Trust Fund to any beneficiary on such terms as to security and repayment as the Trustees shall in their absolute discretion think fit."

30. Although there is a proviso to the effect that the Trustee must charge interest at an arm's length rate, this is subject to a further proviso permitting a lower, or nil, rate of interest in circumstances where the Trustee could exercise its discretion to ensure that the whole of the income from the loan (after expenses) is paid to that beneficiary. This provision is also cross-referenced in the body of the Trust Deed in clause 15(4), which expressly provides for the Trustee to have power to lend as contemplated by that provision so as to benefit a Beneficiary, in other words as a dispositive and not merely administrative power.

31. Part V of the Schedule confers broad immunities on the Trustee, broadly in the absence of fraud by the Trustee. Part VII of the Schedule deals with appointment and removal of trustees and gives the protector power to both appoint trustees and, if he considers it to be in the best interests of any of the Beneficiaries, remove them.

32. It is also relevant to note that clause 3 of the Trust Deed contemplates that further additions may be made to the trust fund, and provides a power for the Trustee to agree with any person contributing property that the Trustee will be responsible for any NICs or PAYE liability arising either from that transfer or from any benefit conferred on beneficiaries in respect of the property contributed.

33. Finally, the Trust Deed for La Vita contains an additional clause which is not in the other two Deeds. Clause 19 provides:

> "Notwithstanding anything herein contained or implied, no part of the capital or income of the Trust Fund shall in any circumstances whatsoever "become" an amount which "is or is treated as earnings for the purposes of the United Kingdom Income (Earnings and Pensions) Act 2003" within the meaning of the United Kingdom Finance Act 1989 section 43."

The Deed of Appointment

34. The Deed of Appointment was entered into between the Trustee and the protector. It is stated to be supplemental to the Trust Deed and to be executed pursuant to the power of appointment in clause 6(2) of the Trust Deed. The exercise of this power is expressed to be subject to, among other things, clause 5(1) of the Trust Deed (the trust provisions governing the Initial Period). Clause 3 of the Deed of Appointment expressly states that the appointment made by it (and any income, except insofar as a beneficiary has become absolutely entitled to it) is revocable by the Trustee by deed executed with the written consent of the protector at any time before the expiration of the Initial Period, and subject to that is irrevocable.

35. The effect of the Deed of Appointment was to create separate sub-funds out of the trust property, initially in amounts of £10 each, in favour of identified employees and their families. There is a separate sub-fund for each named employee and his or her relatives (the "Appointed Beneficiaries"). The type of family members who can benefit is the same as in the main Trust Deed (spouses, children and remoter issue, parents and so on) but by reference to the particular employee only. The Deed of Appointment makes it clear that each sub-fund is to be held separately, but on and

subject to all the trusts, powers and provisions in the Trust Deed, and reading references to the Beneficiaries as the Appointed Beneficiaries.

Deed of Addition

36. The Deed of Addition was entered into by the settlor and the Trustee and provides for the contribution of an additional amount to the trust (£300,000 in the case of Allen: see Appendix 2). It refers to the fact that the amount had already been transferred to the Trustee (on trust for the settlor absolutely) in anticipation of the Deed being executed, and provides that the Trustee should now hold that amount as accretions to the sub-funds in the amounts set out in the Schedule. The Schedule sets out the amount to be added to each sub-fund (totalling £300,000 in the case of Allen). The Deed of Addition also contains an undertaking by the Trustee to discharge NICs or PAYE in respect of the contribution or the conferral of benefits in respect of it (as permitted by the Trust Deed), subject to certain limits.

The Loan Agreements

37. A single form of loan agreement was used for each employee (the "Loan Agreement"). Where more than one loan was made they were made under the same agreement. The parties are the Trustee as lender and the relevant individual as borrower. The agreement provides for an initial loan of a specified amount, and contemplates that additional loans may be made from time to time as agreed between the parties. The loans are effectively treated together as a single loan (the "Loan").

38. The Loan is unsecured and interest-free. Clause 3 permits the borrower to repay the Loan in whole or in part at any time, and provides for the Loan to "become due and payable one month after service of written demand" by the lender on the borrower. Clause 4 provides for insolvency related events of default (including the borrower suspending payment of debts, being unable to pay debts as they fall due, entering into an arrangement with creditors or being subject to bankruptcy proceedings) and provides that if an event of default occurs the lender may declare the Loan immediately due and payable. Clause 5 contains a conventional "no waiver" provision confirming that no omission or delay on the part of the lender in exercising any right or power shall operate as a waiver, nor shall any single or partial exercise preclude further action.

39. It is also worth mentioning the template document used to request loans. This is a one-page document with space to include bank details, and is in the form of a letter from the relevant employee to the Trustee applying for an interest-free loan in the specified amount. It contains the sentence "I understand that the trustees have complete, independent and unrestricted authority over whether to advance the loan".

PSL's advice

40. Prior to entering into the Trust Deed PSL provided a detailed letter of advice to each of Allen and Landid. This describes how the EBT would be set up as a form of discretionary trust for a defined class of employees. It states on page 1 of the letter:

> "In order for an EBT to be effective it is vital that the trustees have a complete and unfettered discretion as to the way in which they deal with the trust funds. This fundamental point has to be understood by any company embarking on the creation of such an EBT. However it is perfectly acceptable for a company to make recommendations to the trustees as to how funds are to be distributed and we would normally suggest that in most cases you would want to make recommendations to the trustees of your EBT."

And on page 2:

> "Given the absolute power that the trustees have over the trust funds it is vital to ensure that suitable trustees are appointed."

41. The letter goes on to discuss the tax differences between using an onshore or offshore trust, and recommends Tenon (IOM) Corporate Services Ltd to act as trustee, before going on to say that because trustees can only act within the powers set out in the deed PSL's recommendation was that they be given the "widest possible powers", noting however that the fact that powers exist "does not necessarily mean that they will always be used". It describes how trusts can be used for many purposes including payments of discretionary bonuses or the provision of shares, but not to fund the company's contractual obligations to employees. It then describes sub-funds as follows:

> "One form of award which many companies and trustees find attractive is the use of a sub-fund under the trust. Broadly the sub-fund is a discretionary fund within the EBT, which is reserved for the benefit of a particular employee's family and which will be de facto controlled by the adult beneficiaries of the sub-fund. Assets in the EBT, including cash, may then be assigned to the sub-fund of the employee. The assignment of the EBT's assets to the sub-fund is not a taxable benefit on the employee and this view is supported by leading Tax Counsel and case law. Although the employee does not get full ownership of the cash in the fund he has the satisfaction of knowing that there is an element of the overall EBT which is reserved for the benefit of him and his family."

42. The letter goes on to explain that one of the "great virtues" of a sub-fund is its flexibility, with the trustees having power to invest in a wide range of assets and also that the monies could be used to make loans to the employee or his family. It describes the tax effect of an interest-free loan connected with employment, which based on a benefit in kind of 6.25% resulted in an effective tax rate of 2.5% per annum for a higher rate taxpayer together with a 12.8% employers' NICs charge, and notes that no benefit in kind charge would arise from 6 April following the year in which the employment ceased. An appendix is also included summarising the tax implications of generating income within the trust, which the letter describes as complex.

43. In a section headed "Do I have to tell my employees about the existence of the trust?" PSL advises that there is no legal requirement to do so but that it recommends that employees are informed, at least in general terms, about the trust and the fact that

they are potential beneficiaries, and offers help in drafting the communication. The letter comments that HMRC "often ask whether or not employees have been notified of the existence of the trust and if there is such evidence it is often helpful to the company's case".

5 44. The letter has a section on the inheritance tax treatment of the EBT. It also states:

> "Crucially the value of assets held within the EBT will be outside the chargeable estate of beneficiaries for Inheritance Tax purposes. The EBT will also be exempt from the normal rules regarding 10-year charges on the value of assets held in discretionary trusts, offering a 10 significant advantage over more common personal discretionary trusts. This effectively allows assets to be held for the benefit of key employees of the company, outside their estate for IHT purposes."

45. The letter goes on to consider corporation tax and accounting issues for the company. The comments on accounting refer to UITF32 (discussed further below) 15 and conclude that the EBT's assets would remain on the balance sheet of the company until the funds in the EBT are unconditionally transferred. The corporation tax advice refers to the restrictions under FA 2003, designed to link deductibility to benefits being taxable on employees, and PSL's development of a "strategy" which is not caught by the rules by ensuring that the employer contributes funds to sub-trusts 20 whilst retaining an interest in the funds. If the employer's interest is subsequently given up the surrender would be a loss of value which must be charged to the profit and loss account under GAAP. Counsel had advised that giving up an interest in this manner did not fall within the rules restricting deductibility.

46. The letter then goes on to describe a two-stage process under which the EBT is 25 first set up, following which the company could choose to give up its interest by making a payment to charity within 40 days. It refers to the inclusion of an "unlikely and unrelated specified event" within the first 85 days which would have the same result. It also refers to its fees, to the possibility of retrospective legislation in relation to the corporation tax deduction and to the likelihood of HMRC enquiry in relation to 30 both the company and employee tax aspects (noting that the scheme would be disclosed under the Disclosure of Tax Avoidance Scheme rules).

47. The letter concludes by explaining that, if the company wanted to proceed then it would need to identify the protector, a default beneficiary and the nominated charity. It explains that the protector's role is to oversee the actions of the trustees and provide 35 them with an insight and understanding into the wishes of the settlor and, in some cases, the beneficiaries, and notes the protector's power to appoint and remove trustees and the requirement for protector consent to distribute trust capital. The letter advises that the protector should be one of the company's directors. It also advises that the default beneficiary should be an employee who is unlikely to take any 40 substantial benefit from the EBT. Finally, it suggests that the company may want to start to consider who it is "likely to recommend to receive awards under the trust and the broad amount that is appropriate for each individual".

48. Further written advice was provided by PSL shortly before the expiration of the 40 day period for making the £100 payment to charity. This described the two ways in which the company's interest in the trust's assets could be given up, either by the Specified Contingency not being met within 85 days of the creation of the trust (which it stated was "extremely unlikely" but "not so remote as to be virtually certain that it will not occur") or by paying £100 to the specified charity to terminate the Initial Period within 40 days. The letter attached draft Board minutes relating to both options, gave practical advice about making and evidencing the payment to charity, and also gave further advice about the risk of retrospective legislation and HMRC enquiry.

Browne Jacobson's advice

49. The appellants also received memoranda from Browne Jacobson described as "Trust Summary- Explanatory Notes for Clients" under cover of a letter which enclosed the draft Trust Deed and also set out specific details relating to the trust in question, such as the names of the trust and the Trustee, the protector, the default beneficiary and the chosen charity. The letter includes the following statement:

> "Although it does not expressly say so in the deed, when making their decisions, the Trustees should take account of the wishes of the Company (as Settlor). However, this is only one factor the Trustees are required to take into account and the Trustees are of course not obliged to comply with those wishes."

The letter also refers to the trustee immunity provisions which prevent the Trustee being personally liable in the absence of fraud.

50. The Trust Summary summarises significant provisions of the Trust Deed. It notes that "it is the Trustees alone who have the power to distribute the Trust property, although the consent of the protector may be required to do this". It describes the role of the protector, noting that he has "significant controls over the exercise of the Trustees' powers" including in respect of the overriding powers in clause 6, the power to pay income during the Initial Period and in deciding how to distribute trust property at the end of the Trust Period, and that he has power to appoint and remove trustees, but also explaining the fiduciary nature of the role.

51. Most of the rest of the note summarises the terms of the Trust Deed in an uncontroversial manner, but it is worth noting that Browne Jacobson comment that under Isle of Man law the accumulation period is the same as the Trust Period.

Findings specific to Allen

52. Limited agreed facts in respect of Allen are set out in Appendix 2, to which reference should be made in conjunction with these findings.

53. Allen was the subject of a management buy-out in 1990, at which time it was acquired by its current holding company Topcrete Limited. The principal ordinary shareholders following the buy-out were Roy Topp and Brian O'Kane. Mr Farenden

and three other senior managers, Neil Crowhurst, Colin Pentlow and Nicholas Perkins, also acquired ordinary shares. These six shareholders became the sole shareholders in 1997 when an investment made by a finance house at the time of the buy-out was fully repaid. This repayment was funded partly by the issue of redeemable ordinary shares which were in turn redeemed between 2002 and 2007. Mr O'Kane ceased to work for Allen in 1999 following a disagreement over future strategy.

54. At the time the EBT arrangement was implemented in late 2007 and early 2008 the percentage ordinary shareholdings were approximately Mr Topp 42%, Mr Farenden 9%, Mr Pentlow 3%, Mr Crowhurst 3%, Mr Perkins 2% and Mr O'Kane 40%. A two for one rights issue was undertaken in June 2008 which was fully subscribed by all shareholders except Mr O'Kane. The effect was to reduce Mr O'Kane's shareholding to around 18% and proportionately increase those of the other shareholders. Further rights issues were undertaken subsequently, in which Mr O'Kane also did not participate.

55. When the EBT structure was implemented Allen had around 45 employees. There were no contractual bonus arrangements for any staff, with the possible exception of one member of staff who did not benefit from the EBT arrangements. Limited discretionary sales bonuses had been paid in the past but the scheme had been terminated some years earlier. Only Mr Topp and Mr Farenden had (and have) written service contracts. These contracts provide for discretionary uplifts to salary but no bonuses or other forms of remuneration apart from reimbursement of expenses.

56. Following the buy-out Allen experienced a fairly lengthy period of poor performance, but improved profitability was achieved after 1999 and profits had risen to £299,000 by the year to February 2007. Mr Farenden's evidence (which we accept) was that Mr Topp and Mr Farenden decided that it was an appropriate time to implement an arrangement to keep senior management motivated, using the majority of the expected profits for the year ending 29 February 2008, the total amount of which, ignoring the impact of the EBT and related fees, was in the region of £400,000. (See further [72] and [73] below for our findings on the drivers behind the EBT structure.)

57. Mr Farenden came across the EBT arrangement being promoted by PSL as a result of his own researches. He had not come across EBTs before. In late June 2007 PSL sent him some information about itself and some spreadsheets setting out possible tax savings. These compared a bonus, a dividend and what the PSL structure was said to provide, using the same £300,000 figure that was ultimately contributed to the EBT and taking account of PSL's fees. Two versions of the spreadsheet were provided, one showing a corporation tax deduction and one with no deduction.

58. Mr Farenden had an initial meeting with a PSL representative, Julie White, in July 2007. Following this meeting Ms White responded by email to follow up on some of Mr Farenden's queries. This included a question about a potential rights issue. Ms White advised that there should be no problem with employees using funds drawn down as loans from the sub-funds to subscribe for shares in a rights issue provided

employees were free to choose what they did with the cash, but advised that it would be preferable to have a reasonable gap between the two events, suggesting three months as a rough guide.

59. Mr Farenden also considered a potential alternative to PSL as provider of the EBT arrangement, suggested by Allen's auditors following an approach he made to them. Mr Topp and Mr Farenden decided to proceed with PSL because the entire arrangement would be administered by one provider with existing experience of EBT arrangements, whereas the alternative would have entailed dealings with more than one firm and in circumstances where the relevant contact had no previous experience of implementing an EBT.

60. Mr Farenden had initial reservations about some aspects of the EBT arrangement, particularly in relation to the security of funds and the Trustee's control over them, and he initially raised his concerns with PSL who proposed that Mr Farenden be appointed as the protector and explained that role to him. Mr Farenden also conducted some of his own due diligence on the Tenon group, including speaking to Mr Schofield in relation to security of funds.

61. A formal engagement letter with PSL was signed in early September 2007. The terms agreed with PSL provided for a 12% fee (excluding VAT), all but £3000 of which was payable only following the payment to charity. The fee covered the Trustee's fees and also those of Browne Jacobson. PSL provided a detailed advice letter on 6 November 2007 and Browne Jacobson provided a draft Trust Deed and its note of advice on 23 November. At the time the engagement letter was signed Mr Farenden expressed disappointment that the version of the scheme previously offered by PSL had been closed, noting that Allen was seeking to undertake a rights issue before the end of the financial year (ending February 2008). Ms White responded that there was insufficient time to implement the structure prior to the pre-Budget report in mid October but said that if there were no relevant changes then they would implement the strategy as soon as possible thereafter, and this should leave a reasonable gap between the funds being available to beneficiaries and the end of February.

62. The decision to establish the EBT was made at a Board meeting on 26 November 2007 by the two directors, Mr Topp and Mr Farenden. This meeting both approved the draft Trust Deed and resolved to suggest to the trustees that sub-trusts be created in favour of each of Mr Farenden, Mr Topp, Mr Crowhurst, Mr Pentlow, Mr Perkins and their respective families. On the same day Mr Farenden sent the Trust Deed to Allen's usual firm of solicitors for review, because he had no experience of trusts and thought additional advice was required. Written advice was received from one of the partners in the firm, Graham Budd, on 3 December. This advice summarised key provisions and raised a number of issues. These including querying what would happen if the Trustee went into liquidation (noting that the amount would be £300,000 rather than the £100 stated in the Deed), noting that clause 3 gave the trustees absolute power to invest and control monies, querying the Specified Contingency provision as bizarre, highlighting the exclusions from liability for the trustees and pointing out that "you will be putting complete faith in the Trustee".

63. Mr Farenden reviewed the advice and annotated a copy of it with handwritten comments. The handwritten comments include a comment to the effect that clause 3 of the Trust Deed did not appear applicable because it seemed to be restricted to non-cash items and "we do not propose to hold investments", and a comment in relation to Mr Budd's reference to an exclusion of Trustee liability in respect of choice of investments that "as only loans envisaged, not considered pertinent". Similar comments are made in relation to other paragraphs in the advice. Next to a statement in the letter that Mr Budd was under the impression that the purpose of the settlement was for Mr Farenden's and Mr Topp's benefit Mr Farenden made a note that it was not just for them but also for Mr Crowhurst, Mr Pentlow and Mr Perkins. Mr Farenden also made the comment "good!" against Mr Budd's observation that the protector could remove the Trustee. His oral evidence, which we accept, is that the references to only cash being held, and to loans being envisaged, reflected his expectations as to what would happen but that he was aware that each beneficiary could choose what they wanted to do. He appreciated that it was up to the individuals to decide whether they wished to request loans, although he fully expected them all to do so. We also consider that he appreciated that the Trustee had control of the funds and was not legally obliged to advance the money, even though in practice he fully expected (and effectively assumed) that loans would be made as and when requested and he had no particular concern that they might not be.

64. Mr Farenden also sought clarification from PSL of certain of the issues raised by Mr Budd in an email dated 5 December, to which PSL responded on 6 December. The queries raised included the security of the funds to be paid over of "approx £300,000" and the Specified Contingency concept. PSL's response to the latter query was to refer to their advice letter. The response on the former was to explain that the Trustee would establish a bank account solely in the name of the trust, and that further bank accounts would be opened for sub-funds. Although the Trustee would have control over the funds they would be held in trust for the beneficiaries and therefore separate from the Trustee and from the employer.

65. Following receipt of this further advice the signed Trust Deed was posted to the Trustee with the £100 needed to establish the Trust, and was executed and dated by the Trustee on 21 December. The Deed of Appointment was executed on 8 January 2008, and on 11 January Mr Farenden emailed PSL to confirm the total sum to be contributed and the split between the sub-funds (as subsequently reflected in the Deed of Addition: see paragraph 6 of Appendix 2). This email also queried whether providing these details was unhelpful in securing corporation tax relief.

66. A further Board meeting was held on 16 January 2008 which noted that the sub-funds had been established and resolved to contribute £300,000 as an accretion to the sub-funds in accordance with the terms of the draft Deed of Addition, which the Board resolved to execute. (The Schedule to this Deed set out the individual amounts to be added to each sub-fund.) The money was transferred to the Trustee on the same day. The Board minutes note that Allen remained the principal beneficiary at that point and that the effect of the Deed of Appointment remained revocable with the consent of the protector until the end of the Initial Period.

67. Around the time of this Board meeting a notice to employees was also displayed at both of Allen's sites, and was taken down around a month later. This was in a form drafted by PSL and reflected their advice that employees should be notified (see [43] above). The notice refers to the decision to create a discretionary employee benefit trust and informs staff that they are potential discretionary beneficiaries, and that Allen would ask the trustees to consider making appropriate benefits available to employees who they feel have shown the necessary commitment to help drive the company forward. We accept Mr Farenden's evidence that the notice was provided to employees only because they were following PSL's advice, and that no employee responded to the notice.

68. We also accept Mr Farenden's evidence that, although a number of the earlier documents refer to a figure of £300,000, a final decision was only made as to the quantum in early January 2008, at which time an updated sales forecast was available taking into account trading performance during the winter period. The allocation of this amount was clearly decided by 11 January.

69. PSL's further advice was provided on 28 January 2008. At a third Board meeting on 29 January it was noted that the Deed of Addition had been executed on 18 January and that Allen now had a choice of whether to take no further action (in which case it was likely that it would become entitled to the assets 85 days after the trust was created) or to make a payment of £100 to Heart Research UK, which would result in Allen ceasing to have any beneficial interest in the EBT and the sub-funds becoming irrevocable. The Board referred to the company's "wish to reward and motivate employees" and determined that the payment should be made to charity. A cheque was posted the same day.

70. There was therefore approximately a two week period between the Board's decision to contribute £300,000 to the EBT and the payment to charity. Mr Farenden confirmed in evidence that the only thing that would have prevented a payment to charity being made was the state of Mr Topp's health, which had been poor for some years. If he had died in that period they would not have proceeded. Whilst we accept this evidence we do not consider that Mr Topp's death was a contingency that was actually taken into account as a realistic possibility during that period.

71. Each of Mr Farenden, Mr Topp, Mr Crowhurst, Mr Pentlow and Mr Perkins signed pro forma letters to the Trustee applying for an interest-free loan in the full amount added to the relevant sub-fund. These letters were signed and sent to the Trustee on 4 and 5 February 2008. Loans were made on the dates and in the amounts specified in paragraph 8 of Appendix 2, pursuant to Loan Agreements dated 6 February 2008 in the case of Mr Topp, 7 February for Mr Farenden and Mr Perkins, 12 February for Mr Crowhurst and 14 February for Mr Pentlow. The further small loans to Mr Farenden and Mr Topp on 18 April 2008 were made pursuant to requests made by them on 17 April. These followed a query from Mr Farenden about bank interest and reflected the amounts earned within the sub-funds relating to Mr Farenden and Mr Topp. The amounts of interest earned within the sub-funds for the other three employees were regarded by Mr Farenden as too small to justify further action.

72. Our conclusions as to the aims of the EBT arrangement are as follows. We accept Mr Farenden's evidence that EBT arrangement was intended to motivate and reward Mr Pentlow, Mr Crowhurst and Mr Perkins, together with Mr Farenden and Mr Topp as the sole directors, and to reflect their contributions to the business, and that Mr Topp and Mr Farenden viewed the continuation within the business of Mr Crowhurst and Mr Pentlow in particular (as well as, presumably, themselves) as vital to the future performance of the business. It was these five individuals who comprised the senior management of the company and in practice made decisions about the business at monthly management meetings. The amounts allocated to Mr Farenden, Mr Crowhurst and Mr Pentlow were comparable to 50% of their annual salary, with Mr Perkins being allocated a lower amount reflecting his perceived lesser importance to the business, and the balance being allocated to Mr Topp. Although Mr Farenden suggested that they had not initially ruled out the possibility of a couple of other employees benefiting, and that if either of them had responded to the employee notice they might have been included, we do not consider that this was considered very seriously and we think it unlikely that they would have been included even if they had responded.

73. It is also very clear from the evidence that the EBT arrangement was intended to provide funding for the rights issue that took place in June 2008. In fact, the amount subscribed by each of the five individuals in the rights issue equated to a high proportion of the amounts received by way of loan from the EBT (around 78% for Mr Farenden, 88% for Mr Topp, 84% for Mr Crowhurst and Mr Pentlow, and 80% for Mr Perkins). Our understanding of Mr Farenden's evidence was that, assuming (as anticipated) that Mr O'Kane did not participate in the rights issue, the overall effect was to allow the five most senior individuals to align their shareholdings more closely with their perceived contributions to the business. In our view this was ultimately the key driver for the EBT structure.

74. Mr Farenden was cross-examined and answered questions from the Tribunal about the significance of the corporation tax reduction offered by the EBT structure. This saving was reflected in the one of the spreadsheets initially used by PSL in June 2007, and was referred to by Mr Farenden in the email in which he set out the amounts to be allocated to the sub-funds. We find that Mr Farenden regarded obtaining a corporation tax deduction as desirable, but that it was not essential and that from Mr Farenden's perspective the scheme would have been entered into even if there had been no possibility of a deduction. In contrast, Allen would not have entertained paying out £300,000 if that meant incurring PAYE and NICs on that amount. It wanted to enable the five individuals to participate in the proposed rights issue by providing them with sufficient funds to do so if they wished. A bonus subject to PAYE and NICs would not have achieved this objective, and the additional amounts required would have been likely to turn the company's profit into a loss. Equally, we infer that a dividend would not have achieved the intended objective, because it would have benefitted Mr O'Kane as well as giving rise to income tax.

Findings specific to Landid

75. Limited agreed facts in respect of Landid are set out in Appendix 3, to which reference should be made in conjunction with these findings.

76. Landid was established by Mr Silver and Stephen Morgan in 2005. They had worked together at a previous business specialising in office and industrial development which Mr Silver had also co-founded and continued to run as CEO following its sale to a US REIT. Landid's main business was to acquire commercial property sites and manage their development and subsequent sale or letting on behalf of investors. A group reorganisation was implemented in September 2007 as a result of which a holding company was inserted above Landid and individual projects were transferred into separate subsidiaries.

77. Most of the projects that Landid was involved in were, or were primarily, office developments. One of its earliest projects, and by far its most successful, was the development of prime offices at a site in Leatherhead. The timing was particularly fortunate because Unilever was looking to rationalise its corporate food division offices at the time and the location met its needs. As a result the entire scheme was pre-let to Unilever, which in turn enabled Landid's client to secure a forward sale of the entire site to a pension fund on completion of the development.

78. Landid's normal business model was to work on behalf of clients in return for fees. It did not generally have access to capital sufficient to enable it to invest in projects itself, although one scheme, the development of a head office for Nike in Sunderland which commenced in April 2008, was an exception to this because they were able to defer payment until the end of the project. In the normal case where Landid was working on a fee basis it always hoped to be able to participate in "promote" in addition to receiving its normal fees. This was an additional fee in the form of a percentage share of profits from the project to the extent that the investor's profit on a sale of the site exceeded an agreed "hurdle" rate of return. The Leatherhead project was spectacularly successful in this respect: the site was acquired for almost nothing, and the pre-letting to Unilever meant that a forward sale was agreed at a significantly increased price. So whereas any promote that might typically be expected to be obtained would be in the region of £100,000 to £200,000 the promote from the Leatherhead project was approximately £5.4m exclusive of VAT. Our understanding of Mr Silver's evidence was that a promote of this amount was wholly atypical and quite possibly unique. In fact, the chances of receiving promote on any other project dried up as a result of the recession that followed the financial crisis in 2007/08, and after taking account of the EBT structure Landid made a modest loss after tax for its financial year ended 31 March 2008.

79. When Landid was first set up Mr Silver owned 55% of the shares and Mr Morgan 45%. Mr Routh, with whom Mr Silver had previously worked, joined in early 2006 with a view to focusing on the day-to-day implementation of projects. He was heavily involved in the Leatherhead project. Mr Silver focused more on identifying projects and liaising with investors, and Mr Morgan specialised in letting space to potential tenants. Mr Routh acquired a 5% shareholding when he joined, resulting in Mr Silver owning 52.25% of the shares and Mr Morgan owning 42.75%. Mr Routh also became

a director, although it is apparent that he was not involved in all decision making. In particular, all salary and bonus decisions were made by Mr Silver and Mr Morgan. Mr Routh was also not aware of the promote percentage agreed in respect of the Leatherhead project.

80. Neither Mr Morgan nor Mr Silver had a written contract of employment or any contractual bonus arrangements. Mr Routh had a contract in the form of an offer letter which he countersigned. This provided for a salary and a performance related bonus at a target rate of 25% of salary. It also provided that in the event that Landid established an incentive pool (defined as the "promote pool", but not to be confused with promote arrangements agreed with clients) in respect of a project or group of projects then he would be entitled to 7.5% of it. In fact Mr Routh never received a performance related bonus and the promote pool was never established, so neither of these provisions became relevant. Mr Routh retired and ceased to be a director in March 2011. The recession had had a significant impact on Landid and led to Mr Routh waiving his regular salary from 2009 onwards and being paid only for time spent on a project. Mr Morgan left Landid in March 2013.

81. Landid is a small business. During the period in question there were only two employees in addition to the three shareholders. One of these was Charlotte Elliott, who was Mr Silver's PA at his previous business and joined Landid when it was set up in 2005 as his PA and office manager. At the relevant time Mrs Elliott had no written employment contract, and she left Landid in October 2008 for family reasons before rejoining in 2013.

82. PSL was introduced to Landid by its accountants, Kirk Newsholme, and an initial meeting was held in 2006. Either at that meeting or subsequently PSL proposed an EBT scheme involving the purchase of gilts, which Mr Morgan and Mr Silver decided to proceed with but which was abandoned in April 2007 following legislative changes.

83. A further meeting was held with PSL (the date of which was unclear) which was attended by Bob Newsholme of Kirk Newsholme as well as Mr Morgan, Mr Silver, Mr Routh and a PSL representative, at which the EBT structure that Landid implemented was proposed for use in respect of any promote payment received on the Leatherhead project. PSL explained that the strategy could save PAYE, NICs and corporation tax and that, whilst not approved by HMRC, such structures were commonplace and this particular strategy had received a favourable opinion from leading Counsel. Some further due diligence was undertaken by Mr Newsholme at Landid's request. This confirmed that PSL was a well known provider of tax strategies and that the structure had indeed been the subject of a favourable opinion from leading Counsel.

84. PSL sent a formal engagement letter on 10 January 2008, which was signed and returned by Mr Morgan on 14 January. PSL's fee was 6.5% (excluding VAT), all but £3000 of which was payable only following the payment to charity. The fee covered the Trustee's fees and also those of Browne Jacobson. Kirk Newsholme received a

25% rebate from PSL. Mr Silver was aware of this but did not consider that it would cloud Mr Newsholme's judgement in recommending the scheme.

85. PSL's advice letter was sent to Mr Silver on 17 January and Browne Jacobson's letter enclosing a draft Trust Deed and summary of the Trust provisions was sent on 24 January. Mr Morgan and Mr Routh received copies of PSL's advice and the papers from Browne Jacobson.

86. The decision to establish the EBT was taken at a Board meeting on 28 January 2008, with all three directors present. The Board approved the draft Trust Deed and also resolved to suggest to the Trustee that sub-trusts be created in favour of each of Mr Silver, Mr Morgan, Mr Routh, Mrs Elliott and their respective families. The signed Trust Deed was sent to the Trustee on the same day with the £100 needed to establish the trust, and was signed and dated by the Trustee on 31 January.

87. On 29 January Landid issued a sales invoice to its client in respect of the Leatherhead promote. Payment was received on 31 January. On 8 February the Trustee provided a draft Deed of Appointment creating sub-funds in favour of Mr Silver, Mr Morgan, Mr Routh, Mrs Elliott and their respective families. The Deed of Appointment was signed and returned by Mr Silver on the same day, and was executed and dated by the Trustee on 12 February.

88. In the meantime, Mr Newsholme emailed Mrs Elliott on 7 February in response to an email she had sent on 31 January. That email referred to a lunch she had had with Mr Silver three days earlier in which he had talked about an EBT and suggested she emailed Mr Newsholme for answers to her queries. These were "how to get money out of the EBT and how long does that process take?", whether it was "a good idea to keep some money in there", and a query about the tax charge on the interest. Mr Newsholme's response noted that taking the funds out would result in tax and national insurance on the cash which "defeats the object of doing the arrangement" and suggested a loan, stating that the arrangements would hopefully all be done in around three weeks following which decisions could be made e.g. about taking loans. The advice also notes that by reducing the amount taken out by way of loan the 2.5% tax charge would also be reduced, and the balance left in the trust could be invested in a high interest account which would not attract UK tax on the interest.

89. Also on 12 February Mr Silver and Mr Morgan reached agreement about how the £5 million to be contributed to the EBT would be allocated between the four individuals. It is not clear exactly when it was agreed that the total amount to be contributed should be £5 million, but it would have been before this date. It is however clear that before agreement was reached on 12 February there had been a difference of view between Mr Morgan and Mr Silver about the allocation. Mr Silver's evidence, which we accept, is that he would have preferred to allocate additional amounts to Mr Routh, bearing in mind his close involvement in the Leatherhead project, and to Mrs Elliott given her significance to the business. He wished to reward their loyalty and commitment and incentivise them to continue to work in the business. Mr Morgan was not happy with allocating them increased amounts and was also not initially happy with the final allocation, which he thought

was insufficiently favourable to him. Mr Newsholme got involved and provided some alternative calculations on 12 February. However, these do not show numbers that differ from the final allocation and instead simply set out two slightly different ways of presenting the same conclusion. The first splits the £5 million in proportion to shareholdings (which would result in Mr Routh being allocated £250,000) and then reduces the allocations to Mr Morgan and Mr Silver by allocating £150,000 to Mrs Elliott and an additional amount to Mr Routh to bring his total to £500,000. The second achieves exactly the same result by first deducting the £150,000 for Mrs Elliott, splitting the balance in proportion to shareholdings and then allocating an additional sum to Mr Routh by reducing the allocations to Mr Morgan and Mr Silver.

90. Following receipt of Mr Newsholme's calculations Mr Morgan and Mr Silver had a further discussion and reached agreement as to how the £5 million should be apportioned. Mr Routh was not involved in any of these discussions, or indeed in the decision that £5 million should be allocated to an EBT, and was only informed after the discussions were completed of the amount which would be allocated to his sub-fund. We also accept that, although Mrs Elliott was clearly informed about the EBT proposal at her lunch with Mr Silver in late January she was not informed of the amount that would be allocated to a sub-fund for her until after the decision was taken on 12 February. It was clear however that neither objected to their sub-fund being set up, and in oral evidence Mr Routh confirmed that he was in favour of it.

91. A further Board meeting was held on 13 February with all three directors present. The minutes note that the sub-funds had been established and that the Board resolved to contribute £5m as an accretion to the sub-funds in accordance with the terms of the draft Deed of Addition, which the Board resolved to execute. (The Schedule to this Deed set out the individual amounts to be added to each sub-fund, reflecting the agreement reached between Mr Morgan and Mr Silver on the previous day: see paragraph 5 of Appendix 3.) The minutes also note that Landid remained the principal beneficiary at that point and that the effect of the Deed of Appointment remained revocable with the consent of the protector until the end of the Initial Period. On the same day Mr Morgan signed a notice to employees in similar form to the one used by Allen (see [67] above), clearly following PSL's advice to do so, and the £5 million was transferred to the trust bank account. The Deed of Addition was executed and dated by the Trustee on 14 February.

92. PSL's further advice explaining the options open to Landid was provided on 27 February. Another Board meeting was held on 28 February, again with all three directors present. The minutes note that the Deed of Addition had been executed and that Landid now had a choice of whether to take no further action (in which case it was likely that it would become entitled to the assets 85 days after the trust was created) or to make a payment of £100 to Heart Research UK, which would result in Landid ceasing to have any beneficial interest in the EBT and the sub-funds becoming irrevocable. The Board referred to the company's "wish to reward and motivate employees" and determined that the payment should be made to charity. A cheque was posted the same day.

93. On 4 March Mr Newsholme sent a note to PSL of behalf of Landid requesting information on a number of matters raised by the directors. The queries raised included questions related to the investment process (including appointing the individuals' investment advisers to each sub-fund, whether there were prohibited investments, and how cash was currently invested), the identity of the Trustee and safeguards in respect of it, the process for making loans and the position on death. The note also explained that two directors had taken loans from the company which needed to be repaid for cash flow reasons, and asked whether loans could be made from the EBT so that the loan accounts could be paid back by 31 March (the year end). These queries led to a meeting on 19 March between a PSL representative, the three directors and Mr Newsholme. The notes of the meeting record that there was no restriction on the type of assets which the EBT could hold, although the Trustee would not sanction "risky investments". It was explained that the cash was currently held with RBS, that the Trustee "will generally seek to find beneficial interest rates but the onus is on the beneficiaries to seek the best rates" and would provide management of the funds. In relation to death, the note records the once probate has been granted the Trustee could be asked to consider whether they would write off the loan. A letter of wishes was also suggested to govern distribution of the sub-fund assets in the event of death. (Letters of wishes were subsequently supplied, at least by Mr Routh and Mrs Elliott.)

94. Consideration was given to an additional EBT arrangement in relation to an anticipated promote payment in respect of another project. This was discussed at a Board meeting on 31 March 2008. With this in mind, and also to gain further assurance as to the Trustee's operation, Mr Morgan, Mr Routh and Mr Newsholme travelled to the Isle of Man to meet the Trustee on 30 June. However, the income from the additional project did not materialise and the idea of a further EBT was not pursued.

95. As can be seen from Appendix 3, the position in relation to loans from the Landid EBT was more complex than for the other appellants. Mr Silver and Mr Morgan took a number of loans over a period, as did Mrs Elliott. Mr Routh's position is not covered in Appendix 3 but is described below.

96. Mr Routh had no immediate need for the funds, since he had independent means following the takeover of a business that he had been a partner in. Since at the time bank interest rate returns were reasonable (in the region of 5%) he decided not to request a loan but instead to leave the funds with the Trustee. He did however make further enquiries during July 2008 to see whether he could involve his independent financial adviser (IFA) in identifying investment opportunities, as a result of which, and at the Trustee's suggestion, he wrote a letter requesting that the Trustee consider appointing his IFA as an adviser to the trust. This letter was subject to the proviso that recommendations made by the IFA be confirmed to Mr Routh by the Trustee prior to implementation. Mr Routh explained, and we accept, that this reflected the general arrangement he had with his IFA that the adviser would give advice to Mr Routh rather than proceed without his involvement. In the event no recommendations were made.

97. Mr Routh also approached the Trustee in July 2008 about the possibility of the Trust purchasing the freehold of a parking space in a Cornish village where he owned property, but the purchase did not proceed. The same email also referred to the selection of deposit accounts and reported that Mr Routh had discussed this with his IFA and was nervous of depositing more than £50,000 in any one account because of the risk of bank failure. He asked whether the Trustee had a list of offshore deposit funds into which he could "direct my funds". A representative of the Trustee responded confirming that they were happy to consider the purchase of a car parking space at fair value and asking about obtaining a valuation, and also attaching a list of deposit rates and saying that they were happy to consider opening accounts, but if a number of accounts were to be opened they would propose to charge a small administration fee.

98. In the event the Trustee made its own decision to redistribute funds held in the light of the worsening financial crisis, and wrote to Mr Routh on 7 October 2008 informing him that they had redistributed all funds held by the Trustee with Royal Bank of Scotland International (RBSI) among four banks, RBSI, Lloyds, Barclays and Bank of Ireland, the division between the banks depending on the size of the balance. Some further correspondence followed in which Mr Routh asked about using Irish banks and gilts, and subsequently about moving cash out of Irish banks either to Northern Rock or to Bradford & Bingley. Funds were moved from Bank of Ireland to Bradley & Bingley some time after this, apparently in January 2009. There is no indication that Mr Routh was aware of this and it was the source of some confusion subsequently.

99. Mr Routh was contacted again by the Trustee in May 2009 to inform him that, in order to preserve capital, funds would be transferred to a fund managed by RBS yielding 0.46%. Although the letter appears to relate to the full amount held on deposit within the sub-fund the amount actually moved appears to have excluded the deposit with Bradford & Bingley. The letter points out that where cash was invested was ultimately a matter for the Trustee, but the Trustee wished Mr Routh to be aware and to have time to consider the letter before the funds were moved, noting that the Trustee considered it very important that those with a beneficial interest in the funds were kept informed of the Trustee's intention and were given an opportunity to discuss investment strategy.

100. On 30 November 2010 PSL emailed Mr Routh warning him about possible draft legislation regarding EBTs which might result in any new loan taken out after 9 December being taxed as income. Mr Routh had intended to wait until he retired before requesting a loan in order to avoid any benefit in kind liability, but in response to the advice he immediately requested a loan of £500,000. He signed the Loan Agreement on 1 December in an amount of £523,439, clearly reflecting the total value then thought to be in the sub-fund. The Loan Agreement was signed by the Trustee and dated 3 December. The final version shows manuscript amendments increasing the amount to £523,451.66, no doubt reflecting additional interest accrued. Although Mr Vallat drew our attention to inconsistent minutes of the relevant meeting or meeting of directors of the Trustee, one showing the lower and one showing the higher figure and both also dated two days earlier than the date of the Loan

Agreement, it is clear from the initialled manuscript amendments that a decision was taken by Mr Schofield and his fellow director, and effectively therefore by the Trustee, to advance the higher amount. This decision was clearly reached on the understanding that the Trustee was responding to a request from Mr Routh that the entire balance in his sub-fund be lent to him. In our view this was a relatively rare example of implementation defects in the paperwork.

101. In relation to Mr Silver there was clearly an initial hiccup which delayed the first loan. Mr Silver was cross-examined about emails from him and Mr Newsholme on 6 March 2008 in which Mr Silver indicates that the "money must be there tomorrow" and Mr Newsholme refers to a commitment that Mr Silver needed to meet. After the initial problems were resolved the Loan Agreement was signed by the Trustee and dated 10 March. After that funds were received reliably in response to requests. A query was raised by the Trustee where the requested payee was not Mr Silver, to confirm that the loan was for him. We were referred to an example where the requested payee was a garage and Mr Silver confirmed that the loan was for him. Mr Silver requested that particular loan on 17 September 2008 and the email correspondence clearly indicates that he expected a very speedy turnaround, although the loan was not in fact advanced until 19 September.

102. Mr Silver chose to make two loan repayments of £126,045 in total. Mr Silver could not recall the details in cross-examination but clearly recalled the benefit in kind charge. He also suggested that he was slightly bothered that the loan might be called in. Our conclusion is that the repayments were made because Mr Silver did not need the funds at the time and would have been conscious of the tax cost of having a loan outstanding that was not required. He clearly expected to be able to, and did, draw these funds out by way of further loans when he wished. We should also note that it does not appear that Mr Silver took any steps to attempt to influence how the Trustee invested funds that were not drawn down as loans, although he was kept informed by the Trustee and received a similar letter to the one received by Mr Routh on 7 October 2008 notifying him that balances were being split between different banks. The final loan to Mr Silver was made on 3 December 2010, no doubt following PSL's advice.

103. Mrs Elliott requested her first loan on 20 March 2008, after Mr Newsholme emailed her to say that PSL was "now happy that you can take a loan from your Trust". The Loan Agreement was dated 28 March 2008. From July 2008 the balance of the funds not loaned to Mrs Elliott was deposited with Allied Irish Bank, we infer at her request.

104. Mr Morgan first asked PSL about a loan on 27 March, saying that he needed to transfer money to Landid as part of a repayment of a director's loan and adding that the amount requested "needs to be in our bank account by 31 March". The Loan Agreement was dated 1 April and the first loan was made on the same date. Around £1.5 million was deposited at Irish Nationwide (IOM) Ltd in July 2008, and Mr Morgan received a similar letter to Mr Routh dated 7 October 2008 about the Trustee's decision to split balances between different banks. The final loan to Mr Morgan was made on 6 December 2010, again no doubt following PSL's advice.

105. As part of Mr Routh's settlement with HMRC his sub-fund was wound up by shortening the Trust Period and the outstanding debt was released. We accept Mr Routh's evidence that the steps taken were determined by the terms of the negotiation and settlement with HMRC. Mr Schofield's evidence was similar: he said that what happened would depend on HMRC's directions as part of the settlement, which the Trustee was not directly involved in agreeing. We do not accept HMRC's suggestion that this demonstrated that the Trustee simply did what it was told by the employees. It is clear that the steps taken reflected the settlement reached. It is highly unlikely that a professional Trustee would exercise its discretion to refuse to co-operate with the terms of an agreed settlement.

106. We accept Mr Silver's and Mr Routh's evidence that, despite the reference to "de facto" control in the PSL advice letter (see [41] above) and to email correspondence indicating their clear expectation that funds would be available by way of loan as required, they understood throughout that the Trustee would have legal control over the trust funds, that the Trustee had discretion as to whether or not to make loans and that it could require repayment of loans. Mr Routh was particularly clear and impressive about the fact that the Trustee had complete discretion, pointing to other parts of the PSL advice letter that made that clear, and that whilst he could make recommendations he was not in full control of the funds. He also pointed to the fact that, during the financial crisis, the Trustee moved funds around without prior consultation, and noted that although he had provided a letter of wishes the Trustee was not obliged to follow it.

107. Whilst Mr Silver and Mr Routh clearly expected that loans would be available in practice, and in Mr Routh's case that the Trustee would generally be amenable to acting in accordance with his wishes in respect of investments, we find that this was a matter of expectation rather than a belief that they could compel the Trustee to act in a particular way. Similarly, although neither expected the loans to be called in they both appreciated that the Trustee had power to do so.

108. Mr Silver was cross-examined on the aim of the structure and the significance of the corporation tax saving. His evidence was that the aim of the structure was to reward a small team of people who had stayed together, and who had worked with him at his previous business, in a tax efficient manner. He said that he did not consider or understand the corporation tax saving aspect: he was just following advice. He also said that he had considered whether the Leatherhead promote funds could be used for the Nike head office development instead.

109. Our overall conclusion from the evidence is that the EBT was set up to distribute the bulk of the promote payment from the Leatherhead project in a tax efficient manner, as a reward to Mr Morgan, Mr Silver, Mr Routh and Mrs Elliott for their contributions to the business. The basic distribution was in accordance with shareholdings, but with adjustments to benefit Mrs Elliott and Mr Routh (as indicated by Mr Newsholme's calculations: see [89] above). We accept that the corporation tax position was not at the forefront of Mr Silver's mind. His key objective was to enable Mr Morgan, Mr Silver, Mr Routh and Mrs Elliott to access the bulk of the promote payment from the Leatherhead project without PAYE or NICs. This is also consistent

with the terms of the email sent by Mr Newsholme to Mrs Elliott on 7 February 2008, referring to the "object" of the arrangements being defeated by taking the funds out (see [88] above). We do not accept HMRC's submission that Mr Silver's evidence on this question should be dismissed as incredible simply because of the level of PSL's fees, the artificial provisions in the Trust Deed designed to avoid Schedule 24 FA 2003 or the focus on corporation tax in PSL's advice. Mr Silver was not focusing on detail, including the company's corporation tax position which we infer he left to his advisers. However, we do think it much more likely that Mr Newsholme would have had the corporation tax benefits firmly in mind when recommending a scheme the complexity of which is substantially driven by the corporation tax position. We also cannot ignore the point that corporation tax on the Leatherhead promote would have given Landid a significant one off tax charge on what was clearly regarded as an exceptional profit (at the time the main rate of corporation tax was 30%) and would have materially reduced the amount that could be distributed. We think it highly unlikely that Mr Newsholme had not made this point to Mr Silver and Mr Morgan when recommending the scheme and discussing the amount that would be available for it, and it is also clear that the corporation tax aspects were explained by PSL at the meeting referred to at [83] above.

110. Mr Silver was also cross-examined about whether, after the Board meeting on 13 February which decided to add the £5 million to the sub-funds, there was any doubt about whether the donation would be made to charity. He suggested that there was a possibility that the scheme could be stopped and mentioned the possible use of the funds for the Nike headquarters scheme. Mr Routh's response to a similar question was that if someone had approached Landid with a takeover offer during that period then he thought they would not have proceeded with the EBT.

111. We do not accept that there was any realistic expectation or possibility that, once the £5 million had been contributed to the sub-funds, the payment would not be made to charity. Both Mrs Elliott and Mr Routh had been told about the arrangements and there is no documentary evidence that indicates that either of Mr Silver's or Mr Routh's suggestions were considered as realistic possibilities at the time.

112. Finally in this section, we should record our findings about a specific area on which Mr Silver was cross-examined, relating to the VAT invoice for the bulk of PSL's fees. Landid's VAT quarter end was 29 February 2008, and one of the points raised by Mr Newsholme with PSL in his note of 4 March (see [93] above) was to request a VAT invoice dated before the end of February. This was referred to PSL's accounts department following which PSL confirmed that they would be able to issue a February dated bill. Mr Vallat did not criticise this as the work had been completed in February, but cross-examined Mr Silver on the fact that the covering letter for the invoice was clearly backdated by PSL to refer to 29 February, although it was not sent until March. Mr Silver's response was that he could not recall this at all, that he left VAT matters entirely to Mr Newsholme and therefore would have passed the letter straight onto him. In our view, whilst PSL were clearly wrong to backdate the letter, there is nothing in that that impugns Landid or Mr Silver's honesty.

Findings specific to La Vita

113. Limited agreed facts in respect of La Vita are set out in Appendix 4, to which reference should be made in conjunction with these findings. As can be seen there Mr Arcari was the sole employee who benefited from the arrangements.

114. La Vita was established in 2005, when the restaurant business previously run in partnership by Mr Arcari and his brother Antonio ("Tony") Arcari was transferred to it. Tony Arcari was involved in a road accident in October 2006 which led to his untimely death in June 2007. Following his brother's death Mr Arcari became the sole shareholder of La Vita. Two further restaurants have been opened, of which one was opened at around the time that the EBT was established. Each restaurant has a total of around 30 staff.

115. La Vita was profitable in each of the years ended 30 November 2006 and 30 November 2007 but neither brother drew a salary. Instead living expenses were funded from the family fish and chip shop business, which was held separately. There are no written employment contracts for directors or staff and no history of bonus payments.

116. Although Mr Burton worked in the Tenon group and his office benefited from the EBT arrangements via a commission rebate, the EBT structure was not widely marketed by his office and was only offered to a few entrepreneurial clients, because it was not regarded as mainstream planning. Because he regarded them as entrepreneurs Mr Burton introduced the brothers to a director of PSL who explained the concept of EBTs.

117. It was clear that Mr Arcari was attracted by the tax saving that an EBT could offer. He understood that a fee would be charged (from which Mr Burton would also benefit) and that there was a risk that the tax saving would not be available. In his view the downside risk was the fee, and the risk was worth taking. Mr Burton confirmed that the tax saving that Mr Arcari was specifically attracted by was the corporation tax saving. Mr Burton's evidence was that this was because La Vita was trying to grow the business and also to service debt. The accounts indicate that La Vita had bank debt of over £300,000 in the year to 30 November 2007 and in addition had current accounts owed to directors of nearly £500,000. We infer that Mr Burton was referring to bank debt. Mr Arcari's particular focus on the corporation tax saving is also consistent with the fact that steps were taken to try to secure the deduction in the year ended 30 November 2007, even though the EBT structure was not actually implemented until the following year, with the fact that the funds were left in the EBT initially rather than being lent and with the fact that Mr Arcari was not otherwise drawing remuneration or dividends from La Vita (both of the last two points suggest that funds were not required to be extracted, so that income tax and NICs were not key drivers, although clearly the structure would not have been attractive if either had arisen). The focus on corporation tax is also consistent with the existence of the directors' current account deficits, which suggests that Mr Arcari may have had another way of taking money out of the company in a non-taxable form. In those circumstances the fee charged by PSL is most clearly justified by the corporation tax saving.

118. There was no evidence that the EBT structure was ever considered as a potential means of rewarding staff other than Mr Arcari and (at least before his death) his brother. In our view it is also somewhat unrealistic to regard it as a scheme to motivate Mr Arcari as an employee. He owned the business and his focus was on saving tax. However, both the appellants and HMRC proceeded on the basis that, for La Vita as well as the other appellants, the payments into the sub-funds were intended to motivate or reward the relevant employee, and we do accept that the £400,000 had the effect of being a reward to Mr Arcari for his contribution to the business.

119. Mr Burton was closely involved in the implementation of the EBT structure. He was keen to ensure that it was implemented properly, that advice was followed and that the scheme was properly disclosed. He or a member of his staff was present at all of the Board meetings (albeit that his presence was not recorded in the pro forma minutes) and his firm was the conduit for all the paperwork. Meetings were generally held at Mr Burton's office. Although Mr Arcari was the sole director Mr Burton made it clear to him that meetings needed to be held and decisions taken as recorded in the minutes. Mr Burton ensured that Mr Arcari understood the structure in "big picture" terms and that what was involved was explained to Mr Arcari by Mr Burton or a member of his staff at each stage in the process, and in particular at the time of each Board decision. We understood this to mean that Mr Arcari appreciated the nature of an EBT as a discretionary trust, the role of the Trustee, the ability to use the EBT to benefit him or his family (including by taking loans), the intended corporation tax treatment and the potential risk of HMRC enquiry, and that the individual steps were also explained to him, such as the effect of making the £100 payment to charity.

120. The first meeting was on 27 November 2007, shortly before the year end. Mr Burton was present and confirmed that although the minutes were drafted by PSL in advance their contents were discussed. This would have been part of a broader pre year-end meeting that Mr Burton's firm generally had with clients. The minutes note the presence of Tony Arcari's personal representative in addition to Mr Arcari. The minutes record a decision to set aside £600,000 for awards to key employees in respect of their service for the year ending 30 November 2007, the amount being used to create an employee benefit trust and sub-trusts for key employees and their families, noting that whilst the trustees would not allow capital to be paid out as remuneration it could be used to provide benefits such as interest-free loans. Reference was made to a "provisional list" of employees and directors, comprising Mr Arcari and his deceased brother. On the same date, Mr Arcari signed letters on behalf of La Vita addressed to himself and his brother's personal representative, informing them that a sum of money had been set aside and that they had been included on the preliminary list of employees likely to receive awards. These letters had clearly been prepared, like the Board minutes, by PSL. Mr Burton explained that Tony Arcari's estate was included as a potential beneficiary because, although the testamentary arrangements provided for his entire interest in the business to be acquired by his brother, that had clearly not occurred by November 2007. However, by the time that the EBT arrangements were implemented in 2008 Mr Arcari was the 100% shareholder and it was determined that he alone should benefit.

121. No further action was taken in relation to the EBT until June 2008. By this stage EDF had been set up and Mr Burton introduced Mr Arcari to them. EDF provided an engagement letter on 16 June 2008. This explained that EDF's fee was 12% of the amount contributed (excluding VAT), of which £3000 was payable when the trust was set up and the balance if the company chose to surrender its interest in the trust assets. The fee covered the Trustee's and Browne Jacobson's fees as well as EDF's own remuneration. EDF's advice letter followed on 20 June 2008. This is in near identical form to the advice letter given by PSL to Allen which is described at [40] to [47] above. The only differences to note are that the letter highlights that trust capital cannot be paid out as remuneration, stating that this point "was of course discussed with you in some detail prior to your year end", that it refers to the need for a board minute to set aside funds prior to the year end, that it includes a slightly extended section on the risk of HMRC enquiry and that it omits the closing suggestion that the company should start to consider who it was likely to recommend to receive awards.

122. We accept Mr Burton's evidence that he understood that the assets would be under the control of the Trustee and that they had discretion. He did not recall picking up on the reference to "de facto" control by the adult beneficiaries in the advice letter but understood that the trust was a discretionary trust under the control of the Trustee. We also accept that that the advice was explained in "big picture" terms to Mr Arcari.

123. Browne Jacobson provided a draft trust deed, together with their explanatory notes, by letter dated 1 July 2008. The notes omit to refer to or explain clause 19 of the Trust Deed (see [33] above) so give the impression that the Trustee has unfettered overriding powers under clause 6 to make distributions. The apparent discrepancy between this advice and the advice from EDF does not appear to have been picked up by Mr Burton. Mr Burton's understanding was that the Trustee had broad discretionary powers and he did not appear to appreciate the existence of clause 19.

124. The decision to establish the EBT was recorded in Board minutes dated 9 July 2008. Those listed as present were Mr Arcari and Mrs Arcari as company secretary. This meeting both approved the draft Deed of Settlement and resolved to suggest to the trustees that a sub-trust be created in favour of Mr Arcari and his family. The signed Trust Deed was sent to the Trustee and was executed by the Trustee on 23 July. The bank account was opened on behalf of the Trust on 29 July with the initial £100 provided by La Vita to establish the Trust, and the Deed of Appointment establishing a sub-fund for the benefit of Mr Arcari and his family was entered into by the Trustee and by Mr Arcari as protector, dated 4 August.

125. Further Board minutes dated 8 August 2008, also with Mr and Mrs Arcari listed as being present, resolved to contribute £400,000 as an accretion to the "sub-funds" in accordance with the terms of the draft Deed of Addition, which the Board resolved to execute. (The Schedule to the Deed of Addition specified that the £400,000 was to be added to the sub-fund relating to Mr Arcari.) Payment was made on the same day. The minutes note that La Vita remained the principal beneficiary at that point and that the effect of the Deed of Appointment remained revocable with the consent of the protector until the end of the Initial Period. (Reflecting their pro forma nature these minutes and the minutes of the 9 July meeting both refer to sub-trusts or sub-funds in

the plural, although only one was created in La Vita's case.) Mr Arcari signed the Deed of Addition, which was also executed by the Trustee and dated 11 August.

126. The explanation for the reduction from £600,000 to £400,000 was that by this stage draft accounts were available for the year to 30 November 2007 and it was appreciated that La Vita was not as profitable as had been anticipated at the time of the 27 November meeting. In fact, after taking account of an accounts charge of £400,000 for the EBT La Vita's profit for the year was only £4741 before tax.

127. The documentary evidence included an undated notice on La Vita headed paper. This was in similar form to the one used by Allen (see [67] above). Mr Burton believed that the notice had been displayed in the restaurants because they were following EDF's advice do so, but as far as he was aware no employee had queried it.

128. EDF provided further written advice on 26 August 2008. This advice was very similar to the further advice provided by PSL which is referred to at [48] above. However, it includes some additional paragraphs which also appear in the 20 June advice letter from EDF, relating to the need for a board minute before the year end to achieve a corporation tax deduction.

129. The final Board minute was dated 29 August 2008. Only Mr Arcari is recorded as present. It was noted that the Deed of Addition had been executed and that La Vita now had a choice of whether to take no further action (in which case it was likely that it would become entitled to the assets 85 days after the trust was created) or to make a payment of £100 to Willow Foundation, which would result in it ceasing to have any beneficial interest in the EBT and the "sub-funds" becoming irrevocable. The minutes refer to the company's "wish to reward and motivate employees" and recorded the decision to make the payment to charity. A cheque was posted the same day.

130. It was clear from Mr Burton's evidence in cross-examination that there was no real doubt that once the £400,000 had been added to the sub-fund the payment to charity would be made shortly thereafter.

131. During the later part of 2008 Mr Arcari and his wife were having marital difficulties. They separated in early 2009 and each sought independent legal advice. An agreement was reached for Mr Arcari to pay his wife £400,000. Mr Burton was not involved in these discussions but he was asked by Mr Arcari for advice about how to fund the pavement. With Mr Burton's help Mr Arcari applied to the Trustee on 16 March 2009 to borrow that amount. The Loan Agreement was entered into, and the loan was made, on 18 March. Subsequently Mr and Mrs Arcari were reconciled.

132. The loan, together with a further small loan referred to in Appendix 4, remains outstanding. We accept Mr Burton's evidence that Mr Arcari's understanding is that a debt exists, and he could be required to repay it.

133. Our conclusion from the evidence is that during the period when the EBT was set up and the sub-fund became irrevocable no decision had been taken by Mr Arcari as to what he wished to do with the funds held by the Trustee. We are not however persuaded by Mr Burton's suggestion that it was coincidental that the amount in the

sub-fund and the amount Mr Arcari agreed to pay his wife at the time of their separation were the same figure. Mr Arcari was obviously aware of the amount held by the EBT and the possibility of taking a loan from the EBT had been explained to him. Mrs Arcari had also been present at the meeting which resolved to contribute £400,000 to the EBT. We infer that both Mr and Mrs Arcari had the amount in the EBT in mind in agreeing the financial separation terms (a process in which Mr Burton was not involved), and that it is more likely than not that Mr Arcari expected that he would be able to access the funds when he needed to do so. This was in line with Mr Burton's understanding and experience (no doubt from EBT structures implemented for other clients) that the Trustee could be expected to be sympathetic to a request for a loan and with Mr Burton's view that there was no real doubt that a loan would be made if requested.

Mr Schofield's evidence

134. During the period in question the Trustee had around 30 staff and it is clear that, although Mr Schofield participated in most meetings of directors of the Trustee in its capacity as trustee of the EBTs, his detailed recollection of and involvement in the implementation and operation of individual arrangements was fairly limited. This is not particularly surprising in the light of his evidence that there were around 400 EBTs of the type in question, out of a total of 800 to 900 EBTs structured by PSL. Nevertheless, he was able to assist us with evidence about how the Trustee generally approached its role.

135. Mr Schofield accepted that the due diligence undertaken by the Trustee when establishing a Trust extended to proof of identity for the relevant employees (the "main" beneficiaries), but did not extend to obtaining information about other potential beneficiaries. He also accepted that loans would invariably be made on request to the "main" beneficiary in the amount requested, up to the amount available in the sub-fund. Loans have not in practice been made to other beneficiaries. Loans were generally made on interest-free terms, unless requested otherwise (which they sometimes were for tax reasons). Staff had a specific procedure manual to follow. Loans were advanced as soon as practicable following a meeting of the Trustee's directors to approve the request and, in the case of the first loan, the Loan Agreement being executed. Where payments were requested to a different person checks would be made to ensure that the loan was being made for the benefit of the "main" beneficiary, but no checks were made on the purpose of the loan or the employee's ability to repay. Mr Schofield's explanation was that the Trustee was aware that the EBT was part of the settlor's remuneration strategy, and the employer had chosen to award funds in favour of particular employees.

136. The Trustee had more work to do if cash was retained within sub-funds. It was typically a choice of bank accounts or gilts, and Mr Schofield confirmed that the Trustee would normally follow any sensible request from the relevant employee as to choice of bank or building society. In some other cases other investments were acquired, typically in property.

137. It was clear that, when making loans, the Trustee did not have a current expectation of exercising its right to require repayment from the employee. In practice voluntary repayments were also rare. However, Mr Schofield had no doubt that the Trustee's rights to demand repayment existed and that there were circumstances in which repayment might be required. Mr Schofield referred to the indemnity given by the Trustee in respect of PAYE and NICs: if a liability arose under the indemnity or in respect of the costs of defending it then repayment would be sought to fund that. The Trustee was facing a potential claim from one settlor (unrelated to the appellants) in respect of this. There had been another example of an employee going bankrupt, where the Trustee had made a claim against the trustee in bankruptcy and had recovered a proportion of the amount owed. Mr Schofield was also aware of three deaths of employees to whom the Trustee had made loans (again not related to the appellants) where the Trustee was currently taking advice to determine the action it should take.

138. Although loans would be made to the "main" beneficiary without consideration of the position of other beneficiaries, Mr Schofield's evidence was that a different approach would be taken in relation to any request for outright distribution of funds. Mr Schofield explained this in terms of an outright distribution, unlike a loan, resulting in a loss of the asset, and in terms of the different powers that the Trustee would be exercising under the Trust Deed, which he believed would mean that the Trustee would make some investigation of the identity and circumstances of the wider group of beneficiaries before reaching any decision (although there were no examples in practice). Although this approach might be criticised in financial terms on the basis that an interest-free and unsecured loan to one beneficiary could well result in the interests of other beneficiaries being adversely affected, we accept Mr Schofield's evidence that a different approach would be taken in practice. The position in respect of loans is also consistent with the express terms of the Trust Deed permitting beneficial loans to be made to individual beneficiaries (see [30] above).

139. Mr Schofield was aware of the additional clause in the La Vita Trust Deed (clause 19). He understood this not to prevent interest-free loans being made, and he understood it to have been included to strengthen the tax analysis. It did not in practice affect the way in which the relevant trusts were dealt with because outright distributions were not requested.

140. Mr Schofield's evidence about cases where sub-funds were wound up following settlement with HMRC is covered at [105] above, in connection with Mr Routh.

The accounting treatment

141. The expert witnesses, Mr Crooks and Mr Cooper, were substantially in agreement about the accounting treatment and we accept their evidence as set out below.

142. The experts agreed that each appellant's accounting treatment of the arrangements, as summarised in Appendices 2 to 4, was in accordance with applicable UK generally accepted accounting principles (GAAP) for the period in question, being the year ended 29 February 2008 for Allen, 31 March 2008 for Landid and 30

November 2007 for La Vita. They also agreed on the relevance of UITF32 (Urgent Issues Task Force Abstract 32) which deals with employee benefit trusts and other "intermediate payment arrangements". All three companies prepared their accounts in accordance with the requirements of the Financial Reporting Standard for Smaller Entities (FRSSE). UITF32 is not strictly mandatory for companies applying FRSSE, but voluntary compliance is recommended on the basis that the starting point for matters not covered by FRSSE is existing practice on the issue in question, and relevant GAAP standards for large companies are the obvious source of such practice.

143. The consensus recorded in UITF32 is that where an entity transfers funds to an intermediary (here an EBT) there is a rebuttable presumption that the entity has exchanged one asset for another asset in accounting terms, in the sense that it will obtain future economic benefits and has control of the rights or other access to those benefits. Where this presumption applies no immediate expense arises. In order to rebut the presumption it is necessary to demonstrate that future economic benefits will not be obtained or that there is no control, for example because the asset vests unconditionally in identified beneficiaries.

144. The experts also agreed on the relevance of the concept of "constructive obligation". FRS12 defines this as:

> "an obligation that derives from an entity's actions where:
>
> (a) by established pattern of past practice, published policies or a sufficiently specific current statement, the entity has indicated to the parties that it will accept certain responsibilities; and
>
> (b) as a result, the entity has created a valid expectation on the part of those other parties that it will discharge those responsibilities."

145. In the case of La Vita the EBT was established after the relevant year end. The experts agreed that this meant that UITF32 was not relevant. Instead, La Vita created a constructive obligation to reward employees in the year ended 30 November 2007. This was evidenced in the board minutes of 27 November 2007 where it was resolved to reward "key employees" and the letters to Mr Arcari and his brother's personal representative. The accounts correctly recorded an accrual in respect of the constructive obligation to reward employees. It was also appropriate to record a charge of £400,000 rather than £600,000. Mr Cooper explained that post-balance sheet events can be taken into account to the extent they reflect conditions at the balance sheet date and are material, and that was the case here.

146. For both Allen and Landid all the relevant events occurred within the financial year in question, and both the concept of constructive obligation and UITF32 were relevant. Both experts agree that, on the evidence that they had been presented with to prepare their reports, there was no constructive obligation to reward employees until the board meetings held by Allen and Landid on 29 January 2008 and 28 February 2008 respectively, when it was resolved to make the payments to charity. Applying UITF32 the earlier contributions to the EBTs (on 16 January 2008 in the case of Allen and 13 February 2008 in the case of Landid) did not give rise to an immediate expense to the profit and loss account. Rather, Allen and Landid exchanged one asset

(cash) for another asset (cash held by the EBT). These assets ceased to be recognised when the payments to charity were made and the sub-funds ceased to be liable to revert to Allen and Landid. Since this occurred before the year end no EBT assets were reflected in their balance sheets.

5 147. In Mr Cooper's view the constructive obligation to reward employees that arose at the board meetings on 29 January and 28 February 2008 created a charge to profit and loss, which was settled by the EBT asset ceasing to be recognised via the mechanism of a £100 payment to charity. In that presentation the derecognition of the asset is a balance sheet movement. Mr Crooks took the approach that both the
10 constructive obligation to reward employees and the loss of the benefit of the EBT assets occurred on the same date (29 January for Allen and 28 February for Landid) and resulted in a profit and loss charge, the substance of which was to reward employees. Both experts agreed, therefore, that there was an obligation to reward employees which was satisfied. Mr Crooks' approach slightly reduced the number of
15 steps by not separating out the creation of the constructive obligation and it being settled. He described his approach as being taken for reasons of simplicity. Both experts agreed that any difference between the two approaches had no effect on the treatment of or disclosure in respect of the transactions in Allen's and Landid's accounts.

20 148. Mr Crooks agreed in cross-examination that, if the constructive obligation to reward employees had arisen at an earlier date (for example on 12 February 2008 in case of Landid) then his analysis would be the same as Mr Cooper's. He also agreed that if the constructive obligation and the establishment of the EBT had occurred in different periods then the accounting treatment would be the same as for La Vita: the
25 constructive obligation would be created in the first period and that obligation would be treated as satisfied when the EBT was established in the following period.

149. Our assessment of the evidence is that Mr Crooks agreed with Mr Cooper, and we find, that the charge to profit and loss account in the accounts of Allen and Landid, as in the case of La Vita, was in respect of the constructive obligation to reward
30 employees, and that this was accepted by Mr Crooks in oral evidence. The constructive obligation was settled by the mechanism of paying £100 to charity, which resulted in the loss of an asset being the funds held by the Trustee. In our view this is consistent with the agreement between the experts that the substance of the profit and loss charge was precisely that, a reward to employees.

35 *Further findings relevant to all three appellants*

150. We make the following findings relevant to all three appellants, largely by way of summary of some of our detailed findings and for ease of reference and clarity:

> (1) None of the employees had any contractual entitlement to any of the amounts contributed to the EBTs. Although the amounts to be allocated to
40 each employee were clearly determined in advance of the contributions to the sub-funds this determination did not give rise to any contractual entitlement.

(2) It was not disputed by the appellants that all the amounts paid into the sub-funds were derived from the employment of the individuals concerned. More specifically, in the case of Allen the arrangements were intended to motivate and reward the five individuals, and in the case of Landid to reward the four individuals, in each case to reflect their contributions to the business ([56], [72] and [109] above]). In the case of La Vita, we consider that the motivation was somewhat different but the effect was to reward Mr Arcari for his contribution to the business ([118] above).

(3) As discussed further below in relation to Issues 2 and 4, the Trust Deeds, Deeds of Appointment, Deeds of Addition and Loan Agreements took effect in accordance with their terms, and none of the relevant terms were practically impossible to implement.

(4) The payment of £100 to charity was preordained in all cases, in the sense that there was no realistic possibility that it would not be made once the relevant appellant had decided to make, and made, its substantial contributions to the sub-funds ([70], [111] and [130] above).

(5) None of the employees have received any benefits from the EBTs apart from the loans, details of which are set out in Appendices 2 to 4 (and above in the case of Mr Routh).

(6) All the witnesses of fact understood that the Trustee had full discretion as a matter of law, and that loans made could be required to be repaid. The Trustee exercised that discretion not only in choosing to make loans but also in relation to its choice of investments, where there were instances of it making decisions without reference to the employees. There was however a clear expectation that loans would be available to the employees as and when requested (with no security being required), and that the Trustee would be amenable to other suggestions, for example (and within reason) in relation to the choice of bank account. There was also no expectation that the loans would be called in during the life of the employee in the absence of something unexpected.

(7) The structure was implemented with care by all three appellants, with PSL's advice (EDF's advice for La Vita) and recommended procedures being followed pretty much to the letter. This was the case even where it was not particularly realistic to do so, for example in relation to the notice to employees or the letter Mr Arcari sent to himself in November 2007.

Issue 1: redirection

151. At the hearing Mr Vallat relied heavily on the decision of the Inner House of the Court of Session in *Rangers*. The Supreme Court upheld that decision in a unanimous judgment delivered by Lord Hodge, which as already mentioned was the subject of additional written submissions following the hearing. Lord Hodge commented at [73] that his reasons were essentially the same as those of the Inner House. Those reasons do not however use the terminology of redirection and in our view the approach taken

is slightly different. In any event we clearly need to pay close regard to the Supreme Court decision.

The facts of Rangers

152. The facts of *Rangers* are summarised at [18] to [31] in the Supreme Court decision. The case related to a trust set up by a member of the Murray group of companies, entitled the Remuneration Trust. Where a group company wished to benefit an employee using the trust it would make a cash payment to the trust and recommend the trustee to resettle the sum on a sub-trust, requesting that the income and capital of the sub-trust be applied in accordance with the employee's wishes. The trustee would invariably comply with the request. The employee would be appointed as protector of the sub-trust and would provide a letter of wishes asking that income and capital be held and applied in accordance with his wishes, and that on his death the funds should be held for a specified member or members of his family. In virtually all cases a loan application was also made to the trustee, and the trustee almost invariably exercised its discretion to grant a loan of the full amount in the sub-trust. No security was taken in respect of the loans, and the first trustee was replaced by a more "compliant" trustee after requesting security in respect of some loan applications.

153. Although the role was expressed to be a fiduciary one, the employee had extensive power as protector, not only to appoint and remove trustees but also to alter the provisions of the sub-trust, change the beneficiaries (although, it seems, not so as to confer an absolute entitlement on the protector) and appoint a different protector. Lord Hodge concluded at [27] that the power to replace the protector with, for example, the employee's wife, may have enabled the employee to be nominated as the beneficiary, extinguish the loan and bring the sub-trust to an end.

154. There were two categories of employee considered, footballers and other employees. For footballers the trust mechanism and the amounts involved were effectively agreed at the time of engagement, via a side letter to the contract of employment which included a provision that the footballer would be appointed as protector of the sub-trust. Loans from the sub-trust with a 10 year term were contemplated but neither the club nor the footballer expected the loans to be repaid at term, instead being left outstanding so as to reduce the value of the footballer's estate on death for inheritance tax purposes. Lord Hodge concluded at [23] that it was clear that the sums paid to the trust and on to the sub-trusts represented remuneration for employment, and noted that the majority of the FTT concluded that the arrangements comprising amounts paid via payroll and through the trust mechanism were presented as a "take it or leave it" deal to prospective employees.

155. Certain other senior employees also benefited from the trust mechanism, both in relation to guaranteed and discretionary bonuses. The mechanism was also used to make termination payments to players. As far as the discretionary bonuses were concerned Lord Hodge noted at [31] that the majority of the FTT had found that there was no contractual right to them before they were awarded, but stated that they were

"paid as a reward for the work which the employees had carried out in their capacity as employees".

The Supreme Court's reasoning

156. On the basis that payments to the trust in respect of both categories of employee were remuneration, Lord Hodge formulated the question for decision as whether an amount that is remuneration (or a reward for services) is taxable as an emolument or earnings when it is paid to a third party in circumstances in which the employee has no prior entitlement to receive it (paragraphs [1], [35] and [36]).

157. Lord Hodge considered the relevant income tax provisions, which included earlier legislation that is not applicable to this appeal together with the relevant provisions of the Income Tax (Earnings and Pensions) Act 2003 ("ITEPA") imposing a charge to tax on "general earnings", defined to include "any salary, wages or fee" and "anything else that constitutes an emolument of the employment" (sections 6, 7 and 62(2)(a) and (c) ITEPA). His Lordship also considered the PAYE regime, including (relevant to this appeal) sections 683 and 684 ITEPA and the PAYE Regulations, regulation 21 of which requires the employer to deduct income tax on making a "relevant payment to an employee", and regulation 80 which empowers HMRC to determine the amount of tax that it appears to HMRC has not been paid and serve notice of the determination on the employer. Lord Hodge referred at [8] to Lord Drummond Young's summary of the position in the Court of Session decision that the central concept is the "payment of emoluments or earnings derived from employment, and an employer who pays emoluments or earnings to or on account of an employee is obliged to deduct tax in accordance with the PAYE Regulations". Lord Hodge noted the corresponding NICs rule requiring an employer who paid earnings to an employed earner to pay NICs, and that the parties to the appeal had agreed that a determination of the income tax position would govern the liability to NICs (paragraph [9]).

158. Lord Hodge went on at [10] to [16] on to consider principles of interpretation of tax legislation. He referred to the existence of a patchwork of provisions (under which the existence of specific charges do not necessarily militate against the existence of a more general charge), the need to focus on the words of the statute rather than judicial glosses, and the move from a literalist to a more purposive approach. Under that approach, as made clear in Lord Nicholls' judgment in *Barclays Mercantile Business Finance Ltd v Mawson* [2005] 1 AC 684 and by Lord Reed in *UBS AG v Revenue & Customs Comrs* [2016] UKSC 13, it is necessary to decide on a purposive construction exactly what transaction will answer to the statutory description and whether the transaction in question does so.

159. Applying these principles, Lord Hodge concluded that there was no requirement in the primary legislation or in the PAYE Regulations that the employee should either receive or be entitled to receive remuneration in order for that reward to be taxable or subject to PAYE ([36] to [40]). However, there were certain circumstances revealed in case law and in statutory provisions which fall outside the general rule. His Lordship referred to three examples of which the third is potentially relevant here,

namely where the payment does not give the intended recipient an immediate vested beneficial interest but only a contingent right. In that case the amount is not paid as remuneration until the occurrence of the contingency ([41]). (One of the other exceptions referred to by Lord Hodge related to perquisites, which in contrast to other parts of the definition of earnings in s 62(2) ITEPA must be obtained directly by the employee: see s 62(2)(b).)

160. Lord Hodge explained the "contingency" exception further at [47] and [48], by reference to *Edwards v Roberts* (1935) 19 TC 618, *Smyth v Stretton* (1904) 5 TC 36 and *Forde and McHugh Ltd v HMRC* [2014] UKSC 14, [2014] 1 WLR 810, cases that were also relied on by the appellants before us. In *Edwards v Roberts* an employee was entitled to an interest in a conditional fund from which the employee was entitled to income, but had no right to receive capital for five years unless the employee died or in some circumstances on termination of employment. The employee could also lose his entitlement in certain circumstances. The employee's argument that he was not taxable on the funds when he finally received them from the trustee on the grounds that the payments into the fund were taxable as emoluments was rejected by the Court of Appeal on the basis that he had only a conditional interest in them at that point. The funds were correctly taxed in the year that they were transferred to him by the trustee. In contrast, in *Smyth v Stretton* a scheme was construed as providing for an agreed application of part of an employee's salary in making payments to a provident fund, so that payments into the fund were taxable at that point.

161. *Forde and McHugh* was a case which Lord Hodge described as consistent with *Edwards v Roberts* in holding that sums paid, otherwise than from salary, which were to provide contingent benefits were not subject to NICs on earnings before the occurrence of the contingency and the payment of the benefits. That case related to the NICs treatment of contributions to an unapproved retirement benefit scheme in which the relevant director had no immediate realisable interest unless he survived to retirement age. The Supreme Court, in a unanimous judgment also delivered by Lord Hodge, held that the contributions were not "earnings". As in this case, counsel for the taxpayer in *Rangers* relied on emphasis in the judgment on what the employee received rather than what was paid by the employer, but Lord Hodge said that this needed to be read in context. *Forde and McHugh* was not concerned with payment of remuneration to a third party, but involved conferring only a contingent benefit on the employee and what would (if HMRC succeeded) be a double charge on the contributions and on receipt of payments from the scheme.

162. Lord Hodge also referred to the Privy Council decision in *Hadlee v Comr of Inland Revenue* [1993] AC 524, where a partner in an accountancy firm assigned a proportion of his share in the partnership to a family trust, and it was held that he remained liable to income tax on that proportion of his income, being the product of his personal exertion. Lord Hodge drew an analogy between the provisions of the relevant New Zealand statute and the UK legislation with its emphasis on emoluments arising from a taxpayer's employment, such that a charge can arise where an arrangement gives a third party part or all of an employee's remuneration ([50]).

163. Lord Hodge went on to consider the PAYE position in some detail, concluding that a judicial comment in *Garforth v Newsmith Stainless Ltd* [1979] 1 WLR 409 referring to payment being made where money is placed unreservedly at the disposal of directors, was not a gloss which established any general rule that a payment is made for PAYE purposes only if money is paid to or placed unreservedly at the disposal of the employee ([54]). In the light of this Lord Hodge concluded that *Sempra Metals Ltd v Revenue & Customs Comrs* [2008] STC (SCD) 1062 was wrongly decided, and that the earlier decision of the Special Commissioners in *Dextra Accessories Ltd v Macdonald* [2002] STC (SCD) 413 also adopted the wrong approach on this point ([56] and [57]).

164. Lord Hodge summarised the position as follows:

> "58. In summary, (i) income tax on emoluments or earnings is due on money paid as a reward or remuneration for the exertions of the employee; (ii) focusing on the statutory wording, neither section 131 of ICTA nor section 62(2)(a) or (c) of ITEPA, nor the other provisions of ITEPA which I have quoted (except section 62(2)(b)), provide that the employee himself or herself must receive the remuneration; (iii) in this context the references to making a relevant payment "to an employee" or "other payee" in the PAYE Regulations fall to be construed as payment either to the employee or to the person to whom the payment is made with the agreement or acquiescence of the employee or as arranged by the employee, for example by assignation or assignment; (iv) the specific statutory rule governing gratuities, profits and incidental benefits in section 62(2)(b) of ITEPA applies only to such benefits; (v) the cases, to which I have referred above, other than *Hadlee*, do not address the question of the taxability of remuneration paid to a third party; (vi) *Hadlee* supports the view which I have reached; and (vii) the special commissioners in *Sempra Metals* (and in *Dextra*) were presented with arguments that misapplied the gloss in *Garforth* and erred in adopting the gloss as a principle so as to exclude the payment of emoluments to a third party.
>
> 59. Parliament in enacting legislation for the taxation of emoluments or earnings from employment has sought to tax remuneration paid in money or money's worth. No persuasive rationale has been advanced for excluding from the scope of this tax charge remuneration in the form of money which the employee agrees should be paid to a third party, or where he arranges or acquiesces in a transaction to that effect…"

165. Applying the principles to the facts at paragraphs [60] to [67], Lord Hodge held that payment into the trust was a component of the remuneration of the footballers and other employees. Footballers had two contracts, their contract of employment and the side letter relating to the trust. The focus of the negotiations that led to those arrangements was on the net remuneration available. Every time a footballer wanted to use the money in his sub-trust he was given a loan, so he was able to access cash when he wanted it. The expectation was that he would not have to repay the loan during his lifetime. The footballer selected the beneficiaries of the sub-trust and as protector he could determine who the trustees were and also its beneficiaries. The

trust administration was lax, as required for the scheme to operate as intended, allowing the entire fund to be lent to the employee without any security. The scheme was designed to give access to the money without delay should the footballer so wish. The charging provisions are drafted in deliberately wide terms "to bring within the tax charge money paid as a reward for an employee's work" ([64]). The chance that the trustee might not agree to set up a sub-trust or might not give a loan did not alter the nature of the payments to the trust, since it was legitimate to look to the "composite effect of the scheme as it was intended to operate": *Inland Revenue Comrs v Scottish Provident Institution* [2004] UKHL 52, [2005] 1 WLR 3172. Footballers were prepared to take the risk, and the fact that the risk existed did not alter the nature of the payments to the trust. The same reasoning applied to executive bonuses, and it was irrelevant that there was no contractual entitlement to them before the employers decided to give them. The PAYE system also operated without difficulty, and applied to the payments into the trust, the trustee being the person in receipt of the emoluments or earnings.

166. Finally, Lord Hodge explained at [68] to [72] that he was not persuaded by the assertion that other provisions in the legislation militated against his view. The provisions referred to included the special rules taxing beneficial loans, which Lord Hodge said could not apply if the sums paid into the trust were emoluments in the first place, because otherwise the taxpayer would be taxed twice. The legislative code for emoluments has primacy over the benefits code in relation to loans. In addition, the disguised remuneration rules now included in Part 7A ITEPA (which appeared to remove many of the benefits some thought the scheme conferred) could not affect the interpretation of prior legislation.

The parties' submissions in this case

167. Mr Vallat submitted that it was not disputed that the sums paid by the appellants into the sub-funds were intended to motivate or reward the relevant employees and were based on their contribution to the business. It was also clear that the employees agreed to, arranged or acquiesced in the payments into the sub-funds. The payments into the sub-funds were therefore earnings and subject to PAYE, and both the PAYE income tax and NICs appeals should be dismissed.

168. Mr Ewart submitted that HMRC's approach ignored two important qualifications. The first was the requirement that an employee receive a vested rather than contingent interest. In *Forde and McHugh* the contingency was that Mr McHugh should reach an age between 50 and 85 which was agreed with the company to be his retirement age. As he controlled the company and he was 54 when the payments were made this was a contingency in form only, but Lord Hodge treated it as an example of the contingency principle being applied. In this case there were two levels of contingency, the first being that the employer had to make the payment to charity since otherwise the trust fund would revert to the employer. It was very likely but not a certainty that that payment would be made. The principles in *Scottish Provident Institution* did not apply to allow the contingency to be ignored, since the sole question was whether there was a contingency rather than whether the contingency prevented there being a single composite transaction for *Ramsay* purposes. It could also not matter that the

contingency would only last for a short period, bearing in mind that in *Forde and McHugh* the contingency had no real substance, being entirely within the control of the employee.

169. The second contingency arose out of the terms of the EBTs, which did not confer a vested interest on the employees. Rather, they were potential objects under the discretionary trusts and did not have control over the Trustee. Although on the evidence the Trustee would routinely exercise its dispositive power to make loans, it would not necessarily have agreed to a request to appoint out the trust fund to a beneficiary absolutely. This was in contrast to the facts of *Rangers*, where the employees enjoyed extensive powers as protectors.

170. The second qualification related to the PAYE Regulations, and the reference Lord Hodge made to a payment being made with the agreement or acquiescence of the employee, or as arranged by the employee. There was no evidence that this had occurred, other than in some cases in the employees' capacities as directors. The Supreme Court cannot have been referring to agreement, acquiescence or arrangement by a director exercising his fiduciary duties, as opposed to an employee acting in his personal capacity. The non-directors had to accept what was decided and were not in a position to agree or arrange. It would be invidious to treat directors differently. In referring to acquiescence the Supreme Court must have had in mind a situation in which the employee had a real choice to receive the money in another way, because otherwise the phrase would be meaningless: every payment would be caught unless the employee argued against it or took legal action to prevent it happening, for example by renouncing his interest in the trust. In this case, if the payments had not been made to the EBTs they would not necessarily have been made directly to the employees. In contrast in *Rangers* the footballers and executives would have been paid directly if the money had not gone into the trust.

Discussion

171. Applying the principles described by Lord Hodge, the first question to address is whether the amounts paid into the sub-funds in this case were remuneration or rewards for services. The answer to this question is in our view not as obvious as it was in *Rangers*, where the amounts paid into the trust – which was even called the Remuneration Trust – were clearly part of the footballers' agreed remuneration or (in the case of other employees) were bonuses forming part of their overall remuneration. However, as summarised at [150(2)] above we have concluded that the payments in this case were rewards for services, and indeed this was not disputed by the appellants. In the case of all three appellants the effect of the payments was to reward the relevant employees for their services. In the case of Allen and Landid this was also the aim of the arrangements.

172. Mr Ewart relied instead on two elements which he said meant that what we have referred to as the "contingency" exception applies, namely the need for the employer to make a payment to charity and the terms of the EBTs. We do not accept that either of these amounts to the kind of contingency contemplated by Lord Hodge.

173. We have found that the payment to charity was preordained, in the sense that there was no realistic possibility that it would not be made once the relevant appellant had decided to make, and made, its substantial contributions to sub-funds (see [150(4)] above). We do not accept that the principles in *Scottish Provident Institution* have no application so that this contingency cannot be ignored. Lord Hodge expressly applied those principles at [65] in concluding that the chance that the trustee would not set up a sub-trust or lend the funds to the footballer did not affect the position, on the basis that it was legitimate to look at the composite effect of the scheme as it was intended to operate (see [165] above). We cannot see any valid reason not to apply those principles in the same way here. It is absolutely clear that, under the scheme as it was intended to operate, the payments to charity would be made and the contingencies satisfied.

174. We accept that the contingency in *Forde and McHugh* was one that had little substance. However, it was clearly not regarded as one that should be ignored applying *Scottish Provident* principles, and the fact that the employee would suffer a double charge if HMRC was correct was clearly a major factor in that case. Although HMRC may have regarded the retirement benefit scheme in question as involving avoidance, the Supreme Court clearly did not view it in that way. Lord Hodge expressly referred to Mr McHugh's ability to bring forward his retirement date for the purposes of the trust deed at paragraph [3] but relied on the contingency at [18] as one of the reasons for allowing the taxpayer's appeal, noting the possibility that Mr McHugh could die before his retirement date. However, Lord Hodge also made it clear at [16] that his principal reason for allowing the appeal was the exposure that would otherwise arise to a double charge on payments into and out of the fund.

175. We would also observe that, even if we were wrong on this point, the way that Lord Hodge framed the exception for contingencies indicates that the amount in question becomes remuneration when the contingency is satisfied. For all three appellants in this case the payment to charity was made within a few days of the payments being made to the sub-funds, and within the same tax year. This suggests that such contingencies would make no difference to the final result in income tax terms. However, we heard no argument on this or on the PAYE implications of such an analysis, and do not rely on it.

176. The second contingency relied on by Mr Ewart relates to the terms of the EBTs and the fact that the employees did not have vested interests in the sub-funds. We do not agree. Although there are some differences between the facts of this case and those in *Rangers* we do not consider them to be sufficient to justify drawing a different conclusion. As in *Rangers* the way the scheme was intended to operate, and did in fact operate, was to allow the employees to access the entire amount of the sub-funds by way of loan. Loans were invariably made on request, on an unsecured basis, and with no expectation that repayment would be required during the lifetime of the employee (see [150(6)] above). As in *Rangers* the individuals were prepared to take the risk that the Trustee might not do what was expected.

177. Mr Ewart relied in particular on the employees' powers as protectors in *Rangers*. That role was particularly important in that case because it appears to have been the

mechanism through which the employees could ensure that the assets ended up with them or members of their family. In this case the Beneficiaries were already established as the relevant employee and members of his or her family. In at least two cases the employee provided a letter of wishes relating to distribution of assets on the employee's death, and the evidence was that once probate had been granted it was contemplated that the Trustee could be asked to waive the loan (see [93] above). There was no indication that the Trustee would not in practice comply with any such requests, and indeed Mr Schofield's explanation that the Trustee was aware that the EBT was part of the settlor's remuneration strategy and that funds were being awarded in favour of particular employees suggests that the Trustee would be compliant (see [135] above).

178. We have accepted Mr Schofield's evidence that, although loans were granted on request, the Trustee would have made some further investigation before reaching any decision on an outright distribution (see [138] above). However, the Trust Deed specifically relieved the Trustee from any obligation to consider all possible objects of its discretionary powers ([27] above), and given Mr Schofield's other evidence that the Trustee was aware of the overall aim of the arrangements to benefit particular employees through the use of loans, we do not think that this is sufficient to distinguish *Rangers*. The key point is how the scheme was intended to operate (*Rangers* at [65]).

179. In our view the role of the protector in the EBTs in this case was intended to be slightly different from the role of the protector in *Rangers*. It was regarded more as a protection against action being taken (or not taken) by the Trustee that was not regarded as consistent with what the employer wished or contemplated, rather than as being part of what was needed to ensure that the ultimate beneficiary or beneficiaries were as selected by the employee. This is particularly clear from PSL's advice letter (see [47] above) and the evidence of Mr Farenden (see [60] above), as well as from the fact that the protector has power to appoint or remove the Trustee, and must give consent to dealings with trust capital (see [26], [27] and [31] above). In the event, the Trustee has acted as anticipated and the protectors have not had to exercise any of their powers, for example to replace the Trustee. So the scheme has operated as intended.

180. In relation to the PAYE Regulations, Mr Ewart relied on Lord Hodge's reference in *Rangers* to payment being made with the agreement or acquiescence of the employee, or as arranged by him. Lord Hodge explained at [40] that the PAYE Regulations contemplate receipts of emoluments by persons other than employees, referred to as "other payees", and that regulation 12 treats such other payees as employees. He then construed the regulations at [58] as applying to payments made with the employee's agreement or acquiescence or as arranged by him. Bearing in mind that Lord Hodge had just reiterated a strong warning about misplaced reliance on judicial glosses it would be wrong for us to treat Lord Hodge's words as if they were express statutory requirements. However, they clearly provide strong guidance about how what appear to be broadly drafted provisions should be construed.

181. In our view the payments to each of the sub-funds were made with at least the acquiescence of the relevant employees, and in most cases with their agreement. In the case of La Vita, Mr Arcari clearly agreed to the payment being made. In the case of Allen, it is clear from the evidence that the five individuals who benefited from the EBT arrangement comprised the senior management of the company who in practice made decisions about the business at monthly management meetings (see [72] above). Although only Mr Topp and Mr Farenden were directors and took the formal decisions at the Board meetings it is inconceivable that the matter would not have been discussed and agreed by all five at one or more monthly meetings, bearing in mind among other things the expectation that they would all participate in the rights issue.

182. The position in relation to Landid is a bit more complex. It is clear that each of Mr Silver, Mr Morgan and Mr Routh were involved in the initial discussions with PSL about setting up an EBT ([83] above). The proposal was explained to Mrs Elliott by early February 2008. The amount to contribute, and its allocation, was agreed by Mr Silver and Mr Morgan by 12 February. Mr Routh was informed of the allocation no later than the Board meeting on 13 February. It is not entirely clear when Mrs Elliott was informed of the precise amount to be allocated to her, but we have accepted that it was at some point after the decision was taken on 12 February ([90] above).

183. In our view each of Mr Silver, Mr Morgan and Mr Routh agreed to the payments being made. On the evidence available we infer that Mrs Elliott at least acquiesced to the payment being made to her sub-fund, even if she was not told the precise amount until later (see in particular the correspondence referred to at [88] above, and also [103] in relation to her subsequent actions). We think it more likely than not, however, that the amount would have been confirmed to her either by Mr Silver or by Mr Newsholme shortly after agreement was reached on 12 February.

184. We do not think it is realistic to say that those employees who were directors (Mr Arcari, Mr Topp, Mr Farenden, Mr Morgan, Mr Silver and Mr Routh) agreed to the payments being made only in their fiduciary capacity as directors. It would be wholly artificial to treat them solely as directors acting without any regard to their personal positions as individuals benefiting from the arrangements, even if they managed to put their personal positions to one side for the duration of the formal Board meetings. And even if they did not positively agree to the arrangements in their personal capacities, they certainly acquiesced. We also note that each of the directors were shareholders as well, and in reality clearly acted in their capacity as owner managers of the relevant businesses.

185. We do not agree that the Supreme Court's reasoning only applies where the employee has a real choice to receive the money in another way. The wording of the PAYE Regulations is broad, and whilst Lord Hodge's construction places some limitation on the concept of "other payee" we do not think it goes as far as Mr Ewart suggests. If Lord Hodge only had in mind payments that the individual would otherwise have received in another way we think he would have said so. He did not, and the terms he used were clearly chosen carefully. There is nothing to indicate that

Mrs Elliott, or indeed any of the other participants, objected to the arrangements. On the contrary the evidence suggests that in reality all the participants were happy to take part. We think that amounts to acquiescence, if not agreement, in the sense used by Lord Hodge, and that it does not matter that none of the appellants would have been prepared to pay the amounts in question as cash bonuses.

186. It is also instructive to consider the facts of the two Special Commissioners decisions that Lord Hodge indicated took the wrong approach, *Sempra Metals* and *Dextra Accessories*. In *Sempra Metals* employees had a choice either to take a cash bonus or have the amount paid to an EBT, the trustee of which was linked to the promoter of the scheme. Amounts in the trust were allocated to individual employees in the records of the trustee but there were no formal sub-funds (paragraph [31]). Employees received loans from the EBT on an unsecured basis, no loan application being refused and the Special Commissioners finding that it was highly likely that loan requests would be accepted (paragraphs [36] and [141]). There was a general expectation that loans would not have to be repaid except in exceptional circumstances, and any repayments made were voluntary and the amount was reallocated to the same beneficiary (paragraphs [38], [39] and [141]). The few employees who did not take loans had their funds invested, with the trustee taking account of but not necessarily following investment requests (paragraph [34]). In our view there are strong similarities between these facts and the facts of this case. It is correct that the employees in *Sempra Metals* had a choice to take cash bonuses instead, but it is also the case that no sub-funds were established, so the assets of the trust were less obviously allocated to individual employees or their families. This did not prevent Lord Hodge from concluding that the case was wrongly decided.

187. In *Dextra Accessories* an EBT was established with a trustee which was linked to the appellant's adviser. Contributions were made to the EBT and sub-funds were subsequently established for six individuals and their families, initially on a revocable basis. Loans were made from the sub-funds which were regarded as genuine loans. The trustee was requested to have regard to the wishes of the individuals. Although it appears that the individuals might otherwise have received the sums in another form the judgment does not make this clear. The Revenue's argument that the money contributed to the trust and allocated to the sub-funds amounted to a payment of emoluments was rejected by the Special Commissioners on the basis that the EBT funds did not belong to the employees (paragraph [17]). As described at paragraph [22] the loans could be called in and the individuals could lose their entire interest in the EBT in some circumstances. In disagreeing with the Special Commissioners' conclusion on this point Lord Hodge must have considered that it did not matter that the individuals might not obtain an absolute interest in the trust funds.

188. Unlike *Rangers* there is no specific agreement between the parties to this case that resolution of the income tax and PAYE position on this issue should determine the NICs position. However, following the Supreme Court decision we received no submissions suggesting that any distinction should be drawn between them. Accordingly, our conclusion on Issue 1 is that the payments to the sub-funds constituted earnings for the purposes of both income tax and NICs, and gave rise to an obligation to deduct PAYE.

Issues 2 and 4: bare trust/unconditional payments

189. Given our conclusions on Issue 1 is not strictly necessary for us to consider any of the remaining Issues. However, we heard very full argument on Issues 2 and 4 at the hearing and significant parts of the evidence, and findings of fact, are relevant to them. We have therefore considered them below in some detail in view of their significance and in case they become relevant on appeal. The discussion proceeds on the basis that we are wrong in our conclusion on Issue 1.

190. It is convenient to consider Issues 2 and 4 together, as they were at the hearing. We should note however that they would give rise to different consequences to the extent that loans were made in later tax years than the tax year in which the trusts were set up and funded.

The parties' submissions

191. Mr Vallat submitted that, as a matter of law, the sub-funds were in reality bare trusts for the relevant employees, or that payments to the sub-funds were in reality on terms that they were held on bare trusts (Issue 2). In the alternative he submitted that the terms of the loan agreements purporting to confer a right to demand repayment did not have effect so that they were not in reality "loans" (Issue 4).

192. In his skeleton argument Mr Vallat made it clear that he was not relying on the principle of sham in the sense described in *Snook v London and West Riding Investments Ltd* [1967] 2 QB 786 (CA) ("*Snook*") and *Hitch v Stone* [2001] EWCA Civ 163, [2001] STC 214, because HMRC were not alleging any dishonesty. Instead he relied principally on an alternative line of cases in support of the proposition that terms inserted in a document with a view to thwarting a statutory purpose, and which the parties did not seriously intend to have any effect, could be ignored on the basis that they did not form part of the true agreement. Properly understood, these were arrangements to put the funds at the disposal of the beneficiaries, and not under the control of the Trustee. It was not intended that the Trustee should have any real discretion, or be able to demand repayment of the "loans". The cases he principally relied upon were the House of Lords decision in *Antoniades v Villiers & another* [1990] 1 AC 417 ("*Antoniades*"), together with the Supreme Court decision in *Autoclenz Ltd v Belcher & others* [2011] UKSC 41 ("*Autoclenz*") and the Court of Appeal decision in *Bankway Properties Ltd v Pensfold-Dunsford & another* [2001] EWCA Civ 528, [2001] 1 WLR 1369 ("*Bankway*").

193. Shortly before the hearing the Upper Tribunal released its decision in *The Brain Disorders Research Limited Partnership & another v HMRC* [2017] UKUT 0176 (TCC). One of the questions considered by the Upper Tribunal was whether or not a finding of sham had been open to the First-tier Tribunal ("FTT") in that case in circumstances where it had not made a finding of dishonesty. The Upper Tribunal concluded that the FTT could make such a finding on the evidence. Mr Vallat submitted that although the Upper Tribunal relied on and applied the principles in

Snook and *Hitch v Stone* in reaching its decision, the result was the same as applying the principles in *Antoniades*: a contractual term which had not reflected the true agreement between the parties and was never intended to be acted on was disregarded.

194. Mr Ewart submitted that, on the facts of this case, HMRC could not succeed in disregarding the express terms of the arrangements in the absence of an allegation of dishonesty. The Trustee could not be holding the trust funds on a bare trust without being aware of it, and without having a common understanding to that effect with the appellants (in the case of the trusts) or with the recipients of the cash (in the case of the loans). Unlike the *Brain Disorders* case the terms that HMRC were seeking to ignore were not impossible of performance and never intended to be performed: they were capable of performance and the parties purported to perform them, so if HMRC's allegations were right then the parties had pretended that something had happened which had not in fact occurred. The evidence demonstrated that it was fully understood by the parties that the assets were held on discretionary trusts and not on bare trust. This had genuine and important consequences, in particular on death or bankruptcy. The Trustee exercised an express dispositive power in the trusts when it made the loans. If the terms that HMRC wished to disregard were treated as deleted from the trusts then the result would be a resulting trust for the settlor. HMRC needed not only to disregard terms but to insert something else in their place.

195. Mr Ewart relied on *Pankhania v Chandegra* [2012] EWCA Civ 1438 ("*Pankhania*") to support the proposition that the terms of an express trust must be respected in the absence of fraud, mistake, undue influence or sham in the *Snook* sense, and that any different private subjective intention or the supposed "reality" was irrelevant (referring also to *Twinsectra v Yardley* [2002] 2 AC 164 ("*Twinsectra*")). The same principles applied to the loan agreements. The principles discussed in *Antoniades*, *Autoclenz* and *Bankway* did not apply. Leaving *Ramsay* principles to one side there was no principle that it was not possible to "contract out" of tax provisions (by choosing to enter into one transaction rather than another) in the absence of sham in the *Snook* sense. Clearly it was always necessary to determine the true legal relationship, but in this case HMRC could not disregard the discretionary trusts or the terms of the loan agreements without alleging what amounted to a dishonest conspiracy.

The sham concept

196. The classic definition of sham is that given by Diplock LJ in *Snook*:

> "As regards the contention of the plaintiff that the relevant transactions…were a 'sham', it is, I think, necessary to consider what, if any, legal concept is involved in the use of this popular and pejorative word. I apprehend that, if it has any meaning in law, it means acts done or documents executed by the parties to the 'sham' which are intended by them to give to third parties or the court the appearance of creating between the parties legal rights and obligations different from the actual legal rights and obligations (if any) which the parties intend to create. But one thing, I think, is clear in legal principle, morality and the authorities…, that for acts of documents to

> be a 'sham', with whatever legal consequences follow from this, all the parties thereto must have a common intention that the acts or documents are not to create the legal rights and obligations which they give the appearance of creating."

197. These principles were considered again in *Hitch v Stone*, where Arden LJ referred at [63] to the "essence" of this type of sham transaction as being that the parties to a transaction "intend to create one set of rights and obligations but do acts or enter into documents which they intend should give third parties… the appearance of creating different rights and obligations", and emphasised at [66] that there must be a subjective intention to create different rights and obligations and that the parties must have intended to give a false impression to others. Arden LJ also commented at [67] that the fact that a document was uncommercial or even artificial did not mean it was a sham unless the parties intended some other arrangement to bind them.

198. These principles were applied by the Upper Tribunal in *Brain Disorders*. That case related to a claim for capital allowances in respect of amounts paid by a partnership to a company, Numology Limited, on the basis that the sums paid were capital expenditure on scientific research. Under the "Research Agreement" between Numology and the partnership Numology could either do the research work itself or sub-contract it to an Australian company, BRC Operations Pty Limited. Of (say) 100 of funding into the partnership, the bulk of which was funded by borrowings, only around 6 was actually spent on research, by being paid to BRC to undertake the work programme. The rest was deployed in other ways, including in making an advance payment of royalties to the partnership (which was used to make interest payments on the loans) and a deposit to secure remaining royalties.

199. The FTT decided that the provision contemplating that Numology could undertake the research itself was not realistic or even possible, and amounted to a sham. The Upper Tribunal refused to interfere with this decision, even though there was no finding of dishonesty. However, the Upper Tribunal did make it clear that for there to be a sham there must, as a minimum, be an intention to make things appear other than as they are – a "pretence" – stating at [24]:

> "We are, however, conscious that a finding of sham, even if it does not imply dishonesty in the ordinary sense, necessarily requires the fact-finding tribunal to be satisfied of an intention to deceive or, at least, to make things appear other than as they are."

And going on to say at [29]:

> "We do not, however, and despite the note of caution we have sounded, consider that a finding of sham necessarily implies dishonesty. The pretence here was that 96 or 99 might have been spent on research, but the parties did not go further by pretending that it had in fact been spent on research. This was a tax avoidance, or deferral, scheme, and not evasion, and there was no attempt, as there would be in the case of evasion, to conceal what actually happened, however the parties chose to dress it up. One might disapprove of what was done; but we do not consider it could be said to have crossed the threshold into dishonesty."

200. Put another way, there was no dishonesty because the parties never pretended that Numology had in fact done the research. The contract permitted the work to be sub-contracted to BRC and that is what occurred. The provision in the contract that purported to provide for Numology to do the research was a sham (in the *Snook*/*Hitch v Stone* sense) because it was a pretence which was intended to give a false impression to third parties (in that case HMRC), whereas what was always going to occur and what the parties intended was a subcontracting to BRC. As the Upper Tribunal said at [27] "the pretence which justifies a finding of sham was that some other course might have been adopted" (namely that Numology might do the work itself).

201. In our view the sham principle, as explained in *Snook*, *Hitch v Stone* and now *Brain Disorders*, has no application in this case. The principle requires a common intention to create different rights and obligations from those set out in the documents, and an intention to give a false impression to third parties. We have found that the parties did not intend to create different legal rights or obligations, and did not intend to give a false impression. Our overall assessment of the evidence is that the relevant parties understood and intended that the trusts were discretionary trusts, and that the loan agreements documented loans which could be required to be repaid. The situation in this case is very different from that considered in *Brain Disorders*, where what was being disregarded as a sham was a provision which neither party intended to operate and which had been inserted to give an incorrect impression of the nature of the arrangements. We agree with Mr Ewart that in this case the parties purported to, and did, operate the terms of the discretionary trusts that HMRC seeks to strike down, and that loans were in fact made under the terms of the written loan agreements, which included provision under which repayment could be required by the Trustee.

Antoniades and related cases: the "true agreement" issue

202. *Antoniades* was one of two appeals heard by the House of Lords at the same time on the question of whether what purported to be licences to occupy were in fact tenancies, and therefore within the Rent Acts. A landlord had entered into separate but identical agreements with a young man and his girlfriend, whom the landlord knew would be living together, granting the right to occupy the top flat in his property comprising a bedroom with a double bed, a sitting room with a bed-settee, a kitchen and a bathroom. The agreements were expressed to be licences, stated that the Rent Acts did not apply, that the licensor was not willing to grant exclusive possession and (under clause 16) that the use of the rooms was "in common with the licensor and such other licensees or invitees as [he] may permit from time to time to use the said rooms". The landlord did not at any point allow another occupant into the flat, but he did consent to a friend of the couple staying for a few weeks on the bed-settee. The trial judge had found that conditions in the flat were cramped during that period.

203. The House of Lords unanimously held that the two agreements should be read together as a single agreement, on the basis that there had been an intention to confer exclusive possession of the flat for a term in consideration of periodical payments, and accordingly a tenancy had been created. The precise reasoning differs to some extent between the judgments. Lord Bridge referred at page 454 to the "pretence" that

two identical agreements entered into by a man and woman who were going to live together in a small one-bedroom flat and share a double bed created several rather than joint rights and obligations. The provision allowing the landlord to share occupation himself or introduce third parties was repugnant to the true purpose of the
5 agreement and no one could suppose that it was ever intended to be acted on. It was simply an attempt to disguise the true character of the agreement to prevent the couple enjoying the protection of the Rent Acts.

204. Lord Oliver similarly referred to the "total unreality" of the documents (at page 467H) and stated that the clauses permitting the landlord to enter occupation or permit
10 others to do so could not seriously be intended to have any practical operation (at 468B). The lay-out and size of the flat confirmed that these purported rights were a smoke-screen to cover the parties' true intentions, and this was supported by the fact that the landlord never sought to exercise them. The two documents were sham documents designed to conceal the true nature of the transaction, and had to be read
15 together (pages 468 to 470). Lord Jauncey agreed that the documents had to be read together on the basis that the agreements could not be considered without regard to the surrounding circumstances, and the substance and reality was to create a tenancy. It was clear that the intention was that the couple should have exclusive possession, and this was confirmed by the remaining terms of the agreements, which for example
20 required the licensees to be responsible for all gas and electricity (pages 475 to 477). The parties never intended clause 16 to operate and it was "mere dressing up" (477A).

205. Lord Templeman took a slightly different approach, focusing on the inability of parties to contract out of the Rent Acts. Any document which purported to create a licence would nevertheless create a tenancy if the rights and obligations satisfied the
25 legal requirements. Individuals seeking residential accommodation may sign anything to obtain shelter, and it was necessary to consider the surrounding circumstances including the relationship between the prospective occupiers, the negotiations and the nature and extent of the accommodation and intended and actual mode of occupation (page 458). The court had a duty to enforce the Rent Acts and in doing so to observe
30 the principle that parties could not contract out of them (page 459D). Clause 16 was inconsistent with the provisions of the Rent Acts because until the landlord's power to add occupiers was exercised the couple were jointly in exclusive occupation making periodical payments (i.e. there was a tenancy) (page 462C and D and also 465G). However, Lord Templeman went on to say that there was a separate and alternative
35 reason to ignore clause 16, which was that it was not a "genuine reservation" of a power to authorise others to share the flat (page 462E). It was a pretence (page 463D and 465H), the facilities not being suitable for sharing between strangers and the landlord never purporting to exercise the right to introduce additional occupiers. Lord Ackner made a similar comment to Lord Bridge about attempting to disguise a
40 tenancy (at 466D) and agreed with both Lord Templeman and Lord Oliver.

206. It is important to note that there was no suggestion of dishonesty on the part of the landlord. Clause 16 had been included in the agreements in good faith, reflecting a form of document which had been upheld by the Court of Appeal as an effective licence in *Somma v Hazelhurst* [1978] 1 WLR 1014, before that case was overruled in
45 *Street v Mountford* [1985] AC 809. It was also clear however that the couple was

simply relieved to be able to obtain accommodation after a long search and did not understand the distinction between exclusive possession and a licence.

207. Our understanding of the decision is that all of the judgments conclude that clause 16 was unrealistic (or a pretence) that was never intended to be acted on. There is 5 clearly an analogy here with the concept of sham as most recently discussed in *Brain Disorders*, but with the distinction that there was no "common intention" of the parties in relation to clause 16: the young couple simply did not understand the provisions in the documents and were signing them to secure accommodation. In addition, Lord Templeman, with whom Lord Ackner agreed, relied specifically on the 10 parties' inability to contract out of the Rent Acts.

208. *Bankway* also concerned housing legislation. In that case the previous landlord had entered into what was expressed to be an assured tenancy pursuant to the Housing Act 1988. Unlike an assured shorthold tenancy an assured tenancy conferred security of tenure, but it appeared that the landlord wanted the lease to qualify as an assured 15 tenancy to obtain the tax benefits of the business expansion scheme. The tenants were two individuals on housing benefit, who either did not read the agreement at all or did not read it properly, being desperate to obtain accommodation. The initial rent was £4,680 per annum. The tenants did not notice that there was a provision in the lease (which was also referred to in subsequent correspondence varying the agreement) for 20 the rent to increase to £25,000, a sum which there was no prospect of them paying. The thinking seems to have been that the landlord would be able to recover possession by increasing the rent and either relying on the existence of rent arrears, which he duly sought to do, or because the tenant would voluntarily surrender possession when asked for the increased rent.

25 209. The case was heard in the Court of Appeal by Lady Justice Arden and Lord Justice Pill, who found for the tenants. In summary, Arden LJ relied on the principle that the provision allowing the rent to be increased to £25,000 was an improper attempt to evade the mandatory statutory scheme for security of tenure, whereas Pill LJ relied on the inconsistency between that provision and the intention of the parties 30 to grant an assured tenancy as a matter of true construction of the agreement (see [58]).

210. Arden LJ commented at [42] that because there was no common intention to create a different obligation for the purpose of misleading the parties there was no sham in the *Snook* sense. Nor were the appellants misled or under a mistake. 35 However, she explained at [43] that:

> "… there is a variant on the usual definition of sham where a question arises whether an agreement is not intended to have the effect stated but is intended to evade the operation of a statute out of which the parties cannot contract. This doctrine has been developed and applied 40 by the courts not only in the context of the Rent Acts (see *Antoniades v Villiers,* above) but also in the context of agricultural tenancies (*Johnson v Moreton* [1980] AC 37 and *Gisburne v Burton* [1989] 1 QB 391), the question whether a hire purchase agreement is in fact an unregistered bill of sale (see for example *Re Watson* (1890) 25 QB 27),

> the question whether a sale and repurchase agreement is an unregistered company charge (see for example *Re George Inglefield Ltd* [1933] Ch.1), the question whether an absolute conveyance is in fact a mortgage (see for example *Re Duke of Marlborough* [1894] 2Ch 133), the question whether a transaction is in substance an unauthorised reduction of share capital contrary to the Companies Acts (see for example *Aveling Barford Ltd v Perion Ltd* [1989] BCLC 626) and the question whether a sum payable under a contract is a penalty (see for example *Bridge v Campbell Discount* [1962] AC 600). In these types of situations, as Lord Ackner put it in *Antoniades v Villiers*, above at 466, the question is: what was the substance and reality of the transaction entered into by the parties? The Court is not bound by the language which the parties have used. It may for instance conclude, when it examines the substance of the transaction, that what the parties have in their agreement called a sale and repurchase of book debts is in truth a registerable charge over them.
>
> 44. For this purpose, the court can look at all the relevant circumstances, including the subsequent conduct of the parties (see per Lord Jauncey in *Antoniades v Villiers*, above, at 475). There does not have to be a common intention to enter into other obligations or to deceive a third party: in *Antoniades v Villiers* for instance, the "licensees" acknowledged in writing that their agreements with the landlord did not have the protection of the Rent Acts (see *Antoniades v Villiers*, above, at 457-8). Lord Templeman points out in *Antoniades v Villiers* that the earlier case of *Street v Mountford*, above, had established that "where the language of licence contradicts the reality of the lease, the facts must prevail. The facts must prevail over language in order that parties may not contract out of the Rent Acts" (at 463). Or, as Lord Esher MR put it in *Re Watson*, above, "the Court ought never to let a sham document, drawn up for the purpose of evading an Act of Parliament prevent it from getting at the real truth of the matter"."

211. Arden LJ then considered the relevant provisions of the Housing Act 1988 and concluded at [49] that they did not permit parties to an assured tenancy to agree to vary the statutory scheme for security of tenure so as to reduce the level of protection available to the tenant. The provision allowing the rent to be increased to £25,000 was not in substance or reality a provision for the fixing of rent (the landlord never expected to receive rent of that amount), and was instead a provision to enable the landlord to recover possession otherwise than in accordance with the mandatory scheme, and amounted to an unenforceable contracting out ([51] and [54]). It was a device masquerading as a provision for increase in rent, the sum not being rent at all on a true analysis ([55] and [56]).

212. Pill LJ said that he had some difficulty with the concept of unlawful contracting out from the legislation, and based his decision on an analysis of the contract, which made it clear that an assured tenancy was intended. The statutory purpose of the assured tenancy was to give long-term security ([66]). The clause providing for the rent increase was "inconsistent with the statutory purpose which it was the main object of the agreement to achieve" ([67]) and had to be ignored.

213. The two approaches taken by the judges in *Bankway* reflect the differing approaches taken in *Antoniades*, although Pill LJ noted at [62] that the situation was somewhat different: in *Bankway* the landlord clearly wished to create an assured tenancy, whereas in *Antoniades* there was an attempt to disguise the true character of the agreement.

214. *Autoclenz* was an employment law case. The question was whether workers who provided car cleaning services were "workers" for minimum wage purposes. They had signed contracts stating that they were sub-contractors, that there was no obligation on them to provide services or for the company to provide work, and that they could provide substitutes to do the work. The Supreme Court decided that where, in an employment context and taking account of relative bargaining power, the written agreement might not reflect reality it was necessary to examine all the circumstances, of which the written agreement was only a part. The employment tribunal had been entitled to disregard the terms of the written documents insofar as they were inconsistent with its findings, which were that the individuals were obliged to carry out the work offered and to do so personally notwithstanding the substitution clause. Lord Clarke, delivering the single judgment, made it clear at [20] that the "essential question in each case is what were the terms of the agreement". He then went on to describe the position under the ordinary law of contract, under which an argument that the written terms did not reflect the true agreement would generally be addressed, if made out, by rectification for mistake (citing Aitkens LJ in the Court of Appeal in the same case). He went on to say at [21]:

> "Nothing in this judgment is intended in any way to alter those principles, which apply to ordinary contracts and, in particular, to commercial contracts. There is, however, a body of case law in the context of employment contracts in which a different approach has been taken. Again, Aikens LJ put it correctly in the remainder of para 89 as follows:
>
> > 'But in cases of contracts concerning work and services, where one party alleges that the written contract terms do not accurately reflect the true agreement of the parties, rectification principles are not in point, because it is not generally alleged that there was a mistake in setting out the contract terms as they were. There may be several reasons why the written terms do not accurately reflect what the parties actually agreed. But in each case the question the court has to answer is: what contractual terms did the parties actually agree?'"

215. Lord Clarke also referred to *Snook* at [23] as authority for the proposition that where two parties conspire to misrepresent their true contract to a third party that can be disregarded, and stated that *Snook* "is not authority for the proposition that this form of misrepresentation is the only circumstance in which the court may disregard a written term which is not part of the true agreement". He cited a number of cases including *Antoniades* and *Bankway* in support of this, noting at [24] that they were "examples of the court concluding that relevant contractual provisions were not effective to avoid a particular statutory result".

216. Lord Clarke approved the approach of Elias J in *Kalawak* [2007] IRLR 560 in the appeal tribunal at [57] and [58] as to the importance of looking at the reality of the

situation: if the reality was that no one seriously expected that a worker would provide a substitute or refuse work then the fact that the contract covered those unrealistic possibilities would not alter the true nature of the relationship, and also approved the approach of the Court of Appeal in *Autoclenz* and in *Firthglow Ltd v Szilagyi* [2009] ICR 835 (see [25] to [29] in Lord Clarke's judgment). The question, as Smith LJ said in the Court of Appeal in *Autoclenz* [2010] IRLR 70 at [52], was whether the written terms reflected the "true intentions or expectations of the parties (and therefore their implied agreement and contractual obligations)". In order to determine the actual legal obligations it was necessary to look at all the relevant evidence, including not only the written agreement but "evidence of how the parties conducted themselves in practice and what their expectations of each other were" ([53] in the Court of Appeal decision, cited by Lord Clarke at [31] in the Supreme Court decision). Lord Clarke went on to say the following, referring to the judgment of Aitkens LJ in the Court of Appeal in *Autoclenz*:

> "32. Aikens LJ stressed at paras 90 to 92 the importance of identifying what were the actual legal obligations of the parties. He expressly agreed with Smith LJ's analysis of the legal position in *Szilagyi* and in paras 47 to 53 in this case. In addition, he correctly warned against focusing on the "true intentions" or "true expectations" of the parties because of the risk of concentrating too much on what were the private intentions of the parties. He added:
>
> > "What the parties privately intended or expected (either before or after the contract was agreed) *may* be evidence of what, objectively discerned, was actually agreed between the parties: see Lord Hoffmann's speech in the *Chartbrook* case [2009] AC 1101, paras 64-65. But ultimately what matters is only what was agreed, either as set out in the written terms or, if it is alleged those terms are not accurate, what is proved to be their actual agreement at the time the contract was concluded. I accept, of course, that the agreement may not be express; it may be implied. But the court or tribunal's task is still to ascertain what was agreed."
> >
> > I agree.
>
> 33. At para 103 Sedley LJ said that he was entirely content to adopt the reasoning of Aikens LJ:
>
> > "recognising as it does that while employment is a matter of contract, the factual matrix in which the contract is cast is not ordinarily the same as that of an arm's length commercial contract."
> >
> > I agree.
>
> 34. The critical difference between this type of case and the ordinary commercial dispute is identified by Aikens LJ in para 92 as follows:
>
> > "92. I respectfully agree with the view, emphasised by both Smith and Sedley LJJ, that the circumstances in which contracts relating to work or services are concluded are often very different from those in which commercial contracts between parties of equal bargaining power are agreed. I accept that, frequently, organisations which are offering work or requiring services to be provided by individuals are in a position to dictate the written terms which the other party has to accept. In

practice, in this area of the law, it may be more common for a court or tribunal to have to investigate allegations that the written contract does not represent the actual terms agreed and the court or tribunal must be realistic and worldly wise when it does so. ..."

5 35. So the relative bargaining power of the parties must be taken into account in deciding whether the terms of any written agreement in truth represent what was agreed and the true agreement will often have to be gleaned from all the circumstances of the case, of which the written agreement is only a part. This may be described as a purposive approach to the problem. If so, I am content
10 with that description."

217. It is clear from Lord Clarke's judgment that the key question in all cases is what are the terms of the contract. In the ordinary law of contract, particularly commercial contracts, express terms will normally only be overridden in the case of mistake. A different approach has developed in employment cases which reflects the fact that
15 express terms may not be consistent with the reality of the relationship. However, the question in all cases is always what the terms are, determined on an objective basis, and it is important not to concentrate too much on private intentions.

218. *Pankhania* was a case involving joint ownership of property. The claimant sought an order for sale of a residential property registered in the joint names of himself and
20 his aunt. The transfer to them contained an express declaration of trust to the effect that they were tenants in common in equal shares. The aunt claimed that there was a family understanding that she was to be the sole beneficial owner, and that the claimant was included as a joint purchaser only so that his salary could be taken into account for mortgage purposes. The Court of Appeal held that the existence of the
25 express trust precluded any finding that there was a constructive trust of the kind discussed in *Stack v Dowden* [2007] UKHL 17. Patten LJ referred at [17] to the possibility of a declaration of trust being set aside for fraud, mistake or undue influence, but said that nothing of that kind had been alleged. There was no evidence that the express trust was inserted by mistake or that the parties intended to execute a
30 transfer in different terms.

219. Patten LJ also considered the concept of sham as described in *Snook*, saying "what is, I think, clear is that it must be shown both that the parties to the trust deed…never intended to create a trust and that they did intend to give that false impression to third parties or to the court". In this case there was no deception, and
35 the fact that the parties and their family subjectively intended something different was not sufficient to prevent the express trust taking effect simply on the basis that it did not accurately record what they intended to achieve ([22]). Mummery LJ agreed that there was no room for inserting a constructive trust in the absence of a vitiating factor such as fraud or mistake ([27]).

40 220. We disagree with Mr Vallat that *Pankhania* has no relevance because it concerns whether there was a trust rather than what its terms were: there was clearly a trust on both parties' cases. In our view *Pankhania* illustrates the point made in *Autoclenz* that subjective intentions are not determinative, and that ordinarily the express terms of a document, whether a contract or a trust, are not to be overridden except in certain
45 circumstances, in particular fraud, mistake or sham.

221. Mr Ewart also referred to *Twinsectra*. One of the questions in that case was whether a trust had been created by the terms of a solicitor's undertaking given to Twinsectra, in return for which it paid money over to the solicitor. It was held that this was a question of construction of the undertaking and that the understanding or subjective intentions of the relevant individual at Twinsectra were irrelevant: see Lord Hoffman's judgment at [17] (with whom Lord Slynn, Lord Steyn and Lord Hutton agreed) and Lord Millett's judgment at [71] (with whom Lord Hutton also agreed on this issue). This is obviously consistent with the approach taken in *Pankhania*.

Our conclusions on the "true agreement" issue

222. We have concluded that the Trust Deeds created discretionary trusts, and the loan agreements documented loans, in accordance with their express terms. Our reasons are as follows.

223. The key principle to apply in a contractual context is to determine what the terms of an agreement actually are. This is clearly explained in *Autoclenz*, which also makes it clear that the courts will not ordinarily conclude that the actual terms of an agreement are inconsistent with express written terms. There are exceptions for fraud, mistake and sham (in the *Snook* sense) but none of these are in point here. A broadly equivalent principle applies in a trust context, as illustrated by *Pankhania*. Subjective intentions of the parties, or their private understandings of what they thought they were achieving, are not relevant (*Pankhania* and *Twinsectra*).

224. In certain contexts the courts have been prepared to take a broader approach to determining the nature of the relationship between the parties and whether terms included in a written agreement reflect the reality of the agreement between them. In these cases the courts have been prepared to look more broadly at the surrounding circumstances and the conduct and expectations of the parties. *Autoclenz* clearly explains how this approach has been taken in employment cases, as distinct from cases of ordinary commercial contracts, because of the increased risk that terms included in the document do not reflect the true position. Inequality of bargaining power and the potential for an employer to dictate terms are highly relevant to this approach. However, even in an employment context the position is not determined by the private intentions of the parties, but by what was in fact agreed: *Autoclenz* at [32].

225. This broader approach of determining the "true agreement" has also been taken in a housing context, as shown by *Antoniades* and by the judgment of Pill LJ in *Bankway*. Again these cases featured inequality of bargaining power and, effectively, an imposition of terms by the landlord that the tenants did not understand or were not even aware of. Importantly, in each of these cases the term or terms that the courts decided were inconsistent with the true agreement were wholly unrealistic in practice. In *Autoclenz* no one seriously expected a worker to provide a substitute or refuse work, in *Antoniades* there was no realistic possibility of the landlord introducing additional occupiers, and in *Bankway* no one could seriously suppose that the landlord could successfully increase the rent to £25,000 and collect it. Mr Vallat was not able to supply any example of a term being struck down as not being part of the true agreement which was not wholly unrealistic on the facts.

226. Whilst we agree with Mr Vallat that inequality of bargaining power, or the ability of one party to dictate terms, is not necessarily essential in order to determine that the terms of a written agreement do not represent the true agreement, it can provide a sensible explanation for the disparity. Where there is no such inequality then there will generally be less justification to look beyond the express terms of the agreement. We cannot see any such inequality of bargaining power in this case, or any attempt by any party to impose terms which were not understood or accepted by another party. We also see no other features that would justify a departure from an application of ordinary principles that apply to contracts and trusts.

227. In our view Mr Vallat's submission that the true agreement between the parties was that there was a bare trust and/or that there was no obligation to repay the "Loans" is also simply inconsistent with our factual findings. We have concluded that the appellant companies and the Trustee both understood that the Trust Deed established a discretionary trust in accordance with its written terms, and that the Trustee and the employees understood that the Loan Agreements provided that any Loans under them could be required to be repaid. The fact that there may have been no present intention to require repayment is quite a different point, and not relevant: having no present intention is not the same thing as considering that there is in fact no right to demand repayment.

228. The cases make clear that the private understandings of the parties are not determinative. Some actual meeting of minds is needed before it can be determined that the true agreement is different from the written agreement: in other words the parties must both have intended to agree something else, and actually to have agreed something else. But there is absolutely no evidence that either of these things occurred here, and indeed in our view it was not clearly suggested to the witnesses that there was any such agreement between the Trustee and any of the appellants or the employees.

229. In response to a question from the Tribunal, Mr Vallat accepted that in order to determine that there was a bare trust the witnesses would need to have believed that the discretions apparently conferred on the Trustee did not actually exist. But we have accepted the evidence of the witnesses that they understood that the Trustee had discretion as a matter of law, even if in practice their expectations were that those discretions would be exercised in a particular way. Similarly, in the case of the loans the parties would need to have believed that the provision purporting to allow the Trustee to require repayment was not effective and could not be enforced. Again, we have accepted the evidence of the witnesses that they did understand that repayment could be required, even though in practice there was no present intention to call in the loans. We agree with Mr Ewart that in the circumstances of this case it is hard to see how Mr Vallat's submission could succeed in the absence of dishonesty.

230. As already discussed, Lord Templeman in *Antoniades* and Arden LJ in *Bankway* relied on a different approach in reaching their conclusions, namely that the relevant provisions amounted to an attempt to contract out of a mandatory statutory scheme. Arden LJ referred at [43] to a number of other examples in different contexts, but concluded that the key question was what was the "substance and reality" of the

transaction. Mr Vallat submitted that the same principle applied to tax legislation: the parties could not avoid the tax consequences of their arrangements by inserting terms which were intended to avoid statutory consequences and which they did not seriously intend to have effect.

5 231. We do not agree. Mr Vallat was unable to refer us to any case where this approach has been applied to tax legislation. If it was correct then it is highly surprising that it has never been applied in any of the many tax avoidance cases that the tribunals and courts have decided in recent years. In principle, it is clearly possible for taxpayers to arrange their affairs so that they enter into transactions that give rise 10 to less tax than other transactions they might have entered into, and in that sense it is incorrect to say that taxpayers may not "contract out" of tax legislation. Clearly tax legislation will be interpreted purposively, and as is well known a realistic view of the facts must be taken to see whether the particular statutory provisions in question apply. But this is what is generally referred to as the *Ramsay* approach. Importantly, 15 and in the absence of sham, that approach respects the general legal effects of the transactions that the parties have entered into, even in circumstances where it is concluded on a purposive interpretation that the particular tax advantage sought by the taxpayer is not available.

232. Even if we were wrong on this and there was scope to apply the principles 20 discussed by Lord Templeman in *Antoniades* and by Arden LJ in *Bankway* in a tax context, then it would still be necessary to determine the "substance and reality" of the transactions. In our view the trusts were in reality discretionary trusts and the loans were in reality loans. The fact that the terms of the trusts enabled the Trustee to make interest free loans to the relevant employees without giving material 25 consideration to (for example) the potential interests of other beneficiaries or the employees' ability to repay is a reflection of the broad manner in which the Trust Deed was drafted, rather than a feature which turns it into a bare trust. Similarly, the fact that the Trustee had no current expectation that it would require repayment of any of the loans made under the Loan Agreements does not mean that the provisions 30 permitting it to require repayment were ineffective. A loan may still be a loan even if it is left outstanding indefinitely.

233. We do not agree with Mr Vallat that the reference in the PSL advice letter to a sub-fund being "de facto controlled by the adult beneficiaries" evidences the true nature of the arrangements as a bare trust. Mr Vallat submitted that the use of the 35 concept of control here indicated that what was intended was that the employees should be able to use the funds as their own money, and that any disposition by the Trustee would be at their direction. Effectively, he said, this was a bare trust. We disagree. Not only did other parts of the letter make it very clear that the Trustee had discretion, but in our view the expression "de facto controlled" is no more than a 40 shorthand label, intended for a non-legally qualified reader, to summarise the point that in ordinary circumstances adult beneficiaries of a discretionary trust may often have a very significant influence in practice over the way in which a trustee exercises his discretion, and indeed over what investments are made or how the trustee otherwise deploys the funds. Mr Ewart was also correct to point out that the adult

beneficiaries of a sub-fund would frequently not be limited to the individual employee in question.

234. We also note that if Mr Vallat were correct in his submission then it would follow that the trusts would be bare trusts, or the loans would be treated as outright payments, for all purposes and not just for tax purposes. As Mr Ewart pointed out this would have surprising "real world" consequences. In particular, it would mean that the assets would form part of the employees' estates on death, and would also be available to a trustee in bankruptcy. The consequences could go far beyond tax implications in both cases: for example the testamentary dispositions made by the employee might be in favour of people or charities who would not benefit under the terms of the discretionary trusts. It would also mean that no assets would be available to the Trustee to meet its liabilities, including in particular its liability under the indemnities given to the appellant companies in respect of PAYE and NICs. These are not artificial or unlikely contingencies: death is of course a certainty, and any outstanding loan would at some stage have to be dealt with as part of the administration of the borrower's estate, and the Trustee could also have no assurance that there would be no call on the indemnities.

235. Mr Vallat suggested that we should not place much reliance on the position on death, where it may be in the interests of the estate to assert that a loan exists for inheritance tax reasons, or on Mr Schofield's evidence about circumstances where loans had been repaid, because that would have been in cases where it was beneficial to the parties to assert that a loan existed, for example to avoid creditors on a bankruptcy or where it suited Mr Silver to pass amounts back to the Trustee for a period. Mr Vallat pointed out that we were not given much information about the bankruptcy referred to by Mr Schofield, and whether the trustee in bankruptcy was fully appraised of the situation. However, we do not consider that these points should be disregarded. They are consistent with the appellants' submission that the purported loans were in reality loans and they demonstrate that there are circumstances in which loans may be repaid, or may be required to be repaid. We also consider that the position on death is material: the existence of the loans could well reduce inheritance tax but as Mr Ewart pointed out could also have a real impact on where assets end up.

236. We also agree with Mr Ewart that, as far as the Trust Deeds are concerned, accepting Mr Vallat's submission would not simply involve ignoring certain terms, as in the cases relied on by Mr Vallat. Treating the arrangements as bare trusts would require a complete rewriting. In our view this makes it even more improbable that the true nature of the arrangement is one of bare trust.

Issues 3 and 5: *Ramsay*

237. In view of our conclusions on Issue 1 it is not necessary for us to make any additional comment on the *Ramsay* arguments, and given the general guidance provided by the Supreme Court in the *Rangers* case we do not propose to do so.

Corporation tax deduction

238. HMRC accepted that if they succeeded on Issue 1 then the corporation tax appeals should be allowed. Accordingly, it is not strictly necessary to consider any of the arguments on the corporation tax aspects. However, as with Issues 2 and 4 they were fully argued before us and there are a number of findings of fact that are particularly relevant to them, so we have considered them below in case they become relevant on appeal. The discussion below again proceeds on the basis that we are wrong in our conclusion on Issue 1. We should also record for completeness that HMRC have in any event accepted that corporation tax deductions are available in respect of the amounts attributable to Mr Morgan and Mr Routh, both of whom have we understand reached settlements with HMRC.

Issue 6: section 43 FA 1989

239. At the material time section 43 FA 1989 provided (so far as relevant) as follows:

> "(1) In calculating profits or gains to be charged under Schedule D for a period of account, no deduction is allowed for an amount charged in the accounts in respect of employees' remuneration, unless the remuneration is paid before the end of the period of 9 months immediately following the end of the period of account.
>
> (2) For the purposes of subsection (1) above an amount charged in the accounts in respect of employees' remuneration includes an amount for which provision is made in the accounts with a view to its becoming employees' remuneration.
>
> …
>
> (4) If the remuneration is paid after the end of the period of 9 months mentioned in subsection (1) above, any deduction allowed in respect of it is allowed for the period of account in which it is paid and not for any other period of account.
>
> …
>
> (6) For the purposes of this section, remuneration is paid when it—
>
> (a) is treated as received by an employee for the purposes of the Income Tax (Earnings and Pensions) Act 2003 by section 18, 19, 31 or 32 of that Act (receipt of money and non-money earnings), or
>
> (b) would be so treated if it were not exempt income.
>
> (7) In this section—
>
> "employee" includes an office-holder and "employment" correspondingly includes an office, and
>
> "remuneration" means an amount which is or is treated as earnings for the purposes of the Income Tax (Earnings and Pensions) Act 2003."

240. An earlier version of s 43 was considered by the House of Lords in *MacDonald (Inspector of Taxes) v Dextra Accessories Ltd and others* [2005] UKHL 47, [2005] STC 1111. That version included a concept of "potential emoluments", defined as "amounts or benefits reserved in the accounts of an employer, or held by an

intermediary, with a view to their becoming relevant emoluments". The operative rule denied a deduction for relevant emoluments not paid within nine months of the end of the period of account. "Relevant emoluments" was broadly defined and covered emoluments allocated either in respect of particular employments or generally in respect of employments. The House of Lords concluded that funds were held "with a view" to their becoming relevant emoluments if they were held on terms which allowed a realistic possibility that they would become relevant emoluments. It was not necessary for the funds to be held solely or principally for paying emoluments, provided they could be so used. Their Lordships accordingly held that funds held by an EBT trustee which could be used to pay emoluments were held by an intermediary with a view to their becoming relevant emoluments.

241. Mr Vallat submitted that there was a realistic prospect that the funds held in the EBTs, if held by a genuinely independent trustee, would be used to pay emoluments, and therefore that the amounts charged in the appellants' accounts fell within s 43(2). Mr Ewart submitted that the amounts charged in the accounts were not in respect of "remuneration" as defined in s 43(7), and (whilst it was not accepted that the charge in the accounts was a provision), any provision that was made was not with a view to the amount in question becoming remuneration within s 43(2). Any provision was in respect of contributions to the sub-funds, which were not earnings.

242. In *Dextra* the question was whether there was a realistic possibility that the amount held by the EBT could be used to pay emoluments. In this case the question is whether amounts were provided in the accounts with a view to becoming remuneration. In *Dextra* Lord Hoffmann commented at [19] that the "with a view to" language in the definition of potential emoluments must have a similar meaning whether it referred to amounts held by an intermediary or amounts reserved in the employer's accounts, and accordingly we consider that *Dextra* remains highly relevant in construing the amended s 43. However, it is clear that whereas in *Dextra* the position had to be considered from the perspective of the trustee (which meant that the question needed to be answered solely by reference the terms of trust deed: see [15] in Lord Hoffmann's decision), in this case we must consider the position from the perspective of the appellants since the focus is on the entries in their accounts.

243. We have concluded that s 43 does not apply. It is clear that the amounts "charged in the accounts" of each appellant were not charged in respect of employees' remuneration within s 43(1). They were charged in respect of the cost, or expected cost, of the EBT arrangements but as far as the appellants were concerned it was a fundamental part of the planning that no taxable earnings would arise. As regards s 43(2), we are not persuaded that the amounts in question were all correctly described as "amount[s] for which provision is made in the accounts". The experts spoke in terms of a profit and loss account charge, recognition of an expense, or in the case of La Vita an accrual. For Landid and Allen at least the terminology of "provision" seems inapt given that the expense was actually incurred in the year in question, even if it is right that the word "provision" is not used in its strict accounting sense (we note the comments on this issue in *OCO Ltd and Toughglaze (UK) Ltd v HMRC* [2017] UKFTT 589 (TC) at [378]). However, we also do not consider that any provision that was made was made on a basis which allowed for a realistic possibility

that the amounts would become taxable earnings. In reaching this conclusion we do not think it is sufficient, as Mr Ewart suggested, simply to say that amounts charged in the accounts were in respect of the contributions to the sub-funds and were therefore not caught, because arrangements involving intermediaries were covered by Schedule 24 FA 2003 and did not need to be covered by the amended s 43. That approach would in our view be too narrow (quite apart from ignoring the mechansim around the Initial Period and contribution to charity, designed to avoid Schedule 24). However, as regards Allen it was clear that the funds were largely required for a rights issue and the company would not have entertained paying out £300,000 if it thought that would involve PAYE and NICs (see [74] above). Similarly, in the case of Landid the objective was to enable the four individuals to benefit from most of the Leatherhead promote payment without PAYE and NICs (see [109]). In the case of La Vita Mr Arcari's clear focus was on the tax saving, and he had no need or expectation to take any amount as taxable earnings (see [117]). For all three appellants taxable earnings were simply not contemplated. We also do not think that Mr Vallat was correct to suggest that we should take account of what a "genuinely independent" trustee might do. We think we must consider the actual arrangements that the appellants considered that they were implementing. In reality it was no part of any of the appellants' plan, or that of the Trustee, that any of the amounts would be paid out as taxable earnings, and any provision made in the accounts was not made on the basis that there was a realistic possibility that earnings would be paid.

244. In reaching this conclusion we have not needed to rely, and have placed little weight on, the specific provision in clause 19 of the La Vita Trust Deed prohibiting the use of trust funds as earnings for s 43 purposes, the potential significance of which was clearly not appreciated by Mr Burton. However, we have accepted Mr Schofield's evidence that the inclusion of clause 19 did not in practice affect how trusts were operated as only loans were requested. In contrast, we note that the EBT considered in *Dextra* not only had power to pay amounts as emoluments, but in fact did so at least to some extent: see Lord Hoffmann's decision at [11].

Issue 7: Schedule 24 FA 2003

245. Paragraph 1 of Schedule 24 restricts corporation tax deductions "in respect of employee benefit contributions", broadly by deferring them until taxable employment income and NICs arise. At the relevant time paragraph 1(2) provided that an employee benefit contribution was made:

> "… if, as a result of any act or omission—
>
> (a) property is held, or may be used, under an employee benefit scheme, or
>
> (b) there is an increase in the total value of the property that is so held or may be so used…"

246. The appellants argued that, although the amounts paid by them to the Trustee were "employee benefit contributions" as defined, deductions had not been claimed for them. Instead, Allen and Landid had claimed a deduction in respect of the events that led to the cash in the EBTs not being recognised as assets in their accounts under

UITF32 as a result of the payment to charity, and La Vita had claimed a deduction in respect of the constructive obligation recognised in its accounts.

247. It is not necessary to consider Schedule 24 in any detail because the appellants accepted that HMRC should succeed on this issue before us in the light of the Upper Tribunal decision in *Scotts Atlantic Management Limited v HMRC* [2015] UKUT 66 (TCC), [2015] STC 1321 ("*Scotts Atlantic*"). However, our findings of fact include findings that would be relevant to this point on any appeal. These include our conclusion from the expert evidence that in the case of all three appellants the charge to profit and loss account was in respect of the constructive obligation to reward employees, which was settled by paying £100 to charity, and that there was no realistic possibility that the payment to charity would not follow the contributions to the sub-funds.

Issue 8: wholly and exclusively

248. Mr Vallat submitted that the contrived steps involving the Specified Contingency and payments to charity were part of a pre-planned scheme to avoid the operation of Schedule 24 FA 2003. This could not be viewed as an incidental benefit; rather the avoidance of Schedule 24 was an "all-pervading objective" which was a purpose in its own right. This was the view taken by the FTT on this point in *Scotts Atlantic* and the Upper Tribunal had held that it was a conclusion that the FTT was entitled to reach. Mr Vallat did not submit that a deduction should be denied on the grounds that there was any other impermissible purpose, for example that the expense in question was not incurred to reward employees.

249. As far as Allen is concerned we have concluded that the key objective was to motivate and reward the five individuals, enabling them to participate in a rights issue designed to align their shareholdings more closely with their contributions. A corporation tax deduction was clearly desirable but, unlike the PAYE and NICs savings, was not essential. Applying the principles that we discuss further below in relation to Landid, our conclusion in respect of Allen is that obtaining a corporation tax saving was not an object of the expenditure. This is notwithstanding Mr Vallat's submissions that we should infer this from the significance of the PSL's fees, the terms of PSL's advice and the artificiality of the provisions in the Trust Deed relating to the Initial Period. Mr Farenden had clearly had no prior experience of dealing with EBTs and in our view he did not appreciate that the fees were much higher than they might have been for an EBT without a corporation tax saving feature. From his perspective the level of the fees could be justified by reference to the PAYE and NICs savings. He was also unfamiliar with trusts and clearly did not focus on the significance of the Initial Period provisions.

250. As regards La Vita, we have found that Mr Arcari was specifically attracted by the corporation tax saving and in our view it was a clear object of the expenditure. The evidence was that Mr Arcari wished to repay bank debt as well as use funds to carry out his business expansion plans, but we are not persuaded that this turns the corporation tax saving into a "legitimate" purpose as suggested by Mr Ewart. The main effect of the arrangements was to take £400,000 of assets out of the company,

making that sum not obviously available either for debt repayment or business expansion. Saving corporation tax of a much lower amount cannot somehow turn this into expenditure incurred wholly and exclusively for the purposes of the trade.

251. In relation to Landid, the key objective was to enable the four individuals to access the bulk of the promote payment from the Leatherhead project without PAYE or NICs. Mr Silver did not focus on the corporation tax aspects. However, he did rely on his adviser and we have inferred that Mr Newsholme would have had the corporation tax benefits firmly in mind when recommending a scheme the complexity of which was substantially driven by the corporation tax position. It is also perfectly clear that paying corporation tax on the Leatherhead promote would have been a very material cost for the company and that the potential corporation tax saving was highlighted by PSL at a meeting at which all three directors were present. The question is whether this is sufficient to conclude that avoiding corporation tax was a purpose of the expenditure, as opposed to being a purpose of the scheme as it clearly was (see the Upper Tribunal decision in *Scotts Atlantic* at [46] and [66]).

252. The Upper Tribunal described the principles to apply at paragraphs [47] to [55] of that decision. Expenditure is deductible only if it is incurred "wholly and exclusively" for the purposes of the trade. If it was also incurred for another purpose it is not deductible. The question is the taxpayer's object in incurring the expense. It is necessary to "look into the taxpayer's mind at the moment when the expenditure is made". The object of the expenditure must be distinguished from its effect: a payment may be made exclusively for the purposes of the trade even if it secures another advantage as a consequential or incidental effect. However, in some cases conscious motive is not decisive. Some results are so inextricably involved in particular activities that they cannot but be said to be a purpose, and the FTT must take a robust approach. But the question is always the object of the expense, not the object of the means of incurring it, so it is not the case that the way in which an expense is incurred will determine its deductibility, although it can be taken into account. A trader is entitled to order its affairs to incur the least tax liability, and the fact that its choice of the manner in which it achieves its objective is influenced or dictated by tax considerations does not necessarily mean there is a duality of purpose.

253. Our decision on this point is less straightforward than the corresponding point for Allen and La Vita. Taking a robust approach it could be argued that saving corporation tax, in the form of an exceptional and significant charge on what was very much a one off profit, was an object of the expenditure. However, on balance we have concluded that the sole object of the expenditure, as opposed to the object of the scheme, was to make the funds available to the four individuals. The fact that it was believed that corporation tax could be avoided enable Landid to contribute what was effectively a pre-tax profit to the EBT. In other words it affected the amount available, but not the object of the expenditure.

Disposition

254. On the basis of our decision on Issue 1 the appeals by the appellants against the Regulation 80 determinations and Section 8 decisions are dismissed. In the case of

Allen the amounts are reduced to reflect the determination and decision issued on 21 October 2011, as described in Appendix 1. In the case of La Vita the PAYE amount is increased, also as described in Appendix 1.

255. Also in view of our decision on Issue 1, the corporation tax appeals are each allowed.

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

SARAH FALK
TRIBUNAL JUDGE

RELEASE DATE: 13 September 2017

APPENDIX 1: AMOUNTS IN DISPUTE

Note: these figures are derived principally from additional submissions made by HMRC following the hearing. The Tribunal understands that the calculations are agreed by the appellants.

Allen

Regulation 80 determination:

	Pay for which tax unpaid (£)	**Tax due (£)**
Mr Farenden	50,000	20,000.00
Mr Topp	205,000	82,000.00
Mr Crowhurst	17,000	5643.14
Mr Pentlow	17,000	5029.56
Mr Perkins	11,000	2799.45
Total	**300,000**	**115,472.15**

Section 8 decision:

	Primary and secondary contributions due (£)
Mr Farenden	6,898.93
Mr Topp	31,457.28
Mr Crowhurst	2,884.43
Mr Pentlow	2,884.43
Mr Perkins	2,152.25
Total	**46,277.32**

Note: these figures reflect a determination and decision issued on 21 October 2011 and appealed against on 1 November 2011, rather than the determination and decision appealed against to the Tribunal which reflect higher figures not now contended for by HMRC. The Tribunal has power to reduce a Section 80 determination under s 50(6) Taxes Management Act 1970, as applied by regulation 80(5) of the PAYE

Regulations, and to vary a Section 8 decision under regulation 10 of the Social Security Contributions (Decisions and Appeals) Regulations SI 1999/1027. It therefore has power to reduce the amounts the subject of the appeals to the figures shown above.

5

Corporation tax:

The closure notice, dated 16 May 2016, added back the £300,000 deduction claimed in respect of the year ended 29 February 2008, leading to a revised corporation tax
10 charge of £101,161.94.

HMRC accept that if they succeed in the argument that PAYE and NICs arise at the date of allocation then the corporation tax appeal should be allowed and in addition a corporation tax deduction is available for the PAYE and NICs, totalling £161,749.47
15 for the year ended 29 February 2008.

Landid

(Note: since Mr Morgan and Mr Routh have settled, only the PAYE and NICs
20 treatment of the allocations to Mr Silver and Mrs Elliott are in dispute.)

Regulation 80 determination:

	Pay for which tax unpaid (£)	**Tax due (£)**
Mr Silver	2,392,500	957,000.00
Mrs Elliott	150,000	59,863.56
Total	2,542,500	**1,016,863.56**

Section 8 decision:

25

	Primary and secondary contributions due (£)
Mr Silver	330,165.00
Mrs Elliott	21,048.19
Total	**351,213.19**

Corporation tax:

The closure notice dated 23 May 2014 added back the deduction claimed in respect of
30 the year ended 31 March 2008. Only the corporation tax position in respect of the

allocations to Mr Silver and Mrs Elliott is now in dispute, a total add back of £2,542,500 and additional corporation tax of £775,666.

HMRC accept that if they succeed in the argument that PAYE and NICs arise at the date of allocation then the corporation tax appeal should be allowed and in addition that a corporation tax deduction is available for the PAYE and NICs, totalling £1,368,076.75, for the year ended 31 March 2008.

La Vita

Regulation 80 determination:

	Pay for which tax unpaid (£)	**Tax due (£)**
Mr M Arcari	400,000	80,000

This determination was made using a "BR" tax code. HMRC subsequently recalculated the amount due as **£150,624.40** and requested the Tribunal to increase the amount determined accordingly, which it has power to do under s 50(7) Taxes Management Act 1970, as applied by regulation 80(5) of the PAYE Regulations.

Section 8 decision:

	Primary and secondary contributions due (£)
Mr M Arcari	57,910.47

Corporation tax:

The closure notice dated 28 May 2014 added back the £400,000 deduction claimed in respect of the year ended 30 November 2007, leading to additional corporation tax of £98,067.37.

HMRC accept that if they succeed in the argument that PAYE and NICs arise at the date of allocation then the corporation tax appeal should be allowed and in addition a corporation tax deduction is available for the PAYE and NICs for the year ended 30 November 2008 (a year which is not before the Tribunal but which is understood to have an open enquiry).

APPENDIX 2: ALLEN AGREED FACTS

Company

1. Allen (Concrete) Ltd ("ACL") is a company, wholly owned by Topcrete Ltd, whose principal activity is the manufacture of concrete posts and related items.

2. ACL had two directors during the year ended 29 February 2008: Mr Roy Topp ("Mr Topp") and Mr Peter Farenden ("Mr Farenden"). Mr Crowhurst, Mr Pentlow and Mr Perkins were employees of ACL in that year.

3. Topcrete Ltd is and was at the material time controlled by Mr Topp and Mr Farenden.

Employee Benefit Trust

4. On 21 December 2007 ACL established The Allen (Concrete) Limited Employee Trust 2007 ("the EBT") with an initial trust fund of £100.

5. On 8 January 2008 the EBT Trustee (Tenon (IOM) Corporate Services Ltd) executed a Deed of Appointment establishing five sub-funds each with trust fund of £10.

6. On 18 January 2008, ACL and the EBT Trustee executed a Deed of Addition and Contribution Agreement by which ACL contributed a further £300,000 to the EBT, as accretions to the sub-funds as follows:

Mr Farenden	£50,000
Mr Topp	£205,000
Mr Crowhurst	£17,000
Mr Pentlow	£17,000
Mr Perkins	£11,000

7. On 29 January 2008, the Board of ACL resolved to make a payment of £100 to Heart Research UK and a cheque was posted to Heart Research UK on the same date. Following this payment to Heart Research UK, the accretions to the sub-fund referred to in paragraph 6 above ceased to be liable to revert to the Appellant.

Loans

8. Loans which were unsecured and interest-free were made by the EBT Trustee to Mr Farenden, Mr Topp, Mr Crowhurst, Mr Pentlow and Mr Perkins. As at 20 March 2016 the following loans remain outstanding:

5

7 February 2008	Mr Farenden	£49,999
18 April 2008	Mr Farenden	£116
6 February 2008	Mr Topp	£204,960
18 April 2008	Mr Topp	£565
12 February 2008	Mr Crowhurst	£16,999
14 February 2008	Mr Pentlow	£16,999
7 February 2008	Mr Perkins	£10,999

10

Accounts

9. ACL has charged £300,000 to its profit and loss account for the year ended 29 February 2008. That charge was included in the Profit & Loss account under the heading of Directors' Remuneration (£255,000) and Office Salaries and Awards (£45,000).

15

APPENDIX 3: LANDID AGREED FACTS

5

Company

1. Landid Property Ltd ("LPL") is a company whose principal activity is commercial property development and management.

2. LPL had three directors who were also shareholders during the year ended 31 March 2008: Trevor Silver, Stephen Morgan and Christopher Routh. Mrs Charlotte Elliott was an employee of LPL in that year.

10

Employee Benefit Trust

3. On 31 January 2008 LPL established The Landid Property Limited Employee Trust 2008 ("the EBT") with an initial trust fund of £100.

4. On 12 February 2008 the EBT Trustee (Tenon (IOM) Corporate Services Ltd) executed a Deed of Appointment establishing four sub-funds with trust funds of £10 each.

15

5. On 14 February 2008, LPL and the EBT Trustee executed a Deed of Addition and Contribution Agreement by which LPL contributed a further £5,000,000 to the EBT, as accretions to the sub-funds as follows:

20

Mr Trevor Silver	£2,392,500
Mr Stephen Morgan	£1,957,500
Mr Christopher Routh	£500,000
Mrs Charlotte Elliot	£150,000

25

6. On 28 February 2008 the Board of LPL resolved to make a payment of £100 to Heart Research UK and a cheque was posted to Heart Research UK on the same date. Following this payment to Heart Research UK, the accretions to the sub-funds referred to in paragraph 5 above ceased to be liable to revert to the Appellant.

30

Loans

7. Loans which were unsecured and interest-free were made by the EBT Trustee to the beneficiaries as detailed below:

10 March 2008	Mr Trevor Silver	£150,000
27 March 2008	Mr Trevor Silver	£72,000

35

27 March 2008	Mr Trevor Silver	£1,550,000
22 April 2008	Mr Trevor Silver	£55,000
16 May 2008	Mr Trevor Silver	£100,000
4 June 2008	Mr Trevor Silver	£200,000
20 June 2008	Mr Trevor Silver	£50,000
23 June 2008	Mr Trevor Silver	£25,000
16 July 2008	Mr Trevor Silver	£50,000
30 July 2008	Mr Trevor Silver	£38,500
18 August 2008	Mr Trevor Silver	£50,000
19 September 2008	Mr Trevor Silver	£26,045
21 October 2008	Mr Trevor Silver	£13,050
24 October 2008	Mr Trevor Silver	£600
5 November 2008	Mr Trevor Silver	£30,000
5 June 2009	Mr Trevor Silver	£70,000
29 June 2009	Mr Trevor Silver	£30,000
27 August 2009	Mr Trevor Silver	£20,000
3 December 2010	Mr Trevor Silver	£8,000

Mr Silver also made two partial loan repayments as follows:

25 September 2008	Mr Trevor Silver	(£26,045)
26 February 2009	Mr Trevor Silver	(£100,000)

1 April 2008	Mr Stephen Morgan	£253,315
22 April 2008	Mr Stephen Morgan	£45,000
30 July 2008	Mr Stephen Morgan	£31,500
12 January 2009	Mr Stephen Morgan	£30,000
30 March 2009	Mr Stephen Morgan	£20,000
5 May 2009	Mr Stephen Morgan	£30,000
27 May 2009	Mr Stephen Morgan	£30,000
30 June 2009	Mr Stephen Morgan	£14,500
15 July 2009	Mr Stephen Morgan	£143,816.41
1 September 2009	Mr Stephen Morgan	£30,000
13 November 2009	Mr Stephen Morgan	£15,000
27 January 2010	Mr Stephen Morgan	£20,000
24 March 2010	Mr Stephen Morgan	£30,000
30 March 2010	Mr Stephen Morgan	£24,000
22 April 2010	Mr Stephen Morgan	£25,000
27 May 2010	Mr Stephen Morgan	EUR16,714
4 June 2010	Mr Stephen Morgan	£20,000
9 June 2010	Mr Stephen Morgan	£29,667
2 July 2010	Mr Stephen Morgan	EUR16,714
9 July 2010	Mr Stephen Morgan	£15,054.51
9 July 2010	Mr Stephen Morgan	£20,000
2 September 2010	Mr Stephen Morgan	£25,000
13 October 2010	Mr Stephen Morgan	£5,942.20
18 November 2010	Mr Stephen Morgan	£25,000

19 November 2010	Mr Stephen Morgan	£22,950
6 December 2010	Mr Stephen Morgan	£1,185,000
28 March 2008	Mrs Charlotte Elliott	£55,000
21 April 2009	Mrs Charlotte Elliott	£9,500
2 June 2009	Mrs Charlotte Elliott	£30,000
21 July 2009	Mrs Charlotte Elliott	£59,800

Accounts

8. LPL has charged £5,000,000 to its profit and loss account for the year ended 31 March 2008. That charge was included in the Profit & Loss account under the headings of Directors' Remuneration (£4,850,000) and Wages (£150,000).

APPENDIX 4: LA VITA AGREED FACTS

Company

1. La Vita Pizzeria Ltd ("LVP") is a company, registered and trading in Scotland, whose principal activity is operating restaurants.

2. LVP had two directors who were also shareholders, Mr Marco Arcari and Mr Antonio Arcari. Mr Antonio Arcari died on 23 June 2007 and so, at the time of the transactions described below, Mr Marco Arcari ("Mr Arcari") was the sole director.

Employee Benefit Trust

3. On 23 July 2008 LVP established The La Vita Pizzeria Limited Employee Trust 2007 ("the EBT") with an initial trust fund of £100.

4. On 4 August 2008 the EBT Trustee (Tenon (IOM) Corporate Services Ltd) executed a Deed of Appointment establishing a sub-fund with a trust fund of £10.

5. On 11 August 2008 LVP and the EBT Trustee executed a Deed of Addition and Contribution Agreement by which LVP contributed a further £400,000 to the EBT as an accretion to the sub-fund mentioned in paragraph 4 above.

6. On 29 August 2008 the Board of LVP resolved to make a payment of £100 to the Willow Foundation and a cheque was posted to the Willow Foundation on the same date. Following this payment to the Willow Foundation, the accretion to the sub-fund referred to at paragraph 4 above ceased to be liable to revert to the Appellant.

Loans

7. Loans which were unsecured and interest-free were made by the EBT Trustee to Mr Arcari. As at 20 March 2016 the following loans remain outstanding:

18 March 2009	Mr Marco Arcari	£400,000
25 March 2009	Mr Marco Arcari	£5,776

Accounts

8. LVP has charged £400,000 to its profit and loss account for the year ended 30 November 2007. That charge was included in the Profit & Loss account under the heading of Director's Remuneration.