



Neutral Citation Number: [2024] EWCA Civ 1

Case No: CA-2022-002088

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL
(TAX AND CHANCERY CHAMBER)
Mrs Justice Falk and Upper Tribunal Judge Thomas Scott
[2022] UKUT 212 (TCC)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11 January 2024

Before :

LORD JUSTICE PETER JACKSON
LORD JUSTICE NEWEY
and
LORD JUSTICE NUGEE

Between :

THE COMMISSIONERS FOR HIS MAJESTY’S **Appellants**
REVENUE AND CUSTOMS

- and -

DOLPHIN DRILLING LTD **Respondent**

David Ewart KC and Quinlan Windle (instructed by HMRC Solicitor’s Office)
for the Appellants

Nicola Shaw KC (instructed by Ernst & Young LLP) for the Respondent

Hearing date: 14 December 2023

Approved Judgment

This judgment was handed down remotely at 10.30am on 11 January 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

.....

Lord Justice Nugee:

Introduction

1. This is an appeal by the Commissioners for His Majesty’s Revenue and Customs (“**HMRC**”) from the Upper Tribunal (Tax and Chancery Chamber) (“**the UT**”). It concerns the question whether the Respondent, Dolphin Drilling Ltd (“**Dolphin**”), is subject to certain provisions in Part 8ZA of the Corporation Tax Act 2010 (“**CTA 2010**”) which are applicable to contractors in the offshore oil industry. These provisions were introduced by the Finance Act 2014 (“**FA 2014**”) and apply with effect from 1 April 2014; they have the effect where they apply of imposing a “hire cap” which limits the contractor’s ability to bring into account payments it makes under a lease of an asset from an associated person.
2. Dolphin leased an asset called the Borgsten Dolphin (“**the Borgsten**”) from an associated company in Singapore called Borgsten Dolphin Pte Ltd (“**BDPL**”), and in turn provided it to Total E&P UK Ltd (“**Total**”), the operator of the Dunbar oil platform (“**the Dunbar**”). The Borgsten had formerly been a drilling rig but was converted so as to be able to provide a number of services in connection with the preparation of the Dunbar for drilling, and then the operation of the Dunbar. Among other services, the Borgsten was used to provide sleeping accommodation for a number of those who worked on the Dunbar.
3. The question is whether Dolphin’s payments to BDPL were (from 1 April 2014) subject to the hire cap. On the particular facts that will have been the case unless it was “reasonable to suppose” that the use of the Borgsten as accommodation for those who worked on the Dunbar “is unlikely to be more than incidental to another use, or other uses, to which [the Borgsten] is likely to be put”.
4. HMRC decided that this test was not met and amended Dolphin’s returns accordingly. Dolphin appealed to the First-tier Tribunal (“**the FTT**”), which allowed its appeal. HMRC appealed to the UT, which agreed with the FTT.
5. HMRC now appeal to this Court, with the permission of Lewison LJ. We have received interesting and well-argued submissions from Mr David Ewart KC, who appeared with Mr Quinlan Windle for HMRC, and from Ms Nicola Shaw KC, who appeared for Dolphin, respectively. For the reasons which follow I prefer those of Mr Ewart and would allow HMRC’s appeal.

The legislation – Part 8ZA CTA 2010

6. I will start with the relevant legislation. Part 8ZA (ss. 356A-356NG), headed “Oil Contractors”, was inserted into the CTA 2010 by s. 73 and sch 16 paras 1 and 4 FA 2014. It is treated as having come into force on 1 April 2014.
7. It is divided into 4 chapters. Chapter 1 (s. 356K) provides an overview of Part 8ZA, s.356K(1) explaining that Part 8ZA is about the corporation tax treatment of “oil contractor activities”. Chapter 2 (ss. 356L to 356LD) contains relevant definitions, including a definition of “oil contractor activities” in s. 356L and a definition of “relevant asset” in s. 356LA. Chapter 3 (s. 356M) treats oil contractor activities as a separate trade. Chapter 4 (ss. 356N to 356NG) makes provision about the calculation

of profits from oil contractor activities.

8. The hire cap is provided for by s. 356N, as follows:

“356N Restriction on hire etc of relevant assets to be brought into account

- (1) This section applies if the contractor makes, or is to make, one or more payments under a lease of—
 - (a) a relevant asset, or
 - (b) part of a relevant asset.
- (2) The total amount that may be brought into account in respect of the payments for the purposes of calculating the contractor’s ring fence profits in an accounting period is limited to the hire cap.

...”

The remaining subsections contain detailed rules as to the calculation of the hire cap which it is not necessary to set out, there being no issue about the calculations in the present case.

9. The question whether the hire cap applies to Dolphin’s payments to BDPL depends on whether the Borgsten was a “relevant asset”. If it was, then it is not disputed that Dolphin was a contractor carrying on oil contractor activities, as by s. 356L(2)(b) these include activities carried on by a company in the provision of a relevant offshore service, and by s. 356L(3) a contractor provides a relevant offshore service if the contractor provides a relevant asset in connection with the carrying on of exploration or exploitation activities in a relevant offshore area by the contractor. It is common ground that the Dunbar (which lies north-east of the Shetland Islands in the UK sector of the North Sea) is in a relevant offshore area, and that Dolphin provided the Borgsten to Total in connection with the carrying on of exploration or exploitation activities by Dolphin. So the critical question is whether the Borgsten was a relevant asset.

10. “Relevant asset” is defined by s. 356LA, which provides as follows:

“356LA “Relevant asset”

- (1) In this Part “relevant asset” means an asset within subsection (2) in respect of which conditions A and B are met.
- (2) An asset is within this subsection if it is a structure that—
 - (a) can be moved from place to place (whether or not under its own power) without major dismantling or modification, and
 - (b) can be used to—
 - (i) drill for the purposes of searching for, or extracting, oil, or

- (ii) provide accommodation for individuals who work on or from another structure used in a relevant offshore area for, or in connection with, exploration or exploitation activities (“offshore workers”).
- (3) But an asset is not within subsection (2)(b)(ii) if it is reasonable to suppose that its use to provide accommodation for offshore workers is unlikely to be more than incidental to another use, or other uses, to which the asset is likely to be put.
- (4) In subsection (2)–
 - “oil” means any substance capable of being won under the authority of a licence granted under Part 1 of the Petroleum Act 1998 or the Petroleum (Production) Act (Northern Ireland) 1964;
 - “structure” includes a ship or other vessel.
- (5) Condition A is that the asset, or any part of the asset, is leased (whether by the contractor or not) from an associated person other than the contractor.
- (6) Condition B is that the asset is of the requisite value.
- (7) The asset is of the “requisite value” if its market value is £2,000,000 or more.
- ...”

- 11. Again there is much that is common ground. It is not disputed that the Borgsten was a structure that could be moved from place to place (s. 356LA(2)(a)) and that it could be (and was) used to provide accommodation for offshore workers, that is those individuals who worked on or from the Dunbar (being another structure used in a relevant offshore area for exploration or exploitation activities) (s. 356LA(2)(b)(ii)). It is also not disputed that conditions A and B were met, as the Borgsten was leased by Dolphin from BDPL which was an associated person (s. 356LA(5)), and its market value was more than £2m (s. 356LA(6) and (7)). That means that if the Borgsten was within s. 356LA(2), it was a relevant asset; and the question whether it was within s. 356LA(2) depends on whether s. 356LA(3) applied to it. If it did, the Borgsten was not within s. 356LA(2)(b)(ii) and hence not within s. 356LA(2) at all, and so could not be a relevant asset; but unless s. 356LA(3) applied, the Borgsten was within s. 356LA(2)(b)(ii), and was a relevant asset.
- 12. So the question on this appeal is this: was it reasonable to suppose that the use of the Borgsten to provide accommodation for individuals working on the Dunbar was unlikely to be more than incidental to another use, or other uses, to which the Borgsten was likely to be put?

The facts

- 13. The facts were found in great detail by the FTT in a long and careful decision, but for

present purposes they can be summarised more briefly as follows. Numbers in square brackets in this section of the judgment refer to paragraphs of the FTT’s decision (at [2021] UKFTT 145 (TC)).

14. Total operates the Dunbar platform [27]. By 2010 the Dunbar had not drilled for a number of years, but Total intended to recommence drilling for a three year period commencing in 2012 [27]. The Dunbar is a “minimum facility drilling platform” which means that although it has a drilling derrick, it lacks significant facilities which are essential for active drilling operations [23]. To enable such a platform to perform drilling operations it needs the support of a “tender support vessel” (“TSV”) which is designed to provide operational support services known as “tender assisted drilling” (“TAD”) services [23]. The TSV is moored alongside the platform and connected by a gangway and an assortment of hoses; when connected the TSV and the platform effectively form an integrated unit during the drilling campaign [24].
15. In June 2011 Total invited Dolphin to tender for a package of services with a view to recommencing drilling in 2012 [29]. The invitation to tender explained that Total required the use of a TSV so as to become fully operational, stating that the tender vessel “supplies mud storage and pumping, cement storage and pumping, utilities and accommodation” [29]. “Mud” is the name for a man-made compound used in drilling activities; it is a mixture of oils and chemicals which come in both liquid and solid form, and it is used to carry rock cuttings to the surface and to lubricate and cool the drill bit [26(1)].
16. On 1 August 2011 Dolphin submitted a tender [83]. It explained that it proposed to use the Borgsten, which was of a proven design suitable for TSV work and available to suit the Dunbar project timing [84]. The Borgsten had originally been built as a semi-submersible drilling rig in 1975 and was at the end of its useful life as a drilling rig but could be converted into a TSV [30]. Substantial works were required to convert the Borgsten into a TSV [39]. It had two decks, each the size of the football pitch at Wembley, and the significant majority of the space on board was used for the provision of TAD services, although it also had capacity at the time of the invitation to tender to accommodate 102 personnel on board [38]. Dolphin did not propose to change this, and the conversion work envisaged the accommodation being retained [38]-[39]. The Borgsten would have its own crew while in operation as a TSV, being either employees of Dolphin or of its sub-contractors (“**Dolphin personnel**”). These would number around 55 (and would be accommodated on the Borgsten), so there would be some 47 surplus berths on board [40].
17. After some negotiations, on 10 November 2011 Dolphin was awarded the contract to supply TAD services to the Dunbar [33], and on 1 February 2012 a contract for the provision of TSV Drilling Services was signed between Total and Dolphin [35]. The contract was largely based on a specimen contract which had been attached to the invitation to tender [111]. This referred in some detail to the services which Total (referred to as “the Company”) required the contractor to provide. This included a requirement that the TSV provide living accommodation for 100-120 persons, and a specification that Total required “accommodation for 40 COMPANY personnel total” [72]-[75]. The FTT concluded that it was clear that Total expected and required that the TSV providing the TSV Drilling Services would have surplus accommodation that could be used for “**Total personnel**” (that is, personnel provided by Total, being either its own employees or those of its sub-contractors) [81], although they accepted a

submission by Ms Shaw that there was very little detail in the specimen contract in relation to such accommodation, and that it was “tacked on” [82].

18. The contract signed on 1 February 2012 provided for Dolphin to perform the services using the Borgsten as the TSV, and duly included a requirement that the TSV provide accommodation for 102 persons, with Total requiring accommodation for 40 Total personnel. But Total had already on 21 December 2011 requested Dolphin to prepare a study to detail the cost and schedule impacts of increasing the accommodation to 120 persons, since it wished to increase the number of berths available to it from 40 to 65 [114]. This was because it hoped that maximising the capacity of the crew would mean that upgrades to the Dunbar would take less time so that drilling operations could commence more quickly [115], [126]. Dolphin quoted for the work, and on 1 May 2012 the parties agreed to a Change Order under which the accommodation was to be increased to 120 berths, the cost to be borne by Total [118]. The total cost of the necessary works (and associated matters such as increasing the lifeboat capacity) came to \$6,700,800 or £4,188,000 [117].
19. The contract provided for a commencement date for the provision of services of between 1 October 2012 and 31 December 2012 [35], but in the event the actual commencement date was not until 1 February 2013 and the Borgsten moved into position alongside the Dunbar in February 2013 [44]. The Borgsten was not owned by Dolphin but by BDPL, an associated company registered in Singapore [22]. Dolphin leased the Borgsten from BDPL on a bareboat charter basis, paying BDPL a charter fee (initially of over \$100,000 per day) [37].
20. The contract provided for services to be provided first in a pre-drilling phase, expected to last 120 days, and then in a fully operational period when the Dunbar’s drilling operations would be under way [31]. But the pre-drilling phase was in fact extended until April 2015 as the upgrade works on the Dunbar took longer than anticipated [44]. The length of the pre-drilling phase was completely unexpected [153].
21. Since the relevant accounting periods for the purposes of Part 8ZA of the CTA 2010 are (i) the 9 months from 1 April to 31 December 2014 and (ii) the year ending 31 December 2015, they straddle both the pre-drilling and drilling phases. But there was little difference between the day-to-day activities on board the Borgsten in the two phases [46], [152]. The FTT gave a general description of TAD services at [26] as follows:
 - “26. TAD services consist of the provision of a stable base from which to deliver a range of drilling support services, including:
 - (1) the uninterrupted supply of what is referred to as “mud”, water, compressed air and cement to the platform...
 - (2) the provision of facilities, such as warehousing, storage (eg for oils and chemicals, mixed mud, water and cement), workshops providing welding and machine facilities, deck storage for tubing and pipes, stores for spare parts such as cables, hoses, tools and other items, wharf functions, lab space, office and conferencing facilities for the TSV crew as well as personnel of the Operator working on board the TSV and blow out

protection to seal the platform well in the case of a catastrophic event; and

- (3) functions such as a heliport to enable personnel to arrive from and depart to the mainland and other offshore installations and living space including leisure, hospital, galley, mess and sleeping accommodation.”

They later described the functions of the Borgsten in similar terms as follows [45]:

“45. The Borgsten was operational and fully crewed throughout the pre-drilling phase. Once the Borgsten was in position, it was connected to the Dunbar and kept in a constant state of readiness. Its functions included:

- (1) running the mud systems on a closed loop,
- (2) supplying water and compressed air, and
- (3) providing warehousing, heliport, welding and machine shop, deck storage, cranes, wharf, office and accommodation facilities.”

They subsequently expanded on this at [151], where they described the services provided by the Borgsten during the pre-drilling period as follows:

“151. Mr Thain’s evidence, which we accept, was that this period of 120 days (whilst KCAD was implementing upgrades to the Dunbar) was to be used for connecting the Borgsten to the Dunbar and ensuring the TAD services were ready to go. This was complex because there were significant procedures to go through to ensure an efficient interface. Furthermore, there were other services which the Borgsten was providing during this period before drilling commenced:

- (1) The Borgsten was supplying water and compressed air to the Dunbar.
- (2) The Borgsten had a welding and machine shop. These sealed areas were used for works which generated a spark risk, such as welding and cutting of metals. Where the Dunbar needed welding and cutting performed this was done by Borgsten staff in these specific safe areas. There would have been significant amounts of this type of work during the initial phase of preparing the Dunbar for drilling.
- (3) The Borgsten functioned as a floating warehouse for the Dunbar. It stored mud-related materials, spare parts, spare cables, spare hoses, tools.
- (4) The Borgsten acted as a floating wharf enabling it to take deliveries both for itself and the Dunbar from ships. In the

period from 1 April to 1 October 2014 there were 74 boat deliveries (which both delivered and took away items).

(5) The Borgsten ran all the systems needed to provide TAD services, and as such much of the plant and machinery necessary for providing the TAD services was in constant operation, even during the pre-drilling phase. The mud systems were running throughout as a closed loop, running water at pressure through the system.”

22. It will be recalled that the question under s. 356LA(3) CTA 2010 is whether it is reasonable to suppose that the use of the asset in question (here the Borgsten) to provide accommodation for offshore workers is unlikely to be more than incidental to another use or other uses to which it is likely to be put; and that “offshore workers” are by s. 356LA(2)(b)(ii) individuals who work on or from another structure (see paragraph 10 above). So in practice it is the use of the Borgsten to accommodate those working on the Dunbar which is the relevant use.
23. The FTT had evidence as to how many personnel worked on the Dunbar and Borgsten respectively and where they slept. Their findings can be summarised as follows:
- (1) The Borgsten had its own crew, either Dolphin employees or sub-contractors (ie Dolphin personnel). These all worked and slept on the Borgsten, so none of them were offshore workers for the purposes of the legislation [53].
 - (2) The number of Dolphin personnel working on board the Borgsten in the pre-drilling period was usually around 55, this number being fairly constant [140(1)]. Once drilling commenced the number was in the range of 45 to 59 with an average of 52 [140(2)].
 - (3) There were also personnel provided by Total, either its own employees or sub-contractors (ie Total personnel). Most of them worked on the Dunbar (and so could be offshore workers), and some of them worked on both the Dunbar and the Borgsten (and could also be offshore workers); a comparatively small number however worked solely on the Borgsten (and so were not offshore workers) [53], [142].
 - (4) The maximum number of personnel permitted on the Dunbar at any one time was in the mid to high eighties (ie 85-89) as this was the lifeboat capacity on the Dunbar [145(1)]. During the pre-drilling phase there would have been on average around 80 personnel working on the Dunbar. During the drilling campaign this would have reduced to maybe around 70, or 60-70 [145(2)].
 - (5) All personnel working on the Dunbar or the Borgsten needed to be accommodated on one of those vessels throughout the time they were in the field. Personnel were brought to the Borgsten by helicopter most week days (there were no routine helicopters on Saturdays or Sundays); this was how the crews were changed over after their period on board, typically of around 2 weeks [127(1)]. (We were also told that the helicopter trip took about 2 hours each way.)

- (6) The Dunbar had 60 berths [127(6)]. (I add that since there were more than 60 Total personnel usually working on the Dunbar, it was inevitable that some of these would be accommodated on the Borgsten.)
- (7) In fact the number of Total personnel sleeping on board the Borgsten was on average 58 during 2014 (all in the pre-drilling phase) [140(3)]. Once drilling commenced the average remained largely the same at 59, although there was a wider range (from 26 to 72) [140(4)].
- (8) The large majority of the Total personnel sleeping on the Borgsten were working on the Dunbar. In the pre-drilling phase there would generally have been only around 4 or 5 of the Total personnel sleeping on the Borgsten who worked only on or from the Borgsten each day, so some 53-54 of the average 58 were working solely or partly on the Dunbar [142(4)], [143]. In the drilling phase there were more Total personnel who performed their functions only on the Borgsten, estimated at 9 or 10 each day. Hence some 49-50 of the average 59 Total personnel sleeping on the Borgsten in this period were working on the Dunbar [142(5)], [143].

The proceedings

24. Dolphin's corporation tax return for the year ended 31 December 2014 assumed that it was entitled to bring into account in the calculation of its profits the entirety of the hire that it had paid to BDPL. HMRC took the view that the hire cap applied and on 15 January 2018 issued a closure notice amending the return accordingly, the extra corporation tax payable being then calculated at £3,034,129. There has been no issue about quantum so it is not necessary to set out the details of the calculation but in summary the effect of the hire cap is to reduce significantly the amount of hire payments (from 1 April 2014) that can be allowed in the calculation of Dolphin's profits. A review by HMRC on 15 May 2018 affirmed the decision, but recalculated the additional tax payable at £4,039,309.26, there having been an error in the initial calculation. A similar closure notice was issued in relation to the year ended 31 December 2015 on 21 October 2019, the additional corporation tax in this case being £2,691,385.73.
25. Dolphin appealed to the FTT. The FTT (Judge Jeanette Zaman and Mr Duncan McBride) allowed Dolphin's appeal for the reasons given in their decision, released on 16 November 2020 at [2021] UKFTT 145 (TC). They concluded that it was reasonable to suppose that the use of the Borgsten to provide accommodation for those working on the Dunbar was unlikely to have been more than incidental to other uses of the Borgsten. I will have to look at their reasons in more detail below.
26. HMRC appealed to the UT. The UT (Falk J, as she then was, and Judge Thomas Scott) dismissed HMRC's appeal for the reasons given by them in a decision released on 4 August 2022 at [2022] UKUT 00212 (TCC), concluding that the FTT had not misdirected themselves.

The FTT's decision

27. Mr Ewart concentrated his submissions on the FTT's decision. I agree that he was right to do so (nor was this disputed). Although formally the appeal before us is from the decision of the UT, the substantive question is whether the FTT were entitled to reach

the decision they did. If they were, the UT were right to dismiss the appeal, but if they were not the UT should have allowed the appeal. Hence in an appeal such as this what really matters is whether the FTT's decision was wrong in law: see *Proctor & Gamble UK v HMRC* [2009] EWCA Civ 407 per Jacob LJ at [7]-[8], Toulson LJ at [45] and Mummery LJ at [75]-[76].

28. Most of the FTT's decision is concerned with a careful assessment of the evidence and findings of fact. Their consideration of the ultimate question, that is whether it was reasonable to suppose that the use of the Borgsten to provide accommodation for offshore workers was unlikely to be more than incidental to another use or other uses to which the Borgsten was likely to be put, starts at [167]. At [170] they discuss the meaning of incidental as follows:

“170. Both parties noted that there is no definition of “incidental” or “more than incidental” for this purpose, and thus this word, or this phrase, must bear their ordinary meaning. Something is incidental to another matter if it is subordinate, or secondary, to it. We bear in mind throughout that the legislation does not specifically require that this other use is the main (or a main) or primary use.”

29. At [171] they said that there was a significant amount of evidence supporting a conclusion that it was reasonable to suppose that the use of the Borgsten to provide accommodation to Total personnel generally (ie irrespective of whether they were offshore workers on the Dunbar or working on the Borgsten) was unlikely to be more than incidental to the “Permitted Uses” (by which they meant any use or uses of the Borgsten other than the provision of accommodation to offshore workers); they then summarised this evidence, as follows:

“(1) The [invitation to tender] and the Total Contract focus on the provision by the Borgsten of TSV Drilling Services or TAD services to the Dunbar and the technical specifications which would be required of the Borgsten. The requirements relating to accommodation needing to be made available for Total Personnel (up to 40 berths at that stage) are brief, with minimal detail in relation thereto.

(2) At the time of submitting the tender, [Dolphin] did not give any significant thought to the use of the accommodation on the Borgsten by Total Personnel, as the Borgsten had surplus capacity in excess of the number of berths that Total was requesting. As Mr Mitchell put it, the accommodation was just there. This was typical and to be expected of any TSV.

(3) Having required that 40 berths be available for Total Personnel, there is no mention in the [invitation to tender] or the Total Contract of how much use Total would make of the accommodation available to it or who Total would seek to have accommodated on the Borgsten. There was no commitment by Total to use any of these berths (and if it had not done so there would have been no charge of the \$80 unit price). Total had access to office space and a conference room on the Borgsten, thus illustrating that some Total

Personnel would be working (at least some of the time) on the Borgsten.

- (4) In practical terms, making available the surplus accommodation to Total Personnel was immaterial to [Dolphin]. Accommodation needed to be available to, and used by, the [Dolphin] Personnel. As such, [Dolphin] needed to make arrangements to deal with matters such as catering and laundry, and provide a gym and lounges. Ensuring that this covered a larger amount of usage made minimal difference.
 - (5) The basis on which [Dolphin] agreed to increase the accommodation on board the Borgsten from 102 to 120 berths was that Total would bear the cost of the works and this did not delay the conversion (and thus the commencement date under the Total Contract). The additional works involved could be completed as part of the much bigger programme of works to convert the drilling rig into a TSV.
 - (6) After the conversion into a TSV and the increase in the accommodation, most of the deck space on the Borgsten was related to its use to provide TAD services to the Dunbar. Mr Thain's evidence was that less than 10% was used for accommodation (which we take to refer to the cabins) but we do note that there was, in addition, space taken by related facilities including, eg, lounges, galley, mess and the gym.
 - (7) By the time Part 8ZA came into effect on 1 April 2014, the Borgsten had been alongside the Dunbar for more than one year, and had been ready to support the commencement of drilling for just under a year. The drilling reinstatement programme was behind schedule. However, the day-to-day activities on board the Borgsten were largely the same in both the pre-drilling and drilling phases.”
30. At [172] they referred to the costs incurred by Total in having Total personnel accommodated on the Borgsten, concluding that although the costs incurred were clearly large sums of money, the monthly costs were very small (that is, compared to the overall sums paid by Total).
 31. At [173] they said that it was nevertheless clear that Total “expected and required that the TSV providing the TSV Drilling Services would have surplus accommodation that could be used for Total Personnel”, summarising the evidence that led them to that conclusion.
 32. At [174] they noted certain matters which they did not consider to be particularly relevant to the analysis. They then reached their conclusion as follows:
 - “175. The assessment of whether the Borgsten is within s356LA(3) for the accounting periods in issue does not require us simply to weigh these lists of factors against each other. We recognise that, taken together, the factors listed at [173] above demonstrate that the use

of the Borgsten to provide accommodation to offshore workers could reasonably be supposed to be of some importance. We have therefore had to consider whether this precludes the use from being no more than incidental. We have concluded that it does not – incidental does not need to be confined to uses which are trivial; it can capture uses which, whilst being desirable, sought-after or even important are nevertheless, when viewed in context, secondary to (or less important than) another use or uses.

176. Having considered all of the evidence before us, we are satisfied that, on the balance of probabilities, it is reasonable to suppose that the use of the Borgsten to provide accommodation for Total Personnel working on the Dunbar was unlikely to be more than incidental to the use of the Borgsten to provide TAD services to the Dunbar and/or to accommodate [Dolphin] Personnel (who were working on the Borgsten). Accordingly we have concluded that the terms of the exception in s356LA(3) are satisfied such that the Borgsten was not within s356LA(2)(b)(ii) for the accounting periods in issue. [Dolphin’s] appeal is allowed.”

Grounds of appeal

33. There are formally three grounds of appeal against the UT’s decision, namely that the UT erred in law by:
- (1) upholding the FTT’s conclusion that an asset’s use as accommodation for offshore workers would not be more than incidental to another use if it is subordinate or secondary to that other use, and that a use that is important may nevertheless be incidental to another use;
 - (2) focusing too much on the specific facts of the use of the Borgsten by Total rather than the uses to which one might reasonably suppose the Borgsten was likely to be put; and
 - (3) concluding that the FTT at no point found as a fact that use of the Borgsten for accommodation for offshore workers was essential.
34. These grounds were developed in Mr Ewart’s skeleton argument, but in oral submissions he concentrated almost entirely on the first ground, and on what it is for one use of an asset to be incidental to another. I agree that this is the relevant question for the determination of the appeal. It is of course ultimately a question of statutory construction, being a question of what the words in s. 356LA(3) mean. I repeat s. 356LA(3) here for the sake of convenience:
- “(3) But an asset is not within subsection (2)(b)(ii) if it is reasonable to suppose that its use to provide accommodation for offshore workers is unlikely to be more than incidental to another use, or other uses, to which the asset is likely to be put.”

But it is not suggested that “incidental” or “incidental to another use” here have any special or technical meaning. They are ordinary English words and are to be given their

ordinary meaning. This has been common ground throughout, as the FTT noted at [170] (see paragraph 28 above).

The background to the legislation

35. We were taken by both counsel to various materials shedding light on the background to the legislation. It is undoubtedly well established that background materials can be looked at for the purpose of ascertaining the “mischief” which a statute is intended to address; quite how far one can go beyond that in using the evolution of draft legislation as an aid to resolving questions of statutory construction is not I think so clear, but we did not hear any argument on the point and in the present case it does not need to be addressed. Although interesting as background I do not think the material we were shown really assists in determining the appeal. Nevertheless for what it is worth I will set out what it consists of.

36. It starts with the Autumn Statement 2013 issued by HM Treasury in December 2013 (Cm 8747). Under the heading “Avoidance and evasion” this announced a number of proposed measures, one of which was as follows:

“**2.122 Oil and gas bareboat chartering** – The government will cap the amount deductible for intra-group leasing payments for large offshore oil and gas assets, known as bareboat charters, and introduce a new ring fence to protect the resulting revenue. The government will consult with industry in early 2014. (Finance Bill 2014)”

37. The next document chronologically is an “Overview of Tax Legislation and Rates” issued jointly by HMRC and HM Treasury dated 19 March 2014. This included the following:

“**1.65 UK oil and gas: bareboat chartering** – As announced in Autumn Statement 2013, the Government is concerned about the use of bareboat charters to move significant taxable profit outside the UK tax net, and has been holding informal discussions with industry. Legislation will be introduced during the passage of Finance Bill 2014 to cap the amount allowed as a deduction for these charters to companies that provide drilling services or accommodation services on the UK Continental Shelf.”

It continued by explaining how the cap would be calculated, and how the profits from the relevant activity would be ring-fenced by providing that they could not be reduced by other tax reliefs derived from activity outside the UK Continental Shelf.

38. Finally, we were shown a Technical Note issued by HMRC dated 1 April 2014. This confirmed that following an informal consultation with the industry during February 2014 the Government had made a number of changes to the proposals, including limiting the measure so that it would now only apply to “drilling rigs and accommodation vessels”. Draft legislation was included in the Technical Note. This included a draft of s. 356LA in which s. 356LA(2) provided:

“(2) An asset is within this subsection if it is a structure that—

- (a) can be moved from place to place (whether or not under its own power) without major dismantling or modification, and
- (b) can be used to—
 - (i) drill for the purposes of searching for, or extracting oil, or
 - (ii) provide accommodation for individuals who work on or from a structure used in a relevant offshore area for, or in connection with, exploration or exploitation activities.”

There was no equivalent of what is now s. 356LA(3). Since “structure” was defined in the draft legislation as including “a ship or other vessel”, this would have caught any vessel used in the UK offshore oil industry which *could* be used as sleeping accommodation for those working on the vessel itself, and since ships and other vessels in practice do contain sleeping accommodation for those on board, the practical effect would no doubt have been to extend the reach of the legislation to almost any type of movable structure, whether or not they would normally be described as drilling rigs or accommodation vessels.

- 39. The draft legislation was itself put out to consultation. We have not been shown any of the results of the consultation, but as can be seen the legislation as enacted contained two significant changes from this draft, one being the requirement in s. 356LA(2)(b)(ii) that the asset must be capable of being used to provide accommodation for individuals who work on or from *another* structure, and the other being the introduction of s. 356LA(3) which has the effect of excluding assets where use for such accommodation can reasonably be supposed to be unlikely to be more than incidental to another use. Ms Shaw submitted that it was likely that these changes were introduced as a result of the consultation and to address the concerns that the draft legislation would have had a much wider effect than intended. That seems to me entirely credible.
- 40. What I take from this history is that the legislation was designed to combat what was perceived to be a practice of moving profits in fact derived from the UK offshore oil sector outside the UK tax net, and that after consultation the Government decided to confine the new legislation to what could be described as drilling rigs and accommodation vessels, and took steps to ensure that it was not too widely drafted so as to catch other assets. But that is not much more than is apparent from the legislation itself as it was in fact enacted, and the precise effect of that legislation must turn on the statutory language that was used and approved by Parliament. That as I have already said turns on the ordinary meaning of the words in s. 356LA(3), it not being suggested that they have any special or technical meaning.

The ordinary meaning of the words

- 41. So what is it for one use of an asset to be incidental to another? Where ordinary words are used in legislation it is well recognised that seeking to provide definitions of them can be a dangerous exercise, as glossing the statutory language by using other words runs the risk of those (non-statutory) words being treated as a substitute for the statutory words when they may not have quite the same meaning. Most English words have nuances of meaning and shades of usage that are not precisely captured by substituting other words. So one should be wary of trying to lay down a definition of ordinary

words; the meaning of an ordinary word is to be found not so much in a dictionary but in how it is in fact ordinarily used, and I think it is generally more helpful to tease out the meaning of ordinary words by providing illustrative examples of how they are used in everyday contexts.

42. The risk of substituting other words is neatly illustrated by the statement of the FTT at [170] that something is incidental to another matter “if it is subordinate, or secondary, to it”. It is no doubt generally true that if use A is incidental to use B, then use A will be of lesser or secondary importance to use B. But that does not mean that being subordinate or secondary is what incidental means, and by expressing it in this way there is a danger of substituting a test of whether use A is secondary or subordinate to use B for the test of whether use A is incidental to use B. As Mr Ewart submitted, the FTT seem to have decided the ultimate question by assessing whether use A (the use of the Borgsten to accommodate those working on the Dunbar) was in some way lesser than use B (the other uses of the Borgsten). But as he said that does not accurately capture what it is for use A to be incidental to use B.
43. His submission was that use A is only incidental to use B if there is some link between them, or if use A is tied in to use B, and that this is not the case if use A is an unconnected and independent purpose in itself. He gave the example of a barrister using a laptop to write a shopping list (use A) when it is primarily used to write opinions (use B). In such a case, he said, the use of it to write a shopping list is not incidental to the use of it to write opinions. Using the laptop to write a shopping list is no doubt of minor or secondary importance compared to using it to write opinions, but there is no connection between the two (other than that they happen to be uses of the same asset).
44. I think this submission is well-founded. It seems to me to reflect the ordinary use of language. If I can express it in my own words, one would normally say that use A is incidental to use B if it arises out of use B, something that is done because of use B, or in connection with use B, or as a by-product of use B. Using a laptop to write a shopping list does not arise out of using it to write opinions – it is an independent end in itself, unconnected with the writing of opinions, albeit no doubt very much a subordinate or secondary or lesser one.
45. This is in line with the only authority that was cited to us on the meaning of incidental (in a not dissimilar context), namely the decision of Pennycuik V-C in *Robson v Dixon* [1972] 1 WLR 1493. The question in this case was whether the taxpayer, Captain Robson, was resident in the UK for the purposes of income tax chargeable under Schedule E. He was an airline pilot employed by the Dutch airline KLM and was based at Schiphol Airport, Amsterdam, but he maintained a family home for his wife and children in England, and himself commuted from there to Schiphol when it was feasible to do so. By s. 11(1) and (2) of the Finance Act 1956, where a person worked full-time in an employment all the duties of which were performed outside the UK, the question whether he was resident in the UK was to be decided without regard to any place of abode maintained in the UK for his use. For that purpose s. 11(3) provided:
 - “(3) Where an office or employment is in substance one of which the duties fall in the year of assessment to be performed outside the United Kingdom there shall be treated for the purposes of this section as so performed any duties performed in the United Kingdom the performance of which is merely incidental to the

performance of the other duties outside the United Kingdom.”

Captain Robson’s duties were to fly aircraft from Amsterdam to other places in the world, largely in the Americas, and back again. On a relatively small number of flights this required him to land in the UK and take off again, generally staying for an hour or less.

46. On these facts Pennycuik V-C upheld the decision of the Special Commissioners that the performance of Captain Robson’s duties performed in the UK was not “merely incidental” to the performance of his other duties. Of pertinence to the present case are the following parts of his judgment:

(1) At 1498H, having said that effect must be given to the natural meaning of the words, he said:

“The words “merely incidental to” are upon their ordinary use apt to denote an activity (here the performance of duties) which does not serve any independent purpose but is carried out in order to further some other purpose.”

(2) At 1499A-B he said that Captain Robson’s duties, when flying from Holland to America via the UK:

“consisted of taking the plane up at Schiphol, flying it to England, bringing it down at Heathrow or elsewhere, and then taking it up again and flying it again to the next destination, in America. With the best will in the world, I find it impossible to say that the activities carried on in or over England are merely incidental to the comparable activities carried on in or over Holland or in or over the ultimate destination, in America. The activities are precisely co-ordinate, and I cannot see how it can properly be said that the activities in England are in some way incidental to the other activities.”

(3) At 1499F he rejected the submission for the taxpayer that s. 11(3) was satisfied if there were merely relatively short periods of employment in the UK, saying:

“It would have been quite simple for the section so to provide; and it may well be that if the condition were imported only by the expression “in substance,” that would be the result. But the second requirement is expressed in quite different terms and cannot, I think, be treated as referring merely to what has been described as a quantitative, in contradistinction to a qualitative, basis.”

(4) Finally, at 1500A he said:

“It is tempting to say that all the duties performed by a pilot are incidental to the purpose of transporting passengers from one place to another, but that approach clearly would not help here. What has to be shown is that the particular duties in the United

Kingdom are incidental to the performance of other particular duties outside the United Kingdom.”

47. Mr Ewart submitted that Pennycuick V-C’s statement that as a matter of ordinary usage an activity is merely incidental if it does not serve any independent purpose but is carried out in order to further some other purpose is equally applicable in the present context: if use A serves no independent purpose of its own but is carried out to further use B, it is incidental to use B. For reasons already given I am reluctant to endorse that as a definition of what it is for use A to be incidental to use B, and indeed I think one could envisage a case where use A might be incidental to use B even though it could not really be said to further use B. Suppose for an example a boat is used to ferry supplies somewhere and some of the crew take the opportunity to fish over the side of the boat. I would accept that the use of the boat for fishing might be said to be incidental to its use to ferry supplies, even though fishing could scarcely be said to further the ferrying of supplies. This would be more a case of what I have referred to as use A being a by-product of use B.
48. But on the other hand I agree that it is difficult to regard use A as merely incidental to use B if it serves an independent purpose of its own, unconnected with use B, at any rate if that purpose is of some significance and not trivial or casual. And, contrary to a submission by Ms Shaw, I see no difference between use A being “merely incidental to” use B and use A being “no more than incidental to” use B. These to my mind mean the same thing.
49. I therefore consider that Mr Ewart is right, and that Pennycuick V-C’s decision in *Robson v Dixon* is of assistance to the present case. There was some discussion before us as to what he meant by saying that the activities in England and the activities in Holland or America were “precisely co-ordinate”, but all I think he meant is that on a flight from Holland to America via England the part of his duties that consisted in landing and taking off in England was just as much part of his overall duties as taking off in Holland or landing in America, and consisted of doing the same thing in England as he did elsewhere. It was not of a different quality to the rest of his duties.
50. In my judgement therefore the relevant considerations in deciding whether the use of the Borgsten to accommodate those working on the Dunbar was incidental to its other uses are whether its use as such accommodation was an independent end in itself (of some significance), unconnected with its other uses, or whether it was something that arose out of its other uses.
51. I do not think this is the question that the FTT asked themselves. As Mr Ewart submitted, the FTT’s actual decision in [176] is a fairly bald conclusion without any explanation of the reasons for it (see paragraph 32 above). But the matters they relied on in support of this conclusion can be seen from their summary of the evidence at [171] (see paragraph 29 above). These are all matters that support the conclusion that the use of the Borgsten as accommodation for Total personnel was of secondary or lesser importance than its other uses (particularly when viewed from Dolphin’s perspective). But they do not go to the question whether the use as such accommodation was an independent end in itself (of some significance), or arose out of its other uses. Indeed at [175] they say that the use of the Borgsten to provide accommodation to offshore workers could reasonably be supposed to be of some importance, but that:

“incidental does not need to be confined to uses which are trivial; it can capture uses which, whilst being desirable, sought-after or even important are nevertheless, when viewed in context, secondary to (or less important than) another use or uses.”

(see paragraph 32 above).

52. Mr Ewart submitted that this illustrates that the question the FTT asked themselves was the wrong question: they asked whether the use of the Borgsten for accommodation of offshore workers was minor compared to other uses, whereas they should have asked themselves if it arose out of or was connected with some other use. I agree and on this basis I consider that Ground 1 of the appeal is made out. The use of the Borgsten for accommodation of those working on the Dunbar was not simply something that arose out of its use as a TSV supplying TAD services to Total. It was an independent end in itself, of some significance – indeed essential if Total was to be able to have more than 60 personnel working on the Dunbar at any one time as it wished. I agree with Mr Ewart that it could not therefore be said to be no more than incidental to the other uses of the Borgsten. Put simply the Borgsten was not only used to provide TAD services to the Dunbar, it was also used as an accommodation vessel for the Dunbar. This may have been a “secondary” use, but it was a significant and independent use and not incidental to its other uses.
53. Ms Shaw made a number of submissions, but none of them to my mind provided an answer to this point. She said that the question for the FTT was ultimately a multifactorial evaluative decision for them and should be upheld unless they misdirected themselves. But for the reasons I have given I think they did misdirect themselves.
54. She said that the UT were right to say (as they did in their decision at [73]-[75]) that whether one thing can be said to be incidental to another is a qualitative test which requires a consideration of the relationship between them. I agree, but here the FTT did not identify any relationship between the use of the Borgsten as accommodation for those working on the Dunbar and the other uses of the Borgsten save for the suggestion in [175] that although the former was of some importance, even important uses can be secondary to or less important than others. But this says nothing about the relationship between the two uses other than their relative significance, and as I have said this is not to my mind the correct question.
55. Ms Shaw said that there *was* a relationship between the use of the Borgsten as a TSV to provide TAD services and its use to provide accommodation for those working on the Dunbar, in that unless it had provided TAD services there would have been no-one working on the Dunbar at all. Both uses were directed at the same overall end: to enable the drilling campaign on the Dunbar to take place, first by preparing the Dunbar for drilling during the pre-drilling period and then by assisting during the drilling itself. That is no doubt true. But I do not see that it means that one use was incidental to the other. As Mr Ewart pointed out, the point is somewhat reminiscent of that made by Pennycuik V-C in *Robson v Dixon* at 1500A, where he said that it was tempting to say that all the duties of a pilot were incidental to the purpose of transporting passengers from one place to another but that that approach would not help as the question was whether particular duties were incidental to the performance of other particular duties (see paragraph 46(4) above). In the same way it is of no assistance to ask whether the

use of the Borgsten to provide TAD services and its use to provide accommodation were all incidental to the purpose of enabling the Dunbar drilling campaign; the question is whether the latter was incidental to the former.

56. Ms Shaw said that the use of the Borgsten for accommodating Total personnel was not necessarily essential. There was no finding by the FTT that the pre-drilling campaign needed as many as 80 workers on the Dunbar at any one time: this was a preference by Total in the interests of efficiency. The accommodation of any workers over the 60 who could be accommodated on the Dunbar was therefore more of a “nice-to-have” than a necessity.
57. I do not think this is an answer to the point. It may be that Total could have prepared the Dunbar for drilling and then operated it without any more than 60 workers on the Dunbar on any one day (although the FTT’s finding that even during the drilling phase there were on average some 60-70 personnel on the Dunbar (paragraph 23(4) above) suggests this is perhaps unlikely), but the fact is that Total chose to operate the Dunbar with more than 60 personnel working on it both during the pre-drilling phase and the drilling phase. Once they had made that decision, it was inevitable that some of them would have to be accommodated other than on the Dunbar, as the only alternative would have been to fly them in and out each day which would have plainly been quite impractical. Total therefore did need the extra accommodation. That is why Total stipulated in the invitation to tender that it required up to 40 places. And Total then agreed the Change Order increasing the accommodation to 120 berths, so as to have up to 65 berths available for Total personnel, and paid a substantial sum for the extra accommodation to be provided. It seems to me nothing to the point whether the drilling campaign could have been carried out differently and without using the Borgsten as accommodation – the fact is that Total chose to carry out the campaign in a particular way which meant that it did need the Borgsten as accommodation. I do not think in those circumstances this use can be characterised as just a “nice-to-have”.
58. Ms Shaw made other submissions but these were largely directed at specific points deployed in Mr Ewart’s skeleton argument. They do not affect the central argument developed by him orally, namely that use A is only incidental to use B if it has some link or connection with, or arises out of, use B.
59. That is sufficient to dispose of the appeal, but I mention a couple of other points that were touched on in argument.
60. First the statutory question is not of course whether the use of an asset to provide accommodation for offshore workers was in fact incidental to another use of the asset, but whether it is “reasonable to suppose” that its use to provide such accommodation “is unlikely to be more than incidental” to another use or other uses to which the asset “is likely to be put”. One of the questions raised in argument was when this statutory question has to be addressed: at what date does it have to be reasonable to suppose that one use is unlikely to be more than incidental to another? Mr Ewart’s answer was that this is to be addressed at the outset of the relevant accounting period. In the present case there were two accounting periods, one from 1 April 2014 to 31 December 2014, and the other from 1 January 2015 to 31 December 2015, so on this view the question would be posed as at 1 April 2014 and 1 January 2015. Ms Shaw’s preference was for the end of the relevant accounting period(s) and so in the present case 31 December 2014 and 31 December 2015. I do not think anything actually turns on this in the

present case, but I prefer Mr Ewart's answer. The wording requires an objective assessment of the likelihood of something being the case, and it seems to me more natural to read this as referring to an assessment at the outset of an accounting period of the likelihood that something would be the case in the future rather than an assessment at the end of an accounting period of the likelihood that something was the case in the past. This might make a difference in some cases, although I do not find it easy to envisage the circumstances in which it would, or to understand why the legislation is drafted that way. But here the contract was up and running, and the Borgsten had been in position alongside the Dunbar and providing services to it for over a year before the legislation applied, and there was no reason to suppose that it would not continue to carry on in accordance with the contract, which is indeed what it did. In those circumstances I do not see that there would have been any material difference between what would objectively have been thought likely to be the case in April 2014 (or January 2015), what would objectively have been thought likely to have been the case in December 2014 (or December 2015), and what actually happened.

61. The other point touched on in argument is this. As pointed out by Newey LJ, the FTT actually concluded in [176] that the use of the Borgsten to provide accommodation for Total personnel working on the Dunbar was unlikely to be more than incidental to:

“the use of the Borgsten to provide TAD services to the Dunbar and/or to accommodate [Dolphin] Personnel (who were working on the Borgsten).”

(see paragraph 32 above).

62. I have so far effectively addressed the question whether the use of the Borgsten to accommodate offshore workers was incidental to its use to provide TAD services to the Dunbar, rather than whether it was incidental to its use to provide accommodation for Dolphin personnel. But I do not see that the latter is any more promising for Dolphin. To use an example put by Newey LJ in argument, if a car park is provided for an office block and 30 spaces are reserved for the use of the main tenant, and 20 spaces for another tenant, the use of the car park for the latter is not incidental to the use of the car park for the former even though the latter is clearly not the primary use. It is a significant independent use in itself, unconnected with the use of the car park for the main tenant. In the same way the use of the Borgsten to provide accommodation for the Total personnel working on the Dunbar does not seem to me to have been incidental to its use to provide accommodation for the Dolphin personnel working on the Borgsten.

Conclusion

63. I would uphold Ground 1 of the appeal, on the basis that the FTT misdirected themselves (and the UT failed to allow an appeal as they should have done). It was in my judgement not reasonable to suppose that the use of the Borgsten to accommodate those working on the Dunbar was likely to be no more than incidental to the other uses to which it was likely to be put. That means that s. 356LA(3) CTA 2010 does not apply, and since the Borgsten, being a structure that could be used to accommodate offshore workers, otherwise satisfied the test in s. 356LA(2)(b)(ii) (and the other requirements of s. 356LA), it was a relevant asset as defined in s. 356LA, and the hire cap applied for the accounting periods in question.

64. I have in effect touched on Grounds 2 and 3 in passing and I do not think it is necessary to say anything further about them.
65. I would allow the appeal accordingly.

Lord Justice Newey:

66. I agree.

Lord Justice Peter Jackson:

67. I also agree.