Neutral Citation Number: [2018] EWCA Civ 2210

Case No: A3/2016/3101

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL (TAX AND CHANCERY CHAMBER)
HENDERSON J AND TRIBUNAL JUDGE BERNER
[2016] UKUT 0259 (TCC)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 09/10/2018

Before:

LADY JUSTICE GLOSTER
LORD JUSTICE FLAUX
and
LORD JUSTICE LEGGATT

Between:

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS ("HMRC")	**Appellants**
LONDON CLUBS MANAGEMENT LIMITED	**Respondent**

George Peretz QC and Elizabeth Wilson (instructed by the **General Counsel and Solicitor to the Revenue and Customs**) for the **Appellants**
Andrew Hitchmough QC and Barbara Belgrano (instructed by **BDO LLP**) for the **Respondent**

Hearing date: 20 March 2018

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Judgment Approved by the court for handing down

Lady Justice Gloster:

Introduction

1. This is an appeal by The Commissioners for Her Majesty's Revenue and Customs ("HMRC") against the decision of the Upper Tribunal, Tax and Chancery Chamber (Henderson J and Judge Berner) ("the UT"), released on 2 June 2016 ("the judgment")[1] allowing the appeal of London Clubs Management Limited ("LCM") against the decision of the First-tier Tribunal (Judge Sinfield) ("the FTT"), released on 27 November 2014 ("the FTT judgment")[2].

2. The case raises an important point of principle concerning gaming duty, namely the interpretation of section 11(10)(a) of the Finance Act 1997 ("FA 1997"). The issue in the appeal is the pure point of law as to whether a player who places a bet in one of LCM's casinos using either a free bet voucher, or a non-negotiable chip (referred to collectively, both in this judgment and by the UT, as "Non-Negs"), has staked "value, in money or money's worth" with the casino, within the meaning of section 11(10)(a) of the FA 1997. This issue is relevant to LCM's liability to gaming duty in respect of Non-Negs that are lost to (or otherwise retained by) LCM as banker.

3. The UT held that the "value, in money or money's worth", staked by a player staking a Non-Neg, was nil. This was on the grounds that:

> "…both the legislation itself and the authorities support the argument that the value of the stake staked is the amount which is put at risk by the player when staking the stake. That amount is the real amount of money or money's worth that is risked in the game". See [26] of the judgment.

The UT's reasoning was, in essence, that since the Non-Negs (unlike ordinary cash chips) did not represent money deposited with the casino, could not be redeemed for goods or services to a monetary value, and could not be assigned for value, the value put at risk when staking a Non-Neg was zero: see [35] of the judgment. Accordingly, the UT reversed the decision of the FTT which had concluded at [29], that the objectively ascertained value, for the purpose of section 11(10)(a), of a chip staked as a stake in a casino game was the face value of the chip, and that it was irrelevant whether a stake staked was given to the player free of charge.

4. Since gaming duty is (in essence) assessed on the difference between total stakes and total prizes, the effect of the UT's ruling is to reduce the gaming duty payable by casinos. The point of principle therefore affects all UK casinos that offer Non-Negs to gamblers to induce them to gamble in their casinos.

5. The court was informed that the practice of offering Non-Negs is sufficiently widespread for a total of at least £11.1 million in tax to be known to be at stake in relation to past periods as a direct result of the UT's decision. We were also informed that, if the decision stands, there will be substantial implications for tax collection in future, not least because the favourable tax treatment of Non-Negs as a result of the

[1] [2016] UKUT 0259 (TCC).
[2] [2014] UKFTT TC/2013/02728.

judgment will encourage casinos to offer Non-Negs in place of other types of rewards and inducements (such as the use of cash inducements, as discussed below).

The factual background

6. There was no dispute about the facts. They are summarised at [3] – [10] in the FTT judgment which the UT also explicitly adopted in its judgment. In order that this judgment may be self-standing, I quote the UT's summary as it appeared at [3] – [8] of its judgment:

> "The facts
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> 3. The facts can be shortly stated. There was no dispute in that respect in the FTT, and the FTT summarised the position at [3] to [10] of its decision.
>
> 4. As a promotional tool, LCM provides selected customers with a range of means of placing bets free of charge. Those means, non-negotiable chips and certain vouchers collectively called free bet vouchers, are described by the FTT at [6] to [10]. There are certain differences between them, but it was not suggested that those were material to distinguish one from another for the purpose of this appeal.
>
> 5. As the FTT described the position at [6] to [7], non-negotiable chips are similar to normal cash gaming chips ("cash chips") which are either purchased for cash at the gaming tables or won by customers on a winning bet. Non-negotiable chips are used to place bets at the gaming tables in the same way as cash chips. Like cash chips they are replayable until lost. If a player places a bet with non-negotiable chips and wins, the banker pays out the winnings in cash chips and the player retains the non-negotiable chips to place further bets. When such a player loses, the banker takes the non-negotiable chips and places them in the table's "drop box" as the FTT described at [7].
>
> 6. Whilst non-negotiable chips are similar to cash chips, there are differences. First, of course, the non-negotiable chips are not purchased for cash, but are provided free of charge. Secondly, a non-negotiable chip can only be used to place a bet at the gaming tables; unlike a cash chip it cannot be encashed or used to pay for goods and services. Thirdly, there are certain physical differences which enable a non-negotiable chip to be distinguished from a cash chip.
>
> 7. Apart from "free gaming chips vouchers", which are exchangeable for non-negotiable chips at the casino's cash desk without charge, free bet vouchers are similar to non-negotiable chips in that they may be used to place a bet at the tables. "Free play vouchers" and "replayable vouchers", whilst subject to

> terms and conditions such as in relation to the games capable of being played, the types of bet and what prizes might be won, are the same, in playing terms, as non-negotiable chips, the only difference being the use of the voucher instead of a chip. Other free bet vouchers, namely "one-hit" vouchers and "cash match" vouchers are different in that, unlike the non-negotiable chips, they may not be replayed even after a winning bet. Those vouchers are placed in the drop box irrespective of whether the bet with them has won or lost.
>
> 8. We refer, as did the FTT, to the non-negotiable chips and free bet vouchers collectively as "Non-Negs". Although it was not argued that there should be any distinction drawn between them, we should just interpose at this stage that it did not appear to us that the free gaming chips vouchers should have been included in the same category as other Non-Negs. As we shall describe, the relevant element of the banker's profits by reference to which the charge to gaming duty arises requires the value of the "stakes staked" to be taken into account. In contrast to the other Non-Negs, free gaming chips vouchers are not used in the game itself, nor do they end up in the drop box; it is the non-negotiable chips into which those vouchers may be exchanged which are used in the game and which, on a losing bet, are placed in the drop box."

The relevant statutory provisions

7. Gaming duty is an excise duty that was introduced with effect from 1 October 1997. So far as material, section 10(1) of the FA 1997 provides:

> "… a duty of excise (to be known as 'gaming duty') shall be charged in accordance with section 11 below on any premises in the United Kingdom where gaming to which this section applies ('dutiable gaming') takes place on or after [1 October 1997]."

8. Until 27 April 2009, section 10(2) provided:

> "(2) … this section applies to gaming by way of any of the following games, that is to say, baccarat, punto banco, big six, blackjack, boule, casino stud poker, chemin de fer, chuck-a-luck, craps, crown and anchor, faro, faro bank, hazard, poker dice, pontoon, French roulette, American roulette, super pan 9, trente et quarante, vingt-et-un, and wheel of fortune."

9. With effect from 27 April 2009, instead of listing the relevant games by name, section 144(3) of the Finance Act 2009 amended section 10(2) of the FA 1997 to provide:

> "Subject as follows, this section applies to—
>
> (a) casino games, and

(b) equal chance gaming."

"Casino games" are defined by section 15(3) as "games of chance which are not equal chance gaming"; and "equal chance" is defined as:

> "gaming which does not involve playing or staking against a bank (however described, and whether or not controlled or administered by a player) and in which the chances are equally favourable to all participants …".

The claim period in this case spans the change in legislation but nothing turns on the changed terms. It is not in dispute that the gaming at issue in this appeal is within the scope of section 10 and is dutiable gaming.

10. Section 11 of the FA 1997 sets out the rate of gaming duty. It is not necessary to set out the rates, which are subject to change, but section 11 otherwise relevantly provides:

> "(1) Gaming duty shall be charged on premises for every accounting period which contains a time when dutiable gaming takes place on those premises.
>
> (2) … the amount of gaming duty which is charged on any premises for any accounting period shall be calculated, in accordance with the following Table, by—
>
> (a) applying the rates specified in that Table to the parts so specified of **the gross gaming yield** in that period from the premises; and (b) aggregating the results.
>
> [Table not reproduced]
>
> (8) For the purposes of this section **the gross gaming yield** from any premises in any accounting period shall consist of the aggregate of—
>
> (a) **the gaming receipts for that period** from those premises; and
>
> (b) where a provider of the premises (or a person acting on his behalf) is banker in relation to any dutiable gaming taking place on those premises in that period, **the banker's profits for that period from that gaming.**
>
> (9) For the purposes of subsection (8) above the gaming receipts for an accounting period from any premises are the receipts in that period from charges made in connection with any dutiable gaming which has taken place on the premises other than—

11.

(a)

. . . . . .

(b) any charge the payment of which confers no more than an entitlement to admission to the premises.…

(10) In subsection (8) above **the reference to the banker's profits from any gaming is a reference to the amount (if any) by which the value specified in paragraph (a) below exceeds the value specified in paragraph (b) below, that is to say—**

(a) the value, in money or money's worth, of the stakes staked with the banker in any such gaming; and

(b) the value of the prizes provided by the banker to those taking part in such gaming otherwise than on behalf of a provider of the premises.

(10A) Subsections (2) to (6)(a) of section 20 of the Betting and Gaming Duties Act 1981 (expenditure on bingo winnings: valuation of prizes) apply, with any necessary modifications, for the purposes of gaming duty as they apply for the purposes of bingo duty."

[My emphasis.]

12. The issue in this appeal is what "value" (if any) should be ascribed to the Non-Negs pursuant to section 11(10) of the FA 1997 once they are staked and lost.

13. Reference was also made in the parties' arguments and in the judgments below to section 20 of the Betting and Gaming Duties Act 1981 ("BGDA 1981").

"**Expenditure on bingo winnings**

(1) A person's expenditure on bingo winnings for an accounting period is the aggregate of the values of prizes provided by him in that period by way of winnings at bingo promoted by him.

(2) Where a prize is obtained by the promoter from a person not connected with him, the cost to the promoter shall be treated as the value of the prize for the purpose of subsection (1).

(3) Where a prize is a voucher which—

(a) may be used in place of money as whole or partial payment for benefits of a specified kind obtained from a specified person,

(b) specifies an amount as the sum or maximum sum in place of which the voucher may be used, and

(c) does not fall within subsection (2),

the specified amount is the value of the voucher for the purpose of subsection (1).

(4) Where a prize is a voucher (whether or not it falls within subsection (2)) it shall be treated as having no value for the purpose of subsection (1) if—

(a) it does not satisfy subsection (3)(a) and (b), or

(b) its use as described in subsection (3)(a) is subject to a specified restriction, condition or limitation which may make the value of the voucher to the recipient significantly less than the amount mentioned in subsection (3)(b).

(5) In the case of a prize which—

(a) is neither money nor a voucher, and

(b) does not fall within subsection (2),

the value of the prize for the purpose of subsection (1) is—

(i) the amount which the prize would cost the promoter if obtained from a person not connected with him, or

(ii) where no amount can reasonably be determined in accordance with sub-paragraph (i), nil.

(6) For the purpose of this section—

(a)a reference to connection between two persons shall be construed in accordance with **[**section 1122 of the Corporation Tax Act 2010**]** (connected persons), and

(b)an amount paid by way of value added tax on the acquisition of a thing shall be treated as part of its cost (irrespective of whether or not the amount is taken into account for the purpose of a credit or refund).**]**"

The judgments below

The FTT's decision

14. In summary, the FTT held that the value of the Non-Negs for the purposes of section 11(10) of the FA 1997 was their face-value. It rejected the argument put forward by LCM that the Non-Negs did not have any value in money or money's worth within the meaning of section 11(10)(a) of the FA 1997 because the player did not pay for the Non-Neg and did not risk anything of value when he played the Non-Neg.

15. The FTT considered two particular authorities: *Lipkin Gorman (a firm) v Karpnale Ltd* [1991] 2 AC 548 and *Aspinalls Club Ltd v Revenue and Customs Commissioners*, both in the Upper Tribunal, [2012] STC 2124, and in the Court of Appeal, [2014] STC 602.

16. In the present case, the FTT concluded that the objectively ascertained value, for the purpose of s 11(10)(a), of a chip staked as a stake in a casino game was the face value of the chip, and that it was irrelevant whether a stake staked was given to the player free of charge. The value of the Non-Negs was not determined by whether the player himself had deposited any money, or by any other agreement or circumstances. It was irrelevant that the chips were given to the players free of charge. The FTT held that this was what Briggs J meant in *Aspinalls* when he held that:

> "the value concept in section 11(10)(a) assumes an objective ascertainment of value, rather than one derived either from a perception of value to the player, or value to the banker";

see the judgment of the UT in *Aspinalls* at [35]. The FTT did not consider that Moses LJ in the Court of Appeal in *Aspinalls* was applying anything other than a similarly objective assessment of value when he held at [8] that:

> "The value in money or money's worth of the stakes staked is the face value of the chip. Staking a chip is the same as staking money and the value in money of the chip is its face value […] The stake is the amount risked in connection with the game; it is the value of that stake which is put at risk in the game. The value put at risk in the game is not altered by reference to any commission the player receives under the cash chip agreement."

17. The FTT also held that it was not possible to interpret section 11(10) of the FA 1997 by reference to provisions in other statutes relating to other duties, without an express provision authorising such a cross-referencing: see [35]. The "other" statute in question was the BGDA 1981, in which free bets are expressly excluded for the purposes of calculating remote gaming duty.

18. Accordingly, the FTT accepted HMRC's arguments and dismissed LCM's appeal.

The UT judgment

19. In summary, the UT allowed LCM's appeal from the decision of the FTT. It held that the legislation itself, as well as *Lipkin Gorman* and *Aspinalls*, supported the argument that the value was the amount put at risk by the player when staking the stake; thus the value, in the view of the UT, was the real amount of money risked in the game, and not a notional amount represented by the face-value of the stake: see [26].

Accordingly the UT concluded that the FTT erred in law and failed to have proper regard to the requirement that the value in section 11(10)(a) must be a value in money or money's worth: see [35].

20. The reasoning of the UT was that the authorities clearly demonstrated that gambling with a cash chip was not gambling with the chip itself, but in substance gambling with money; but as far as Non-Negs were concerned, no money was deposited for the chip or voucher: see [27]. The UT held that HMRC's argument based on the analysis in *Aspinalls* pushed that case too far. In its view, the reason why, in *Aspinalls*, the value of the stake was not affected by the commission paid to the players was because the court focussed on the money staked in the game, rather than any adjustments outside the game (i.e. the commission). But, in the UT's view, *Aspinalls* was not authority for the proposition that the value of a stake was purely its numerical value and not the money's worth represented by the stake; the assessment of value had to have regard to the economic substance underlying the stake; in *Aspinalls*, the economic substance underlying the stake matched its face-value: see [28]. In particular, the UT relied upon the fact that when, in *Aspinalls*, Moses LJ and Briggs J held that the value of a chip was its face-value, they were speaking in the context of a cash chip.

21. The UT concluded that its understanding of *Aspinalls* was not inconsistent with an objective ascertainment of value. It was right that value should not be derived from a subjective perception of value to either the player or the banker. However, the UT concluded that focussing on the economic substance of a stake was not to assess value by way of such a perception; an objective assessment of value must have regard to the observable economic features of the relevant circumstances: see [31]. Any valuable right that a player using a Non-Neg might have, in that the player could play without putting his own money at risk, was not material to an objective valuation of the stake staked: see [33]. There was also no evidence that the Non-Negs were assignable for money or money's worth to third parties: see [34].

22. Accordingly, in allowing LCM's appeal, the UT held that when Non-Negs were staked as stakes in a casino game "the value, in money or money's worth, of the stakes staked with the banker in [the] gaming" was nil, even though Non-Negs were treated as having their face value for all the purposes of the game, including, in particular, for the purposes of determining whether the player had won a prize and how much that prize was.

23. In the course of its decision, the UT also expressed its expressly non-binding view that where the Non-Neg was "provided" to the gambler as a "prize" to be staked again for more cash chips at the odds offered, the value of the "prize provided" was also nil, by virtue of the operation of section 20(3) and (4) of the BGDA 1981. In expressing that *obiter* view, the UT recognised that it would be unattractive, for the purposes of gaming duty, for Non-Negs to have a nil value when deployed as a stake but to be treated as having their face value when awarded as prizes. The UT's conclusion (i.e. that Non-Negs had a nil value as a prize for the purposes of section 20(4) of the BGDA 1981) is contrary to HMRC's settled published practice in relation to that section.

24. Accordingly the UT allowed LCM's appeal, set aside the decision of the FTT, quashed the decision of HMRC refusing LCM's claim under s 137A of the Customs and Excise Management Act 1979 and allowed that claim accordingly.

Permission to appeal

25. Permission to appeal was granted by Patten LJ on 23 November 2016 who expressed his reasons for giving leave as follows:

> "(i) Although the meaning and effect of section 11(10)(a) FA was considered by the Court of Appeal in *Aspinalls*, that was in the context of a collateral incentive scheme which did not alter the fact that the casino customer was using chips which had a negotiable value equal to the face value of each chip. The customer was therefore putting that amount at risk in placing his bet and the reference by Moses LJ to the value in the money of the chip being its face value has to be read in that context.
>
> (ii) The present appeal raises the question of valuation in a different context; that of a free or non-negotiable chip which is obtained at no cost to the customer; has no redeemable value; but if used to place a successful bet will be honoured at its face value. Given that the Upper Tribunal thought fit to express a view also about section 11(10)(b) and section 20(3) of the Betting and Gaming Duties Act 1981 ("BGDA 1981"), it seems to me important that these points should be considered collectively by the Court of Appeal."

Grounds of appeal

26. HMRC's grounds of appeal were as follows:

i) The UT erred in law by misconstruing section 11(10)(a) of the FA 1997, and misapplying *Lipkin Gorman* and *Aspinalls*. The UT wrongly held that the value of the Non-Neg was the encashment value of the stake staked at the cash desk after the game had been played (which was agreed to be nil), rather than the cash or monetary value of the stake staked.

ii) The UT also erred in law by misconstruing sections 20(3) and (4) of the BGDA 1981, which led it to misapply section 11(10)(b) of the FA 1997.

Submissions of the parties
HMRC's submissions

27. Mr George Peretz QC and Miss Elizabeth Wilson, on behalf of HMRC, submitted as follows:

Ground 1: The UT misconstrued section 11(10)(a) of the FA 1997

i) The starting point had to be the legislation. As a matter of ordinary language, the focus was on a "stake" as a "stake." What mattered was the value of the amount played in the game, not the value of the stake to the player. That was emphasised by the repetition of stake in "stake staked" i.e. the value of a stake was simply the stake staked in the casino game, which was its face-value. That reading of the statute was consistent with the purpose of the provision which was to 'enable a straightforward numerical calculation' of the banker's profits.

ii) The critical wording was "…*in money or money's worth*". This could be demonstrated by the example of the value of a diamond necklace. "In money's worth" reflected the fact that a gambler might stake something of uncertain value, such as a diamond necklace. Its open market value would be uncertain. However, section 11(10) dealt with this possibility by treating the value of that stake as the value that the stake was given in the game. If the banker treated the stake as £10,000, then the value of the stake would £10,000. If he treated it as £15,000, it would be £15,000. It did not matter what the open market value of the necklace might otherwise be. A valuation of the stake in this way created certainty. Likewise it would be wrong to argue that the value of the Non-Negs was *really* zero. The UT's decision did not provide an answer to this diamond necklace example. The UT was wrong to hold that the value of a stake was its encashment value.

iii) The economic substance of the stake lay in looking at the face-value of the stake, staked in the game. Stakes with Non-Negs were treated in exactly the same way, and given the same chance of winning a prize, as cash or ordinary chips with the same face value. When players won with Non-Negs, they were entitled to the same economic benefits as if they had played a cash chip. In the real world, Non-Negs had an economic value, as the UT recognised. That was either the face value as with an ordinary cash chip or the economic value of the chance of winning with the chip. It would be unrealistic to value the Non-Neg at zero merely because it had no encashment value. On the correct interpretation of the statute, it was clear that the statutory intention was that face value was the correct value.

iv) The UT misapplied the Court of Appeal's decision in *Aspinalls*. 'The amount risked in connection with the game' referred to the stake staked, not the value of the stake to the player. The payment of commission to the players did not affect the value of the stakes, because commission went instead to the value risked by the player. This meant that, as a matter of principle, the risk to the player's pocket was simply irrelevant in the game. *Aspinalls* showed that the correct approach was to focus on the value of the stake as against the banker in the game. HMRC also placed reliance on Briggs J in *Aspinalls* when he took the view that if one player gave a cash chip to another player (say £50), the value of that chip when used by that other player would be its face-value (£50), not zero as the respondents might contend, on the basis that no money has come out of that player's pocket: see the judgment of the UT in *Aspinalls* at [31].

Ground 2: The UT misconstrued sections 20(3) and (4) of the BGDA 1981

v) As a matter of ordinary language, it was clear that a Non-Neg might be used in place of money as payment for 'benefits of a specified kind.' In the game, a Non-Neg was as good as cash. Whether a player won or lost, he was in exactly the same position as if he had played with his own cash.

vi) The UT appeared to have held at [50] that Non-Negs were subject to a 'specified restriction' under section 20(4) of the BGDA 1981, on the basis that a Non-Neg could only be used in the same manner as any other Non-Neg. However, if HMRC's understanding were correct, the UT had simply restated

the fact that a Non-Neg was a voucher which could not be sufficient to engage section 20(4)(b). Section 20(4)(b) had to be read as applying only where there was a restriction over and above the fact that the voucher could only be used to obtain benefits of a specified kind (e.g. that a voucher can only be used on certain times and dates.) HMRC's case was that under the BGDA 1981 prizes/ winnings should be valued at face value.

Respondent/LCM's submissions

28. Mr Andrew Hitchmough QC and Ms Barbara Belgrano, counsel on behalf of the respondent, LCM, submitted as follows:

Ground 1: The UT misconstrued section 11(10)(a) FA 1997

i) The approach of the UT not only accorded with the most natural meaning of the statutory language, but also with House of Lords authority in *Lipkin Gorman*. The statutory words "value, in money or money's worth" clearly showed that a real world evaluation of the stake staked was required. As Briggs J, after referring to *Lipkin Gorman*, stated in *Aspinalls* at [35]:

> "gambling with chips is not merely gambling <u>for</u> money but, in substance, <u>with</u> money".

ii) HMRC's diamond necklace example was misconceived. The value of the necklace would be a matter of agreement between the player and the casino before it was staked. That meant that, practically speaking, the necklace would be exchanged for cash chips which would then be used in the casino just like any other cash chips. The player would therefore be staking real money which would match the face-value of the chips. Non-Negs, however, were a different kettle of fish.

iii) The UT's assessment of *Aspinalls* could not be faulted. Moses LJ clearly had in mind a real-world valuation exercise when he referred to the value put at risk in the game. It was nonsense for HMRC to say that, in substance, staking a Non-Neg was the same as staking money.

iv) Whilst permission to appeal was granted by Patten LJ inter alia on the grounds that *Aspinalls CA* raised the question of valuation in a different context, there was no reason why the present context should lead to a different approach to valuation. The decision of the UT was wholly consistent with both *Lipkin Gorman* and *Aspinalls*. The UT's approach was also consistent with the common ground in *Lydiashourne* (VAT & Duties Tribunal Decision E00092 of 13 August 1998, upheld on appeal by the High Court (Lloyd J) [2000] V & DR 127.) The UT stated at [42] that it had derived no assistance from *Lydiashourne*, but noted that its own conclusion was nevertheless consistent with it. In *Lydiashourne*, the issue was whether forged bank drafts had been accepted by the casino as absolute payment for the gaming chips for which they had been exchanged. If they had been, as the forged drafts were inherently worthless, it was common ground that the chips for which they had

been exchanged were equally worthless (irrespective of their face-value.) The Tribunal recorded:

> "…if the forged cheques were accepted in absolute satisfaction of any initial loan which was thereby extinguished then no value was in fact given for the issue of the chips and they did not constitute stakes for money's worth."

HMRC had not explained why it considered that the approach it itself adopted in *Lydiashourne* was now wrong.

v) Finally, there was no error in focussing on the consequences to the player's pocket. That was consistent with assessing the 'value, in money or money's worth.' Whilst HMRC was correct to say that the player's pocket lost nothing in the case of Non-Negs, it was wrong to say that the player's pocket lost nothing in the case of cash chips given free of charge. Cash chips were cash equivalents; they could be used to pay for food and drink, for example. The same could not be done with Non-Negs. If a player lost a £100 cash chip bet, that player had lost £100 in a very real sense.

Ground 2: The UT misconstrued sections 20(3) and (4) of the BGDA 1981

vi) The UT's reasoning could not be faulted. As no payment was required for an original Non-Neg, there could have been be no payment in money for which the Non-Neg could replace. It was also wrong to argue that a stake was a 'payment' for a 'benefit'; a stake was simply a sum which a player was willing to risk. The UT was correct to recognise that a Non-Neg could only be used as a stake.

Discussion and determination

29. In my judgment HMRC's appeal should be dismissed. My reasons may be summarised as follows.

30. The first critical point is that the relevant words have to be construed in their real-world, practical context – not in an artificial world of possible, or philosophical, interpretations of the words "*value"* or "*money's worth".* What has to be ascertained for the purposes of working out the amount of gaming duty under section 11 of the FA 1997 is the *gross gaming yield* from any premises (see section 11(2)(a)), which consists of:

i) the *gaming receipts* from those premises for the relevant period (i.e. in respect of charges made in connection with gaming on the premises); and

ii) the *banker's profits* for that period in respect of dutiable gaming taking place on those premises; see section 11(8) of the FA 1997.

In the context of section 11(8), therefore, one is looking to ascertain a real- world *gross gaming yield,* whether comprising receipts from charges made by the casino or banker's profits. Likewise, in the context of section 11(10) (agreed to be the relevant sub-section here), the purpose of the provision as a whole is clearly to charge duty on the *profits* of a casino in its role as banker. Profits are measured by the difference

between "the value, in money or money's worth, of the stakes staked with the banker in any such gaming" (see section 11(10)(a)), and "the value, in money or money's worth, of the prizes paid by the banker to those taking part in such gaming otherwise than on behalf of a provider of the premises," (see section 11(10)(b)). The calculation of *stakes staked* under section 11(10)(b)), to my mind, in context, involves a conventional arithmetical calculation of real-world stakes received from players, which, if necessary, could feature as actual receipt or revenue figures in a set of accounts; it does not – on any natural reading - include artificial or notional values placed on tokens *given to the player* by the casino, as part of a promotional or marketing exercise, which intrinsically have no value and are non-negotiable, or at best have an economic value to the player equivalent to their face-value multiplied by the chances of winning. In real terms, when the casino gives out Non-Negs to favoured players, it is allowing the player to bet with its (the casino's) own money. There is no receipt by the casino contributing to its gross profits; on the contrary, in permitting the player to gamble with a Non-Neg, what the casino is actually doing is incurring a contingent (non-enforceable) liability to pay out, according to the relevant odds of the game, in respect of the face-value of the Non-Neg in the event that the chip is placed as a winning bet. It is, in my judgment, counter-intuitive in such circumstances to characterise what is essentially an item of the casino's own expenditure as part of the *banker's profits* or as a *stake* having a value in money or money's worth. In no sense could the face value of a Non-Neg, or even the value to the player calculated by reference to the chances of winning, feature as a *receipt* in a casino's accounts or be said to contribute to its gross profits.

31. For that reason taken on its own, I would not regard a Non-Neg as being a *stake* which was required to be taken into account in the calculation of *gross gaming yield* as defined under section 11(8) or of *banker's profits* as referred to or defined under section 11(8)(b)) or section 11(10). In particular, I do not consider that the amplified definition of *banker's profits* in section 11(10) requires one artificially to include the Non-Negs (which are clearly not items of receipt directly contributing to profit, but rather items of expenditure) in the statutory profit calculation. In other words, in construing the relevant provisions one has to have regard to the relevant context. Although the phrase in section 11(10)(a) *the stakes staked with the banker* could arguably be said, linguistically, to be broad enough to include a Non-Neg (simply because a Non-Neg chip is placed on the gaming table by a favoured recipient as a stake), in my judgment, the phrase, construed in its actual context – i.e. the ascertainment of *gross gaming yield* and *banker's profits* - does not permit the artificial inclusion, as an item of *stake* under section 11(10)(a), of an amount of the casino's promotional marketing *expenditure* given to the player by the casino. Only in the most general and indirect sense could such a "stake" be said to be contributing to profit; and it could not be said in any real sense to constitute part of the *gross gaming yield* of the casino.

32. However, if I am wrong in this approach, and one has to characterise a Non-Neg as a *stake,* the reasoning which I have set out above also persuades me that such a stake has no objective value in money or money's worth. I agree with the UT that the dicta in the relevant cases such as *Aspinalls Club Ltd v Revenue and Customs Commissioners*, both in the Upper Tribunal at [2012] STC 2124, and in the Court of Appeal at [2014] STC 602 and *Lipkin Gorman* support this analysis and, in particular,

that, contrary to the submissions of Mr Peretz QC, on behalf of HMRC, the decision of this court in *Aspinalls* does not require us to reach a different result.

33. In *Aspinalls* the club paid certain wealthy players, whom it wished to encourage, a commission, calculated by reference to the value of the chips that had been staked by those players during a prescribed period. Unlike in the present case, the chips in question had been purchased by the players concerned for a sum equal to their full face value and, unless and until lost, could have been exchanged back into that same sum. In other words, they were no different from ordinary cash chips. As its primary argument, Aspinalls contended that the commission paid under the separate commission agreements reduced the overall value of the stakes staked with it during the period, and thus likewise reduced its "banker's profits" for that period. Aspinalls' argument was rejected both by the UT and by this court. Moses LJ (with whom Black LJ and I agreed) held at [8] that:

> "8. But I reject the argument. Section 11(10)(a) is clear. **The value in money or money's worth of the stakes staked is the face value of the chip. Staking a chip is the same as staking money and the value in money of the chip is its face value** (see Davis LJ in *CHT Limited v Ward* [1965] 2 QB 63,79 and Lord Goff in *Lipkin Gorman v Karpnale Limited* [1992] 2 AC 548 (HL) 575 cited at FTT [30], and UT [35]). **The stake is the amount risked in connection with the game; it is the value of that stake which is put at risk in the game.** The value put at risk in the game is not altered by reference to any commission the player receives under the Cash Chip Agreement.
>
> 9. Mr Hitchmough sought to make good his argument by deployment of the reference in s.11(8) to "banker's profits". The concept of profit itself, so he submitted, contemplates the deduction of that which it cost to earn those profits; in short, the expression is a reference to what Mr Hitchmough called the underlying economic reality.
>
> 10. I accept that it is easy, when seeking to construe a statutory expression in its proper context, to overlook the impact of the particular expression or words used by the draughtsman. "If the terms of the definition are ambiguous, the choice of the term to be defined may throw some light on what they mean" (Lord Hoffmann in *Macdonald v Dextra Accessories Limited* [2005] AC 1111 [18]).
>
> 11. But there is no ambiguity in the definition of "banker's profits". "The value, in money or money's worth, of the stakes staked" means what it says: it is the value of the chips risked in the relevant charging period." [My emphasis]

Accordingly, as the UT in this case recognised at [29], the reason:

> "why Aspinalls did not succeed was that the economic risk had to be measured by reference to the stake staked in the game and not by reference to anything else, such as the Cash Chip Agreement".

34. In *Aspinalls* the chips in issue were no different from ordinary cash chips, and therefore it is easy to see why Moses LJ said that "staking a chip is the same as staking money…" (also referring to the commentary of Lord Goff in *Lipkin Gorman*). But in doing so, and referring to the "value put at risk in the game", Moses LJ had in mind, in my judgment, a real-world (economic) value, objectively assessed, as opposed to a subjective value viewed from the perspective of the casino or the player, who, in assessing the economic value of the chip for their respective own purposes, might well take into account the value of the commission agreement.

35. A similar approach was adopted by Briggs J in *Aspinalls* in the UT at [35] – [37] where he said:

> "35. In my judgment the value, in money or money's worth of the stakes staked with the banker in any casino game using chips is nothing more nor less than the face value of the chip. I agree that the starting point is the need to recognise, as reflected in the Lipkin Gorman case, that gambling with chips is not merely gambling for money but, in substance, with money. **A chip is a form of private legal tender carrying the casino's promise that, when presented at the desk at the end of a session, it will be exchanged for cash (or other monetary credit) in the amount stated on its face. It is in my view nothing to the point that, pursuant to an agreement with the casino operator who is also the banker, the player may in due course receive an additional payment or credit as the result of having staked that chip.** This is not primarily because the agreement with the casino is "collateral" or even because (as Ms Wilson submitted) it is an agreement separate and distinct from the rules of the game applicable to all those players who gamble at casinos using chips. **My reason for concluding that the Cash Chips Agreement is irrelevant is that the value concept in s.11(10)(a) assumes an objective ascertainment of value, rather than one derived either from a perception of value to the player, or value to the banker**. If, in substance, staking a chip is the same as staking money, then the value in money of the chip must be its face value. To the extent that Ms Wilson's rules of the game are the origin for treating a chip as tantamount to money, then I agree with her submission, but no further.
>
> 36. I recognise the force of Mr Hitchmough's submission that mere considerations of simplicity should not lightly prevail over an interpretation of the formula for calculating a profit which makes sense in economic terms. Furthermore, the fact that gaming duty is an excise duty based upon the quantification of the gross gaming yield from premises does not

> seriously detract from the force of the point that the relevant constituent of that yield in the present context is the banker's profit. Indeed I regard that point as the most persuasive of Mr Hitchmough's submissions towards an outcome contrary to that which I consider to be correct.
>
> 37. There is I consider some force in Ms Wilson's further submission that the commission derived from the Cash Chip Agreement is the fruit of an agreement with the casino so that, although the casino and the banker are for present purposes necessarily the same person, it is not an agreement with the banker "qua banker" and therefore not relevant to the banker's profit. It is part of the cost incurred by the casino operator (i.e. the provider of the premises) for providing incentives to high value players to come and gamble large sums of money, but does not go to reduce the monetary value of the chips gambled, any more than if the casino permitted gambling with cash rather than chips." [My emphasis]

36. Although, of course, the face value of a Non-Neg is the amount used in calculating winnings or the value of the prize that the player making the stake receives if successful, Non-Negs are clearly not "the same as money" in the sense that cash chips are. Thus a Non-Neg is not, in Briggs J's words:

> "a form of private legal tender carrying the casino's promise that, when presented at the desk at the end of a session, it will be exchanged for cash (or other monetary credit) in the amount stated on its face."

On the contrary, a Non-Neg cannot be encashed in any circumstances or used for food, drink or services. A Non-Neg is not the same as cash. Moreover, the player is not gambling with his own money or putting his own money at risk. The only "promise" which the casino makes to the recipient of a Non-Neg is that, if the Non-Neg is placed on a winning bet:

i) the casino will pay out winnings calculated by reference to the face value of the Non-Neg; and

ii) will return the Non-Neg chip to that player so that he can bet with it again.

When the player loses the Non-Neg and it is placed in the casino's drop box, he is not losing cash, but merely the right to use that chip to place a bet on the table. Indeed, since in many, if not most, cases the Non-Neg will have been received by the player as a gift, it may well be questionable if, having provided no consideration to the casino, he has any enforceable right at all.

37. In such circumstances I see no justification for the artificial assumption that "an objective ascertainment of value, rather than one derived either from a perception of value to the player, or value to the banker" (as per Briggs J supra) of a Non-Neg leads to the conclusion that its face value is the objective value *in money or money's worth* for the purposes of section 11(10)(a). On the contrary, I agree with the analysis of the

UT in its judgment at [30] to [35] that, on an objective assessment of value, a Non-Neg can have no value *in money or money's worth* for the purposes of section 11(10)(a).

38. Thus at [32] to [35] the UT said:

> "32. It is important to have regard to what is required to be valued by s 11(10)(a). It is the "stake staked", and not the chip or voucher or anything else. For a cash chip, therefore, what is being valued is not the chip, but the money which is the real stake. That money is taken into account gross, without any deductions such as those at issue in *Aspinalls*. Likewise, a cash chip which is given by the player who has deposited the cash represented by it to another player, and which can be redeemed for money, represents that money when it is staked on a game. It is the same if what is provided free of charge to a player is something which, whilst not representing a deposit of money, nonetheless has a value in money by being redeemable for money or in money's worth by being redeemable for goods or services to a monetary value.
>
> 33. We do not regard as anything to the point that the Non-Neg might provide the player with a right to play a game, or a right to have the chance to win, or a promise from the club in those respects, which Ms Wilson argued was a valuable right. The mere fact that such a right might subjectively be regarded by the holder of the Non- Neg as a valuable right, in the sense that it would enable that holder to play a game without putting money at risk, is not material to an objective valuation, in money or money's worth, of the stake staked.
>
> 34. On the other hand, the objective valuation of a stake would, in our view, have to have regard to the monetary value, if any, that could be obtained on an arm's length assignment to a third party of the right to place that stake, in the same way that it would if the Non-Neg was redeemable for cash or for goods and services. That would be money's worth for the purpose of s 11(10)(a). It was not, however, HMRC's case that the stakes of the Non-Negs should have any value other than the face value of the Non-Negs, and there were no findings of fact either that the Non-Negs were transferable or, if they were, what value might be realisable on a transfer. Furthermore as s 11(10)(a) requires the individual stake to be valued, there would have to be evidence of a value generally obtainable in a market in Non-Negs or evidence that a particular Non-Neg could have been, at the time it was staked, assigned for money or money's worth. In the absence of such evidence, it is not possible to ascribe any money's worth to the stake by reference to any assignable right.

> 35. It follows, in our judgment, that the FTT erred in law when it concluded, at [27], that the value, in money or money's worth, of a Non-Neg was its monetary face value, on the basis that the face value would be used to calculate winnings in cash chips and on a losing bet the player would no longer have the right to bet that monetary value for free. In our view, the FTT failed to have proper regard to the requirement that the value in s 11(10)(a) must be a value in money or money's worth. On the true construction of that provision, the stakes staked by the Non-Negs did not represent any money paid or deposited with LCM, nor did they have any value in money's worth by reason of being redeemable in money or for goods or services to a monetary value or, on the evidence, otherwise assignable for money or money's worth. Consequently, for the purpose of s 11(10)(a), the stakes staked by the Non-Negs have no value in money or money's worth."

I agree with this analysis. There was no evidence before the Tribunal to suggest that the Non-Negs had any value *in money or money's worth.*

39. Moreover, an additional point can be derived from Lord Goff's analysis in *Lipkin Gorman* at pages 575F – 577A of the hypothetical example of the use of chips in a department store. Although, as he states at 575F-H, in common sense terms those who gamble with chips are gambling with money, applying his analysis to the present case, the gift of a Non-Neg to a favoured player does not involve either a gift of cash to the player or the player exchanging his money up front for chips. In any real sense, he is not gambling with money. Moreover, unless it could be said that, in return for the receipt of the Non-Neg, the player had agreed to play at the relevant casino (or provided other consideration), he could not in any event have enforced the casino's promise to pay winnings on a successful bet by reference to the face-value of the Non-Neg, since he would not have provided valuable consideration for the gift. Those circumstances support the analysis that a Non-Neg has no objective value in money or money's worth.

40. I should say that I found no assistance in Mr Peretz's example of a diamond necklace. As the UT stated at [27], the expression "money or money's worth" is "one that is commonly used to mean either a value in money or in something else that may be converted into money" - such as HMRC's diamond necklace. In other words, the language used ensures that gaming duty will apply whether the stake takes the form of money itself, or some other valuable commodity. Moreover, as Mr Hitchmough QC submitted, HMRC was wrong to say that such a necklace was of uncertain value when staked as a stake, apparently on the grounds that the price that might be achieved on a sale of the necklace at auction was uncertain. A diamond necklace clearly has a value in money's worth - it is a valuable commodity that can be converted into cash, unlike a Non-Neg. Moreover, the value of the necklace as a stake - in money's worth – would necessarily be a matter of agreement between the player and the casino, before it was staked.

The Value of Non-Negs as "prizes" - section 11(10)(b) FA 1997

41. Before the UT, the position of the parties in relation to the value of Non-Negs as "prizes" for the purposes of section 11(10)(b) FA 1997 was, according to the UT's judgment, as follows:

> "43. The appeal was argued before us on the basis of LCM's submission (which we have accepted) that the Non-Negs are to be regarded as having no value for the purpose of s 11(10)(a) FA 1997. LCM's claim in this respect carried with it the corollary that, in the case of a winning bet where the Non-Neg staked on that bet would be retained by the player and could be used as a further free bet, the value of the retained Non-Neg, if treated as a "prize" for the purpose of s 11(10)(b), would likewise be zero. HMRC's case, on the other hand, was that the Non-Negs were to be valued at their face value both for the purpose of s 11(10)(a) and s 11(10)(b), with the result that only when a Non-Neg was not retained by or returned to the player would any amount by reference to the face value of the Non-Neg effectively be incorporated into the banker's profits.
>
> 44. It was thus not part of LCM's claim, or its case in this appeal, that if, as we have decided, no value should be attributable to the Non-Negs for the purpose of s 11(10)(a), Non-Negs provided as prizes should nonetheless have value for s 11(10)(b) purposes. On the other hand, understandably, LCM did not dispute HMRC's analysis of the position with regard to Non-Negs as prizes were HMRC's argument on the value to be given to the Non-Negs for the purpose of s 11(10)(a) to have prevailed.
>
> 45. Given the respective positions of the parties on this question, it would not we think be satisfactory for us to leave matters there without at least expressing our own view. Although we recognise that this will not be binding, it is important, we consider, that the question of the valuation for gaming duty purposes of chips and vouchers for free bets should be regarded as a whole, thus taking into account both the positive and negative elements of the calculation of the banker's profits."

42. The conclusion of the UT on this issue was:

> "48. Our view is that the Non-Negs fall within both (a) and (b) of s 20(4), and consequently must be regarded, for the purpose of s 11(10)(b) FA 1997 as having no value. The effect, which we regard as providing a coherent structure for the treatment of free bets, is that Non-Negs are taken into account on neither side of the calculation of banker's profits."

43. The UT's decision on the construction of section 20 of the BGDA was expressly stated to be non-binding and *obiter*. However, by its notice of appeal, HMRC before this court sought to argue that the UT had erred in law by misconstruing sections 20(3) and (4) of the BGDA 1981, which, in turn, had led it to misapply section 11(10)(b) of the FA 1997.

44. Essentially both sides' respective positions in relation to this issue remained the same before this court as they had been before the UT. That is to say, both sides respectively accepted that there had to be consistency in approach between the value of Non-Negs as "stakes staked" and as "prizes provided" in a winning game.

45. HMRC argued that, in its consideration of the provisions dealing with the treatment of prizes, the UT had misconstrued section 20(3) and (4) BGDA 1981, with the result that it had wrongly attributed a nil value to the Non-Negs when provided as (valuable) "prizes". It submitted that, properly construed, sub-sections 20(3) and (4) BGDA 1981 treated the Non-Negs as having their face value when provided as "prizes" in a winning game, as was HMRC's current publicly stated position. However, because it accepted the principle of consistency, HRMC accepted that, if as LCM contends, Non-Negs should be valued as having no value for the purposes of section 11(10)(a) of the FA 1997, then, likewise, they should be regarded as having no value as prizes for the purposes of section 11(10)(b). Similarly, LCM, as below, accepted that, if it was wrong in its claimed construction of section 11(10)(a), and Non-Negs should be attributed with a value equal to their face value as stakes, then in a winning game they should likewise be given a similar value as prizes.

46. As the UT explained at [46], the value of a prize for the purpose of section 11(10)(b) of the FA 1997 has, since 1 September 2007, been governed by parts of section 20 of the BGDA, as adapted for gaming duty purposes. Section 20(3) relevantly provides:

> "Where a prize is a voucher which—
>
> (a) may be used in place of money as whole or partial payment for benefits of a specified kind obtained from a specified person,
>
> (b) specifies an amount as the sum or maximum sum in place of which the voucher may be used, and
>
> (c) [not relevant],
>
> the specified amount is the value of the voucher …"

47. The UT went on to explain at [47], that if the conditions of section 20(3) were satisfied, the value of the Non-Neg as a prize for the purpose of section 11(10)(b) FA 1997 would be the face value of the Non-Neg. However, section 20(4) provides in certain cases for that value to be zero. Section 20(4) relevantly provides:

> "Where a prize is a voucher … it shall be treated as having no value for the [relevant purpose] if—
>
> (a) it does not satisfy subsection (3)(a) and (b), or

> (b) its use as described in subsection (3)(a) is subject to a specified restriction, condition or limitation which may make the value of the voucher to the recipient significantly less than the amount mentioned in subsection (3)(b)."

48. The UT went on to conclude as follows:

> "48. Our view is that the Non-Negs fall within both (a) and (b) of s 20(4), and consequently must be regarded, for the purpose of s 11(10)(b) FA 1997 as having no value. The effect, which we regard as providing a coherent structure for the treatment of free bets, is that Non-Negs are taken into account on neither side of the calculation of banker's profits.
>
> 49. First, we consider that the Non-Negs fail to satisfy s 20(3)(a) and (b) BGDA. The Non-Negs, when returned or retained as "winnings" are capable of being used to play a game. But that does not constitute them being so used "in place of money as … payment for benefits". The benefit which a retained Non-Neg provides is no different from that referable to an original Non-Neg, for which no payment is required or made. There is accordingly no payment in money which the Non-Neg can replace; the benefit of a retained Non-Neg cannot be equated to that of a cash chip for which payment in money would be required.
>
> 50. Secondly, the use of a retained Non-Neg is restricted to the same use as any other Non-Neg. It cannot therefore have any different value in money or money's worth. As we have determined the value of a stake staked by a Non-Neg to be zero, it follows that the value of a Non-Neg representing a prize must also have a value of zero, which is significantly less than its face value.
>
> 51. In either case, therefore, our view is that the effect of either of s 20(4)(a) or (b) is that a Non-Neg received or retained by a player as a prize has no value for the purpose of s 11(10)(b) FA 1997"

49. I agree with the analysis of the UT. Mr Peretz QC, on behalf of HMRC, submitted that, contrary to the conclusions of the UT, a Non-Neg might indeed be used in place of money as payment for 'benefits of a specified kind', namely the benefit in the course of a game of cash equivalent to the face value or (where chips are used) of a normal chip of equal value to the face value; and that, accordingly, on its terms, in the game the Non-Neg was as good as cash.

50. I disagree. As the UT held, the benefit which a retained Non-Neg provides is no different from that referable to an original Non-Neg. As no payment was required for the original Non-Neg, there can be "no payment in money which the Non-Neg can replace". Nor do I accept that staking a Non-Neg in a casino game entails some sort of "payment" in return for a "benefit". I also agree with the UT that section 20(4)(b)

of the BGDA applies since, as recognised by the UT, the use of a Non-Neg is restricted, since a Non-Neg can only be used as a stake, and (in the light of the conclusions of the UT on section 11(10)(a)) its use as such has no value. Accordingly, in my judgment the UT was right to conclude at [51] that:

> "the effect of either of s 20(4)(a) of (b) is that a Non-Neg received or retained by a player as a prize has no value for the purpose of s 11(10)(b) FA 1997".

Disposition

51. Accordingly, I would dismiss HMRC's appeal.

Lord Justice Leggatt

52. I agree.

Lord Justice Flaux

53. I also agree.