Neutral Citation Number: [2025] EWCA Civ 385

Case No: CA-2024-001332

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL (TAX AND CHANCERY CHAMBER)
MR JUSTICE ROTH AND JUDGE JENNIFER DEAN
[2023] UKUT 00073 (TCC)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 02/05/2025

Before:

LORD JUSTICE PETER JACKSON
LADY JUSTICE ASPLIN
and
LADY JUSTICE FALK

- -

Between:

ALEXANDER BEARD	**Appellant**
- and –	
THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS	**Respondents**

- -
- -

Malcolm Gammie KC (instructed by **Keystone Law**) for the **Appellant**
David Yates KC and Calypso Blaj (instructed by **HMRC Solicitor's Office and Legal Services**) for the **Respondents**

Hearing dates: 19 and 20 March 2025

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Approved Judgment

This judgment was handed down remotely at 2pm on 2 May 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lady Justice Falk:

Introduction

1. This appeal concerns the correct interpretation of the words "dividends of a capital nature" in s.402(4) of the Income Tax (Trading and Other Income) Act 2005 ("ITTOIA"). As the Upper Tribunal ("UT") recognised in granting permission to appeal, it is a point of considerable general importance.

2. The Appellant, Alexander Beard, owns ordinary shares in Glencore plc ("Glencore"). Glencore is a Jersey incorporated company that is tax resident in Switzerland, where it has its head office.

3. The dispute concerns interim and final cash distributions paid by Glencore between 2011 and 2016 ("Cash Distributions"), together with one in specie distribution of shares in Lonmin plc in 2015 (the "Lonmin Distribution", and together the "Distributions"). All of the Distributions were debited to Glencore's share premium account, as permitted under Jersey law. The total value of the Distributions received by Mr Beard during the period in dispute was of the order of £150m.

4. Mr Beard maintains that all of the Distributions received by him fall outside the charge to income tax because they are correctly characterised as "dividends of a capital nature", and instead are subject to capital gains tax ("CGT"). HMRC disagree, and their view prevailed both in the First-tier Tribunal ("FTT") ([2022] UKFTT 129 (TC), Judge Rachel Short) and in the UT ([2024] UKUT 73 (TCC), Roth J and Judge Jennifer Dean).

5. In outline, both the FTT and UT concluded that the Distributions were dividends but were not "of a capital nature". No distinction was sought to be drawn between the Cash Distributions and the Lonmin Distribution in the FTT. In the UT there was a third ground of appeal to the effect that a distinction should be drawn, but the UT disagreed. In the course of their decisions the FTT and UT placed heavy reliance on the decisions of the UT and this court in *First Nationwide v Revenue and Customs Commissioners* [2011] UKUT 174 (TCC), [2011] STC 1540 ("*First Nationwide UT*") and *First Nationwide v Revenue and Customs Commissioners* [2012] EWCA Civ 278, [2012] STC 1261 ("*First Nationwide CA*").

6. I should say at the outset that no disrespect is intended to the UT in not discussing its decision in detail in this judgment. That is because, in a case such as this, the focus is inevitably on the findings of fact by the FTT and whether it made an error of law. The UT's decision has nonetheless been of real assistance in determining the answer to that question.

7. In summary, I have concluded that there was no material error in the FTT's decision and that the appeal should therefore be dismissed.

8. We heard submissions from Malcolm Gammie KC for Mr Beard and from David Yates KC, leading Calypso Blaj, for HMRC. Ms Blaj made oral submissions in relation to the Lonmin Distribution. We are very grateful for Counsel's assistance, and in particular to Mr Yates for taking over at short notice from Mr Milne KC, who appeared for HMRC in the UT but was unfortunately indisposed at the date of the hearing before us.

The statutory framework

9. The preamble to ITTOIA reads as follows:

> "An Act to restate, with minor changes, certain enactments relating to income tax on trading income, property income, savings and investment income and certain other income; and for connected purposes."

10. ITTOIA was enacted as part of the Tax Law Rewrite Project, which was intended to produce legislation that was clearer and easier to use rather than to make major changes. As stated in the summary at the start of the Explanatory Notes to ITTOIA:

> "5. The purpose of [ITTOIA] is to rewrite income tax legislation relating to trading, property and investment income so as to make it clearer and easier to use.
>
> 6. The Act does not generally change the underlying law when rewriting it. The only changes to the law which it does make are minor ones which are within the remit of the Tax Law Rewrite Project and the Parliamentary process for the Act.
>
> 7. In the main, such changes are intended to clarify existing provisions, make them consistent or bring the law into line with well established practice."

Paragraph 8 goes on to explain that this followed a report to Parliament on the scope for simplifying the tax system, the main recommendation of which "was that United Kingdom direct tax legislation should be rewritten in clearer, simpler language". The wording of paragraphs 5-8 of the Explanatory Notes to the Bill that became ITTOIA is in materially identical terms.

11. Section 402 of ITTOIA, contained in Chapter 4 of Part 4 of that Act, imposes the charge to tax on dividends from non-UK resident companies. It relevantly provides:

> "(1) Income tax is charged on dividends of a non-UK resident company.
> …
> (4) In this Chapter 'dividends' does not include dividends of a capital nature."

12. Prior to the enactment of ITTOIA, income tax was charged under a schedular system. Distributions from non-UK resident companies were generally charged to income tax under Case V of Schedule D, which read as follows (most recently s.18(3) of the Income and Corporation Taxes Act 1988 ("ICTA"), although we were told that the wording has been in use since 1842):

> "tax in respect of income arising from possessions out of the United Kingdom..."

13. As discussed below, a number of cases have considered the scope of the charge to income tax under Schedule D Case V. One issue on this appeal is whether the different wording used in s.402 ITTOIA means that the basis of the distinction drawn in that case law between income and capital remains applicable. On this issue the Explanatory Notes to Chapter 4 of Part 4 of ITTOIA are potentially relevant. The relevant wording is largely

unaltered as between the Explanatory Notes for the Bill that became ITTOIA and the Act, but I will refer to the former because they are strictly the relevant version to consider, since they would have been available to Parliament at the time that the legislation was passed (see *Bennion, Bailey and Norbury on Statutory Interpretation*, 8th ed. ("*Bennion*") at 24.14):

> "**Overview**
> 184. This Chapter introduces a separate charge to income tax on dividends from companies not resident in the United Kingdom.
>
> 185. Under section 18(3) of ICTA, there are no individual charges according to types of income within the Schedule D Case IV or V charge. But the system of identifying and classifying income by Schedule and Case has been replaced in this Bill by individual charges on types of income.
>
> 186. Income which, under the source legislation, is charged to tax under Schedule D Cases IV or V, has, where appropriate, been fully integrated with the equivalent income arising from a UK source. In the case of dividends from non-UK resident companies there is no exact equivalent in terms of UK source income. The closest equivalent is the charge to tax on dividends and other distributions from UK resident companies (section 20 of ICTA, Schedule F in the source legislation). But there is no precise overlap. The UK charge, by the adoption of the definition of 'distribution' from Part 6 of ICTA (see the commentary on Chapter 3 of Part 4 of this Bill) can include dividends or distributions of a capital nature and can also operate to convert payments that would otherwise be treated as interest into distributions. Any charge on distributions from non-UK resident companies must be confined to income only. For this reason, it is not possible to integrate the charges and a separate charge is needed to cover dividends from non-UK resident companies.
>
> **Clause 402: Charge to tax on dividends from non-UK resident companies**
> 187. This clause charges to tax dividends of companies not resident in the United Kingdom. It is based on section 18(1) and (3) of ICTA.
>
> 188. For the reasons explained in the overview, the expression 'distribution' has not been adopted. It is possible that a non-UK resident company may make a distribution of income which would not fall within Chapter 4 of Part 4 of this Bill because it is not a 'dividend'. But if the distribution comprises income it will fall to be dealt with either under alternative specific charges (eg interest) or within 'income not otherwise charged', the charge on which appears in Chapter 8 of Part 5 of this Bill.
>
> 189. Although the term 'dividend' is used it is not defined. 'Dividend' is a widely used and understood term and is defined only in very specific circumstances not applicable in this context (see, for example, section 49 of ICTA – dividends held in the name of Treasury). It is not thought appropriate to attempt to define 'dividend' here. It will usually be a matter of referring to the relevant company law to determine whether or not a payment made by a company is a dividend.

> …
> 192. *Subsection (4)* ensures that dividends of a capital nature do not fall within the charge to tax under this Chapter. In determining whether a payment is income in nature, it is necessary (as it is under the source legislation) to analyse the payment under local law (see CIR v Trustees of Joseph Reid (dec'd) (1949), 30 TC 431 HL and Rae v Lazard Investment Co Ltd (1963), 41 TC 1 HL). Whiteman on Income Tax, Third Edition, on page 1107, comments in this context 'the proper test in such circumstances is, applying the local law, whether or not the corpus of the asset is left intact after the distribution. If it is not, the receipt will be a capital receipt; if it is, the payment will be chargeable'."

14. It is also worth noting that Annex 1 to the Explanatory Notes for both the Bill and the Act "contains details of the minor changes in the law made by the Act" (paragraph 4 of the Explanatory Notes to the Act). None of the changes described in Annex 1 relate to s.402.

15. I should also refer to s.122 of the Taxation of Chargeable Gains Act 1992 ("TCGA"). That provision contains the charge to CGT on capital distributions, in the following terms:

> "(1) Where a person receives or becomes entitled to receive in respect of shares in a company any capital distribution from the company… he shall be treated as if he had in consideration of that capital distribution disposed of an interest in the shares.
> …
> (5) In this section—
> (a) the 'amount distributed' means the amount or value of the capital distribution,
> (b) 'capital distribution' means any distribution from a company, including a distribution in the course of dissolving or winding up the company, in money or money's worth except a distribution which in the hands of the recipient constitutes income for the purposes of income tax."

16. The effect of s.122(5)(b) TCGA is that it is necessary first to determine whether a distribution constitutes income for the purposes of income tax. Only if it is not is it necessary to consider s.122. It is for that reason that the dispute turns on the correct interpretation of s.402 ITTOIA, not s.122 TCGA.

The background facts

17. Other than in respect of Jersey law (discussed separately below), the facts are uncontroversial and were largely agreed.

18. Glencore was incorporated in March 2011 under the Companies (Jersey) Law 1991 ("CJL 1991"). In May 2011 it became the listed holding company of the Glencore group via a series of transactions which included issuing ordinary shares of US$0.01 ("Shares") both to acquire the existing group (the "Restructuring") and to investors to raise cash (the "Public Offer"). The difference between the nominal and fair value of the Shares issued, totalling around US$27bn, was recognised as share premium.

19. Glencore made further acquisitions in exchange for the issue of Shares in 2012 and 2013, recognising additional share premium. The acquisition in 2013 was of the 66% holding of Xstrata plc that Glencore did not already own.

20. Prior to 2011, Mr Beard had held profit participation certificates in a Swiss entity in the Glencore group (Glencore International AG), which he had acquired by virtue of his employment, together with shares in its two shareholders. The effect of the Restructuring was to convert these interests into Shares in Glencore.

21. The prospectus issued for the Public Offer recorded that the Swiss Federal Tax Administration had issued a ruling to the effect that distributions could be made from "qualifying reserves" free of Swiss withholding tax. "Qualifying reserves" were reserves arising from capital contributions made by shareholders, and included in particular the share premium arising on the issue of Shares under the Restructuring and Public Offer. Under Swiss tax law such reserves are termed "capital contribution reserves".

22. Each of the Distributions was expressly resolved to be paid from Glencore's "capital contribution reserves" and was paid free of Swiss withholding tax in accordance with the ruling. They were each debited to Glencore's share premium account. The Cash Distributions comprised interim and final distributions for 2011, 2012, 2013 and 2014 and an interim distribution for 2015. Initially, these distributions were described as "dividends", but there was a change of terminology with effect from the final distribution for 2013 to describe them as "distributions".

23. Xstrata plc had held a minority stake in Lonmin plc that Glencore chose to divest by way of a distribution in specie to its shareholders. The Lonmin Distribution was approved by shareholders in May 2015 and was also resolved to be made from capital contribution reserves.

24. The agreed sterling value of the Distributions received by Mr Beard for the tax years under appeal are as follows:

UK Tax Year (6 April-5 April)	Value of Distributions received by Mr Beard
2011-12	£10,372,469.26
2012-13	£31,272,820.54
2013-14	£32,956,347.85
2014-15	£32,964,799.40
2015-16	£42,167,539.61

We were told that, of the total amount received by Mr Beard in the tax year 2015-16, the value of the Lonmin shares he received was around £4.7m.

The Jersey law

The CJL 1991

25. Relevant provisions of the CJL 1991 were originally based largely on the UK's Companies Act 1985 (in the words of the Jersey law experts, "owed much" to it), but there have since been a number of significant amendments. These have included the introduction of an ability to issue shares with no par value and, more significantly for

present purposes, the substantial removal of the doctrine of maintenance of capital. In particular, under the original legislation distributions could only be made out of realised profits (or in some circumstances unrealised profits). That restriction has been removed. Further, as originally enacted a reduction of capital required the sanction of the court. Although that option is still available, there is now an alternative under which a capital reduction can be supported by a solvency statement.

26. Part 8 of the CJL 1991 is headed "Share Capital". Within Part 8, Article 39 provides:

> "**39 Share premium accounts for par value companies**
>
> (1) If a par value company allots shares at a premium (whether for cash or otherwise) —
>
> (a) where the premiums arise as a result of the issue of a class of limited shares, a sum equal to the aggregate amount or value of those premiums shall be transferred, as and when the premiums are paid up, to a share premium account for that class;
>
> (b) where the premiums arise as a result of the issue of a class of unlimited shares, a sum equal to the aggregate amount or value of those premiums shall be transferred, as and when those premiums are paid up, to a separate share premium account for that class.
>
> (1A) An amount may be transferred by the company to a share premium account from any other account of the company other than the capital redemption reserve or the nominal capital account.
>
> (2) A share premium account may be expressed in any currency.
>
> (3) A share premium account may be applied by the company for any of the following purposes –
>
> (a) in paying up unissued shares to be allotted to members as fully paid bonus shares;
>
> (b) in writing off the company's preliminary expenses;
>
> (c) in writing off the expenses of and any commission paid on any issue of shares of the company;
>
> (d) in the redemption or purchase of shares under Part 11; and
>
> (e) in the making of a distribution in accordance with Part 17.
>
> (4) Subject to this Article, the provisions of this Law relating to the reduction of a par value company's share capital apply as if each of its share premium accounts were part of its paid up share capital."

27. Article 39(3)(e) was inserted by the Companies (Amendment No 10) (Jersey) Law 2009 ("Amendment 10"). No amendment was made to Article 39(4). Article 39(1A) was inserted during the period in dispute by the Companies (Amendment No 11) (Jersey) Law 2014 ("Amendment 11").

28. Article 61 forms part of Part 12, dealing with reductions of capital. Following the Companies (Amendment No 6) (Jersey) Law 2002 ("Amendment 6"), Article 61 provided:

> "**61 Reduction of capital accounts**
>
> (1) A company may by special resolution reduce its capital accounts in any way.
>
> (2) In particular, and without prejudice to the generality of paragraph (1), the company –
>
> > (a) may extinguish or reduce the liability on any of its shares in respect of share capital not paid up; and
> >
> > (b) may, with or without extinguishing or reducing liability on any of its shares –
> >
> > > (i) reduce any capital account by an amount which is lost or is unrepresented by available assets, or
> > >
> > > (ii) pay off any amount standing to the credit of a capital account which is in excess of the company's wants.
>
> (3) Except as provided in paragraphs (4) and (5), every reduction of capital shall be subject to confirmation by the court.
> …"

29. "Capital accounts" is defined as meaning:

> "(a) in relation to a par value company, its share capital accounts and any share premium accounts and capital redemption reserves; and
>
> (b) in relation to a no par value company, its stated capital accounts;"

The reference to "stated capital accounts" is to the capital accounts required to be maintained by no par value companies, recording the value received on the issue of shares.

30. During the period in dispute, Article 61 was further amended by Amendment 11 to provide that, as an alternative to sanction by the court, capital could be reduced using a solvency statement process. As so amended, Article 61 states:

> "(1) A company may reduce its capital accounts in any way.

(1A) A reduction of capital shall be sanctioned by a special resolution of the company.

(2) In particular, and without prejudice to the generality of paragraph (1), the company –

(a) may extinguish or reduce the liability on any of its shares in respect of share capital not paid up; and

(b) may, with or without extinguishing or reducing liability on any of its shares –

(i) reduce any capital account by an amount which is lost or is unrepresented by available assets, or

(ii) pay off any amount standing to the credit of a capital account which is in excess of the company's wants.

(3) Subject to paragraphs (4) and (5), every reduction of capital shall either –

(a) be supported by a solvency statement (see Articles 61A and 61B); or

(b) be subject to confirmation by the court (see Articles 62 to 64).

…

(6) A reduction of capital supported by a solvency statement shall be treated for all purposes in the same way as one that has been confirmed by an order of the court."

31. Part 17 of the CJL 1991 deals with distributions, in particular Articles 114 and 115. It is common ground that the Distributions were made under Part 17.

32. The provisions of Articles 114 and 115 were fundamentally changed by the Companies (Amendment No. 9) (Jersey) Law 2008 ("Amendment 9"). Further amendments were made by Amendment 10, which were intended to be largely clarificatory, and by Amendment 11. As amended, they provide:

"**114 Meaning of "distribution" in this Part**

(1) In this Part, "distribution", in respect of a company, means every description of distribution of the company's assets to its members as members, whether in cash or otherwise.

(2) However, "distribution" does not include a distribution by way of–

(a) an issue of shares as fully or partly paid bonus shares;

(b) the redemption or purchase of any of the company's shares;

(c) any reduction of capital made in accordance with Part 12; or

(d) a distribution of assets to members of the company on its winding up.

115 Restrictions on distributions

(1) A company may make a distribution at any time.

(2) A company shall not make a distribution except in accordance with this Article if the distribution –

(a) reduces the net assets of the company…

(3) A company (other than an open-ended investment company) may make a distribution only if the directors who are to authorise the distribution make a statement in accordance with paragraph (4).
[Paragraph (4) sets out the requirements of a solvency statement by the directors.]
…
(7) A distribution made in accordance with this Article shall be debited by the company to –

(a) a share premium account, or stated capital account, of the company; or

(b) any other account of the company, other than the capital redemption reserve or the nominal capital account.
…
(9) A distribution made in accordance with this Article is not for the purposes of Part 12 a reduction of capital."

33. Article 115(9) was inserted by Amendment 10, which also slightly reworded the opening words of Article 115(7). Further, but immaterially, Amendment 11 added the words after "this Article" in Article 115(2) and defined "net assets".

34. For completeness, Part 11 of the CJL 1991 contains provisions dealing with own share purchases and redemptions of redeemable shares.

The FTT's findings of fact about Jersey law

35. The FTT heard expert evidence from Mr Simon Felton for Mr Beard and from Mr James Willmott for HMRC. Mr Felton is a Jersey qualified solicitor and Mr Willmott is an advocate of the Royal Court of Jersey.

36. A preliminary point to note is that it is not entirely easy to extract from the FTT's decision all its findings of fact about Jersey law. This may in part have reflected some straying by the experts into areas that the FTT was required to decide as a matter of UK law, in particular whether the Distributions were capital rather than income (as to which see further below), but it also arises from the way in which the FTT's decision is structured. What follows is my assessment of what the most relevant findings were.

37. The FTT recorded at [66] that the experts were agreed, among other things, as to the following:

a) Any distribution under Part 17 CJL 1991 required a solvency statement.

b) Such a distribution was not required to be made from profits.

c) The term "dividend" is used but is not defined by the CJL 1991, and is not used in Part 17, which instead uses the term "distribution".

d) A distribution made under Part 17 CJL 1991 and debited to a share premium account reduces the amount standing to the credit of a capital account.

38. The experts also agreed (in a memorandum partly appended to the FTT's decision) that Jersey company law materially diverged from the approach in this jurisdiction in 2008, when Amendment 9 had the effect of permitting distributions to be debited from share premium account but required a solvency statement to be produced irrespective of the account from which the distribution was debited. They also noted the limited relevant case law authority, in the form of the decision of the Royal Court of Jersey in *Re WPP plc* [2013] JRC 31 ("*WPP*").

39. The FTT further found as follows at [178]:

> "(1) If Glencore had chosen to pay the Distributions in reliance on Part 12 CJL 1991 the Distributions would not have been treated as distributions for Jersey law purposes.
> (2) The account from which Glencore debited the Distributions was a capital account. For Jersey law purposes that does not necessarily mean that the Distributions were debited to shareholder funds.
> (3) Under CJL 1991 the only funds from which distributions cannot be made are the nominal capital and capital redemption reserve funds of a Jersey company.
> (4) Glencore used both the term 'dividend' and the term 'distribution' to describe the Distributions made to shareholders.
> (5) Part 17 CJL 1991 is the only relevant machinery which can be used by a company like Glencore to make income distributions."

40. Earlier, at [172], the FTT had explained the use of the expression "shareholders' funds" as equivalent to what the authorities regarded as a payment out of (share) capital. The FTT also explained that references in the discussion that followed to "assimilation to capital" were to "capital in the sense of shareholders' funds". The decision is not entirely clear but, in context, "shareholders' funds" must refer to nominal share capital or, potentially, to amounts treated in the same way as it (assimilated). The term "assimilation" appears to be derived largely from *First Nationwide* and to relate to share premium being treated in the same way as nominal capital.

41. The FTT went on at [179]-[235] to discuss whether the Distributions were "dividends". Although that issue is not before us except in relation to the Lonmin Distribution, this section of the FTT's decision contains further relevant findings of fact.

42. The FTT found at [196] that the Distributions were made under Part 17 CJL 1991. The FTT also found at [197]:

> "(1) The Jersey legislature has changed its position on the treatment of share premium over time, but, at the time when Mr Beard received his distributions share premium could be used to make payments of distributions either under Part 12 or Part 17. There was no legal difference for Jersey law purposes which process was used.
> (2) The only limiting factor in paying distributions out of share premium under Part 17 was the solvency statement which the directors were required to make. That was a statement which looked to the protection of the creditors of the company, not its shareholders.
> (3) The experts agreed that a payment made using Part 17 reduced a capital account of the company (the share premium account).
> (4) The experts agreed that had Glencore used the Part 12 mechanism for paying the Distributions, including the necessary special resolutions, that would have been a return of capital which would have been treated as a capital dividend."

The last sentence of sub-paragraph (1) must be an infelicity. As the judge said at [248], Part 12 and Part 17 are different mechanisms. However, the effect of a payment under either mechanism being debited to share premium would be to reduce the amount standing to the credit of that account. Further, sub-paragraph (4) is in my view an example of the experts straying beyond their proper remit, rather than a relevant finding of fact (see further [84] below).

43. The FTT further found as follows:

> "199. Each of the pre-2014 Distributions were paid in accordance with Glencore's articles of association which referred to the declaration of final dividends (Article 129) and the declaration of fixed and interim dividends (Article 130) including in Article 130:
>
> > 'the Directors may pay the fixed dividends on any class of share carrying a fixed dividend expressed to be payable thereof and may also, from time to time, announce and pay interim dividends on shares of any class of such amounts and on such dates and in respect of such periods as they see fit.'
>
> 200. Mr Hitchmough [then for HMRC] also pointed out that, on the advice of Mr Gammie at the end of 2013, Glencore had changed its terminology from referring to 'dividends' to 'distributions' in its corporate documents from May 2014 and changed its article dealing with capital distributions (Article 8) to say:
>
> > 'The company may, by Ordinary Resolution, approve the distribution to its members of any sum standing to the credit of the Company's share premium account, but no such distribution shall exceed the amount that is recommended by its Directors.'
>
> 201. Distributions paid after these changes were paid under Article 8 rather than Articles 129 and 130. In some, but not all, of Glencore's corporate documents the Distributions after this date are referred to as 'distributions', though there are inconsistencies."

44. The FTT concluded at [203]-[205] that the Distributions fell within the meaning of a "dividend", and were paid "by the same mechanism … as would be used for paying a dividend out of trading profits". (The first of these findings is a conclusion of law, not fact: see [84] below. The second is a finding of fact.)

45. In response to Mr Gammie's reliance on Article 39(4) as showing that, as in the UK legislation, share premium is assimilated to share capital, the FTT noted at [211] the similarity of that provision to UK legislation but then said this:

> "212. Whatever Article 39(4) may suggest about the character of share premium for CJL 1991 purposes, it is impossible to ignore the significance of the changes made in Amendment No 9 in 2008 and Amendment No 10 in 2009 and Part 17 of the Jersey legislation, to which, on any straightforward reading, Article 39(4) is subject; the reference at Article 39(4) to treating share premium as if it were share capital is "subject to this Article" which includes Article 39(3)(e) and its reference to the ability of Jersey companies to pay distributions out of share premium under Part 17.
>
> 213. At the very least, Part 17 introduced a significant watering down of the protection of capital principle, if it did not destroy it altogether."

46. The FTT then considered *WPP* and concluded at [218], partly in reliance on that decision, that payments debited from share premium account were not "assimilated to capital".

47. The FTT returned at [251] to the relationship between Article 39 and Part 17, saying this:

> "On my analysis, and even taking account of Article 39(4), my view is that Part 17 overrides the "assimilation to capital" provided by Article 39; the deeming provision at Article 39(4) is made subject to the ability of a company to pay a distribution under Part 17 (Article 39(3)(e)). The legal character of share premium as assimilated to share capital is broken by Article 39(3)(e) and payments made under Part 17 cannot properly be treated as anything other than distributable profits."

The decision in WPP

48. WPP was another Jersey incorporated company which had share premium that had arisen on a reconstruction. It sought Jersey court approval for a capital reduction under which an amount standing to the credit of its share premium account would be transferred to a reserve which was expressed to be available for the payment of dividends. The reason given was to ensure clarity of the tax treatment of such dividends.

49. In concluding that the court's approval did not need to be subject to specific steps designed to safeguard creditors, such as obtaining their consent, the Royal Court of Jersey considered the UK position under which "the principle of the maintenance of capital is still retained", and observed:

> "19. The position in Jersey, however, is now very different. As a result of the amendments introduced by the Companies (Amendment No.9) (Jersey) Law 2008 and the Companies (Amendment No.2) (Jersey) Regulations 2008

(together the "2008 amendments") the principle of the maintenance of capital is now of very limited application in Jersey…"

50. The court then considered Article 115 as amended, commenting at [20]-[21] that the requirement for a solvency statement was "now the key protection for creditors", that "the Law no longer distinguishes between a distribution out of share premium account and a distribution out of profits" and "the principle of maintenance of capital … is now only applied in respect of the nominal capital and the capital redemption reserve (if there is one)". The position of creditors would therefore be "completely unaltered" by the proposed transfer ([22]).

The grounds of appeal

51. Save in respect of the Lonmin Distribution, Mr Beard does not now challenge the conclusion of the tribunals that the Distributions were "dividends" within the meaning of s.402 ITTOIA.

52. The grounds of appeal can be summarised as follows:

Ground 1: The UT erred in law in deciding that the Distributions were not "dividends of a capital nature" within s.402(4) ITTOIA. A return of Glencore's capital contribution reserve reduced its capital, whatever Jersey law mechanism was used. The UT failed to give adequate attention to the relevant provisions of the CJL 1991 and the expert evidence, instead wrongly relying on a statement in *WPP* that concerned the protection of creditors. The UT also wrongly applied pre-ITTOIA case law and authorities dealing with trusts.

Ground 2A: The UT wrongly characterised the Lonmin Distribution as a "dividend" for the purposes of s.402 ITTOIA. Rather, it was an in specie distribution of part of Glencore's capital contribution reserve.

Ground 2B: Even if it was a dividend, the Lonmin Distribution was "of a capital nature". Further, this was so even if ground 1 did not succeed. The use of the Part 17 mechanism did not deprive the Lonmin Distribution of its capital nature.

53. I will start by addressing two preliminary points. The first relates to the correct approach to the FTT's findings of fact about Jersey law, which HMRC maintain may only be challenged on *Edwards v Bairstow* grounds. The second is the correct approach to the interpretation of s.402(4) ITTOIA, and specifically the role of the Explanatory Notes set out at [13] above. I will then summarise and address the parties' submissions on the substantive issues. In the course of doing so it will be necessary both to consider the proper role of foreign law in a case of this kind, and to analyse in some detail the relevant pre-ITTOIA case law, of which the principal authorities are the two decisions of the House of Lords referred to in the Explanatory Notes, *Inland Revenue Commissioners v Reid's Trustees* [1949] AC 361 ("*Reid's Trustees*") and *Rae (Inspector of Taxes) v Lazard Investment Trust Co. Ltd* [1963] 1 WLR 555 ("*Rae v Lazard*").

Findings of foreign law

54. It is trite that findings as to foreign law are findings of fact, not law, albeit that they have been described as being "of a peculiar kind" (*Parkasho v Singh* [1968] P 233, 250). Their

nature was most recently considered by the Privy Council in *Lea Lilly Perry v Lopag Trust Reg No 2* [2023] UKPC 16, [2023] 1 WLR 3494 ("*Perry v Lopag*"), where the issue arose in the context of a challenge to findings of fact in respect of foreign law which had been made by a trial judge and had been upheld by a lower appellate court (concurrent findings of fact).

55. In *Perry v Lopag*, Lord Hodge recognised that there is a spectrum of circumstances. At one end the foreign legal system may be a common law system which applies an approach similar to that under English law. In that situation both a first instance judge and appellate courts will bring to bear their own skill and experience in making findings of foreign law. He referred at [12] to the following statement by Evans LJ in *MCC Proceeds Inc v Bishopsgate Investment Trust plc* [1999] CLC 417:

> "When and to the extent that the issue calls for the exercise of legal judgment, by reference to principles and legal concepts which are familiar to an English lawyer, then the [appellate] court is as well placed as the trial judge to form its own independent view."

Lord Hodge emphasised the words "to the extent".

56. At the other end of the spectrum are cases where the relevant legal system is far removed from the common law, such as *Byers v Saudi National Bank* [2022] EWCA Civ 43, [2022] 4 WLR 22, where the trial judge was dependent on translations of foreign texts and on the evidence of foreign law experts, and/or where the trial judge may have had to evaluate the reasoning of the experts to determine which view was to be preferred. At that end of the spectrum skill and experience in domestic law may have a "minimal role to play" and the trial judge's findings on the content and application of foreign law will "have a close kinship to other findings of fact", such that an appellate court should be slow to intervene in the judge's assessment (see at [15]).

57. Neither *Perry v Lopag* nor the other cases considered by Lord Hodge were concerned with a statutory appeal confined to errors of law. In such a case, I agree with HMRC that there is no scope to challenge findings of fact unless there has been an error of a kind described by Lord Radcliffe in *Edwards v Bairstow* [1956] AC 14, 36, namely that "the facts found are such that no person acting judicially and properly instructed as to the relevant law could have come to the determination under appeal". Lord Radcliffe added that the test could be put in various ways, including that there is "no evidence to support the determination" or "the evidence is inconsistent with and contradictory of the determination", but he preferred the phrase "the true and only reasonable conclusion contradicts the determination". (For a recent more detailed discussion of *Edwards v Bairstow*, see the judgment of Nugee LJ in *A Taxpayer v The Commissioners for His Majesty's Revenue and Customs* [2025] EWCA Civ 106 at [72]-[77].)

58. In principle, I do not consider that the need for challenges to findings of fact to meet the threshold established by *Edwards v Bairstow* should make a material difference to the approach of an appellate court to findings of foreign law. To the extent that the relevant legal system is one that applies an approach similar to that under English law, the application by a lower tribunal or court of its own skill and experience will necessarily require the application of legal principles, such as principles of statutory interpretation. Inherent in that process, therefore, must be the scope for error which can properly be characterised as an error of law, as Lord Radcliffe contemplated. So while an appellate

court or tribunal is not in the same position as the fact-finding tribunal, if it considers that that tribunal has erred in its application of legal principles then it would be able to conclude that it made an error of law. I would not therefore endorse the comments in *First Nationwide UT* at [66] (and followed by the UT in this case at [65] and [66]), which suggest that the approach endorsed in *Perry v Lopag* could not apply because the UT's jurisdiction is limited to appeals on points of law.

59. Specifically in the case of the Jersey company law with which we are concerned, the legislation is derived in part from the Companies Act 1985. Further, many of the relevant concepts in the current legislation will be familiar to UK company lawyers. It is also not irrelevant that appeals from Jersey courts would lie ultimately to the Privy Council. In those circumstances, Mr Yates' acceptance that this court is able to appraise the relevant legislation for itself was a realistic one. I would add that we are similarly able to appraise the effect of the *WPP* decision.

60. However, Mr Yates also fairly pointed out that in this case the FTT considered detailed expert reports and heard oral evidence from the experts for a full day, for which we saw no transcript. In those circumstances, particular care is required given the evidence available to the FTT to which we have not been taken. Nevertheless, given the overriding significance of the Jersey statutory provisions and our ability to appraise *WPP*, it is appropriate to review both the relevant Jersey legislation and the FTT's findings with particular care to determine whether there has been any error of approach, or whether they were findings that the FTT was entitled to make.

Statutory interpretation and the relevance of Explanatory Notes

The general approach

61. It is uncontroversial that Explanatory Notes to an Act of Parliament may be used "to understand the background to and context of the Act and the mischief at which it is aimed": *Bennion* at 24.14. However, as *Bennion* also explains they will not supplant the language of the legislation: *R (Kaitey) v Secretary of State for the Home Department* [2021] EWCA Civ 1875, [2022] QB 695 at [109].

62. In *R (O and Project for the Registration of Children as British Citizens) v Secretary of State for the Home Department* [2022] UKSC 3, [2023] AC 255 at [29]-[31], Lord Hodge said this about the process of statutory interpretation, including the role of Explanatory Notes:

> "29. The courts in conducting statutory interpretation are 'seeking the meaning of the words which Parliament used': *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG* [1975] AC 591, 613 per Lord Reid. More recently, Lord Nicholls of Birkenhead stated: 'Statutory interpretation is an exercise which requires the court to identify the meaning borne by the words in question in the particular context.' (*R v Secretary of State for the Environment, Transport and the Regions, Ex p Spath Holme Ltd* [2001] 2 AC 349, 396 .) Words and passages in a statute derive their meaning from their context. A phrase or passage must be read in the context of the section as a whole and in the wider context of a relevant group of sections. Other provisions in a statute and the statute as a whole may provide the relevant context. They are the words which Parliament has chosen to enact

as an expression of the purpose of the legislation and are therefore the primary source by which meaning is ascertained. There is an important constitutional reason for having regard primarily to the statutory context as Lord Nicholls explained in *Spath Holme*, p 397: 'Citizens, with the assistance of their advisers, are intended to be able to understand parliamentary enactments, so that they can regulate their conduct accordingly. They should be able to rely upon what they read in an Act of Parliament.'

30. External aids to interpretation therefore must play a secondary role. Explanatory Notes, prepared under the authority of Parliament, may cast light on the meaning of particular statutory provisions. Other sources, such as Law Commission reports, reports of Royal Commissions and advisory committees, and Government White Papers may disclose the background to a statute and assist the court to identify not only the mischief which it addresses but also the purpose of the legislation, thereby assisting a purposive interpretation of a particular statutory provision. The context disclosed by such materials is relevant to assist the court to ascertain the meaning of the statute, whether or not there is ambiguity and uncertainty, and indeed may reveal ambiguity or uncertainty: *Bennion, Bailey and Norbury on Statutory Interpretation*, 8th ed (2020), para 11.2. But none of these external aids displace the meanings conveyed by the words of a statute that, after consideration of that context, are clear and unambiguous and which do not produce absurdity...

31. Statutory interpretation involves an objective assessment of the meaning which a reasonable legislature as a body would be seeking to convey in using the statutory words which are being considered. Lord Nicholls, again in *Spath Holme* [2001] 2 AC 349, 396, in an important passage stated:

> 'The task of the court is often said to be to ascertain the intention of Parliament expressed in the language under consideration. This is correct and may be helpful, so long as it is remembered that the 'intention of Parliament' is an objective concept, not subjective. The phrase is a shorthand reference to the intention which the court reasonably imputes to Parliament in respect of the language used. It is not the subjective intention of the minister or other persons who promoted the legislation. Nor is it the subjective intention of the draftsman, or of individual members or even of a majority of individual members of either House … Thus, when courts say that such-and-such a meaning 'cannot be what Parliament intended', they are saying only that the words under consideration cannot reasonably be taken as used by Parliament with that meaning.'"

63. It will be observed from this that Explanatory Notes, like other external aids to interpretation, play a secondary role but "may cast light on the meaning of particular statutory provisions" as well as providing background and identifying the mischief at which the provision is aimed and its purpose. Further, the context they can provide is relevant irrespective of whether there is apparent ambiguity in the wording of the legislation.

The Tax Law Rewrite Project

64. In *R (Derry) v Revenue and Customs Comrs* [2019] UKSC 19, [2019] 1WLR 2754 ("*Derry*"), Lord Carnwath (with whom Lord Reed, Lady Black and Lord Kitchin agreed) considered the approach to the Income Tax Act 2007 ("ITA"), which like ITTOIA was enacted as part of the Tax Law Rewrite Project. At [10]-[11] he endorsed the following passage from Sales J's judgment in *Eclipse Film Partners (No 35) LLP v Revenue and Customs Comrs* [2013] UKUT 639 (TCC), [2014] STC 1114 at [97], which likened the correct approach to that appropriate to a consolidation statute, as explained in *Farrell v Alexander* [1977] AC 59:

> "When construing a consolidating statute, which is intended to operate as a coherent code or scheme governing some subject matter, the principal inference as to the intention of Parliament is that it should be construed as a single integrated body of law, without any need for reference back to the same provisions as they appeared in earlier legislative versions . . . An important part of the objective of a consolidating statute or a project like the Tax Law Rewrite Project is to gather disparate provisions into a single, easily accessible code. That objective would be undermined if, in order to interpret the consolidating legislation, there was a constant need to refer back to the previous disparate provisions and construe them."

65. To provide a little more context, the issue that Sales J was considering also concerned ITTOIA. In the preceding paragraph, at [96], he had commented that, from a consideration of the Explanatory Notes, the part of ITTOIA that he was concerned with "was intended merely to consolidate existing statutory provisions in a more user-friendly format without changing their content or legal effect", such that it should be approached in the same way as consolidating legislation, noting that (as with such legislation) ITTOIA was enacted using a truncated Parliamentary process (see also his judgment at [90]).

66. In *Derry*, Lord Carnwath added that Sales J's comments should be read with Lady Arden's comments at [84]-[90] on the relevance of prior case law, but also emphasised the need to approach the task from the standpoint of the resulting statutes being intended to be "relatively easy to use".

67. Lady Arden's comments at [84]-[90] emphasised that the courts should respect the terms of the preamble to ITA, confirmed by the Explanatory Notes, to the effect that (minor changes aside) the legislation was not intended to change the law. She noted the approach adopted to predecessor statutory provisions but drew a distinction with prior case law, to which the restraint required by *Farrell v Alexander* did not apply. She noted that Parliament was likely to have had previous case law in mind when enacting a consolidating statute.

68. In *NCL Investments Ltd v Revenue and Customs Commissioners* [2022] UKSC 9, [2022] 1 WLR 1829 at [47] the Supreme Court sounded "a note of caution" about Lady Arden's observations, which were not necessary for the decision in *Derry*. Lord Hamblen and Lady Rose observed that there had been no submissions on the point in *Derry*, that it was not necessary to consider their correctness in the present appeal, but:

> "… in a future case it may be necessary to give further consideration, with the benefit of submissions on the issue, as to whether and when it is appropriate to refer to earlier case law either in relation to a consolidation statute properly so called or to a Tax Law Rewrite Project statute."

69. We were also referred to the recent Supreme Court decision in *Centrica Overseas Holdings Ltd v Revenue and Customs Commissioners* [2024] SC 25, [2024]1 WLR 3391 ("*Centrica*"). This concerned the very different question of the divide between revenue and capital expenditure. However (and albeit not in the context of consolidation or the Tax Law Rewrite Project), it is worth noting that Lady Simler, with whom Lord Hodge, Lord Stephens, Lady Rose and Lord Richards agreed, concluded that when introducing an exclusion for capital expenditure from the deductibility of expenses of management in 2004, Parliament could be taken to have been aware of the established case law on the point in the context of trading expenditure ([53]). Reliance was also placed on the Explanatory Notes both to the Finance Act 2004 and the provision's subsequent re-enactment in the Corporation Tax Act 2009 (itself a product of the Tax Law Rewrite Project) ([54] and [57]).

70. On the facts of this case I have no doubt that it is appropriate to consider the earlier case law, for the following reasons:

    a) As is apparent from the preamble to ITTOIA, its purpose was to restate the law with minor changes. That alone suggests that, in general, Parliament intended a continuity of approach.

    b) That this is so is made plain in the Explanatory Notes to the Bill. They both confirm the purpose of the Act (to rewrite in clearer language, without generally changing the law) and indicate specific minor changes that are intended. No intended change is indicated in respect of s.402. This is obviously not determinative, but it is relevant in ascertaining Parliament's intention.

    c) As will be seen from the discussion below, there was a well-established body of case law, including House of Lords authorities, that had identified the correct approach to determining whether a receipt from a foreign possession was income or capital for the purposes of Schedule D Case V. That is part of the context in which s.402 was enacted.

    d) Importantly, paragraph 192 of the Explanatory Notes to the Bill expressly refers to that earlier case law and to the test as set out in the leading text book, *Whiteman on Income Tax*.

    e) Since the Explanatory Notes are on any basis a legitimate aid to interpretation to understand the background to and context of the legislation, the mischief at which it is aimed and its purpose, it must be right to have regard to the fact that they refer to the earlier case law.

The submissions in summary

Submissions for Mr Beard

71. Mr Gammie submitted that the enactment of ITTOIA had involved a major change in structure. In contrast to the previous schedular system, the charge to tax on UK and foreign income was integrated and charged by reference to its type. Instead of determining whether there was income from a foreign possession, the relevant test was whether there was a "dividend of a capital nature". The question whether the corpus of the asset was left intact after the distribution may be a relevant consideration but it is no longer determinative. Rather, the legislation expressly contemplates that it is possible for a "dividend" to be capital. The return of share premium account through a distribution by a Jersey company was an archetypal example of that, and just as such a return by a UK company before the enactment of the Companies Act 1948 would not have attracted tax, it was also excluded from the charge under s.402. Mr Gammie alternatively submitted that s.402 did not make a substantive change to the law, but none of the earlier cases addressed the situation with which we are concerned, or they focused on the maintenance of capital rule which Jersey had moved away from.

72. Mr Gammie submitted that what was being returned by Glencore was part of what was originally contributed for the shares. It had been received as such, recorded at all times as part of Glencore's capital (and therefore as part of its liability to shareholders) and then directly returned to shareholders from share premium account. Mr Gammie relied on Article 39(4) of the CJL 1991. Amounts in share premium account were subject to that provision at all times. In effect, a payment from share premium made under Part 17 was a capital reduction.

73. Mr Gammie relied on the way in which the Jersey law had developed, with a starting point on the enactment of CJL 1991 that was very similar to the Companies Act 1985. The first significant departure, with Amendment 6 in 2002, was the introduction of both no par value companies and a new concept of "capital accounts" ([29] above), which included share premium and the stated capital of no par value companies. Further, under the revised Article 39 share premium was required to be recorded separately for each class of share. There was an equivalent provision for the stated capital of no par value companies in Article 39A. The FTT had erred in failing to consider the treatment of no par value companies, which was a significant part of the overall picture since stated capital was their only form of share capital. The stated capital of a no par value company was equivalent to the par value and premium of a par value company. Share premium account was treated as capital just in the same way as stated capital. If the FTT was correct then it would appear to follow that a no par value company had nothing in the nature of capital.

74. Amendment 9, in 2008, substantially removed the maintenance of capital principle, the legislature deciding instead that creditors should be protected by a solvency statement procedure and that distributions should be permitted to be made under Part 17 from share premium account. It could not be the case that choosing to protect creditors in a different way meant that amounts that had previously been regarded as capital were now to be characterised differently. The FTT and UT had wrongly concluded that the move away from the maintenance of capital principle made a difference. The position in Jersey remained fundamentally different to that in the Cayman Islands, considered in *First Nationwide*, where share premium was not treated as part of the capital at all and (short

of liquidation) could only be returned via a distribution. Mr Gammie also drew attention to the fact that the amended Article 115 permitted distributions not only from share premium but from the entire stated capital of a no par value company.

75. To the extent that the test of "corpus" of the asset remained relevant following ITTOIA, share premium should be treated as a liability to the shareholders of the relevant class of share, such that payments made from share premium did not leave the asset intact.

76. As far as the Lonmin Distribution was concerned, the Lonmin shares were inherited by Glencore via its acquisition of Xstrata, and Glencore identified that they were non-core assets that would be better managed by shareholders. They did not represent a profit, and the distribution was a "one-off" which did not affect Glencore's profit distributions. The Lonmin Distribution was not a "dividend", but even if it was it was capital in nature.

Submissions for HMRC

77. Mr Yates' primary submissions were 1) that ITTOIA did not change the law, and the earlier case law is binding; 2) that, in essence, the effect of the earlier case law was that the chosen mechanism was definitive, with references to "corpus" being a shorthand; but 3) neither pre ITTOIA case law nor the current legislation rule out the possibility of a dividend having a capital nature. Further, while it is necessary to consider the relevant foreign law to determine the characteristics of the mechanism, the categorisation as capital or income is a question of UK law.

78. Mr Yates helpfully confirmed HMRC's position that it was the choice of the Part 17 mechanism that rendered the Distributions subject to income tax. In contrast, a capital reduction under Part 12 would have been accepted as giving rise to a capital rather than income receipt. Made as they were under Part 17, the Cash Distributions were income.

79. Mr Yates accepted that there were infelicities in the FTT's decision, including in the way that [251] was expressed ([47] above). But its findings of fact could not successfully be challenged. He also pointed out that the FTT had carefully considered the somewhat chameleon quality of share premium under Jersey law, whereby it was treated as capital for the purposes of Part 12 but otherwise if distributed under Part 17.

80. Ms Blaj submitted that the Lonmin Distribution, paid under the same Part 17 procedure as the Cash Distributions, could not be distinguished from them. It was a straightforward dividend in specie. Further, distinguishing *Sinclair v Lee* [1993] Ch 497, it was not of a capital nature.

The proper role of foreign law

81. It is helpful to start with a consideration of the proper role of foreign law in determining whether an amount falls to be charged under s.402.

82. The correct approach to the role of foreign law in this context was conveniently summarised by Robert Walker J in the High Court decision in *Memec plc v Inland Revenue Commissioners* [1996] STC 1336 ("*Memec*"), by reference to the speech of Lord Pearce in *Rae v Lazard*:

> "When an English tribunal has to apply the provisions of an United Kingdom taxing statute to some transaction, arrangement or entity which is governed

> by a foreign system of law, the tribunal must take account of the rules of that foreign system (properly proved if not admitted) in order to determine the nature and characteristics of the transaction, arrangement or entity. But having informed itself in this way, the tribunal must then apply the taxing statute as part of English law. The point is made in several of the speeches in the House of Lords in *Rae (Inspector of Taxes) v Lazard Investment Co Ltd* [1963] 1 WLR 555, 41 TC 1. Lord Pearce ([1963] 1 WLR 555 at 573, 41 TC 1 at 31) put it concisely: 'The factual situation (which includes the foreign law) has to be examined in order to apply the English law.' He then referred to what Rowlatt J had said in *Garland (Inspector of Taxes) v Archer-Shee* (1929) 15 TC 693 at 711:
>
> > 'The question of the American law is, what are exactly the rights and duties of the parties under an American trust, and when you find what those rights and duties are, you see what category they come in, and the place they fill in the scheme of the English Income Tax Acts which the courts here must construe.'"

83. Thus, foreign law must be considered in order to determine the nature and characteristics of the transaction. That is a question of fact, although as already discussed the fact-finding tribunal's approach or reasoning might disclose an error of law in an *Edwards v Bairstow* sense. The tax legislation must then be construed and applied to the facts. That second stage requires the application of English (strictly here, UK) law. I note that this approach was also spelled out clearly by Buckley J in *Courtaulds Investments Ltd v Fleming (Inspector of Taxes)* [1969] 1 WLR 1683 ("*Courtaulds v Fleming*") at p.1689 (see [104] below).

84. The proper interpretation and scope of the expressions "dividend" and "of a capital nature" are undoubtedly questions of (UK) law. In particular (and as discussed further below), I agree with Mr Yates that the fact that a foreign legal system might label something as "capital" cannot determine whether a transaction does in fact give rise to capital rather than income. Rather, whether it does or does not depends on the factual characteristics of the transaction, determined with reference to the relevant foreign law, to which UK tax law must then be correctly applied. Put another way, the dividing line between income and capital is drawn by UK law, and the task of the fact-finding tribunal is to apply that law to the facts as found. In the different context of capital expenditure, the same point was emphasised by the Supreme Court in *Centrica*, namely that the capital or revenue nature of an amount is a question of law: see at [12] and [62].

85. It follows from this that I consider that some of the evidence of the experts that was considered by the FTT, and in particular evidence relating to the categorisation of the Distributions as income or capital, may have strayed beyond the proper province of expert evidence into the questions of law that needed to be determined. However, it was rightly not suggested that this led to any material error in the FTT's decision.

The relevant case law

86. Turning to the principal authorities, *Reid's Trustees* concerned a dividend paid by a South African company out of capital profits made on the sale of property in and around Johannesburg. South African law was assumed to be the same as English law. The House of Lords, allowing an appeal from the Court of Session, held that the dividend was taxable under Schedule D Case V.

87. Lord Simonds regarded it as a "short and simple case" in which the court below had ignored "that what may be regarded as capital in the hands of the payer may yet be income in the hands of the payee". Although (at that time) an equivalent dividend paid from non-taxed capital by a UK resident company would not have attracted tax, the position of a foreign company and its shareholders was "wholly different" because the dividend was fully taxable whatever the source (pp.371-372). At p.373 Lord Simonds said that he could not imagine a "safer or better" approach than to ask "whether the corpus of the asset remains intact in the hands of the taxpayer". In the instant case the relevant possession, which was the shares, did.

88. Lord Normand referred at p.374 to a dividend as being "at least prima facie income of the recipient" and to the shares remaining "intact and precisely as they were" before it was paid. He observed that it was relevant to consider trusts cases which determined how dividends should be allocated between a life tenant and holders of interest in remainder, and proceeded to do so, concluding that "these authorities show that a distribution of money to shareholders out of profits realized by the sale of the company's assets without any alteration of the share capital is normally a payment of the nature of income" (p.376). Like Lord Simonds he rejected an argument that the treatment of distributions by UK resident companies was relevant.

89. Lord Morton commented that, after the payment was made, the shareholding was "exactly the same" and, like Lord Normand, that "prima facie" a dividend was income. He similarly considered that the approach that had been taken in trusts cases was helpful (p.380). Lord MacDermott considered that it was not possible to look beyond the immediate source, namely the shares, and the "shareholding…rested as it was" such that the dividend "cannot…have contained an element of capital" (p.383).

90. Lord Reid also emphasised the distinction between payments by foreign and domestic companies and considered that if a dividend was income for trusts purposes that would point to it being income for tax purposes, although it was not conclusive (p.385). He observed that there were many ways in which a company could deal with its profits, some of which would create new capital assets (he had earlier mentioned the issue of bonus shares) but: "If it adopts other methods the result is the receipt of income by its shareholders". If a dividend was chosen then "the nature and origin of those profits does not and cannot be made to affect the quality of the receipt by the shareholder for the purpose of income tax" (p.386).

91. The next significant authority chronologically is *In re Duff's Settlement* [1951] Ch 923 (CA) ("*Re Duff's*"). This is a trusts rather than a tax case but it is of particular interest because it considered the impact of the introduction of s.56 of the Companies Act 1948, which contained very similar wording to Article 39(4) of the CJL 1991. (What became s.56 of the 1948 Act was originally enacted as s.72 of the Companies Act 1947, but for convenience I will refer only to s.56.)

92. The company in question had shares with a nominal value of £1 each which had been issued at a premium of 12s. 6d. per share. The company undertook a court approved reduction of capital under which a payment was made to shareholders from share premium account of 2s. 6d. per share. Jenkins LJ, giving the judgment of the court, explained that before s.56 was enacted a distribution out of share premium would have given rise to income and not capital for trusts purposes, following cases such as *In re Bates* [1928] Ch 682 and *Hill v Permanent Trustee Company of New South Wales Ltd*

[1930] AC 720 ("*Hill v Permanent Trustee*"). The share premium would have been profits available for dividend, and if paid out otherwise than on a liquidation or a reduction of capital it would be:

> "…simply a cash distribution which, no matter how described, and notwithstanding that in the hands of the company it bore the character of a capital, not an income, profit could not in law be anything else in the hands of the recipients than income derived from their shareholdings." (p.927)

93. I should pause at this point to note that Mr Gammie relied on the fact that, prior to the introduction of s.56, a dividend from share premium paid by a domestic company would not have been subject to tax. I do not doubt that that was the case, but the reason for it is not that such amounts were treated as capital rather than income for tax purposes in the hands of shareholders. Rather, it was because of the very different tax system applicable at the time to shareholders in domestic companies, namely that they were not directly subject to tax on dividends they received but rather were potentially exposed to further tax only on distributions from taxed profits: see for example Lord Simonds' judgment in *Reid's Trustees* at p.372, Lord Reid's judgment at p.384 and, more generally, *Bradbury v English Sewing Cotton Co. Ltd* [1923] AC 744.

94. The enactment of s.56 changed the company law position fundamentally, since it took the share premium account out of the category of divisible profit and showed that where:

> "…the transaction in question is a distribution amongst shareholders of the share premium account, or part thereof, that transaction is to be treated as if the company was reducing its capital by paying off paid up share capital." (*Re Duff's* at pp.928-929).

Further, the "notionally paid up share capital" represented by share premium should be treated as paid up on the shares participating in the distribution. Applying that to the facts of *Re Duff's*:

> "…the company is to be considered as having paid off (with the sanction of the court) 2s. 6d. per share of the capital paid up on each of its issued shares by way of reduction of capital. If it is asked how this can be, inasmuch as the shares remained before and after the distribution fully paid shares of 1l. each, our answer is that, for the purpose of applying the reduction provisions of the Act to a transaction such as this, the section requires that each fully paid 1l. share should be treated as if it were a fully paid share of 32s. 6d. reduced by a return of capital to a fully paid share of 30s. 0d. We do not see how else the provisions of the section can be given intelligible effect. The company being thus by force of the section deemed to have paid off notionally paid up capital, the sum distributed must, we think, clearly be deemed to have left the company as paid up share capital returned to the members, and not as distributable profit divided amongst the members by way of dividend. What reason is there for holding that the capital character with which the trustees' proportion of the amount was thus impressed when it left the company was effaced and replaced by an income character when it reached the hands of the trustees? For our part we can see none. We think the hypothesis enjoined by the section must follow the amount received by the trustees and determine its character and destination in their hands also. The cases to which we have

> referred show that the character, as a matter of company law, of any given distribution as it leaves a company determines its character in the hands of the recipient. The relevant company law in the present case seems to us to require that the distribution here in question should be treated from the point of view of the payer, that is, the company, as a distribution by way of return of capital." (p.929)

95. Jenkins LJ went on to distinguish *Reid's Trustees* on the basis that the shares participating in the distribution had to be treated as if their nominal amounts and amounts paid up on them "included the proportions attributable to them respectively of the share premium account". The result was the same as if the share premium account had been used to pay up bonus shares which were then cancelled. The "mechanics" were "an essential factor in determining the character as between capital and income of the sum distributed". A company (in context, a UK incorporated company) could only make a distribution either by way of dividend or return of capital, and which category applied could "justly be determined by reference to the method or mechanics of distribution…which the company has adopted". The answer to that question must also "prima facie determine" whether it was capital and income between the tenant for life and remainderman (pp.930-931).

96. Jenkins LJ also observed at pp.931-932 that share premium account was "essentially a capital profit". But whereas previously the right to a distribution from it would have accrued to the tenant for life "by reference to the character of the distribution", s.56 made such a distribution "equivalent in law to an actual return of paid up share capital and capable of being validly effected only through the medium of precisely similar reduction proceedings". Section 56 thus recognised the "essentially capital character of premiums received on the issue of shares", and whether the matter was looked at either in terms of the origin of share premium or the "mode and character" of its distribution, the answer was the same. The sum was capital.

97. *Rae v Lazard* concerned a "partial liquidation" of a corporation, Certain-teed, established in the State of Maryland, by which it transferred one of its two businesses into a new company, Bestwall, with the consideration shares being distributed to shareholders. The taxpayer company was assessed to tax under Schedule D Case V on its receipt of Bestwall shares. It was found as a fact that it would not have been possible under Maryland law to effect the transaction by way of dividend; rather "the distribution effected a division of capital assets formerly owned by Certain-teed and now owned in part by Certain-teed and in part by Bestwall" (p.562).

98. The Revenue's appeal to the House of Lords failed. Lord Reid, with whom Lord Cohen and Lord Guest agreed, noted that a partial liquidation was unknown to English law. The important factual findings included that there was no dividend but rather a division of capital assets, and that the original interest held by Lazard did not remain intact and was now represented by its combined holdings in Certain-teed and Bestwall (pp.565-566). Lord Reid then observed:

> "In deciding whether a shareholder receives a distribution as capital or income our law goes by the form in which the distribution is made rather than by the substance of the transaction. Capital in the hands of the company becomes income in the hands of the shareholders if distributed as a dividend, while accumulated income in the hands of the company becomes capital in the hands of the shareholders if distributed in a liquidation." (p.567)

99. Referring to the way in which the test was articulated by Lord Simonds, Lord Normand and Lord MacDermott in *Reid's Trustees* Lord Reid said:

> "Accepting that test, as I do without reservation, the question is whether 'the corpus of the asset' or 'the shares of the company' or the 'capital of the possession' did or did not remain intact after the Bestwall shares were distributed: or whether the Bestwall shares were merely fruit or had in their fall taken part of the tree with them." (p568)

Applying Maryland law, the corpus of the asset did not remain intact: trees in Maryland could be split in two and still survive.

100. Lord Jenkins and Lord Guest also both emphasised the significance of the foreign law, Lord Guest commenting that it was the law of incorporation and the "legal machinery employed" that determined the character of the payment in the hands of the shareholders (p.570). Lord Pearce also referred at p.572 to machinery:

> "…it is not the source from which the assets are distributed but the machinery employed in their distribution which determines the question whether they are received as capital or income."

He referred to *Re Duff's* as exemplifying that "it is possible for a new statutory method of distribution to enlarge the categories of possible capital distribution" (p.572). After the passage referred to by Robert Walker J in *Memec* referred to at [82] above he said that, under Maryland law, there had been a distribution of capital. On the facts, that accorded with the substance of the transaction, though in other circumstances a court might feel entitled to "look behind the labels or even, perhaps, behind the machinery itself" to find the "true substance".

101. Both Lord Jenkins and Lord Pearce expressly agreed with the judgments of the Court of Appeal in *Rae v Lazard*, reported at 41 TC 1 ("*Rae v Lazard CA*"). The Court of Appeal's decision was also referred to by Buckley J in *Courtaulds v Fleming*, where he observed that he was assisted by Upjohn LJ's judgment. Buckley J referred at p.1691 to the following two passages:

> "First, when a company makes a distribution among its shareholders, the question whether such distribution is capital or income is determined against all the world by the legal machinery which the company employs to make the distribution—not, let me add, by the label which it attaches to that distribution…
>
> Secondly, when considering the question of income arising from foreign possessions under Case V of Schedule D, the precise interest taken by the person owning the foreign possession must be determined by the proper law of the foreign possession...
>
> I agree with the Crown's argument to this extent: that the relevant United States law cannot conclusively determine whether the receipt of the shares in Bestwall are income or capital for the purposes of the Income Tax Act, 1952; but until the true nature of the receipt is ascertained by, in this case, the law

of the State of Maryland, I do not see how it is possible to begin to solve the problem." (*Rae v Lazard CA* at p.20, per Upjohn LJ.)

102. It is also worth referring to Diplock LJ's comment at p.21 of *Rae v Lazard CA* that the court "must look to see the true legal character of what was done, and… is not bound by the technical meaning in English law of the particular expression used by a foreign Legislature". Similarly, Lord Evershed MR concluded that the concept of partial liquidation was not "just a label" (pp.17-18) and that what Certain-teed had done was "to distribute, not a dividend consisting of or made up of profits, whether capital or income, but part of its capital assets as though that part of the business had been wound up" (p.20).

103. The dispute in *Courtaulds v Fleming* related to a distribution out of share premium account made by an Italian company to the taxpayer investment trust company. Under Italian law, a non-distributable "legal reserve" had to be maintained at least equal to 20% of the share capital. Provided it was, share premium was distributable. Following the introduction of an Italian withholding tax the company determined that, rather than paying an ordinary dividend for the year in question, it would transfer profits and a further sum to the legal reserve such that the share premium was distributable. Share premium was then distributed in the amount that would otherwise have been paid by way of dividend. The Special Commissioners found that this was a return of capital under Italian law but concluded that the taxpayer's receipt was nonetheless taxable under Schedule D Case V.

104. Buckley J allowed the taxpayer's appeal. He applied the test of whether the shares remained intact, following *Reid's Trustees* and *Rae v Lazard*, observing that both the nature of the foreign possession and the effect of the distribution on it had to be ascertained under its governing law. However, whether having regard to those things the question the distribution was income under Case V was a question of English law (p.1689).

105. Buckley J concluded that the treatment of share premium under Italian law was analogous to that for domestic companies after 1948, as considered in *Re Duff's*. The share premium could be distributed if the legal reserve was maintained "but only apparently on the footing that the distribution is treated as a return of capital". Italian law treated premiums as notional paid up capital, or "an accretion to the tree and part of it", not as distributable profit (pp.1693-1694).

106. The authorities to which I have referred so far predated the enactment of ITTOIA. *First Nationwide* was decided subsequently, albeit by reference to a period before its enactment. As a subsequent decision it cannot be of any direct relevance to Parliament's presumed intention, but this court's decision in particular is nonetheless significant for its analysis of the earlier case law.

107. I can conveniently adopt the UT's outline in this case of what *First Nationwide* was about:

> "29. *First Nationwide* concerned a structured finance transaction by which a subsidiary of the Nationwide Building Society sought to raise funds. A major part of the case was concerned with whether each of two distributions made by a Cayman Islands company was (i) a 'dividend', and (ii) an 'overseas dividend' for the purpose of the manufactured payments legislation

in Schedule 23A ICTA 1988 and related regulations. If the answer to both those two 'dividend issues' was 'Yes', then the corresponding payments were deductible as a management expense for the purpose of corporation tax. The distributions were paid out of the share premium account of the company. The UT upheld the FTT in concluding that the distributions were overseas dividends for the purpose of the relevant UK legislation.

30. On further appeal, HMRC accepted that the payments were dividends but argued that they were not payments of an income nature but capital payments and accordingly not deductible…"

(The corresponding payments referred to by the UT were payments made by the taxpayer as borrower under a stock lending arrangement in amounts equal to the dividends, known as manufactured dividends. The actual dividends were received by a third party.)

108. The distributions considered in *First Nationwide* were made in respect of redeemable preference shares the only substantive rights of which were to the return of the capital contributed on the issue of shares, being rights which were described as "capital". Further, it was expressly recorded that the dividends had to be paid exclusively from share premium account, and the amount payable on redemption abated *pro tanto* to the extent that the dividends were paid: *First Nationwide CA* at [21]. It was also common ground that for an amount to be an "overseas dividend" it had to fall within Schedule D Case V: *First Nationwide UT* at [19].

109. The relevant Cayman Islands legislation had previously included a rule corresponding to s.56 of the Companies Act 1948, but this was replaced in 1989 by a new provision that expressly permitted share premium to be applied as the company determined, including in the payment of dividends, provided that the company remained able to pay its debts as they fell due. The UT in *First Nationwide* concluded that, as a result, the payments in dispute were dividends even though payment of them effected a corresponding reduction in the amount payable on redemption of the relevant shares.

110. In the course of its discussion, the UT (Warren J and Judge Sadler) noted at [37] that it had not found the "general description" of a dividend by Harman J in *Esso Petroleum Co Ltd v Ministry of Defence* [1990] Ch 163, 165 and adopted in the Court of Appeal decision in *Memec* ([1998] STC 754, 768-769), namely "a payment-out of a part of the profits for a period in respect of a share in a company", to be of particular assistance, noting that it may not be apt, for example, in respect of capital profits. I agree.

111. HMRC's further appeal to this court failed. Moses LJ gave the leading judgment, with which Rix LJ and Briggs J agreed. Moses LJ described the jurisprudence as well-established: the distinction between capital and income "depended upon the mechanics of distribution" (*First Nationwide CA* at [10], referring there to the trusts case of *Hill v Permanent Trustee*, where Lord Russell said at p.729 that whether something was income or "corpus" turned on "the procedure adopted"). Moses LJ referred at [12] to the significance of *Re Duff's* as lying in "the emphasis the courts placed upon the mechanism of payment in order to draw the distinction between capital and income". He also relied on Lord Reid's judgments in *Reid's Trustees* and *Rae v Lazard* as expressing the "principle that the form of the distribution dictates its character"; everything "depended on the method" and the conclusion in *Rae v Lazard* was "dictated by the machinery" (*First Nationwide CA* at [16]-[17]). The same principle that "it is the machinery by which

the assets are distributed which determines whether they are capital or income" was expressed in *Courtaulds v Fleming* (*First Nationwide CA* at [18]), commenting that the Weekly Law Report's headnote for that case incorrectly described the distribution by the Italian company as a dividend rather than a withdrawal from share premium reserve.

112. Moses LJ concluded that the effect of the change in Cayman Islands law in 1989 was to make share premium distributable as income, just as it had been in this jurisdiction before 1948. He rejected arguments to the contrary of Mr Gammie for the Revenue, based on the nature of the share rights (see [108] above) and the requirement to transfer share premium to a separate account, on the ground that there was no "third category" between income and capital. Rather (at [25]), while Cayman Islands law was relevant it was not determinative, and "the jurisprudence establishes that it is the form by which the payments are made which determines their character". The mechanism of a return of capital could have been adopted but had not been. He referred to *Sinclair v Lee* as an example of where it was possible to identify a dividend as not giving rise to income, but no such analysis was possible on the facts of *First Nationwide* ([26]-[27]). *Sinclair v Lee* is considered further below.

Conclusions from the case law

113. The test referred to in the Explanatory Notes of whether or not the corpus of the asset is left intact after the distribution emerges clearly from the first principal House of Lords authority, *Reid's Trustees*, where each of Lord Simonds, Lord Normand, Lord Morton and Lord Normand used that or a similar expression.

114. In *Reid's Trustees* Lord Reid referred instead to the method of distribution as being determinative. Some 14 years later in *Rae v Lazard* he reiterated that point by saying that whether what is received is income or capital turns on the form in which the distribution is made, but he also accepted that the question was whether the corpus of the asset remained intact. Further, each of the other Law Lords who gave a speech, Lord Jenkins, Lord Guest and Lord Pearce, either directly referred to the "machinery employed" as being determinative, or did so indirectly by approving the judgments in the Court of Appeal in that case.

115. In effect, therefore, the question whether the corpus of the asset remained intact is not a separate or different test from one that focuses on the machinery employed. Rather, the mechanism or form of the distribution is an essential element in determining whether the corpus, or capital, of the asset is to be regarded as left intact. Put another way, the mechanism is key to answering the question of whether the corpus is intact, and will (generally – see below) be determinative.

116. I would observe that a test expressed in terms of the mechanism is somewhat clearer and easier to apply than one that simply asks, without further guidance, whether the corpus of the asset remains intact. For example, without further elucidation the latter expression is not straightforward to apply to the facts of either *Rae v Lazard* or *Courtaulds v Fleming*, where the actual shares in the company in question appeared to remain legally unaltered. This may help to explain the focus on the mechanism in *Rae v Lazard*.

117. Cases concerning trusts are relevant but cannot be determinative, not least because they ultimately turn on the interpretation of trust instruments and the settlor's presumed intention. But with that caveat, *Re Duff's* provides further support for the significance of

the mechanism employed. It is a vivid illustration of the need to focus on, as Jenkins LJ put it, the "the character, as a matter of company law, of any given distribution as it leaves a company" as determining its character in the hands of the recipient. The effect of s.56 of the Companies Act 1948 was to treat a return of share premium as a repayment of share capital. It was "deemed to have left the company as paid up share capital returned to the members, and not as distributable profit divided amongst the members by way of dividend". As Jenkins LJ said, the "mechanics" were an "essential factor" in determining whether what was returned was income or capital. (See [94]-[96] above.) Thus it was critical in that case that the mechanism used to return amounts from share premium account was that of a reduction of capital, as it had to be following the enactment of s.56. While Jenkins LJ did also refer at p.932 to the alternative of looking at the origin of the share premium account and the "essentially capital character" of share premium (in wording that I note echoed that of the Cohen Committee in recommending the change in law that became s.56), that cannot have been determinative. This is because those features were present before s.56 was enacted, during which time distributions from share premium were, as Jenkins LJ had observed, treated as income in cases such as *Hill v Permanent Trustee*.

118. However, as is implicit in what Jenkins LJ said, while mechanism is key it is not necessarily conclusive in all cases. For example, a payment that takes the form of a dividend is "prima facie" income: Lord Normand and Lord Morton in *Reid's Trustees*; Jenkins LJ in *Re Duff's*. As discussed below, *Sinclair v Lee* provides an example of a transaction that took the form of a dividend but which was treated as capital in nature. I would therefore agree with Lord Pearce's comment in *Rae v Lazard* that it might be necessary to look behind the mechanism in some cases to identify the "true substance" (see [100] above).

119. Two other points are worth drawing out. First, the origin of the profit or amount in question does not affect the position. *Reid's Trustees* provides an obvious example of this, as Lord Reid explained (see [90] above). The treatment of share premium before 1948 and in *First Nationwide* provides another.

120. Secondly, in determining whether an amount is income or capital it is necessary to look behind labels that may be applied under the relevant foreign law (see the comments to that effect in *Rae v Lazard* referred to at [100]-[102] above).

121. I therefore largely agree with Moses LJ in *First Nationwide CA* that, in deciding whether an amount received was income within Schedule D Case V, the mechanism is key. However, as Moses LJ himself recognised in referring to *Sinclair v Lee*, it is not necessarily conclusive in all cases.

Interpretation of s.402(4) ITTOIA

122. Mr Gammie relied on what he described as a major change in structure on the enactment of ITTOIA, with the move from a schedular system to taxation by type of income and the integration of tax on UK and foreign income. However, as he accepted the integration of UK and foreign income was not total.

123. Importantly, dividends and other distributions from UK companies are charged under Chapter 3 of Part 4 of ITTOIA, and non-UK dividends under Part 4, for the reasons explained at paragraph 186 of the Explanatory Notes to the Bill (see [13] above). Further,

as the Explanatory Notes also explain the charge to tax on foreign dividends is confined to amounts that are income, whereas the charge to income tax on distributions from UK resident companies can include amounts of a capital nature, as was the case prior to ITTOIA: see now the definition in s.1000 Corporation Tax Act 2010, including the express inclusion of a "capital dividend" in s.1000(1)A (the definition applies to income tax by virtue of s.989 ITA 2007) and also s.383 ITTOIA, which explicitly states that dividends and other distributions of UK resident companies "are to be treated as income".

124. The structure and content of Chapter 3 and Chapter 4 are accordingly very different, reflecting the previous law. The Explanatory Notes hint that the choice of the term "dividend" for Chapter 4 may have been intended at least in part to minimise confusion with Chapter 3, which charges income tax on "distributions" as defined (a concept which includes but is not limited to dividends). But it was also recognised that amounts may be received which are of an income nature without necessarily being a "dividend" (paragraph 188 of the Explanatory Notes to the Bill).

125. I therefore reject Mr Gammie's submission based on the change in structure effected by ITTOIA. Rather, it is clear from Chapters 3 and 4 of Part 4 of ITTOIA and the Explanatory Notes that (a) the treatment of UK and non-UK source dividends or other distributions continued not to be aligned; and (b) it would also continue to be the case, as it was before ITTOIA, that the charge to income tax on non-UK source dividends arose only if the amount in question was income rather than capital.

126. As to what is income and what is capital, the obvious place to look must be the earlier case law. Given that it is a question of UK law (see [84] above) there is no other sensible candidate. If there were any possible doubt on the point then the Explanatory Notes make it crystal clear.

127. On a first impression the concept of a "dividend of a capital nature" is a little puzzling, because whatever meaning is given to the term "dividend" it would be expected to be income in nature. However, while in most cases a dividend would be income in nature it is possible that it might not be: see [118] above. The example given by Moses LJ in *First Nationwide CA* and by the UT in this case was *Sinclair v Lee.* That was a demerger by a UK company. But there may well be other examples under less familiar systems of foreign law. As the UT correctly observed in this case at [75]:

> "It is impossible to envisage all the circumstances in which a company may pay a dividend, in particular when s 402 is concerned with companies incorporated under a multitude of foreign laws which may include procedures and arrangements unknown in the UK…"

128. Further, and quite apart from a multiplicity of different foreign legal systems, the precise scope of the term "dividend" is inherently somewhat unclear, with the description adopted in *Memec* potentially not being apt in all circumstances: see [110] above. It is therefore unsurprising that the draftsman wanted to make it clear that, if it was possible to have a dividend that was capital in nature, the charge to income tax under s.402(1) of ITTOIA should not apply to it.

129. I therefore see no difficulty in applying the earlier case law, and disagree with Mr Gammie's submission that the question whether the corpus of the asset was left intact

after the distribution – applied, as already discussed, by considering the mechanism of the distribution – is no longer determinative.

Application to the facts: the Cash Distributions

130. As Mr Yates pointed out, Mr Gammie's submissions about the history and development of Jersey law, the effect of Article 39(4) of the CJL 1991 and the comparison with no par value companies, amount in large part to challenges to the FTT's findings of fact. I would also observe that the FTT's proper concern was the state of Jersey law when the Distributions were made rather than either the history per se (much of which, incidentally, predated Glencore's incorporation in 2011) or the treatment of no par value companies, which Glencore is not. Those other features may cast some light on the proper interpretation of the relevant Jersey law, but cannot displace the wording of the legislation as it was in force and applicable to Glencore at the relevant times.

131. Mr Gammie's focus on Article 39(4) does not take proper account of the fact that it is subject to Article 39(3)(e). The FTT was in my view correct, and certainly entitled, to find at [212] and [251] that Article 39(4) was subject to that provision, which expressly permitted share premium to be applied in making a distribution under Part 17. While the FTT could certainly have expressed the point better at [251] in particular, the sense is sufficiently clear.

132. The *WPP* decision confirms what is clear from a reading of the legislation, namely that the CJL 1991 "no longer distinguishes between a distribution out of share premium account and a distribution out of profits". *WPP* also confirms that the consequence of this is that the maintenance of capital principle no longer applies to the share premium account. However, the proper focus for our purposes is not on the maintenance of capital principle as such, but on the fact that distributions may be made from share premium under Part 17, and that was the mechanism that was in fact used to make the Distributions. The legislature's decision to move away from the maintenance of capital principle in respect of share premium and to protect creditors by another means provides a rationale for the changes: it explains <u>why</u> share premium is now distributable in the same way as (for example) trading profits.

133. Since Article 39(4) has no application to distributions made under Part 17 rather than Part 12 and the Distributions were in fact made using the Part 17 mechanism and not under Part 12, *Re Duff's* cannot assist Mr Beard, not least given its focus on the mechanism used: see [117] above. The position is not improved by the point that share premium has to be recorded separately for each class of share. That has no relevance to the analysis of the mechanism actually employed to make the Distributions.

134. Similarly, Mr Beard is not assisted by the distinction Mr Gammie sought to draw between Jersey law and the Cayman Islands law considered in *First Nationwide*. As I understood it, the distinction relates essentially to the fact that in the Cayman Islands there is no provision that treats share premium as capital for any purpose. But the fact that share premium is treated under Jersey law as capital for capital reduction purposes, so that the mechanism in Part 12 can be employed to return it, tells us nothing about its treatment when it is distributed under the different mechanism of Part 17, to which Article 39(4) has no application.

135. There is also, in my view, nothing in Mr Gammie's reliance on share premium account being a "capital account" under Jersey law, or in the comparison with no par value companies.

136. In relation to the former, as already discussed labels applied under foreign law are not determinative, but more fundamentally the divide between income and capital is one for UK rather than foreign law (see [84] above). Further, the fact that the Distributions were debited to an account which may for some Jersey law purposes be regarded as "capital" does not determine their tax treatment as income or capital, just as the fact that the source of the profit distributed in *Reid's Trustees*, namely capital profit, did not affect the character of the distribution in that case as income. As Lord Pearce pointed out in *Rae v Lazard*, what is important is not the source but the mechanism (see [100] above). The wording of s.402(4) reinforces this, because the relevant question is whether the dividend is of a capital nature. As the UT correctly observed at [69]:

> "The focus of s 402(4) is on the character *of the dividend*, not of the funds from which the dividend is made."

137. As regards the latter, we are simply not concerned with the position of no par value companies, but even if regard were had to that so as to see (as Mr Gammie put it) the full picture as regards Jersey law, I cannot see what difference it could make. The stated capital of a no par value company, like share premium of a par value company like Glencore, can either be distributed under Part 17 or be the subject of a capital reduction under Part 12. Which mechanism is used is critical to the UK tax analysis. I therefore discern no material error in the FTT's failure expressly to address the position of no par value companies in its analysis.

The Lonmin Distribution

138. I agree with Ms Blaj's submission that the Lonmin Distribution falls to be treated as a "dividend" for the purposes of s.402 ITTOIA. No meaningful distinction can be drawn between it and the Cash Distributions in that respect. The Lonmin Distribution was made using precisely the same mechanism as would be used, and was used, for ordinary cash distributions.

139. Further, and as already discussed, Harman J's general description of a dividend adopted in *Memec* is not necessarily apt in all circumstances. In particular, there is in my view no requirement to identify what is paid as representing something that can be characterised as profit for a period. So I do not consider that there is anything in Mr Gammie's reliance on the Lonmin shares having been inherited via Glencore's acquisition of Xstrata. But even if I was wrong about that, the Lonmin Distribution was actually debited to share premium in exactly the same way as the Cash Distributions. As the UT observed at [42] by reference to *First Nationwide UT* at [37], share premium may itself be regarded as a profit arising on the issue of shares, in the sense that the company received more than their par value. This accords with *Re Duff's*, where share premium was characterised as "essentially a capital profit" (see [96] above). The fact that the Lonmin shares themselves might not directly amount to profit is nothing to the point, just in the same way as cash to pay a dividend debited to profit and loss account might in fact be sourced from (for example) borrowings.

140. I also agree with HMRC that the Lonmin Distribution was not "of a capital nature". Rather, it was a distribution in specie by Glencore of (in relative terms) a fairly minor asset to its shareholders, which for tax purposes has the same income character as a distribution under Part 17 of an equivalent amount of cash.

141. *Sinclair v Lee* was a very different case. It concerned ICI's demerger of Zeneca, which took the form of a dividend in specie satisfied by the transfer of the Zeneca business to a new company in exchange for the issue of shares direct to ICI shareholders (a so-called tripartite or indirect demerger).

142. The question before the court was whether trustee shareholders in ICI would be required to treat the receipt of the Zeneca shares as capital or income. It was not therefore a tax case. (The tax treatment of the demerger is immaterial but it may help to clarify that, as a dividend of a UK resident company, it would have been subject to income tax irrespective of whether it was income or capital – see [123] above – but for a specific exemption for demergers.) The fact that it was a trusts, rather than tax, case is reflected in a number of references to the relevance of the presumed intention of the settlor. However, HMRC did not seek to suggest that it should be distinguished on that basis. Rather, *Sinclair v Lee* was relied on by HMRC as illustrating the sort of situation that could fall within s.402(4) ITTOIA on the basis that the dividend received by shareholders was of a capital nature.

143. As Sir Donald Nicholls VC observed at p.504, the commercial effect of the transaction was to divide ICI up. The expected value of Zeneca represented over half of the value of ICI (see the reference to an expected 55:45 split at p.504), which prompted the Vice-Chancellor to comment at p.505 that treatment as income was "directly opposite to one's instinctive reaction".

144. The Vice-Chancellor ultimately relied on a list of eight factors to conclude at p.514 that to treat the transaction as giving rise to income "would be to exalt company form over commercial substance to an unacceptable event [sc. extent]". Ms Blaj sought to distinguish each of the factors from this case, but I really need only mention the Vice-Chancellor's conclusions that the commercial purpose of the transaction was not for ICI to part with assets but to "replace a single head company with two head companies", and that ICI shareholders would be "no nearer the underlying assets than before". There is no parallel to either of those key features in the Lonmin Distribution.

Conclusion

145. In conclusion, I would dismiss the appeal.

Lady Justice Asplin:

146. I agree.

Lord Justice Peter Jackson:

147. I also agree.