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Case Number: TC09650

FIRST-TIER TRIBUNAL
TAX CHAMBER

[Location/By remote video hearing]

Appeal reference: TC/2016/02554
TC/2016/07169

Tax avoidance scheme – whether payments made were earnings within s62 ITEPA

Heard on: 15-22 January 2024
Judgment date: 25 September 2025

Before

TRIBUNAL JUDGE GERAINT WILLIAMS
DUNCAN MCBRIDE

Between

(1) GW MARTIN & CO LIMITED
(2) QUADRANT SURVEYING LIMITED

Appellants

and

THE COMMISSIONERS FOR HM REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Mr Michael Avient of counsel, instructed by Grey Eclipse Limited

For the Respondents: Mr Richard Vallat KC and Mr Jack Rivett of counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs

DECISION

INTRODUCTION

1. The two appeals brought by GW Martin & Co Limited ("GWM") and Quadrant Surveying Limited ("QSL") (collectively the "Appellants") are against (i) Regulation 80 determinations (Income Tax (PAYE) Regulations 2003, SI 2003/2682) issued by HMRC in respect of PAYE income tax; and (ii) Section 8 decisions (Social Security Contributions (Transfer of Functions etc.) Act 1999) issued in respect of national insurance contributions ("NICs"). The income tax and NICs claimed by HMRC are considered to be due from the Appellants on payments made to certain employees as rewards for their services.

2. The Appellants made the payments pursuant to a widely marketed scheme (the "Scheme") which purported to avoid the income tax and NICs otherwise payable in respect of the payments and to obtain a corporation tax deduction. QSL implemented the Scheme as marketed by Evolve Professional Services Ltd ("Evolve") and GWM implemented the Scheme as marketed by Blackstar (Europe) Ltd ("Blackstar").

3. In respect of QSL, the determinations dated 7 March 2016 issued by HMRC for 2013/14 were:

   (1) Determination under Reg 80 for PAYE of £48,372

   (2) NICs decisions totalling £29,879.63

4. In respect of GWM, the determinations issued by HMRC were:

   (1) Determination for 2011/12 under Reg 80 for PAYE of £167,166.90

   (2) Amended determination for 2012/13 under Reg 80 for PAYE of £35,720.32

   (3) Amended NICs decision notices for period 2011 to 2013 totalling £89,097.74

5. The issue is dispute is whether the Appellants were required to deduct PAYE and pay NICs in respect of payments ("Payments") made or amounts credited to the loan accounts of employees and directors (together "Employees"). At the hearing, the parties were agreed that the issue in dispute was whether the payments made to the directors and employees are properly characterised as "earnings" within the meaning of s62 of the Income Tax (Employment and Pensions Act 2003 ("ITEPA").

PRELIMINARY ISSUE

6. On 19 December 2023, HMRC served a Supplementary Bundle containing documents that had been identified when HMRC were finalising their skeleton argument. The e-mail requested that the Supplementary Bundle be admitted as it would "enable the Tribunal to deal with these appeals fairly and justly, thus furthering the overriding objective". The Appellants' representative was copied into HMRC's e-mail, it was confirmed that the Supplementary Bundle had been sent to the Appellants' representative for review but no response was received. The Supplementary Bundle contained the amended Section 8 decisions and Regulation 80 determinations, HMRC TBS View Employment List screenprint in respect of Mr Clark, Mr Cousens and Mr Skelton, the GWM company accounts dated 31 October 2022 and the GWM confirmation statement dated 29 March 2023. On 8 January 2024, the Tribunal directed that HMRC's application for the admission of the Supplementary Bundle be considered at the start of the hearing. On 12 January 2024, the Appellants sent to the Tribunal and HMRC their grounds of opposition to HMRC's application. The application was opposed on the grounds that: (i) the application was not accompanied by evidence and (ii) no reason had been given for the delay and HMRC not having pleaded prejudice there is no basis on which the documents can be admitted.

7. The application was dealt with in short order. Having heard the parties' submissions, we were satisfied that the documents contained in the Supplementary Bundle were relevant and would enable the Tribunal to deal with the two appeals fairly and justly in furtherance of the overriding objective and applied the presumption that all relevant information should be admitted unless there is a compelling reasons to the contrary, *Revenue and Customs Commissioners v Atlantic Electronics Ltd* [2013] EWCA Civ 651 applied.

RELEVANT LEGISLATION

8. The parties were agreed that the question of whether the Appellants are liable to account for PAYE income tax on the payments made to their directors and employees under the Scheme depends upon whether the payments are properly characterised as "earnings" within the meaning of s62 of the Income Tax (Employment and Pensions) Act 2003 ("ITEPA"), which provides:

> "62 Earnings
>
> (1) This section explains what is meant by "earnings" in the employment income Parts.
>
> (2) In those Parts "earnings", in relation to an employment, means-
>
> (a) any salary, wages or fee,
>
> (b) any gratuity or other profit or incidental benefit of any kind obtained by the employee if it is money or money's worth, or
>
> (c) anything else that constitutes an emolument of the employment.
>
> (3) For the purposes of subsection (2) "money's worth" means something that is –
>
> (a) of direct monetary value to the employee, or
>
> (b) capable of being converted into money or something of direct money value to the employee."

9. Similarly, the question of whether the Appellants are liable to account for primary and secondary Class 1 employer contributions in respect of the payments depends upon whether they also meet the definition of "earnings" under section 3 of the Social Security and Contributions and Benefits Act 1992 ("SSCBA"), which provides:

> "3 Earnings" and "earner".
>
> "(1) In this Part of this Act and Parts II to V below-
>
> (a) "earnings" includes any remuneration or profit derived from an employment; and
>
> (b) "earner" shall be construed accordingly.

10. In addition, the parties were agreed that the Court should adopt a purposive approach in construing tax legislation and applying it to the facts of the case, pursuant to the *Ramsay* principle of interpretation (*W.T. Ramsay Ltd. v Inland Revenue Commissioners* [1982] A.C. 300 (H.L.) ("*Ramsay*"), at pp. 323G – 324B, per Lord Wilberforce.

BURDEN OF PROOF

In this appeal the burden of proof rests upon the Appellants. The burden of proof is the usual civil standard on the balance of probabilities.

GROUNDS OF APPEAL

11. The Grounds of Appeal in both appeals were identical and were as follows:

Ground 1: The Payments to the Employees did not constitute earnings because the Employees were required to return all the payments to the employer.

Ground 2: If, to the contrary, the payments are found to be earnings, their value was nil, the Employees being required to pay the amount to the employer for shares with no value.

EVIDENCE

12. We were provided with a hearing bundle for each of the two appeals, an authorities bundle, a supplementary bundle, the parties' skeleton arguments, HMRC's Note of Evidence and the Appellants' speaking note.

13. We also received witness statements and sworn oral testimony from the following witnesses:

(1) Witness statement of Mr Alex Coupland ("AC") on behalf of QSL dated 7 June 2023 comprised of 18 paragraphs with seven exhibits;

(2) Witness statement of Mr Graham Martin ("GW") on behalf of GWM dated 25 November 2016 comprised of eight paragraphs (six substantive paragraphs when paragraph one providing his name and address and the statement of truth in paragraph eight are excluded) without exhibits; and

(3) Witness statement of Mr Ian Fitzpatrick ("IF") of Blackstar Group dated 25 November 2016 comprised of eight paragraphs (six substantive paragraphs when paragraph one providing his name and address and the statement of truth in paragraph eight are excluded) without exhibits.

Our assessment of the witness evidence

AC's evidence

14. AC is a director, significant shareholder and company secretary of QSL and received a Payment of £75,000 following QSL's use of the Scheme in 2013. We found AC to be generally frank and straightforward in his evidence and willing to assist the Tribunal but was at times keen to advance QSL's case with regard to the exit strategy and Share buyback. He claimed to be aware of the potential for a call but did not expect it to happen. His evidence initially was that he could not recall whether the call was enforced or paid by QSL upon Mr Rowe's retirement but when asked about the Share buyback his evidence was that call had been paid. We noted that his was the only witness statement which acknowledged that the purpose of the Scheme and QSL's involvement in the Scheme was to avoid PAYE and NICs contributions. When considering his evidence we were mindful of the time that had elapsed since QSL implemented the Scheme and the share buyback and that he had a financial interest in the outcome of the appeal.

GW's evidence

15. GW is a Chartered Accountant and director and majority shareholder of GWM. He received Payments totalling £312,000 following GWM's use of the Scheme in 2011 and 2012. We found that GW's evidence was marked by inconsistency and a lack of clarity. His evidence in cross-examination appeared to shift depending on the context and question and his recollections were often vague or contradictory. His witness statement did not mention the tax-saving purpose of the Scheme, despite this being a central and undisputed aspect of its design. He later acknowledged the financial benefit but maintained that the Scheme also served to reward long-serving employees. At times, GW portrayed himself as an experienced Chartered Accountant with decades of experience, whilst at other times he claimed limited

understanding of tax planning arrangements and the Scheme. This duality raised questions about the reliability of his evidence. His responses during cross-examination were often indirect and he occasionally diverted into unrelated topics. He attributed gaps in his statement to his professional advisors and introduced new evidence late in the proceedings, such as the idea that calls on shares were only applicable to "bad leavers." He suggested that holding E Shares carried "kudos", despite the documentary evidence that the E Shares offered no real control or financial rights and carried potential liabilities. He also claimed that employees might benefit from a future sale of the company, though no sale occurred and it was accepted that the financial targets required for such benefits were wholly unrealistic.

16. Although several employees left GWM, triggering the conditions for payment on their Shares, GWM and GW did not pursue these payments. GW later claimed he misunderstood the terms, believing calls were conditional on misconduct rather than retirement. This explanation was not supported by any documentation. He could not recall receiving or reviewing key advice documents and repeatedly stated he had relied upon advisers and had a lack of detailed understanding of the Scheme.

17. We have therefore treated GW's evidence with caution and have not accepted it save where it is consistent with contemporaneous documents or involved admissions that ran counter to his interests.

IF's evidence

18. IF is a Chartered Tax Adviser and was a director of Blackstar and, at the relevant time, a consultant to Evolve. He later became a director of Evolve after it had ceased trading. He is currently a director of Grey Eclipse Limited ("GEL") which is running these appeals and the litigation on behalf of approximately 100 clients who it is understood pay a monthly subscription fee to GEL for the litigation service. IF gave evidence that was marked by evasiveness and a lack of transparency. His role in promoting the Scheme and subsequent involvement in related litigation raised concerns about his impartiality. In his written statement, IF did not acknowledge that the Scheme was designed to reduce PAYE and NICs, during cross-examination he abandoned that position. He candidly admitted that he had not reviewed any documents when preparing his witness statement, which weakened the reliability of his recollections and suggested a lack of diligence. IF claimed he was unaware of any plans for participants to exit the Scheme, even though he was a shareholder in Ashmere Strategies Limited ("ASL"): a company that offered such exit options. His justification for not mentioning this involvement was that he had not been specifically asked, which came across as evasive and disingenuous. He had a vested interest in the outcome of the appeals given his role in promoting the Scheme and his current position managing litigation for clients that had used the Scheme. His claim that the outcome of these appeals would not affect him was unconvincing.

19. We viewed IF's evidence as unreliable, shaped by selective memory with a tendency to deflect responsibility. His failure to acknowledge key aspects of the Scheme and his involvement in related entities cast doubt on the accuracy and completeness of his testimony.

20. We have therefore treated IF's evidence with caution and have not accepted it save where it is consistent with contemporaneous documents or involved admissions that ran counter to his interests.

APPROACH TO EVIDENCE

21. HMRC submitted that the Courts have repeatedly noted the fallibility of human memory, especially where events happened several years ago and the witnesses have a stake in a particular version of events (see *Chalcot Training Limited v Ralph & ors*. [2020] EWHC 1054 (Ch.) ("*Chalcot*") at [29]), citing *Gestmin SGPS SA v Credit Suisse (UK) Limited* [2013]

EWHC 3560 (Comm.)) ("*Gestmin*") and those concerns apply with force here. The events that are the subject of each appeal took place more than 10 years ago, and, in the case of GW and IF, their statements are more than seven years old (both dated 25 November 2016). The statements do not exhibit any documents and IF confirmed that he had not looked at any documents when preparing his statement. Each of the three witnesses has a significant interest in the outcome of the appeals: AC and GW are directors and substantial shareholders in the Appellants and received monies under the Scheme and the outcome of the litigation will have reputational and possibly financial implication for IF given his role in the promotion of the Scheme. Accordingly, HMRC submitted that where witnesses evidence is unreliable for any reason, as here, we should attach greater importance to the contemporaneous documents as a means of establishing the facts and motivations and state of mind of those concerned.

22. Where the Appellants have chosen to rely upon short witness statements which do not refer to any documents and in oral evidence referred to matters for the first time and not previously disclosed, the Appellants should not profit from its failure to set out in advance the evidence which it chooses to rely upon.

23. Mr Avient submitted in respect of the witness evidence that it was not open to HMRC to assert in submission matters that had not been put to the witnesses in cross-examination and there was no basis for the Tribunal to accept such assertions and make findings of fact. To make such findings would be a breach of fairness. In support of that submission, Mr Avient relied upon the decision of the Supreme Court in *TUI UK Ltd v Griffiths* [2023] UKSC 48 ("*TUI*") and an extract from Chapter 12 of *Phipson on Evidence* 20th Edition – "Requirement to challenge evidence". The key point is the question of fairness, if certain key elements of HMRC's case to were not put to the witnesses then, in the absence of any evidence or admission to the contrary, the Tribunal cannot find that the Appellants intended to exit the scheme and not repay any money.

24. We note that in *Tui*, Lord Hodge summarised his conclusions on the general laws, principles and rules of evidence at [70] of his judgment. We further note that [70(i)] begins by stating that the rule considered is a "general rule" and at vii that the "rule should not be applied rigidly":

> (i) The general rule in civil cases, as stated in *Phipson*, 20th ed, para 12-12, is that a party is required to challenge by cross-examination the evidence of any witness of the opposing party on a material point which he or she wishes to submit to the court should not be accepted. That rule extends to both witnesses as to fact and expert witnesses.
>
> (ii) In an adversarial system of justice, the purpose of the rule is to make sure that the trial is fair.
>
> (iii) The rationale of the rule, ie preserving the fairness of the trial, includes fairness to the party who has adduced the evidence of the impugned witness.
>
> (iv) Maintaining the fairness of the trial includes fairness to the witness whose evidence is being impugned, whether on the basis of dishonesty, inaccuracy or other inadequacy. An expert witness, in particular, may have a strong professional interest in maintaining his or her reputation from a challenge of inaccuracy or inadequacy as well as from a challenge to the expert's honesty.
>
> (v) Maintaining such fairness also includes enabling the judge to make a proper assessment of all the evidence to achieve justice in the cause. The rule is directed to the integrity of the court process itself.

(vi) Cross-examination gives the witness the opportunity to explain or clarify his or her evidence. That opportunity is particularly important when the opposing party intends to accuse the witness of dishonesty, but there is no principled basis for confining the rule to cases of dishonesty.

(vii) The rule should not be applied rigidly. It is not an inflexible rule and there is bound to be some relaxation of the rule, as the current edition of *Phipson* recognises in para 12.12 in sub-paragraphs which follow those which I have quoted in para 42 above. Its application depends upon the circumstances of the case as the criterion is the overall fairness of the trial. Thus, where it would be disproportionate to cross-examine at length or where, as in *Chen v Ng*, the trial judge has set a limit on the time for cross-examination, those circumstances would be relevant considerations in the court's decision on the application of the rule.

(viii) There are also circumstances in which the rule may not apply: see paras 61-68 above for examples of such circumstances.

25. Accordingly, taking into account our assessment of the witness evidence at paragraphs 14-20 above, we have adopted the following approach to the evidence:

(1) Where there is relevant contemporary documentary evidence, such evidence is generally to be preferred, particularly where the documents present an inconsistent picture to that in oral testimony given the fallibility of human memory (*Gestmin*, *CXB v North West Anglia NHS Trust* [2019] EWHC 2053 (QB) and *Kogan v Martin* [2019] EWCA Civ 1645 (*Kogan*)).

(2) The Tribunal must take account of all the evidence available to it and where oral testimony is not believed the Tribunal must explain why (*Kogan*).

(3) It is inappropriate to reach a conclusion about witness credibility based solely on the way they gave evidence. The ordinary process of reasoning requires us to consider matters such as consistency of the account with known facts, previous accounts given by the witness, other evidence and the overall probabilities. However, an assessment of credibility could quite properly include the impression made upon us with due allowance being made for the pressures that might arise from the process of giving evidence. (*Re B-M (children: findings of fact*) [2021] EWCA Civ 1371).

(4) Where it has been disputed that HMRC have clearly put its case or assertions to the Appellants' witnesses we have stated set out our reasons for accepting or rejecting the evidence.

(5) The Appellants have relied upon very brief witness statements which do not refer to any documents and in oral evidence referred to matters for the first time that had not been previously disclosed. We have treated such evidence with caution and when considering such evidence have at the forefront of our mind that the burden of proof lies with the Appellants and the Appellants should not unfairly profit from its failure to set out in advance the evidence which it now chooses to rely upon.

ADVERSE INFERENCE

26. HMRC invited us to draw adverse inferences in respect of Mr Andrew Rowe ("AR") and the five GWM employees who were not called to give evidence on the Appellants' behalf in line with the ordinary principles for so doing which are set out in Lord Sumption's speech in the Supreme Court in *Prest v Prest* [2013] 2 AC 415 at [44], and in *Wisniewski v Central Manchester Health Authority* [1998] PIQR P324 by Brooke, LJ. The principles were conveniently summarised by Morgan, J in *British Airways PLC v Airways Pension Scheme*

Trustee Ltd [2017] EWHC 1191 (Ch) ("*British Airways*") at [141-143]. We note that Lord Leggatt in *Royal Mail Group Ltd v Efobi* [2021] UKSC 33, Lord Leggatt at [41] stated:

> "41. The question whether an adverse inference may be drawn from the absence of a witness is sometimes treated as a matter governed by legal criteria, for which the decision of the Court of Appeal in *Wisniewski v Central Manchester Health Authority [1998] PIQR P324* is often cited as authority. Without intending to disparage the sensible statements made in that case, I think there is a risk of making overly legal and technical what really is or ought to be just a matter of ordinary rationality. So far as possible, tribunals should be free to draw, or to decline to draw, inferences from the facts of the case before them using their common sense without the need to consult law books when doing so. Whether any positive significance should be attached to the fact that a person has not given evidence depends entirely on the context and particular circumstances. Relevant considerations will naturally include such matters as whether the witness was available to give evidence, what relevant evidence it is reasonable to expect that the witness would have been able to give, what other relevant evidence there was bearing on the point(s) on which the witness could potentially have given relevant evidence, and the significance of those points in the context of the case as a whole. All these matters are inter-related and how these and any other relevant considerations should be assessed cannot be encapsulated in a set of legal rules."

27. As is apparent from the above cases, we are entitled to draw an adverse inference from the absence of evidence (including the attendance of a witness) which might have been expected to be material to an issue to be decided and we should take a common sense approach when determining whether an adverse inference may be drawn. An adverse inference serves to strengthen evidence of the party against whom the evidence was relevant or weaken the evidence of the party who could have adduced it. However, in order to draw an adverse inference there must be some evidence as to the primary issue and a case to answer. Where the reason for a failure to adduce the evidence is accepted by the court or Tribunal no adverse inference should be drawn. A credible but incomplete explanation for absence of the evidence is likely to impact the strength of any adverse inference to be drawn. Here, no reason has been given by the Appellants for not calling the witnesses to give evidence despite one of the witnesses, Mr Yalden, now being a director of GWM. In oral evidence, GW stated that he had met up with Mr Cousens, one of the three former employees, within the last month. In our judgment, the witness evidence of AR, Mr Cousens and the four employees would be clearly relevant as to their understanding of the Scheme, their exposure to future calls and whether there was ever any intention or expectation that a call would be triggered in respect of the Shares or, if triggered, enforced by the Appellants. We have therefore drawn an inference that, if the individuals had been called to give evidence, their witness evidence would not have supported the Appellants' case.

RELIANCE ON CHALCOT DECISION

28. HMRC, in their skeleton argument at paragraph 122 and in oral submissions, relied upon the High Court decision in *Chalcot* which recorded that other exit strategies were considered (including by the scheme promotor, Blackstar) to enable Scheme participants to avoid their contingent liability to pay up the uncalled amounts on the Shares. This, it was submitted, confirmed that there was never any or any realistic expectation that there would be a substantive demand to pay up the uncalled amounts on the Shares.

29. In *Chalcot*, the claimant company applied to set aside payments it had made to its two directors (then husband and wife) following implementation of the same Scheme that is the subject of these appeals. Following the issue of HMRC determinations in respect of PAYE income tax and NICs, the claimant company commenced proceedings in the Chancery

Division to set aside the payments made to the two directors on the basis that they were unlawful. It argued that, rather than being remuneration paid to the directors, the payments were distributions of capital made to them as shareholders. Alternatively, it argued that the payments were an unlawful commission contrary to the s552 Companies Act 2006 or an unlawful discount on the shares contrary to s580 Companies Act 2006. It sought a declaration that the agreements by which the schemes were effected were void and that its register shares be rectified so as to remove the two directors as the holders of the shares. HMRC opposed the application, arguing that the payments were remuneration to the company's directors and the company was bound by them. Michael Green QC (sitting as a Deputy Judge of the Chancery Division) agreed with HMRC's submissions and found that, from a company law perspective, the payments made to Chalcot's directors were a form of remuneration paid in recognition of their services as directors or employees. The directors had to receive the payments in their capacity as directors or employees for the scheme to work and the documents and accounts recorded the payments as remuneration or an employment related reward. It was integral to the success of the Scheme that the payments were said to be and actually were remuneration.

30. HMRC, in the main, rely upon *Chalcot* at [70] which recorded:

> "70. The meeting on 18 October 2011 at Blackstar's offices was attended by Mr Leigh [Chalcot's accountant] , Mr Howitt and Ms Bottomley and by Mr Ed Lorman and Mr Peter Snowden of Blackstar. From Mr Leigh's notes, it appears that Blackstar explained how the E Shares scheme worked, that they would defend the scheme to the Upper Tier Tribunal and Blackstar's fees (12.5%plus VAT of the amount put into the scheme). Mr Leigh's notes specifically recorded that Blackstar explained the following:
>
> > "The payment to the director is recorded as an 'employment expense'.
> >
> > There is no PAYE & NIC due because there maybe an obligation on the individual to purchase the E Shares ie a payment with an obligation.
> >
> > Need to consider the provisions for the 'E' shares in the event of a sale.
> >
> > - need to assign the shares at some point to an "asset protection vehicle" which would acquire the shares and then when the Company made a call on the shares, the APV could not pay and the shares would be forfeited"
>
> The latter point, even though raised in the context of a potential sale of the Company, was the first mention of a form of exit strategy from the E Shares scheme, where by Mr Ralph and Ms Stoneman might ultimately be able to avoid their obligations on an automatic triggering of a call on the unpaid 99% of the E Shares. This was the " twist " to the scheme that Mr Leigh referred to in an email to Ms Bottomley that same day. This exit strategy was something that was raised periodically but Ms Stoneman said that through out she " remained sceptical about this 'exit route' possibility ." She and Mr Ralph considered that the call on the shares would likely remain within their control and that if necessary assets could be liquidated, such as the Ibiza property, or the Company sold, in order to meet the call."

31. It is appropriate to record at this juncture that, following a case management hearing/directions hearing in respect of these appeals (as well as appeals involving Scheme users) on 13 December 2017, the Directions of Judge Raghavan dated 18 December 2017 recorded that Patrick Way QC (instructed by Blackstar Defence Ltd) appeared on behalf of GWM (amongst others), the QSL appeal related to the same type of scheme and that they were sent notice of the hearing but were not in attendance and noted that no specific objection had been made to HMRC's draft directions re-categorising the appeal as complex. The parties

appearing at the CMH agreed to the appeals being stayed until such time as the *Chalcot* appeal was finally determined. *Chalcot* ultimately proceeded to the Court of Appeal where the decision of the High Court was affirmed.

32. Mr Avient objected to HMRC's reliance upon *Chalcot* on the basis that it "goes to nothing in this case" as the evidence of both AC and GW was that they had no awareness of proposed exits at the time that they entered into the Scheme and took the steps to achieve the desired outcome. Similarly, the evidence of IF was that he had no knowledge or awareness of the exit strategies that were discussed in *Chalcot*. In addition, HMRC did not put to either witness that their evidence in relation to their knowledge or, more accurately, their lack of knowledge as to proposed exits was not correct or true. Consequently, HMRC having not challenged this evidence is not in a position to submit otherwise.

33. Despite Mr Avient's objection to HMRC's reliance on *Chalcot* being predicated on its irrelevance to the issues to be determined, we considered whether the rule in *Hollington v Hewthorn & Co Ltd* [1943] KB 587 that, absent the operation of estoppel, factual findings in civil cases in England and Wales are inadmissible in subsequent proceedings.

34. In *Hollington v Hewthorn*, the Court of Appeal considered whether findings of fact in an earlier case were evidence in subsequent proceedings involving the same party but a different other party. Leggatt J (as he then was) in *Rogers v Hoyle* [2013] EWHC 1409 summarised at [93] the ratio in *Hollington v Hewthorn*:

> "… it is the duty of a court to form its own opinion on the basis of the evidence placed before it; and that it would not be proper for the court in forming that opinion to be influenced by the opinion of someone else, however reliable that person's opinion is likely to be. In so far as the evidence before the later court is the same as the evidence before the earlier court, the later court is in as good a position to draw inferences and conclusions from the evidence. In so far as the evidence is different, the opinion of the earlier court does not assist the court's task."

35. Recently, the Competition Appeal Tribunal ("CAT"), chaired by Bacon J, in *Consumers Association v Qualcomm Inc* [2023] CAT 9 ("*Qualcomm*") considered the rule in *Hollington v Hewthorn* and the application by Qualcomm to strike out the Consumers Association's paragraph 4 of its Reply which stated that "*Reasoned findings made by foreign courts and regulators may be taken into account in proceedings before the Tribunal, at least to the extent that such findings have not been specifically reversed on appeal*." In oral submissions it was confirmed that the Consumers Association was contending that it was open to the Tribunal, if appropriate to place weight on the assessments of evidence before courts and regulators cited in the Amended Claim Form. The CAT rejected Qualcomm's submission at [19]:

> "We reject Qualcomm's submission that the rule in *Hollington v Hewthorn*, if it applies, is binding on this Tribunal. No cogent basis has been made out as to why a High Court rule of evidence should necessarily bind this Tribunal and we accept Which?'s submission that the discretion given to this Tribunal as to the evidence to be admitted is broad. The submission that *Hollington v Hewthorn* is fundamentally fair does not of itself support a position that it should be regarded as binding on this Tribunal. Moreover, as shown by the exceptions, the rule does not embody a universal principle of fairness."

36. However, at [22]-[23], Bacon J said:

> "22. Having arrived at the position that we are not bound by the rule in *Hollington v Hewthorn*, the question then arises as to whether this Tribunal should nevertheless adopt the same principle.
>
> 23. We are of the view that at the trial of these collective proceedings it would not be appropriate to attach any weight to the findings reached by other courts, tribunals or regulators. The principal reason for this is the reason given by Christopher Clarke LJ in *Rogers v Hoyle*, being that it is for this Tribunal to assess the evidence and make primary findings of fact. Relying upon the evaluative judgments of other decision-makers necessarily circumvents that role. To place weight on their findings, however distinguished or authoritative, risks the decision being made at least in part on evidence which is not before the Tribunal."

37. We agree with the CAT in *Qualcomm* at [19] and consider that per Rule 15(2)(a) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ("FTT Rules") we may "admit evidence whether or not the evidence would be admissible in a civil trial in the United Kingdom". Rule 15(2)(a), in common with all FTT Rules, must be interpreted in accordance with the overriding objective at Rule 2(3) FTT Rules which requires the Tribunal to give effect to the overriding objective when it exercises any power under the FTT Rules or interprets any rule. In our judgment, the findings in *Chalcot*, even though they deal with the same Scheme and theses appeals were stayed behind *Chalcot*, are not conclusive as against these Appellants. Overall, we have concluded that the non-evaluative findings determining the company law position of Chalcot's use of the Scheme did not assist in our overall assessment of the evidence before us.

ACCEPTED FACTS AND OUTLINE OF THE SCHEME

38. It was accepted by Mr Avient at the start of the hearing that the steps entered into by the Appellants were tax avoidance schemes for the purposes of the Disclosure of Tax Avoidance Schemes (DOTAS). The Scheme implemented by QSL and GWM was identical save for the fact that one was marketed by Evolve and the other by Blackstar. Evolve and Blackstar (both of which are dissolved) are connected and IF, who provided a witness statement and gave evidence, was a director of both promotors. There was no dispute between the parties as to the main steps taken by either Appellant in relation to the implementation of the Scheme nor any dispute as to the Scheme documents.

39. We have first set out the accepted facts and outline of the Scheme and steps taken in respect of GWM and then set out the background facts in respect of QSL and the relevant steps taken by QSL insofar as the background facts or steps differed to those taken by GWM. We then proceeded to made specific findings of fact.

GWM

40. GWM is a UK incorporated and resident company, whose principal activity is precision engineering. At all material times, GWM's directors were Graham Martin ("GW"), Nora Martin and Brenda Yalden, who together held the entire issued ordinary share capital of GWM. GW is the major shareholder, holding 89% of the issued share capital. GW has given a witness statement and oral evidence on behalf of GWM in these proceedings

41. GWM was made aware of the Scheme by GW who was (at the material time) CEO of both GW Martin and Graham Martin and Co (a firm of accountants) ("GMC"). GW is a Chartered Accountant and, following his father's sudden death in 1984 and his brother's stroke in or around 1986, took over the management of GWM whilst at the same time running GMC.

42. GW became aware of the Scheme having attended various TENS Solutions (an accountancy network) tax planning seminars. GWM decided to "*use the scheme over a cash bonus as it was considered very tax efficient by the Directors*". On 12 October 2011, Blackstar issued a letter of engagement to GWM . The letter variously recorded:

> "We are writing to set out the terms on which Blackstar (Europe) Limited ("Advisor") has been engaged to act as adviser to G W Martin and Co. Limited ("'Company") in relation to the provision of employment rewards ("Transaction").
>
> 1. The Advisor's role and responsibilities
>
> Although circumstances may change as the Transaction proceeds, we envisage our role and responsibilities to be as follows:
>
> (1) The provision of taxation advice in connection with the Transaction
>
> (2) The drafting of all relevant documentation in connection with the Transaction
>
> …
>
> 2. Limitations on Advisor's responsibilities
>
> The advice given by the Advisor is based on its understanding of current law and practice and the Company accepts that this can change as a result of statute or case law, Revenue Practice, or Government announcements which may be retrospective or retroactive in nature.
>
> No guarantee is given by the Advisor that HM Revenue and Customs will not challenge the advice given by the Advisor and the Company accepts full responsibility for all taxes payable which may arise out of the transaction.
>
> However, the Advisor agrees that in the event of such a challenge it will at its sole expense pursue or defend any appeal against such assessment up to and including the Upper Tier Tribunal Level.
>
> 3. Remuneration
>
> We have already discussed and agreed the basis and level of our remuneration for providing the Services as follows:
>
> A fee of 11% of the amount paid by the Company under the scheme (subject to a minimum non-refundable fee of £11,500 to cover legal costs and expenses).
>
> The above fee will be inclusive of the Advisor's legal fees and disbursements m respect of the transaction and will be payable upon the signing of this letter of engagement.
>
> The Advisor may invoice the Company for any fees as soon as they become payable"

43. GWM held a board meeting on 14 October 2011 attended by GW and Nora Matin [sic]. The minutes recorded the following:

> "It was noted that the Company's yearend [sic] is imminent and that the results for the year currently anticipated would show that it had been a profitable trading year. It was noted that once the actual results had been determined more accurately the Company proposed to provide additional non-contractual employment rewards for the benefit of the directors and senior employees listed below, reflecting their contribution to the performance of the Company during the year.

> The precise form and cost to the Company of the awards is to be finalised in due course and is to be at the Company's discretion. The total cost to the Company is anticipated to be in the region of £400,000 allocated between the individuals as indicated below.
>
> It was noted that the directors interested in the matter under consideration had declared their interest in it and were aware of the proposal having attended the meeting. It was agreed that Graham Martin would advise those not in attendance of the anticipated level of reward to be provided in their cases, but would make it clear that the precise form and cost to the Company remained solely at the Company's discretion.
>
> | | |
> |---|---|
> | 1. Graham Peter Martin | £280,000 |
> | 2, Andrew John Clark | £ 48,000 |
> | 3. Terry Norman Cousens | £ 23,000 |
> | 4. Martin George Cresswell | £ 20,000 |
> | 5. Paul Byron Skelton | £ 23,000 |
> | 6. Stuart Martin Yalden | £ 6,000" |

44. On 20 October 2011, Blackstar issued an invoice to GWM for £46,000 (exclusive of VAT):

> "For professional services:
>
> In respect of the provision of tax advice in relation to the grant of employment rewards"

45. On 24 October 2011, Blackstar wrote to GWM explaining the details of the Scheme. This letter was, insofar as material, in identical terms to that issued to QSL on 18 November 2013. The letter relevantly stated:

> "Dear Graham
>
> Re: E Securities
>
> We write to thank you for the interest that you have shown in our E Securities offering. We have received the initial papers from Graham Martin & Co and have begun the preparation of the further documentation to support the issue of a new class of shares within the Company. …
>
> Having engaged BlackStar to provide advice, we thought it would be helpful to set out the main features of the E Securities offering and provide a summary of the tax treatment.
>
> This report is intended to summarise the potential conditional employment reward as discussed at your meeting and provide you with an overview of your requirements.
>
> …
>
> Objectives
>
> We have fully discussed your objectives and these are:
>
> The Company has generated profits during the year and wishes to provide directors/employees with tax-efficient, flexible benefits from the company in a manner which is attractive to both the Company and the employee/s.
>
> If the reward is made within the current accounting period then the expense will be dealt with within the accounts for this period.

…

Offering

A company, pays to Mr A, in connection with his employment, £100,000 on a legally binding condition that he, at the same time, subscribes £1,000 (the initial called sum) for shares in the company with a nominal value of £100,000, for illustrative purposes, say class E shares, being a new class of share, distinct from the company's existing share capital. The sum paid to Mr A is not a loan and is not repayable to the company other than through the arrangement to subscribe for E shares.

Rights attaching to the shares

The rights in connection with making calls on the shares would be broadly along the following lines:

The company can call for all or part of the uncalled amount to be paid up on say 3 months notice.

The shares are to be treated as if a call for the shares to be paid up in their entirety is made if the company is placed into liquidation.

The shares are required to be paid up in full if the employee ceases to be an employee of the issuing company.

CT deduction

Using the above as an example if a payment was made to Mr A then he would receive £100,000 and pay back to the company £1,000 for the E Shares. Under UK Generally accepted accounting principles (GAAP), the company can deduct £99,000 from its profit and loss account, so gets tax relief on all but 1% of the payment made.

Income tax and NIC

The payment made to the individual should not be taxable in his hands as he enters into a binding contract to acquire E shares. E shares are non-voting shares and do not affect the value of the existing ordinary shares in the company. There are also no automatic dividend rights on the E Shares.

Benefit in kind

The payment made to the individual is not a loan so there are no ongoing taxes.

…

Advantages

The advantages of the E Securities planning over other offerings in the market are:

No use of EBTs or other third party trust structures and therefore not subject to new Disguised Remuneration legislation introduced in April 2011.

Client may be able to dispose of his shares thus negating the need to keep the strategy open indefinitely."

46. GWM implemented the Scheme on 22 November 2011. The minutes of a board meeting which was held on that date (and accordingly the resolutions passed at that meeting) attended by Nora Martin (Chairman) and GW recorded as follows:

> "IT WAS NOTED that the Company's results for the period ended 31 October 2011 were positive and that that it was appropriate to consider recognising the contribution of the following individuals

Graham Martin

Andrew Clark

Terence Cousens

Martin Creswell

Paul Skelton

Stuart Yalden

IN RECOGNITION of the foregoing draft resolutions concerned with the creation of class E shares were produced and are attached to these minutes for reference purposes. In addition there were produced to the meeting draft contracts facilitating the subscription for class E shares (copies are attached to these minutes for reference purposes). The contracts provided for the following acquisitions by the following individuals:

Graham Martin	280,000 class E shares
Andrew Clark	48,000 class E shares
Terence Cousens	23,000 class E shares
Martin Creswell	20,000 class E shares
Paul Skelton	23,000 class E shares
Stuart Yalden	6,000 class E shares

It was noted that the approval of the shareholders would be required to permit the Directors and employees to enter into contracts with directors in connection with the class E shares and that a suitable proposed resolution had been included in the resolutions produced to the meeting for consideration.

IT WAS RESOLVED subject to obtaining shareholder approval of the necessary amendments to the Company's article of association and agreement to the Company entering into the contracts mentioned above with those individuals who are employees that:

1 class E shares be created;

2 related special resolutions and form SH01 be filed at Companies House;

3 amended articles of association be filed at Companies House;

4 contracts to facilitate the acquisition of class E shares be entered into by the Company and related offers to subscribe be accepted when made; and

5 class E shares be issued pursuant to the offers by the individuals and acceptance by the Company with entries being made in the Company's share register and share certificates being issued to the allottees.

47. The written resolutions passed by GWM on 22 November 2011 adopted by special resolution new articles of association which included the following:

(1) Article 6(b), GWM's share capital was divided into ordinary shares and E Shares.

(2) Article 6(g), E Shares would not carry any right to vote.

(3) Article 6(h), E Shares would not carry any right to receive notice of or to attend any meeting of the shareholders of the company.

(4) Article 6(i), on a winding-up of GWM and only to the extent that there were assets available to be distributed to the shareholders of the company, each E Share would only be entitled to receive a payment of 1p but such payment would rank in priority to the payment of other classes of share.

(5) Article 6(j) the directors might pay a dividend on the E Shares but where a dividend was paid on any other class of share there would not in consequence be an entitlement for the holders of the E Shares to require any dividend to be paid in respect of the E Shares.

(6) Article 6(k) upon a subsequent disposal of the entire share capital of GWM on arm's length terms to an unconnected purchaser, 10% of the consideration payable by the purchaser would be allocated to the holders of E Shares and divided between them in proportion to the number of E Shares held by each. This was on the proviso that, in summary, the Company's turnover and profit before taxation during the twelve month period ending 22 November 2014 were each in excess of 500% of the turnover and profit before taxation during the twelve month period to 21 November 2011.

(7) Article 6(l), where a holder of an E Share did not hold shares of GWM of any other class, his or her consent would not be required to permit a variation of the rights attached to non-E Shares notwithstanding any incidental impact on the rights of holders of E Shares.

(8) Article 6(m), E Shares could only be transferred with the unanimous consent of the directors of the Company.

(9) Article 6(n), E Shares would be allotted 1p paid, 99p uncalled.

(10) Article 6(o), GWM may by giving notice to the holder of an E Share make a call for the full amount previously uncalled or for any part of the amount previously uncalled. The amount called would be due for payment on the ninetieth day following the date of the notice unless that day is a Saturday or Sunday or a bank holiday in England in which case the call would be due for payment on the next day following that was not a Saturday or Sunday or a bank holiday in England.

(11) Article 6(p), any amount uncalled in respect of an E Share would be treated as called in full and payable immediately upon the appointment of a liquidator of GWM.

(12) Article 6(q), in the event that calls were not paid when due to be paid, the holder of the E Share might be required to forfeit his E Share but GWM reserved its right fully to pursue by all lawful means the payment of any called but unpaid amounts.

48. By the same resolutions, GWM was authorised to enter into a contract facilitating the subscription for E Shares by GW, Andrew Clark, Terence Cousens, Martin Creswell, Paul Skelton and Stuart Yalden. That contract was entered into on 22 November 2011 and contained the following provisions:

(1) Recital B(b) stated: "As part of the employment arrangements between the Employer and the Employee and in particular in recognition of the services of the Employee during the period ended 31 October 2011 the Employer is willing to assist the Employee to subscribe for Class E shares of the Employer on the terms more particularly set out below".

(2) Clause C provided (so far as relevant) as follows:

"C.1 In consideration of the Employee offering to subscribe for Class E shares substantially in the form of the offer to subscribe set out in the schedule to this

agreement ("the Offer") and subject to the Employee complying with the further terms set out below ("the Terms") the Employer shall pay to the Employee a sum of £[1%] followed by a sum of £[99%] ("the Payments") which sums shall when paid be non-refundable.

C.2 The sum of £[1%] shall be applied by the Employee in making the Allotment Payment as described in the Offer.

49. GWM's bank statements show that, on 23 November 2011, the 1% payments were made by GWM to each of the employees named at paragraph 46 above. The bank statements show the repayment of the sums by each employee to GWM on the same date. They also show that on 24 November 201, the 99% payments were made by GWM to the employees.

50. GWM's unaudited financial statements for the year ended 31 October 2011 included as part of directors' remuneration (under Note 2) "*an amount of £280,000 provided in respect of an obligation existing at the period end. This obligation has been satisfied post year end by the payment by the Company of £280,000 to a director in consideration for the director agreeing to subscribe for 280,000 Class E shares*". The Blackstar letter to HMRC dated 20 August 2013 confirmed at paragraph 18b that "*The £120,000 paid to employees was charged to employees wages whilst the £280,000 was charged to directors remuneration. As the payments were after the year end the other side of the entry was in accruals*."

51. GWM implemented the Scheme for a second time in November 2012. The sums paid in accordance with the second implementation of the Scheme were as follows: Andrew Clark was paid £12,000; GW was paid £32,000; Martin Creswell was paid £12,000; Paul Skelton was paid £12,000; Stuart Yalden was paid £20,000; and Terence Cousens was paid £12,000. They each subscribed for and were allotted an equivalent number of E Shares, paid up as to 1%.

52. On 16 November 2012, Blackstar issued an invoice to GWM for £11,500 (exclusive of VAT):

> "For professional services provided:
>
> In respect of the provision of tax advice in relation to the grant of employment rewards"

53. The relevant steps for the implementation of the Scheme were followed (the same steps when the Scheme was first implemented by GWM) and the documents signed and dated 21 November 2012.

54. GWM's banks statements record that on 22 November 2012 the 1% payment was made to each of the employees and 1% payment paid back to GWM by the employees. On 23 November 2012, the bank statements record the 99% payment being made to the employees.

55. GWM's unaudited financial statements for the year ended 31 October 2012 included as part of directors' remuneration (under Note 2) "*an amount of £32,000 provided in respect of an obligation existing at the period end. This obligation has been satisfied post year end by the payment by the Company of £32,000 to a director in consideration for the director agreeing to subscribe for 32,000 Class E shares*".

56. On 31 July 2016, Terence Cousens ceased to be an employee of GWM. On 31 March 2018, Andrew Clark ceased to be an employee of GWM. At some point in 2021, Paul Skelton ceased to be an employee of GWM. Note 17 of the financial statements of GWM for the year ended 31 October 2022 confirms that the E Shares remain paid up as to only 1%. The confirmation statement for GWM dated 29 March 2023 records that £495,000 remains unpaid on the total number of shares in issue. Accordingly, despite ceasing to be employees of

GWM, the E Shares held by Terence Cousens, Andrew Clark and Paul Skelton remain paid up as to only 1%.

57. On 21 June 2016, HMRC issued GWM with APNs in respect of the PAYE income tax and NICs due pursuant to the determinations and decisions. Following representations, the APNs were upheld in respect of the sums due for 2011/12 and varied in respect of the sums due for 2012/13to reflect the errors in the original Regulation 80 determinations and Section 8 decisions. GWM has paid the sums due pursuant to the APNs in full.

QSL

58. QSL is a UK incorporated and resident company whose principal activity is surveying. At the material time, the directors of QSL were Alex Coupland ("AC"), Mark Perkins, Mark Robertson and Andrew Rowe ("AR"). QSL's ordinary shares were held by AR (25%) and by Taylor Pearson Holdings Limited ("Taylor Pearson") (75%). The directors of Taylor Pearson were Mark Perkins, AC and Mark Robertson who each owned ⅓ of the shares in Taylor Pearson (either individually or jointly with a spouse). Companies House records confirm that AR resigned as director on 30 September 2014 and Mark Robertson resigned as a director on 19 November 2019.

59. Prior to its implementation of the Scheme in 2013, QSL had previously used the Scheme. Appeals in respect of QSL's previous use of the Scheme had not at the time of the hearing been notified to the Tribunal and are not the subject of this appeal.

60. On 18 November 2013, Evolve sent a letter to QSL regarding its proposed use of the Scheme and explaining the details of the Scheme. The letter stated:

> "Dear Sir
>
> Re: Employment Benefit in the form of Partly Paid Shares (EBIPPS)
>
> We write to thank you for the interest that you have shown in a further EBIPPS offering. We have received the initial papers from Landmark Financial Planning Limited and have begun the preparation of the further documentation to support the issue of further shares within the Company. We anticipate that you should receive these within five working days."

61. The letter then proceeded to explain the Scheme in materially identical terms to the letter issued by Blackstar to GWM on 24 October 2011 at paragraph 45 above. The only material difference was that the proposed new shares to be issued per the Scheme were labelled as "P Shares" rather than "E Shares". It is understood this reflected QSL's second implementation of the Scheme.

62. On 18 November 2013, Evolve issued a letter of engagement and issued an invoice to QSL. The letter of engagement "*in relation to the provision of employment rewards*" was in identical terms to the one issued to GWM. The invoice was for £16,500 (exclusive of VAT):

> "For professional services provided:
>
> In respect of the provision of tax advice in relation to the grant of employment rewards"

63. On 25 November 2013, QSL held a board meeting. The minutes noted that QSL's "*results for the period ended 30/4/2014 were positive and that it was appropriate to consider recognising the contribution of the following individuals*", namely, AC (75,000 P Shares) and AR (75,000 P Shares). At the same board meeting it was resolved that a class of P Shares would be created, the relevant documents would be filed at Companies House, contracts to facilitate the subscription for P Shares by AC and AR would be entered into and offers to subscribe for P Shares by each of AC and AR would be accepted. Written resolutions were

signed by AC on behalf of Taylor Pearson and AR on 25 November 2013 authorising the variation of QSL's articles of association in order to accommodate the issue of the P Shares and permitting QSL to enter into contracts with employees in connection with the subscription for P Shares. On the same day, AC and AR each entered into an agreement in relation to their subscription for P Shares. Each agreement stated:

> "B WHEREAS:
>
> (a) The Employee is employed by the Employer
>
> (b) As part of the employment arrangements between the Employer and the Employee and in particular in recognition of the services of the Employee during the period ended 30/4/2014 the Employer is willing to assist the Employee to subscribe for Class P shares of the Employer on the terms more particularly set out below; and
>
> (c) Class P shares are to be £1 shares with an initial called up amount of 1p with 99p uncalled."

64. QSL agreed to make a payment of an amount equivalent to 1% of the P Shares nominal value to each employee, who would then use that amount to subscribe for the P Shares (Clauses C.1 and C.2). A second payment equivalent of 99% of the nominal value of the P Shares was to be paid to the employees, which sum would be "non-refundable" (Clause C.1). Appended as a schedule to each agreement was a document headed "Application for Class P shares", which was in materially identical terms to those submitted by the employees of GWM pursuant to the implementation of the Scheme.

65. The bank statements for AR (joint bank account with Mrs Rowe) and AC show that on 27 November 2013 QSL transferred £750 which was equivalent to the 1% payments made to AR and AC under the Scheme. QSL's bank statements show that on 28 November 2013 AR paid an amount equal to the 1% payment to QSL and on 2 December 2013 AC paid an amount equal to the 1% payment to QSL.

66. On 12 December 2013, QSL confirmed in a letter to AC and AR that their loan accounts with QSL had been credited with the sum of £74,250 (the 99% payments under the Scheme).

Buyback of P Shares by QSL

67. On 30 September 2013, AR retired as a director of QSL. As a consequence, it was decided to seek to unwind the Scheme. This required the balance of the subscription price to be paid in respect of the P Shares and E Shares (the first implementation of the Scheme). Advice was sought by QSL from a firm of solicitors unconnected to the Scheme, Wilkin & Chapman Solicitors, who advised that the best way forward was for QSL to acquire and cancel the Shares.

68. Quadrant carried out a buyback of its shares under Chapter 4 of Part 18 of the Companies Act 2006. On 22 December 2015, Quadrant passed the following special resolutions:

> "SPECIAL RESOLUTIONS
>
> 1 THAT the terms of
>
> (a) a contract proposed to be made between the Company and Alex Mark Coupland for the purchase by the Company of 60,000 E Shares of £1 00 each and 75,000 P Shares of £1 00 each in the capital of the Company,
>
> (b) a contract proposed to be made between the Company and Andrew John Rowe for the purchase by the Company of 60,000 E Shares of £1 00

each and 75,000 P Shares of £1 00 each in the capital of the Company, and

(c) a contract proposed to be made between the Company and Stephen Lilley for the purchase by the Company of 16,350 E Shares of £1 00 each in the capital of the Company.

for a total consideration of £286,350 (two hundred and eighty six thousand three hundred and fifty) as set out in the three contracts attached (the Purchase Contracts) be approved and the Company be authorised to enter into the Purchase Contracts.

2 THAT, provided sufficient approval is obtained by 31 December 2015, the payment by the Company out of capital of the sum of £286,350 for the purchase of its own shares pursuant to the Purchase Contracts be approved. A copy of the directors' statement and auditor's report prepared in connection with the payment out of capital is attached in accordance with section 718 of the Companies Act 2006."

69. Copies of the Purchase Contracts had not been disclosed and were not in evidence but it appears from the terms of the special resolutions above that the price paid by QSL for the P Shares was £1 per share.

70. Form SH06 ("Notice of cancellation of shares") filed by QSL at Companies House shows that the P Shares were cancelled on 3 February 2016.

FINDINGS OF FACT

71. We have set out below our findings of fact on which our decision is based. For ease of reference we have referred to the E Shares and P Shares collectively as "Shares".

Fees paid to use the Scheme

72. QSL and GWM paid £16,500 and £57,500 respectively to use the Scheme to provide surplus funds to Employees for an uncertain period of time. The period of time could be as short as three months and subject to the liquidation of the company or departure of the employee. We do not consider the Appellants' evidence plausible that such a high level of fees was payable upon each iteration of the Scheme merely for the provision of the tax free use of a sum of money to an Employee for an indeterminate period which could be as short as three months.

Rewards for service as employees

73. The Payments made to the Employees were rewards in recognition of their services as employees. This was accepted by Mr Avient in opening and confirmed by the Scheme documents and oral evidence.

(1) The scheme documentation in evidence was in standard format and recorded that the payments were "employment rewards": the Blackstar Engagement Letter dated 12 October 2011 to GWM (the "provision of employment rewards" at paragraph 42 above); the Evolve Engagement Letter dated 18 November 2013 to QSL (the "provision of employment rewards" at paragraph 60 above); the Blackstar invoice addressed to GWM dated 20 October 2011 at paragraph 44 above stated it was in respect of professional services provided "In respect of the provision of tax advice in relation to the grant of employment rewards". The Evolve invoice to QSL dated 18 November 2013 at paragraph 62 above stated it was for professional services provided "In respect of the provision of tax advice in relation to the grant of employment rewards".

(2) The minutes of GWM's board meeting held on 14 October 2011 (at paragraph 43 above) recorded that GWM "proposed to provide additional non-contractual employment rewards for the benefit of directors senior employees listed below, reflecting their contribution to the performance of the Company during the year". The minutes of the GWM board meeting on 22 November 2011 (at paragraph 46 above) record that GWM's results for the period ending 31 October were positive and "it was appropriate to consider recognising the contribution of the following individuals".

(3) The minutes of QSL's board meeting held on 25 November 2013 (at paragraph 63 above) recorded that QSL's results for the period ended 30 April 2014 were positive and it was "appropriate to consider recognising the contribution of the following individuals".

(4) The Agreements to subscribe for E Shares (GWM) and P Shares (QSL) both record in identical terms in the recital at B that "(a) the Employee is employed by the Employer; (b) As part of the employment arrangements between the Employer and the Employee and in particular in recognition of the services of the Employee during the period ended".

(5) The accounts of GWM for the years ended 31 October 2011 and Notes to the Financial Statements for the year ended 31 October 2012 record the payments made to GW under the heading "Directors' Emoluments" as "Directors' remuneration". The Notes to the Financial Statements for the year ended 31 October 2014 under the heading of "Operating Profit" records the payments made as "Directors' remuneration and other benefits etc".

(6) In cross-examination, AC, when asked about the P Share buyback answered that he was not £75,000 better off following the buyback as the £75,000 was "our earnings for that year". GW, in cross-examination, confirmed that the Scheme provided an "opportunity to take a reward" and that he viewed the payment as a reward for many years of service.

Commercial purpose of Shares

74. The Shares had no commercial purpose.

(1) When it was put to IF that the Shares had no commercial purpose he answered "confirmed". It was put to him that the only point of the shares was to create the call obligation and he answered "yes".

(2) AC accepted that the only purpose of the Shares was to render the user liable for the unpaid amount and accepted that it was "part of the strategy".

(3) GW was reluctant to accept that the Shares had no commercial value and relied upon the "kudos" of employees being shareholders which "made long-term employees happy to have the kudos of being shareholders". He accepted that there was nothing in the advice of Scheme details that referred to the "kudos" of being a shareholder as a commercial benefit. We have considered the "kudos" point below and did not accept his evidence on that point.

Avoidance of PAYE and NICs

75. The purpose of the Scheme was to avoid the payment of PAYE and NICs.

(1) This was acknowledged in opening by Mr Avient. This point was acknowledged by AC in his witness statement at paragraph five.

(2) GW and IF both accepted in cross-examination that, despite their witness statements stating that the purpose of the Scheme was to "incentivise and lock in key people" (IF paragraph seven) and "incentivise and retain key employees" (GW paragraph four), the purpose of the scheme was to avoid the payment of PAYE income tax and NICs and to pay the rewards in the most tax efficient way.

Shares worthless

76. The Shares were worthless and the reward was the cash sum paid. The issued Shares carried no voting rights, no dividend rights, and only minimal rights on winding up.

(1) The witnesses were all agreed that the shares were worthless and the reward was the cash sum paid and not the worthless Shares.

(2) GW was clear in his evidence that the reward was the cash sum of £280,000 for many years service not the worthless Shares

Incentive to Employees

77. We do not accept that the Shares provided any incentive to the Employees.

(1) There was no evidence before us about what information was given to the non-director employees of GWM who subscribed to the Scheme. HMRC, in their Information request dated 17 May 2013 at point 11, requested "copies of all letters informing beneficiaries that they have been awarded E-Shares. Blackstar's reply dated 20 August 2013 confirmed that "Copies of letters to individuals advising that they had been issued E shares have been requested and will be forwarded shortly." Copies of those documents was chased by HMRC on 19 November 2013. Blackstar's response dated 18 December 2013 stated: "The company have advised that copies of the letters to the beneficiaries to advise of [sic] them they had been issued E shares have been filed and will forward in due course."

(2) GW in cross-examination, confirmed the letter dated 22 November 2011 in which he applied for E Shares was not the same one sent to employees but he recalled there was "another piece of paper saying he had got them". His recollection was that he remembered the process and the letter would have been like the one sent to AC dated 12 December 2013 which merely confirmed that in "response to your offer to subscribe for shares … the Company has accepted your offer and class P Shares of £1 each … have been allotted to you". The letter was a was a standard template letter which still had at the head "TO BE PRODUCED ON COMPANY LETTERHEAD"). GW confirmed that fuller advice was not given to employees.

(3) We cannot see that employees would be incentivised by the receipt of the Payment for past services, a "reward", that had to be paid back at some indeterminate point in time. We cannot see how, on the ordinary use of the word, that constitutes a "reward".

"Kudos" of holding Shares

78. There was no "kudos" attached to an Employee being a holder of Shares.

(1) We did not accept GW's evidence at paragraph four of his witness statement that "Feedback from the individuals concerned indicates there was a "kudos" attached to being a shareholder having been employees for over 20 years". We did not consider GW's evidence to be credible: the witnesses were agreed that the Shares did not grant any meaningful rights to participate in the company's governance (either at board or shareholder level) except in limited circumstances where directors' duties were at issue.

The shares were essentially valueless, as the witnesses all agreed, and exposed the holders to potentially significant liability to pay up the uncalled amounts on the shares.

(2) There was no evidence before the Tribunal, other than GW's assertion, on how the employees themselves viewed the Scheme or the Shares they received. No current or former employees who participated in the Scheme were called as witnesses by GWM in support of GW's assertion. For the reasons set out at paragraph 27 above we have drawn an inference that, if the individuals had been called to give evidence, their witness evidence would not have supported the Appellants' case. Accordingly, we have attached no weight to GW's assertion that possessing the Shares carried any prestige.

Holders of Shares not benefit financially

79. We have attached no weight to GW's evidence (paragraph four of witness statement) that the holders of Shares might benefit financially if the company were sold and certain performance targets were met. We have not accepted his evidence, raised for the first time in cross- examination, that GWM nearly attained the financial targets set out at paragraph 47.(6) above. The assertion by GW in oral evidence that GWM "nearly attained the financial targets" in Article 6(k) at paragraph 47.(6) above was not contained in his witness statement nor supported by any contemporaneous evidence.

Liability was a contingent liability

80. The subscribers' liability to pay up the uncalled amounts on the Shares was a contingent liability.

(1) The terms upon which Shares were subscribed for provided that the liability to pay up the uncalled amounts could be triggered in three specified circumstances: on three months notice by the company, on the appointment of a liquidator of the company and on cessation of employment with the company. It is clear from the Scheme documentation that the obligation to pay up the shares is a contingent obligation and not, as submitted by Mr Avient, as inevitable.

Exit strategies

81. We find that exit strategies were contemplated by Blackstar and Evolve at the time that QSL and GWM entered into the Scheme.

(1) The identical letters of advice explaining the details of the Scheme sent to QSL and GWM under the heading of "Advantages" (at paragraphs 45 and 61 above) referred to two advantages of the Scheme over other offerings in the market. No other advantages were mentioned. The second bullet point stated "Client may be able to dispose of his shares thus negating the need to keep the strategy open indefinitely" is clear and unambiguous on its wording. and we do not accept Mr Avient's submission that it just meant bringing the Scheme to an end.

(2) IF's evidence in respect of exit strategies was vague and contradictory. He variously stated he knew nothing about an "asset protection vehicle" referred to in *Chalcot* at [70], there was no exit strategy and the 2nd bullet point in the advice letter was wrong and should not have been included. His evidence in cross-examination was when taken to *Chalcot* at [70], that he didn't know where Mr Lorman (Blackstar external consultant) had got the idea of exit strategies as Blackstar did not have a solution and it must have been a "misunderstanding". He did not accept that Mr Lorman may have been on a frolic of his own, he did not know him well but thought he was trusted but in any event he did not attend the meeting with *Chalcot* and he had been ill and off work at the relevant time. Despite the issue in *Chalcot* being whether

the Scheme (marketed by Blackstar and Evolve) worked from a company law perspective his evidence was that he had not read the decision in *Chalcot* and was seeing it for the first time at the hearing. IF's evidence was contradicted by the clear evidence of the existence of exit strategies at [70] in *Chalcot*. We consider that IF's evidence was simply not plausible and have not accepted IF's evidence that exit strategies were not in existence at time that the Appellants entered into the Scheme.

Discussion of exit strategies at implementation of Scheme

82. We find that there was no discussion of exit strategies by QSL and GWM at the time that they implemented the Scheme.

(1) Both GW's and AC's evidence was that they had not read the decision in *Chalcot*.

(2) AC's evidence was that he could not recall being told about the second bullet pointed advantage of the Scheme and, whilst he accepted that it appeared to refer to ways of getting rid of the shares without paying the uncalled amounts, he could not recall discussing the point. That point was not pursued in cross-examination.

(3) GW's evidence was that he did not ask about exit strategies as he did not think it right to ask and there was nothing in the original planning and it was not a concern at the time that GWM entered into the Scheme. Despite GW's earlier answers that: he did not understand the second bullet point, he had no recollection of asking any questions about one of two key advantages, he had every opportunity to ask questions, he had attended various TENS seminars about the Scheme as "I don't jump into anything", he would have asked any questions if required as he was "not frightened to ask questions" and GWM had been paid commission as introducer of the Scheme to GWM it was not put to him by Mr Vallat that his answers were not credible and the Tribunal would be asked to not believe his evidence.

Intention or expectation that call would be triggered

83. We find that there was no intention or expectation that a call would be triggered in respect of the Shares and, if the call were triggered, it would be enforced by either QSL or GWM.

(1) Both AC and GW were consistent in repeatedly saying that they understood that the Payments would have to be repaid by them to their respective companies at some point in time. We did not consider this evidence plausible.

(2) AC's evidence was that liquidation of QSL was remote, he did not consider that a call would ever be made and it was not contemplated at the time that QSL entered into the Scheme that AR would retire. It was put to AC in cross-examination that the prospect of a call was commercially irrelevant and never likely to happen and he answered "yes, that's right".

(3) AR retired on 30 September 2014 and, in accordance with the terms upon which the Shares were allotted, upon his retirement "*any amount uncalled in respect of the share shall be treated as called in full and payable immediately*". Despite the clear wording, the Shares remained unpaid for 15 months (December 2015) when QSL undertook the Share buyback. AC confirmed in cross-examination that he understood that the call was triggered upon AR's retirement, that the uncalled amount was payable immediately and, after initially stating that he could not remember if the call was enforced, accepted that the call was not enforced in the 15 month period. Despite his evidence that he always knew that the uncalled amount would be payable and understood that AR's retirement immediately triggered the call it was not enforced. The

action taken was to obtain advice on how to unwind the Scheme rather than how to enforce the call in accordance with the stated Scheme obligation. In our judgment, the only credible explanation for the actions of AR/QSL was that there was no intention to enforce the call.

(4) GW's accepted that liquidation not a risk for GWM and there was no reason for GWM to make a call on notice. On the evidence before us, the position in respect of GWM at the time of the hearing was that the calls triggered by the departure of three employees in approximately July 2016 had not been enforced. GW acknowledged in cross-examination that he had known and understood since December 2023 that the call had been triggered following the departure of three employees but that they had not been enforced. GW's evidence then became that his failure to enforce the call was due to a "misunderstanding" of the terms on which the Shares were issued. We do not accept this evidence as credible when one looks at the clear wording of Blackstar's letter dated 24 October 2011 (at paragraph 45 above) and takes into account that GW is a Chartered Accountant who had attended a TENS' seminar where the Scheme was presented. In cross examination, GW introduced the concept of "bad leavers" (an employee who left GMW on "bad terms") and his belief that the call was not triggered on an employee retiring. We do not accept this evidence of credible and the concept of "bad leavers" is not referred to in any contemporaneous documents nor Scheme documentation, a conclusion which GW accepted.

(5) Mr Avient submitted that it was not put to GW in cross-examination that there was no intention to enforce the call. We agree that it was not put to GW that there was no intention to enforce the calls; however, on the evidence before us, the position at the time of the hearing was that the calls had not been enforced. GW's answers in cross-examination as to whether he would now enforce the calls was equivocal and varied: he confirmed that the call would have to be made and when it was put to him that it was not the call that needed to be made but to collect it he confirmed "yes, have to", that he was going to think about what to do in light of the Tribunal decision and that he had been very interested to hear what QSL had done to unwind the Scheme. He further confirmed that he had not discussed the call with any of the former employees despite a recent meeting with Mr Cousens. In our judgment, the only credible explanation for the inaction of GW/GWM was that there was no intention to enforce the call.

Share buyback by QSL

84. The buyback of the Shares by QSL confirms that there was no intention by QSL to enforce the call.

(1) Despite the clear wording of the Scheme documentation that, in the event of an employee ceasing to be employee the call was automatically triggered, no action was taken by QSL until some 15 months after AR's retirement.

(2) The Scheme documentation is clear that, in the event that the call is triggered, the uncalled Share amounts are required to be paid to the issuing company. This was not done.

(3) Advice was not sought from the Scheme promotor on how to comply with the Scheme obligations but rather advice was sought from a firm of solicitors on how to unwind the Scheme.

(4) AC was not challenged in cross-examination on whether he had paid the uncalled amount and we have accepted that, based on the auditor's report and SH01 filed at company's house that the shares were fully paid up before being repurchased by QSL.

(5) It is clear from the evidence that the Shares held by AR and AC were only paid up to enable QSL to unwind the Scheme rather than in compliance with the obligations provided in the Scheme documentation.

Awareness of Chalcot

85. We do not accept that AC, GW or IF were unaware of *Chalcot*.

(1) The Directions of Judge Raghavan dated 18 December 2017 following a case management hearing/directions hearing on 13 December 2017 recorded that Patrick Way QC (instructed by Blackstar Defence Ltd) appeared on behalf of GWM (amongst others) and that the Quadrant appeal related to the same type of scheme and that they were sent notice of the hearing but were not in attendance and noted that no specific objection had been made to HMRC's draft directions re-categorising the appeal as complex. The parties appearing at the CMH agreed to the appeals being stayed until such time as the *Chalcot* appeal was finally determined. *Chalcot* ultimately proceeded to the Court of Appeal and we do not accept the Appellants' evidence that they were unaware of the *Chalcot* proceedings and the decision of the High Court.

(2) We accept the Appellants' evidence that they had not read the decision in *Chalcot*. That evidence was not challenged and is consistent with their disinterested approach to these appeals despite being the lead Appellants.

Retire

86. We find that AR and AC did intend to retire one day but do not accept that it inevitably follows that the call would be triggered or, if triggered, enforced. It did not happen when AR retired from QSL nor when employees left the employ of GWM.

PARTIES' SUBMISSIONS

Appellants' submissions

87. Mr Avient submissions on behalf of the Appellants are summarised as follows.

88. It was accepted in opening that the Scheme was a tax avoidance scheme designed to give the Employees funds in tax efficient way, the funds were made available as a reward to the Employees but there was no contractual entitlement to the payments. There was no dispute as to the Scheme documentation or implementation: the dispute is the tax treatment of the Payments.

89. The issue is whether the Appellants were required to pay PAYE and NICs on the Payments where it was a requirement of the Payments being made that the Employees subscribe to the same sum for shares in the employer company. The Appellant's case is that because of this requirement there was no charge to tax on employment income either because there were no earnings or their value was nil. For the same reason, no NICs was payable in respect of the Payments. The shares had significant restrictions placed on them and they were therefore worthless.

90. The transactions were relatively straightforward with the outcome that the Employee has the use of the vast majority of the Payment until it is required to be returned to the company by way of a call to pay the full subscription price of the shares.

91. In considering whether a tax charge arises in respect of employment:

> "… the central concept in the tax regime governing employment income is the payment of emoluments or earnings derived from employment; and an employer who pays emoluments or earnings to or on account of an employee is obliged to deduct tax in accordance with the PAYE Regulations"

92. (*RFC 2012 plc (in liquidation) formerly Rangers Football Club plc v Advocate General for Scotland* [2017] UKSC 45 ("*RFC 2012*"), Lord Hodge at [8] affirming the statement of Lord Drummond Young in *Advocate General for Scotland v Murray Group Holdings Ltd* [2016] STC 468 ("*Murray Group*"). In determining whether a charge to tax arises, it is the words of the statute and not "*judicial glosses*" which should be the focus, the latter providing possible clarification and illustrations as to the application of the specific provision (*RFC 2012* at [11]).

93. The approach to be taken in interpreting taxing statutes is purposive and to "…have regard to the purpose of a particular provision and interpret its language, so far as possible, in a way which best gives effect to that purpose' (*RFC 2012* at [12]). In doing so the Supreme Court affirmed the decision in *Barclays Mercantile Business Ltd v Mawson (Inspector of Taxes*) ("*BMB*") [2005] STC 1, Lord Nicholls at [32]:

> "[T]he question is always whether the relevant provision of the statute, upon its true construction, applies to the facts as found"

94. It would be going too far to simply disregard elements of transactions which had no commercial value, the correct approach being to decide *"…exactly what transaction would answer to the statutory description and secondly, to decide whether the transaction in question did so*" (*RFC 2012* at [13]). Consequently, the analysis of the facts depends upon the purposive construction of the statutory provision (*RFC 2012* at [14], *UBS AG v Revenue and Customs Commissioners, Deutsche Bank Group Services (UK) Ltd v Revenue and Customs Commissioners* ("*UBS*") [2016] STC 934, Lord Reed at [62]). It is not being asserted that the transactions were a sham, the point is not in issue.

Ground 1

95. The Payments do not constitute 'earnings' for the purposes of s62 ITEPA, notwithstanding its wide definition. The Payments are not a salary, wage or fee, the payment being subject to the obligation to subscribe for shares (s62(2)(a)). The Payment was encumbered from the start with the obligation to subscribe to shares in the company. For the Payment to be made, the Employee was obliged to pay 1% to subscribe for the shares and on occurrence of any number of events the 99% could be called without any discretion or choice. The Payment was imbued with the entitlement of the employer to claw it back.

96. The Payments do not fall within the scope of a "gratuity or other profit or incidental benefit of any kind obtained by the employee if it is money or money's worth" (s62(2)(b)).

97. The shares, due to the restrictions placed on them, are worthless, and as such have no monetary value to the Employee when the Payments are made and the Employee subscribes for the shares (s62(3)). Consequently, no benefit or advantage is obtained by the Employee and the shares are not capable of being converted into money or something of direct monetary value to the Employee (*RFC 2012* at [45]). As regards the Employee, there was no profit at the time the payments were made. An Employee who receives a payment subject to the obligation to subscribe that amount for worthless shares in the employer company, nothing goes "*into his own pocket*" (*RFC 2012*, at [45 Unlike in *RFC 2012*, there is no payment to a third party, there are only two parties, the Employee and the employer, and as a consequence of the transactions there is nothing of value which the Employee receives. In order for the Payment to fall within the scope of earnings it must be an emolument, which it is not.

98. It is the use of the Payment which is the reward to the Employee for the purposes of s62 ITEPA. Although not a loan, the benefit of the Employee being free to exploit the Payment is analogous to that of funds loaned to an employee which are repayable at some stage. As regards the latter, in principle, the benefit not being quantifiable (*O'Leary v*

McKinlay 63 TC 729, Vinelott J at [739] and [740]) because an amount lent is to be recovered in due course. The provision of or advance of a loan, of itself, does not constitute a payment of earnings or an emolument from employment under s62 ITEPA and no PAYE or NICs is payable for its provision.

99. A condition of the Payment is that it will be recovered by the employer with the Employee only having use of the funds for the period before it is called, therefore the payment is not at their absolute disposal. The only advantage to the Employee is the use of the funds which do not constitute earnings, the decision in *Smyth (Surveyor of Taxes) v Stretton* 5 TC 36 ("Smyth") can be distinguished as there is no sum added to the Employee's earnings. For a charge to arise, monies must be absolutely at the disposal of the Employee (*Garforth v Newsmith Stainless Ltd* [1979] STC 129 ("*Garforth*"), *Sempra Metals v Revenue and Customs Commissioners* [2008] STC (SCD) 1062 ("*Sempra*"), *Aberdeen Asset Management plc v Revenue and Customs Commissioners* [2014] STC 438 ("*Aberdeen*"). In the cases of the Appellants, the payments are not at the absolute disposal of the Employee, the obligation existing to subscribe for shares. For the purposes of NICs, the Employee obtained nothing from the employment, only receiving shares with no value (*Forde & McHugh Ltd v Revenue and Customs Commissioners* [2014] STC 724 ("*Forde*").

100. The obligation to make the payments on call for the full subscription price were and remain a real commercial possibility. In the instance of QSL, the amount was called and paid when an Employee chose to retire. In respect of GWM, the Payments were made to directors and key employees with the requirement to pay the full subscription price upon ceasing employment incentivising those employees and ensuring their retention in the work force. It served a real purpose.

101. It is not possible to ignore both the legal and real consequences should the employer company be wound up, in respect of limited companies this not being a remote possibility. The clawing back of the Payments is very real as is the Employee's loss of the continued use of the Payment. This is an intended consequence of the Scheme with the Employee losing use of the Payment if the company got into financial difficulties. This risk is not to be disregards but constitutes a key element and obligation for the Payment to be made.

Ground 2

102. If the Payment is earnings, its value will be nil as the Employee receives the Payment subject to the condition that the employer can clawback the Payment at any time. Looking at the facts realistically, the value must be nil because of the equal and opposite effect of the payment and the Employee's obligation to pay the money back. *Cordy v Gordon* 9 TC 304 ("*Cordy*") and *Machon v McLoughlin* 11 TC 83 ("*Machon*") can be distinguished as the Employee is required to return the Payment to the payee and in return receives worthless shares.

103. The shares provide no right of control over the company, no rights to dividends and only provide for payment of 1p per share winding up and are worthless. The terms on which the Employee might receive a payment on the disposal of the company are so remote as to render such terms as worthless.

HMRC's submissions

104. HMRC's primary case is that the Payments are taxable earnings in full and on their own terms (s62 ITEPA and s3 SSCBA): they are payments made to the Employee in respect of their employed services; no obligation to apply those amounts to subscribe for shares can alter their character as such or reduce the amount brought into charge.

105. Alternatively, if one must look beyond the receipt of the Payments to the subscription for E-shares, applying the *Ramsay* principle of statutory interpretation leads to the same conclusion; the shares are simply a mechanism for the payment of earnings.

The Payments are taxable earnings

106. The Payments paid by the Company to the Employee, on its own terms, constitutes earnings which fall within the meaning given by s62 ITEPA and s3 SSCBA and the Company is required to account for PAYE and NICs. The Payment was paid by the Company and received as earnings by the Employee on or around the date(s) that the 1% and 99% payments were transferred by the Company to the relevant Employee's accounts (loan account or personal bank account): see *Garforth*.

107. The Payment was paid in respect of the relevant Employee's employed services with the Appellants. The standardised board minutes for QSL and GWM both state that the Shares (in connection with which the Payment is paid) are to be issued in order to recognise the Employee's contributions to the Company for a particular period of service. It is irrelevant that the Payment is paid on the condition that the Employee would subscribe for Shares in the Company. Where the recipient of earnings is required to apply them in a particular way, the payment retains its character as earnings: see *Smyth* at [45] and [46], and *RFC 2012* at [52]-[59]. It is irrelevant that the obligation assumed under the Scheme by the Employee was to the Appellants rather than a third party: see *Cordy* and *Machon*. The Employee received sums which represented employment income; no subsequent use of that income can alter its character as such.

108. In relation to the 1% payments, the Employee received value from the Company in respect of his employment: either (i) in the form of cash paid to the Employee, or (ii) in the form of Shares subscribed for by the Employee, worth at least their paid up amount.

The Ramsay principle

109. Alternatively, if it is necessary to look beyond the receipt of the Bonus payments to the subscription for Shares, a purposive view of the legislation applied to the facts viewed realistically leads to the conclusion that the Bonus payments were payments of earnings to the Employee, which should therefore be taxed under s9 ITEPA and s6 SSCBA.

110. A realistic view of the facts involves looking at the overall effect of a composite transaction, rather than considering each step individually: see *Ramsay* and *BMBF*. In addition, the focus should be on the character of the receipt in the hands of the Employee rather than the legal form of the source of the payment, see *Brumby v Milner* (1976) 51 TC 583 at 607G; and *CIR v PA Holdings Ltd* [2011] EWCA Civ 1414 at [33] to [38].

111. Taking all of the circumstances into account, the overall effect of the transactions is that the Employee receives the cash sums in his hands at his unreserved disposal in respect of his employment with the Appellants. The requirement that the Employee subscribe for Shares and the terms of those Shares, including the (remote) possibility that the 99% uncalled for amounts would be demanded by the Company, were inserted purely with the intention of avoiding the payment of PAYE income tax and NICs in relation to the Payments. The Shares were simply a mechanism for the tax-free payment of earnings to the Employee. The liability that the 99% will be called up is a commercially irrelevant contingency, which can therefore be ignored when taking a realistic view of the facts: *CIR v Scottish Provident Institution* (2004) 76 TC 538 ("*SPI*"), at [23]. Even if the contingency is a real commercial possibility, it should be disregarded because the parties proceeded on the basis that it should be disregarded: *Astall v Revenue & Customs Commissioners* [2009] EWCA Civ 1010 at [34] ("*Astall*"); *Berry v Revenue & Customs Commissioners* [2011] UKUT 81 (TCC) ("*Berry*") at

[31(xiv)]; cf *UBS AG* v *Revenue & Customs Commissioners, Deutsche Bank Group Services (UK) Ltd v Revenue & Customs Commissioners [2016] UKSC 13* ("*UBS*").

112. The contingent liability attaching to the Shares to pay the uncalled amounts is remote and therefore not "onerous" contrary to the Appellants' argument). Even if the terms on which the Shares were issued, in particular the fact that the 99% payments could be called up by the Company at three months' notice, could be said to affect the value of the earnings received by the Employee (by way of the Payment), that value cannot be said to be nil. On any view, the Employee has received some value or benefit from the cash sums placed at his disposal and/or the Shares issued to him.

DISCUSSION

113. We are grateful to the parties for their skeleton arguments, comprehensive oral submissions and responses to the questions raised during the hearing. In reaching our decision on this appeal we have considered everything drawn to our attention by way of submission/argument. It is, however, inevitable, given the detail of the arguments and the quantity of material before us, that not everything in the appeal is given specific mention in this judgment.

Ground 1 - The payments to the Employees did not constitute earnings because the Employees were required to return all the payments to the Employer.

114. The parties were agreed and we agree that we should adopt a purposive approach in construing tax legislation and applying it to the facts pursuant to the *Ramsay* principle of interpretation. As identified by the parties, in *Rossendale* the Supreme Court explained that the *Ramsay* involves two components or stages. The first is to ascertain the class of facts (which may or may not be transactions) intended to be affected by the relevant tax charge or exemption. This is a process of interpretation of the statutory provision in the light of its purpose. The second is to discover whether the relevant facts fall within that class, in the sense that they "answer to the statutory description" and may be described as a process of application of the statutory provision to the facts.

115. In regard to the first stage, Lord Hodge in the Supreme Court in *RFC 2012* considered the definition of "earnings" in s62 ITEPA and at [35] stated:

> "Income tax on emoluments or earnings is, principally but not exclusively, a tax on the payment of money by an employer to an employee as a reward for his or her work as an employee … What is taxable is the remuneration or reward for services."

116. He further identified at [59] that the legislation applies to remuneration paid in money or money's worth and noted:

> "The relevant provisions for the taxation of emoluments or earnings were and are drafted in deliberately wide terms to bring within the tax charge money paid as a reward for an employee's work"

and confirmed at [65] the purposive approach which should be applied:

> "In applying a purposive interpretation of a taxing provision in the context of a tax avoidance scheme it is legitimate to look to the composite effect of the scheme as it was intended to operate."

117. In respect of the second stage, it was accepted by the Appellants and as confirmed by the Scheme documentation and our findings of fact that the express purpose of the Scheme was to reward the Employees for their services. HMRC submitted that on that basis the Payments clearly fall within the definition of earnings in s62 ITEPA and s3 SSCBA. We agree with HMRC's submission. However, that is not the end of the matter. The Appellants

do not accept that clear characterisation of the Payments as earnings because the terms under which it was paid required the Employee to return all the payments to the employer and therefore did not meet the statutory description of earnings.

Certainty

118. HMRC submitted that the Appellants' Ground 1 starts from a false premise as the Employees were not required to return all the Payments received under the Scheme to the Appellants but rather the Payments were made subject to an obligation to subscribe for the Shares and apply 1% of the Payments towards paying up the Shares as to 1% of their nominal value. The majority of the Payment, 99%, was at the free disposal of the Employees albeit subject to a contingent obligation to pay up the 99% uncalled amount on the Shares in three prescribed circumstances. We agree and find as fact that, as evidenced by the Scheme documents, the obligation to pay up the 99% uncalled amounts is a contingent obligation and the Appellant is misconceived on certainty. The Scheme documentation is clear in its wording that the three circumstances in which the call could be exercised were contingencies and not a certainty.

119. As we have found above, whilst the Scheme documentation sets out three circumstances in which the Payment was required to be returned our findings of fact confirm:

(1) The likelihood of a call being made on three months notice was considered remote and unlikely by both AC and GW; it was considered "commercially irrelevant".

(2) The risk of liquidation of the Appellants was a remote possibility and a risk that the Employees were prepared to take;

(3) Where the cessation of employment triggered the call, it was not enforced by either Appellant. The Appellants are unconnected otherwise than through their use of the Scheme but in both cases the call was not enforced when triggered.

120. We find that the Appellants is misconceived on the certainty of the obligation to pay up the uncalled Shares and the three circumstances triggering repayment were remote, commercially irrelevant or unenforced in practice.

Absolute disposal of Employee

121. Mr Avient at paragraph 33 of his skeleton argument stated that for a charge to tax to arise, monies must be absolutely at the disposal of the Employee and relied upon *Garforth*, *Sempra Metals* and *Aberdeen* as authority for that proposition. We were taken by Mr Vallat to [52]-[59] in *RFC 2012* where Lord Hodge explained the decision in *Garforth*, distinguished the decision in *Aberdeen* and overruled the decision in *Sempra Metals*.

122. Therefore, for a tax charge to arise there is no requirement that the monies must be absolutely at the disposal of the Employee:

> 54 The gloss is no basis for establishing a general rule or "principle" that a payment is made for the purposes of PAYE only if the money is paid to or at least placed unreservedly at the disposal of the employee. Yet it has been so used."

123. At [58], Lord Hodge summarised the position as follows:

> "58 In summary, (i) income tax on emoluments or earnings is due on money paid as a reward or remuneration for the exertions of the employee; (ii) focusing on the statutory wording, neither section 131 of ICTA nor section 62(2)(a) or (c) of ITEPA, nor the other provisions of ITEPA which I have quoted (except section 62(2)(b)), provide that the employee himself or herself must receive the remuneration; (iii) in this context the references to

> making a relevant payment "to an employee" or "other payee" in the PAYE Regulations fall to be construed as payment either to the employee or to the person to whom the payment is made with the agreement or acquiescence of the employee or as arranged by the employee, for example by assignation or assignment; (iv) the specific statutory rule governing gratuities, profits and incidental benefits in section 62(2)(b) of ITEPA applies only to such benefits; (v) the cases, to which I have referred above, other than *Hadlee* [1993]AC524, do not address the question of the taxability of remuneration paid to a third party; (vi) Hadlee supports the view which I have reached; and (vii) the Special Commissioners in *Sempra Metals* [2008] STC (SCD) 1062 (and in *Dextra* [2002] STC (SCD) 413) were presented with arguments that misapplied the gloss in *Garforth* [1979] 1 WLR 409 and erred in adopting the gloss as a principle so as to exclude the payment of emoluments to a third party."

124. We agree with Mr Vallat that what we take from *RFC 2012* is that putting money at an employee's absolute disposal is not the only circumstance in which it could be earnings. *Sempra Metals* had overstated the position and was corrected in *RFC 2012*. We therefore reject the Appellants' submission that the Payments could not be earnings as they were not at the absolute disposal of the Appellants.

Characterisation of Payment

125. HMRC relied upon *Smyth* for the proposition that a sum receivable by way of earnings is not the less earnings because the Employee has not got the full right to apply it as they like. In *Smyth*, Channell J at [42] stated:

> "Now, in this Case I have to deal with a decision which certainly is very much in point, and that is the decision in this. Case of Bell v Gribble and Hudson v Gribble. That establishes, if authority were wanted (I think for the main proposition authority clearly existed before), that a sum receivable by way of salary or wages is not the less salary or wages taxable because for some reason or another the person who receives it has not, got the full right to apply it just as he likes. The fact that income which is income, but which has even by operation of some statute to be devoted compulsorily to some purpose or another, does not prevent it being income,.[sic] That is decided of course by one of the various Mersey Dock Cases."

126. At 45:

> " … it has been, stated distinctly to be salary, and it seems to me not by any means necessary to prevent it being salary, because there is a binding obligation"

127. At 46:

> "The result seems to me to be that I must take that sum as a sum which really has been added to the salary and is taxable, and it is not the less added to the salary because there has been a binding obligation created between the Assistant Masters and Governors of the Schools that they should apply it in a particular way."

128. Mr Avient sought to distinguish *Smyth* on the basis that the sum in dispute in *Smyth* was stated to be a salary whereas, as on the facts here, the Payments were not a salary because the requirement to repay meant it did not have the character of salary or wages. We do not accept that distinction as a basis for distinguishing the decision in *Smyth*. In our judgment, the applicable principle derived from *Smyth* is that "*income which is income, but which has even by operation of some statute to be devoted compulsorily to some purpose or another, does not prevent it being income*" is not limited to payments received as a salary but

to "earnings". Support for that conclusion can be found in *RFC 2012* at [52]-[59] referred to above and in *Murray Group* at [55]-[56]. We consider that the decision in *Smyth* remains good law. The decisions in both *Smyth* and *RFC 2012* are binding on this Tribunal.

Obligation to employer not third party

129. Mr Avient submitted that a further distinguishing feature of this appeal is that here, the Employees obligation under the Scheme was to the Appellants rather than a third party. *RFC 2012* was concerned with payments to third parties and is of limited assistance on the facts of these appeals. Mr Vallat submitted that it was irrelevant that the obligation was to the employer rather than a third party and relied upon *Cordy* and *Machon*. The important point is that the Payments were made in recognition of services provided by the Employees in their capacity as such. We agree with HMRC's submission. Furthermore, we do not accept the principles expounded in the decision of the Supreme Court in *RFC 2012* are limited merely to payments made to third parties and not of wider application.

130. In both *Cordy* and *Machon* it was found that the taxpayer appellants had received an emolument when they were required to account to their employer part of their salary variously for board, washing, laundry etc. *Cordy* was a decision of Rowlatt J (who was counsel in *Smyth*) who stated at 308:

> "If we get a case where a person is paid a salary, and, being paid that salary, out of that salary has to pay a counter amount to secure himself some necessaries which he must have and which his employers think he ought to have in a certain form, then it seems to me there is no relevance in the question whether what he gets by that counter payment can be disposed of for money or whether it is inalienable. You do not get to that question, because he has been paid a salary and what he does with the salary is immaterial."

131. *Machon* was another decision of Rowlatt J that was appealed to the Court of Appeal. The appeal failed. Lord Hanworth MR at 94 stated:

> "In *Smyth v Stretton*, 5 TC 36, it was determined that where an Assistant Master at Dulwich College had to contribute to a certain fund from which he would receive a benefit contingent on the length of service and on good conduct, the sum so deducted was still a part of his salary and formed a taxable addition to it. Now I need not refer at length to what Mr. Justice Channell said, but I take those two cases as illustrating the fact that it cannot be said that the only sum which is chargeable to tax is the actual money paid into the hand of the employee."

132. Warrington LJ at [95] in *Machon*, quoted from High Court decision of Rowlatt J in *Machon*:

> "That is one proposition, but when you have a person paid a wage with a necessity - a contractual necessity, if you like - to expend the wage in a particular way, then he must pay tax upon the gross amount and no question of alien ability or inalien ability arises."

133. *In Murray Group* at [56] where, having considered *Smyth* at [55], Lord Drummond Young in the Court of Session, Inner House stated at [56]:

> "The fundamental principle that emerges from these cases appears to us to be clear: if income is derived from an employee's services qua employee, it is an emolument or earnings, and is thus assessable to income tax, even if the employee requests or agrees that it be redirected to a third party. That accords with common sense."

134. We cannot see that whether the obligation assumed by the Employee is to the employer or a third party should be determinative of the taxation position. No credible explanation was given by the Appellants as to why that should be the outcome. If the Appellants' position were correct, the widely drafted provisions in s62 ITEPA would be readily circumventable.

Analogous to a loan

135. Mr Avient submitted that, whilst making clear that the Payment was not a loan, it was nonetheless analogous to a loan as the Employee had use of the Payment for a period of time but was then required to return it. Reliance was placed upon *O'Leary v McKinlay (HMIT)* at [733] and [734] of the Special Commissioner's decision of DC Potter QC where it was stated:

> "Adapting the reasoning of the House of Lords in that Case [*Tennant v Smith(4)* 3 TC 158] to the present circumstance, it seems to me that the use of borrowed money, as opposed to the borrowing itself, is not an emolument from the employment"

136. And at [734]:

> "The principle that I derive from those two authorities is corroborated by the fact, of which I take notice, that the practice of unofficial loans to employees has for many years been widespread, and is in practice not brought within the tax net save by the express enactment of Finance Act 1976, ss 61 and 66."

137. We are clear that on the basis of the facts before us, that the Payments were not a loan nor were the Payment analogous to a loan. The Scheme documentation refers to a "reward" and no reference is made in the Scheme documentation to the Payment being a loan or a quasi-loan. Our findings of fact were that both GW and AC viewed the Payment as a reward for their service as an Employee and not as a loan that would be required to be repaid.

138. For all the above reasons we find that the Payments are properly characterised as "earnings" within the meaning "earnings within the meaning of s62 ITEPA and the Payments are "earnings" for the purposes of s3 SSCBA.

Ramsay principle

139. Despite our above conclusion we have considered HMRC's alternative argument that a purposive view of the legislation applied to the facts realistically leads to the conclusion that the Payments were payments of earnings to the Employee which should be taxed under s9 ITEPA and s6 SSCBA. HMRC's position is that, taking all the circumstances into account, the Employee receives a cash payment in his hands at his unreserved disposal and the requirement that the Employee subscribe for Shares was simply a mechanism for the provision of tax-free earnings to the Employee. The liability that the 99% will be called up is a commercially irrelevant contingency and, on a realistic view of the facts, can be ignored. The Appellants' position is that it is not possible to ignore both the legal and real consequences of the obligation to make the payments on call for the full subscription price. In *SPI* at [23] Lord Nicholls of Birkenhead stated:

> "23. We think that it would destroy the value of the *Ramsay* principle of construing provisions such as section 150A(1) of the 1994 Act as referring to the effect of composite transactions if their composite effect had to be disregarded simply because the parties had deliberately included a commercially irrelevant contingency, creating an acceptable risk that the scheme might not work as planned. We would be back in the world of artificial tax schemes, now equipped with anti- *Ramsay* devices. The composite effect of such a scheme should be considered as it was intended to

> operate and without regard to the possibility that, contrary to the intention and expectations of the parties, it might not work as planned."

140. In *Astall* at [34], Arden LJ (as she then was) stated:

> " … It is characteristic of these composite transactions that they will include elements which have been inserted without any business or commercial purpose but are intended to have the effect of removing the transaction from the scope of the charge."

141. The Upper Tribunal in Berry at [31(xiv)], Lewison J, having referred to *SPI* and *Astall* stated:

> "(xiv) In considering whether there is no practical likelihood that the whole series of transactions will be carried out, it is legitimate to ignore commercially irrelevant contingencies and to consider it without regard to the possibility that, contrary to the intention and expectation of the parties it might not work as planned: *IRC v Scottish Provident Institution* [2005] STC 15 at [23], [2004] 1 WLR 3172 at [23]. Even if the contingency is a real commercial possibility it may be disregarded if the parties proceeded on the basis that it should be disregarded: *Astall v Revenue and Customs Comrs* [2010] STC 137 at [34], 80 TC 22 at [34]."

142. As stated at paragraph x above, we found as fact that the liability to pay up the uncalled amount was commercially irrelevant contingency and that the parties proceeded on the basis that it should be disregarded. We are clear in our view that, applying a purposive view of the legislation to the facts viewed realistically leads to the clear conclusion that the Payments were payments of earnings to the Employees which are taxable under s9 ITEPA and s6 SSCBA.

Ground 2 – If the Payments are earnings, their value was nil, the Employees being required to pay the amount to the Employer for shares with no value

143. The final matter for determination is whether, notwithstanding our findings that the Payments constituted earnings within the meaning of section 62 ITEPA and section 3 SSCBA, the Appellants second ground that the value of the earnings must be nil because of the contingent obligation to repay the Payments and the alleged worthlessness of the Shares.

144. We do not accept that the value of the Payments was nil. As we have found above, the Payments were made to the Employees in recognition of their services and were placed at their disposal. The obligation to repay the uncalled amounts on the Shares was contingent and, in practice, unenforced. The Shares themselves, while lacking commercial value, were merely the mechanism through which the Payments were structured. The economic reality is that the Employees received substantial cash sums which were not returned and which were not subject to any genuine or enforced repayment obligation.

145. The Appellants' reliance on the "equal and opposite" effect of the Payment and the obligation to repay is misconceived. As we have found, the obligation to repay was not enforced in any instance, and the Appellants took active steps to unwind the Scheme rather than enforce the contractual terms. The argument that the value of the Payments was nil is therefore inconsistent with both the documentary evidence and the conduct of the Appellants.

146. Even if we are wrong, we agree with HMRC that on any view, the Employee has received some value or benefit from the cash sums placed at his disposal and/or the Shares issued to him.

147. We therefore reject Ground 2. The Payments were earnings and their full value is chargeable to PAY and NICs.

CONCLUSION

148. For the reasons set out above, we find that:

(1) The Payments made to the Employees under the Scheme were earnings within the meaning of section 62 ITEPA and section 3 SSCBA;

(2) The Payments were made in recognition of services provided by the Employees in their capacity as employees;

(3) The obligation to repay the uncalled amounts on the Shares was contingent, commercially irrelevant, and unenforced;

(4) The Shares had no commercial purpose and did not constitute a genuine incentive;

DISPOSITION

149. Accordingly, we dismiss the appeals brought by GW Martin & Co Limited and Quadrant Surveying Limited.

150. The Regulation 80 determinations and Section 8 decisions issued by HMRC are upheld.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

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

Release date: 25th SEPTEMBER 2025