Neutral Citation Number: [2026] EWCA Civ 445

Case No: CA-2025-000671

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL (TAX AND CHANCERY CHAMBER)
MR JUSTICE RICHARD SMITH AND JUDGE JEANETTE ZAMAN
[2024] UKUT 00404 (TCC)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17/04/2026

Before:

LORD JUSTICE SINGH
LADY JUSTICE FALK
and
LORD JUSTICE FOXTON

- -

Between:

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS	**Appellants**
- and –	
M R CURRELL LIMITED	**Respondent**

- -
- -

Julian Ghosh KC and Edward Waldegrave (instructed by **HMRC Legal Group**) for the **Appellants**
Ben Elliott (instructed by **Charles Russell Speechlys LLP**) for the **Respondent**

Hearing dates: 24 and 25 March 2026

- -

Approved Judgment

This judgment was handed down remotely at 10.00am on Friday 17 April 2026 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

.....

Lady Justice Falk:

Introduction

1. This is an appeal by HMRC against a decision of the Upper Tribunal (the "UT") in which the UT allowed an appeal by M R Currell Limited (the "Company") against a decision of the First-tier Tribunal (the "FTT"). The FTT had dismissed the Company's appeal against determinations by HMRC that it was liable to income tax under the PAYE system and to account for national insurance contributions ("NICs") in respect of a payment of £800,000 (the "Payment").

2. The Payment had been made in November 2010 by the Company to an employee benefit trust (the "EBT"). The EBT had immediately on-lent the £800,000 to Mr Mark Currell, a director and shareholder of the Appellant (the "Loan"). Mr Currell had in turn applied the funds in the manner described below.

3. HMRC concluded that the Payment constituted taxable earnings of Mr Currell and made determinations accordingly. The Company appealed to the FTT, which agreed with HMRC. The UT concluded that there had been an error of law in the FTT's decision. It decided to set that decision aside and re-make it, allowing the Company's appeal against HMRC's decisions.

4. HMRC now appeal to this court with the permission of Arnold LJ. We heard submissions from Mr Julian Ghosh KC and Mr Edward Waldegrave for HMRC, and from Mr Ben Elliott for the Company. We are grateful for their assistance.

5. In summary, I would dismiss the appeal. The UT was correct to set aside the FTT's decision and reached the correct conclusion in re-making it.

The facts

6. The FTT ([2023] UKFTT 613 (TC), Judge Nigel Popplewell and Mr Duncan McBride) made detailed findings of fact. For present purposes the key elements are as follows.

7. The Company's painting and decorating business was originally established by Mr Currell in the 1980s. He was joined as a partner at a relatively early stage by his wife, Mrs Kimberly Currell. The business grew and was incorporated in 2002. It achieved substantial success. Mr and Mrs Currell were both directors. Although Mr Currell was "a driving force" and would have had to approve significant decisions, Mrs Currell's role was very important, as were those of employees who acted as contract managers. The contract managers benefited from sizeable bonuses when targets were met. Mr and Mrs Currrell's two sons also became involved in the business. By November 2010 the shareholdings were approximately 31% each held by Mr and Mrs Currell, 5% held by each son and 28% held by a share incentive plan.

8. Mr Currell took very modest amounts by way of salary (under £5000 annually between 2009 and 2011). The Company paid dividends to its shareholders, generally totalling around £60,000-£80,000 annually. Mr Currell also received income from other investments.

9. The EBT was established by a deed dated 18 November 2010. It had an independent corporate trustee (the "Trustee"). The initial trust fund was £100. The beneficiaries were

described as the "bona fide employees" of the Company together with their relatives. On 22 November 2010, the Company issued a memorandum telling staff that it had decided to implement a new employee incentive arrangement in the form of a trust, under which funds would be contributed by the Company and could be paid out as benefits to employees. The memorandum added that this would "have the advantage that bonuses can be provided in profitable years and ring-fenced within the Trust for later payment".

10. On the same date the directors wrote to the Trustee, sending it a copy of board minutes approving the contribution of £800,000 to the EBT and referring to the possibility that the Trustee might use the contribution to make loans on appropriate terms to employees or directors, and pay bonuses and provide other benefits. Mr Currell also wrote to the Trustee applying for a loan of £800,000 to buy 261,437 "A" shares in the Company. His letter stated that he appreciated that the Trustee would require security. The Trustee approved Mr Currell's request on 23 November 2010.

11. On 25 November 2010, Mr Currell entered into a loan agreement with the Trustee pursuant to which it agreed to lend him £800,000 for a five-year term, secured by a charge on his interest in the A shares. The Loan was interest free unless Mr Currell became a "bad leaver". Mr Currell had the option to prepay the Loan, but the Trustee could not require repayment prior to the maturity date except in certain circumstances, which included Mr Currell's insolvency or cessation of employment.

12. The following day, Mrs Currell sold 261,437 A shares to Mr Currell (the "A Shares") for £800,000. The A shares had previously been valued at that amount by the Trustee. The bank transfers on that day reflected the Payment, the Loan and the share sale, but also a further transfer of £800,000 from Mrs Currrell to the Company. This was treated as a loan from Mrs Currrell to the Company.

13. The Loan was not repaid at maturity in November 2015. However, in 2019 £50,000 was repaid to the Trustee and used to pay bonuses.

14. The FTT made the following important findings (cross-references are to paragraphs of its decision):

    a) All of the transactions, that is the Payment, the Loan, the share sale and the loan to the Company by Mrs Currell, were "prewired". The Company required the working capital in its business and it was "inevitable" that the £800,000 would find its way back to it ([31(8)] and [36(13)]).

    b) For that reason the FTT was unconvinced by the Company's evidence about the purpose of the arrangements being to "ring-fence" funds in the EBT to allow the payment of bonuses, because once back in the Company the funds were still at risk of business failure, and the security for the Loan would be worthless in that event ([36(9)-(19)]).

    c) Rather, the "substantial reason" for the Company to make the Payment was to enable the Trustee to meet its commitment to provide the Loan ([30], [32]).

    d) Mrs Currell's loan to the Company could be repaid "whenever she wanted" and the funds used for the "mutual benefit" of Mr and Mrs Currell ([16(3)], [50]).

e) The FTT accepted that the Loan was a genuine loan with a real repayment obligation, that Mr Currell had the independent funds to settle it on the repayment date and that he was "fully conscious" of his obligation to repay on that date ([36(10)], [43]).

f) The reason why the Trustee did not ask Mr Currell to repay the Loan in November 2015 was because of a concern about double taxation. By then HMRC had already opened an enquiry into the arrangements and had issued the determinations in March 2015. There was a concern that, if the money had been repaid and then used to pay bonuses, there would have been tax on the payment of those bonuses as well ([15(31)], [16(8)]).

g) If the Company had not made the Payment it would not have paid Mr Currell £800,000 as remuneration for his work. The Payment did not replace remuneration which Mr Currell had sacrificed or reduced in anticipation of receiving it ([15(12) and (13)]). There was "no evidence" that, if the £800,000 had not been paid by way of a loan, it would have been paid as salary or other remuneration ([54(10)]).

h) However, the only reason the Loan was made was "because of the work which [Mr Currell] had done over the years in building up the business firstly as a sole trader, then in partnership, and then via the medium of the company" ([53]).

15. There are two potential qualifications to these findings, both related to the ways the FTT expressed itself elsewhere in the judgment. I need to refer to these because Mr Ghosh placed some reliance on those other statements as representing the FTT's findings. However, reading the judgment as a whole, I consider that what is stated above best reflects the FTT's factual findings.

16. The first potential qualification, in respect of d) above, is that at [36(13)] the FTT referred to funds being used "as [Mr Currell] wished". In contrast, at [16(3)] (under the heading "Findings of fact") and at [50] the FTT referred to the funds being at the unfettered disposal of Mrs Currell and to the absence of misgivings by Mr Currell that funds would not be drawn for their mutual benefit. Those other paragraphs make more sense. There is no dispute that the loan back to the Company was made by Mrs Currell. The fact that Mr Currell had no concerns about how she would exercise her rights is not the same thing as him having control of the funds.

17. The second possible qualification relates to f) above. At [36(14)] the FTT referred to the double tax concern as "one reason" rather than "the reason" for the absence of a repayment demand in 2015. Again, this contrasts with what is said in the section of the FTT's decision described as findings of fact. Further, no other reason is given, and the way in which [36(14)] is expressed suggests that it is intended as a cross-reference to the earlier finding. On any basis the point cannot bear the weight that HMRC seek to place on it.

The relevant statutory provisions

18. Part 2 of the Income Tax (Earnings and Pensions) Act 2003 ("ITEPA") imposes the charge to tax on employment income. Relevantly for present purposes, section 6 of ITEPA charges tax on "general earnings", defined as earnings within Chapter 1 of Part 3 of ITEPA. In that Chapter, section 62(2) defines earnings as follows:

> "(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."

"Money's worth" is defined in section 62(3) as something that is of direct monetary value to the employee, or is capable of being converted into money or something that is of direct monetary value.

19. Pursuant to section 15 of ITEPA, UK resident employees are taxed on the full amount of general earnings "received" in a tax year. Section 18 of ITEPA sets out when general earnings are treated as received. Relevantly, this includes a time when "payment is made of or on account of the earnings". A similar provision applies for PAYE purposes: see section 686 of ITEPA.

20. In summary, therefore, there are two requirements for a PAYE liability to be triggered on general earnings of a UK resident employee. There must both be earnings within section 62(2) of ITEPA, and they must be received (which includes payment). The issue in this case relates to the first of these requirements, namely whether the Payment comprised earnings.

21. In addition to the general charge to tax on earnings within section 62(2), there are detailed rules governing the taxation of benefits in kind. In particular, Part 3 of ITEPA contains a "benefits code" which includes, in Chapter 7, specific provisions that apply to employee loans. Within Chapter 7, section 175 of ITEPA imposes a charge to income tax on the benefit provided by loans made at less than a prescribed rate of interest, known as the "official rate". Tax is payable by reference to the difference between the official rate and the rate actually charged. This tax charge was said not to apply on the facts of this case due to an exception where the loan is used to purchase shares in a closely controlled company. Under section 188 of ITEPA, tax is also payable on any part of an employee loan that is released or written off.

22. Under section 64 of ITEPA, if the same benefit would both give rise to earnings and to a charge under the benefits code, the earnings rules generally have primacy.

23. The definition of earnings for the purposes of NICs is slightly different to the income tax definition. Section 3(1) of the Social Security Contributions and Benefits Act 1992 provides that earnings "includes any remuneration or profit derived from an employment". However, it is common ground that for present purposes there is no relevant difference between the income tax and NIC regimes or in their collection mechanisms, so I will concentrate on the income tax position.

24. It is worth clarifying at this point that the Payment and Loan were made before the coming into effect of Part 7A of ITEPA (see further [102] below).

The reasoning of the FTT

25. The FTT described the main issue as being whether the "sole or a substantial reason" for the Payment was that it was a "reward or benefit" for Mr Currrell's services as an employee or director, using that terminology as a shorthand for section 62 of ITEPA (FTT decision at [12], [14] and [22]). However, as part of viewing the facts realistically and applying a purposive approach it could consider subsequent events ([23]). The FTT

took the approach of looking first at the reasons why the Payment was made and then at the reasons why the EBT made the Loan ([24]).

26. As already mentioned, the FTT found that the substantial reason for the Payment was to enable the Trustee to make the Loan, which was "prewired" ([30] and [31(8)]), as was the payment back to the Company ([31(15)]).

27. The FTT then went on to consider the Loan, first in a passage at [33]-[37] headed "Was the Loan a reward or benefit?", and then in a section at [38]-[55] considering the reasons why the Loan was made. The FTT introduced the first passage by saying at [33] that:

> "… we first need to consider whether, as a matter of law, a genuinely repayable loan can be a reward or benefit in the first place (whatever the reasons for its payment), and more importantly whether the Loan was a reward or benefit in this case".

28. The FTT concluded that a genuine loan of money with real repayment obligations could, as a matter of legal principle, comprise a reward or benefit and that "in this particular case, the Loan was a reward or benefit" ([36]). The FTT summarised the position as follows at [37]:

> "In summary, therefore, it is our view that as a matter of law there is nothing which prevents a genuine money loan on commercial terms conferring a benefit on the borrower. It is our view that in the vast majority of cases in practice, such a loan will confer a benefit. And in the context of this case, the Loan conferred a benefit on [Mr Currell]. Its payment to [Mr Currell], therefore, was potentially within the ambit of section 62 ITEPA. Whether it was earnings depends on the substantial reason for its payment."

29. The FTT then turned to the reasons why the Loan was made. It concluded that the "only reason" that the Trustee provided the Loan was Mr Currell's work in the business, and the Loan "was a reward for those services" ([53]-[55]).

30. I should draw out two points made by the FTT in reaching that conclusion. First, after observing that the Loan was a real one with a genuine obligation to repay, it said at [44]:

> "… a real loan with a genuine obligation to repay does not, as a matter of law, mean that it simply cannot be earnings. The enquiry is still the same. What is the reason for payment of the Loan. If it was paid as a reward or benefit for [Mr Currell] for his exertions as an employee/director of the company, then it is earnings even though there was a genuine obligation to repay it. *Rangers* is authority for this proposition."

Mr Ghosh accepted that the FTT made an error in this paragraph.

31. Secondly, the FTT said this at [54(11)], after referring to the limited amounts that Mr Currell had received by way of salary and the lack of evidence that the £800,000 would otherwise have been paid as remuneration:

> "But it is precisely because [Mr Currell] has been 'under rewarded' that the Trustee considered that [he] should be granted a loan which the Trustee knew

> would be introduced into the company in a form which [Mr Currell] could access without payment of tax."

32. The FTT then concluded as follows:

> "56. We have found that it was inevitable, at the time at which the Payment was made by the company to the EBT, that it would be paid by the Trustee to [Mr Currell] by way of the Loan. We have also found that it was more likely than not that the Loan was paid to [Mr Currell] as a reward for the services which he had provided to the company. In our view there is no legal principle which prevents a genuine money loan on commercial terms with a real repayment obligation from being a reward or benefit.
>
> 57. In these circumstances [it] is our view that the Payment, therefore, was paid by the company as a reward for the services supplied by [Mr Currell] to the company. It therefore comprises earnings and [is] thus taxable as asserted by HMRC."

The UT's decision

33. The Company's ground of appeal to the UT ([2024] UKUT 404 (TCC), Richard Smith J and Judge Jeanette Zaman) was that the FTT erred in law in concluding that the Payment constituted earnings, and in particular in holding that the principal of the Loan constituted a reward or benefit within section 62(2)(b) of ITEPA. HMRC filed a Respondent's notice contending that the FTT based its decision on section 62(2) generally, not section 62(2)(b) specifically, but if that was wrong the decision should be upheld based on section 62(2) generally. The Respondent's notice also maintained that any error of law on the part of the FTT was not material. The UT treated the permission to appeal as extending to section 62(2) generally (UT decision at [34]).

34. The UT decided that the FTT had concluded that it was the Payment rather than the Loan that comprised earnings, and that the FTT had not materially distinguished between the sub-paragraphs of section 62(2) ([85]-[86]). However, the UT concluded that the FTT had made an error of law in relation to the Loan, as shown by the summary at [37] of the FTT's decision.

35. The UT considered the approach taken by the FTT to be contrary to the statutory code, and that *RFC 2012 plc (in liquidation) (formerly The Rangers Football Club plc) v Advocate General for Scotland* [2017] UKSC 45, [2017] 1 WLR 2767 ("*Rangers SC*") did not assist HMRC's argument to the contrary ([90]-[99]). Rather, Mr Currell had a genuine obligation to repay the Loan, and its payment to him was not a payment of earnings. The FTT erred in law in concluding as it had at [37] (UT decision at [100]-[102]).

36. Having determined that the FTT had made an error of law, the UT followed the guidance provided by Henderson LJ in *Degorce v Revenue and Customs Comrs* [2017] EWCA Civ 1427, [2018] 4 WLR 79 ("*Degorce*") at [95], to the effect that a decision should generally be set aside if there was a material error of law, namely an error that might (not necessarily would) have made a difference to the result. The UT considered that this test was satisfied and set the FTT's decision aside ([103]-[110]).

37. The UT then re-made the decision on the basis of the FTT's findings of fact, subject to one additional immaterial addition. The UT concluded that the Payment did not constitute earnings within section 62 ITEPA. It distinguished *Rangers SC*, essentially on the basis that it was common ground that the payments to the trust in that case comprised remuneration. In contrast, in this case the £800,000 paid to the EBT was not remuneration, and there was a genuine obligation to repay the Loan ([120]-[133]).

The grounds of appeal

38. There are four grounds of appeal:

    Ground 1: The UT erred in detecting a material error of law in the FTT's decision.

    Ground 2: The UT erred in concluding that, in order for a "redirected earnings" analysis to apply, it is necessary for there to be an entitlement of some kind to the earnings in question before they are redirected. The UT also made further related errors in re-making the FTT's decision.

    Ground 3: The UT erred in reaching its conclusion that the making of the Loan did not constitute a payment of earnings.

    Ground 4: The UT mischaracterised the factual and evaluative conclusions which the FTT reached.

39. HMRC's primary focus was on Ground 1, and alternatively Grounds 2 and 4. Ground 3 was very much a fallback.

Whether the FTT erred in law

40. I have no doubt that the UT was correct to detect a material error of law in the FTT's decision. Mr Ghosh's primary submission was that the passage at [33]-[37] was obiter, an "excursus" that was not a necessary part of the reasoning. He also suggested that it would have caused less difficulty if that section had been labelled something like "What does the Loan tell us about the nature of the Payment?" rather than "Was the Loan a reward or benefit?".

41. I do not agree that this passage was obiter or an unnecessary digression. It is apparent from the way in which the FTT's decision is structured, and made obvious by the way in which [33], [56] and [57] are expressed – including the use of the words "need" at [33] and "therefore" at [57] – that the FTT viewed the passage at [33]-[37] as an essential step in its reasoning. Further, and as discussed in more detail below under Ground 3, there is no doubt that the FTT made an error in concluding at [37] that the advance of what it had found to be a genuine loan with a real repayment obligation constituted earnings, subject only to a consideration of the reason for its payment. Although the FTT did not use its own shorthand for section 62 of "reward or benefit" at [37], the reference in that paragraph to section 62 and the later passage at [44] show that this was what it had in mind.

42. Mr Ghosh submitted that this cannot be correct because it would have involved the FTT concluding that there were income tax charges on both the Payment and the Loan, and there is no hint that the FTT considered that. I do not find that to be a persuasive point.

HMRC were not contending for double tax, so there was no reason for the FTT to focus on that possibility.

43. Having correctly concluded that there was a material error of law, the UT took what was obviously the right course in the circumstances, namely to set aside and re-make the FTT's decision, exercising its powers under section 12(2)(a) and (b)(ii) of the Tribunals, Courts and Enforcement Act 2007 ("TCEA"). Neither party had proposed a remittal.

The approach of this court

44. Having concluded that the UT did not err in setting aside and deciding to re-make the FTT's decision, the role of this court is to determine whether the UT made an error of law in the course of re-making the decision: see section 14(1) TCEA. If the UT has not erred in law then we have no power to set its decision aside. If the UT has made an error of law then we have a discretion to do so under section 14(2)(a). In the same way as Henderson LJ observed in *Degorce* at [95] in relation to the powers of the UT under section 12 TCEA, immaterial errors that could not have made a difference will not justify the exercise of the discretion, because there will have been no injustice. In contrast, a material error, in the sense of one that may have made a difference, will normally require that jurisdiction to be exercised.

45. However, even if there is a material error it will not always be necessary to set a decision aside. As Henderson LJ made clear in *Degorce*, the critical point is what justice requires. If a court or tribunal is satisfied that the correct result was reached, then the existence of infelicities in the reasoning will not require the court to go through the motions of setting aside and re-making the decision with the same result. Rather, the appellate court or tribunal may simply express the reasons for the conclusion in its own way.

46. This is such a case. Grounds 2 and 4 of the appeal both challenge various aspects of the UT's reasoning in re-making the decision. While I am doubtful that these challenges involve errors that could have made a difference to the UT's conclusion, I am entirely satisfied that that conclusion was the only one that could properly have been reached. In those circumstances, and because the argument before this court took a somewhat different course to that before the UT, it is preferable that I set out my own reasons why the UT reached the correct conclusion. In the course of doing that I will address HMRC's criticisms of aspects of the UT's reasoning so far as it is appropriate to do so.

47. Ground 3 is in a different category. It is an argument that HMRC put forward in the alternative to ground 1, and seeks to maintain that the Loan itself comprised a payment of earnings. I will deal with this separately, and to the limited extent required to confirm that the FTT did indeed err in law on that issue.

48. I must first, however, consider what the judgment of Lord Hodge in *Rangers SC*, with whom the other members of the court agreed, did and did not decide. Given the arguments raised in this case it is necessary to address this in some detail, and also refer to the decisions below, in particular the decision of Lord Doherty in the UT (*Murray Group Holdings v Revenue and Customs Comrs* [2014] UKUT 292 (TCC), [2015] STC 1 ("*Rangers UT*")), upholding a majority decision of the FTT (*Murray Group Holdings v Revenue and Customs Comrs* [2012] UKFTT 692 (TC), [2013] SFTD 149 (TC) ("*Rangers FTT*")).

The *Rangers* litigation

The facts

49. The *Rangers* litigation related to an employee benefit trust set up by a member of the Murray group of companies, entitled the Remuneration Trust. Where a group company wished to benefit an employee using the trust it would make a cash payment to the trust and recommend the trustee to resettle the sum on a sub-trust, also requesting that the income and capital of the sub-trust be applied in accordance with the employee's wishes. The trustee would invariably comply with the request. The employee would be appointed as the protector of the sub-trust and would provide a letter of wishes asking that income and capital be held and applied as he desired, and that on his death the funds should be held for a specified member or members of his family.

50. In virtually all cases a loan application was also made to the trustee by the relevant employee, and the trustee almost invariably exercised its discretion to grant a loan of the full amount in the sub-trust. No security was taken in respect of the loans, the first trustee having been replaced by a more "compliant" trustee after requesting security in respect of some loan applications. In contrast, the second trustee's approach was "lax". The expectation of the parties was that the loans would not be repaid at their 10-year terms but would remain outstanding for life, so reducing the value of the employee's estate for inheritance tax purposes.

51. Although the role of protector was expressed to be a fiduciary one, the employee had extensive power not only to appoint and remove trustees but also to alter the provisions of the sub-trust, change the beneficiaries and appoint a different protector. In *Rangers FTT* the majority had also found that players who moved abroad had been able to "unscramble" the arrangements and obtain an absolute right to the funds. In *Rangers SC* Lord Hodge observed at [27] that the power to replace the protector with, for example, the employee's wife, may have enabled the employee to be nominated as the beneficiary, extinguish the loan and bring the sub-trust to an end.

52. There were two relevant categories of employee, footballers and senior executives. For footballers the trust mechanism and the amounts involved were agreed at the time of engagement, via a side letter to the contract of employment which included a provision that the footballer would be appointed as protector of the sub-trust. Lord Hodge concluded at [23] that it was clear that the sums paid to the trust and on to the sub-trusts under the side-letter arrangements represented remuneration for employment, and noted that the majority of the FTT had concluded that the combined payroll and trust arrangements were presented as a "take it or leave it" deal to prospective employees.

53. Although the same trust mechanism was used, the position of senior executives was different in one respect. For them, the trust mechanism was used in relation to annual bonuses. The majority of the FTT had found that there was no contractual right to those bonuses before they were awarded. They were discretionary. Lord Hodge observed at [31] that the bonuses were nonetheless "paid as a reward for the work which the employees had carried out in their capacity as employees". I would add that in *Rangers FTT* the majority had found at [103] that there had been a prior practice of paying annual bonuses to executives based on work performance and profitability. In effect, the trust arrangement replaced that.

The decisions below

54. In the FTT HMRC sought to challenge the genuineness of the loans. The majority decided that the scheme was effective because the arrangements were not shams and the employees had received only loans. In upholding that decision in *Rangers UT*, Lord Doherty observed at [63] that the majority of the FTT had endeavoured to take a realistic view of the facts. The end result was that the employees received loans, not earnings.

55. HMRC adopted a different approach before the Inner House of the Court of Session, arguing that the payments to the trust involved a redirection of the employees' earnings and were taxable on that basis. That argument was accepted (*Advocate General for Scotland v Murray Group Holdings Ltd* [2015] CSIH 77, [2016] STC 468). One of the employers, RFC 2012 plc, appealed to the Supreme Court.

The Supreme Court's reasoning

56. Lord Hodge described the issue for decision as whether an amount that is remuneration (or a reward for services) is taxable as an emolument or earnings when it is paid to a third party in circumstances in which the employee has no prior entitlement to receive it ([1], [35] and [36]). This reflected the nature of the argument in the Supreme Court. As Lord Hodge recorded at [34], the argument put for the taxpayer was that it was "not sufficient that the payment of money arises from the performance of the duties of an employment", and that money paid to a third party "does not amount to the payment of earnings or emoluments unless the employee already has a legal right to receive the payment and it is paid at his direction".

57. Lord Hodge concluded that there is no general legislative requirement that the employee should either receive or be entitled to receive remuneration in order for that reward to be taxable. Rather (at [41]), the general rule is that "the charge to tax on employment income extends to money that the employee is entitled to have paid as his or her remuneration whether it is paid to the employee or a third party". This is subject to three exceptions, namely i) benefits within section 62(2)(b), where the statute prescribes receipt by the employee; ii) "where the employer uses the money to give a benefit in kind which is not earnings or emoluments", in relation to which special rules apply; and iii) cases where the employee acquires only a contingent interest.

58. Lord Hodge described the second exception as being:

> "… where the employer spends money to confer a benefit in kind which the recipient cannot convert into money. Such expenditure is not a perquisite or profit, gratuity or incidental benefit for the reasons discussed above and only falls within the income tax regime because of special statutory provision, such as, currently, the "benefits code" in Part 3, Chapters 2–11 of ITEPA, which cover among others the provision of living accommodation, cars or loans and the payment of expenses…" ([46])

59. The first and third exceptions are of less direct relevance, but it is worth noting that the cases considered in relation to them, *Tennant v Smith (Surveyor of Taxes)* [1892] AC 150 ("*Tennant v Smith*"), *Abbott v Philbin (Inspector of Taxes)* [1961] AC 352, *Heaton (Inspector of Taxes) v Bell* [1970] AC 728, *Edwards (Inspector of Taxes) v Roberts* (1935) 19 TC 618, *Smyth (Surveyor of Taxes) v Stretton* (1904) 5 TC 36 and *Forde and*

McHugh Ltd v Revenue and Customs Comrs [2014] UKSC 14, [2014] 1 WLR 810 were described by Lord Hodge at [49] as concerned with the "source or the nature of the right which the employee received" rather than the identity of the recipient. In contrast, as he explained at [50], *Hadlee v Comr of Inland Revenue* [1993] AC 524 (PC) "supports the view … that a charge to income tax on employment income can arise when an arrangement gives a third party part or all of the employee's remuneration".

60. Lord Hodge then considered cases addressing whether there had been a payment of earnings, in particular *Garforth (Inspector of Taxes) v Newsmith Stainless Ltd* [1979] 1 WLR 409 ("*Garforth*") and *Aberdeen Asset Management plc v Revenue and Customs Comrs* [2013] CSIH 84, [2014] STC 438 ("*Aberdeen*"), and concluded that two decisions of the Special Commissioners, *Sempra Metals Ltd v Revenue and Customs Comrs* [2008] STC (SCD) 1062 and *Dextra Accessories Ltd v MacDonald* [2002] STC (SCD) 413, were wrongly decided. He observed at [54] that Walton J's "gloss" on the meaning of payment in *Garforth* ("money placed unreservedly at the disposal …") had wrongly been treated as establishing a principle.

61. Lord Hodge summarised the position as follows:

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

62. Turning to the facts, Lord Hodge then explained at [61] to [66] why it was that payments into the trust were a component of the remuneration of the footballers and other employees. Footballers had two contracts, their contract of employment and the side letter relating to the trust. The focus of the negotiations that led to those arrangements was on the net remuneration available. Every time a footballer wanted to use the money

in his sub-trust he was given a loan, so he was able to access cash when he wanted it. The expectation was that he would not have to repay the loan during his lifetime and, on his death, the funds would go to his family. The footballer selected the beneficiaries of the sub-trust and as protector he could determine who the trustees were and also its beneficiaries. The trust administration was lax, as required for the scheme to operate as intended, allowing the entire fund to be lent to the employee without any security. The scheme was designed to give access to the money without delay should the footballer so wish. The charging provisions are drafted in deliberately wide terms "to bring within the tax charge money paid as a reward for an employee's work" ([64]). Further, the chance that the trustee might not agree to set up a sub-trust or might not give a loan did not alter the nature of the payments to the trust, since it was legitimate to look to the "composite effect of the scheme as it was intended to operate": *Inland Revenue Comrs v Scottish Provident Institution* [2004] UKHL 52, [2005] 1 WLR 3172. Footballers were prepared to take the risk, and the fact that the risk existed did not alter the nature of the payments to the trust.

63. The same reasoning applied to executive bonuses:

> "66. The bonuses which RFC and the other employing companies gave their executives were made available through the same trust mechanisms… The employees had no contractual entitlement to the bonuses before their employers decided to give them but that does not alter the analysis of the effect of the scheme. The fact that bonuses were voluntary on the part of the employer is irrelevant so long as the sum of money is given in respect of the employee's work as an employee: *Blakiston v Cooper* [1909] AC 104, 107, per Lord Loreburn LC, *Hartland v Diggines* [1926] AC 289, 291, per Viscount Cave LC. For the same reasons as those which cause the footballers' remuneration paid to the Principal Trust to be subject to taxation, the bonuses which were paid to the employees though the trust mechanism fall within the tax charge as emoluments or earnings when paid to the Principal Trust."

64. Finally, Lord Hodge explained at [68] to [72] that he was not persuaded by the assertion that other provisions in the legislation militated against his view. The provisions referred to included the special rules taxing beneficial loans in Chapter 7 of Part 3 of ITEPA, which Lord Hodge said could not apply if the sums paid into the trust were emoluments in the first place, because otherwise the taxpayer would be taxed twice ([69]). The legislative code for emoluments has primacy over the benefits code in relation to loans. In addition, the (subsequently introduced) disguised remuneration rules in Part 7A ITEPA could not affect the interpretation of the prior legislation.

What relevant principles can be drawn from Rangers SC

65. Although HMRC sought to present this case as being on all fours with *Rangers SC*, there is a fundamental distinction. The issue there was whether amounts were precluded from being taxed as earnings because they were paid to a third party. That is clear throughout the decision, but is obvious from the way that Lord Hodge described the issue and from his summary of the taxpayer's argument ([56] above).

66. At least by the time the dispute was before the Supreme Court, it was simply not in issue whether the payments to what was (after all) called the Remuneration Trust were

themselves earnings. Rather, as the UT observed in this case at [126], in *Rangers SC* it was accepted by the taxpayer that the payments to the trust were remuneration. In sharp contrast, that is the very issue in this case. The issue in *Rangers SC* was instead whether the additional requirement of payment (see [20] above) could be met where the recipient was a third party. It was held that it could, and that this was not precluded by cases such as *Garforth*.

67. It follows that *Rangers SC* is of relatively limited assistance. It is common ground between the parties in this case that payments may be earnings even if made to a third party.

68. It is also common ground that, as shown by the position of the executives in the *Rangers* litigation, it is not necessary for the employee to have had a prior legal right to the amount in question. Discretionary bonuses paid to a third party with the "agreement or acquiescence of the employee or as arranged by the employee" (*Rangers SC* at [58], see [61] above) may be taxed as earnings. In response to one of HMRC's criticisms of the UT's decision, I observe that, read as a whole, it is apparent that the UT understood that point, and what it said at [127] of its decision should not be interpreted otherwise.

69. Nonetheless, some relevant guidance can be derived from *Rangers SC*.

70. First, Lord Hodge's second exception from the general rule that payments to third parties may be remuneration relates to benefits that are not convertible into money. The examples given by Lord Hodge include loans (see [58] above). I return to this at [96] below.

71. Secondly, in considering the first and third exceptions Lord Hodge described the authorities to which he referred as concerned with the "source or nature" of what was received. That indicates the key issue in this case. The question is whether the Payment was in the nature of an emolument derived from Mr Currell's employment.

72. Thirdly and most significantly, despite the point being uncontroversial in that case Lord Hodge carefully explained at [61] to [66] why it was that the amounts paid to the Remuneration Trust were in fact remuneration. In doing so he focused on the nature of the amounts in question (paid either pursuant to a contractual entitlement agreed upon engagement, or otherwise given in respect of the employee's work), the fact that the sums were available to be accessed whenever the employee wanted with no need to repay the loans during the employee's life, and the effective control of the sub-trust by the employee, such that he could determine which family members would benefit from the funds when the loans were ultimately repaid.

Whether the Payment was earnings

73. Mr Ghosh put the argument that the Payment comprised earnings in two principal ways. The first, to which he returned on a number of occasions in opening, was to the effect that the Loan was for work done, the payment to the EBT was made to fund the Loan and therefore the Payment was also for work done. This argument is essentially the one accepted by the FTT at [57].

74. The second, which Mr Ghosh focused on more in reply, was that the Payment was earnings because the overall arrangement provided Mr Currell with tax-free access to

£800,000 in cash, in a world in which he had previously been under-rewarded for his work.

75. I cannot accept either argument. The first involves a non sequitur. The fact that the Loan was made "because of the work which [Mr Currell] had done" (see [14h)] above) does not turn a payment made to fund it into an emolument. Yes, the FTT (in effect) found that the Loan was a benefit arising from Mr Currell's employment. But the Payment was not an emolument simply because it funded that benefit.

76. It is necessary to return to basic principles. Section 62(2) ITEPA codifies earlier legislation and case law. What is taxable is remuneration or a reward for services as an employee: *Rangers SC* at [35]. The test was previously expressed, in what was then Schedule E, as being whether there was an emolument (defined to include salaries, perquisites and profits) that arose from employment. Under Schedule E tax was charged on the "full amount … received in the year", although as is the case now the timing of receipt was prescribed, and included the point when a payment was made (*Rangers SC* at [5]). Nevertheless, the charge focuses on what the employee gets: it is, after all, a tax charge on his or her income.

77. As already discussed, the issue in *Rangers SC* was whether it was necessary for the employee himself or herself to have received, or at least be entitled to receive, the remuneration. It was held that receipt by the employee was not required, provided the amount was paid elsewhere with the employee's agreement or acquiescence. But that does not avoid the need to determine whether the amount in question in fact falls within section 62(2). In *Rangers SC* it was common ground that the payments to the Remuneration Trust were indeed remuneration, Lord Hodge nonetheless explained in some detail at [61] to [66] why that was so on the particular facts. The analysis would have been a lot simpler if it had been the case that the loans to the footballers and executives that were almost invariably made from the funds received themselves determined that the payments were earnings. But that is the argument that is being put here.

78. I have no difficulty with the FTT's conclusion that the Loan was provided because of Mr Currell's work, and in that sense the provision of the Loan could be seen as a reward for services. But the Payment was not in the nature of a reward for services just because its function was to fund the Loan and the Loan was made because of Mr Currell's work. Whether the Payment itself had the character of remuneration is a separate question. Put another way, the need to fund the Loan explains <u>why</u> the Payment was made but not <u>what</u> it was. It does not determine its nature.

79. An illustration of this is provided by the facts of *Wilkins (Inspector of Taxes) v Rogerson* [1961] Ch 133. An employer had decided to offer employees a gift of an item of clothing as a Christmas present, made to the employer's order by a named tailor. Mr Rogerson took up the offer and had a suit made at the cost of £14 15s. The employer contracted with and paid the tailor.

80. Mr Rogerson was assessed to tax on £14 15s as income under Schedule E, but the Special Commissioners reduced this to tax on £5, being the second-hand value of the suit. This court agreed. As Lord Evershed MR explained at p.144, what Mr Rogerson got was a present of a suit. This was not a case of an employee's debt being discharged by the

employer. The receipt of the suit was taxable because it could be turned into money by selling it (see *Tennant v Smith*).

81. The logical consequence of Mr Ghosh's argument is that Mr Rogerson was correctly assessed to tax on £14 15s. That was the amount that his employer paid to a third party (the tailor) to fund the provision of the benefit to him. But it has never been suggested that *Wilkins v Rogerson* was wrongly decided, and it was not.

82. Other examples may readily be identified. As discussed further below, the provision of a loan to an employee does not generally give rise to an emolument, most obviously because of the existence of the repayment obligation. Instead, as noted at [21] above, a loan at a rate of interest below the official rate will generally give rise to a charge under Chapter 7 of Part 3 of ITEPA by reference to the difference between the official rate and the rate actually charged.

83. Loans to employees may be made for a variety of reasons. One mundane example discussed at the hearing is a season-ticket loan. Suppose that, instead of making such a loan directly to an employee, an employer puts a third party – whether an employee benefit trust or, say, another group company – in funds to make it. If Mr Ghosh's argument were correct, then I can see no reason why the payment to the third party, at least if made outright rather than by way of a loan, should escape tax as an emolument of the employee. The loan to the employee is, it can be assumed, provided because of the employee's work (indeed, to allow him or her to get to work), and the purpose of the payment is to fund the loan. Such an arrangement – the employer making a payment to a third party with the intention that the third party would make a repayable season ticket loan to an employee – would on this analysis have a materially different tax result to the provision of a loan directly by the employer to the employee. And that would be so even where, as in this case, the payment and the loan are entirely "prewired".

84. It is necessary to approach the matter with a degree of common sense. In *Revenue and Customs Comrs v Apollo Fuels Ltd* [2016] EWCA Civ 157, [2016] 4 WLR 96, [2016] STC 1594 ("*Apollo Fuels*") this court rejected an attempt to tax employee car-leasing arrangements where the employees paid the full market rate for the use of the vehicles, observing at [3] that income tax is a tax on income, and that such a counter-intuitive result would require Parliament to express itself in clear terms. In the same way here, unless compelled by clear legislation or binding authority I would not hold that a payment made to fund an employee benefit (or indeed something that is not in fact taxable, as in *Apollo Fuels*) is itself a taxable emolument. In particular, *Rangers SC* is not authority for that proposition.

85. The second argument Mr Ghosh relied on was that the Payment was earnings because the overall arrangement provided Mr Currell with tax-free access to £800,000 in cash, in circumstances where he had previously been under-rewarded for his work.

86. I cannot see how this can assist HMRC. Mr Ghosh stressed the access that he said Mr Currell would have to the cash lent back by Mrs Currell to the Company, referring to [36(13)] in the FTT's decision (as to which see [16] above). But Mr Currell would presumably have had much readier access to the cash if Mrs Currell had retained it rather than lending it back to the Company, which evidently needed it for working capital purposes.

87. This exposes the key point. The provision of a loan, at whatever rate of interest, provides access to the cash lent, but that cannot be considered in isolation from the repayment obligation. The existence of that obligation is critical. What is obtained is the benefit of the funds provided, but subject to an obligation to repay. The fact that the money went back to the Company cannot assist HMRC in demonstrating that the Payment was taxable, any more than the retention of the proceeds of the Loan by Mrs Currell, or indeed by Mr Currell, would have done. If anything, and given that the entire arrangement was "prewired", the fact that the Loan proceeds were returned to the Company might suggest that nothing had really happened.

88. Adding the label "tax-free" does not take matters further. A statement of what may or may not be the tax result cannot determine the correct characterisation of the transactions.

89. The FTT's observation that Mr Currell was "under rewarded" (see [31] above) also does not assist. The FTT had earlier found that the Payment did not replace remuneration and that there was no evidence that, if the £800,000 had not been paid by way of a loan, it would have been paid as remuneration ([14g)] above). Consistently with this, while the FTT had found at [15(9)] that there was "a culture of paying sizeable bonuses" to the contract managers, it made no such finding in relation to Mr Currell.

90. I understand how Mr Currell could be described as "under rewarded", but that does not demonstrate that the Payment was remuneration. It could explain the Loan – as the FTT found that it did – but it does not permit the further inference that the Payment was remuneration. I would add that it is commonplace for entrepreneurs in Mr Currell's position to take modest salaries, leaving wealth to build up in a family owned company. Funds extracted from the company are not necessarily remuneration just because salaries have been paid at below the market rate.

91. The facts considered by Lord Hodge in *Rangers SC* were very different to the facts of this case. Here, the Loan was found to be one that was not only genuine and secured, but one which Mr Currell understood that he had an obligation to repay and had the funds to do so, rather than it being understood that it would remain outstanding for his life. The Loan was not repaid because by the maturity date HMRC had already opened an enquiry into the arrangements and had issued the determinations, leading to concerns that further tax would be due on the £800,000 if it was used to fund bonuses. On repayment of the Loan, the funds would be held by a trust for the benefit of employees and their relatives generally, not by a sub-trust for family members which was effectively controlled by the borrower through a protector mechanism and which had a "lax" trustee. Further, and unlike the payments to the footballers (which were contractually agreed) and the executives (where there was a practice of paying annual bonuses), the £800,000 would not otherwise have been paid as remuneration. The culture of paying bonuses applied only to the contract managers.

92. In truth, what Mr Currell got was the Loan. This was not a case of diverting remuneration to the EBT.

Whether the Loan was earnings (Ground 3)

93. As already mentioned, Ground 3 seeks to maintain that the Loan itself comprised a payment of earnings. HMRC do not seek to support the FTT's conclusion that the "vast majority" of employee loans were taxable in this way. Rather, their main objective with

this ground seems to be to obtain clarification from this court that, in some circumstances, a loan could comprise the payment of earnings, and to suggest that the UT erred in suggesting otherwise (a suggestion which I am satisfied that it did not make). The argument that this particular loan comprised earnings was advanced very much as a fallback.

94. I need not say much about this. As a general proposition, the advancement of a loan will not amount to a payment of earnings, at least in the amount of the principal of the loan. There are two reasons for this.

95. The first and most obvious reason is the existence of a repayment obligation. What is provided is access to funds, subject to that obligation. The benefit is limited to the use of the funds, and it is uncontroversial that that benefit is generally taxed under Chapter 7 of Part 3 of ITEPA, by reference to any shortfall below the official rate of interest: see the discussion by the Special Commissioner in *O'Leary v McKinlay (Inspector of Taxes)* [1991] STC 42 ("*O'Leary*") at p.46. Vinelott J effectively approved the Special Commissioner's reasoning at p.51, albeit in the context of on-demand loans.

96. The second reason, which is also referred to in *O'Leary*, is this. As is now reflected in section 62 of ITEPA but was first established by *Tennant v Smith*, benefits in kind may be taxable as earnings only where they can be turned to account. Where a loan is made it is not the loan itself that can be turned to account. Rather, what the employee can turn to account is the funds raised. The benefit lies in the use that he or she can make of the proceeds of the loan. This point is also consistent with Lord Hodge's second exception in *Rangers SC*, where he referred to benefits, including loans, that cannot be converted to money: see [58] above.

97. I do not exclude the possibility that, in some limited circumstances, the provision of a loan may amount to a payment of earnings in the amount of the principal of the loan. That would most obviously be in a case of sham or where it was otherwise never intended that the "loan" should be repaid, such that the true agreement is not one of loan (compare, for example, *Antoniades v Villiers* [1990] 1 AC 417). HMRC relied on the decision of the FTT in *OCO Ltd v Revenue and Customs Comrs* [2017] UKFTT 589 (TC) as going further than that, but that case needs to be approached with some caution. It was decided before *Rangers SC* was handed down and is not obviously consistent with the decisions in *Rangers FTT* and *Rangers UT*. The FTT also found that the scheme in that case only made sense if repayment did not occur, such that there was no realistic possibility of repayment being demanded ([342] to [346]). Further, the point was not necessary to the FTT's decision.

98. In contrast, the Loan in this case was a genuine one. There was no finding that it was advanced on the understanding that it would not be required to be repaid. Mr Waldegrave's submission that Mr Currell had practical control of whether repayment was required is not made out on the facts, and would in any event be insufficient as a matter of law. On the facts, the loan was made by the Trustee, an independent entity. Even if the Trustee had been entirely reactive to the Company (a finding that the FTT made only in relation to the award of employee bonuses: see its decision at [15(34)] and [16(9)]), Mr Currell did not have sole control of the Company. Further, there is in any event no authority for the proposition that the fact that the borrower controls the lender is sufficient to alter the legal character of a loan. It is not. I would add that, were it

otherwise, the legal status of the entirely commonplace transaction of a loan to a parent company could be called into question.

99. HMRC sought to support their case by reference to *Garforth* and *Aberdeen*. However, these cases address the question of payment, not whether the amount in question is earnings (*Garforth* at p.410; *Aberdeen* at [4]). This was the context in which those cases were considered by Lord Hodge in *Rangers SC*.

Concluding remarks

100. In conclusion, I would dismiss the appeal.

101. In the particular circumstances of this case, it is appropriate to add some further observations about the issues raised by the appeal.

102. HMRC are obviously of the view that Mr Currell should not have been able to "access tax-free cash" from the Company in the way that he did. Parliament evidently agreed. If the transactions had been implemented only a short time after they were, the charge that HMRC seek to impose in this case would have arisen on the Loan under the provisions of Part 7A of ITEPA (often referred to as the "disguised remuneration" rules), which were inserted by Finance Act 2011. Further, changes were made by Finance Act 2013 to the "loans to participators" rules in Part 10 of the Corporation Tax Act 2010 ("CTA 2010") which prevented companies from using avoidance arrangements to sidestep the tax charge those rules impose when a loan is made to a shareholder of a closely controlled company (see now section 464A CTA 2010).

103. It is of course right that HMRC should consider whether arrangements implemented before these changes fail under the pre-existing law. But, however proper HMRC's motives are, caution is required to avoid a risk of over-reach, with consequential risks to legal certainty. A close inspection of the trees can risk a failure to distinguish the overall wood.

104. I appreciate that, before the facts were found by the FTT, the distinctions from *Rangers SC* may not have been fully apparent. Once they were, however, the position changed because it was clear that tax on the Payment could not be sustained except by reference to the Loan.

105. That in turn has led HMRC to argue, in effect, that the full £800,000 is taxable as earnings simply because it was paid via a third party, even where it would not have been so taxable if it had been lent directly to Mr Currell, and indeed in circumstances where the more obvious analysis might be that, viewed realistically, the "prewired" Loan should be treated as made directly by the Company. It has also led HMRC to argue that a loan can be earnings merely because the borrower has practical control of its repayment. As Mr Elliott fairly pointed out, those propositions are both novel and unsupported by authority. If either gained traction it would cause considerable uncertainty.

106. The potential consequences of HMRC's arguments are not difficult to see. For example, owner-managed companies (which, it should be borne in mind, must self-assess their tax liabilities) would have to consider whether the longstanding practice of allowing directors to draw on loan accounts in fact gives rise to immediate PAYE and NIC obligations. Groups that fund service companies that employ staff would have to consider

whether those funding payments also result in an immediate earnings charge when they are used to confer benefits such as season-ticket loans.

107. These are not unrealistic points. As Mr Elliott's submissions skilfully demonstrated, they flow directly from HMRC's arguments in this case, and Mr Ghosh did not provide a persuasive answer to them. As I have explained however, those arguments are wrong.

Lord Justice Foxton:

108. I agree.

Lord Justice Singh:

109. I also agree.