AD Bly Groundworks and Civil Engineering Ltd v HMRC: pots, presumptions and practical guidance

Introduction

AD Bly Groundworks and Civil Engineering Ltd v Revenue and Customs Commissioners (*AD Bly CA*)[1] is not an ostensibly interesting case. It involves neither complex statutory interpretation, nor a tricky or pernicious scheme, nor any groundbreaking analysis. Rather, it confirms what tax professionals should already know about the rules applicable to sections 54 and 1290 of the Corporation Tax Act 2009 (CTA 2009) from decisions of both the Supreme Court and the Court of Appeal. However, what it lacks in being an exercise in groundworks, it makes up for as an exercise of minute improvement and curation, providing useful clarification of the "wholly and exclusively" test in light of recent case law, and a steer on how section 1290 CTA 2009 is to be applied. Save for one flaw, it is a strong and useful decision; that alone should make it worthy of study.

Facts and tribunal decisions

AD Bly CA involved a tax scheme (the scheme), marketed by Charterhouse (Accountants) Ltd (Charterhouse) and disclosed to HMRC pursuant to the disclosure of tax avoidance schemes (DOTAS) legislation in the Finance Act 2004 (FA 2004).[2] HMRC had challenged the use of the scheme by several taxpayers; *AD Bly CA* concerned two test appellants, AD Bly and CHR Travel Ltd (CHR Travel) (collectively the appellants),[3] which acted as lead cases for the remainder.

[1] *AD Bly Groundworks and Civil Engineering Ltd v Revenue and Customs Commissioners* (*AD Bly CA*) [2025] EWCA Civ 1443; [2025] S.T.C. 1916.
[2] *AD Bly CA* [2025] EWCA Civ 1443 at [3]; Finance Act 2004 (FA 2004) s.7.
[3] *AD Bly CA at* [10]–[12].

The scheme was simple but aggressive.[4] A company would engage Charterhouse as advisers.[5] Charterhouse would then recommend a remuneration and pensions package as "an incentive to retain high-level staff".[6] This would be in the form of an Unfunded Unapproved Retirements Benefit Scheme (UURBS). In particular, the company signed a deed whereby it undertook to apply between 80–100% of the company's earnings in a particular year towards purchasing an annuity when the subject of the deed reached a retirement age of 77.[7] Charterhouse would then recommend the appointment of a "remuneration consultant", who, upon purporting to examine the best means of retaining staff, would recommend how much of the company's earnings in a single year to apply towards the UURBS.[8] This would then be implemented.

Pausing here, it is worth examining the purported benefits of the scheme. From a pension's perspective, a UURBS was purportedly an "incentive to retain high level staff, without having a negative effect on the commerciality of the business"[9] as there was no requirement to make a capital contribution into a pension pot. The issue is that this UURBS is a horrible way to create a pension. From the perspective of the business, they would have to commit to spending several years' annual profits in a single lump sum on an annuity product that did not exist at the time.[10] From the perspective of the employee, they would have to gamble on the prospect that the company would not only still exist, but would still have liquidity to purchase this annuity when they hit 77. The scheme *also* promised tax effects. It was accepted by an agreed accounting expert that Financial Reporting Standard 17 required the UURBS liabilities to be set against the corporate profits for the tax year.[11] However, as the benefits should not constitute an employee benefit contribution, they would not fall within section 1290 CTA 2009, and, as they provided no "relevant benefits", there would be no income charge under the employer-financed retirement benefit schemes legislation.[12] In essence, much of the taxable profit in a year could be wiped out. Attracted by these benefits, AD Bly implemented this scheme for the accounting years 2011–12 and 2012–13, while CHR Travel implemented it in 2012–13 and 2013–14.[13]

HMRC challenged the scheme on two bases. First, they argued that the expenditure on the UURBS could not be deducted as it was not "wholly and exclusively for the purposes" of the company's trade and, therefore, section 54(1)(a) CTA 2009 would prevent it from being deducted (the section 54 issue). Secondly, HMRC also raised an alternative argument; that section 1290 CTA 2009 did prevent the deduction in any event (the section 1290 issue).

The section 54 issue is a fact-sensitive inquiry, so it is worth examining the First-tier Tribunal (FTT) findings. The appellants claimed that the utilisation of the scheme was a legitimate attempt to remunerate and incentivise staff in a crowded market.[14] In evidence, both appellants' directors

[4] A point adverted to by Charterhouse in their engagement letters; *AD Bly CA* [2025] EWCA Civ 1443 at [13].
[5] *AD Bly CA* [2025] EWCA Civ 1443 at [3]; *AD Bly Groundworks and Civil Engineering Ltd v Revenue and Customs Commissioners* (*AD Bly FTT*) [2021] UKFTT 445 (TC); [2022] S.T.I. 40 at [57].
[6] *AD Bly FTT* [2021] UKFTT 445 (TC) at [16]–[17].
[7] *AD Bly FTT* [2021] UKFTT 445 (TC) at [77].
[8] *AD Bly FTT* at [2021] UKFTT 445 (TC) at [14], [68] and [74].
[9] *AD Bly FTT* [2021] UKFTT 445 (TC) at [16]–[17]; note that the turn of phrase is mentioned in two witness statements.
[10] *AD Bly FTT* [2021] UKFTT 445 (TC) at [98].
[11] *AD Bly CA* [2025] EWCA Civ 1443 at [10].
[12] See Income Act (Earnings and Pensions Act) 2003 Pt 6 ch.2; accepted at *AD Bly CA* [2025] EWCA Civ 443 at [60].
[13] *AD Bly FTT* [2021] UKFTT 445 (TC) at [4].
[14] *AD Bly FTT* [2021] UKFTT 445 (TC) at [16]–[17].

stated that they had held board meetings,[15] and considered that a more attractive remuneration package was required, before approaching Charterhouse, who then instructed remuneration consultants to determine the appropriate level of remuneration.[16] While the appellants accepted they did have tax discussions in mind, the scheme "was first and foremost a pensions" one.[17] In support of this, the appellants noted that they did actually implement the scheme and some payments were made pursuant to it; in short, that it was not a sham.[18]

The FTT did not agree with this assessment. The FTT noted that both sets of directors had near identical witness statements,[19] which CHR Travel's director admitted had mostly been drafted by Charterhouse and provided to him.[20] This diminished the utility of their evidence somewhat. The FTT also found that there had been no board meetings, as contended by the appellants,[21] but rather that they had been approached by Charterhouse with the scheme in hand. The FTT also noted the lack of commerciality of the UURBS and the fact that neither Charterhouse, nor their remuneration consultants, purported to have any pensions experience.[22]

As a consequence, the FTT made the factual finding that "the Appellants' primary purpose in entering into the [UURBS] was to reduce their liability to pay tax without incurring any actual expenditure"; in consequence, the payments were not "wholly and exclusively" for the benefit of the appellants' trade and section 54(1)(a) CTA 2009 prevented the deduction.[23] In coming to this conclusion, it relied on the summary of the relevant principles set out by the Upper Tribunal (UT) in *Scotts Atlantic Management Ltd (In Liquidation) v Revenue and Customs Commissioners* (*Scotts Atlantic*).[24]

The FTT went on to reject HMRC's alternative section 1290 issue, however. It noted that the decision of the Court of Appeal in *Revenue and Customs Commissioners v NCL Investments Ltd* (*NCL CA*)[25] was that section 1290 CTA 2009 should only apply where "a payment or transfer" leads to the benefits; in that case (which involved grants of options to purchase) there was no such transfer—and there was no way to distinguish the UURBS under this scheme from those options, as it was not a "payment or transfer".[26]

[15] *AD Bly FTT* [2021] UKFTT 445 (TC) at [26] and [55].
[16] *AD Bly FTT* [2021] UKFTT 445 (TC) at [91].
[17] *AD Bly FTT* [2021] UKFTT 445 (TC) at [92].
[18] *AD Bly CA* [2025] EWCA Civ 1443 at [32]–[33].
[19] *AD Bly FTT* [2021] UKFTT 445 (TC) at [13]–[20] and [24].
[20] *AD Bly FTT* [2021] UKFTT 445 (TC) at [20]; as advice for any tax litigators reading this note—this is a *horrible* idea. *Do not do this*.
[21] *AD Bly FTT* [2021] UKFTT 445 (TC) at [90].
[22] *AD Bly FTT* [2021] at [98] and [91]; at [96] and [97], the FTT also noted that, in any event, the appellants did not follow the advice of the consultants.
[23] *AD Bly FTT* [2021] UKFTT (TC) at [99].
[24] *Scotts Atlantic Management Ltd (In Liquidation) v Revenue and Customs Commissioners* (*Scotts Atlantic*) [2015] UKUT 66 (TCC); [2015] S.T.C. 1321 at [50]–[55]; for present purposes, the decision in *Scotts Atlantic* was an exceptionally aggressive film-cum-employee benefit trust scheme whereby the "all-pervading object" of the arrangements was tax avoidance (at [63]).
[25] *Revenue and Customs Commissioners v NCL Investments Ltd* (*NCL CA*) [2020] EWCA Civ 663; [2020] S.T.C. 1201 at [77]–[78].
[26] *AD Bly FTT* [2021] UKFTT (TC) at [111].

The appellants appealed the decision of the FTT to the UT, which was dismissed in *AD Bly Groundworks and Civil Engineering Ltd v Revenue and Customs Commissioners* (*AD Bly UT*).[27] The appellants argued that the FTT's reliance on *Scotts Atlantic* was misplaced; in any event, that the decision was inconsistent with a later Court of Appeal decision in *Hoey v Revenue and Customs Commissioners* (*Hoey*)[28] and, as a matter of policy, it would be unsustainable to apply section 54 CTA 2009 to situations where there is a parallel tax motive, especially in the pensions sphere, where there are tax savings encouraged by Parliament.[29] These arguments were rejected;[30] as was the Revenue cross-appeal that the FTT's decision was inconsistent with the decision of the Supreme Court in *Revenue and Customs Commissioners v NCL Investments* (*NCL SC*).[31] Both sides appealed to the Court of Appeal, composed of Falk, Newey and Cobb LLJ.[32]

Decision of Falk LJ

The section 54 issue

The section 54 issue comprised two Grounds of Appeal—first, that *Scotts Atlantic* was improperly applied, as the decision did not mandate that the choice of a tax efficient arrangement would necessarily result in an impermissible duality of purpose; and secondly, that *Scotts Atlantic* was wrongly decided in light of *Hoey*.[33]

Both grounds failed. Dealing first with *Scotts Atlantic*, Falk LJ recited the relevant paragraphs from the decision in full,[34] which set out four principles for the application of the "wholly and exclusively" test: 1) that the "object" of a payment required a determination of the subjective mental state of the taxpayer;[35] 2) that "the object of an expenditure must be distinguished" from any tax-advantageous effect;[36] 3) that "some effects are so intrinsically and inextricably involved in [an expenditure] that they cannot but be said to be" one of its objects;[37] and 4) that traders are entitled to order their affairs in such a manner to reduce their liability, in so far as they do not have an impermissible purpose.[38]

Falk LJ noted that those principles aligned perfectly with not only the recent Court of Appeal decision in *Marlborough DP Ltd v Revenue and Customs Commissioners* (*Marlborough DP*),

[27] *AD Bly Groundworks and Civil Engineering Ltd v Revenue and Customs Commissioners* (*AD Bly UT*) [2024] UKUT 104 (TCC); [2024] S.T.C. 949.
[28] *Hoey v Revenue and Customs Commissioners* [2022] EWCA Civ 656; [2022] S.T.C. 902.
[29] *AD Bly UT* [2024] UKUT 104 (TCC) at [27] and [37].
[30] *AD Bly UT* [2024] UKUT 104 (TCC) at [27], [48] and [52].
[31] *Revenue and Customs Commissioners v NCL Investments Ltd* [2022] UKSC 9; [2022] S.T.C. 599; *AD Bly UT* [2024] UKUT 104 (TCC) at [64] and [71].
[32] As adverted to already, Falk LJ gave the only judgment.
[33] *AD Bly CA* [2025] EWCA Civ 1443 at [21]; note that the judgment blurs together the two grounds of appeal. The writer will attempt to follow the structure of Falk LJ's judgment, rather than that of the grounds.
[34] *AD Bly CA* [2025] EWCA Civ 1443 at [28].
[35] *Scotts Atlantic* [2015] UKUT 66 (TCC) at [50]; citing *Malallieu v Drummond (Inspector of Taxes)* [1983] 2 A.C. 861; [1983] S.T.C. 665.
[36] *Scotts Atlantic* [2015] UKUT 66 (TCC) at [51]; citing *Vodafone Cellular Ltd v Shaw (Inspector of Taxes)* (*Vodafone*) [1997] S.T.C. 734; 69 T.C. 376.
[37] *Scotts Atlantic* [2015] UKUT 66 (TCC) at [52]; citing *Mackinlay (Inspector of Taxes) v Arthur Young McClelland Moores & Co* [1990] 2 A.C. 239; [1990] S.T.C. 898.
[38] *Scotts Atlantic* [2015] UKUT 66 (TCC) at [55]; citing *Vodafone* [1997] S.T.C. 734.

but also her own authoritative statement of the law of purpose in *BlackRock Holdco 5 LLC v Revenue and Customs Commissioners* (*BlackRock*).[39] The summary was, therefore, unimpeachable. While the appellants argued that *Scotts Atlantic*, which involved an extremely artificial scheme where the tax purpose was "all-pervading" was no authority in respect of a less artificial scheme like the one marketed by Charterhouse, this was swiftly rejected.[40]

Falk LJ noted that that the "critical point" in the case was how *Scotts Atlantic* was applied to the facts found by the FTT.[41] Those facts were "fatal to the Appellants' case"; they showed that there was no consideration of the pensions aspect before an approach by Charterhouse, and no real concern about the level of remuneration or pensions provision.[42] The fact that the scheme was not artificial and some of the pensions were in payment was irrelevant, and the FTT did not err in law by not considering whether the pensions were "reasonable" or "needed".[43] One of the "principal purpose[s]" of the scheme was tax avoidance and, in light of this, the FTT was "entitled, if not bound, to conclude the provisions made by [the appellants] were not deductible".[44]

The appellants raised the argument that

> "in the context of remuneration and/or pensions provision, a tax avoidance purpose … could not prevent a deduction for any sum not shown to be excessive, at least unless it is found that the company's object was an all-pervading one."[45]

They relied on two arguments: the decision in *Hoey* and the parliamentary policy to incentivise pension contributions. The second argument was rejected out of hand; ultimately, there was no evidence to suggest that section 54 would be disapplied when pensions were involved.[46]

The first argument was based on two quotes from the decision of Henderson LJ in Hoey. It is worth quoting these in fuller detail. First, Henderson LJ noted that

> "where remuneration paid to an employee is reasonable in amount … it is usually difficult to envisage circumstances in which deduction of the expenditure will not be allowable."[47]

Secondly, Henderson LJ said that

> "once the existence of a trade is recognised, the mere fact that a transaction is entered into with a fiscal motive does not … denature it or meant that it is infected by a duality of purpose."[48]

[39] *Marlborough DP Ltd v Revenue and Customs Commissioners* (*Marlborough DP*) [2025] EWCA Civ 796; [2025] S.T.C. 1235; *BlackRock Holdco 5 LLC v Revenue and Customs Commissioners* (*BlackRock*) [2024] EWCA Civ 330; [2024] S.T.C. 740 at [110]–[124]; *AD Bly CA* [2025] EWCA Civ 1443 at [29]; she also cited the other unallowable purpose cases from 2024—*Kwik-Fit Group Ltd v Revenue and Customs Commissioners* [2024] EWCA Civ 434; [2024] S.T.C. 897 and *JTI Acquisition Co (2011) Ltd v Revenue and Customs Commissioners* [2024] EWCA Civ 652; [2024] S.T.C. 1179.
[40] *AD Bly CA* [2025] EWCA Civ 1443 at [31] and [33].
[41] *AD Bly CA* [2025] EWCA Civ 1443 at [32].
[42] *AD Bly CA* [2025] EWCA Civ 1443 at [32].
[43] *AD Bly CA* [2025] EWCA Civ 1443 at [32]–[33]; note that Falk LJ does not necessarily consider the reasonableness point wholly irrelevant but, rather, a factor that was neither pleaded before the FTT nor essential to the test for purpose.
[44] *AD Bly CA* [2025] EWCA Civ 1443 at [44].
[45] *AD Bly CA* [2025] EWCA Civ 1443 at [34].
[46] *AD Bly CA* [2025] EWCA Civ 1443 at [45].
[47] *Hoey* [2022] EWCA Civ 656 at [172].
[48] *Hoey* [2022] EWCA Civ 656 at [194].

Henderson LJ went on to note that, as a consequence, there was a "strong prima facie inference" that the remuneration payments on the facts of Hoey would be deductible.[49]

Falk LJ suggested that the comments of Henderson LJ would usually be correct, but they did not have the meaning that the appellants suggested. There was no rule that applied solely to remuneration and pensions save that, where expenses were incurred to remunerate employees, their object is usually remuneration not avoidance and, if it were otherwise, they might fall foul of section 54 CTA 2009 and not be deductible. In the present case, the tax avoidance purpose meant that the prima facie inference was rebutted, and section 54 applied.[50] The appellants' appeal was dismissed.

The section 1290 issue

Falk LJ then turned to the section 1290 issue. Falk LJ took the view that section 1290 CTA 2009 could not apply for three reasons. First, she took the view that the choses in action under the UURBS could not constitute an employee benefit contribution. Falk LJ noted that section 1291, while not defining what a "contribution" is, does define that it is "made" when there is an increase in value, or a contribution to some property which benefits can be provided "out of"—in essence, there must be some "pot" from which the benefit comes.[51] The scheme did not create such a pot unless one defined that pot as "any of the company's own assets, present or future" which could be applied to satisfy the liability—and that was not a definition the statutory wording could bear.[52]

Secondly, Falk LJ noted that the property that comprised a benefit contribution must be held "under" the scheme—and it was difficult to say that choses in action could be held under such a scheme, as they more properly comprise rights *against* the scheme.[53] This replicates the approach in *NCL CA*.[54]

Thirdly, Falk LJ considered that the scheme could not constitute an employee benefit scheme. She noted the decision in *NCL SC*; in that case, Lady Rose and Lord Hamblen commented that, as section 1291 CTA 2009 defined "employee benefit scheme" as "trust, scheme or other arrangement",[55] "the term 'other arrangement' must be something akin to a trust or a scheme".[56] Falk LJ noted that, under the scheme, "there was no broader trust or scheme … [save for the] contractual undertakings".[57] Falk LJ felt her conclusions on these points were confirmed by the fact that section 1290 does not have the goal of ensuring that all employee benefits deducted from taxable profits are matched by a corresponding employment tax charge;[58] more is needed for section 1290 to apply. The cross appeal was, therefore, also rejected.

[49] *Hoey* [2022] EWCA Civ 656 at [198].
[50] *AD Bly CA* [2025] EWCA Civ 1443 at [39].
[51] *AD Bly CA* [2025] EWCA Civ 1443 at [52].
[52] *AD Bly CA* [2025] EWCA Civ 1443 at [52].
[53] *AD Bly CA* [2025] EWCA Civ 1443 at [53].
[54] *NCL CA* [2020] EWCA Civ 663 at [77].
[55] Corporation Tax Act 2009 (CTA 2009) s.291(2).
[56] *NCL SC* [2022] UKSC 9 at [72]; although it is not stated, one assumes this is a consequence of the *eiusdem generis* presumption.
[57] *AD Bly CA* [2025] EWCA Civ 1443 at [55].
[58] A purpose confirmed in *NCL SC* [2022] UKSC 9 at [73].

Comment

AD Bly CA itself is not a case with a surprising outcome. Falk LJ affirms that aggressive tax planning will largely fall foul of section 54 CTA 2009, and that the "wholly and exclusively" test is a highly fact-sensitive one, and applied in the same way across the entire Corporation Tax Statute. Her judgment also largely follows the Supreme Court's previous interpretations of section 1290. That said, there are three elements of Falk LJ's judgment which deserve closer attention.

Falk LJ tells us how much "more is needed"

In *BlackRock*, Falk LJ noted that, for an action to have an impermissible duality of purpose under a "wholly and exclusively" test,[59] it was insufficient that an effect of an arrangement be to reduce tax or that the decision maker considers the tax element—"[s]omething more is needed".[60] How much more is needed remained undefined in *BlackRock*, and the quote risked becoming a dicta oft-repeated by those acting for taxpayers in defence of questionable planning.[61]

Falk LJ seems to have given a little clarity on what more was needed in *AD Bly CA*. Having noted that traders do include expenditure in the expectation that they will get a deduction,[62] she later clarifies that "the mere fact that [expenditure] is sought to be achieved in a way that avoids tax will not prevent" it being a deduction, before noting that a taxpayer may be entitled to make a "choice of a tax-efficient method" of making that expenditure.[63] This clarifies the obvious; a taxpayer may engage in tax optimisation in their expenditure, in so far as tax optimisation is not the reason they engaged in the expenditure in the first place. The approach is surely correct; it is simple and focuses on the question posed by the statute rather than attempting to add an additional gloss.[64] That said, it is worth noting that, in the FTT decision, a taxpayer's object was gleaned not only from witness evidence,[65] but also from the way the transaction was carried out and the commerciality thereof.[66] The appellants' case appeared to be that the FTT's approach towards this evidence was an illustration of a confusion between object and effect decried by *Scotts Atlantic* and *BlackRock*. This is surely not the case; rather, it appears to be an expression of a point made in *Scotts Atlantic*,[67] where the UT notes that the "means by which the expenditure is made" could itself "be one of the circumstances … taken into account [for] determining … purpose".[68] This illustrates that "more" being needed should not be taken as a licence for taxpayers to engage in convoluted minimisation strategies; at a certain point, the existence of that

[59] On that occasion, under CTA 2009 s.441.
[60] *BlackRock* [2024] EWCA Civ 330 at [150].
[61] A little like the comments of Lord Upjohn in *Inland Revenue Commissioners v Brebner* (*Brebner*) [1967] 2 A.C. 18 at 30; [1967] 2 W.L.R. 1001.
[62] *AD Bly CA* [2025] EWCA Civ 1443 at [35].
[63] *AD Bly CA* [2025] EWCA Civ 1443 at [39]; note also the discussion at [41].
[64] It also matches dicta in previous cases, e.g. *Scotts Atlantic* [2015] UKUT 66 (TCC) at [54] and *Brebner* [1967] 2 A.C. 18 at 30.
[65] Which, due to the intermeddling of Charterhouse, was functionally useless.
[66] *AD Bly FTT* [2021] UKFTT 445 (TC) at [98].
[67] In the passage approved at *AD Bly CA* [2025] EWCA Civ 1443 at [29].
[68] *Scotts Atlantic* [2015] UKUT 66 (TCC) at [54].

convolution could be taken as evidence of an improper purpose in the absence of strong witness evidence to the contrary.

Treatment of presumptions

The appellants cited several passages from *Hoey*—in particular, Henderson LJ's comments that it is "usually difficult to envisage circumstances in which" remuneration payments will not be deductible,[69] and that there is a "strong prima facie" inference that such payments will be deductible[70] —and while these could not sensibly be taken to support the appellants' contentions for them, they might be taken to suggest that, in the remuneration and pensions realm, it is presumed that section 54 CTA 2009 will not apply.

Falk LJ's judgment, at times, dismisses any idea of there being such a presumption, as she notes the "fundamental reason" why such expenses are deductible is because their purpose will be to remunerate.[71] One reading of that is to suggest that the remuneration realm bears no special magic; if a payment has a remunerative object, it will be deductible, and, if that is not its object, section 54 CTA 2009 applies, in the same way that it would not apply to any expense with a business purpose. However, Falk LJ goes on, in the same paragraph, to note that, "on the facts". the "strong prima facie inference … was convincingly displaced" and that Henderson LJ will usually be correct.[72] That, then, suggests that Falk LJ's understanding of *Hoey* is that it introduced a set of presumptions.

Folding extra-statutory presumptions into the law would surely be a mistake. The achievement of Falk LJ in *BlackRock* was to provide a clear restatement of the law rooted in the case law of the House of Lords and on the test actually within the statute. To introduce special rules in the realm of remuneration would be a mistake, not only as an unnecessary gloss, but one which arbitrarily distinguishes between remuneration and other expenditure. It might also create confusion as to the proper application of section 54 CTA 2009 by both HMRC and taxpayers engaging in tax planning.

That said, the tenor of the judgment does not suggest that Falk LJ approves of such an approach. In the salient paragraphs, Falk LJ first addresses the reasons why remunerative expenses tend to be deductible—i.e. they are usually not tax motivated—and then references the inference in *Hoey*. Falk LJ also places significant emphasis on the fact the "critical point" in these cases tends to be "the FTT's conclusions on the facts",[73] and seemingly endorses the FTT's approach towards making findings of fact based on inference in the absence of reliable witness evidence; which, while not inconsistent with a presumption-based approach, suggests that little reliance is placed on it. While Falk LJ does rely on some of the language of *Hoey*, its use can be looked at in light of the fact that her court was bound by the court in *Hoey*; while a clearer repudiation of Henderson LJ's approach may be desirable, it would not be possible for Falk LJ to do provide this.[74]

[69] *Hoey* [2022] EWCA Civ 656 at [172].
[70] *Hoey* [2022] EWCA Civ 656 at [198].
[71] *AD Bly CA* [2025] EWCA Civ 1443 at [39].
[72] *AD Bly CA* [2025] EWCA Civ 1443 at [39].
[73] *AB Bly CA* [2025] EWCA Civ 1443 at [32].
[74] It is worth noting that Falk LJ's cautiousness about *Hoey* [2022] EWCA Civ 656 is somewhat replicated by the decision in *Marlborough DP* [2025] S.T.C. 1235, which makes no reference to any strong prima facie inferences, despite covering very similar grounds to *Hoey* and *AD Bly CA* [2025] EWCA Civ 1443.

Falk LJ's pot

As well as requiring a scheme to fall within the definition of "employee benefit scheme"[75] and that "property" be held (or its value increased),[76] Falk LJ's judgment envisages that there be some form of pot of assets made available under the scheme, from which assets can be dispersed.[77] This could be argued to be an additional element, seen neither in the previous cases of *NCL CA* and *NCL SC*, nor in the statute. It might even be argued to be an unnecessary gloss.

Properly viewed, this should not be the case. If the judgement is viewed properly, it is clear Falk LJ does not view this as a gloss. Falk LJ never envisages this to be free-standing element, but rather an aspect of the question of whether an expenditure is an employee benefit contribution—and in any event, deploys the metaphor in order to clarify that the statute appears to be intended to target situations where the property is clearly defined. However, Falk LJ has touched on something that would be a useful additional aspect of the test; but she is wrong to suggest that it is an aspect of the contribution issues, as it would be both more sensible, and more realistic in terms of the statute, to understand the criterion as an aspect of the question of whether an arrangement is an employee benefit scheme. Falk LJ's reasoning for the pot criterion is based on the fact that, while section 1291(1) CTA 2009 does not define contribution, it envisages that the making of a contribution will cause property to be held, or increase the value of property that is somehow in a silo and made available for the purpose of the scheme. This makes sense as a matter of the statutory purpose but, as a matter of common sense, it is like saying that "money" is "something that can be held in a porcelain box shaped like a barnyard animal"—while not untrue, it would be a better descriptor of a piggy bank than it would a descriptor of money. Similarly, it makes more sense to understand the pot criterion as an aspect of defining what the property is held in (i.e. the scheme), rather than as a description of the things that enter it.[78]

If one categorises the pot criterion as an aspect of determining whether property is held in a scheme, it can shed light on an unsatisfactory element of the decision in *NCL SC*. The court's reasoning in that case fails to fully explain what about the arrangements under that case, which involved the granting of options, were insufficiently scheme-like. If, however, an "employee benefit scheme" had to be a scheme whereby a pot of assets came to be held for the employees' benefit, there is not only a benchmark for what is and is not scheme-like, but such a scheme would share sufficient similarities with a trust so as not to disturb the wording of section 1250(2) CTA 2009.

Secondly, even if this were a gloss on the statute, it is by no means an unnecessary one. If Falk LJ had intended a gloss on the statute, it is surely justified by the statutory purpose. It would be bizarre if section 1290 CTA 2009 were interpreted in such a way that any executory contracts in favour of employees could technically constitute employee benefit schemes, with any profits of the company falling within the scope of employee benefit contributions. Parliament surely

[75] *AD Bly CA* [2025] EWCA Civ 1443 at [54].
[76] *AD Bly CA* [2025] EWCA Civ 1443 at [53].
[77] *AD Bly CA* [2025] EWCA Civ 1443 at [52].
[78] One of Falk LJ's arguments against HMRC's position is that it created a situation where "property" under the scheme would be treated as all present and future company property. This argument is more effective if applied as a means of limiting the definition of the word "scheme", rather than the definition of the word "property"; *AD Bly CA* [2025] EWCA Civ 1443 at [52].

intended more to be required, especially considering the purpose of section 1290 is not as a general code to ensure expenditure is matched to a commensurate income tax charge.[79] As a consequence of these reasons, the pot criterion, in so far as it is one, would be a useful aspect of the statutory test; while one should be grateful that Falk LJ uncovered that importance, it is an unusual aspect of the decision that she did not properly characterise it.

Conclusion

It is clear then that *AD Bly CA* is a useful case; one of many good decisions from Falk LJ. On the section 54 CTA 2009 front, it provides a clear restatement of the law on the "wholly and exclusively" test, as well as making a good effort to cut through any attempt to confine that test with needless presumption. There is little to fault there. On the section 1250 CTA 2009 front, it is weaker; while it might be lauded for introducing a useful criterion into the test, Falk LJ's mischaracterisation of the criterion is liable to confuse. This, at the very least, needs remedy but otherwise it should be lauded.

Tom Williamson[*]

[79] Note *NCL SC* [2022] UKSC 9 at [73].

[*] Barrister, Pump Court Tax Chambers.