ANONYMISED FORM OF THE DECISION

[2012] UKFTT 692 (TC)

TC02372

Appeal number: SC/3113-3117/2009

Income Tax and NIC – Schedule E – emoluments/earnings – tax avoidance scheme - Remuneration Trust – employees' individual sub-trusts – "protectors" - (1) whether payments by employer into trust represent emoluments subject to PAYE and NIC; - (2) whether benefits (particularly loans) derived by employees from the Remuneration Trust represent emoluments subject to PAYE and NIC; - (3) "Ramsay" doctrine – whether applicable – whether trust and loan arrangements artificial and fall to be disregarded; - No - Appeal allowed.

FIRST-TIER TRIBUNAL
TAX CHAMBER

MURRAY GROUP HOLDINGS and OTHERS **Appellants**

- and -

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS **Respondents**

TRIBUNAL JUDGE: **Mr Kenneth Mure, QC**
Dr Heidi Poon, CA, CTA, PhD
S A Rae, LLB., WS

Sitting in private at George House, 126 George Street, Edinburgh on 25 October – 5 November 2010, 18-21 and 26-28 April, 3-6 May and 7-10 and 16 November 2011, and 16-18 January 2012

Andrew Thornhill QC, Mark Studer, Jonathan Bremner and Thomas Chacko, Barristers, for the Appellants

Roderick N Thomson, QC., instructed by the Office of the Advocate General, for the Respondents

We have been unable to reach a unanimous view. The following decision represents the joint (majority) opinion of Mr Mure and Mr Rae. All references to the Tribunal's views and inferences therein should be construed as referring to their views only. The dissenting opinion of Dr Poon is added as an Appendix and should be read independently.

DECISION

Preliminary

1. This Appeal relates to a series of disputed assessments arising out of the funding and operation of an Employees' Remuneration Trust ("the Trust") established by the Murray Group for the benefit of its employees and their families. The five Appellant companies are members of the Group.

2. The Murray Group consists of around 100 companies involved variously in metal and other trading, mining, property, and commercial investment. There is principally Murray International Holdings Ltd ("MIH"), the ultimate holding company. It has one subsidiary, Murray Group Holdings Ltd ("MGHL"), also a holding company. One of its subsidiaries is Murray Group Management Ltd ("MGML"), which provides management services to the Group. The Group includes Rangers Football Club too ("Rangers"). In April 2001 the management company of the Group set up the Trust. Other companies in the Group subsequently participated in the scheme. The companies would pay monies into the Trust with a direction to the Trustees that a sub-trust be established and funded for the family of a particular employee. Also a loan facility (at commercial rates on a discounted basis) would be made available to the employee. As a debt on his estate this could offer Inheritance Tax advantages too.

3. It is the tax implications as affecting the benefits to the employees which fall to be considered. In effect the issue is whether the payments into trust or the benefits taken by the employee fall to be taxed as emoluments of their employment, with PAYE and NIC liabilities arising for the employer.

4. The Tribunal is not required to consider the deduction for Corporation Tax purposes of these payments as a business expense. This is now regulated statutorily by Finance Act 2003, Schedule 24. This measure, which restricts deduction, is of an anti-avoidance nature. It may be noted in the circumstances of this appeal that trust payments thereafter were made only in relation to footballers. As Rangers was loss-making for tax purposes, Corporation Tax savings did not arise. In the course of this appeal Finance Act 2011, Schedule 2, introduced further anti-avoidance provisions. Since then trust payments even for footballers have apparently ceased.

5. A Statement of Agreed Facts was lodged by Parties. Also, at various stages they provided helpfully for our reference typed Skeleton Arguments setting out their Counsel's views.

The Law:

6. In the course of their submissions counsel referred extensively to authority, including tax and NIC Statutes, and especially case-law. We note below those on which we relied principally in reaching our conclusions.

Taxation

Income and Corporation Taxes Act 1988 ("ICTA")

Income Tax (Earnings and Pensions) Act 2003 ("ITEPA")

Social Security Contributions Act 1999

Income Tax (PAYE) Regulations 2003 (SI 2003/2682)

Case Law: Tax

W T Ramsay Ltd v *IRC* [1982] AC 300

Barclay's Mercantile Finance Ltd v *Mawson* [2005] UKHL 51 & 52

CIR v *Scottish Provident Institution* [2005] UKHL 51 & 52

CIR v *Mayes* [2011] EWCA Civ 407

Sempra Metals Ltd v *HMRC* [2008] STC (SCD) 1062

MacDonald v *Dextra Accessories Ltd* [2005] UK HL 47

Heaton v *Bell* 46TC 238

Smyth v *Stretton* 5TC 36

Garforth v *Newsmith Stainless Ltd* [1979] STC 129

Collector of Stamp Revenue v *Arrowtown Assets Ltd* [2003] HKCFA 46

Shilton v Wilmhurst [1991] IAC684

Astall & Anor. v *Rev. & Customs Commissioners [2009] EWCA Civ 1010*

Paul Dunstall Organisation Ltd v *Hedges [1999] STC (SCD) 26*

DTE Financial Services Ltd v *Wilson [2001] EWCA Civ 455*

NMB Holdings v *S of S for Social Security* [2000] 73TC85

Aberdeen Asset Management plc v *HMRC* FTC/94/2010

Autoclenz v *Belcher* [2011] UKSC 40

Trust Law

Underhill & Hayton: Law relating to Trusts and Trustees

Thomas & Hudson: Law of Trusts

Thomas on Powers

Walkers on Evidence para 415(a)

Halsbury's Laws of England

Harvey v *Stracey* (1853) 1 Drewry 73

Rule 4.5 of the SFA's Registration Procedure Rules provides *inter alia*:-

"All payments to be made to a player relating to his playing activities must be clearly recorded upon the relevant contract and/or agreement. No payments for his playing activities may be made to a player via a third party".

The Evidence

7. Evidence was led at length over 17 days. The account of each witness is summarised in turn and at the conclusion of this section we set out our preliminary Findings-in-Fact on the less controversial aspects. Later, in the concluding section of the Decision, we comment on the more contentious factual issues.

8. The Appellants' first witness was Mr Red, a senior member of the group's tax function. He is a Chartered Tax Advisor and qualified as a tax inspector previously to joining the Appellants. He spoke to the terms of his Witness Statement, which was briefly expanded on, and was then cross-examined at length in relation to the operation of the Trust and the context in which it emerged and has developed.

9. Mr Red insisted in his evidence that the Trust was not a means of "tax avoidance". He accepted that it had the attraction of providing a larger sum for the employee and his family given the savings in PAYE and NIC liabilities. It served to incentivise the employees. The Respondents' argument *viz* that the payments into trust were disguised wage and bonus payments, was put to Mr Red and tested from many standpoints. Certain documentation put to him, bearing to have been signed or issued by him, he explained, had originated in form from Messrs Baxendale Walker, a professional partnership, which provided the Group with specialist advice on the Trust.

10. It was noted in an internal memo prepared by Mr Red dated 8 September 2005 to the Board of MIH that he had described the Trust as a form of "tax avoidance scheme" (Respondents' extra doc 1) which contrasted, of course, with his initial evidence to us. He did accept that the Group had been less than forthcoming in response to HMRC's enquiries than he would have wished, but he explained that he had been guided by Messrs Baxendale Walker. Curiously no board minute was recovered in relation to the introduction of the Trust. Mr Red was somewhat defensive in his evidence about the Group's motives in operating the Trust and, perhaps not unnaturally had responded similarly in correspondence to HMRC's enquiries. There was a legitimate adversarial interest arguably, in our view.

11. There was a contrast, Mr Red explained, between the benefitting under the Trust of footballers in Rangers and of other categories of employees of the Group. Football players had tended to be recruited on the basis of a "net of tax" package. Part was a wage/payroll payment subject to PAYE and NIC, and the balance a payment tax-free into trust which (ordinarily) could be accessed by means of a loan agreement with the Trustee, which was recorded in a separate "side-letter" entered into at the same time as the player's contract. Mr Red explained that the "side- letter" (or, as he preferred, the "letter of undertaking") which set out the balance paid into trust had not been disclosed initially to HMRC. In fact, as he explained, it did not in his view have to be disclosed as part of the player's remuneration package to the football authorities. It was not a financial entitlement, he insisted, nor did it represent, in his view, a payment to a player.

12. Earlier there had been in place a pattern of discretionary annual bonuses paid to other senior employees of the Group. There was no contractual provision for the payment of bonuses. Once the Trust was formed the Group companies instead made payments to the Trust, which in turn could establish and fund sub-trusts for individual employees' families. The Group or particular company would "recommend" to the Trustee where appropriate that a sum effectively *in lieu* of bonus be paid to a particular sub-trust.

13. Mr Red described his understanding of the operation of the Trust which applied similarly to both footballers and other employees. The employee was the *Protector* of the sub-trust, with the ability by way of a "Letter of Wishes" to change Trustee and nominate the ultimate beneficiaries, customarily his wife and/or children. A loan agreement at a commercial rate (in the form of an initial discount and hence without periodic interest payments) could be made available to the employee. Depending on the Trustee's discretion (expected ordinarily to be favourable) the loan term could be extended. An outstanding loan would represent a debt on death of the employee for Inheritance Tax purposes according to Mr Red's understanding.

14. Mr Red explained how he would discuss with the favoured employees the operation of the Trust, a sub-trust, loan facility, and form of Letter of Wishes. He would liaise between the employee and Trustee and provide and forward completed forms. He confirmed that typically a loan request was completed at the same time as the Letter of Wishes. Generally employees used the loan facility. However, he conceded that when an issue arose with the Trustee's declining to process unsecured loans, Rangers gave certain assurances to the players concerned about the delay.

15. Crucially the mechanism of the Trust and sub-trusts provided a cheaper way to produce a certain net amount. Mr Red strove to argue that the employee (including the footballers) did not elect between a payroll payment, made net of tax, and a trust "benefit". At the conclusion of his evidence (see Notes of Evidence for 28/10/10 at p80), he stated that he doubted whether any employee was ever given an option between either benefit as such. In fairness he explained that at the stage when he became involved, the decision for a payment to be made into trust had already been taken.

16. The Murray Group's second witness was Mr Yellow, a member of the senior management team of Murray International Holdings. He read and confirmed the terms of his Witness Statement.

17. Mr Yellow explained that he had not been involved in the formation of the Trust or in drafting the relative legal documentation. He conceded the description of it as "tax avoidance" and agreed that it offered tax advantages. The operation of the Trust had been explained to him as an employee. He saw it as offering advantages to himself and his family and appreciated (and used) the benefits offered via a Letter of Wishes and a Loan Request in relation to an individual sub-trust of which he was "protector".

18. Mr Yellow agreed that while he had an expectation of a bonus annually, he had no contractual right to it. It would be explained to him that the Group was considering (in evidence the words "thinking of" were stressed) offering him a bonus. He could choose to have this paid directly to him, subject to PAYE and NIC. Alternatively the Group could make a payment into the Trust and request the Trustees to consider contributing to a sub-trust for his dependents. This could provide a larger sum in trust which he could then probably borrow albeit on commercial terms. He acknowledged that he had made several Loan Requests *ex facie* for home-improvements. He accepted that substantially the loans had been applied otherwise, for his family's benefit. The precise use was never checked or questioned and, he claimed, it seemed to him unimportant. He acknowledged (WS para 26) that as Protector of the sub-trust he had changed the Trustee from Equity Trust (Jersey) Ltd ("Equity") to Trident Trust Co Ltd ("Trident") as Equity, the original appointee, had doubted the commerciality of the loans.

19. In cross-examination Mr Yellow was asked about a property development in France and its connection with Mr Black's sub-trust. Subsequently this was helpfully clarified by Mrs Crimson of Trident in her evidence (see her second WS).

20. We observe that in paras 14-15 of his WS Mr Yellow seemed to suggest that in relation to annual bonuses he had the option of taking either a net of tax payroll benefit or of there being a payment into his sub-trust. At the conclusion of his evidence, in response to Dr Poon and Mr Thornhill, Mr Yellow explained that Mr Blue, a senior member of the Group's management team, introduced the matter by saying "We're thinking of giving you a bonus". (We refer to the Notes of Evidence – 28/10/10 – pages 137-138).

21. Next, evidence was taken from Mr Turquoise CA, CTA, a tax partner with PricewaterhouseCoopers ("PwC") of some 11 years standing. He had advised Mr Evesham, a Rangers player, in relation to his personal tax affairs, including benefits derived by him and his family via the sub-trust set up on their behalf. He had been consulted in early 2002 about this, and in addition to considering the relative documentation he had met with Mr Elgin, a Rangers' director, and also with Mr Red. He had also the benefit of PwC's legal department's guidance.

22. Mr Turquoise explained that he had been persuaded to recommend the Trust's loan facility given that his client intended to invest the monies and so would be able to make repayment as and when required, and further that he had secured an appropriate tax indemnity from Rangers. His other concern was that the loan arrangement might be viewed as beneficial for tax purposes, but he felt reassured by the commercial rate interest provision and the repayment terms.

23. Mr Evesham had consulted him again in about 2004 when his contract with Rangers was reviewed and also when Equity was replaced as Trustee. Finally he again advised Mr Evesham when he left Rangers and established his residence outside the UK. Mr Evesham on his advice then revised his Letter of Wishes from "widow and children" to his "wife" so enabling the Trust funds (in effect the loans) to be transferred to her without delay.

24. It seemed that Mr Turquoise on all the information available to him, including legal advice, treated the arrangements as an effective trust and a loan at commercial rates and recoverable. The loans were not considered as income requiring to be declared in the player's Tax Returns.

25. Immediately after Mr Yellow, Mr Green gave evidence. (Having read and adopted his Witness Statement other witnesses, including Mr Turquoise, were interposed because of "timetabling" requirements). He is a senior member of the management team of the Premier Property Group ("PPG"), owning and developing commercial property in the UK, and part of the Murray Group.

26. Mr Green had received bonuses subject to PAYE deductions, but in 2004 it was proposed by PPG to pay him a bonus via the Trust. In cross-examination Mr Green insisted that he did not have an option of having payment made directly to himself and subject to PAYE. Rather, he had the "opportunity" of a payment being made into trust. (See Notes of Evidence – 29/10/2010 – page 62). His understanding was that as *Protector* he could change the Trustee of "his" personal sub-trust and select the Trust beneficiaries. He had withdrawn loans from his sub-trust to build up funds for house-purchase purposes. He believed (perhaps incorrectly) that funds would thus be more readily accessible. He seemed uncertain whether there was an interest rate advantage in withdrawing the trust funds by way of loan. He understood that the Trust offered the potential advantages (albeit subject to the Trustee's discretion) of being able to access a larger sum than that payable by way of a direct salary payment net of tax, viz the facility of the loan, which could be renewed and effectively extended, and later Inheritance Tax savings.

27. Next, Mr Violet gave evidence. Firstly, he confirmed the terms of his Witness Statement. He was a former Rangers manager. The Trust had been mentioned as offering benefits to him, which had been investigated by his solicitor and agent, Mr Grey (the next witness). Mr Violet explained that he had received from Rangers in addition to his contract of employment, a separate document in respect of "his" sub-trust. His concern was in securing a satisfactory overall financial "package". He understood in general terms that he could access monies in the sub-trust by way of loan and that ordinarily the Trustee would be agreeable to this. He had used the loan

facility and had not expected to have to make repayment during his lifetime. He did in fact make a repayment of £82,000 on one occasion. This had enabled the Trustees to purchase a holiday flat in Scotland.

28. Mr Grey had advised Mr Violet to seek a tax indemnity from Rangers in respect of trust benefits, which was granted. Mr Grey had also sought additional trust and tax planning advice from a specialist firm of solicitors, Messrs Turcan Connell, who had confirmed the Inheritance Tax advantages of the Trust in passing benefits to his widow and/or (perhaps preferably) children. After Mr Violet had left Rangers "his" sub-trust had continued.

29. In cross-examination Mr Violet was invited to comment on an insurance proposal, in respect of apparently a "keyman" policy in favour of Rangers. His annual salary there was disclosed as £560,000. He was asked whether that sum coincidentally represented his basic pay plus the grossed up (or "pre-tax") value of the Trust benefits. Mr Violet seemed to think that it was his salary exclusive of loan benefits. (The terms of his contract included potentially substantial bonuses).

30. Thereafter, evidence was taken from Mr Grey, a solicitor who for some years has specialised in football agency work and sports law. He in turn read and adopted the terms of his Witness Statement. Included in his clients are several Rangers personnel, in particular Mr Violet, Mr Purple and Mr Cardiff. He lectures in sports/football law in Scotland at a university level. By way of qualification he indicated that this specialist expertise did not extend to the tax treatment of benefits received from remuneration trusts.

31. Mr Grey confirmed that the Scottish Football Association requires disclosure of the terms of a footballer's contract but that does not extend, as he understands, to payments from a remuneration trust. While payments from the player's Club must be disclosed, including benefits in kind such as cars and accommodation, benefits from Third Parties, such as a sports company, need not. However, there is no formal SFA ruling in respect of remuneration trust benefits.

32. Mr Grey spoke to negotiating on behalf of client players with Mr Black, for Rangers. Typically Mr Black would be involved only at the initial stage of negotiating a "global" deal. Beyond such a "broad brush" conclusion other persons were involved on behalf of Rangers. Mr Grey spoke highly of Rangers as a negotiating party. He acknowledged that the use of the remuneration trust enabled the Club to negotiate a more beneficial deal in as much as PAYE and NIC liabilities were mitigated. He considered the loan arrangement advantageous. It could be used, appropriately in his view, to purchase a house, which would represent security for its value. Furthermore, a loan had Inheritance Tax advantages. Mr Grey noted that in about 2005 he had confirmed this benefit on behalf of his client, Mr Violet, by seeking specialist advice from Messrs Turcan Connell, Solicitors.

33. Mr Grey spoke also to his negotiation of a contract for Mr Purple with Rangers. The aspects of basic wage, bonus and appearance money were discussed. (At that detailed stage officials of Rangers other than Mr Black were involved). The

concluding offer by Rangers was of two elements, half in salary and half in benefit form from the Remuneration Trust. The contract providing for the salary and a separate document, referred to as a "side-letter", bore the same date. His client was interested in the total global figure. Mr Grey did not consider that the terms of the "side-letter" required to be disclosed to the SFA. It did not represent a benefit from the Club. There could only be a "recommendation" by the Club to the Trustees. Also, since Rangers were willing to grant tax indemnities, he was further reassured about the trust mechanism.

34. Mr Grey stressed that he viewed the loan facility afforded by the sub-trust to the player as repayable and enforceable as a debt for Inheritance Tax purposes. While the term would normally be for 10 years, he believed that it could be continued, and in effect become a "revolving" facility. He was insistent on this point to HMRC in his discussions with them when their officers attended at his office in the course of this enquiry. He was strongly critical of the records of his responses set out in the Notes of Meeting composed by Inspector 1, one of HMRC's investigating inspectors. (Revenue Productions 5-28)

35. At the conclusion of his evidence, in response to questions from the Tribunal Mr Grey indicated that when dealing with Rangers, he had never experienced having to advise his clients on an option between a trust benefit and an alternative "net of tax" payment. The opportunity to play for Rangers represented an important career development for his clients, and the financial "package" in totality was usually irresistible. (Notes of Evidence – 3/11/10-pages 94-96).

36. Next, Mr Black gave evidence. He read and confirmed the terms of his Witness Statement. His role within the Group is in providing strategic guidance to the individual companies. These companies carry out wide-ranging commercial activities. It also owns Rangers Football Club. The Remuneration Trust was set up in about 2001, Mr Black explained, following on specialist advice. While he himself was familiar with its broad function, its day-to-day operations were supervised by Mr Red. Originally it was used to benefit only MGM's employees, but later was extended to employees of other companies in the Group and their relations. It was valuable in incentivising employees in providing larger sums for their and their families' benefit in view of the tax savings. Mr Black did not consider the Trust as a means of tax avoidance, but rather as a means of retaining and rewarding loyal employees. So far as Rangers was concerned it enabled the Club to attract players who would not otherwise have been obtainable.

37. Mr Black explained the change of trustee from Equity to Trident following on the former's concern about the lack of security for its loans to employees. (We refer to paras 19-20 of the WS).

38. While Mr Black had been involved in "signing and selling" 350-400 players in 20 years of involvement at Rangers, he had not, and could not, because of all his commitments, devote any real time to detailed contractual negotiations. At the start of each football season he would meet with his manager to decide on which players might be possible recruits. The manager would have an approved budget for this

purpose. The selected player would be offered a contract incorporating standard SFA terms and in favoured cases also a "side-letter" in respect of possible Trust benefits. When shown the letter dated 11 July 2001 to him personally by Mr Grey on behalf of Mr Purple (Vol 2-13- pages 21/22) Mr Black explained that it was only the broad terms of an agreement, not the formal contract.

39. In respect of his own sub-trust Mr Black explained that he determined his own bonus. It depended broadly on company profitability and the performance of MIH, and the need to retain funds for the company's own purposes. He would discuss this with a senior member of the Group's management team, Mr Blue. He had not decided yet whether or not to seek to extend his first loan from the sub-trust, due to be repaid in about a year's time.

40. Finally, Mr Black spoke to a house restoration development in France ("Bel Azur"). Tax reasons had prompted his decision to finance this via the sub-trust. The site was nearby his own villa and the construction and building work could be organised readily. Mr Black supervised it personally with his architect and builder.

41. The Tribunal pursued the matter of discretionary bonuses further with Mr Black. While he would determine his own bonus, more generally he and Mr Blue would determine appropriate figures. These would be discussed with the favoured employees and the means of payment considered. (Notes of Evidence 29/10/10 pages 148-150). Given Mr Black's controlling position special considerations about taxing *his* bonus arise, and we address these later.

42. Then the Appellants called Mrs Crimson, a director of Trident, currently the managing trustee of the Remuneration Trust and Sub-trusts relating to the Murray Group. She spoke to the terms of both her Witness Statements. She holds various qualifications in banking and financial services. Her personal involvement (explained in cross-examination) was in over-viewing the administration of the Trusts and maintaining records of decisions. Her company administers other remuneration trusts as well as the Murray Group's. (Most of these have the same legal advisers, Messrs Baxendale Walker).

43. Mrs Crimson explained that by phone or email Mr Red of the Murray Group or Mr Magenta (or his assistant) of Rangers would indicate the name of a suggested beneficiary and the amount to be contributed to the Trust, with the suggestion that a sub-trust for that individual, or rather his family, be set up. At about the same time that individual would submit a Letter of Wishes in relation to the intended beneficiaries of the Trust capital, and a Loan Request. Messrs Baxendale Walker as the Trusts' legal advisers would be asked by Trident to prepare the appropriate sub-trust deed. In the event of further sums being paid into trust for the same "beneficiary" a further Loan Request was customarily submitted. Monies would be paid to the Trustees in cleared funds, via the CHAPS system.

44. Further, Mrs Crimson explained that Trident had to date taken over the administration of most of the "Murray" trusts from a previous administrative trustee, Equity. She understood that the Murray Group had become dissatisfied with Equity's

hesitation in certain cases to advance unsecured loans to the recommended "beneficiaries" out of the relative sub-trust's funds. She explained that Trident was prepared to be more amenable to such requests. It was satisfied, she indicated, by the current employment circumstances of the borrowers vouched in very general terms by the Group.

45. In cross-examination Mrs Crimson was pressed about Trident's willingness to extend loans, the first of which would fall due for repayment in 2011. She explained that she and another director scrutinised loan applications after a preliminary review undertaken by two subordinate employees. She spoke to the very limited criteria to be applied in approving a loan application. She maintained that it was reasonable to advance a loan of an amount up to the applicant's payroll wage.

46. Mrs Crimson was pressed in cross-examination in relation to particular aspects of her company's administration of the Trust and sub-trusts. According to her, these trusts are a fairly minor part of her company's total business; other junior officers of the company are involved in routine aspects; and there was a significant passage of time between the occurrence of certain matters raised and the date of this hearing.

47. In particular we would make the following observations about Mrs Crimson's evidence:-

(i) In relation to the establishment of a sub-trust there was some conflict in her account – whether the first indication was by email, phone call or fax or simply by transmission of loan documents. Earlier Mrs Crimson did say that while a phone call or email was the first notification to Trident, she herself would not customarily receive this. (In fact her company's preserved records seemed to be somewhat sparse). In any event the inference by Trident of a request for the establishment and funding (or further funding) of a sub-trust from receipt of loan documentation seemed to the Tribunal reasonable given the pattern of previous trust transactions. Mrs Crimson added that by implication, if not expressly, Trident as trustee had to exercise discretion in the creation of a sub-trust and lending arrangements.

(ii) In para 22 of her Witness Statement Mrs Crimson explained how Trident's reservations about the granting of loans were allayed. Generally the football players and senior employees were highly paid and with substantial capital assets. The thrust of cross-examination was that loans were issued automatically, without any objective assessment or proper exercise of discretion. In reply Mrs Crimson explained that compliance files were kept as a matter of routine on individuals who were settlors, protectors and beneficiaries. Identification and copy utility bills were preserved to satisfy money-laundering and banking ("know your client") practice. She referred also to a "World Check" verification. This seemed to produce only negative results, suggesting only a limited value, but, as we were advised, this relates to fraudulent activity or politically sensitive involvement. It is not a credit check. Client profiles were reviewed regularly depending on a "risk" rating. (This varies between 6 months and

2 years). While Mrs Crimson was insistent that the granting of loans (and in due course) the extension of any loans were made strictly on a discretionary basis and assessed individually, the criteria by which this would be determined remain unclear. The criteria acknowledged in para 22 of the WS do not appear to be reflected in any records relating to the grant of loans with no specific information on the debtors' remuneration, means and future prospects. (Indeed no considered decision about a loan recorded in a formal Minute was produced in the course of the hearing). We are conscious that a footballer's career in particular is precarious and inevitably limited in term.

In the event of a borrower defaulting then the interests of those individuals identified in the Letter of Wishes (ordinarily the employee's family) would be prejudiced. Mrs Crimson did acknowledge that liability for any breach of duty could result if a beneficiary sustained loss. It was, she explained, her company's policy to ensure that loans could be repaid in the interests of those persons entitled to the Trust capital, usually the family.

(iii) Annual accounts for the Trust and Sub-trusts are prepared and individual bank accounts for each are maintained. However, only accounts for the Trust are sent to the Murray Group. Otherwise the Trust records appeared to be limited if not minimal. Some documentation was recovered from Trident's records on the direction of the Murray Group's Senior Counsel in the course of Mrs Crimson's evidence, but it seemed to the Tribunal to be sparse and of a somewhat superficial "tick box" nature. The decision-making process, in particular the negotiation of the loan facility, and exercise of discretion in granting it, was not reflected satisfactorily in Trident's records.

(iv) Finally, Mrs Crimson was not entirely candid about when her company had received copy Minutes of Resolutions by the Group to pay funds into trust. In fact it became apparent only in continued cross-examination that these items had been exhibited to her on the eve of her giving evidence. (See Notes of Evidence – 2/11/10- pages 13-16 and 27). We comment further on this in paras 85-86.

48. Evidence was then taken by video link from Mr Silver, a Spanish football agent, who has acted on behalf of several Rangers players and also in one instance has advised the Club. He spoke to and confirmed his Witness Statement.

49. In particular Mr Silver acted on behalf of Mr Inverness in 2004 when he joined Rangers. He explained the remuneration "package" which he had concluded on his client's behalf. It comprised a salary of £130,000 per annum, a guaranteed bonus of £100,000, and a variety of other benefits. In addition the "package" included possible inclusion in the Remuneration Trust for a "recommended" amount of £118,000. The negotiation was not lengthy: the package was proposed on a "take it or leave it" basis. Mr Inverness was keen to join Rangers and would not have quibbled significantly on the terms. In response to the Tribunal Mr Silver insisted that any benefit from the Remuneration Trust was a distinct matter: it could not be

exchanged for another benefit. While the £118,000 benefit was expected, it was not 100% certain.

50. Mr Silver's understanding of the Trust arrangement was that the Club would contribute to the Trust in the expectation that a separate sub-trust for Mr Inverness would be created. While the Club did not control the Trust, it was expected that the Trustees would follow its (reasonable) wishes. A loan, not repayable until death, would ordinarily be available to the player.

51. A former Rangers player, Mr Gold, who is now assistant coach for a national age-group football team, gave evidence of the re-negotiation of his employment contract with the Club. In addition to his original salary being continued, contributions to the Trust would be made totalling £500,000. These again would be held in trust. Mr Gold was content with the offer and did not seek to re-negotiate its terms. He took legal advice, who confirmed that it was a trust effective under English Law, whereby he himself could not dispose of the trust fund. Advances by way of loan could be made. On the re-negotiation of the contract he completed a Letter of Wishes and Loan Request, although in the event he chose not to take advantage of this. Mr Gold explained that he was concerned about the capital allocated to his personal sub-trust earning a reasonable interest rate on deposit, but did not wish to invest in shares or property. He spoke to his understanding that the funds in trust were not held on his direction: the Trustee's approval was required. In his case he had requested and received copies of the accounts for "his" sub-trust.

52. Then Mr Purple gave evidence. He presently works in the media and was formerly a professional footballer. (He too was a client of the witness, Mr Grey). He was the subject of a bid by Rangers during the course of his career in the period before the Trust was set up. His contract was negotiated by Mr Grey and then subsequently re-negotiated at a time when the Trust was in use. A major change then was that half of the "consideration" would be paid into the Trust but could be accessed by way of loan arrangement. He had been reassured by Mr Grey that the Trust arrangement was effective and legitimate in law. At the conclusion of his evidence Mr Purple confirmed that he had never been given the option of any alternative to the loan arrangement.

53. Thereafter evidence was taken from Mr Blue, CA, currently a senior member of the management team of Premier Hytemp, a Murray Group subsidiary. He confirmed the terms of his Witness Statement. He was a founder shareholder of Argyll Consulting Ltd, pension specialists, which had been introduced to the concept of Remuneration Trusts by Mr Baxendale Walker. Mr Blue explained that he had no legal expertise and had been guided as to the merits of a Remuneration Trust by Mr Red, but he did understand the basic principles involved. He acknowledged such a trust as a tax avoidance scheme, offering PAYE and NIC savings. He noted too the Inheritance Tax advantages of the loan facility, which had the convenience of being at a discount (without regular interest repayments) and possibly also an extending "rollover" facility.

54. Mr Blue agreed that, while he used his loans to purchase a holiday house and improve his principal residence, he was not required to provide the Trustee with detailed reasons. He appreciated the value of his role as *Protector* with some influence in relation to the Trustee and of his ability to submit to them a Letter of Wishes in respect of the ultimate destination of the sub-trust's capital.

55. Mr Blue explained that a decision was made annually by Mr Black whether he and two other senior executive directors should receive a bonus. Mr Blue had no contractual right to this. He would be given the opportunity to receive this provision via the Remuneration Trust, which he had found attractive.

56. The Tribunal noted that in para 14 of his WS Mr Blue appeared to suggest that the favoured employee would be given an option between a trust contribution and a cash bonus. However, in his evidence (see Notes – 3/11/10 – pages 164-166), he indicated that a specific figure was not mentioned until he had accepted the trust payment. Also he stressed both in evidence and in his WS (para 15) that he never had a contractual right to a performance related bonus.

57. This witness was also involved in the payment of bonuses to his subordinates. These were non-contractual but generally related to the individual's and their company's performance. In very general terms Mr Blue explained that he would discuss the option to take a loan under the scheme and that Mr Red would also advise on more specific matters:- see Notes of Evidence – 3/11/10 – pages 142-145. (Mr Blue's evidence seems very important not simply in relation to his own remuneration but the remuneration of his subordinates in the Group structure). He stressed that there was no contractual right to a bonus.

58. The last witness at the first diet of the hearing of evidence was Mr Indigo, a board member of Rangers since 2000. His previous career was in industry, latterly serving in senior executive roles. He explained how Mr Black had encouraged him to join the Club, to use his business acumen in developing a diversity of business operations. His directorship was initially non-executive and unpaid. However, it became a substantial commitment for a period from 2002-2004 during which Mr Indigo received benefits from the Remuneration Trust in recognition of that. He had no contractual right to these, but he believed that they were made in recognition of his efforts there and with Response Handling Ltd, a Murray Group Company. Mr Indigo was cross-examined in detail about his knowledge as a board member of Rangers of HMRC's investigation. He acknowledged that he was aware of HMRC's interest from about 2005. He had discussed this with Mr Red, who was responsible for administration of the Group's tax affairs. The Board had accepted Mr Red's responses to HMRC as adequate and appropriate. He was aware that Mr Red had been advised by Messrs Baxendale Walker, and no further legal opinion was sought on the matter. Mr Indigo understood that Mr Red had been fully cooperative with HMRC.

59. The term "side-letter" (setting out the Trust benefits for a footballer) was unfamiliar as such to him, Mr Indigo claimed. He acknowledged that he was, however, aware of the overall content of arrangements made with players and did not

consider these to be "secret". He believed that the Trust had been used to pay appearance money and bonuses. He was not aware that "side-letters" as separate documents from the main contract had ordinarily been executed on the same day. He was not surprised, he claimed, that the practice of "side-letters" had not been disclosed to HMRC until about 2008. He had understood that the use made of the Remuneration Trust by Rangers was proper and acceptable. Mr Indigo claimed that he was unaware of the Board being asked about "side-letters". Mr Red was responsible for the Group's tax affairs and the Board would not review his work in detail. Personally he was not surprised at the non-disclosure of "side-letters" if these had not been requested in specific terms.

60. The Remuneration Trust had originally been intended to benefit senior executives of the Murray Group (sub-trust no 46 is in favour of Mr Indigo's beneficiaries) and had at a later stage been extended to Rangers. When the players were introduced into the trust arrangements, Mr Indigo was not involved in player management. He resisted strongly the suggestion that the Trust benefits were "disguised" remuneration. He insisted that they were not paid to the player or other employee. This was a "trust" arrangement. The player/employee had to seek a loan, sometimes taking the initiative himself. Not all did so. On occasion, proposed trust contributions were not made. There was only an expectation of these, not a contractual right. Mr Indigo spoke to the payments arising out of an initial conversation with Mr Black, which was later elaborated on by Mr Red. While the payment record of contributions to Mr Indigo's trust seemed regular, he claimed in his evidence that there had been a significant repeated delay in payment. Had there been failure to make a payment Mr Indigo indicated that he would not have continued working for the Club.

61. Mr Indigo was then asked about the loans which he drew from "his" sub-trust. He had not calculated the exact interest rate payable but the LIBOR link suggested that it was reasonable. He appreciated the Inheritance Tax advantages to his estate and family. While there was no guarantee, he expected that the loan could be extended. He acknowledged that the stated purpose of the loans was "home improvements". He had in fact used them for investing in property more broadly, however. He did not consider this mis-description to be significant or requiring to be corrected. Mr Indigo was questioned in detail about the wording of board minutes in relation to the Trust. He agreed that the language was very formal. He insisted that, according to his understanding, the scheme could be used for remuneration of players, the payment of bonuses and appearances. The wording may have been in legal form, but it did not obfuscate the Board's intentions. The use of the Trust was recorded. He acknowledged that certain items in the company records were not familiar to him.

62. In a brief re-examination Mr Indigo confirmed that Rangers accounts (as a plc) were audited by Grant Thornton and had been approved as having no contingent liabilities. The working of the Remuneration Trust had been disclosed to the auditors.

63. The Appellants' first witness at the adjourned hearing (resumed in April 2011) was Mr Magenta, CA who worked on football administration matters within Rangers.

Mr Magenta read both his Witness Statements. He explained that both were drafted with the assistance of counsel and finally revised and approved by himself.

64. In his original Witness Statement Mr Magenta explains that he learned of the Remuneration Trust in about 2001/2002. At that stage he was not involved in negotiations with football players and his understanding of the Trust's purpose was that of making tax efficient payments to them. Initially the trust mechanism had been used to make bonus payments, securing (only) a NIC advantage. The related loan facility provided a valuable opportunity for the players and with only one exception (Mr Gold) had been taken up. Mr Magenta had been involved in administering the related paperwork.

65. From 2004, Mr Magenta had become involved in negotiating players' contracts and explaining the Trust's functions to them. Mr Black would negotiate a broad agreement in principle but which was not legally binding. Mr Magenta's task was negotiating a "deal" in finalised form, usually incorporating a salary (liable to PAYE and NIC) and an additional trust provision, benefiting the player's family and affording loan facilities to him. This had tax advantages of reducing PAYE liabilities, yet provided the same total net benefit to the player and his family. Mr Magenta would explain to the player that he would become "protector" of his "own" allocated sub-trust and could appoint benefits to his family. Ordinarily the player would take up the loan facility initially for a 10 year period, and could expect it to be renewable for a continued term, which offered also Inheritance Tax advantages as representing a debt on his estate. Once explained this strategy was generally acceptable to players and they appreciated that the Trust would be administered at the Trustees' discretion. Mr Magenta would explain that the Club could only "recommend" the creation of an individual's sub-trust, with the player being appointed as "protector".

66. Mr Magenta spoke to documentation setting out the "benefits" payable to players. There was a distinction, he insisted in cross-examination, between contractual payments and payments into trust. He spoke to a series of documents recording these. He insisted that there was no obligation on Rangers to report trust payments to the SFA and in cross-examination maintained that notwithstanding Rule 4 of the SFA regulations a trust payment need not be disclosed to them. Only payments from the footballer's Club *qua* employer needed to be registered, he insisted.

67. Mr Magenta himself had an allocated sub-trust set up in 2003. He preferred its benefits to a bonus paid to him directly and subject to PAYE. He valued the loan facility and the Inheritance Tax benefits. He was "protector" of his own sub-trust. However, after about 2005 Rangers decided to increase his salary instead of enhancing his trust benefits. He explained that he was hopeful of extending the duration of his loan.

68. Mr Magenta was questioned closely about "side-letters" and benefits payable in terms of these. "Side-letters", he said, were part of the "package" offered to players but were distinct from the player's contract. The "side-letters", Mr Magenta insisted, did not have to be disclosed to the football authorities. The SFA rules did

not extend to payments from third parties, and this, in accordance with an earlier decision by the Club, would include any trust benefits as being distinct from payments in terms of the player's contract. Mr Magenta was cross-examined in detail in relation to payments and other categories of benefit paid to various players and was pressed for his views on the manner of computation of the payroll payments and trust benefits and on the exploitation of (as Mr Thomson suggested) a tax ploy to achieve an enhanced value. Certain instances were noted where payments and other benefits were given to players on termination or variation of their contract with Rangers. (Ultimately the answers involved aspects of law which fall to be determined by the Tribunal).

69. Mr Magenta's second Witness Statement had been prompted by a phone-call from Mr Red made in the course of the latter's evidence in October 2010. It too had been drafted with the assistance of Counsel before being finally approved by Mr Magenta. It relates principally to the team bonus paid in the 2005/6 season in respect of the UEFA Champions League. Bonuses were traditionally the subject of negotiation between the Club's Chief Executive, and the team captain. The negotiations had proved difficult as the players' expectations were high. As a transitional measure, Mr Magenta explained, the previous season's bonus structure had been used for domestic competitions. For the UEFA Champions League trust benefits had been given: this was cheaper for the Club, and there was no contractual obligation, Mr Magenta insisted, to pay it in cash directly to the players. The amount of the benefit had been settled only shortly before the "legs" of the competition were played.

70. The Appellants' final witness was Mr Scarlet, a senior official at Rangers. From 2002 onwards, he had became more involved with the operation of the Trust.

71. Mr Scarlet's own sub-trust was established in September 2001 after discussions with Mr Red. He understood that he could have a 10 year loan of funds contributed to his sub-trust, all free of tax, and that this could be extended thereafter. The loan would represent a debt on his estate, reducing its value for Inheritance Tax purposes. Then the trust fund might be made over to his wife and/or family. He had secured an indemnity from Rangers against any personal tax liability. He indicated that he had been asked by the Trustees to state the purpose of his loan.

72. In his negotiations with players for Rangers Mr Scarlet worked with Mr Magenta. He would be involved in finalising precise contractual terms after an outline "package" had been negotiated with Mr Black. The value of a sub-trust arrangement was, he would explain, that contributions to it could be made free of charges under PAYE and NIC. These contributions in full could then be made available by loan to the player. Larger sums effectively could be released and the term of a loan extended. More complex enquiries when made by players would, Mr Scarlet indicated, be referred to Mr Red.

73. According to Mr Scarlet the precise contractual terms of a player's engagement had to take account of bonuses and other benefits such as accommodation and travel expenses. Where a trust contribution was negotiated and a sub-trust

proposed, a letter of undertaking would be prepared. Ordinarily the player would be appointed as "protector" of the sub-trust. Such arrangements were cheaper for Rangers in view of tax and NIC savings. If trust contributions could be staggered, Mr Scarlet explained, that had cash flow advantages for the Club and also helped to retain the player. Trust contributions, he added, would not be disclosed to the Scottish Football authorities.

74. Mr Scarlet was aware that Trident had succeeded Equity as Trustee in 2006. No more contributions were made to the Trust after 2008 and in the two previous years only first-team players had so benefited.

75. In addition to his principal Witness Statement Mr Scarlet completed a second Statement, prepared only shortly before his giving evidence, dealing with the controversy about bonus payments relating to the UEFA Champions League in the 2005/6 season. He confirmed that a bonus structure is negotiated annually between the Club and the team captain on behalf of the players. The captain that year had made very high demands and the negotiation had proved difficult. Ultimately and on the eve of a qualifying "tie" a bonus was agreed, but on condition that the negotiated figure would be paid into trust.

76. This second Witness Statement records also Mr Scarlet's reaction to an email about the manner of payment of a salary increase to him promised by Mr Black. The manner of payment had become complicated and had caused embarrassment to him because of a lack of liaison between Mr Black and Mr Indigo.

77. Mr Scarlet was cross-examined at length by Mr Thomson on certain matters. As a preliminary aspect the circumstances of his completing his Witness Statements was raised. The first, he explained, had been prepared with the assistance of Counsel and approved by him in final form. His second Statement also was prepared with the assistance of both Messrs Bremner and Chacko, who, of course, appear for the Appellants.

78. Mr Scarlet recollected settling the bonus for the UEFA Champions League on the eve of a qualifying match at Famagusta. Mr Black had encouraged him to settle the matter. Mr Scarlet had gone to see the captain at the pitch and the matter was concluded for a payment of £25,000, provided that it was paid into trust. Mr Scarlet maintained his account of the negotiation and was insistent that he had not rehearsed the evidence with Mr Magenta (the immediately preceding witness).

79. Mr Scarlet was then asked about the matter of "side-letters". When engaging a player a decision would be made about the total sum to be paid. Mr Scarlet had difficulty in remembering details of the division of this total between payroll and trust payments but acknowledged that there could be 50:50 apportionments between wage/payroll and trust payments. In response to the suggestion that a player's remuneration was one package, Mr Scarlet explained that there were three components generally – a salary, bonuses and Remuneration Trust benefits. The Remuneration Trust benefit, as Mr Scarlet understood, did not have to be registered with the SFA or SPL. He himself had not been a party to the decision not to register

these details. Nor had he been involved in the inquiry by HMRC. He was not responsible for any delays in responding. Mr Red principally had been the party responding to HMRC. He agreed with the terms of a memo by e-mail (Respondents 1/8, page 19) from Mr Red to the Club's HR manager that only discretionary bonuses should be subject to the Trust arrangements and that they should not affect existing contractual rights. (This interpretation seemed to us to be correct on the basis of Mr Thornhill's view of the scheme.)

80. Mr Thomson then turned to the treatment of Mr Scarlet's own remuneration and that of other employees and the significance of part-payment via the Remuneration Trust. In about August-September 2003 Mr Scarlet had had a discussion with Mr Black about his level of remuneration which, he considered, had fallen in relation to that of his colleagues. Mr Black was sympathetic but the responsibility for implementing pay increases was that of Mr Indigo. Rangers' HR Department had limited expertise and Mr Scarlet found its records, which were put to him for comment, confusing. Mr Scarlet's understanding was that his salary increase would be subject to PAYE but that any bonus could be paid via the Remuneration Trust. It emerged that an additional £6,000 payment into trust had been made, apparently to compensate Mr Scarlet for tax borne on a benefit made via payroll which he had expected to be paid for the benefit of his sub-trust.

81. Mr Scarlet was invited to comment on a £500k payment into trust in the case of Mr Purple. The player was being transferred to another club and certain contractual payments were due to him. Mr Scarlet claimed that he could not clearly recollect the basis for the financial arrangements concluded. He explained that he relied on the professional accountants on the board and its auditors, Grant Thornton, to ensure that these arrangements were in order. When asked about the financial severance agreement with another player for whom a sub-trust had not been established, Mr Scarlet's evidence was again to the effect that he was uncertain.

82. Next, Mr Scarlet was cross-examined on several aspects of the actual administration by the Trustees. He acknowledged that in very general terms he was aware of delays in the transmission of trust payments and complaints by players. He explained that he had not been immediately involved and that the Head Office of the Group had dealt with it. Mr Thomson referred Mr Scarlet to a memorandum from Mr Red noting Equity's reservations about granting certain loans. This, he explained, would have been referred to Mr Magenta and the two other CAs involved in Rangers' management. So far as he himself was aware, this was an administrative problem.

83. In conclusion, Mr Scarlet was pressed about the apparent artificiality of paying players substantial sums via the Trust mechanism, even of amounts exceeding the payroll portion of their benefits. It was noted that players (and Mr Scarlet) had sought and obtained from Rangers indemnities against possible tax liabilities on trust payments. There must have been good reason for this, Mr Thomson suggested. Mr Scarlet's response was in general terms that, notwithstanding his senior position in Rangers, the matter of trust payments was the responsibility principally of the Group's Head Office and its professional accountancy staff.

84. Mr Scarlet was the taxpayers' final witness. We think it appropriate to comment at this stage on their witnesses' credibility and reliability. While we make specific comment on the evidence of Mr Red and Mrs Crimson, we found the other witnesses generally credible and reliable. The football players, their agents and the various professional advisors all gave frank accounts and were straightforward in their manner. In his submissions Mr Thomson made detailed criticisms of the evidence given by the Appellants' executives. Their Witness Statements had been drafted by Counsel and this (quite innocently) might have tended to suggest a degree of rehearsal. However, HMRC's enquiry has been conducted over an extended period. Further, it is a matter of public knowledge that HMRC and also certain UK Police Authorities have been investigating the affairs of other football clubs. This background may well have contributed to the culture of defensiveness which to varying degrees seemed to affect the Appellants' officers' testimony before the Tribunal and, perhaps, earlier dealings with HMRC. Mr Black gave a frank account of his entrepreneurial role within the Group. He said – and we accept – that by and large he made only decisions in principle and delegated the detailed implementation to others. He gave a straightforward factual account of the development at Bel Azur. Mr Thomson made particular criticisms of also Mr Scarlet's and Mr Magenta's evidence about the last-minute settlement of the negotiation of the players' bonus for the UEFA competition in 2005/06. We are hesitant to draw any sinister conclusion from this section of the evidence. We can accept that the club captain, who was elected by the players as their representative, had negotiated strenuously on their behalf until the proverbial "last minute".

85. Certainly, we considered that Mr Red was defensive in his evidence to us. He accepted that there had been delays in his providing certain information to HMRC. His position, perhaps, was somewhat invidious inasmuch as he was charged with the day-to-day management of a scheme devised and directed by another party, Messrs Baxendale Walker (none of whose representatives gave evidence.) One aspect of his evidence which disturbed us was his meeting with Mrs Crimson on the eve of her giving evidence. Having collected her at Edinburgh Airport it seems that there was some discussion about Trust matters and he passed to her for her consideration that evening certain extra documents including company minutes. (These were produced as late extra documents by the Taxpayers' Counsel and Advisors for scrutiny by the Tribunal.)

86. We made particular comment (at para 47) in respect of Mrs Crimson's evidence. We found this unsatisfactory in many respects. In somewhat vague and general terms and in a repetitive manner she acknowledged the broad principles of her role as Trustee. However, we would question her understanding and awareness of these responsibilities in detail. While she may not have been involved in the detailed management of the taxpayers' Remuneration Trust, she was the senior official with responsibility for it. In our view her attitude seemed casual and even lax given the legally onerous nature of her responsibilities. While Equity took a firm stance about trust administration, Trident was prepared to be more compliant.

87. Mr Thomson on behalf of the Respondents led two witnesses, Inspector 1 and Inspector 2, both senior investigating officers of HMRC. Both read and adopted their

Witness Statements. Mr Thornhill asked the Tribunal to read these Witness Statements in a cautionary way. They were, he suggested, opinionative in many respects. He had restricted the amount of detailed evidence led on behalf of the Appellants in anticipation of this being conceded. Mr Thomson approved of such an approach to interpretation, and, indeed, introduced the contents of the Witness Statements in a selective way. Indeed, Inspector 2 accepted that in his general approach he had treated loans as representing "emoluments" for tax purposes. (In any event, the Tribunal was cautious in interpreting the Group's internal records: it was unclear as to whether and to what extent the staff of the various companies appreciated the legal niceties of the terminology used.)

88. Inspector 1 became involved in investigating the tax affairs of the Murray Group, having taken over the enquiry from a colleague. In particular the administration of the Group's Remuneration Trust came under scrutiny. On his instructions the determinations of liability under PAYE and the decisions in respect of NIC liability were issued in respect of certain "benefits" considered to have arisen via the Trust structure. It had been observed that the amounts contributed to the Trust substantially exceeded the amounts paid and taxed as bonuses. The Murray Group had not been forthcoming in providing documentation about payment of bonuses, and the Trustee (not unnaturally in our view) refused to divulge confidential information. The response of the Murray Group to HMRC about the Trust was essentially that it was independently managed. Inspector 1 explained, however, that he viewed the Trust's management as a "sham". There had been a change of Trustee in circumstances which aroused HMRC's suspicions.

89. Further documentation had been obtained by HMRC via an enquiry conducted by the City of London Police. This related to a number of football clubs, and was not restricted to Rangers FC. Inspector 1 had noted also information obtained about the development at Bel Azur. Inspector 1 referred also to his notes of the interview with Mr Grey, the solicitor and football agent. This note had been prepared by him from contemporaneous notes and his recollections. His colleague, a Mr Luton, had approved its terms. (We note the contrasting evidence on this point by Mr Grey at para 34). Inspector 1 noted also that documentary information had been obtained from the SFA.

90. Inspector 1 had concluded that there were divergences between information volunteered by or on behalf of the taxpayers to HMRC and that derived from scrutiny of the internal records. In certain specified instances these records suggested in his opinion that benefits paid via the Remuneration Trust were truly emoluments of the recipient's employment. He recorded these in detail in his Witness Statement.

91. The change of Trustee from Equity to Trident and the circumstances in which this was made ie Equity's reservations about advancing loans, was a further factor encouraging Inspector 1 to conclude that the loan arrangements were a sham. The management and processing of sub-trusts and loans was consistent with this, he suggested. Further, it seemed to him that there was no expectation on the part of the employees to have to repay the loans.

92. In cross-examination Inspector 1 explained that his Witness Statement set out the history of the investigation, highlighting aspects and documents founded upon. He accepted that matters of (his) opinion had merged into the narrative. It was suggested by Mr Thornhill by way of colour highlighting of parts of its narrative that the factual element in the Witness Statement was limited. Mr Thornhill acknowledged that his purpose was to scrutinise the witness's testimony and distinguish matters of opinion from fact. In fairness Mr Thomson had (fairly in our view) encouraged the witness to exclude opinionative aspects in giving his evidence.

93. Inspector 1 explained that he had been influenced by Rangers FC's board reports about payments via the Remuneration Trust in concluding that all the benefits were contractual. These, not "side-letters", had suggested to him that these were "emoluments" for tax purposes. He had concluded that the loans from the Trust were a sham and in reality were earnings and accordingly taxable. He viewed the cash in the sub- funds as being at the disposal of the particular employee and accordingly his taxable earnings. There was an expectation of a loan being available quite irrespective of the discretion of the Trustees. As "protector" of his individual sub-trust, the employee was empowered to change Trustee so conferring control over the trust fund, Inspector 1 argued.

94. In respect of the development at Bel Azur Inspector 1 considered that this was conducted not by the Trustees but more likely by Mr Black personally or the company Group. There was no documentary evidence of the Trustee's involvement.

95. HMRC's other witness was Inspector 2, again a senior tax inspector involved in investigation work. He adopted his Witness Statement and a short supplement. On the direction of Mr Thomson he read it somewhat selectively, highlighting details of certain of the individual sub-trusts. Inspector 2 explained that he had been asked to consider contributions made by the Murray Group to the Remuneration Trust initially by his colleague Mrs Bedford, and then by Inspector 1.

96. Of the 111 sub-trusts, Inspector 2 explained, 108 were actively used. Of these 81 were for Rangers FC players and 27 for other Murray Group employees. Initially the Murray Group had provided only limited documentation but in the course of the enquiry further material emerged from other sources. As a result of the enquiry determinations of liability under PAYE and NIC were made. Essentially HMRC's approach was to view all payments made into a sub-trust as emoluments of the particular employee's employment. The sums assessed were viewed as net of tax and accordingly grossed-up.

97. While Rangers had used the Remuneration Trust to benefit its players until recently, since 2005 it had not been used for other employees of the Murray Group. In the case of footballers, "side-letters" were traced in many instances. This document had, apparently, been treated by the Club as distinct from the player's contract. Only the contract had been disclosed to the SFA. While certain "side-letters" had been issued when the player was initially "signed" for the Club, others had been granted on renegotiation of a player's contract, or on his being transferred to another football club. Inspector 2 listed certain examples of these.

98. Inspector 2 noted also that in instances tax guarantees or indemnities had been granted to players. The terms of other documentation had suggested to him that trust payments were regarded by Rangers as "salary". Inspector 2 had concluded that there was a degree of artificiality in the arrangements whereby an employee, as "protector" of his own sub-trust, would apply for a loan from the sub-trust a few days in advance of the relative trust deed being executed. Further, there was little evidence of the Trustee's exercising discretion in relation to the grant of loans. The applicant/employee was not interviewed: his circumstances were not investigated: the loans were often substantial in relation to the employee's salary. The process of seeking the loan had been initiated by Mr Red, of Murray Group, not, it seemed, by the individual player. In instances where disablement insurance had been negotiated for players, the amount of cover tended to include both direct wage payments and payments into trust.

99. Having dealt with these general observations Inspector 2's Witness Statement then addresses the individual sub-trusts, to which reference is made.

100. In a brief cross-examination Inspector 2 acknowledged that he had proceeded on the basis that "loans" represented taxable remuneration of the employment of the players and other employees concerned. As a question of law, Inspector 2 agreed, that was for the Tribunal to determine by reference to legal principle.

101. On the basis of that evidence and the Joint Statement of Agreed Facts Mr Thomson closed his Proof on behalf of the Respondents.

102. We considered that Inspector 1 and Inspector 2 had carried out a conscientious and diligent investigation into the Remuneration Trust operated by the Murray Group and the payments and the benefits made available to its employees and families. We have noted that the Group had not been forthcoming in producing documentation at various stages of HMRC's enquiry. Relevant information had become available via other sources, particularly the City of London Police's investigations. While we found both Inspectors credible, they acknowledged that their approach proceeded on the premise that all payments into the Remuneration Trust represented taxable emoluments. Where their evidence and findings strayed into technical legal areas, we considered it with all due caution.

103. On the basis of that evidence we make the following **Findings-in-Fact**. We should stress that this is no more than a factual narrative and does not deal with any legal effects of the principal trust, sub-trusts, and loan obligations purportedly set out in the documentation referred to. (Our Findings-in-Law thereanent are explained in our Decision *infra* para 232). Further, as a factual narrative it focuses only on the essential aspects, the structure, and operation of the trust scheme. We consider the controversial area of orchestration argued on behalf of the Respondents later (again see para 232). Special aspects emerge in relation to certain individual sub-trusts.

(i) Murray Group Management Ltd provides management services to the companies of the Murray Group. It is one of 100 or so companies owned by Murray Group Holdings Ltd, which in turn is owned by

Murray International Holdings Ltd, the Group's ultimate holding company.

(ii) One of the companies in the Group is Rangers Football Club Ltd. During the Years in question it was loss-making for Corporation Tax purposes.

(iii) By Deed dated 20 April 2001 ("the Definitive Deed") MGM Ltd set up the Employees' Remuneration Trust ("the principal trust"). It was subsequently amended by Deed of Variation dated 28 January 2002, Deed of Amendment dated 29 November 2002, and Deed of Amendment and Rectification dated 12 October 2005.

(iv) 108 sub-trusts were established subsequent to the date of the Definitive Deed. These are in name of individual employees of companies in the group and bear to be for the benefit of their families individually. The Deeds purporting to create the sub-trusts referred to and adopted the terms of the Definitive Deed.

(v) When the possibility of creating a sub-trust in name of an employee was contemplated, the benefits and trust mechanism would be explained to him *viz* the loan facility providing a tax-free sum, greater than a payment net of tax deducted under PAYE, and repayable out of his estate, so reducing its value for Inheritance Tax purposes. Further, the employee could also be appointed *protector* with extended powers in respects resembling trusteeship, but without title to the trust assets, and not enabling the conferring of any absolute beneficial right on the employee himself.

(vi) When an employing company decided to propose that a sub-trust be constituted in name of a particular employee, it would have the employee complete a Letter of Wishes (naming the family members benefiting on his death) together with (almost invariably) a Loan Application on his own behalf. These would be submitted to the Trustee. A standard form of deed to create the sub-trust would then be provided by Messrs Baxendale Walker, the specialist "wealth" adviser to the Group. The employing company would pay a contribution to the principal trust which at its discretion would set up a sub-trust in name of the selected employee.

(vii) On these occasions the employing company would advance monies to the Principal Trust and without exception a sub-trust in name of the employee was established. In (almost) all of these cases loans for the full amount advanced for an extended term (10 years) and on a discounted basis were granted by the trustees to the employee. The terms of these loans to date have not expired but the employees' general expectation is that they will be renewed. The discount reflected LIBOR interest rates fixed at the outset plus about 1½ to 2%.

(viii) Subject to limited exceptions none of the loans has been waived and none of the nominated employees has obtained an absolute right to any part of the capital value of the loan.

(ix) Virtually all the sub-trusts continue to date.

(x) In July 2006 the original trustee of the Principal Trust, Equity Trust Jersey Ltd (known earlier as Insinger Trust Company Ltd) was succeeded by Trident Trust Company Ltd. Each trustee was resident in Jersey. Sub-trusts set up before that date had also been administered by Equity. Certain of these were also transferred to Trident then. The new appointment made by MGML was prompted by several instances when Equity had questioned certain loan applications, which had delayed payment.

(xi) In the case of the Group's employees other than footballers, they had no contractual right to a bonus. However, a practice had developed within the Group to pay on a discretionary basis annual bonuses depending on the work performance of the employee and the profitability of his employing company.

(xii) In the case of certain footballers the terms of engagement were commonly recorded in two documents, one being a contract of employment, the other being described as a side-letter. The latter would provide ordinarily for the constitution of a sub-trust in name of the footballer. While the SFA required players' contracts to be registered with it, Rangers did not consider it appropriate to have side-letters registered.

(xiii) A Statement of Agreed Facts relative to the circumstances of the Appeal was concluded by Parties.

Appellants' Submissions

104. The validity of the Trusts, the structure of the Principal Trust and sub-trusts, is a crucial issue in the Appeal and is inter-related with the matter of the legal right to recover the loans advanced. While they are administered in Jersey (and their tax *residence* is presumably there), the proper law of the Trusts is declared to be English Law and we had expected the customary format of this being proved as a matter of fact by way of expert evidence. However, Counsel indicated that on this occasion they proposed to address us on this as a matter of law, English law being one of the systems with which the Tribunal , having the "UK" as its jurisdiction, would be expected to be conversant: Section 26, Tribunals Courts and Enforcement Act 2007. (We refer to the commentary in *Walkers on Evidence* para 415(a) and note the somewhat comparable considerations affecting interpretation in relation to the taxation of charitable trusts). Mr Studer (rather than Mr Thornhill) presented the Appellants' submissions in relation to the Trusts over a two-day period and in due course Mr Thomson replied.

- Validity of Trusts

105. Firstly, on behalf of the Appellants Mr Studer addressed us on the validity and interpretation of the Trusts. Helpfully he prepared in advance a typed Skeleton Argument and then presented this to us with reference to the actual deeds and relevant authorities. Part of this was not controversial.

106. Initially, Mr Studer referred us to certain basic principles of construction in terms of English Trust Law, which were confirmed by references to *Halsbury* (vol 113, paras 164 *et seq*). Interpretation should be viewed from the standpoint of a reasonable person having all the relevant background knowledge and as a matter of business efficacy. An intention, if clear, even if not exactly stated, should prevail. A deed should be read in its entirety and as a *unum quid* with other inter-related documents. A *purposive* construction should be pursued and that with a view to upholding an instrument rather than invalidating it. A deed should be considered void from uncertainty only in instances where it is unintelligible in that context.

107. In addition to the Definitive Deed dated 20 April 2001 by MGML creating the Remuneration Trust there were 108 sub-trusts, five of which were for MGML's employees. Of the other 103, 22 were for employees of other companies in the Group, and 81 for players in Rangers. Essentially the other companies in the Group adopted the Definitive Deed by individual Deeds of Adherence. Significantly and problematically the Deeds of Adherence pre-dated the amendments of June and November 2002 and October 2005.

108. In relation to the Trust contributions made by the adhering companies Mr Studer argued that these represented separate funds to be held in trust for only the families of employees of that particular company. He considered that individual *referential trusts* had been created in such circumstances and referred us to the narrative in *Thomas and Hudson: Law of Trusts* 5-55 to 57. It was nonsensical, Mr Studer argued, that an adhering company would wish to benefit employees of other group companies and their families. Each Deed of Adherence was declared to be *supplemental* to the Definitive Deed and so fell to be construed in conjunction with it or by reference to it.

109. The amending deeds which bore to affect the Definitive Deed and post-dated the Deeds of Adherence should not affect the sub-trusts for employees of the subsequently adhering companies. None of the adhering companies was a party to the amending deeds nor consented to them.

110. In the event we understand that HMRC do not challenge the existence of some trust structure affecting the payments into trust made by the adhering companies.

111. In relation to the Definitive Deed the effect of the three amending deeds is more complicated. Mr Studer considered in turn the efficacy of the Deed of Variation of January 2002, the Deed of Amendment of November 2002, and the Deed of Amendment and Rectification of October 2005. In presenting his argument he invoked the principle of *severance*: while certain of the contents of particularly the January and November 2002 Deeds had to be disregarded as contravening the Definitive Deed, the remainder could stand. In support he founded on *Harvey* v *Stracey* and Thomas on Powers, page 158.

112. The first of the amending deeds affected the class of beneficiaries, and while the matter of certainty of definition of the class could arise, Mr Studer submitted that in the case of a discretionary trust it was not necessary to enumerate precisely every

possible member. It was sufficient for the "any given postulant" test to be satisfied ie by reference to whether a particular individual qualifies (see *Thomas and Hudson: Trusts* 2ed para 4.09 *et seq* and authorities noted there). There were in fact records of persons who would qualify as beneficiaries (as "providers") to assist. Thus the first amending Deed except insofar as in conflict with the terms of the Definitive Deed should stand.

113. In relation to the Deed of Amendment of November 2002 a purported alteration of the class "excluded persons" in the Definitive Deed had to fall as conflicting with the terms of the earlier deed. However while the November Deed's purported "3 day" retrospective effect could not be recognised, it could apply prospectively. Further, the Trustee's powers of appointment under the Definitive Deed could procure the purported restriction of beneficiaries in terms of the November 2002 Deed.

114. The Deed of Amendment and Rectification of October 2005 was necessarily invalid so far as purporting to take effect from the date of the Definitive Deed, but it could still take effect prospectively. While in the case of Mr Red's sub-trust certain special considerations arose in relation to the beneficiaries, the power to lend to him (and presumably to seek repayment) was not affected.

115. In short, Mr Studer submitted, while technical criticisms can be made of the three amending deeds, they should not be set aside in their entirety as void. Their sound and severable contents were of effect and fell to be viewed as a *unum quid* with the Definitive Deed.

116. Mr Studer then analysed the role and capacity of the employee appointed as *protector* of his sub-trust. The concept of *protector* is not unfamiliar to English trust law: see *Underhill and Hayton: Trusts* 18 ed at para 1.78. A *protector* is distinguishable from a trustee in that trust property does not vest in the office. However, it is not a term of art in English law and its character depends on the powers conferred in each individual case. These powers may be fiduciary or may be personal. While the latter are exercisable in favour of the *protector* himself, the former are not. Critical in this present appeal is whether the powers conferred by amendment are exercisable for the *protector's* personal benefit. Ordinarily powers to add further beneficiaries are fiduciary. So too are powers to appoint further trustees and powers to amend the trust deed. In particular in the case of sub-trust no 1 (for Mr Black's family) Mr Studer argued that Mr Black himself for a variety of reasons could not place trust funds at his own disposal. Mr Studer argued in support of a similar conclusion in relation to the other sub-trusts. As their wording varied somewhat, he considered the other trusts in several distinct categories.

117. In conclusion, according to Mr Studer, MGML's sub-trusts stand as valid in terms of the Definitive Deed and the Amending Deeds under severance of any infringing elements and, where appropriate, prospectively. The other sub-trusts created by Deeds of Adherence by other companies in the Group fall to be recognised as *referential trusts* for the benefit of the families of employees of the respective companies. In none of the sub-trusts could the *protector* appoint trust property to

himself, he considered. Finally, in Mr Studer's submission, all the funds paid with the intention of their being held in trust were indeed held in terms of an enforceable trust.

118. The Tribunal raised with Mr Thornhill what the consequences would be were the trusts to be held as ineffective. He agreed with the Tribunal's postulation that on that hypothesis possibly all the employees had received was a loan, the creditors of which in the *scenario* posed would be MGML and the other companies in the Group. Such a loan, if on commercial terms, would not represent an emolument for tax purposes, in his view.

- Taxation

119. Following on Mr Studer's submissions Mr Thornhill then addressed the Tribunal in relation to the taxation implications of the Remuneration Trust. Although he had lodged Written Submissions for our reference at the outset he explained that in his oral submissions he proposed to concentrate on what in view of the evidence had emerged as the key issues. The legal relationships created by the trusts were critical. So also were the loan arrangements. He founded on the Special Commissioners' decisions in both *Macdonald* v *Dextra Accessories Ltd* and *Sempra Metals Ltd* v *HMRC*. He posed for the Tribunal two questions. "Can it be said that funds set aside under such trusts effectively belong to the employee in such a way that they become emoluments?" Further, had the funds been "… put unreservedly at the disposal of the employee in question?" In each case, he considered, the tests had not been satisfied. He noted also a (then) impending change in the relevant legislation imposing a charge where loans are made from an Employment Benefit Trust (or Remuneration Trust) to an employee. (See Finance Act 2011, Schedule 2, noted in para 4 hereof). This change was unnecessary, he submitted, if the loans were already the property of the employee and assessable on him.

120. Mr Thornhill led us through the relevant legislation – contained for 2002/3 in the Income and Corporation Taxes Act ("ICTA") 1988 and for the subsequent years in Income Tax (Earnings and Pensions) Act ("ITEPA") 2003. The content of both was broadly similar but the presentation differed somewhat. ICTA 1988 imposed a charge on both *emoluments* and on *benefits in kind* or their cash equivalent. There was a charge also in respect of beneficial loans. A "receipts" basis for assessment purposes was introduced into ICTA: earnings were taxed in the Year of receipt but the mode of taxation depended on the Year to which they related: Section 202A. Broadly this treatment continued into the scheme of ITEPA 2003. Mr Thornhill noted in particular Section 202B ICTA: it bears to refer to the stage when emoluments are due and payable, which normally will be when the work has been performed and payment from the employer can be claimed. This posed the question of the tax consequences of the employee waiving his right to payment before it is due: he should not then be taxable, Mr Thornhill argued. More controversially, what should the tax consequences be where the employee opts instead for an alternative such as a Remuneration Trust benefit? Then, Mr Thornhill submitted, the employee should be taxed not on the emolument but on the benefit. It was irrelevant, he continued, whether the Remuneration Trust benefit was contractual. He conceded that where it

derived from a (footballer's) side-letter it was contractual, but not in the cases of bonuses paid to employees of other Murray Group companies.

121. Mr Thornhill then referred to the PAYE legislation and the provisions of the Social Security Contributions and Benefits Act 1992 anent National Insurance contributions and Section 8 of the Social Security Contributions (Transfer of Functions) Act 1999 under which the decision disputed in the Appeal had been made.

122. Mr Thornhill then turned to the provisions of ITEPA which apply to most of the Years of Assessment under appeal. The charge on "employment income", on "general earnings", and on "specific employment income" is set out in Sections 1, 6 and 7. There are particular provisions in respect of beneficial loans. He noted Sections 16, 17, 18 and 19, which deal with the Years by reference to which earnings are taxed. Then he referred to Sections 62-63 which define "earnings" and other taxable benefits. (While the structure of the provisions differ from the 1988 Act, their effect is similar).

123. Mr Thornhill then considered specific provisions relating to the taxable benefit of loans. Section 173 ITEPA relates to employment-related loans as defined in Section 174. A charge arises under Section 175 where it is a "taxable cheap loan". (The witness, Mr Turquoise of PwC, had considered this and had advised his client that the charge did not apply). Section 188 deals with the situation where loans are written off or released and consequently treated as earnings. He read this in conjunction with Section 189. He considered that in circumstances in which a loan is written off post employment, an effective tax charge would result under these sections.

124. Mr Thornhill next addressed the tax legislation on "termination payments". ICTA, Section 148 and Schedule 11, had been superseded by parallel provisions in Section 401 ITEPA. The charge is imposed on payments connected in any way with the termination of an employment or change of duties or change in earnings, which are not otherwise taxable. The charge is subject to an exemption of up to £30,000. On the basis of the evidence Mr Thornhill invited us to distinguish three categories (i) a "golden goodbye" in appreciation of <u>past</u> services, which, if taxable, was taxable as earnings of the employment; (ii) a payment to get rid of an employee, say a footballer, which would be taxable only under Section 401 as compensation for <u>giving up</u> the employment; and (iii) where payments were made to players who "signed" for another club, provided that they continued playing for that club. This last payment fell outwith Section 401 but could be taxable as earnings of the new employment on the basis of *Shilton v Wilmshurst*. In the second category, where additionally the bargain concluded is for a payment into the Remuneration Trust, could it be taxable under Section 401? There was no case-law to assist, so far as Mr Thornhill was aware. The interpretation of Subsections (1) and (4) was complex , he accepted, but he submitted that if the employee never had right to the money himself, but had arranged for it to pass to the Remuneration Trust, it should fall outside Section 401. In relation to the interpretation of the words "… to the order of …" in subsection (4)(a) Mr Thornhill invited comparison with the interpretation of similar

wording in the Bills of Exchange Act 1882. (See para 7c of his Supplementary Skeleton Argument).

125. The final statutory reference was to Sections 684-687 ITEPA affecting PAYE. If applicable, PAYE liability after an employment had ceased, would be at the basic rate only. (The appeal was against determinations which had been made at the higher 40% rate).

126. Mr Thornhill then addressed the Tribunal on the relevant case-law. Firstly, he referred to the decision in *Sempra*. That related to *inter alia* an Employment Benefit Trust (analogous to a Remuneration Trust) and a second trust for employees' relatives and dependents. The issue arising was whether payments by the employer to the EBT and then to the family trust constituted emoluments or earnings. The Special Commissioners held that they did not. (Their decision was not appealed by HMRC). The circumstances of *Sempra* were, Mr Thornhill argued, similar to this appeal. In particular each employee had the choice of a bonus paid in cash or the amount of the bonus paid into trust. Loans were readily available, on a long-term basis, with a liability to pay interest. An Inheritance Tax advantage was available if the loan remained unpaid at the employee's death. Each employee had his own fund or "pot" allocated to him and held by the trustees. They were largely co-operative with the company's wishes. No loan applications were refused. Generally it was not expected that loans would be repaid. If they were, the proceeds would still be held by the trustees for the employee's family's benefit. The total indebtedness increased over the years: in one case it exceeded 20 times the employee's salary.

127. Crucially, when the employee elected for the payment to be made into the trust, he had no entitlement to the bonus. This contrasted sharply with the decisions in *Heaton v Bell* (an early case mentioned by the Tribunal) and *Smyth* v *Stretton*. In both there was a contractual entitlement to a higher pay when election for the alternative benefit (respectively the private use of a car provided by the employer and a pension contribution) was made. In both cases the Court held that there was a "convertible" benefit and the employees were taxed on their gross salary before deduction. Mr Thornhill noted specifically the principles set out in para 139 of *Sempra*. *Payment* takes its meaning from its statutory context. Placing money unreservedly at the disposal of an employee is equivalent to payment. It states in terms - "Bearing in mind the definition of emolument, the placing of a perquisite or profit unreservedly at the disposal of an employee can also be equivalent to payment. However, the concept of payment is a practical, commercial concept and, for the purposes of the PAYE system, payment ordinarily means actual payment, that is a transfer of cash or its equivalent and not merely the discharge of the employer's obligation to the employee". Later at para 142 the Special Commissioners refused to accede to HMRC's invitation to find that the payments by *Sempra* into trust had been placed unreservedly at the disposal of the employee and that that was equivalent to payment to the employee. They refused to find that the monies held by the trustee had vested in the particular employee when the amounts were allocated by the trustee. Such a conclusion would have ignored the trust, the trustee's discretion, and the loan arrangements. While the trustee was likely to comply with all reasonable requests, it was not a cipher. The Special Commissioners concluded at para 144 that "… when

the [Appellant] made payments to the trusts, no transfer of cash or its equivalent was placed unreservedly at the disposal of the employees. That means that there was no payment by the Appellant of emoluments or earnings giving rise to an obligation to deduct income tax and pay it to the Revenue". The Special Commissioners acknowledged that in formulating their interpretation of "payment" they had considered the decisions in *Garforth* and in *DTE Financial Services Ltd*.

128. While Mr Thornhill was resigned to criticisms being made of Mrs Crimson's evidence, he insisted that there was an effective trust structure, however lax the administration might be. Moreover, there were loans, which were bi-lateral and recoverable. There was a contrast between breach of duty and negligence by a trustee: Mrs Crimson's trust company could benefit from a generous exemption provision in respect of the latter. He stressed that the factors crucial to the Special Commissioners' decision in *Sempra* followed a parallel to the circumstances of the present case. In essence he submitted that on the basis of *Sempra* no liability to tax could arise where the employees (the non-footballers) elected for the trust option instead of a discretionary bonus payable via payroll. Nor was there a payment of earnings in the footballer cases on the basis of an obligation to make payment into trust with a recommendation to the trustee to set up a sub-trust being fulfilled.

129. Mr Thornhill then discussed the Special Commissioners' decision in *Dextra*, which dealt *inter alia* with payments into an Employment Benefits Trust. (This aspect of their decision was not the subject of appeal by HMRC). While in certain respects it represented a "stronger" case than this appeal from the taxpayer's viewpoint, there were similarities. There was a structure of sub-funds. The three directors were remunerated almost entirely via the trust and were not paid a significant salary. The loans were substantial. The persons principally involved had controlling interests. While there was the likelihood of compliance by the trustee with the taxpayer company's wishes, the Special Commissioners did comment on the conscientious view taken by the trustee of his duties. The Special Commissioners agreed with HMRC that they should adopt a commercial approach in deciding whether or not there had been a payment of emoluments or earnings. They commented that – "Cash in the sub-fund is equivalent to cash in the individual's money-box only if the trustee is, in a commercial sense, inevitably compelled to comply with the individual's wishes, which we have found that it is not". The Special Commissioners rejected any argument that the EBT was an artificial tax avoidance scheme and refused to apply a *Ramsay* approach, distinguishing the decision in *DTE Financial Services Ltd* v *Wilson*.

130. *DTE* involved a PAYE avoidance scheme. Its circumstances were highly artificial. There was an arrangement of very brief duration with funds being placed in an offshore trust in which a contingent interest was created, then transferred and then sold. The desired result was achieved – that of paying a bonus to its director, Mr McDonald – after a sequence of pre-ordained transactions, the intermediate one being purely for tax avoidance. The Court considered it appropriate to invoke the *Ramsay* doctrine in relation to the question of payment. In the Court of Appeal it was stressed that payment was a practical, commercial concept. It meant actual payment,

a transfer of cash or equivalent. The cash payment received was assessable income for purposes of Section 203(1) ICTA 1988.

131. Mr Thornhill submitted that in this Appeal the question was whether money ended up in the employees' hands. It had obviously in the case of Mr McDonald in *DTE*: it was his property. But in the present case was the money at the employees' disposal? While *Ramsay* had been invoked in *DTE* about the application of PAYE, it was not apt here (as in *Sempra*) to determine whether the funds were at the employees' disposal.

132. Mr Thornhill then referred the Tribunal to the decision in *Paul Dunstall Organisation Ltd* v *Hedges*. There, a bonus had been awarded in the form of a beneficial interest in land. The interest was undivided and could be turned into money. As it had been placed unreservedly at the disposal of the employee, it was considered to be equivalent to payment and assessable under Schedule E.

133. Mr Thornhill then sought to distinguish the decision in *Astall* v *R & C Commissioners* in the Court of Appeal. There a tax avoidance scheme had been devised using "deep discount securities". There was a 15% chance of a "market change" condition occurring which would frustrate the objective. That was considered sufficiently low to be ignored given that the taxpayers were willing to take the risk. Mr Thornhill distinguished this decision as a *Ramsay* case: there was a significant artificiality in the arrangement. In this context he noted also the decision in *CIR* v *Scottish Provident Institution*, where there had been a composite transaction. He referred particularly to the opinion of Arden LJ there and her review of the *Ramsay* principle. She approved the decision in *Mawson* which indicates that even in a "one step" transaction with several facets, no regard need be paid to artificially inserted provisions. The first stage of the correct approach is to understand the meaning of the relevant statute, and thereafter to apply the law to the transaction viewed realistically.

134. Mr Thornhill confirmed that the *Ramsay* principle applied in the present case for the purposes of construing the relevant legislation. That required a purposive and contextual construction. There did not appear to be a dispute about construction, however, here. Quite simply, the issue was whether funds were put unreservedly at the disposal of the employee. They were not, Mr Thornhill insisted. In the present case – as in *Sempra* – the loans might be viewed as "soft" loans: they were on attractive terms, unsecured and for substantial sums. But they were not artificial: they were the object of the transaction and the intended end result. "Payment" could not be extended to cover such a loan arrangement. Moreover, there were real trusts, with trustees who had duties and discretions. Similar trusts had been acknowledged as valid by the Jersey Courts.

135. Mr Thornhill then referred to the special circumstances arising in *Shilton* v *Wilmshurst*. There, the taxpayer (a goal-keeper) had been transferred by one Club to another. The dispute related to an arrangement by the transferring Club to pay Mr Shilton £75,000 if he were to play for four years for the transferee Club. This was held to be taxable as an emolument of an employment: the charging provisions could

extend to emoluments for future services, even when paid by the former employer. In essence it was an inducement to take up the new employment. The charge arose for purposes of the basic charging provisions, not the provisions contained in Section 401 affecting "termination payments". The relevance of this decision to the present case is that there were, Mr Thornhill conceded, certain instances (Mr Purple and Mr Ely) in which such a tax liability arose. However, having made that concession for certain limited instances, Mr Thornhill invited us to make a decision in principle, affecting the arrangements here generally, but allowing the exceptional circumstances of particular cases to be resolved (ideally by the Parties themselves) individually.

136. Mr Thornhill stressed again in relation to the basic charging sections (Sections 202A & B ICTA and Sections 62-63 ITEPA) that until the time payment became due the taxpayer could without tax consequence either waive his future right or select an alternative, such as re-directing the payment into a trust. To avoid liability to income tax the re-direction must be made timeously, before the salary payment became due. However, if he has acquired a right contractually due after performance of his duties, such as a guaranteed bonus, and he then directs these to be paid into the trust, he is taxable. There it is too late to make the change. All this is consistent with the decisions in *Dextra* and *Sempra*, Mr Thornhill submitted.

137. This distinction applied to the payments characterised in the course of the hearing as termination payments. Section 401 ITEPA applied only to payments within its scope *viz* payments and benefits on termination of employment or on changes in duties or earnings. Other payments made at or about the termination of the employment fell to be categorised either as emoluments or earnings or not. Belated recognition for services would be emoluments, while payments connected with a football player's transfer to another Club would not. In neither of these cases would Section 401 apply.

138. Essentially Mr Thornhill's stance was that if monies were paid into the Remuneration Trust and the employee did not become entitled to them, and had never been entitled to them, he would not ordinarily be taxable on them. Exceptions could arise, however, and he considered in this context the possible effect of the employee's becoming *protector* of "his" sub-trust. If that meant that the funds were at the employee's absolute disposal, he would be taxable. However, adopting the submissions of Mr Studer, the role of the *protector* was fiduciary: he could not exercise his powers for his personal benefit.

139. Mr Thornhill then turned to *Heaton* v *Bell* which the Tribunal had raised earlier. There an employee was given the opportunity to have the private use of a car provided by his employer. If he decided in favour of this, there would be a reduction in his wage. The issue was what was his taxable wage. The opinions in the House of Lords indicate that what was crucial was the true interpretation of the agreement and what legal relationships had been created. It was held that the true agreement was that the wage remained unchanged. Quite simply the employer was entitled to recoup the outlay from the wage paid. Significantly the employee could revert to his original position of receiving his full wage and return the car. The same principles,

Mr Thornhill argued, should apply to the various circumstances arising in the present case ie what was the legal reality created in each case? In the case of footballer's side-letters, these were contractual. They were part of the remuneration package. The Tribunal, Mr Thornhill submitted, had to decide what legal relationships had been created especially under the Remuneration Trust.

140. Mr Thornhill then referred to the matter of the Champions League bonuses. He urged us to accept Mr Scarlet's evidence as truthful, *viz* that the agreement that there should be a payment into trust was reached just before the match in Famagousta. In that event no special legal considerations arose – the bonuses should be treated similarly to other such payments. But even if the bonuses had been agreed at the start of the season, before the games were played, and so before any entitlement to payment arose, parties could still adopt a different arrangement for payment into trust without prejudice to their being free of tax.

141. Mr Thornhill emphasised that the validity of the trusts was crucial to this argument, whether in the case of discretionary bonuses paid to "non-footballers" or payments in terms of the footballers' side-letters. The Tribunal posed the question of what the effect of the loan arrangements would be in isolation, ie if the trust arrangements were a nullity. Could there be a taxable emolument if a loan were not released? Mr Thornhill submitted that there would not, but adhered to the submission of Mr Studer that the trusts were indeed effective. Further and in any event he argued that the loans should be viewed as bilateral arrangements. The players/employees seemed to view them as genuine. Two players had made a considered decision not to accept loans. Others who had, had made repayments. Others had sought professional advice on the loans. While criticism could be made of Mrs Crimson's company's approach, that did not negate the commerciality of the arrangement as "loans" even although they might be regarded as "soft" loans.

142. The evidence about the engagement of players and the terms which typically included trust benefits in terms of a side-letter, was that Rangers FC would make an offer on a "take or leave it" basis. There, Mr Thornhill indicated, the trust benefits would not be taxable. But, he argued further, even if there had been an option between a trust benefit and a payroll payment, election for the trust benefit would not be taxable as long as it was exercised before any contractual right arose. Even in the case of a compromise agreement involving a trust payment concluded in the course of the player's employment, that should still escape tax, in Mr Thornhill's submission, provided that the trust payment was not a payment made "to the order of" the player. If the trust payment was not the subject of an election exercised by the player in such circumstances, it would fall outside Section 401.

143. In Mr Thornhill's view the need to introduce in FA 2011 the further anti-avoidance provisions forming Part 7A ITEPA tended to suggest that there was a *lacuna* in the charging provisions affecting trust arrangements like those implemented in the present case. That, he argued, reinforced his view that liability under PAYE and NIC did not arise.

Respondents' Submissions

144. On behalf of the Respondents Mr Thomson presented the Tribunal with an extensive typed narrative of the telling aspects of the evidence as he considered it together with his legal arguments. These – ten in number – depend on a detailed factual analysis, demonstrating an orchestrated scheme delivering cash to the employees free of tax and NIC, and devised purely for tax avoidance purposes. It was artificial and not legitimate, he argued. The assessments under appeal had been based on the grossed-up value of the cash received at a rate reflecting higher rate tax liability in view of the earnings level of those persons benefitting.

145. Mr Thomson's submissions rely substantially on *Ramsay* but extend beyond that. They are in a sense a *Ramsay Plus* argument, founding also on the availability of cash (the "cash box" argument) and on a lack of candour on the part of the Appellants and their witnesses (the "obfuscation" argument). Several other heads of argument are highlighted. The decision in *Sempra* is faulted in his view.

146. There is a sharp contrast between the approach of the Appellants' Counsel who stressed the legal consequences of the trust structure and loans and, on the other hand, Mr Thomson's argument which relied on an intricate factual tapestry, woven from witness evidence and documentary records presented in the course of the hearing. A careful analysis of the credibility and reliability of the various witnesses was required too, he argued.

147. Mr Thomson's submissions depended on detailed factual findings about the functioning of the Remuneration Trust. He saw it as a mechanism for placing cash unreservedly in the hands of the employee, together with the advantage of avoiding tax. The evidence led by the Appellants tended to conceal the real way in which the trust operated in his view. False evidence, he claimed, had been given in many respects. Monies paid to footballers by Rangers in terms of *side-letters* were agreed in advance as "part and parcel" of the employment contract. The true nature of the employment trust payments may well not have been disclosed to the Club's auditors, Mr Thomson ventured. Discretionary bonuses paid to executive staff were in reality part of annual salary, he submitted. Realistically loans were not genuine. They would be renewed automatically and would never be repayable, he said. When Equity had become obstructive as trustee, it was replaced by Trident, and in the *interim* payments into the trust were held back. The employees' expectations were that one way or another the "trust" benefits would be paid to them. Trust and payroll payments were in effect interchangeable. Whether footballers or executives, the Group's employees could opt for a trust or payroll payment, Mr Thomson argued. The trust was a cipher and a travesty of a true discretionary trust. It was complicit with the employer and not independent. It was a "well-oiled" machine, operating in a pre-ordained manner, with a pre-determined result, *viz* the employee receiving the cash unconditionally and free of tax. Sub-trusts were opened automatically on the employee's submitting a loan request. That was the signal to the trustee that funds would be transmitted. There was no evidence of the exercise of the trustee's discretion in establishing the sub-trusts. The concept of the employee or footballer as *Protector* was a nonsense. That relationship in conjunction with the relationship

between the main trust and powers of the employer undermined any argument in support of the trust and loan arrangements being an enforceable legal reality, in Mr Thomson's view.

148. In the course of their enquiry there had been concealment from HMRC of many relevant documents. In footballer employment files volunteered to HMRC *side-letters* had been removed apparently. However, in files seized unexpectedly from the Club *side-letters* were present. No records had been produced in relation to the approval of executives' bonuses. This was highly relevant, Mr Thomson stressed, particularly as the *onus* of proof lay on the taxpayers. Mr Red and Rangers had not been forthcoming in providing all relevant documentation, he suggested.

149. While Mrs Crimson emphasised Trident's seeking "World Check" information about the sub-trusts' *Protectors*, the value of that information was useless other than for money-laundering purposes.

150. In reviewing the credibility and reliability of the Appellants' witnesses Mr Thomson delivered a coruscating attack particularly on Mr Red and Mrs Crimson. He reviewed Mr Red's attitude earlier towards HMRC's investigation as well as his evidence before the Tribunal. Mr Red, he submitted, had been uncooperative and misleading in the course of the investigation. He had lied in material respects to the Tribunal, Mr Thomson claimed. Most culpably, having given his own evidence he "approached" Mrs Crimson on the eve of her giving evidence, giving her documentary records relating to company minutes in relation to payments into the trust and other matters of its administration. Apparently he had asked her to consider the terms of these documents before giving her evidence.

151. What emerged from Mrs Crimson's evidence was that Trident was no more than a cipher, prepared to act on the directions of the Murray Group, and which disregarded the duties of trusteeship. Mrs Crimson's answers were often in formulaic terms. In her Witness Statement she had indicated that copies of the sub-trust accounts had been sent to the Group companies. This was not in fact the case, Mr Thomson said.

152. Mr Thomson's criticisms extended to other officials of the Murray Group. For instance, there was a collective hesitancy to describe the Scheme's purpose as "tax avoidance". Their evidence and Witness Statements spoke with a "solidarity" following a "corporate line". This to an extent might be explained away by the English practice (followed here) of Counsel drafting the initial form of Witness Statement, but major concerns remained. Mr Thomson made criticisms of the evidence of Mr Black, Mr Blue, Mr Magenta and Mr Scarlet. Messrs Magenta and Scarlet had, Mr Thomson suggested, given a rehearsed account of the negotiation of the 2005/06 UEFA bonus on the eve of the crucial match at Famagousta. Only at the last minute was it agreed that a payment into trust should be made, they claimed.

153. On the other hand the testimony of HMRC's Inspector 1 and Inspector 2 was both credible and reliable, Mr Thomson submitted. (Mr Thomson again confirmed

that he would not be relying on any inferences drawn by them, only their evidence as to fact).

154. In addition to criticisms of witness testimony Mr Thomson commented on the dearth of documentary evidence generally from the taxpayers. The motivation for the Scheme was tax avoidance. There was an absence of board minutes, for example, relating to contributions to the Trust. Mr Red (Witness Statement paras 2 and 9) seemed to suggest that one object was supporting employees at times of low profitability, or in cases of hardship. In fact it was only an "elite" group of employees which benefitted.

155. Mr Thomson then addressed the nature of the Scheme. It was a bespoke package. Its whole purpose was to put cash at the employees' disposal. That, he submitted, was achieved when payment was made into the particular sub-trust. At that stage the money was unreservedly at the employee's disposal, he argued. All the employees, except the footballer Mr Gold, took out loans for the full sums paid into trust. The intention was that these loans would never be repaid.

156. The formal terms of the Trust fell to be ignored. In reality the trustees had no discretion. The Trust was not genuine: it had a nominee function. In reality the *Protector* (the employee) was the settlor and his "Letter of Wishes" was in fact his instructions. The trustees "in blind obedience" created the sub-trusts. The loans, Mr Thomson argued, were in breach of trust. They were not "commercial", and were conferred on persons who were not beneficiaries. They were deeply discounted and were not secured. The *Protectors* exercised power to create personal (not fiduciary) benefits. The trustees had no independent will: they had a very wide indemnity: the employer used the trust to meet the individual employee's desires. The powers of the employee/*Protector* over the sub-trust fell to be viewed in conjunction with the power of the employer over the principal Trust when reviewing the Scheme.

157. Mr Thomson then addressed the Tribunal on the introduction of the various categories of employees into the Scheme. In the case of non-footballers it seemed that they had an option between a payroll payment subject to PAYE or a trust contribution. Essentially the trust was considered to be a means of paying bonuses free of tax. The employee had the option, not irrevocable in nature, between a payroll payment and a trust contribution. It seemed that the employee's duties as *Protector* were never explained. Mr Thomson noted in particular the £50K paid for a sub-trust for Mr Sheffield. He had no formal contract of employment or duties within the Group but was described as Mr Black's "fixer". This payment into trust had to be for services, Mr Thomson argued. In the case of Mr Indigo £200K had been paid into trust, coinciding with an increase in his workload for Rangers, which he believed was in acknowledgement of that.

158. So far as the footballers were concerned the matter of the Trust was customarily raised in negotiations. While an overall "package" would be agreed for a net amount, there would be a split between payroll and trust payments. In reality both represented earnings, Mr Thomson asserted. So far as loan arrangements were concerned, given the age of players, successive renewals must have been envisaged.

159. The suggestion made on behalf of Rangers that Mr Black's involvement did not extend beyond concluding an outline agreement and a specific overall figure, was not borne out in evidence. Given that the burden of proof rested on the Appellants, there was a dearth of evidence available to support the Appellant's contentions about the nature and stages of the process of agreeing "deals" on the engagement of footballers. Mr Thomson referred to specific individuals. All sub-trust monies had been withdrawn as "loans" except in the case of Mr Gold's sub-trust. The *side-letters*, while not disclosed to the SFA, were in reality part of the player's contract with the Club. The players expected to receive the monies paid into trust. Mr Violet believed that the purpose of the Trust was to suit Rangers. So far as he was concerned, his lawyer had reassured him that the arrangement was legal. However, according to Mr Thomson, given that the burden of proof rested on the Appellants, it had not been shown that the *side-letter* benefits were other than part of the contract of employment of the players. He founded on the Supreme Court's recent decision in *Autoclenz v Belcher* in support of his contentions. That decision related to employment status but, in Mr Thomson's submission, it enabled the Tribunal to view the reality of the trust payments here ie that they represented disguised remuneration for Schedule E purposes. Whether payments were made via payroll or trust, the system of payment was interchangeable. When Equity as trustee had become uncooperative, it was promptly replaced by Trident. When recently the tax advantage of trust payments had ceased for Rangers, remuneration due to Messrs Maidstone and Mr Guildford was made via payroll. Rangers had promised to ensure that even if the trust arrangements ceased, alternative arrangements would be made to give the players their agreed net pay. That crucially was the underlying reality.

160. Mr Thomson complained that it was difficult to ascertain whether the player's contract of employment started with both the disclosed contract and *side-letter* being signed, or at an earlier stage and then reduced to formal terms, since the taxpayers had disclosed only limited documentation. The over-arching contract was the contract of employment and the *side-letter* was part of it. No explanation had been advanced for its being a separate document. The inference was obvious: it was secret and not to be disclosed. *Side-letters* were used for periodic payments during the employment, in effect payment of a wage. They were used also for payment of bonuses and appearance money, and even for termination payments. Use of the term "net" was indicative of the payment relating to the employment. Why would the term be used had the sub-trust been intended to benefit a relative, Mr Thomson asked.

161. *Side-letters*, of course, had not been registered with the football authorities, the SFA and SPL. The spirit of their rules was that the whole contract terms should be registered. Suspiciously, no evidence was led as to who decided that the benefits in terms of the *side-letters* should not be registered. Non-registration of *side-letters* was incompatible with both authorities' policing and disciplinary powers. For example any fines imposed on players would customarily reflect the disclosed wage. Non-disclosure would thwart the authorities' powers.

162. Mr Grey had indicated correctly that payments from promotional and other commercial bodies need not be registered, but the *side-letter* payments, Mr Thomson argued, were not from such a third party but from the Club and for playing football.

The Rules required the widest declaration of benefits, he submitted. It seemed that Mr Grey was unaware of the trust being used for "appearance money", he observed.

163. On any view, Mr Thomson argued, Rangers could have sought a ruling from the SFA or SPL about disclosure of *side-letters* but, clearly, they had chosen not to do so. There was a conscious decision to conceal their existence, and that extended even to the Club's auditors. The nature and arrangements under the Remuneration Trust had not been disclosed in full to the auditors. In the "key issues document" for 2004 they indicate that they have not reviewed the Trust's operation and receipts in detail. Mr Thomson noted in particular payments made relating to Mr Purple's contract in relation to disclosure. Significantly, while Rangers granted numerous indemnities in respect of players' potential tax liabilities, these documents did not refer expressly to *side-letters*, Mr Thomson added.

164. Mr Thomson then scrutinised the terms and efficacy of the Trust documents. We consider the legal effects of these in our Decision *infra* (paras 213 *et seq*). In broad terms, Mr Thomson submitted, certain of the purported amendments were inept and void, which had the effect of the terms of the main trust only governing certain subsequent trusts. Mr Thomson considered firstly the January 2002 Deed. Certain trust provisions were, he argued, void from uncertainty. The "any given postulant" test was not satisfied. Mr Thomson submitted that Mr Red's evidence for the reasons for amendment was incomplete: there appeared to be further, undisclosed reasons as well as changes in accounting standards (*viz* UITF 32). The class of beneficiary (and "providers") was large and indeterminate and its boundaries were uncertain. This, Mr Thomson submitted, was a conceptual uncertainty. Arguably it could include as beneficiaries parties who could not on any realistic view be considered as potentially intended beneficiaries. Any argument as to "severance" of an offending provision did not save other minor provisions.

165. Mr Thomson then turned to the November 2002 purported amendment. It was, he submitted, void. Mr Black was not validly appointed as *protector*. Further, the purported amendment was forbidden by the terms of the original Trust Deed. While the Deed contains a power of appointment, that did not equate to a power of amendment. The trustees could not amend the trust deed to fetter their discretion.

166. In the course of Mr Thomson's reply to Mr Studer's arguments in respect of the trust arrangements the Tribunal queried whether, if the trust structure fell to be disregarded, would there still be enforceable and recoverable loans? This prompted Counsel for both parties to clarify their stances and, as it emerged, their views, however remarkably, tended to coincide (see Notes of Evidence: 9 November 2011 p3 *et seq*). Mr Thomson suggested that a loan made in breach of trust (eg a loan to a party outwith the proper class of beneficiary) was neither invalid nor voidable. However, the trustee/creditor might be liable for breach of duty. Mr Thornhill appeared to agree: there was an obligation to repay the loan and at a premium. Given that the existence of an obligation to repay was acknowledged by both Counsel, the matter of the loan being *ultra vires* seemed to diminish in importance.

167. Mr Thomson stressed that he did not view the loans as "shams". It was not necessary for the Tribunal to scrutinise the loan documents. His argument was that the whole arrangement was liable to tax as it was a mechanism for paying earnings. In that sense the loans, while not shams, were not genuine in any normal sense. (Notes, 17 January 2012, p46.)

168. Mr Thomson noted the involvement of Deepwater (a company associated with Equity) as a source of funding. However, it seemed, he suggested, that monies passed directly from Equity as trustee to the employee. Interest was compounded, and no actual payment was required. Separate loan agreements for each loan seemed to have been unnecessary.

169. There was *obfuscation* in relation to the manner of funding of the Trust. HMRC had apparently sought clarification of the basis on which funds were paid. Eventually it emerged that the Murray Group companies funded on the basis of specific sums going to particular individuals. That was the basis of the Scheme: otherwise funding would stop. With only one exception the sums paid into trust matched the sums loaned.

170. The resolution to advance cash followed the same formulaic terms. This, Mr Thomson submitted, reflected Messrs Baxendale-Walker's efforts to circumvent the relevant tax legislation. The advances on receipt by the trustees were placed on short-term deposit, all consistent with an imminent transfer to a sub-trust and then being lent.

171. The monies paid into the trust did not reflect the various companies' profits. Rather, they reflected obligations in the side-letters issued. A curiously high fraction of a football player's income was paid via the Trust as compared with payroll.

172. Mr Thomson then considered termination payments, made here in the case of footballers. The possible liability under Section 401 ITEPA 2003 had to be considered. A related issue was whether the tax liability was at basic or higher rate, depending on the date of issue of the P45. Many of these payments, Mr Thomson argued, were taxable under Section 401. (In some cases the £30,000 exemption under Section 403 had been acknowledged). However, Section 62 ITEPA could in many instances apply too, where payments represented a deferred payment of income (when higher rate liability could apply). The monies paid to Mr Indigo were such an example. Mr Thomson identified individual cases at pages 52-55 of the notes of 9 November 2011.

173. Section 401's charge applied when Section 62 did not. Mr Thomson considered particularly the scope of Section 401(4)(a) in respect of payments made "on behalf of or to the order of the employee".

174. Mr Thomson noted that most of these exceptional payments were made expressly "in full and final settlement", and use was made of the £30,000 exemption under Section 403. That suggested that they were within the scope of Section 401 rather than inducement payments, not otherwise taxable.

175. Mr Thomson submitted that the Appellants' interpretation of Section 401(4)(a) by reference to the Bills of Exchange Act was not apposite. The argument of the Appellants that "to the order of" is apt only when the individual has a right to receive the money himself, was not justified, explained Mr Thomson, in an anti tax avoidance provision.

176. The next matter addressed by Mr Thomson was discretionary bonuses paid to managerial and executive staff. The evidence here, he suggested, was unclear, but it seemed that employees were given a choice between a payroll bonus or a trust payment. The number and value of these discretionary bonuses seemed, however, to be small. The trust was used, he submitted, for payments where there was an onerous undertaking. In five instances involving footballers (Messrs Selby, Inverness, Doncaster, Barrow and Furness) it was accepted that the guaranteed bonus had been paid through the Remuneration Trust. However, Mr Thomson argued that there had been payment of guaranteed bonuses generally to other players. In support of this argument he relied on the evidence about the bonus for the UEFA Champions League 2005/2006. He urged the Tribunal to reject the evidence of Mr Red, Mr Magenta and Mr Scarlet to the effect that there had been no concluded agreement with the Club captain (on behalf of the players) until the eve of the match at Famagousta. (The Tribunal, of course, has considered their evidence earlier). The evidence of such a concluded agreement for payment via the Trust was contradicted by the facts that ultimately not all the team members received bonuses in that way. Certain of the players were not in the Trust Scheme. Accordingly the Tribunal was entitled to find, in Mr Thomson's view, that the Remuneration Trust had been used generally to pay contractually due bonuses.

177. Mr Thomson then addressed the involvement of the Murray Group in the operation of the Remuneration Trust. There was a high degree of involvement reflecting its use as a mechanism for payment of its employees. The payments into trust reflected payments to be made to specific employees. Mr Gold did not want a loan, yet documents were prepared on the basis that he did. Mr Red had again been less than candid about spreadsheets and other records kept in respect of the sub-trusts. Mrs Crimson's evidence was to the effect of receiving signed loan agreements in advance of sub-trusts being set up. Letters of Wishes and loan requests were made contemporaneously. The steps were pre-determined: trusts were set up without exercise by the Trustee of any discretion: the Appellant, not the Trustee, made the real decisions. The Appellants were involved in winding-up the sub-trusts. They held the "reins". The Trust was just an engine for passing on funds. Essentially this was the *Ramsay* argument.

178. Mr Thomson then considered the actings of the trustees. They did not seem to consider who properly were beneficiaries. They followed the requests of the Appellant companies and their employees. Any exercise of discretion was illusory. Sums earmarked for particular employees by the employer were passed on by the Trustee, who liaised with them and Messrs Baxendale Walker. The employees were specifically excluded as beneficiaries of the trust arrangements, yet "soft", non-commercial loans were granted to them. Loans on such a basis were a breach of trust. Trident operated the Trust as a money machine. No loan requests were ever refused:

information about debtors' ability to repay was never sought, particularly important where interest was discounted and loans were likely to be extended. Mrs Crimson seemed unaware that half of players' "remuneration" was in certain instances paid via the Trust. Also, she did not appreciate that certain substantial loans were advanced on the occasion of certain players' employment with Rangers ending, after which their earning capacity (and ability to repay) was likely to diminish. Trident had approved loans to Mr Black and his sons, which were in breach of trust. Trident was wholly complicit in the operation of the Scheme. The enquiry of Trident made by Mr Blue about a loan extension had been "provoked" by the present appeal, Mr Thomson ventured.

179. Mrs Crimson's responses about her duties as trustee seemed formulaic and her processing of trust administration was mechanistic, Mr Thomson stated. Once she received a loan application and Letter of Wishes a sub-trust was set up automatically. This did not require a decision by Trident as trustee. Some loan requests bore to be post-dated. Records were compiled in the same terms. As Mrs Crimson admitted, this was "processing" without individual consideration. The trust indemnity was "bullet proof" from the viewpoint of the trustee, and had been so deliberately drafted by Baxendale Walker to ensure the trustee's compliance. The trustee followed the employer's requests invariably.

180. In certain instances sub-trusts were purportedly set up but were incompetent. In one – Mr Berwick's – it was set up several months before he became an employee. Only then did he qualify as a beneficiary. Also Mr Black and his sons were Excluded Persons, yet sub-trusts in their favour were "opened" incompetently. Loan documents were drafted by Baxendale Walker on a *pro forma* basis. There was no evidence of directions by the Trustee or enquiry by them as to borrowers' financial circumstances. Renewals, it seemed, were assured by the Trustee without enquiry or consideration of player's future financial circumstances. (Loans would, of course, have been granted at the peak of a player's earning capacity).

181. In instances where sub-trusts had been terminated the Trustees cooperated fully and the employee kept the monies, Mr Thomson suggested. They cooperated with Baxendale Walker and did not take the initiative in seeking their advice. The employees did not seem to take an interest in the trust arrangements. The role of *protector* was never explained to them. In the case of Mr Aberdeen's voluntary sequestration, he omitted to mention his loan as a debt. The terms of the loan document were not apparently scrutinised. Where enquiry was made about the purpose of the loan, any unspecific reason seemed acceptable and was never verified. The employee's interests and wishes were always paramount. The rate of interest was not of apparent concern. Even Mr Blue, a CA, was unaware of the rate.

182. Mr Thomson then reviewed the manner of termination of certain trusts. The Appellants were intimately involved. The employee apparently retained the funds and the trust beneficiaries received nothing, he submitted. The beneficiaries seemed to be fully cooperative, but they could, of course, be changed by the employee as *protector*. The employee, with the assistance of the Appellants as employer, had absolute power,

with the ability to change *protector* and to choose and re-select beneficiaries. The sub-trust fund was the employee's "pot".

183. Mr Thomson then turned to Equity's being superseded as trustee by Trident. The Jersey regulators had criticised the lack of security for loans. Apparently the Appellants "shopped around" and found Trident, which was prepared to lend without security. Pending Trident's appointment substantial sums due to players were withheld. Surprisingly, in Mr Thomson's view, Mr Scarlet was unaware of the consequential disquiet. As a solution the payments were grossed-up, which reflected in Mr Thomson's view that the agreements were a "net of tax" provision. The Murray Group had absolute power over the selection of the trustee and, significantly, the Trust's administration was a substantial part of Trident's business.

184. Mr Thomson then considered certain individual trusts – those of Mr Black, Mr Violet and Mr Gold. The loan funds in these cases seemed to have been viewed as the personal cash of these individuals themselves, and the trustees never intervened in the application of these funds. The evidence indicated that loans would automatically be extended and never have to be repaid. In instances Rangers had granted indemnities to players in respect of contingent tax liabilities arising from the operation of the Trust. In effect Rangers were guaranteeing a net sum in the individual player's hands. Payment of remuneration through payroll or the Trust was interchangeable. With the introduction of the new provisions in Part 7A of ITEPA payments to players (such as Messrs Maidstone and Guildford) were now made by payroll. Now there was no longer an advantage in using the Trust.

Decision

185. As noted in the introduction the Tribunal was unable to reach a unanimous decision. Accordingly, the following paragraphs nos. 186-233 represent the majority opinion of Mr Mure and Mr Rae. Dr Poon's dissenting opinion is set out in the Appendix hereto.

Majority opinion

186. Essentially the issue before us is whether the term *earnings* (or *emoluments* for 2002/03) extends to the "loans" made to the Murray Group executives and Rangers footballers under the Trust arrangements with a resulting charge to tax under PAYE. The same consideration arises in respect of liability to National Insurance Contributions.

187. Interestingly the Parties do not adopt opposing stances on each and every legal proposition advanced. Mr Thornhill addressed us in detail on the scope of the income tax charge on *earnings* and other benefits from employments, and, with amplification from Mr Studer, on the structure and effect of the principal trust and sub-trusts, and, thirdly, on the loan arrangements.

188. In reply, and significantly in our view, Mr Thomson accepted that both the trusts and loan arrangements were not "shams" (although certain detailed criticisms were made) but, rather, urged us to view these structures in a broader context, viz a

practical and commercial reality in which payments were made by the companies in the Murray Group, and where these were invariably received by the favoured employee or footballer and enjoyed in effect absolutely by him. As we understand too, Mr Thomson did not attack the principles affecting the primary interpretation of *earnings* and *emoluments* and the tax and NIC charges in respect of these as set out by Mr Thornhill. Rather, Mr Thomson submitted, as this was a scheme devised purely for tax avoidance purposes, an extended sense including monies advanced into trust and then lent, should be adopted.

189. Crucially the difference between Mr Thornhill and Mr Thomson was whether the anti-avoidance principles set out initially in *Ramsay* and other related decisions could be invoked here to extend the charges on *earnings* to the loans. Helpfully, Mr Thomson presented us with detailed and meticulously drafted written submissions on which he addressed us, and which develop a *Ramsay plus* argument focussing on *Ramsay* but fortified by other propositions in support of the tax charge on earnings and NIC liabilities being applied.

190. We agree – and this was conceded by Mr Thornhill (see, for instance, Notes of Evidence, 18 January 2012, p60) – that we should adopt a *purposive* interpretation of *earnings* in our approach. In relation to statutory interpretation we note the comments of Ribeiro PJ in *Collector of Stamp Revenue* v *Arrowtown Assets Ltd* at para 35:-

> "The driving principle in the *Ramsay* line of cases continues to involve a general rule of statutory construction and an unblinkered approach to the analysis of the facts. The ultimate question is whether the relevant statutory provisions, construed purposively, were intended to apply to the transaction, viewed realistically."

This was noted approvingly in *Barclays Mercantile Business Finance Ltd* v *Mawson* at para 36, *infra*.

191. However, that approach, on one view, is circumscribed inasmuch as there are already specific statutory provisions affecting *loans* (Sections 173-175 and 188-189 ITEPA) and from the 1960s and 1970s there date more general charging provisions in respect of benefits-in-kind of a non-cash nature. Further, the legal effect of the trust structure and loans (all of which, it was conceded, were not in law a sham) reinforces these constraints. This qualification seems to be reflected in the Court of Appeal's recent deliberations in *Mayes* v *HMRC* (albeit a highly artificial scenario) per Toulson LJ at the conclusion of the decision especially paras 102, 103, 105, 106 and 107:-

> "102. The root problem in this case from the viewpoint of HMRC lies in the structure of the relevant statutory scheme. As has been pointed out by Proudman J and Mummery LJ Chapter 11 of Part XIII of ICTA 1988 creates a complex set of rules for determining when a gain is to be treated as arising in connection with a life insurance policy.

103. Inherent in the scheme is the possibility of a disconnection between what would be regarded as a gain on an ordinary commercial view and what is to be treated as a gain for the purposes of the statute.

104. …

105. In the present case the opposite has occurred. The inventor of SHIPS 2 has found a clever way of making the legislative structure work to HMRC's disadvantage by devising a series of steps giving rise to a chargeable event and a corresponding deficiency, albeit that the taxpayer was no worse off commercially.

106. The *Ramsay* principle permits a purposive approach to the construction of tax legislation. …

107. In the present case it has not been suggested that the payment of premium following shortly by a surrender of the bonds were a sham. As Mummery LJ has said, they were legal events with legal consequences. They were events which ICTA has caused to carry physical consequences. The particular consequences in the present case were obviously not foreseen or intended by the legislature; but legislation, especially legislation which is highly engineered, can have unintended consequences."

192. The *Ramsay* principle and earlier related case-law were reviewed by the House of Lords in the conjoined appeals in *Barclay's Mercantile Business Finance Ltd* v *Mawson* and *IRC* v *Scottish Provident Institution*. *Mayes* suggests (per Mummery LJ at para 71) that the starting-point now in assessing tax avoidance schemes should be reviewing the principles set out in *Mawson* at paras 26-42. Reading this somewhat selectively we note –

"[32] The essence of the new approach was to give the statutory provision a purposive construction in order to determine the nature of the transaction to which it was intended to apply and then to decide whether the actual transaction (which might involve considering the overall effect of a number of elements intended to operate together) answered to the statutory description. Of course this does not mean that the courts have to put their reasoning into the straitjacket of first construing the statute in the abstract and then looking at the facts. It might be more convenient to analyse the facts and then ask whether they satisfy the requirements of the statute. But however one approaches the matter, the question is always whether the relevant provision of statute, upon its true construction, applies to the facts as found. As Lord Nicholls of Birkenhead said in *MacNiven* v *Westmoreland Investments Ltd* [2001] UKHL 6 at [8], …

'the paramount question always is one of interpretation of the particular statutory provision and its application to the facts of the case.'

[36] Cases such as [*Ramsay* and the earlier related authorities] gave rise to a view that, in the application of *any* taxing statute, transactions or elements of transactions which had no commercial purpose were to be disregarded. But that is going too far. It elides the two steps which are necessary in the application of any statutory provision: first, to decide, on a purposive construction, exactly what transaction will answer to the statutory description and, secondly, to decide whether the transaction in question does so. [There follows then the quote *supra* from the Opinion of Ribeiro P J].

[38] *MacNiven* shows the need to focus carefully upon the particular statutory provision and to identify its requirements before one can decide whether circular payments or elements inserted for the purpose of tax avoidance should be disregarded or treated as irrelevant for the purposes of the statute. In the speech of Lord Hoffmann in *MacNiven* it was said that if a statute laid down requirements by reference to some commercial concept such as gain or loss, it would usually follow that elements inserted into a composite transaction without any commercial purpose could be disregarded, whereas if the requirements of the statute were purely by reference to its legal nature (in *MacNiven*, the discharge of a debt) then an act having that legal effect would suffice, whatever its commercial purpose may have been. This is not an unreasonable generalisation, indeed perhaps something of a truism, but we do not think that it was intended to provide a substitute for a close analysis of what the statute means. It certainly does not justify the assumption that an answer can be obtained by classifying all concepts *a priori* as either 'commercial' or 'legal'. That would be the very negation of purposive construction; …

[39] The present case, like *MacNiven*, illustrates the need for a close analysis of what, on a purposive construction, the statute actually requires. …"

193. In short it would seem that even in cases of "aggressive" tax avoidance, such as the present case, the application of the *Ramsay* doctrine to strike at tax saving arrangements may be fettered in a context where there is already a highly prescriptive statutory code and, also, enforceable legal structures in place which are of fundamental practical effect, and not merely incidental or artificial for tax avoidance purposes only.

194. Mr Thornhill referred us to the charging provisions defining *emoluments* for tax purposes. For the Year 2002-03 this is contained in Section 19(1) Income and Corporation Taxes Act 1988. For the later Years of Assessment in the Appeal the provisions of the Income Tax (Earnings and Pensions) Act 2003 apply. There the concept of *earnings* is substituted for *emoluments*. In particular Section 62 provides –

"(1) This section explains what is meant by 'earnings' in the employment income Parts.

(2) In those Parts 'earnings', in relation to an employment, means –

(a) any salary, wages or fee,

(b) any gratuity or other profit or incidental benefit of any kind obtained by the employee if it is money or money's worth, or

(c) anything else that constitutes an emolument of the employment.

(3) For the purposes of sub-section (2) 'money's worth' means something that is –

(a) of direct monetary value to the employee, or

(b) capable of being converted into money or something of direct monetary value to the employee."

While the structures of both charging provisions differ somewhat, the concepts of *earnings* and *emoluments* are similar. They provide essentially that cash or benefits in money's worth (or "convertible" into cash) which represent a reward for services performed in an employment are chargeable to tax.

195. The same principle applies for NIC. Section 3(1)(a) of the Social Security Contributions Act 1999 defines "earnings" as including "… any remuneration or profit derived from an employment." The *Ramsay* principle has been extended to NIC: see *NMB Holdings* v *S of S for Social Security*.

196. Mr Thornhill developed this further by reference to the decisions in *Garforth* v *Newsmith Stainless Ltd* and *Sempra Metals Ltd* v *HMRC*, a decision by the Special Commissioners in favour of the taxpayer and not appealed by HMRC. He submitted that before a tax liability can arise, the monies had to be absolutely at the disposal of the taxpayer. Liability to tax could not result until payment or entitlement to payment had arisen. So too the services would have to have been rendered by the employee before tax liability arose. We consider this approach to be sound and refer firstly to Walton J's judgement in *Garforth* and his consideration of the sense of "payment" for tax purposes in relation to directors' bonuses. He seemed to stress that monies had to be placed unreservedly at the employee's disposal for payment to result ([1979] STC 129 at p133 e-f):-

> "I therefore come back to the question whether, on the facts of the present case, there was 'payment' to the directors. The argument really is, on the one hand, that all that happened was that the balances in the directors' loan accounts with the company were increased without them getting anything out of it unless and until they withdrew their money from the company, and, on the other hand, that the money was placed unreservedly at their disposal, they could have had it at any moment they chose, and that amounts to payment. As between those two contrasting views, I have no hesitation at all in saying that, in my judgement, when money is placed unreservedly at the disposal of directors by a company that is equivalent to payment; …".

197. That view, however, falls to be clarified by the recent opinion of Warren J in *Aberdeen Asset Management plc* v *HMRC* in the Upper Tribunal ("AAM"). While that decision post-dates by a few days counsels' closing submissions in this Appeal, both sent subsequently written submissions on the decision. That case involved benefits to employees by way of share transfers. In para 40 of his decision Warren J interprets Walton J as indicating that *payment* would result from funds being placed unreservedly at the employee's disposal, but (perhaps) it was not a necessary condition for payment. However, later in his decision [para 83] Warren J considered that for the purposes of Section 203 ICTA 1988 it was a "… necessary even if not sufficient condition for there to be a payment …" that monies should be unreservedly at the employee's disposal.

198. On any view, taking the range of circumstances contemplated in *Garforth* and these of *AAM*, the acceptance of loans in the circumstances of the present appeal could not amount to *payment* in our view.

199. *Garforth* was relied on in *Sempra*. That involved an Employee Benefit Trust and one aspect of the decision was whether payments into trust were subject to PAYE and NIC as *earnings* or *emoluments*. In particular the employees had a <u>choice</u> between receiving a cash bonus or a payment being made into trust (see para 18 at p 1069). The issue for the Special Commissioners corresponds to that before this Tribunal. The sense of "payment" by reference to *Garforth* and certain other authorities was noted. The Special Commissioners concluded as follows –

> "[139] From those authorities [*Mawson* and *Scottish Provident*] we derive the following principles. Payment is a word which has no settled meaning but takes its meaning from its statutory context. In the context of s203 of the 1988 Act and regs. 16 and 13 of the 1973 Regulations, when money is placed unreservedly at the disposal of the directors by a company that is equivalent to payment. Bearing in mind the definition of emolument, the placing of a perquisite or profit unreservedly at the disposal of an employee can also be equivalent to payment. However, the concept of payment is a practical, commercial concept and, for the purposes of the PAYE system, payment ordinarily means actual payment, that is a transfer of cash or its equivalent and not merely the discharge of the employer's obligation to the employee. More generally, it is necessary first to decide, on a purposive construction, exactly what transaction will answer to the statutory description and, secondly, to decide whether the transaction in question does so. If a transaction is deliberately structured to include an element of uncertainty with no commercial purpose then the composite effect should be considered as it was intended to operate without regard to the possibility that it might not work as planned.
>
> [140] We now turn to apply those principles to the facts of the present appeal and what we have to ask is whether money, or its equivalent in cash, was placed unreservedly at the disposal of the employees; a discharge

of an employer's obligation to the employee will not suffice for this purpose.

[141] The facts are that in relation to both trusts, employees requested the appellant to make payments to the trusts of amounts which they would otherwise have received in cash as bonuses. The discussions with the employees before the Trusts were established persuaded them that there were advantages for the employees in the Trust arrangements. None of the employees would have accepted the arrangements if they had considered that there was a realistic possibility that the sums otherwise received as bonuses would not be available to them in one form or another and it was highly likely that all requests for loans would be accepted. The Trustee always accepted the Appellant's allocation of the total bonus pool between the individual employees and the amount equivalent to each employee's bonus was allocated by the Trustee to him and was available to him. A very small part of the funds paid to the Trustee was unallocated. Each employee chose what he wished to do with his allocated amount. The loans made by the Trustee to the beneficiaries had some features which were non-commercial. Thus, for example, very large sums were lent on unsecured loans and some of the nominated beneficiary recipients had no other income. Interest was not charged until 2004 and then when paid could be re-borrowed. When interest was paid in 2004 it was not demanded at the contractual rate but at a lower rate acceptable to the Revenue; the interest paid was re-allocated to the same beneficiary. There was a general expectation that the loans would not have to be repaid except in exceptional circumstances. The loans which were repaid were repaid voluntarily and the amount was re-allocated to the same beneficiary.

[142] Although the facts which we summarise show that the employees benefited from the arrangements in our view they do not lead to the conclusion that the payments made by the Appellant to the Trusts amounted to the payment of money or a profit equivalent to cash to the employees. Mr Brennan asked us to find that the payments by the Appellant to the Trusts were placed unreservedly at the disposal of the employee and that that was equivalent to payment to the employees. It was his case that the monies held by the Trustee vested unconditionally in the employees when the amounts were allocated by the Trustee. However, like the Special Commissioners in *Dextra* … paras 16-17, on the evidence before us we are unable to make the finding requested. To do so would be to ignore the existence of the trusts, the continuing discretion of the trustee and the existence of the loans in those cases where loans were made. The employees (or their nominated beneficiaries) were not free to do whatever they liked with their allocated funds; they could apply for loans, or request the making of other investments, but the final decision remained at the discretion of the Trustee. We agree that the Trustee was likely to comply with

reasonable requests but that does not mean that the Trustee was a cipher who did what it was told. Having heard the evidence of Mr Gittins, a director of the Trustee, we formed that view that he well understood the obligations of a Trustee.

[143] We heard in at least one instance … of a case where the Trustee refused to apply funds in a manner requested by a beneficiary. As to the loans, albeit that they were on terms which reflected the employee benefit nature of the arrangements rather than an arm's length commercial relationship between trustee/lender and beneficiary/borrower, they were nevertheless real loans on which interest was paid, and in respect of which, in some cases, principal was repaid. If an employee required funds to be placed unreservedly at his disposal, as was eventually the case with Mr Hussey, the Trustee was required to take further and specific action to bring that about. The circumstances are far removed from that of the directors in *Garforth* or the director in *DTE Financial Services Ltd*.

[144] We conclude that when the Appellant made payments to the Trusts, no transfer of cash or its equivalent was placed unreservedly at the disposal of the employees. That means that there was no payment by the Appellant of emoluments or earnings giving rise to an obligation to deduct income and pay it to the Revenue".

In the circumstances of *Sempra* the funds, while loaned, were not paid over in the sense of being unreservedly at the employee's disposal, and hence there was no PAYE or NIC liability (see also para 148).

200. In addressing the interpretation of *payment* in a purposive way we have noted also *DTE Financial Services Ltd* v *Wilson*, where a contingency which was estimated as merely theoretical, fell to be disregarded. The Court of Appeal stressed that for PAYE purposes *payment* was a practical, commercial concept, essentially actual payment, with a cash value. Similarly, in *Paul Dunstall Organisation Ltd* v *Hedges* the Special Commissioners could identify a convertible, cash value of a perquisite or profit enabling them to make a finding of *payment*.

201. We are conscious that Mr Thomson submits that *Sempra* was decided incorrectly and in particular that the *Ramsay* argument was not addressed (paras 350-368 of his concluding Submissions). We are not so satisfied and observe, perhaps significantly, that HMRC did not appeal the decision.

202. *Sempra* followed soon after the decision of the House of Lords in *MacDonald* v *Dextra Accessories Ltd*, which considered the sense of emoluments in the obverse context of a deduction being made for Corporation Tax purposes for contributions into an Employment Benefit Trust and having special regard to Section 43 FA 1989. In *Dextra* HMRC argued, ultimately successfully, that the payments into the EBT were *potential emoluments* which would preclude the "corresponding" deduction for Corporation Tax purposes unless they were taxable under PAYE. However, before

the Special Commissioners – and this is the significance for the present Appeal – the *Ramsay* approach was considered and rejected –

> "[22] We agree with Mr Brennan [counsel for HMRC] that we should apply a commercial approach in construing the relevant legislation to determine whether there has in this case been payment of emoluments or earnings, and that in applying this commercial approach we should view the facts as a whole. This is particularly the case where the six are taking virtually the whole of what would otherwise be the remuneration through the EBT. But however much we view the transaction as a whole, the facts as we have found them do not support the conclusion that he wishes us to reach. Cash in the sub-fund is equivalent to cash in the individual's money-box only if the Trustee is, in a commercial sense, inevitably compelled to comply with the individual's wishes, which we have found that it is not. It was the Trustee's decision whether to make payments out of the sub-funds and the Trustees restricted how amounts in the sub-funds could be invested. If any of the six did something damaging to the group it is likely that they would lose the entire benefits in the EBT. Since the directors are also shareholders it is not very likely that they will do something damaging to the group but it is always possible that there will be a disagreement and loss of the benefits in the EBT would be a possible consequence. This is far removed from the situation in cases like *DTE Financial Services Ltd* v *Wilson* … where the inevitable end result is cash in the hands of the employees. Similarly the loans are factually loans which can be called in, and are not disguised payments of emoluments. Therefore we find that, applying a commercial approach to the relevant statutory concepts, in this case there was no payment of emoluments or earnings by reason of these particular arrangements involving the EBT. If it is necessary for us to decide it we do not categorise the EBT as an artificial tax avoidance scheme."

It was noted earlier that the funds in the EBT did not belong to the employees and hence they were not taxed on them.

> "[17] We quite understand the Revenue not liking the asymmetry of the companies obtaining an immediate deduction for the payments into trust without any charge to tax on the employee except perhaps a charge to tax on interest-free loans at the official interest rate, and not even that if the official interest rate is paid, which we understand it eventually was on all the loans. However, it is in the nature of employee benefit schemes that the employer should obtain a deduction having paid away money to such a trust. The reason why the employees are not taxed on funds in the EBT is simply that they do not belong to the employees. The six may have carried this to extremes by not taking any significant remuneration in cash but their position is entirely different from what it would have been if they had."

While HMRC's approach was successful before the Court of Appeal and House of Lords the *Ramsay* aspect was not appealed further (see Opinion of Neuberger J, para 9 and of Jonathan Parker LJ, at para 8).

203. We have applied these principles in considering the categories of potential liability set out *infra*. They lend support in our view to the proposition advanced for the Appellants (para 35 of their initial Skeleton Argument) that –

> " '… (a) a discharge of an employer's obligation to the employee will not suffice' to establish that payments of earnings have been made. In the present case … no payment of earnings has been made because the funds have not been placed unreservedly at the disposal of the employees."

This proposition draws on the decision in *Sempra* (see para 140 thereof.)

204. Later in our Decision (para 231) we comment on the legal effect of the trust and somewhat exceptional loan arrangements. Subject to limited exceptions we consider that these structures are of legal effect (and it was not, of course, suggested that they were in law a "sham") and on that basis we now consider the several categories of potential tax liability individually. The hearing provided an overview as to the general working of the Remuneration Trust. Each sub-trust was not addressed exhaustively. That approach has proved sufficient to enable us to give a decision in principle (as the Appellants wished). Special considerations do arise in certain individual cases, and we are conscious that these may require to be dealt with further.

(i) Executives' bonuses

205. Several senior employees of the Appellants spoke to these as beneficiaries, and Mr Red spoke to the general administrative procedures affecting bonuses. We accept that these were entirely discretionary with no contractual entitlement. While the views of the individual employee would be canvassed, he never had an enforceable claim to a bonus or other benefit. The arrangements were very informal and at most offered only a hope or expectation. We consider these circumstances to be distinct from these arising in *Heaton* v *Bell*, in which the employee had a continuing contractual right to elect between the benefit (the use of a car) and restoration to his original (higher) wage. In the case of the Appellant's executives they never had an enforceable claim to a cash bonus. While Mr Yellow indicated that he considered that he had a "choice" between a cash bonus and a discretionary trust benefit, that was not the generally held view by other executives. No documentary evidence clarifying this was produced, and so far as we are aware, did not exist. HMRC recovered substantial documentation in the course of their enquiries. Quite simply, if the employee expressed interest, then the employer would make a payment to the principal trust. We note as significant that in the circumstances of *Sempra*, the employees did have a "choice" between an outright payment and a trust benefit. We consider that in the case of the executive bonuses, the benefit falls within Mr Thornhill's description of a mere discharge of an employer's obligation to an employee (*supra*). Thus, we agree, no tax liability arises. While the employee would expect loan access to the payment, he would not have absolute entitlement to it.

(ii) Footballers: on engagement

206. Rangers' players fall to be treated distinctly, and their cases fall into several categories.

207. Firstly, the arrangements on engagement may be considered. We accepted the evidence of Mr Black, Mr Magenta, and Mr Grey. Characteristically the prospective players and their agents focussed on a net figure. This could be maximised via the trust mechanism, and moreover could only be afforded by the Club that way. A "deal" would be offered by the Club only on a "take it or leave it" basis, which we accept.

208. The format spoken to was of a contract of employment, with remuneration paid subject to PAYE and NIC and additionally a "side-letter" providing for a discretionary trust payment. We consider that the side-letter's obligation does not amount to an *emolument*. Again, it falls within the description of "a discharge of an employer's obligation to an employee".

(iii) Footballers: termination payments

209. These were categorised helpfully by Mr Thornhill.

Firstly, we agree that simple "testimonial" payments, clearly referable to past services, and in cash or money's worth, are taxable. There is a substantial body of early case-law affecting particularly professional cricketers, and where there was a tradition of such payments, which supports this.

Next, we note Section 401 ITEPA, the provisions affecting "golden handshakes" without contractual entitlement, originally contained in the Finance Act 1960. This is more problematical especially in relation to payments into trust. The charge extends to changes in duties and in earnings from an employment. There is a £30,000 exemption. It requires the payment to be "provided on behalf of or to the order of the employee". Apparently there is no case-law interpreting this wording, but we did find helpful the comparative provisions albeit relating to Bills of Exchange noted by Mr Thornhill. (see para 124 *supra*). It seems to us that the *Garforth* principles are apt here too, which would tend to exclude from Section 401's application payments into trust where not *in lieu* of a prestable salary entitlement. (It may be that in relation to termination payments made after the date of issue of a P45 form, only basic rate tax falls to be deducted – see SI 2003/2682).

Thirdly, the decision in *Shilton* v *Wilmhurst* may be noted, where the "terminal payment" is made conditionally on the performance of future services for another employer. Ordinarily such payments are taxable.

(iv) Footballers: guaranteed bonuses

210. Finally, Mr Thornhill noted five cases where peculiarly trust payments were made in respect of guaranteed bonuses. These relate to Messrs Selby, Inverness, Doncaster, Barrow, and Furness, as confirmed by his instructing solicitor's letter of

29 September 2011. The Appellants concede that in these cases there is a sufficient *nexus* with a contractual right to create a tax liability (paras 19 and 20 of Supplementary Skeletal Argument of 4 November 2011).

(v) Particular exceptional cases

211. While we do not express a concluded view on the following persons' sub-trusts, we consider that exceptional considerations may arise occasioning PAYE and NIC liability. Firstly, in the case of Mr Black, in view of his active control exercised generally over the Group's activities, he seemed able to decide his own bonus apparently without reference to his co-Directors. Next, in the case of his sons' sub-trusts we refer to our reservations about their competence set out in para 180. Thirdly, Mr Indigo seemed to acknowledge that in view of his unexpectedly onerous commitments, he would have expected some reward. The payments into his sub-trust in view of that expectation, and made subsequent to the rendering of the services, might arguably be taxable as a deferred bonus (Notes of 7 November 2011 p9). Finally, in the case of Mr Red's sub-trust a complication arises inasmuch as his nominated beneficiaries (his nieces) fell outside the prescribed class of qualifying beneficiaries. Nonetheless, in the case of Mr Black's sons and Mr Red, the loan arrangement in itself might preclude a consequent tax liability.

As we understand, Mr Thornhill seemed to concede that the decision in *Shilton* v *Wilmhurst* could have relevance to the circumstances of Mr Purple and Mr Ely (Notes, 7 November 2011 p9).

212. In reviewing these categories for possible PAYE and NIC liabilities we have proceeded on the basis that there is (broadly) a trust structure, effective in law, and legally recoverable loans. Mr Thomson, of course, conceded that these were not "shams": rather he encouraged us to view them in a *Ramsay*-type context, in which they could be elided. Nonetheless, and in acknowledgement of Mr Studer's considerable assistance, we think that we should address the broad principles discussed. These, we consider, are satisfied here.

213. The trusts, both principal and sub-trusts, bear to be governed by English law as proper law. They are professionally managed by a Jersey-based trust company, originally Equity and now Trident, and their tax *situs* or *residence* is presumably there. They bear the format of Employment Benefit Trusts.

214. While extensive criticisms may be made of the draftsmanship of certain of the trust documents, particularly the limited efficacy of the three amending deeds, the creation of a trust structure, with individual sub-trusts holding funds beneficially for different families or groups does not appear to be disputed. We accept the broad formulations of Mr Studer in relation to the construction of the trust documents (para 105 *et seq*). We agree that the trusts for MGM employees were affected by the amending deeds to which, of course, MGM was a party. The other companies in the Group had by adoption of the principal trust deed by way of Deeds of Adherence created *referential trusts.* These trusts were not affected by the Deeds of Amendment subsequent to their individual Deeds of Adherence.

215. We are satisfied too that the principle of *severance* is apt to preserve those amendments contained in the Deeds of Variation which are not inconsistent with the fundamental terms of the Definitive Deed. We are persuaded by Mr Studer that these amendments are separable and not tainted by the other provisions purporting to amend but falling to be disregarded as invalid.

216. We are again satisfied by Mr Studer that the "any given postulant" test applies – and can be satisfied – in relation to determining the class of "Providers" and hence the class of beneficiaries. We agree that in terms of English Trust Law it is unnecessary to identify exhaustively all the possible beneficiaries.

217. We should observe that while Mr Thomson made certain criticisms of Mr Studer's submissions on the principle of severance and the "any given postulant" test, his considered position and his major attack on the scheme was its artificiality in the context of *Ramsay*.

218. The form of the loan document is sufficient in our view to create a liability to repay. The extent of Mr Thomson's criticism at its highest was that the loans to the employee, who was also *protector* of "his" sub-trust, were arguably voidable as *ultra vires* (contrast his remarks on 9 November 2011 at p4-6 – noted in para 166 hereof – and on 16 January 2012 at pages 5 and 139). He did not argue that they were a "sham" or crucially that they were irrecoverable. To date none of the loans has been reduced or challenged as voidable. That the loans were recoverable, on whatever basis, appears to us to be critical when considered in relation to the principles affecting "payment" in *Garforth*. If they have not been paid over absolutely, then they are not taxable *emoluments*.

219. Moreover, even if the trust structure were to fall, the loans would still remain loans – by presumably the trustees as nominees of the Appellants. Mr Thornhill argued this as a reserve stance (Notes, 7 November 2011 p25).

220. Thus we cannot accede to Mr Thomson's proposition that payment of monies into the trust represents payment of *emoluments* or *earnings*. We do not consider that the trust structure and loans can be disregarded or their legal effects elided and we elaborate on this in the context of *Ramsay* in the succeeding paragraphs. There was not an absolute transfer of funds from employer to employee on that view, and hence PAYE and NIC liabilities do not result.

221. Having addressed the nature of the tax charge on *earnings* and *emoluments*, the trusts and the loan arrangements, we now turn to the possible application of the *Ramsay* principle and consider whether it could affect the tax consequences of these arrangements. This, it seems, is the essence of HMRC's contentions.

222. In *Ramsay* and a sequence of decisions following shortly thereafter the "rule" was considered to strike at any non-commercial elements in a tax avoidance scheme. The rule was reviewed by the House of Lords in *Mawson* and that interpretation was considered there to be too sweeping. As now refined the rule emphasises that it is a principle of interpretation: where a commercial concept is introduced into the

legislation, then any non-commercial aspects in the transaction may possibly be ignored; and where the legal nature is of the essence, then the legal effects should prevail. Recently in *Mayes* the Court of Appeal acknowledged as having full legal effect certain "self-cancelling" steps in a tax avoidance scheme –

> "[78] It would be an error … to disregard the payment of a premium at Step 3 and the partial surrender at Step 4 simply because they were self-cancelling steps inserted for tax advantage purposes. It was right to look at the overall effect of the composite Step 3 and Step 4 in the seven step transaction in the terms of ICTA to determine whether it answered to the legislative description of the transaction or fitted the requirements of the legislation for corresponding deficiency relief. So viewed, Step 3 and Step 4 answer the description of premium and partial surrender. On the true construction of the ICTA provisions, which do not readily lend themselves to a purposive commercial construction, Step 3 was in its legal nature a premium paid to secure benefits under the Bonds and Step 4 was in its nature a withdrawal of funds in the form of a partial surrender within the meaning of those provisions. They were genuine legal events with real legal effects. The court cannot, as a matter of construction, deprive those events of their fiscal effects under ICTA because they were self-cancelling events that were commercially unreal and were inserted for a tax avoidance purpose in the pre-ordained programme that constitutes SHIPS 2. It follows that a corresponding deficiency relief is available to Mr Mayes."

Earlier, the Court commented in relation to *Ramsay* –

> "[74] … *Ramsay* did not lay down a special doctrine of revenue law striking down tax avoidance schemes on the ground that they are artificial composite transactions and that parts of them can be disregarded for fiscal purposes because they are self-cancelling and were inserted solely for tax avoidance purposes and for no commercial purpose. The *Ramsay* principle is the general principle of purposive and contextual construction of all legislation. ICTA is no exception and is not immune from it. That principle has displaced the more literal, blinkered and formalistic approach to revenue statutes often applied before *Ramsay*."

223. In our view in the present Appeal we have to regard the trust structure and loans as "… genuine legal events with real legal effects". (*Mayes* para 78 *supra*).

224. In applying the charging provisions anent *earnings* to the monies advanced here we have followed strictly the requirements for *payment* following on *Garforth* and *AAM*. We consider that the employees benefiting did not obtain an absolute legal entitlement to the monies. Having regard to the legal effect of the trust and loan structure, the employees' entitlement or, rather, expectation is to no more than a loan. Further, we do not consider that that was altered by the employee's status and powers

as *protector* of his sub-trust: the fundamental structure could not be revised by the employee *qua protector* to confer absolute rights.

225. While we accept that there was a degree of orchestration in the arrangements made with employees, we are satisfied that these fall short of enabling an absolute transfer of funds to the employee. The trust management by Trident came under close scrutiny. Its attitude differed from that of Equity. But they both operated within the same trust framework. It is that legal framework rather than the lax attitude of a particular professional trustee which matters, in our view. The reaction of Equity in, for instance, seeking a form of loan security, is consistent with the legal effectiveness of the trust. Trident, while it (and Equity too) had the benefit of a broad indemnity provision, risked possible criticism from beneficiaries with a potential interest in the capital of the sub-trust fund. Another professional trustee in the future might revert to Equity's more critical attitude.

226. The terms of the Appellants' internal memos and communications anent the operation of the Remuneration Trust were highlighted by Mr Thomson. This had been a major feature emerging from HM Inspectors' investigation. While these are suggestive of "aggressive" tax avoidance, we are conscious that they were composed by lay persons without specialist legal experience. They cannot on any view override the legal effect and tenor of the constituting documents.

227. In the course of evidence we were invited to consider several cases in which footballers had left Rangers. The sub-trust/loan arrangements subsisted. Only with the consents of those interested in the capital of the sub-trust concerned, could the legal framework be "unscrambled", so enabling the player to receive an absolute right to the monies put into trust. Mr Evesham was a case in point (see para 23).

228. No instances of a contrasting approach, with an uncomplicated system for payment were noted, and we have no reason to consider that the cases cited were contrived. The case of the sequestration of Mr Aberdeen might be noted briefly. Mr Thomson considered it significant that he had not declared the loan from his sub-trust as a debt. However, we are unaware as to the nature of any professional advice which he then received, and we are not prepared to speculate as to his understanding of the legal technicalities of the trust/loan arrangements.

229. In several instances players (and their professional advisers) had sought further expert specialist advice on the trust/loan arrangements. On behalf of Mr Violet, Mr Grey had consulted with Messrs Turcan Connell, WS, and on behalf of Mr Evesham, Mr Turquoise, CA, a tax partner himself in PwC, had sought guidance from his legal department. On such independent referral, it seems, these arrangements had been viewed as enforceable in law.

230. During his closing submissions we invited Mr Thomson to give us a considered reply as to whether or not HMRC would regard the loans as debts on an employee's estate in the event of death. He replied (two days later) to the effect that HMRC preferred not to commit itself. We would have expected such a claim of indebtedness to be vigorously disputed.

231. The trust/loan scheme is essentially straightforward. It does not include a complicated sequence of stages. The extent of the employer's obligation is to make a payment into trust. The trust structure and loans bear to be of legal effect. Loans were discretionary although in fact they were (almost) invariably granted. But that was the extent of the employee's benefit. Whether the arrangement is viewed commercially or legalistically, the inexorable conclusion, in our view, is that the payments into trust became a loan and no more. They were not paid over absolutely and so do not become *earnings* or *emoluments*. We do not regard the liability to make repayment as a remote contingency which might in the context of a purposive construction fall to be disregarded as too remote for practical purposes c/f *Astall & Anor* v *R & C Commissioners*.

232. Our Findings of Fact are as set out in para 103 *supra* and in our consideration of tax liability in particular cases (para 203 *et seq*) we have identified a factual matrix upon which we have proceeded. We are unable to make further Findings-in-Fact in support of there being an orchestrated scheme extending to the payment in effect of wages or salary absolutely and unreservedly to the employees involved, as Mr Thomson urged us to do. We considered this with some care in view of his trenchant criticism of certain witnesses' evidence. We make the following **Findings of Law** as affecting the general arrangements and confirming *in Law* as well as *in Fact* the trust structure and loan arrangements –

1 The principal trust purportedly constituted by the Trust Deed by MGM Limited and Insinger Trust Co Ltd dated 20 April 2001 was valid and subsisting and continues.

2 The sub-trusts (subject to our remarks in paras 210 and 226) purportedly constituted by the relative declarations of trust were valid and subsisting and continue.

3 The sums advanced to the employees of the Appellants by way of loan in terms of the relative loan documents, were made in pursuance of discretionary powers and remain recoverable and represent debts on their estates.

4 The sums advanced by the Appellant companies into the principal trust, whether on payment thereto, or on payment to a sub-trust, or thereafter on being advanced by way of loan to the employee, were not at any time held absolutely or unreservedly for or to the order of the individual employee.

233. Accordingly, the assessments made fall to be reduced substantially. It was conceded that advances in favour of certain players are taxable and liable to NIC, and we have found that in certain other limited instances, there may be a similar liability. To that extent the assessments should stand. In these circumstances we expect that it is sufficient that we allow the Appeal in principle. Parties can no doubt settle the sums due for the limited number of cases mentioned without further reference to the Tribunal.

Expenses

234. We were not addressed on the matter of expenses and accordingly we make no award.

235. Finally, we must express our thanks to counsel and their advisers for their patient and skilful guidance throughout this lengthy hearing. All our queries and requests were dealt with promptly. The Appellants' counsel produced in advance very useful introductions to their arguments. Although Mr Thomson was outnumbered "four-to-one" he was still able to produce for us a detailed written submission extending to about 350 pages. We all found it of great assistance in our deliberations.

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

MR KENNETH MURE, QC
SCOTT RAE, LLB, WS

RELEASE DATE: 29 October 2012

APPENDIX

Dr Poon's Dissenting Opinion -

Dissenting Decision

Murray Group Holdings and Others v The Commissioners of HMRC

Introduction

1. The Tribunal have been unable to reach a unanimous decision. The essential differences between the majority and minority can be summarised in two respects. With regard to Findings-in-Fact, I cannot subscribe to the conclusion reached by the majority that 'we are unable to make further Findings-in-Fact in support of there being an orchestrated scheme extending to the payment of wages or salary absolutely and unreservedly to the employees involved' (paragraph 232). In respect of Findings-in-Law, our essential difference lies in how the *Ramsay* principle is to apply. The kernel of my colleagues' decision, contained in paragraph 223, is that they 'have to regard the trust structure and loans as "… genuine legal events with real legal effects'' [quoting from *Mayes*].' I disagree that the legal form of a transaction with its corollary legal effect is conclusive as a dictum in applying the *Ramsay* principle, and make extra Findings-in-Law regarding *Ramsay* and its application to the present case.

2. In making my extra Findings-in-Fact and in-Law, I am guided by 'the ultimate question' posed by Ribeiro PJ: 'whether the relevant statutory provisions, construed purposively, were intended to apply to the transaction, viewed realistically', (quoted in *Mawson* at [36] from *Collector of Stamp Revenue v Arrowtown Assets Ltd* [2003] HKCFA 46 at [35]). To that end, the facts that inform me regarding the realistic nature of the transaction are more widely characterised than the legal form of the transaction. Secondly, in following the edicts for any trier of fact laid down in *Heaton v Bell* [1970] AC728 at 748B [Lord Morris], 'The quest must be to find the realities of the arrangements that were agreed,' and at 760E [Lord Upjohn], 'having ascertained the real nature of the transaction, you cannot … disguise it by using camouflaged clothing', I have highlighted areas of conflicting evidence and drawn my conclusions as to what I regard as the real nature of the transaction.

3. A body of evidence that is not narrated in the majority Decision, which seeks to give a judgment in principle on the efficacy of the trust arrangements as a tax-avoidance scheme, is of critical relevance in forming my view of the transactions in their real terms. On the whole, in my quest 'to find the realities of the arrangements that were agreed' [Lord Morris], I place more reliance than my colleagues do, on the documentary evidence. As regards the oral evidence, so far as the corporate witnesses and the trustee representative of the Appellants are concerned, their Witness Statements convey to me an element of choreography, perhaps due to the active involvement of counsel in their preparation. More specifically, I have reservations about the credibility of certain witnesses, namely, Mr Red, Mrs Crimson and

Mr Scarlet. The oral evidence has already been narrated in the majority Decision, and the Respondents' major concern is noted (para 152 MD) regarding 'the English practice (followed here) of Counsel drafting the initial form of Witness Statements'. In making my extra findings-in-fact, I have accorded greater coverage therefore to the admitted documentary evidence as providing a more realistic record of the nature of the transactions. Obliterated in some instances and by no means complete, nonetheless the documentary evidence that spans over a decade provides a contemporary record of the transactions as they happened at the time, and affords an account of the true intention and role of the participants in the scheme.

4. The burden of proof rests with the Appellants to meet the 'balance of probabilities' standard. It is with this yardstick that I make my extra findings-in-fact, and against which the evidence offered by the Respondents is related. Factual details, absent in the majority Decision, regarding the quantum of assessments, the extent of the operated scheme, the actual workings of the scheme, and the nature and volume of evidence presented, are some of the crucial aspects of the Respondents' evidence and form a significant part of my extra findings.

Extra Findings-in-Fact

Preliminaries

5. A Statement of Agreed Facts of only four pages was supplied, giving details of the Murray Group companies participating in the Scheme, and a chronology of the key stages in the inception and operation of the Trust. Three appendices form part of the Statement, and give respective listings of: (1) the employees for whom sub-trusts have been set up; (2) the funds contributed into the main Trust; and (3) the sums allocated to each sub-trust. The sequence of sub-trusts runs from 1 to 112, but number 66 has not been used, and three other numbers were never set up, bringing the total of actual sub-trusts to 108, of which 81 were set up by Rangers for its employees, and 27 were set up by other group companies.

6. The quantum of the fund movements gives an indication of the size of the scheme. The overall totals contributed into the main Trust were £55.5m and €5.3m, and the sums allocated to the individual sub-trusts were £52.9m and €5.3m in the decade from April 2001 to March 2010; a balance of £1.1m from the main Trust funds was allocated to participating group companies between June 2001 and October 2002 for the purpose of distributing bonuses.

7. Contributions into the main Trust in Euros of €5,330,981 matched almost exactly the sums entering the sub-trusts of €5,330,050. A similar correlation existed between the main Trust and the sub-trusts for contributions in GBP. The differential between £55.5m and £52.9m would have been accounted for, to a large extent, by fee and expense payments to the Trustee, as the head sums going into the main Trust covered the Trustees' fees invoiced on a quarterly basis (Mrs Crimson's WS at paras 35, 41, Day 6/14,16). From the appendices to the Agreed Statement of Facts, the following facts are also adduced: from 20 April 2001 to 3 March 2010, 457 payments were made into these sub-trusts, and 453 loans were requested and granted; the four payments that did not result in the granting of loans were all related to Mr Gold's sub-

trust. Except in the case of Mr Gold's sub-trust contributions, there was a straight-in, straight-out correlation between the contribution into a sub-trust and the sum loaned to the protector/employee of the sub-trust. A global picture of the movements of funds is therefore: contributions into the main Trust (after payments of trustees' fees and expenses) entered the various sub-trusts; all sums entering the sub-trusts left as loans to the protector/employees of the respective sub-trusts, except in the case of the four payments into Mr Gold's sub-trust.

8. Apart from the Statement of Agreed Facts and the Witness Statements from the parties, the Tribunal was also supplied with 24 arch-lever volumes of evidential documents, in addition to the authorities bundles. The first 12 volumes relate to the main Trust and its 108 sub-trusts, along with documents concerning each of the employees for whom a sub-trust had been set up; the documents take the form of employment contracts, internal memoranda, email exchanges, and associated correspondence with third parties, such as trustees or agents. Volume 13, entitled 'Other Issues', contains a well-chosen set of letters, emails, spreadsheets, auditors' report, management reports that illustrate the workings of the scheme. Volume 14 contains enquiry correspondence between HMRC and the Appellants, and the related Determinations and Notices under appeal. Volume 15 is a collection of the legal instruments for the Trust and the minutes of meeting adopting the various Deeds. Volume 16 contains the 'Deeds of Addition', schedules of Rangers' bonus structures and contributions into sub-trusts, and Rangers FC Football Business Monthly Reports from 2004 to 2009. Volume 17 contains the Trust's bank account transaction records, accounting projections of trust payments falling due, and listing of entities administered by Trident. Volumes 18 and 19 contain the year-end accounts of the sub-trusts administered by Trident. Volume 20 is a miscellaneous collection of Trustees' administrative papers. Volume 21 contains copies of Football Regulations and Handbooks, and Auditors' Key Issue Memoranda. Volume 22 contains seven supplemental documents supplied by HMRC in the third diet of the Hearing.

9. The Hearing, recorded by stenographers, lasted for 29 days over four diets, of which 17 days were for the examination of evidence. A daily transcript of the proceedings was provided electronically in near real time during the Hearing, followed by a hard copy the following day. The format I have adopted for referencing is: (a) references to the transcripts are given in brackets as (Day/page.line); (b) all other references not preceded by 'Day' refer to the joint bundle of document files as (File/divider/page); (c) references to the majority Decision are introduced as (para number MD).

10. The Trust stands to be governed by English law, and this Tribunal was sitting in Scotland. In this regard, English trust law should have been treated as foreign law in a Scottish court, and be dealt with as evidence. In the proceedings, however, Mr Studer did not give evidence on English trust law, but made submissions on behalf of the Appellants. This was an anomaly in the proceedings and was raised as a preliminary matter. The matter was disposed of with the parties agreeing that the First-Tier Tax Tribunal is a UK Tribunal, and that the case could have been heard in England where English trust law would not have been treated as foreign law. On this basis, Mr Studer's submissions on English trust law were admitted.

The Appeals

11. The appeals (all heard together as one appeal) relate to the tax years 2001/02 to 2008/09, and concern a number of assessments for PAYE and NIC issued between February and April 2008 covering the period up to 5 April 2007, and the additional assessments issued in March 2010 for 2007/08 and 2008/09. The PAYE Determinations are raised under Regulation 80 of the Income Tax (Pay as You Earn) Regulations 2003, and Schedule 8 Notices of Decision for NIC are made under Section 8 of the Social Security Contributions (Transfer of Functions) Act 1999. The initial assessments were variously amended and subsequently consolidated for the quantum of £46,265,397 as at 21 April 2010. The split of the total assessed is £34,650,228 for income tax, and £11,615,169 for employer's national insurance contributions.

12. The assessments are the result of an enquiry opened in January 2004 by HMRC into the use of an employee benefit trust in the Murray Group. The assessments are served on five Murray Group companies: Murray Group Holdings Ltd (MGHL), Murray Group Management Ltd (MGML), the Premier Property Group Ltd (PPGL), G M Mining Ltd (GMML), and The Rangers Football Club Plc (Rangers). Of the £46.2 million assessed, the sum of £36.6 million (PAYE £27.4m, NIC £9.2m) is on Rangers, and the balance of £9.6 million allocated variously among the other four group companies.

13. The assessments are raised in respect of a scheme whereby the sums contributed into the Murray Group Management Remuneration Trust (RT) by the employer companies were advanced as loans to the employees through their individual sub-trusts. The essential question for the Tribunal is whether the scheme under the Remuneration Trust arrangement was effective as a tax-avoidance scheme for the period from 6 April 2001 to 5 April 2009. The relevant charging provisions are under section 62 ITEPA 2003 for PAYE (or section 19 of ICTA 1988 prior to 6 April 2003), and section 6(1) of the Social Security Contributions and Benefits Act 1992 for NIC purposes.

14. The critical issue in front of this Tribunal is whether payments made via the remuneration trust mechanism amount to being emoluments for tax purposes. The questions that arise are as follows:

(1) Whether upon the true interpretation of the contractual arrangements, there have been payments made to the employees via the trust?

(2) Can these trust payments be characterised as having been made 'unreservedly at the disposal' of the employees?

The extra findings-in-fact are made with the purpose of arriving at an answer to these antecedent questions. A selective approach is necessary in the face of the volumes of evidence, and I have chosen in some instances, to relate in greater detail the history of certain sub-trusts as illustrative representatives for aspects of the arrangements.

The Evidence

15. The Respondents have categorised the payments through the trust arrangements into five areas in accordance with the situations that gave rise to them: (i) bonus payments to ordinary employees; (ii) salary increase to ordinary employees; (iii) bonus payments to footballers; (iv) payments to footballers and managers under side-letters; (v) termination payments further to side-letters. The categorisation is adopted here to provide a recognisable basis for the narration of the evidence concerning the operational aspect of the trust arrangements. Categories (iii) to (v) largely concern Rangers, and accounted for the £36.6m out of the total assessments of £46.2m, and are given wider coverage in my findings of fact. I have also included evidence in the following areas which I consider relevant in 'the quest to find the realities of the arrangements that were agreed' [Lord Morris], and the order of my narration of evidence is as follows:

(a) The background regarding the trust: implementation and personnel;
(b) The enquiry by HMRC into the use of the remuneration trust;
(c) The nature of the side-letters;
(d) The view of the auditors on the Remuneration Trust;
(e) The trustees' functions in reality beyond the terms of the deeds;
(f) The veracity of trustees' independence;
(g) The features of the loan structure;
(h) The categories of payments made under the trust scheme:
    (i) Bonus payments to ordinary employees;
    (ii) Salary increase to ordinary employees;
    (iii) Bonus payments to footballing employees;
    (iv) Payments to footballers and managers under side-letters;
    (v) Termination payments;
(i) The interchangeability between the trust arrangement and payroll;
(j) The example of Mr Evesham' sub-trust operation;
(k) The indemnities granted by the Appellants to the employees;
(l) The termination of sub-trusts;
(m) The role of the employee as the protector of his own sub-trust.

16. Much as one would like to emulate the 'commendable brevity' credited to the commissioners in *Garforth* in the laying out of evidence, I have found it impossible to do justice to the evidence in a short document. The evidence, spanning a full decade, together with the magnitude of the operation of the scheme, gives rise to its inevitable volume. Not much has been agreed by way of a Statement of Agreed Facts to assist the task. Finally, there does appear to exist a layer of 'camouflaged clothing' over the real arrangements, and this has rendered the task of ascertaining 'the real nature of the transaction' more arduous and complex. The process of removing the layer of 'camouflaged clothing' necessitates more lengthy narration to arrive at credible conclusions, especially if the conclusions so reached are contrary to the assertions by the Appellants' witnesses.

17. The Appellants called and led 15 witnesses in the following order: Mr Red, Mr Yellow, Mr Turquoise, Mr Green, Mr Violet, Mr Grey, Mr Black, Mrs Crimson, Mr Silver, Mr Gold, Mr Purple, Mr Blue, Mr Indigo, Mr Magenta and Mr Scarlet.

With the exception of Mr Turquoise, all other witnesses read to the terms of their Witness Statements. While counsel's involvement in statement preparation is apparently permitted, the overall impression created by the Witness Statements from the Murray Group senior employees and Mrs Crimson of the trustee company, was one of guardedness and careful omission of salient facts.

The Background regarding the Trust

18. The name of Paul Baxendale Walker came up repeatedly in the course of the hearing. He loomed large in the background as the architect of the trust scheme with a continuing input into the operation of the scheme beyond its inception. Significantly, he was not called as a witness. References were made in the cross-examination of various witnesses to the fact that Mr Baxendale Walker was suspended by the Law Society in England from practice for three years on 30 March 2003 and was eventually struck off on 29 September 2006. According to the evidence from Mr Red and Mrs Crimson, the Group continued to seek the advice of Baxendale Walker during the period of his suspension through a firm of solicitors bearing his name that operated until 30 March 2006 (the end of the suspension period). Subsequent to Baxendale Walker being struck off by the Law Society, the Appellants sought his advice through a multi-disciplinary limited liability partnership bearing his name, and of which the legal profession was not one of the disciplines.

19. In the final diet of hearing in January 2012, the Tribunal was provided by HMRC the High Court Decision, *Baxendale-Walker v Middleton & Others* [2011] EWHC 998(QB). The Decision itself was referred to in Mr Thomson's submissions regarding the indemnity clause to cover the Trustees in this scheme to act 'in breach of trust', and forms part of the background knowledge for this Tribunal. It is noted that the Law Society instructed an expert report on the legality of the Baxendale Walker's tax-avoidance schemes in 2002, and the result, known as the Langley Report, was released on 13 May 2003. The High Court judgment was on the action brought by Baxendale Walker to seek damages caused by the Langley Report of approximately £230m from various parties, and the action failed on all nine counts. It is also noted in the submissions of the Respondents that there has been 'a run of cases concerning Baxendale Walker trusts in the Jersey courts, culminating for the current purposes in *GL v Nautilus Trustees, Re the Remuneration Trust* [2009] JRC 164A' (HMRC written submissions at paragraph 115.12).

20. If Baxendale Walker was the architect of the scheme, Mr Red was the key person who instigated, implemented, and operated the scheme within the Murray Group. In his role within the Group's tax function, Mr Red was instrumental in bringing the scheme to the attention of the executives in the Group. When asked about the first contact he had of the scheme, Mr Red replied that he went to 'a presentation given at the offices of Argyle Consulting Limited in Glasgow … about various employee incentive arrangements'. Following the presentation, Mr Red 'had discussions, particularly with Mr Blue and Mr Black, but with other Board members' involvement as well, as to whether [the group] wanted to think about putting some kind of arrangement in place to incentivise employees.' According to Mr Red, 'the decision was made that [he] should meet with Paul Baxendale Walker personally' and that

'certainly after [his] meeting with Paul Baxendale Walker and a report back to Board members, it was decided at that stage that [the group] should consider putting such an arrangement in place' (Day 1/69-71). If Mr Red's position was 'somewhat invidious inasmuch as he was charged with the day-to-day management of a scheme devised and directed by another party' (para 85 MD), it should be set in the context of his instrumental role in putting the scheme in place. He instigated the process of bringing the scheme into the Murray Group; his role was not that of a passive middle manager left to implement decisions passed down from executives.

21. One strand of evidence tested in cross-examination concerned the proof of the purpose for the scheme. This was tested in various ways, and Mr Red repeatedly denied that he considered the Remuneration Trust scheme was for tax avoidance; he had also denied this in his replies to HMRC enquiry correspondence (14/108 and 120). In the internal memorandum (which has been referred to at para 10 MD), Mr Red appeared to be explaining to the Board of MIHL the implications for the Murray Group's Remuneration Trust following the judgment of *McDonald v Dextra*. The judgment and legislation related to *Dextra* were given in the first three paragraphs. The rest of the two-page memorandum, (that is, over half of its content), had been blackened and rendered illegible, except for the first sentence in a middle paragraph on page 2, which reads:

> 'Looking forward, it's my view that, while the *Dextra* case in itself has not changed the future deductibility of contributions into the Remuneration Trust, the Board should give serious thought to its attitude to tax avoidance schemes generally and to the future of this scheme specifically.'

We were not told what had been expurgated, but from the only readable sentence in the middle section, Mr Red would appear to view the Remuneration Trust as a form of 'tax-avoidance scheme'.

22. That internally the executives (who would have been directly addressed by the aforesaid memorandum) understood that the scheme as for tax-avoidance, was to a certain extent testified by Mr Yellow (Day 4/101) and Mr Blue (Day 8/141). Mr Yellow spoke of the scheme having tax advantages, and Mr Blue confirmed his understanding of the scheme as for avoiding PAYE and NIC. Mr Blue was one of the two key executives with whom Mr Red discussed the scheme prior to its implementation. As a Chartered Accountant, Mr Blue's understanding of the scheme as for tax avoidance was not without professional knowledge either. As for Mr Black, he denied that the scheme was for tax avoidance in cross-examination, though he went on to describe the scheme as 'a method of us acquiring, especially football wise, better players in a more cost effective manner than we would be able to do so'; that the club had been 'very ambitious at that time'; and 'it was seen as a correct and proper way for us to proceed'; that Rangers 'have been very successful, because we've been able to attract players of a certain standard that, perhaps, we may not have been able to otherwise' (Day 5/126). It was not examined in detail how Mr Black understood the scheme as being cost-effective. However, set in context, that cost-effectiveness conferred by the trust arrangements can be inferred as coming from

being able to offer the payroll equivalent of a 'net' sum without the costs of PAYE and NIC in addition.

23. The Respondents submit that 'the rationale for the introduction of the scheme, or the basis of the decision made' by the Board of Murray Group should be found as a crucial fact since 'at the heart of this appeal is the question of what the nature of the scheme is'. The Respondents also submit that the minutes of the Board meetings referred to by Mr Red for the purpose of discussing whether to put the scheme in place, and attended by Mr Black, Mr Blue and other Board members, have not been produced. In the course of Mr Red's cross-examination, the dearth of documentation in this respect was put to him, and the Appellants' counsel had responded at the time by drawing the Tribunal's attention to document (15/H/67) as the minute of a meeting on 19 April 2001 at 11am, with Mr Black and Mr Blue present and Mr Red in attendance (Day 1/84), and paragraph 2 of the minute reads:

> 'The Chairman reported the proposal that the Company make contributions to a scheme established under irrevocable trust ('the Scheme') for the purpose of funding the provision of discretionary benefits to present and future employees of the Company and their respective wives, widows and dependents. The Chairman noted that the establishment of the Scheme ought to promote employee loyalty to the Company and that the trade of the Company will thereby be benefitted. The Chairman noted that for the purpose of inheritance tax and capital gains tax, all 'Participators' in the Company and all persons 'connected' with such persons are excluded from benefits under the trusts of the Scheme.'

The wording in this paragraph was replicated to various degrees in other minutes of meetings in relation to the adoption of the Deeds of Adherence and so on. The Respondents, however, do not consider this minute of meeting as substantive for the purpose of recording the discussions that actually gave rise to the rationale for the adoption of the scheme. In their submissions, the Respondents reiterate that insofar as the Appellants have proved nothing to the Tribunal regarding the rationale behind the implementation, the onus of proof in this respect has not been discharged.

The Enquiry by HMRC

24. The enquiry commenced in January 2004 and it was not until April 2008 when sufficient information became available (but not through the Appellants' disclosure) for prior year assessments to be raised. The protracted and chequered course of the enquiry was largely due to a lack of candour and co-operation from Mr Red, who was the chief officer dealing with the enquiry. Key documents such as the side-letters, calculations of figures of contributions, emails and memorandums related directly to the trust's operation were not disclosed, despite repeated requests and statutory demands for information. From the enquiry correspondence, the tone in Mr Red's response suggests a degree of hostility, and his remarks were at times aggressive. With his background as a former Inspector of Taxes, and with his professional

knowledge as a Chartered Tax Adviser, it is judicious to infer that Mr Red's attitude and his non-disclosure of key documents did not spring from a lack of understanding of what was being requested, but was informed by a wish to withhold documents which might implicate the operation of remuneration trust as falling outwith the legitimate scope even by his own understanding. It was informative that Mr Red refused any meetings with HMRC in the course of the enquiry, for the likely reason that face-to-face interviews could lead more readily to unintended evidence being divulged.

25. Central to the enquiry was the question regarding the basis of determining the amounts contributed to the main Trust and the sub-trusts. It was a question repeatedly raised by HMRC in the enquiry correspondence, and repeatedly met with evasive and disingenuous answers. When asked 'what projections or calculations have been produced to allow the magnitude of contributions to be matched with the expected future bonuses or benefits' (14/47), the reply was: 'there are no projections or calculations produced specifically for this purpose' (14/51). To subsequent questions on any link between amounts of contribution to the Trust and the granting of loans, it was replied that there was: 'no trigger for the chain of events that led to an employee being told that they could apply for a loan from the Trust'; 'The loan amount was not specified' (14/119); 'the Board were not made aware of the way in which the trustees had used the funds'; 'The company has no control over the funds in the Trust and could not communicate wishes as to how they would like the Trustees to consider using their discretionary powers to apply the funds contributed to the Trust' (14/120); 'Your remark that sufficient funds are paid to the trust to cover the full amount of the loan request is simply incorrect'; and 'We continue to reject the view that there is a clear link between the amounts "paid" to the Trust and the loans to the employees. Once you accept that there is no control by the Company of either the Trust, the Trustees or Deepwater, it will become self-evident that there can be no link between the contributions to the Trust and loans to the employees'; that the comments were 'nonsensical and have no basis in fact' (14/143-146). Each of these assertions will be discussed in turn against other sources of evidence that emerged.

26. Unable to elicit the requested information by correspondence, HMRC had served statutory notices under paragraph 27 Schedule 18 FA 1998 on 21 September 2007 to request the administration files for Mr Purple (sub-trust 13), Mr Skegness (sub-trust 38), and Mr Berwick (sub-trust 63). Only Mr Purple's and Mr Skegness's files were handed over at the time as Mr Berwick's had been seized by police. Significantly, neither files handed over contained the side-letters, which were later recovered. It was highly probable, as the Respondents submit, that Mr Red, who was directly involved in handing over the files, had deliberately removed the side-letters germane to the players' administration files.

27. The impasse in procuring the necessary documents for the enquiry was broken only by the separate enquiry conducted by the City of London Police (COLP) in the autumn of 2007, when a search warrant on Rangers secured various documents and crucially image copies of computer hard drives. The COLP consulted HMRC Criminal Investigation Section on the material seized from Ibrox, and allowed HMRC's investigating officer to have the first sighting in October 2007 of a side-

letter in Mr Berwick's file that was seized. It was then that the Respondents became privy to information, hitherto unavailable, on how the trust scheme was being used within Rangers. Following application to the General Commissioners, two S20 TMA70 notices were issued on 6 June 2008. These notices were replied to on 18 July 2008 (14/201-4), wherein Mr Red asserted: 'your belief in the existence of documents demonstrating how amounts contributed to the Trust are determined is irrational and unfounded. I cannot help with your fantasies and the production of a S20 makes no difference to this'.

28. It was not until 7 May 2009, almost a year after the issue of the S20 notices, and five and a half years since the enquiry commenced, that the Appellants eventually provided the majority of the documents that were admitted as evidence for this Hearing. A notice under Schedule 36 FA2008 was issued on 11 June 2009 with the Appellants' approval, enabling the police to hand over the data and documents seized. It could be adduced from the sequence of events that the COLP investigation had acted as a trigger to the eventual disclosure of additional documents.

29. The conduct of the Murray Group in general, and Mr Red in particular, in the course of HMRC's enquiry went beyond the description of 'a lack of candour'. It would be judicial to conclude that it had been obstructive and obscurantist, and there is evidence of active concealment of documents, as the Respondents submit. Equally, to describe Mr Red as 'somewhat defensive' in giving his sworn testimony (para 10 MD) would be an understatement. On more than one occasion, Mr Red had attempted to mislead the Tribunal. The following paragraphs give examples of how Mr Red had made certain assertions or denials in an attempt to create an impression of the nature and operation of the Trust, which was commensurate with his own understanding of what would be the legitimate scope of its use as a tax-saving scheme.

30. In terms of his professional knowledge, Mr Red is a Chartered Tax Adviser and a former Inspector of Taxes. He showed his professional understanding of the legitimate scope of the scheme as a tax-saving measure in an internal email (to the Group's Human Resource manager) dated 12 November 2003:

> 'No payment which is due under a contract of employment should be made through the Trust as the Revenue can attack any such arrangement as simply replacing an existing contractual right and tax it as if it had never happened, so no savings would occur. Only discretionary bonuses should be subject to the Trust arrangements.' (1/8/19)

This understanding was reiterated in Mr Red's letter of reply to HMRC dated 20 July 2004 (14/23), in which he stated: 'Where bonuses are provided pursuant to contractual terms, such bonuses cannot be distributed from the Trust.' In these two statements, Mr Red effectively delineated what he understood to be the *legitimate* use of the trust arrangements as a tax-saving mechanism. It is only by holding on to what Mr Red – as a tax professional – understood to be the legitimate scope of the scheme that one can fairly assess the evidence in relation to his conduct during HMRC's enquiry and in the course of the Tribunal Hearing.

31. A host of questions were put to Mr Red in cross-examination to elicit the true nature of the scheme and the way the scheme operated, the veracity of trustees' independence, the extent of the trustees' exercise of discretionary powers, the control the Appellants' companies had over the trust funds, and the role of the protector/employees in the sub-trusts. The oral evidence was then cross-checked with Mr Red's written replies in HMRC's enquiry correspondence. When confronted by inconsistency in his own oral and written evidence, some of his responses are: 'I agree it is inconsistent'; and '(Pause) I would prefer that this letter did not say that because I disagree with what it says. And in retrospect my answer would have been: yes, the company or its officers or employees communicated wishes regarding using the discretionary powers' (Day 1/103); 'As I have already said, there are instances where I would rather I had divulged information which I haven't' (Day 2/18); 'The letter was drafted by somebody else. … It would have been Mr Baxendale Walker or somebody else in his firm. I cannot say which particular individual' (Day 2/19).

32. It seemed that when the inconsistency between his oral and written evidence could not be explained away, Mr Red resorted to attributing authorship of the correspondence to a third-party of whom he could not be specific. The overall impression created by Mr Red's evidence, oral and written, was that he was being vague and evasive. It was clear that he was not on sure ground, because he was trying to tell a version of how the trust scheme *should* operate, rather than the version as it actually operated. As a result of this schism, it led to deliberation and inconsistency in Mr Red's testimony, and to subsequent attempts to influence Mrs Crimson's (and possibly Mr Scarlet's) evidence to support a version of how the scheme should have operated.

The Nature of the Side-letters

33. Another strand of evidence being tested was the nature and purpose of the side-letters. Asked about the secrecy surrounding the side-letters, referring to the fact that they were not lodged with the SFA, nor disclosed in the long period of HMRC's enquiry, Mr Red's reply was: 'I still say there is nothing secret about them. We have nothing to hide in these side letters'. While not denying the proposition put to him by the Respondents that 'there's an overarching contract with each of the footballers, consisting of the written contract and the side letters', Mr Red maintained that 'it's our view that the side-letter or the letters of undertaking do not need to be registered or lodged with the SFA' (Day 3/31-32).

34. The content of the side-letter adopts a standard format with similar wording, and an example from Rangers Football Club is as follows:

> 'I confirm that the Board of Rangers Football Club (the Club) will recommend to the Trustees of the Murray Group Management Remuneration Trust (MGMRT) to include you as the protector of a sub-trust and to fund this sub-trust with a total of £500,000 net as follows, £125,000 in November 2001 and 2002 and £125,000 in March 2002 and 2003 or earlier at the Club's sole discretion, subject to you being a registered player with the Club on each due date.

The Club undertakes to fund the MGMRT to the extent necessary to permit the trustees of the MGMRT to carry out this recommendation.'

35. It is not accepted that there had been no deliberate concealment of the side-letters, in view of how the first side-letter only came to light through the seizure of Mr Berwick's file nearly four years into the enquiry. It is not accepted that the non-disclosure of the side-letters arose from a 'credible' view that Mr Red considered the side-letters irrelevant to HMRC's enquiry. As a former Inspector of Taxes, Mr Red knew, or should have known, that the side-letters were highly relevant to the enquiry. The side-letters showed a form of contractual arrangement, and they proved linkage between the sums contributed into the sub-trusts at the appointed dates and their withdrawal as loans from the sub-trusts as contemporaneous transactions. The contractual aspect and the linkage between the amounts of contributions to the main Trust and the sums loaned had been repeatedly raised in the enquiry correspondence. A fair conclusion to be drawn from the circumstantial evidence on the one hand, and Mr Red's oral evidence on the other, is that the side-letters had been actively concealed. The reason for the concealment might have been, in Mr Red's view, the side-letters could be incriminating evidence against the impression of the trust operation that he had been trying to give.

36. The side-letters would appear to negate many of Mr Red's assertions regarding the nature of the trust arrangements. They answer HMRC's question concerning 'what projections or calculations have been produced to allow the magnitude of contributions to be matched with the expected future bonuses or benefits' (14/47). They are contrary to the claim that 'there are no projections or calculations produced specifically for this purpose' (14/51). The side-letters prove the linkage of events between amounts of contribution to the main Trust and the granting of loans through the sub-trusts, and negate the assertions that there is 'no trigger for the chain of events that led to an employee being told that they could apply for a loan from the Trust'; and belie the statement that 'the loan amount was not specified' (14/47).

The View of the Auditors on the Remuneration Trust

37. In the 'Auditors' Report of factual findings to the directors of Rangers Football Club plc' for the period ended 31 January 2005 (13/27-58), the Remuneration Trust came under the heading of 'Search for unrecorded liabilities' (13/44). The auditors commented: 'We identified that the company are currently spreading the costs of all remuneration trust payments evenly across the year, irrespective of whether the player is registered a the club for all or part of the year'. The report continues by stating the auditors' opinion: 'that the payments made to the remuneration trust should be fully recognised in the profit and loss account on the date of the board minute agreeing the payment to be made to the trust rather than being spread evenly over the accounting period.' The report continues by outlining the adjustments that should be made to bring the figures for the remuneration trust payments in line with recommended accounting method. This report does not appear to address any further issues on the remuneration trust other than the timing when this 'unrecorded liability' should be treated as having arisen for accounting purposes.

38. Another reference to the scheme by the auditors of Rangers came under the Key Issues Memorandum (KIM) for year ended 30 June 2004. It would appear that Rangers changed their accounting period end from 30 June to 31 January, with the period from 1 July 2004 to 31 January 2005 (noted above in the Report) being the transition period. The purpose of the KIM, as stated in the introduction, was to be 'an integral part of our working papers and forms part of the record of examination in connection with our audit of the financial statements of the Group for the year ended 30 June 2004'(21/15/4), and under note 4.5, the auditors reported on the Remuneration Trust as follows:

> 'We have not reviewed in detail the legal documentation for each of the transactions and we are therefore unable to form a view on their efficiency. However we have been informed that, to date, there has been no challenge by the Inland Revenue on this scheme. The Inland Revenue has however challenged a similar scheme in *McDonald v Dextra Accessories Limited* which resulted in the courts ruling in favour of the taxpayer. Given this information, we have accepted that there is no taxation liability, contingent or otherwise, which requires to be reflected in the accounts for the year ended 30 June 2004. We will continue to monitor this area in future years.' (21/15/12)

The Key Issues Memorandum for year ended 30 June 2004 would have been prepared some months after the year-end. The management of Rangers would have been aware of the enquiry into the scheme by HMRC that commenced in January 2004, and the auditors were informed that 'there has been no challenge from the Inland Revenue on this scheme'. On one level of interpretation, an enquiry does not amount to being a challenge, but it would appear that the auditors were not made aware of the enquiry at this stage.

39. For the year ended 30 June 2005, only the introductory pages of the Key Issues Memorandum have been made available, but without the substantive notes. For the year 30 June 2006, a 'Draft' copy of the Key Issues Memorandum is available and under note 4.8 for the Remuneration Trust, the auditors reported:

> 'From an audit point of view we have not attempted to opine on the efficiency of this tax arrangement, instead we have assessed the correspondence with HMRC and considered the relevant case law. To date, there has been no technical challenge by HM Revenue & Customs (HMRC) on the schemes. The Club have received an enquiry from HMRC in respect of the accounting period to 30 June 2002, which asks for additional information in respect of the payments to the Trust in that year. At this stage HMRC has asked for significant amounts of documentation which has been supplied to them but no detailed technical challenges have been made by HMRC.
>
> We have received confirmation from [Mr Red] that the text contained within letters sent to individuals outlining their award is in line with that

approved by the Queens Counsel when the scheme was established.' (21/17/4)

40. The auditors' comments in the Key Issues Memorandum are to be understood in the context that 'it is essential that the directors confirm [their] understanding of all the matters referred to in this memorandum is appropriate, having regard to their knowledge of the particular circumstances' (21/18/3). It cannot be ascertained when the KIM was drafted, but the history of the enquiry indicated that HMRC was still in an impasse up until the autumn of 2007 in obtaining information from the Appellants, and the impasse was broken with the materials discovered by the COLP enquiry, not by the co-operative disclosure as the auditors seemed to have given to understand.

41. The Respondents submit that 'the auditors had not seen the side letters, otherwise they would have been a matter of specific comment' (para 124.3 of written submissions). It is not clear whether the auditors had actual sight of a side-letter when they made the reference to 'the text contained within letters sent to individuals outlining their award'. For the year ended 30 June 2004, the auditors reported in KIM that Mr Purple had waived his right to his 10% transfer fee, and that a loan of £500,000 to Mr Purple from the Remuneration Trust was 'unrelated from the contractual amount he would have been due' (21/15/13). It would appear, from the evidence heard on Mr Purple's termination payment, which is narrated in more detail under the section on 'Termination Payments' in my findings of fact, that the auditors had been told an untruth on both scores, regarding the waiver of the right, and the loan being unrelated to the contractual payment on transfer. The auditors were also told that the paperwork for Mr Purple was 'mislaid', (and therefore was not available for the auditors to inspect). Over the use of the remuneration trust, the auditors seemed to have been treated by the Appellants with the same lack of candour as accorded to HMRC. The auditors did not seem to be privy to any (or much) of the documentation, and had not formed a view on the scheme other than relied on what they had been told by the management.

The Trustees' Functions

42. To ascertain the role of the trustees in the scheme, I focus on two aspects: their independence from the Appellants as the founder, and the extent of their exercise of discretionary powers. For the trustees' independence, I look at factors that may influence their independence. For the exercise of discretionary powers, I look at the procedural aspect of the scheme to establish the actual functions of the trustees in a scheme that consists principally of advancing loans to the protector/employees. The evidence concerning the trustees' functions is addressed first before that for the trustees' independence, which is addressed in the next section.

43. Mrs Crimson could not be precise on many material aspects of the running of the scheme, such as the procedure for preparing the trust accounts, or any checks on the credit rating of the borrowers. Mrs Crimson was unclear where accounts had been sent, whether to the company, or to the protectors, and in fact, evidence emerged that neither had been sent these documents. The accounts for the sub-trusts did not appear to have been prepared nor sent out to the protector/employees as a matter of normal practice. The production of the sub-trust accounts seemed to have been prompted by

the Tribunal proceedings. A set of accounts for the majority of the sub-trusts covering two accounting periods in comparative columns: (i) one year to 5 April 2007, and (ii) two years to 5 April 2009, were made available to the Tribunal in a later diet of the Hearing after Mrs Crimson had given evidence. Most of these year-end accounts seemed to have been signed off by the directors of Trident in the summer of 2010. The documentation and records maintained by Trident for the sub-trusts appear to be scant. The World-Checks carried out on some of the employees, which Mrs Crimson claimed to be a means of vetting their credit worthiness, were in fact a minimum test required for the Money Laundry Regulations. The trustees did not update the 'borrowers' on the extent of their indebtedness. No borrowers seemed to have requested their statements of accounts, except for Mr Gold who has not taken out loans and has been monitoring the investment of funds retained in his sub-trust.

44. Mrs Crimson claimed that loan requests would only be declined if exceptional issues came to light to warrant such action. The evidence showed that no loans had ever been refused. The Respondents submit that if the loans were genuine loans in the commercial sense, it would have been the duty of the trustees to make an assessment of the borrowers' financial means to service or repay the loans, and to exercise their discretionary powers in refusing loans in cases such as the following: (a) Messrs York, Dundee, Cardiff, Birmingham, and Bath, where the sums 'loaned' by their sub-trusts far exceeded the sums they received through the payroll before domestic expenditure. For instance, Mr Dundee received repeated loans to the total of £200,000 per annum while his annual salary through payroll was around £100,000 gross; (b) loans were made in termination of employment context where future earnings at the same level were not guaranteed, for example, Mr Purple moved to another club for less money; (c) Mr Aberdeen has become bankrupt since leaving the Rangers and no action was taken; (d) Mr Inverness's loans were used to fund lifestyle spending. There was no evidence of any questions ever being asked to ascertain the circumstances of the borrowers for the exercise of discretion in the granting of a loan.

45. On the contrary, the evidence indicates that the role of the trustees was essentially passive, whose principal function seemed to be that of conveying designated sums of money from the Appellants to designated employees as instructed by the loan requests. It was a 'process' in which the trustees' principal function was to process the loans; they did not seem to exercise any discretion. Indeed the timing of events in most cases meant they would not have been able to exercise any discretion, such as Mr Coventry obtaining an indemnity for departing remuneration trust payments before the trustees had supposedly made a decision (Day 6/125-129). Money arrived around the same time into the main Trust as the receipt of the loan requests and letters of wishes (for the first application of loan). A record in November 2006 shows funds being transferred for loans to three individuals before the trustees would have the chance to make a decision (Day 6/54-65); Appellants' request to 'process payments' as soon as the funds were transmitted meant there would have been no time for the trustees to consider the matter (Day 9/72-79); loans were post-dated to give an appearance of the order of events being in the correct sequence (Day 9/78); evidence of deliberation by trustees to be recorded in the minute was not borne out (Day 9/48) – except for changes in names and sums, standard and proforma wording was used in

the trustees' minute book for each 'deliberation'; there were no individual particulars regarding the borrowers.

46. It has been submitted by the Respondents and not contended by the Appellants that the way the Trustees had acted in advancing the sums as loans meant that the Trustees had been acting in breach of trust. This was an issue raised by the Langley Report, and was one of the three conclusions drawn by the Forensic Investigation Report (FI Report) produced by the Law Society on 5 June 2003: that 'there was evidence that BWS [Baxendale Walker Scheme] had put in place trust structures with the intention that they would be operated in breach of trust and this conclusion was supported by the Langley Report' (*Baxendale-Walker v Law Society and others* [2011], at paras 20, 23, 112, 119, 120). The deeds for the Murray Group main Trust and each sub-trust were drafted with clauses designed to give a wide-ranging indemnity to the trustees – reference in clause 6.1 of Deed for the main trust and of each sub-trust. The drafting of these deeds was traced to Baxendale Walker, and this would be in line with the finding made in the Langley Report and the Law Society's FI Report. The evidence suggests that the Murray Group Remuneration Trust was intended to be operated in breach of trust, and that the scheme required such breach to achieve its purpose.

47. It emerged in cross-examination that control of the Appellant companies over the application of funds was apparent. It was not the case, as Mr Red claimed (*supra* 25) that 'the Board were not made aware of the way in which the trustees had used the funds'. The Board seemed to have directed the trustees to allocate funds to sub-trusts according to the loan requests as part of the agreement with Trident, and to make loans to the employees without any questions. The loan requests and the protectors' letters of wishes were the only extant documents for all the sub-trusts. There was no proof of any vetting of suitability, any request for security, any examination of ability to repay loans, any check on their credit worthiness – the loans were made as a matter of course, with no consideration other than 'processing' the loan requests. The facts proved contrary to Mr Red's claim that 'the company has no control over the funds in the Trust and could not communicate wishes as to how they would like the Trustees to consider using their discretionary powers to apply the funds contributed to the Trust'.

48. In cross-examination, it became clear that Mrs Crimson was very uncomfortable with her position. She spoke with hesitation, prevarication, and gave conflicting details, for instance, as regards the number of Baxendale Walker advised clients in Trident's portfolio. She admitted at one point: 'I think I have found this very difficult' (Day 9/10.15), probably referring to the giving of evidence under cross-examination. She gave the impression of being aware of what her professional duties as trustees *should* have been, but knew well in practice that the trustees had no independence, and that there was no exercise of any discretionary powers at all in the granting of loans. The so-called 'four-eye process' whereby two directors would examine the loan requests and exercise their supposedly discretionary powers appeared to be no more than a procedure to rubber-stamp the documentation that had been prepared by the Appellants. In most cases, the loan requests seemed to have pre-dated the allocation of funds into the sub-trusts, and in some instances, had pre-dated the date of the deed for the set up of the sub-trust.

49. There is no substantive evidence to support the claim of discretionary powers being exercised in granting loans to the protector/employees. There is an inextricable link between the loan requests and the allocation of funds into individual sub-trusts. The loan requests arrived around the same time as the contributions into the main Trust, and seemed to function as *instructions* to the trustees for the two steps in this process: (1) *which* sub-trusts were to be allocated money from the funds arriving into the main Trust; (2) *how much* was to be allocated to each designated sub-trust so as to meet the amount on his loan request. In operating the scheme that consisted of principally advancing loans to the protector/employees, Trident's functions appeared to be essentially passive and perfunctory, and seemed to be largely related to the processing of the loan requests. There is no evidence of any exercise of discretionary powers in the granting of loans.

The Veracity of Trustees' Independence

50. Equity was the trustee company for the Murray Group Remuneration Trust until 2006. The Respondents consider that it is informative that no witnesses were called from Equity, though some sub-trusts have remained under the trusteeship of Equity after Trident was appointed. The removal of Equity in 2006 was occasioned by the regulatory pressure on Equity from the Jersey Financial Services Commission (FSC). To comply with FSC's stipulations, Equity intimated the requirements to introduce changes such as the need for security and payment of interest, for loans advanced to the employees through the trust mechanism. Trident replaced Equity in June 2006 and continue to advance loans on previous terms.

51. The Respondents also submit that the control of the Appellant companies over the trustees was evidenced in the removal of Equity. It was because Equity, on seeking legal advice, recommended the implementation of a more robust loan structure that they were removed. If the loans were a matter entirely between the protector/employees and the trustees, the Respondents submit, Equity could have revised the terms of the loan direct with the protector/employees. But this was not a real option in practice, and what happened was that Equity referred the matter directly to the Appellants as the employer-founding companies for a resolution. When the matter could not be resolved with Equity, the Appellants effected the termination of the Equity as trustees by way of Mr Black exercising his rights as the protector of the main Trust. While the Respondents submit that the executed decision was technically incompetent because Mr Black had not been validly appointed, it remains the fact that Murray Group Management Ltd (MGML) had the absolute power to terminate the appointment of Equity and to appoint new trustees. Whether the power to do so was vested with Mr Black by the Deed of Amendment of January 2002, or with MGML, the result was still the same, that the Appellants, as employers, had the control over the appointment and removal of the trustees.

52. Another example of control being exercised by the Appellants over the trustees pertains to the removal of Deepwater in the lending arrangement operated under Equity. Deepwater was introduced as a company by Equity to lend money to the protector/employees of the Murray Group sub-trusts. Equity would lend money to Deepwater at 1.5% above LIBOR and Deepwater would lend to the

protector/employees at 2% above LIBOR, making a profit with the differential in interest rate. The Appellants took action to stop such practice. Their action to remove Deepwater in the loan arrangements was an example of their control over the trustees' conduct. The Appellants' ability to stop the practice counters their assertion that they had nothing to do with the loan arrangements, and that the loan arrangements were simply matters of agreement between the trustees and the protectors. We have also heard evidence from Mrs Crimson that the trustees have no control over the interest rate, and that the terms of interest have been set by the Appellants at 2% above LIBOR and have not varied since the implementation of the scheme.

53. It is relevant in assessing the veracity of Trident's independence to review their client profile. The Murray Group's main Trust and the 100 sub-trusts taken over by Trident was the largest group of trusts managed by Trident, 'the only one of this size', according to Mrs Crimson. Together they represented 101 out of a total of 700-800 entities in Trident's portfolio (Day 6/35). In terms of Trident's fee income from the entities under the Murray Group: (1) Acceptance fees of £1,500 were levied on each sub-trust on transfer over from Equity; (2) Annual fees of £1,000 for each of the 100 sub-trusts, and £2,500 for the main Trust were charged. These annual fees are payable regardless of whether there have been any transactions for a particular sub-trust in the year; (3) Administration fees on each loan transaction processed as a percentage of the sum. Mrs Crimson could not be precise about the percentage fee charged for administration; she suggested that it was 'less than 1%' (Day 6/34.10). Evidence from Rangers' internal communications for management purposes, for example, Mr Magenta's schedule (4/28/59) listing the costs of funding Mr Evesham, Mr Warwick and Mr Bath with the trust arrangements, shows 'RT Fee' at 1% of the 'RT payments', not 'less than 1%' as suggested by Mrs Crimson.

54. On the point of the fees charged by Trident as trustees, evidence from the joint bundle (volumes 18 and 19) containing the year-end accounts for most of the sub-trusts indicates a somewhat random structure. For example, the accounts for 27th sub-trust for Mr Nottingham of Premier Property Group (18/19/3) show administration fees charged for the two years to 5 April 2009 at £2,864 and annual fees for the two years at £2,000. For the year to 5 April 2007, acceptance fees of £1,500 (for taking over the trusteeship), annual trustees fees of £1,200, and administration fees of £612 were charged. There had been no transactions in this sub-trust during Trident's trusteeship. It is unclear why there should have been an administration fee of £2,864 and £612 charged in the 3-year period. The initial funds allocated to the sub-trust and loaned out to Mr Nottingham totalled at £162,600. In the three years to 5 April 2009, a total of £8,176 was paid as fees to Trident for this sub-trust, before any sub-trust expenses.

55. The accounts for Mr Burford's 40th sub-trust (18/25/3) show an even higher ratio of trustees' fees to loan capital: £2,945 was charged for administration in the two years to 5/4/09 and £845 for the year to 5/4/07; annual fees of £2,000 and £1,080 for the respective accounting periods, and £1,500 acceptance fees on transfer. A total of £8,370 was charged in the three years when the original funds loaned out stand only at £40,000. Again there had been no transactions into the sub-trust or any other

movement in the capital account to explain how the administration fees of £3,790 might have been incurred.

56. According to Mrs Crimson, the majority of the 700-800 trust entities in Trident's portfolio were employee benefit trusts. Trident was recommended to Murray Group by Baxendale Walker to replace Equity as trustees. When asked how many of these trust entities were related to Baxendale Walker, Mrs Crimson prevaricated, and her answers were confusing. She said at one point: 'most of the remuneration trusts that we have are Baxendale Walker advised clients. We don't tend to have – [prevarication] – that many remuneration trusts, if any, who aren't Baxendale Walker advised' (Day 6/46/11-15). When asked specifically for the number of the trusts which were Baxendale Walker's clients, Mrs Crimson gave a small number of around 40. She confirmed that Trident continued to receive advice from Baxendale Walker in the period after 2006 (Day 6/48), and Mrs Crimson was aware of the fact that Baxendale Walker had been struck off by the Law Society in England in 2006.

57. We heard evidence on how Mr Red had a conversation with Mrs Crimson on the eve of Mrs Crimson's giving of evidence, and passed her a brown envelope containing copies of Murray Group company minutes of meetings deciding on the contributions to the trust. The Respondents submit that this was an attempt in conniving evidence, since Mr Red had asserted in his oral evidence, given the day before Mrs Crimson was due to give evidence, that the Trustees had been sent such minutes as part of the procedure. In reality these minutes were never sent to the Trustees, and to cover up the fact that the Trustees had never had sight of these minutes, Mr Red passed her the brown envelope on the eve of Mrs Crimson's testimony so that she could claim that Trident had been sent these minutes as a matter of course. The import of such minutes being sent was supposedly to meet the 'Constructive Obligation' as stated in Schedule 3 of the trust deed, inserted by January 2002 amendment. 'Constructive Obligation' was a formulaic definition designed to address a change in law and the inserted amendment reads: 'a copy of the board minute or written resolutions of the directors of the Founder, which states that a proposed transfer of property to the Trustees will discharge in whole or part Constructive Obligation, shall be sufficient evidence to the Trustees that such transfer of property to the Trustees constitutes a Permitted Contribution.'

58. Mrs Crimson's evidence does not give much substance to the veracity of the trustees' independence. The Murray Group Remuneration Trust with its 100 sub-trusts as one client group represented more than 12% to 14% of Trident's overall portfolio in terms of entities. In terms of fee structure, it would not be unreasonable to extrapolate that a similar percentage applied to fees from Remuneration Trust group in relation to the total fee turnover. There seemed to be a strong presence of clients in the portfolio being advised by Baxendale Walker. The circumstances leading to Equity's removal were firmly in the foreground for the incoming trustees to understand what the Appellants would be expecting from the conduct of the new trustees. All these factors suggest that Trident's real independence from the Appellants was highly compromised, and there is no evidence to contravene this inference. On the contrary, the 'brown envelope' episode stands as a proof of the Appellants' control over the trustees, and the trustees' readiness to comply with the

direction. As the Respondents submit, the conduct of the trustees was characterised by being compliant and complicit: (1) Trident as trustees were willing to act in breach of trust to achieve the aims of the Appellant companies in using the sub-trusts to grant loans to the protector/employees; (2) Mrs Crimson as a director of the trustee company was willing to connive in giving false evidence to help create a false impression of procedural practice that would suggest Trustees' independence.

The Features of the Loans

59. A memorandum by Mr Red dated 11 May 2006 giving the circumstances that led to Equity's removal as trustees was informative of the genuine nature of the loan arrangement in a commercial context, and it reads as follows:

> 'Towards the end of March, I was advised by the trustees that they were undergoing a regulatory assessment by Jersey equivalent of the FSA, and would be unable to enter into new loan arrangements while this was going on. Their expectations were that the assessment would be complete by the end of April, although they had only limited control over this. I asked that they keep me informed and passed the information to Mr Magenta at Rangers, the only Group company now contributing to the Trust.
>
> At the end of April, they advised me that an issue had arisen during the review concerning whether the loan structures they had been putting in place were robust enough to be 'commercial' and, therefore, whether they were completely fulfilling their obligations as trustees to invest the funds in their hands in the best interests of the Trust's beneficiaries. They were taking legal advice on this aspect and wanted to meet to discuss the outcome. A meeting was arranged on 8 May.
>
> At the meeting, I met with Mr Duxford, a director of Equity Trust, their lawyer, Mr Oxford … While we discussed several aspects of the Trust, we came back to the important issue as to whether the loans were 'commercial' or not. The trustees, on legal advice, had reached the conclusion that the loan structure, as it stood, was not 'commercial' enough to satisfy their obligations as trustees and that future loans would have to change structure in some way, which may involve payment of interest annually on the loan, taking some form of security, or increasing the interest rate charged.' (13/77)

60. The terms and conditions related to these loans advanced to the employees as protectors of their sub-trusts characterise the reality of the funds that have been made to the employees as 'loans'. From the documentary and oral evidence, the following features can be ascribed to the loans:

(i) No security had ever been requested or required for the hundreds of thousands of pounds borrowed;

(ii) No scrutiny was undertaken of the purpose for which the loans were requested;

(iii) No vetting of borrowers or assessment of means was carried out;

(iv) The loans were expected to be renewed indefinitely and to remain as liabilities against the employees' estates;

(v) It was the understanding of all parties involved – Appellants companies, trustees and employees – that the loans would never be expected to be repaid against the wishes of the employees;

(vi) The interest rate was chosen at a percentage (1.5% or 2% because of Deepwater's involvement); and according to Mrs Crimson, the rate did not vary with changes in the LIBOR rate, so the trustees were committing themselves to the same rate of interest over the term of 10 years;

(vii) No interest had ever been paid during the term of any of the loans; again it was the understanding of all participants that the interest would never be called upon to be paid during the lifetime of the employees who had borrowed the sums;

(viii) The interest element was designed to be rolled up indefinitely, to remain as a 'paper' debt and to augment the overall indebtedness of the employees' estates, thereby conferring a bigger reduction against inheritance tax.

61. The certainty that the loan would be renewed and never be required to be repaid was expressed by various witnesses as follows:

(a) Mr Black: 'When my first loan is up in mid-2011, I will decide either to pay back the loan or re-negotiate. Whatever I feel is appropriate at that moment.' (Day 5/141.16)

(b) Mr Grey: 'I could not conceive of any situation where the loans would require to be repaid.' (Day 5/107.18)

(c) Mr Violet: 'I expected that the trustees would renew the loan with the result that the loan would carry on until I died, which would produce an inheritance tax benefit. Therefore, while I knew these were loans, I never thought I would pay anything back during my lifetime.' (Day 5/27)

62. These are the features of the loans on which the legal advice sought by Equity came to the conclusion that 'the loan structure, as it stood, was not "commercial" enough to satisfy their obligations as trustees and that future loans would have to change structure in some way which may involve payment of interest annually on the loan, taking some form of security, or increasing the interest rate charged'. The assessment that the loans are not 'commercial' by the Jersey Financial Services Commission represents the opinion of an independent regulatory body and should be accorded its due weight in evaluating the commercial reality of the loans as advanced to the protector/employees.

Bonus Payments to Ordinary Employees

63. Concerning the matter of how bonus payments in recognition of past services came to be made through the remuneration trust, we heard evidence from the senior employees of the Group who had bonus paid via the trust mechanism: Mr Blue, Mr Yellow, and Mr Green, Mr Black, Mr Magenta, and Mr Red. Their Witness Statements were carefully drafted with the aid of the junior counsel to give the formulation that rather than paying a bonus in some cases, a contribution was made instead to the remuneration trust. An example comes from Mr Blue's Witness Statement at paragraph 14:

> 'In the case of more senior employees, the Group's senior management would consider whether it was appropriate to make contributions to the Trust. If the Group thought it appropriate for contributions to be made to the Trust, the individual was asked whether, in the event that he was awarded a bonus, he would prefer a contribution to be made to the Trust rather than a cash bonus to be paid through the payroll.' (Day 8/133)

64. In response to questions from the Tribunal, Mr Blue indicated that in relation to his own bonuses he was asked whether he wanted to be involved in the remuneration or not. Then he said, 'Following the acceptance of that role [sic], I was then made aware of what the payment would be. So having accepted that I would go down the trust route, it would be a cash payment.' The chairman then asked: 'So if the trust route it would then be –', to which Mr Blue replied: 'Once we were agreed it was going to be a trust payment then he would tell me what the figure would be and I would be able to make a decision, based on that number' (Day 8/165-166).

65. Mr Yellow's evidence given under cross-examination indicated that he was presented with a choice as to whether he wanted to have a payment into the remuneration trust or through payroll (Day 4/104-107). He also indicated that he thought if he had said he did not want to use the remuneration trust, he would have been paid his bonus through payroll, though he stated he did not know if the figure would have been grossed up had he chosen to be paid through payroll (Day 4/123.11).

66. In Mr Green's evidence under cross-examination, he described the process as: 'if I was awarded a bonus … instead of a payment being made to me through payroll, an amount would be contributed by PPG to the trust' (Day 4/140-141). Mr Green described the position as being 'given the opportunity as I saw it to have it done this way' (Day 5/62.2).

67. Similarly, Mr Black's reply indicated an arrangement somewhat different from the formulation in the Witness Statement. In reply to the Tribunal, Mr Black described the arrangement for staff bonus as follows: 'an amount was decided and put forward. Mr Blue […]was in charge of that. He would speak to the individuals and it would be decided if they were to get a bonus and how they would like it to be handled' (Day 5/148). In relation to his own bonus, Mr Black's reply was: 'I discussed it with my colleagues as to the best route at that particular time.'

68. There was also a high expectation of bonuses being paid each year. Mr Yellow received a bonus in each of the eight complete years he had been employed before his sub-trust was set up. He then received bonuses through the remuneration trust, and since the Appellants decided to wind down the use of the trust especially in respect of payment of executive bonuses, he reverted to receiving his bonuses through the payroll in each year again.

69. From the Witness Statements, the formulation regarding bonus payments via the trust was that *rather than paying a bonus in some cases, a contribution was made instead to the remuneration trust.* This appeared to be the subtle course of distinction in the circumstances of the arrangement that the counsel acting for the Appellants was trying to steer the witnesses. This fine distinction, however, was not easily maintained and under cross-examination, the responses from the employees all seemed to suggest that there was a 'choice' between the payroll and the trust mechanism, and there was 'consent' from the employee to go down the trust route. It would also appear that the figure of bonus was then made clear after the route was chosen; and that if the trust route was not chosen, the bonus would have been paid via payroll, though whether it would have been grossed up or not was not clear.

Salary Increase to Ordinary Employees

70. The episode concerning the possibility of using the trust mechanism to pay Mr Scarlet what would appear to be an agreed figure for his salary increase is informative of the views held by the staff and personnel involved regarding the workings of the trust mechanism. The sequence of the internal communications related to this episode is narrated as follows:

(i) Ms Cambridge (an HR Manager) to Mr Red, email dated 12/11/2003: 'Is it possible to have part of an annual salary paid through the trust? Mr Scarlet has asked if it would be possible for his salary increase (10K) be paid like this and Mr Indigo has asked me to contact you about it.' (2/8/19)

(ii) Mr Red's reply on 12/11/2003: 'I would strongly advise against any such move. No payment which is due under a contract of employment should be made through the Trust as the Revenue can attack any such arrangement as simply replacing an existing contractual right and tax it as if it had never happened…' (2/8/19).

(iii) Ms Cambridge to Mr Indigo, email dated 14/11/2003: ' …I have emailed Mr Red regarding paying salary through the trust and he has strongly advised against this. I have advised Mr Scarlet and he is happy with this – he just wanted to know if it was possible. … His bonus payments have already been made through the trust.' (2/8/20)

(iv) Ms Cambridge to Mr Scarlet, email dated 1/12/2003: 'I know that there has been some confusion over your salary increase. I have confirmed with Mr Indigo that it is not possible to pay your annual salary increase in one advance payment through the trust. Mr Red is aware of this now. The only

feasible option was to pay an amount into the trust in monthly/quarterly arrears but Mr Red said this was not possible due to the administration involved…' (2/8/24).

(v) It would appear there had been some more communications since Ms Cambridge's email before the next document on record from Mr Scarlet to Mr Indigo, email dated 18/12/2003. It was a long email which started with Mr Scarlet saying that regarding his salary, he was 'somewhat angered and concerned by a number of things' and detailed 'the chain of events as explained':

'**Summer**: Mr Black suggested that any pay rise I got should be paid through the trust obviously as a discretionary bonus as it cannot be contractual however out of courtesy I should check this with you.

August: Discussion with you where I advised of the above where you stated you would look at this for me along with my pension concerns and my contract terms.

Late November: I am advised by Ms Cambridge that she could not 'put my salary increase through the trust' as advised by Mr Red. I challenged this with Ms Cambridge and said this was not what was to be done and that Mr Red should have been informed my increase was to be non contractual and put through as a discretionary bonus as I do with players, coaches and more recently Mr Burford. …

She advised me at this stage she had not realised this fully and possibly explained wrongly to Mr Red what was to be done, thereafter she had another conversation with Mr Red who I believe stated that yes this obviously could be done. At this point she advised that she had actually informed payroll however would change the instruction to payroll and process through the trust. At the end of the meeting I gave her back the letter addressed to me from you that stated my contractual increase for her to shred….' (2/8/25)

71. According to Mr Scarlet's email, it was 'confirmed to [him] that a bank transfer was made from Ibrox to cover this and that Mr Black when challenged again by Mr Red had said all was okay.' But events did not turn out as he expected, and three and a half weeks after his meeting with Ms Cambridge, Mr Scarlet's trust paperwork still had not been processed, and this prompted him to write the long email to Mr Indigo. Mr Scarlet said towards the end of his email: 'it [the trust arrangement] was not something I asked for (was cited at the time to be a saving to the company anyway)…' and he bemoaned the fact that as his £15,000 salary increase was now processed through payroll, he was short by £6,000 for an investment commitment he had made.

72. From the evidence, Mr Scarlet's salary increase seemed to have been agreed at £15,000. He was given to understand that the increase could be put through the trust mechanism so that he would be receiving the sum of £15,000, and he reached this

understanding with Ms Cambridge to alter the instructions to payroll. For one reason or another, the salary increase was processed through payroll, and Mr Scarlet received only £9,000 after tax of £6,000. He referred to this in his email as : 'To lose £6k because of a communication breakdown outwith my control'. In the end, Mr Scarlet was 'compensated' for this £6,000 he considered to have lost by receiving two trust payments of £3,000 each in September and October of 2004.

73. The episode itself suggests that what was agreed as salary increase was to be re-named as discretionary bonus in order that it could be processed as a trust payment. The gesture of Mr Scarlet passing the letter containing his contractual entitlement of a salary increase to be shredded was symbolic of this process of re-naming an agreed contractual entitlement. Furthermore, when Ms Cambridge asserted that she could not 'put [his] salary increase through the trust', Mr Scarlet said he 'challenged this with Ms Cambridge and said this was not what was to be done'. From the context, it would appear 'what was to be done' was to put the intended salary increase through the trust as non-contractual discretionary bonus, 'as [Mr Scarlet had done] with players, coaches and more recently Mr Burford' (per Mr Scarlet's email of 18/12/2003). The salary increase episode for Mr Scarlet was not an isolated incident, it would appear to be a recognised practice within the organisation, to convert what was understood by the parties to be a salary increase into a trust payment; it was a rehearsed procedure, a 'what was to be done' in a salary increase situation.

Bonus Payments to Footballing Employees

74. Before the introduction of the remuneration trust scheme, appearance money, match bonuses, championship bonuses, and contingency bonuses for qualifying in competitions for the footballing employees were detailed in a schedule that formed part of their contracts. The terms of these additional payments to their basic salary took up the equivalent of an A-4 page in this schedule. As the use of the remuneration trust became more wide spread, in the contracts for players with a sub-trust in place, the clause for the terms of bonus payments was reduced to stating that the club would pay the player 'a bonus in accordance with the schedule agreed from time to time'. Mr Red in his evidence acknowledged the practice of appearance money being paid by the trust mechanism, particularly in the latter part of the period (Day 1/60.15).

75. The Appellants have declared by way of a letter dated 29 September 2011 that five players: Mr Selby, Mr Inverness, Mr Doncaster, Mr Barrow, and Mr Furness had their guaranteed bonuses paid to them via the trust mechanism. This was in respect of a guarantee that the players would receive a certain amount each year in squad bonuses under the terms of their written contracts. The Appellants have not confirmed the amounts concerned for these five players in terms of their guaranteed bonuses, and have qualified that the agreement is made without concession to any liability.

76. The Respondents submit that these five players were not the only ones with such guaranteed bonuses as part of their written contracts, and cited the examples of Mr Berwick (7/63/15, guarantee of net) and Mr Bath (10/88/4,31 guarantee of gross); but unlike the other five players, the Appellants have not agreed that these other players received payments through the remuneration trust in settlement of their

guaranteed bonuses. The Respondents further submit that in respect of the five 'agreed' players, the trust payments were made to meet contractual obligations to pay income in the form of squad bonuses, and the five agreed players were not exceptions but illustrations of similar arrangement being made to discharge a contractual obligation of guaranteed bonuses through the trust mechanism.

77. In respect of the SPL League 2004/05, an email from Mr Withington to Mr Magenta after the league celebrations in May 2005 asked: 'How much will this little Gers Feast cost us in players and mangers bonus???' Mr Magenta's reply was: 'Bonuses to be paid out of winning League £548,000 through payroll … plus NIC and £100,000 through remuneration trust.' In giving evidence, Mr Magenta stated that the net remuneration trust payment was in respect of Mr Violet's bonus (Day 11/52-53). The trust mechanism and the payroll appeared to be two interchangeable methods of meeting the same entitlement.

78. The occasion of UEFA Champions League bonuses in 2005/06 became a focus in the cross-examination of Mr Red, Mr Scarlet, and Mr Magenta. According to Mr Scarlet, 'The Famagusta tie to the Champions League Stages, … [was] worth to the club about £15 million between gate receipts, sponsorship and prize money' (Day 13/43.9-12). The UEFA bonuses were higher than other championship bonuses and were contingent upon Rangers reaching the qualifying stage, and this happened in the season of 2005/06. The Appellants' witnesses tried to maintain the story line that unlike any other years, 2005/06 was exceptional in that there had been no agreement reached for that season, and the agreement was only reached on the eve of the Famagusta match, and Mr Ipswich, the captain of the squad, was made out as the obstacle to any agreement being reached until then. The reason for maintaining this story line was to 'prove' that there had been no prior agreement about the UEFA bonuses to create what could be called a contractual entitlement.

79. Mr Scarlet gave a vivid account of what happened on the eve of the match and how the agreement was reached. 'I went on the training pitch' – 'something I never do' – said Mr Scarlet, in order to speak to Mr Violet the manager. Mr Scarlet said he then 'went to the track side and, when training finished, as Mr Ipswich came off the pitch, knowing that [he] wouldn't now see [Mr Ipswich] until the following night', he said to Mr Ipswich, 'Look, we need to sort these bonuses out' (Day 13/49.14-21). Mr Ipswich, the captain of the squad, was somewhat vilified by Mr Scarlet as 'the bad apple in the dressing room' (13/42.11), 'an awkward character', 'one of the greedier players', with 'money as his driver', and that 'he would probably at times use his leverage as the captain of the club in the public aspect to any sort of dispute being damaging to the club as part of his leverage in negotiations' (Day 13/40.20-42.14). Mr Scarlet said that he thought 'it was maybe a tactic of [Mr Ipswich's], he delayed the whole process right up until the crunch of before the game because it was worth a lot of money to the football club', and that Mr Ipswich was asking for 'this exorbitant figure' (Day 13/50.8) on the eve of the match and that eventually according to Mr Scarlet, 'Okay, I think it was £25,000 contribution to the Trust and he would be happy with that, and at that point that was it completed' (Day 13/49.23-25). I find this the most compromising account to Mr Scarlet's own credibility as a witness. It was a story too embellished with vivid details that it did not come across as a faithful

account of a recall of an incident some six years ago. The account sits at odds with Mr Scarlet's inability to answer questions put to him on other occasions due to a lapse of memory. It was also an account too charged with personal comments against a person who could not give any counter evidence that it actually reduced the overall fairness of Mr Scarlet's testimony. Mr Ipswich was with Rangers for over 9 years in total. He was one of the very few players who had been with Rangers for such length of time, and his long service would suggest, one way or another, that he could not have been such an impossible player to work with as Mr Scarlet seemed to suggest.

80. The UEFA bonuses took up considerable amount of time in the examination of evidence, and this was largely the result of the witnesses trying to give an account that would appear to be contrary to reality. When Mr Red gave evidence in October 2010, his story line about the UEFA bonus was that the document purporting to be a schedule of agreed bonuses for 2005/06 was in fact a 'draft' prepared in advance and was not, as he claimed, agreed then or later. It would appear that Mr Red contacted Mr Magenta at the morning break on 27 October 2010 when he was giving evidence to this Tribunal, and asked Mr Magenta to check with SPL to see if the standard club bonus schedule for 2005/06 was sent. An email dated 27 October 2007 12:56:43 was sent to Mr Magenta from one Ms Chedworth at SPL, and it states:

> 'I don't appear to have a Standard Club Bonus Schedule for season 2005/06 lodged with SPL. A few individual player's contract contain terms and conditions pertinent to them including bonuses.' (22/1)

Mr Magenta's supplementary statement states that the email was sent and received on 27th October and forwarded to junior counsel attending the Tribunal Hearing three minutes after its receipt by Mr Magenta (Day 11/34-35). It would appear that as a result of no bonus schedule being lodged with SPL for 2005/06, the line of story came to be developed as how the year could be claimed to be 'exceptional' in not having an agreed schedule, so that the UEFA bonus could not be termed as an 'agreed' bonus giving rise to a contractual entitlement

81. In any event, the story line that 2005/06 was exceptional to other years and that no agreement could be reached until the eve of the defining match was inconsistent with Mr Violet's comment made as the manager of Rangers during that season. Mr Violet had no recollection of any lack of agreement prior to the match and he stated that if there had been a failure to make such agreement, there would have been an uproar (Day 5/46.20, 49.11). Even if it was indeed the case there was no agreement for 2005/06, according to Mr Magenta and Mr Scarlet, the 2004/05 bonus schedule was adopted pending resolution of the supposed dispute. That schedule (16/B/39-41) provides for payment of UEFA Champions League Bonus, so even if no agreement had been reached, the players would still have been entitled to the same bonus as had been agreed the previous year. Indeed, in 2005/06 the players received bonuses only modestly higher than those agreed per the bonus schedule for 2004/05, and did not seem to be some 'exorbitant figure' as described by Mr Scarlet. In the end, only 9 out of 29 players received their UEFA bonus through the trust arrangements, with some new sub-trusts being created for this occasion. The details of these new sub-trusts are separately narrated under 'interchangeability of trust arrangement and payroll.'

Trust Payments under Side-letters

82. Of the 108 sub-trusts set up, 81 of them are for employees of Rangers. Given that over three-quarters of the sub-trusts relate to Rangers' employees, and nearly 80% of the total assessments (£36.6m out of £46.2m) relate to Rangers, I have given more extensive coverage in my fact-findings to trust payments made by Rangers under the terms of the side-letters. The use of the Remuneration Trust arrangement with these employees also seemed to have a prescribed format, and it is the operation of the scheme under Rangers that is being narrated below. The pattern was borne out in the cross-examination of Mr Mr Magenta (Day 12/1-30), where a number of sub-trusts were looked at in detail. The sub-trusts being examined included: Mr Coventry (sub-trust 5), Mr Doncaster (sub-trust 92), Mr Inverness (sub-trust 72), Mr Selby (sub-trust 73), Mr Carlile (sub-trust 81), Mr Whitehaven (sub-trust 82), Mr Beverley (sub-trust 109). The process in respect of how a remuneration package was structured using the trust mechanism is as follows:

(i) Negotiation for the engagement of footballing employees, or re-negotiation of an existing contract, hinged on reaching an agreement of the 'net' figure of remuneration. The 'net' figure meant the annual equivalent of remuneration after deductions of income tax and national insurance contributions.

(ii) The net figure, once agreed, enabled a written contract of employment to be drawn up. Along with the terms of engagement would be the headline salary, stated as the grossed up equivalent of the agreed 'net' annual remuneration. The contract of employment is the document that was lodged with the SFA and SPL as part of the compliance procedure.

(iii) In cases where the Remuneration Trust arrangement was used, the agreement would have two parts: the employment contract and a letter of undertaking, usually signed on the same day. The letter of undertaking is referred internally within the group as 'the side-letter', and stated that the employer would undertake to contribute specified sums at specified dates into the employee's sub-trust. The side-letter was not lodged with the SFA or SPL.

(iv) In a two-part agreement, the 'net' annual figure thus agreed would often be split half way, with 50% of the net total being grossed up as the headline salary in the contract of employment, and the other 50% making the total of the specified sums for contribution into the sub-trust stated in the side-letter. For example, if the *net* annual was agreed at £1m, it would mean £500,000 would be grossed up and paid through payroll, and £500,000 as annual contributions into the sub-trust, in bi-annual or quarterly instalments.

(v) When the appointed dates in accordance with the relevant side-letters came up, Rangers would make contributions into the main Trust. Several sums might become due at around the same time, and they would be batched for payment into the main Trust.

(vi) The trustees would allocate the contributions coming into the main Trust to the designated sub-trusts. The allocation of funds into the sub-trusts was done solely with reference to the loan requests from the employees. The amount of loan requested by an employee would determine the sum to be allocated, and it would be into the sub-trust of which the employee had been made the protector. The despatch of the loan requests was coterminous with the transfer of the head sum into the main Trust. On its first application, a loan request would be accompanied by a letter of wishes; thereafter, the loan request would be the only document for the 'transaction'.

(vii) The trustees would grant the loans invariably, and the sums allocated into the sub-trusts would be transferred into the personal bank accounts of the protector/employees as the final step in this process.

(viii) For players with a sub-trust, the scheme had also been used on some other occasions, for example, for bonuses on winning a match, or in a termination of employment situation.

83. In some instances, the proportion of a player's remuneration going through the trust mechanism was more than 50% of the 'ballpark figure'. Some examples suffice: (a) Mr Selby (73) received £460,000 through the trust per annum and £300,000 net through payroll; (b) Mr Dundee (76) with £200,000 p.a. from trust and around £100,000 net from payroll; (c) Mr York (61), Mr Cardiff (65), Mr Birmingham (87) and Bath (88) all received substantially more through the trust arrangements than through payroll. From Inspector 2's Witness Statement, the period from June 2002 to 31 August 2005 saw 51 new players signed for Rangers First team squad, 30 of them joined the Remuneration Trust scheme. Of the 21 who did not join the scheme, 14 came through the youth ranks, and 7 others were with the club for short spells. Since 31 August 2005, 52 players have signed for Rangers FC first team; only 7 of them have joined the trust scheme. He noted in connection with the decline in the use of the scheme, the timing of HMRC's enquiry which opened in January 2004.

84. Mr Purple's testimony gave his understanding of the negotiation process for a pay deal. He was a credible witness and answered questions put to him from counsel and the Tribunal in a straightforward and open manner. Mr Purple's first contract covered a period from 1998 to 2003, and provided staged increment for his salary culminating at £416,000 per annum from 1 June 200. The contract was re-negotiated in 2001, and he was asked about the negotiation process. According to Mr Purple, his agent Mr Grey, 'would have a figure in mind that he would go and negotiate with. As always, sometimes you don't get what your first option is. … But [Mr Grey] came back and said ballpark figure is roughly equating to £16,000' (Day 8/126.22-127.2).

85. The terms of Mr Purple's second contract covered a period from 2001 to 2005. It stated the basic wage at £416,000 pa (£8,000 per week), and he would receive additional gross remuneration of £4,000 for each appearance in a first team match (2/13/29). These components did not add up to the 'ballpark figure of £16,000'. A side-letter dated 13 July 2001 (2/13/34) provided that bi-annual instalments of £125,000 would be contributed to Mr Purple's sub-trust, giving an annual total

£250,000 in net terms. If £250,000 was grossed up at 40%, it would equate to £416,667 gross per annum or around £8,000 gross per week. Adding the trust payments at the equivalent of £8,000 gross per week to the weekly gross per contract of £8,000 would give the 'ballpark figure of £16,000 per week'. In other words, the ballpark figure that had been agreed was split 50-50 between payroll and remuneration trust payments.

86. I asked Mr Purple what he understood to be his package with Rangers, compared to the package he received from his next club when he was sold on by Rangers before the end of his second contract. Mr Purple's reply was clear and direct:

> 'The total package at Rangers, … was the equivalent to £16,000 plus £4,000 appearance. And when I was going to [the next club] I think it was, … £11,000 salary and £2,000 or £3,000 appearance.' (Day 8/125.19-25)

In his Witness Statement (para 12) Mr Purple stated that when he was going to the next club, he 'was going to be on a lower salary'. In Mr Purple's understanding, the 'ballpark figure of £16,000' was the benchmark of his salary entitlement comparison; it was not just the weekly basic wage of £8,000 under his second contract. As both Mr Purple and Mr Grey understood, it was the basic wage £8,000 plus the remuneration trust payments of £8,000 weekly gross equivalent that formed the 'ballpark figure of £16,000'. In stating that he was going on a lower salary in his Witness Statement – a contractual entitlement in the sense of *emolument* – Mr Purple was comparing a like for like between the £16,000 from Rangers and £11,000 from the next club. In Mr Purple's understanding, the £8,000 gross equivalent from trust payments was part of his emolument with Rangers.

87. Mr Purple was also asked about the operation of the trust arrangements in relation to the side-letter agreement. Again his reply was straightforward:

> 'From [what] I can recall I think the payments were made October and February, … what was agreed. So when it was coming to that time, I just had to sign a form that I think Mr Grey had given to me saying – to ask the trust for the loan so that the money could be paid. … I had no doubts that they would be paid on the dates that were specified.' (Day 8/117.6-22)

When asked whether he needed to do anything other than signing the loan request form to get the money from his sub-trust, Mr Purple's reply was: 'No, I think it was pretty straightforward. The machinery was pretty well oiled as far as I could see and it was paid on time. I didn't have any problems' (Day 8/118.9-11).

88. Mr Purple was then asked of his understanding of the nature of the loan, and his reply was, *inter alia*, that 'Mr Grey always made it quite clear that he felt that I or my family wouldn't pay the money back as such' (Day 8/110.10-12). He also said, 'I didn't realise I had to give an absolute, specific reason. It's up to me how I invest my money' (Day 8/124.14-15). It was clear from Mr Purple's testimony that he had full

confidence in Mr Grey's advice, and it was under Mr Grey's advice that Mr Purple entered the trust arrangements and Mr Purple seemed to have been assured by Mr Grey that neither he nor his family would ever be asked to 'pay the money back as such', notwithstanding the fact that the sums advanced were being addressed as loans, and that he did not have to give an account to any person on how he had disposed of the money advanced to him addressed as 'loans'.

89. Mr Grey was asked in his testimony the percentage of agency commission he would be getting in respect of Mr Purple, and he replied, 'The practice is: normally our standard fee would be 5% of the transfer fee or the player's gross income.' (Day 8/87.24) Mr Grey also said that the FIFA recommended rate was 5%. In any event, Mr Grey's practice was to be paid agency commission totalling £100,000 in three instalments in connection with Mr Purple's second contract by Rangers (2/13/33). A contract between Rangers and Mr Grey's practice to that effect was enclosed with a covering letter from Mr Elgin dated 13 July 2001, in which Mr Elgin also mentioned the tax implications of benefit-in-kind on Mr Purple with the Club settling the agency commissions in re-negotiating an existing contract. If the commission was based at 5% of the player's gross income under the standard practice, it would not have been pitched to the £416,000 plus £4,000 appearance money per the disclosed contract.

90. The figure of £100,000 was indicative that the parties were in agreement of a much higher headline figure as Mr Purple's gross income, in fact close to £2 million. The basis of the agency commission was revealed in the first version of the 'Financial Proposal' drafted by Mr Grey (2/13/5). In all, over the re-negotiation, there are about ten versions of this 'Financial Proposal' all drafted by Mr Grey to chart the varying of terms in the course of the negotiation. Only in the first version was the basis for calculating agency commission spelt out and is as follows:

> 'The Club will pay agency commission of 5% of the increase in the player's terms and conditions. The player is receiving an additional £520,000 per annum over a four year period and therefore 5% on £2,000,000 is £100,000 payable within thirty days of the player signing his new contract.' (2/13/5)

The trust payments, by this reckoning, were calculated as part and parcel of 'the player's gross income'. If the trust payments were only the entitlement to loans, that could not have given effect to a salary increase of £2 million over four years to arrive at Mr Grey's fee of £100,000. We heard evidence given by Mr Grey that the standard fee of his practice, and as recommended by FIFA, was to charge 5% of 'the player's gross income'. In the way figures were discussed and fees were set, all the parties concerned – Rangers, the player, his agent – acted in agreement to give effect that the amounts under the trust arrangements formed part of the player's overall entitlement of 'gross income'.

91. An example of the figures involved can be given by the simpler case of Mr Inverness, in Mr Scarlet's email to Mr Magenta, and it reads as follows:

> ‘Please find details as requested updating you further on the conversation last week. The player I was in negotiations with overseas last week has been secured on the following terms:
>
> Contractual salary, £300,000 gross pa.
>
> Guaranteed bonus, £100,000 gross pa.
>
> Remuneration Trust, £180,000 net pa.
>
> Appearances: Remuneration Trust, £1,200 net per game, total £48,000.
>
> Cost per annum, £396,000.
>
> Within the above is the built-in percentage that [another club] would have owed to the player of the transfer fee.’ (8/72/1)

92. Another example comes from the supplementary Witness Statement from Inspector 2, HMRC officer, as an addendum to paragraph 7.79 in respect of sub-trust 79 for Mr Newport. The supplementary statement relates the details of a facsimile dated 31 March 2004 from Mr Scarlet on behalf of Rangers to Mr Gloucester, Mr Newport’s agent. The content of the facsimile is as follows:

> ‘… Further to discussion this morning, I can confirm to offer the following terms and conditions.
>
> - 2 year contract 2004/05 and 2005/06
> - £10,000 gross per week
> - £5,000 gross per competitive match played
> - Relocation expenses of £8,000
> - 5% of gross salary will be paid as agent’s fee
>
> Please sign below to confirm your acceptance.’ (9/79/0)

93. The facsimile was in effect an offer of terms and stipulated the amount on which the agent’s fee would be based. The offer was ‘translated’ into two documents: an employment contract with Mr Newport signed on 1 July 2004, and a side-letter dated the same (9/79/1-2). The terms of the signed contract and the side-letter gave effect to the equivalent of gross weekly total of £10,000 in the following manner:

(i) Gross salary at £270,000 per annum, which equates £5,192 per week;

(ii) Remuneration trust payments: £300,000 over the two-year period, which equates £2,885 per week;

(iii) Trust weekly payments grossed up with tax at 40% equate £4,808 per week;

(iv) Gross weekly salary of £5,192 plus grossed up trust weekly equivalent of £4,808 to arrive at the gross weekly total of £10,000.

94. In Mr Red’s cross-examination, he was asked about the ‘deal’ negotiated to sign on Mr Norwich (Day 2/79-82). A memorandum from Mr Scarlet in January 2003 at paragraph 4 sets out the ‘global’ agreement for engaging Mr Norwich:

> 'Mr Norwich, currently under contract with [a Spanish club] is earning approximately £5,000, £8,000 gross per week. They are willing to let him come to Rangers for no transfer fee but are looking for Rangers to play a friendly in Spain and if we do not they want £40,000. It would be my intention to contact that club directly and negotiate a deal until the end of the season at £8,000 per week.' (6/47/1)

It was put to Mr Red that it was Mr Scarlet's intention to achieve a deal of £8,000 gross per week, and the deal was translated into a package whereby Mr Norwich received £3,000 gross per week as salary, and the equivalent of £2,000 net per week through the 47th sub-trust set up for him. Mr Red agreed 'that is the result', but disagreed that the memorandum was 'some kind of agreement between the club and the player' (Day 2/81.21 and 82.2).

95. In each of the examples given, the pay negotiation was trying to arrive at an agreed figure for the player's earnings, either in net or in gross terms – 'the ballpark figure'. In the minds of all the parties concerned: Rangers, the player, and his agent, it was a package for earnings that had been struck. The structuring of the pay deal using the trust mechanism came after the overall income entitlement had been agreed. From the oral evidence of Mr Purple and Mr Grey, the player and his agent were in perfect agreement as to how they regarded the trust payment component – as part and parcel of the 'ballpark figure' in the pay deal. The internal communications from Mr Scarlet, of which those quoted above are a mere fraction, also indicate that he was Rangers' representative in these negotiations to arrive at a 'ballpark figure'. He would appear to be either the person who made the decision, or was influential in the decision regarding the use of the trust arrangements in structuring an agreed pay deal.

Termination Payments

96. The Respondents' witnesses gave evidence regarding payments via the remuneration trust on the occasion when employment was terminated, with some 35 sub-trusts being identified as having been used to make what would have appeared to be termination payments. Most of these payments concerned footballing employees, with three non-footballing employees: Mr Elgin (of Rangers), Mr Bury (of Rangers), and Mr Indigo, whose payment was made by MGML for his service with Response Handling Ltd. There is a wide spread in the quantum of payments under this category, ranging from £1.55 million for Mr Ely (sub-trust 43) to £20,000 for Mr Manchester (sub-trust 62). I have chosen cases to illustrate where the trust arrangements appeared to have been used to settle: (a) payments in lieu of notice (PILON); (b) the player's percentage of his transfer fee; (c) inducement payment to play for a different club; (d) for severance falling within the provisions of s403 ITEPA 2003.

97. Two of the witnesses called, Mr Violet and Mr Purple, had both received sums via their sub-trusts on termination of their employment with Rangers. Their agent, Mr Grey, also gave evidence, which will be discussed in conjunction.

98. Mr Violet was asked the circumstances leading to his departure from Rangers in 2006. He related that he took a six-month sabbatical prior to his departure and was

then offered the job of a national team coach. The side-letter to Mr Violet dated 24 September 2003 provided for a payment in the event of his employment being terminated, and the exact wording is:

> 'In the event of your employment with the Club being terminated by the Club pursuant to Part II of clause 13 of your contract of employment, the Board will further recommend the funding of the sub-trust by an amount which is equal to £530,000 less the net amount of salary to be paid to you in lieu of notice as a consequence of the termination of your contract.' (4/29/31)

Mr Violet described his understanding of the provisions in his evidence: 'it must have been around the time that I signed a new deal. So the most important part of any contract when you sign a new deal is the termination clause' (Day 5/45.23-25). The provisions under the side-letter meant Mr Violet would not necessarily get the £530,000, but would get £530,000 less salary in lieu. The question was put to Mr Violet whether it was his understanding that the arrangement was superseded in reality, given he did get the £530,000, and it was to cover his salary in lieu; Mr Violet answered in the affirmative. Mr Grey was asked of his understanding of the termination clause provisions in the side-letter, whether the £530,000 was 'directly dependent upon the amount of salary that was going to be paid in lieu of notice' (Day 8/76.1-3). Mr Grey's reply was: 'I think that's because Rangers were contractually obliged to pay. I don't know if it was three months or six months salary. … I would need to see the contract' (Day 8/76.6-8).

99. Obtained from Mr Grey's client file for Mr Violet is a letter dated 7 April 2006 to Mr Magenta (4/29/72), and it starts by stating: 'I return the Compromise Agreement between the Club and Mr Violet which is substantially acceptable subject to my following observations', and continues by qualifying the terms of the Compromise Agreement that was under review by the two parties. The next letter on file is to Mr Scarlet from Mr Grey dated 6 June 2006:

> 'If the payment to the sub-trust can be made before 30 June … then I would suggest the compromise agreement be altered to take account of the present circumstances. However, my overriding proposal to the Club is Mr Violet continue to be paid until such time as the payment can be made into his sub-trust. If the Club are agreeable then we will not require to address the situation concerning the Club's breach of contract.' (4/29/74)

Mr Violet's termination date coincided with the time when Rangers was withholding payments under the trust arrangements until Equity could be replaced. The sum of £530,000 should have been due when Mr Violet left the Club; the sum was not paid on time. From Mr Grey's letters, there was clearly a compromise agreement in place in respect of Mr Violet's termination settlement; hence the suggestion to change the date to a later date to avoid a breach of contract.

100. The next round of communications concerning the trust payment of £530,000 being late came from Mr Magenta's emails, in which it was discussed that Mr Violet should receive interest in compensation for the payment being late:

To Mr Scarlet on 21 July 2006:

> 'after a conversation with Mr Grey, I understand it has been agreed between Mr Violet and the Chairman that we will pay Mr Violet interest for the time he has not received his Trust money – again, please can you confirm.' (4/29/77)

To Mr Grey dated 26 July 2006:

> 'Further to our conversation today I would suggest that if the Trust payment is in Mr Violet's account on 31 July this would mean 61 days late and interest at base (4.5%) for 61 days would be £3985, I will obviously need to check and agree this with Mr Scarlet.' (4/29/79)

101. At around this time when Mr Violet's £530,000 was late, there was a bi-annual instalment sum £160,000 due to be paid into Mr Violet's sub-trust on by virtue of the other provisions under the same side-letter. The sum eventually reached the sub-trust late and was the first payment processed by Trident on succeeding to Equity. It was, however, for £162,000 and Mr Grey was asked whether he could offer any explanation for the extra £2,000. It was suggested to him whether it was in compensation for the payment being overdue. Mr Grey could not vouch for the reason why an extra £2,000 was paid, though he mentioned that he did raise the matter of interest with Mr Black in connection with the £530,000 being paid late. He said in reply, 'I thought it would be appropriate to pay interest, but Rangers took a different view and interest wasn't paid' (Day 8/73).

102. Whether the extra £2,000 was indeed interest for late payment in relation to either the £160,000 or £530,000, is perhaps of little relevance. What is of direct significance is why Mr Grey considered interest should be due, if all that Mr Violet was entitled to was the benefit of obtaining a loan from his sub-trust. With a genuine loan, the borrower pays interest to the lender; with property absolute due, the receiver is entitled to demand interest if the receipt is overdue. Mr Grey, as the professional agent who had negotiated the pay deals for his client, was of the view that there was an underlying entitlement to receive the said sums of money via the sub-trust by their due dates. The fact that he viewed interest as appropriately due because the payment of the sum was late suggests that the nature of the underlying entitlement, as Mr Grey understood it, was not so much that of a loan, but perhaps of property absolute to Mr Violet.

103. Mr Grey was then asked about Mr Purple's transfer. It was put to Mr Grey that because the transfer took place before the expiry of Purple's contract, and that had he stayed on, he would have been entitled to his contractual salary and trust payments, and benefits and so on; and it was 'a recognition of his rights, that he received a payment through the mechanism of the remuneration trust' in the quantum of

£500,000 on transfer. Mr Grey affirmed that this was his understanding of the nature of the £500,000 payment (Day 8/74.22 & 24).

104. Referring to the transfer, Purple said in his evidence that 'it probably wasn't through choice but the Club got an offer and decided to accept it' (Day 8/116.19), and the trust payment was a way of 'sorting that out' as it happened before the expiry of his current contract on 31 May 2005. In Mr Purple's second contract, there was a clause to provide that he would receive 10% of any transfer fee received by the Club. Mr Purple was sold to another club on 5 August 2003 for £1.75 million, which means he would have been due £175,000 as his share of the transfer fee. This was 'supposedly waived' and in the manner that Mr Purple and Mr Grey referred to this entitlement, they considered the trust payment of £500,000 as a way of 'sorting that out', towards the settlement of Mr Purple's entitlement of transfer fee.

105. The Auditors' Report for Rangers referred to Mr Purple's entitlement of transfer fee under the 'key issues' document for 2004, and stated at paragraph 4.10 that the auditors were advised that Mr Purple had waived his right to this payment but the documentation in this respect was mislaid, (and hence not available for the auditors' inspection or consideration). The auditors also noted the loan of £500,000 to Mr Purple in the following terms:

> 'It was noted that around the same time a loan was made to Mr Purple from the Remuneration Trust for £500,000. We understand that this payment was unrelated to the contractual amount that he would have been due … We have accepted the representations made by management on this matter and therefore no adjustment requires to be made to the accounts in this respect.' (21/15/13)

As discussed earlier, on the balance of probability, the auditors did not appear to be aware of the existence of the side-letter, so they would not have understood the loan of £500,000 in the context of this being from Mr Purple's sub-trust as created under the terms of the side-letter. As Mr Purple and Mr Grey both understood, the £500,000 was clearly in their minds, to 'sort out' Mr Purple's entitlement on his transfer, including the transfer fee due. The auditors had not been told the truth behind the sum of £500,000 advanced to Mr Purple on his departure from Rangers, and were under the false impression that the transfer fee had been waived.

106. An example of an inducement payment to play for a different club is afforded by Mr Ely (sub-trust 37). He was sold on before the end of the contract period. The following documents subsist to chart the undertakings given by Rangers to Mr Ely at various stages of his career with Rangers:

(i) Original contract for a period from 2000 to 2005, with terms of his salary as: 'basic wage was £700,000 net per annum in equal monthly instalments of £97,222 gross' (5/37/1).

(ii) A side-letter dated 23 November 2000 from Mr Elgin (5/37/4) confirmed that Rangers would 'arrange net payments into a fund' for the player's

benefit as follows: £450,000 on 30/11/200; £700,000 on 30/11/2001 and 2002; £500,000 on 30/11/2003 and 2004. It was stated that £200,000 of the sums due in each of 2001 and 2002 were unconditional; others would be conditional on the player still being registered with the Club.

(iii) Clause 11 of the contract states: 'In the event that the player is requested by the Club to accept a transfer to another Club during the term of this agreement, he shall be entitled to additional gross remuneration of 20% of the net transfer fee, in excess of £12.5m received by the Club.

(iv) Mr Ely was sold to another club for less than the £12.5m specified in clause 11 in 2002, so he would not have received his percentage of transfer fee on excess over £12.5m. A side-letter dated 30 August 2002 (5/37/5) superseded the earlier side-letter and set new terms as: to fund his sub-trust 'with a total of £1,550,000 net, payable £800,000 in September 2002, and £250,000 on each occasion in May 2003, 2004, and 2005'. These payments were understood to be on the condition that Mr Ely was still registered with that other club on the due dates. (5/37/5)

(v) A fax from Mr Magenta to Mr Salford, dated 25/9/2002 advising Mr Ely's agent: 'I understand that £200,000 is to be paid to yourself, it would be easier if Mr Ely paid this directly to you, after he has received funds, because if we paid to you directly it would result in a benefit in kind for Mr Ely which would result in him paying tax at 40% on this amount.' (5/37/6)

It would appear that £800,000 of the trust payment to Mr Ely was in part to cover the agent's fee of £200,000 relating to the transfer.

(vi) A fax from Mr Elgin to Mr Ely's agent dated 18 October 2002, advising that £800,000 was transferred from the main 'Trust to a sub-trust and then on to Mr Ely's personal bank account yesterday', and that Mr Ely would be able to transfer any amount due to the agent. (5/37/9)

(vii) £250,000 was paid via his sub-trust in July 2003 and 2004, when Mr Ely was playing for another club. Mr Ely left that club in 2003 and the July 2005 payment per the side-letter was not paid.

The context of trust payments made to Mr Ely when he was playing for a different club would appear to come under the heading of 'inducement payment' and if so, the payments through the trust arrangements represent the *net* due to the player. The gross equivalents would have been taxable under s62 ITEPA 2003, with income tax and national insurance contributions.

107. Mr Bristol started his contract with Rangers in 2000. His employment ended before the terms of his second contract, which was to cover the a period from 2002 to June 2005. A side-letter was drafted by Mr Scarlet to go with the second contract with four half-yearly payments of £100,000 from September 2003 to February 2005. Two copies of this draft letter are on file, differently dated on 20 January 2003 and 27 July 2003, and neither seem to have been implemented in the end. Per email from Mr Magenta to Mr Scarlet dated 5 January 2004, the decision to 'pay off' Mr Bristol

seemed to have been made, with a new agent now acting for the player in concluding the deal:

> 'I think we could pay him off through the trust, he is now going back to [another country] not [a UK club]. Their proposal is now:-
>
> £350k payment to Mr Bristol
> £6k/£7k of fees
> Pro Active to receive fee of 10% of saving approx £60k
>
> On the face of it, it is still a good deal for us (saving of nearly £600k), however they are now trying to change the deal you verbally had with Mr Malmesbury [the former agent to the player], I have told them this.
>
> Let me know how you want to play it.' (7/64/10)

108. From documentation, it would appear that the Football Committee decided to 'play it' by creating a sub-trust (64) for Mr Bristol on the eve of his departure from Rangers with the specific purpose of settling his severance entitlement. The dates on the respective documents are informative as to how this operation was effected:

(i) 12 January 2004: per agenda to the meeting of The Football Committee Meeting held on that date at 2pm at Murray Park, chaired by Mr Indigo and attended by Mr Black, Mr Scarlet, Mr Violet, and Mr Bury, under the heading of 'Update on previously agreed actions' was the following entry concerning Mr Bristol:

> 'Agreed with agent to pay Mr Bristol £350,000 through RT to cancel contract. Agent to receive £35,000.
>
> Currently Mr Bristol discussing personal terms with [a foreign club], deal will be free transfer with 20% of any future transfer to RFC.
>
> If Mr Bristol had stayed cost to RFC would have been £1.1m.' (7/64/10e)

(ii) 21 January 2004: The 64th Sub-trust was established by a Declaration of Trust made by Equity; (letter from Equity to Mr Red 7/64/19-20, on 20)

(iii) 22 January 2004: Deed of Indemnity signed and witnessed between Rangers and Mr Bristol covering the sum of £320,000; (7/64/11-15)

(iv) undated January 2004: A side letter drafted by Mr Magenta addressed to Mr Bristol to fund his sub-trust in January with £320,000; (7/64/16)

(v) 22 January 2004: A loan request letter signed by Mr Bristol to the Trustees of MGML Remuneration Trust to borrow £320,000; (7/64/17)

(vi) 23 January 2004: Mr Bristol was specifically included as a principal beneficiary by a Deed of Amendment; (per Equity 7/64/20)

(vii) 23 January 2004: Allocation of £320,130 to sub-trust 64; (17/D/23 from schedules on GBP Cash Management Bank Accounts from 20 April 2001 to 20 May 2010); £320,000 per appendix 3 of Statement of Agreed Facts; differential probably to cover expenses of the bank transfer.

109. The indemnities by the deed of 22 January 2004 give Mr Bristol specific provisions against any tax liabilities arising from the Event as follows:

> '2.1.1. Liability of Taxation arising as a result of or by reference to any Event.
>
> 2.1.2. Liability for Taxation to the extent that the same arises due to the loss reduction modification or cancellation of some Relief in consequence of the Event.
>
> 2.1.3. Liability for any claim by the Trustees against the Player that a claim for Taxation made against the Trustees by the United Kingdom Inland Revenue or UK Contributions Agency should be recovered by way of indemnity or otherwise from the Player.'

110. It would appear that the agreed figure of £350,000 (net) with the new agent for severance was structured, by putting £30,000 through payroll to obtain s401 exemption, with the balance of £320,000 being paid through the trust arrangements. It is also noteworthy that the Loan Request Letter and the Deed of Indemnity were signed on the same date of 22 January 2004, one day after the deed to establish the sub-trust was signed, and pre-dated the actual allocation of funds into the new sub-trust on 23 January. The context leading to the £320,000 paid through the trust suggests the sum fell within the provisions under s403 ITEPA 2003, and should have been assessed for income tax at the player's marginal tax rate. The indemnities sought by Mr Bristol were to a certain extent covering the s403 tax charge. Mr Bristol's sub-trust no longer exists; he was one of the players who took the steps to terminate his sub-trust and had the 'loan' written off formally in 2007.

111. Many more players seemed to have termination settlements structured in a similar manner through the trust arrangements - to name but a few: Mr Exeter, Mr Dartmouth, Mr Yarmouth, Mr Wells, Mr Thurso, Mr Bridlington, Mr Warwick, Mr Lincoln, Mr Newark, Mr Aberdeen, Mr Shrewsbury, Mr York, Mr Berwick. The pattern that emerged conforms to the description in Mr Magenta's email dated 12 September to Mr Withington, in which Mr Magenta noted: 'Mr Shaftesbury, Mr Wycombe and Mr Bath are to receive £30K *ex gratia* tax free, you have on your schedule o/s by RT. Will switch to payroll, payments going through this week' (11/93/16). An undated letter from Mr Scarlet to Mr Shaftesbury undertook to fund his sub-trust with £60,000 (11/93/17). Where the remuneration trust seemed to have been used as part of the termination package, the components in the package had in common the following features: (1) a payment of £30,000 was made through payroll; (2) the balance of net equivalent due less £30,000 was paid through the trust

arrangements; (3) the final trust payment, in one sum or by instalments, was often much bigger than any outstanding trust payments due under the terms of an earlier agreement by a side-letter; (4) they appeared to be the net equivalent of a gross total agreed (subject to some adjustments).

112. Among the documentation for Mr Winchester's sub-trust 43 is a letter (5/43/9) dated 1 July 2002 from Mr Elgin to Mr Chichester of MacRoberts, Solicitors, who would appear to be acting for Mr Winchester over his termination agreement. Mr Elgin's letter was in reply to the solicitor's letter of 3 May, and would appear to be a response to the comments of the solicitor regarding a draft agreement in connection with Mr Winchester's termination. Mr Elgin's paragraphs were tabulated with references which looked like clause numbers in an agreement, for example:

> '1.2 I confirm your interpretation of termination date.
>
> 1.4 …We will, however, need to introduce an element of objectivity in determining whether Mr Winchester may have been unfairly or wrongfully dismissed or has suffered a repudiatory breach of contract by the Club. I suggest that these matters require to be definitively established by either an employment tribunal or through the court, with no right of appeal available to either Mr Winchester or the Club.' (5/43/9)

The compromise agreement would appear to be the subject of the correspondence between the solicitor and Mr Elgin, and this has not been produced. The only documentation subsequent to Mr Elgin's letter is a letter to Mr Chichester of McRoberts enclosing a cheque of £12,043 in settlement of three invoices, and says, 'As discussed recently, were I a direct client, I would object strongly to the level of these fees but I recognise that you drafted, and we signed, a blank cheque.' The remarks from Mr Elgin clearly indicate that the settlement for these invoices was on behalf of Mr Winchester, and would be consistent with the standard practice in a termination of employment situation whereby the employer is liable for the legal fees incurred by the employee in engaging a lawyer to act on his behalf.

113. Direct references were made by the player's adviser to a compromise agreement in the cases of Mr Violet (*supra* 99) and Mr Winchester. We have no sight of them, or any compromise agreements in general regarding other players or non-footballing employees. The question regarding the existence of compromise agreements in termination situations was variously put to Mr Red and Mr Scarlet, and both denied that such documents existed as a matter of normal course. Mr Scarlet started giving his answer with some hesitation by saying, 'There was [sic] some instances where there would be maybe a compromise agreement with the player' and then diverted the question to footballing regulations and registration (Day 14/160-161). Mr Red was cross-examined on Mr Dartmouth's transfer (2/17/4,9), and the context was put to him by the counsel as: 'It's a compromise agreement in relation to him leaving the club and giving up his rights'. Mr Red was quick to respond by saying: 'Where is this compromise agreement?'; 'I see no compromise agreement'; 'I see no written compromise agreement' (Day 3/64). Mr Red seemed to be asserting his position all along that no sight of a document meant no inference of its existence could be drawn.

114. It is significant and informative that no compromise agreements are made available as evidence. A compromise agreement would have been the document worked on by the legal representatives of the employer and the employee to reach a mutually acceptable, legally binding, position for severance. It is presumptive that such legal documents existed to detail the terms and conditions of severance, and to identify and quantify the components in the termination package, so that their respective tax treatments can be ascertained. For example, payments in lieu of notice or inducement payments are assessed as earnings under ITEPA2003 s62 (with PAYE and NICs); and payments that are compensatory in nature for the loss of office fall under the charging provisions of s403, with the first £30,000 being exempt under s401 and the balance subject to income tax (but not NICs). It is also the agreement where a tax indemnity clause is likely to have been incorporated in favour of the employee. The compensation components would be calculated using the *Gourley* principle to guarantee the employee the *net* sum agreed, with any tax liabilities arising being made good by the employer as part of the package. With Rangers as the employer and the players as employees, the stakes in each termination settlement were so high that such legal agreements would have been essential. It can be presumed, or at least it is reasonable to presume, that a compromise agreement existed in each of these cases. The non-production of these agreements does not mean they did not exist. It is likely that these documents are not produced to avoid evidence that would establish a direct contractual link between termination settlements and the sums contributed into the sub-trusts of the said players. It remains another unsatisfactory aspect where the Appellants have not discharged their onus of proof.

Interchangeability between the Trust Arrangement and Payroll

115. Over the period in 2006 when the scheme ran into difficulty with Equity requesting security over the loans, the trust mechanism was simply suspended until Trident was appointed in replacement. The last payment into a sub-trust by Equity was on 10 March 2006 for Mr Furness, and the first payment by Trident was on 5 June 2006 to Mr Violet. Internal communications by senior executives (Mr Red, Mr Magenta and Mr Scarlet) highlighted the 'crisis' caused by not being able to make available sums of money as loans via Equity at the appointed times as governed by the terms of the side-letters. Mr Scarlet directed Mr Magenta in an email to phone 'the outstanding people from the list' to give a false reason for the delay: 'Due to the year end and a heavy amount of administration, the trust payments that you were due to receive will not be with you until the end of June' (13/94). The email instructed Mr Magenta to call Mr Inverness, Mr Newport, Mr Dorchester, Mr Ipswich, stating that Mr Scarlet himself had called Mr Shrewsbury to leave a message, and that Mr Black would call Mr Evesham.

116. The six named in Mr Scarlet's email would represent some of the people from the list, presumably the list was compiled of the employees who would be due sub-trust payments in this period. These employees were not merely due their loans; they were due 'the trust payments' (the phrase used by Mr Scarlet); and the delay was serious enough to involve Mr Black to allay the disquiet. Furthermore, in the cases of Mr Magenta, Mr Burford (5/14/23, 24, 30) and Mr Northleach (8/71/20), Rangers substituted trust payments that would have been due with payments through the

payroll. The sums for contributions that would have been made into the sub-trusts in accordance with the respective side-letters were *grossed* up for PAYE and NIC, with the intended result that the employees received the same net sums of money through payroll as they would have received through their sub-trusts. The action of the management and the expectations of the employees in this episode highlighted the underlying reality that the side-letters set up a contractual obligation for the employer to make available certain sums of money by certain dates. As for the employees, the disquiet and pressure on the management, from documentary and circumstantial evidence, all pointed towards a form of contractual entitlement deemed to be theirs, whereby stipulated sums of money would be at their disposal by the appointed time.

117. In the cross-examination of Mr Scarlet, the extent of his involvement and knowledge of the operation of the trust payments was tested in many ways. With great resilience, Mr Scarlet denied knowledge and involvement and asserted that he left the matter largely to Mr Magenta and Mr Red. While it is accepted there would have been delegation, it is inconsistent with documentary evidence that Mr Scarlet could have no knowledge of the issue. As discussed earlier concerning his role in striking a pay deal with a player and his agent, Mr Scarlet appeared to play the key role in negotiating these deals, certainly latterly. He seemed to be in full command of the numerical details regarding the structure of these deals involving the trust mechanism. In the way he directed Mr Magenta to make the phone calls, he seemed to be strategically involved with the operation of the trust. In his oral evidence, he deflected questions in these respects and claimed a lack of understanding in these matters. An example of such a response came in his reply to a question put to him regarding Mr Red's memorandum quoted earlier (13/77) concerning Equity's request for a change in the loan structure, and Mr Scarlet's reply was:

> 'As I said on numerous occasions, anything to do with this would not come naturally to me and my understanding of it; I let Mr Magenta deal with [it]. One of the reasons I have Mr Magenta and others round about me – I have another two chartered accountants that work for me – is to assist in this sort of thing with my lack of understanding.' (Day 14/114)

118. This assertion of lack of understanding of the trust operation in general, and of the 2006 episode that led to Equity's removal in specific, sits at odds with Mr Scarlet's email instructions to Mr Magenta to give a pretext for the delay related above, and the following email sent in Mr Scarlet's name on his behalf by his secretary. The email dated 20 June was addressed to HR and copied to Mr Reading with the subject matter being 'For Clarity – Private and Confidential', and level importance marked as High, and sensitivity as Confidential.

> 'As you know, we have had some administrative problems with the Trust.
>
> Employees outwith the 1st team set up who have annual trust payments will now no longer receive them and these payments will be grossed up through payroll, subsequently contracts will need to be amended.

> **Mr Magenta**: His annual contracted salary has an additional £10,000 net payment currently outstanding through the Trust in Jersey. He was supposed to receive this payment in April. Please attend to this, putting the gross amount through payroll this month.
>
> **Mr Burford**: He is due, on top of annual current contract, a £10,000 net instalment in August. This should be grossed up and paid through payroll.
>
> **Mr Northleach**: He is due, on top of annual current contract, £5,000 net in January and £5,000 net in July. The July payment should be grossed through payroll, as January has been paid.
>
> Obviously the contracts of the above personnel need attended to.' (5/40/22)

119. Mr Magenta, Mr Burford and Mr Northleach were not footballers and the sums due to them were considered small in comparison with the trust payments due to players, which had to be delayed until Equity was replaced. The email not only illustrates how the trust payments and the payroll were interchangeable, it also indicates the high level of knowledge that Mr Scarlet had of the workings of the scheme, and that he was closely involved in managing the 2006 situation when the trust payments could not be processed via Equity, all of which are contrary to what he asserted.

120. When the legislation under Part 7A of the ITEPA, as inserted by section 26 of Schedule 2 of FA 2011 (on Disguised Remuneration), took effect from April 2011, the Appellants unilaterally ended the trust arrangement on the two still current obligations under the side-letters (to Mr Guildford and to Mr Maidstone). The sums of contributions supposed to enter the sub-trusts were then grossed up through the payroll. The Respondents produced as evidence two similar letters dated 3 May 2011 from Mr Scarlet on behalf of Rangers to Mr Guildford and Mr Maidstone. The letter to Mr Maidstone, for whom sub-trust 112 was set up, referred to the side-letter of 10 November 2008 and stated that a further sum of £322,000 over and above what had already been made to his sub-trust would have been recommended in accordance with the terms of the side-letter, and continued as follows:

> 'Unfortunately, the law has changed and the old arrangement carries no benefits at all. Instead, therefore, the Board propose to make additional payments of £260,000 in May 2011 and £410,000 also in May 2011 directly to you. It's the Board's understanding that such payments will be subject to deductions for Income Tax and National Insurance Contributions, the net result being that you [Mr Maidstone] will receive payment of the amount which would have gone into the Trust.' (22/5)

121. The occasion of Rangers winning the UEFA championship led to six sub-trusts being created for Mr Warwick, Mr Camden, Mr Islington, Mr Kensington, Mr Balham, Mr Brixton to pay their entitlement via the trust arrangements. An email from Mr Magenta to Mr Red of 21 June 2006 confirmed the names agreed with Mr Scarlet for the new sub-trust creation. Three players, who had sub-trust numbers

already allocated to them as 95, 97 and 98, did not receive their UEFA bonuses through the trust arrangements in the end. Mr Magenta's email gave direction to Mr Red to this end,

> 'I have also agreed with Mr Scarlet to gross up the payment due to Mr Dorchester and to pay through Payroll amounts due to Mr Hampstead and Mr Highbury therefore not requiring Trust to be set up for these people.'(11/95/1)

The nine names mentioned in this email occupied two series of numbers in the sub-trust register from 95 to 98, of which only 96 was used for Mr Warwick and the other three numbers remained unused. The other five players with trust arrangements were allocated numbers from 103 to 108. The payroll and the trust arrangements were interchangeable in meeting the employer's obligations to settle the bonus payments.

122. The fact that the trust mechanism and payroll were interchangeable on more than one occasion provides some circumstantial evidence regarding the underlying nature of the trust payments. The essence of the trust payments, under this interpretation, directs towards an income entitlement that is normally accorded to payments via the payroll. If the side-letters only provide the promise of a loan, why should there be a moment of 'crisis' when the trust mechanism was not there to process loans by the dates directed by the side-letters? If the UEFA championship bonus was the *same* entitlement for *all* the players in the squad, that entitlement should be identical to all. Why should some of these players only receive a loan through the trust arrangements while other players who did not have a sub-trust received the championship bonus through the payroll? If the loan were a genuine loan, why would these players who received their bonus through the trust mechanism be content to obtain a loan and to forego their outright entitlement of earnings through the payroll? One cannot help asking these questions, and the answers invariably lead to two suggestions: (1) that the employer and the employee demonstrated a mutual understanding of an underlying entitlement that a sum of money was to be made available by a certain time under the terms of the side-letter; (2) in the way that players were willing to 'forego' their UEFA bonus entitlement in exchange for a trust payment in the form of a loan suggests that in their minds, the loan was not a 'real' loan, and they were no worse off for receiving a trust payment addressed as a loan instead of a payroll payment.

The Example of Mr Evesham's Sub-trust Operation

123. Mr Evesham was a footballer who was a highly-valued player for Rangers. He sustained injury towards the end of his career with Rangers. In his eight and a half years with Rangers, Mr Evesham had his contract re-negotiated a few times, and the changes in his 'package' are instructive of the intention of the employer and expectations of the employee. The insurance claim by Rangers for Mr Evesham's injury was met by payments that calculated Mr Evesham's earnings as inclusive of the trust payments due to him under the terms of his side-letter.

124. The first contract covered a period from 1998 to June 2003 (4/24/1-9). The terms for his remuneration for the rest of the season 1998/99, and from 1 July 1999 are stated as follows:

> '(1) The player will be paid net remuneration of £36,000 per month (equivalent of DM 100,000 per month) for the period January to June 1999.
>
> In addition the player will receive a net payment of £90,000 (equivalent to DM 250,000) in his January 1999 salary.
>
> The Club will be responsible for UK taxes on these amounts.
>
> (2) The player's basic wage will be one million (£1,000,000) pounds gross per annum (£83,333 per month) from 1 July 1999. The player is responsible for all taxes from this date.
>
> (3) The player will receive additional gross remuneration as follows subject to being registered with the Club on each due date:
>
> £250,000 on 31 October 1999
>
> £250,000 on 31 October 2000
>
> £250,000 on 31 October 2001
>
> £250,000 on 31 October 2002
>
> These amounts will be paid into a pension scheme on the player's behalf.'

Clause 4 is a detailed schedule for setting out his entitlement to various match bonuses. Clauses 4 [sic should have been 5] to 11 [sic, 12] pertain to various benefits, obligations for commercial activities, and the percentage entitlement to a transfer fee.

125. The second contract covered the period from 21 November 2001 to 30 June 2005 (4/24/10-18). The terms for his remuneration are stated as follows:

> '(1) The player's basic wage will be one million (£1,000,000) pounds gross per annum (£83,333 per month). The player is responsible for all taxes from this date.
>
> (2) The player will receive additional gross remuneration as follows subject to being registered with the Club on each due date:
>
> £250,000 on 31 October 2002
>
> £250,000 on 31 October 2003
>
> £250,000 on 31 October 2004.'

Effectively, the 2nd and 3rd clauses in the first contract became the 1st and 2nd clauses in the second contract. The £250,000 in the second clause no longer stipulates that the annual sum of £250,000 would be contributed into a pension scheme on his behalf. The £250,000 effectively became a lump sum payment in the second contract.

126. As part of the package for Mr Evesham's second contract, he was given a letter of undertaking (a side-letter) dated 21 November 2001 signed by Mr Elgin on behalf of Rangers, and in which Rangers gave the undertaking to fund Mr Evesham's sub-trust with 'a total of £875,000 *net* as follows, £125,000 in March 2002, 2003, 2004 and 2005 and £125,000 in October 2002, 2003, 2004' (4/28/19, emphasis added).

127. The following sums were paid into Mr Evesham's sub-trust:

06/02/2002	£125,000 for loan request letter 21/11/2001 (4/28/20)
07/11/2002	£125,000 for loan request letter 21/10/2002 (4/28/21)
29/04/2003	£125,000 for loan request letter 04/04/2003 (4/28/22)
11/11/2003	£125,000 for loan request letter 27/10/2003 (4/28/23)

In every instance, the loan request letter pre-dated the actual contribution into the sub-trust. Under this package, Mr Evesham received £250,000 per annum as 'loans' through the trust arrangements in addition to the £1 million in salary and a lump sum of £250,000 in October.

128. The third contract covered the period from 1 February 2004 to 30 June 2007 (4/28/26-33), and the clauses pertaining to monetary rewards were reduced to the following:

> '(1) The player's gross basic wage will be as follows:-
> 1-2-04 to 30-6-04 £1,000,000 per annum (£83,333 per month)
> 1-7-04 to 30-6-07 £ 667,000 per annum (£55,583 per month)
>
> (2) The Club shall pay the player a bonus in accordance with the schedule agreed from time to time and lodged with the SFA and SPL, as applicable to all players in the First Team Squad.'

Under the third contract, the first clause for the three-year period to 30 June 2007 saw a stark reduction in Mr Evesham's gross annual salary entitlement to £667,000. Compared to the second contract, where the player was receiving a gross salary of £1 million per annum plus £250,000 lump sum, making the package worth £1.25 million gross, (and that was without including the £250,000 due under the side-letter), Mr Evesham's annual salary was effectively halved under the terms of the third contract.

129. It would appear that the side-letter of 21 November 2001 must have been replaced by a new letter of undertaking around the same time when the third contract was put in place. HMRC investigating officers had requested for such documentation to no avail. What can be established is through the audit trail of monies that moved into Mr Evesham's sub-trust and loaned to him per the trust documents maintained, listing the Deepwater Loans as Schedule 1 and Individual Loans as Schedule 2. (The two schedules are identical because under the Equity arrangements, the Trust loaned the sums to Deepwater for Deepwater to make loans of identical sums to individuals to profit the differential in interest rate between the two sets of loans.) The listing per the two schedules of loans for Mr Evesham's sub-trust 28 is as follows:

Date	Document Description	Amount (£)
04.02.2002	Finance Agreement	125,000
07.11.2002	Memorandum of Borrowing	125,000
28.04.2003	Memorandum of Borrowing	125,000
10.11.2003	Memorandum of Borrowing	125,000
22.04.2004	Memorandum of Borrowing	125,000
10.11.2004	Memorandum of Borrowing	300,000
22.03.2005	Memorandum of Borrowing	300,000
31.10.2005	Memorandum of Borrowing	300,000
22.12.2005	Memorandum of Borrowing	95,000

130. From the schedule of loans, it can be inferred that the bi-annual sums of contribution into Mr Evesham's sub-trust was increased from £125,000 to £300,000 when the terms of the third contract were negotiated. For ease of comparison of the terms in the second and third contracts, I have summarised the core components as follows, and this is without reference to any match bonuses:

Component	2nd Contract (£)	3rd Contract (£)
Gross salary	1,000,000	667,000
Gross lump sum	125,000	nil
Trust payments (net)	250,000	600,000
Trust payments grossed up at 40%	166,667	400,000
Total in gross equivalent	1,541,667	1,667,000

131. When the third contract was being negotiated, Mr Evesham was at the height of his career. Media speculations subsisted as to Mr Evesham's financial expectations and his desire to leave Rangers if they were not met. The news report also alluded to Mr Evesham as not going to 'follow the lead' of other players, who were willing to take a drop in salary. It was not the case that Mr Evesham was being demoted and had to accept a cut in salary to remain in the club when he negotiated his third contract. The evidence leads towards an interpretation that the component under the trust payments was accepted by Mr Evesham as part of his overall remuneration entitlement to arrive at the £1.7m he was reported to expect from the new contract.

132. The tabulated figures above show the gross equivalent total under his second contract of £1.54m and under his third contract of £1.67m, which would be close to the expected deal of £1.7m, once entitlement for appearance and match bonus was also taken into account. If one were to go by what was stated in the disclosed contract, discounting the trust payments as loans, Mr Evesham's earnings would only be £667,000, which was a long way from his expected £1.7 million.

133. The report also mentioned that Mr Evesham's agent, Mr Pershore, would arrive in Scotland for the re-negotiation. We have no sight of any documentation recording

the discussions between the agent and Rangers in this case, or in other cases. The many versions of 'Financial Proposal' prepared by Mr Grey for Mr Purple's contract negotiation are the kind of document that one would expect for each player on such an occasion. The versions of 'Financial Proposal' for Mr Purple were obtained from Mr Grey's client files for Mr Purple by the Respondents. The dearth of documentation regarding the negotiation or re-negotiation of contracts is another aspect, the Respondents submit, where Appellants have not discharged the onus of proof.

134. Apart from the disproportionate reduction in the headline salary, another anomaly of the third contract pertains to the clause for match bonuses. In the previous two contracts for Mr Evesham, the bonus clause was detailed and ran on to cover the equivalent of a whole page of A4, specifying the amount for each appearance in a match in the Premier Division, the League and Scottish Cups, and the contingency bonuses for qualifying in competitions. By contrast, the bonus clause in the third contract had become substantially vague and loose. There is no documentation to give guidance on how bonuses under the third contract were determined. The £95,000 advanced as a loan on 22 December 2005 per the loan schedule would appear to be outwith the bi-annual trust payments of £300,000; the date and the amount suggested that it might have been in connection with meeting a (European) match bonus obligation by Rangers.

135. The loan schedule recorded the £95,000 as the last sum because Equity was then replaced by Trident, and these schedules were not produced by Trident. Evidence of further payments to Mr Evesham's sub-trust can be traced to Appendix 3 of the Statement of Agreed Facts: £300,000 on 18/9/2006; £310,000 on 10/11/2006; and £300,00 on 10/04/2007. The sums allocated to Mr Evesham's sub-trust agreed with Mr Magenta's spreadsheet on 'RT payments', attached to email of 19 May 2006 (13/79-92).

136. Another schedule by Mr Magenta for internal purposes noting three contracts (Mr Evesham, Mr Warwick and Mr Bath) coming up to expiry (4/28/59) and lists Mr Evesham's remuneration costs as:

	Gross cost to Club	Net to Player
Contract 1/6/06-30/6/07	£722,583	£433,500
Employers NIC	£92,491	
RT	£600,000	£600,000
RT Fees	£60,000	
Total	£1,475,074	£1,033,550

This is a schedule to detail the overall costs to Rangers for engaging the service of Mr Evesham (and the other two), and what was achieved in net terms in the hands of the players with the trust arrangement in place. The differential of £722,583 and £667,000 was unclear, and was probably attributable to the costs of various benefits.

137. In 2005, Mr Evesham sustained an injury and was expected to be out of action for some months. The Board Report of February 2005 (16/J/184) for Rangers Football Club Plc, Football Business Unit, recorded the player's injury on page 4 and noted that after a six-week excess period the insurance policy to cover Mr Evesham's wage costs would pay £24,365 a week. Extrapolating the weekly figure by multiplying with the fraction 365/7 gives an equivalent of annual wage costs of £1,270,460. The injury fell within the period of the third contract when the gross salary of Mr Evesham was stated at £667,000. It would appear that the insurance cover took into account the £667,000 and the £600,000 through trust payments to arrive at £1,267,000 per annum. For the season 2004/2005, Rangers did receive insurance payment for Mr Evesham of £388,722 for the period from 23 January 2005 to 30 June 2005, a total of 22 weeks, and discounting the first six weeks excess, the payment was closely matched to 16 weeks at £24,365, which should give a total of £389,840.

The Granting of Indemnities by the Appellants

138. The request for a tax indemnity letter by Mr Evesham came as part of the advice given by Mr Turquoise of PwC in 2004. The first indemnity letter was dated 1 February 2004 when the second contract was being negotiated. It was signed by Mr Scarlet on behalf of Rangers. The content of the indemnity letter was as follows (4/28/34):

> 'I hereby confirm that the Rangers Football Club plc ('the Club') will be responsible for any liability for UK taxation assessed on you in respect of amounts appropriated to the Twenty-Eighth Sub Trust of the Murray Group Management Remuneration Trust or applied in providing you with benefits from that sub trust and for any UK taxation applied against funds forming part of that sub trust in respect of any period during which your are employed by the Club.
>
> This undertaking is conditional on you following any advice and taking any action reasonably notified to you by the Club with respect to funds accumulated by the sub trust and in dealing with appropriate authorities and bringing to the immediate attention of the Club any communication with such authorities. Neither you, nor anyone acting on your behalf, will make any response, either verbal or written, to such authorities without obtaining the prior advice of the Club.
>
> It is a fundamental condition that the content of this letter remains confidential.'

139. In 2006, when Mr Evesham again consulted Mr Turquoise in respect of the documents he had to sign to effect a change of trustees from Equity to Trident for his

sub-trust, a letter from Mr Turquoise (4/28/61-2) detailed the changes to be made to these documents also led to a revisal of the indemnity previously granted. The new indemnity was executed as a deed in replacement of the letter of 2004, and to include the additional terms as follows:

> 'Any amounts payable by you pursuant to the deed of indemnity and release of covenant supplemental to The Murray Group Management Remuneration Twenty-Eight Sub Trust dated 7 September 2006 between you and Trident Trust Company Limited where those amounts represent a loss to you without a consequent increase in the funds held in the Twenty-Eighth Sub Trust.'

140. This additional clause in the 2006 Deed of Indemnity would appear to grant similar terms of indemnity to Mr Evesham as those in draft agreement in April 2004 for Mr Coventry's file (1/5/14):

> 'In the event that the funders or granters of the said loans or any associated companies, trusts, individuals or organisations should seek repayment of the said loans without offering alternative funding, Rangers Football Club accepts full responsibility and liability in respect of such payment and undertakes to meet any costs associated with the repayment in full.'

The terms of indemnity in this letter appear to be an undertaking to repay the loans if the player was ever asked to repay them by the trustees. The copy of the letter came as an attachment to an email from Mr Red to Mr Worcester, which said, 'following our conversation, I attach a revised copy of the letter with the changes we discussed and the wording tightened up a bit'. The copy from the attachment was not signed and it is not clear what the final status of this offer was.

141. At the key stages of Mr Evesham's involvement with his sub-trust, Mr Turquoise was consulted. The documentary evidence on file has to be considered along with the account of Mr Turquoise's oral evidence (paras 21-24 MD). The lengthy letter from Mr Turquoise of 11 August 2006 (4/28/61-2) requesting detailed revisal to clauses in the trust and loan agreements, the requests for tax indemnity when the scheme was introduced with Mr Evesham's second contract with Rangers, and the widening of that indemnity in 2006, and the final termination of the sub-trust when Mr Evesham left his employment with Rangers, would suggest a very cautionary approach towards the trust arrangements on the whole. These cautionary measures should be read in conjunction with the comments in the majority Decision concerning the view of the employees' advisers on the scheme (paras 24, 28, 32, 229 MD)

142. Apart from Mr Evesham (4/28/34) and Mr Coventry (1/5/30,31), whose agents secured indemnity for them, Mr Grey also secured indemnity for his two clients, Mr Purple (2/13/22) and Mr Violet (4/29/51, 64), in similar terms to that granted to Mr Evesham in February 2004 (*supra* 138). Mr Scarlet also obtained an indemnity (1/8/18), despite Mr Red's email stating that: 'We would not normally give indemnities to employees. Some foreign players are treated differently because they are employed on a net salary basis' (13/6). Other foreign players who were granted

indemnity were: Mr Winchester (5/43/13), Mr Wells (6/44/8), Mr Bristol (7/64/11-15), Mr Chester (8/69/3), Mr Dundee (9/76/3), and Mr Barrow (10/84/3).

143. Overall, it would appear that three types of indemnity have been granted. (1) The most usual one is a tax indemnity, and it takes the form that Rangers would be responsible for any liability for UK taxation in respect of amounts paid to the employee *as a net amount*. The indemnity covers the payments via the trust mechanism only, and is conditional on the player following the advice and guidance of the Club in dealing with any authorities; that the indemnity letter itself is to be kept confidential. (2) There would appear to be a wider cover being negotiated by Mr Turquoise for Mr Evesham and by Mr Coventry to indemnify the employees in the event of the loans being enforced for repayment. (3) The tax indemnity in relation to a termination settlement as detailed in the case of Mr Bristol in *supra* paragraph 109.

144. While the grant of indemnity does not appear to extend to every employee with a sub-trust, it seemed likely that those employees who had asked for indemnity were granted one. The significance of the granting of indemnity is not so much who has been granted one, but why it was *deemed necessary* by the employees and their advisers in the first place. If the agreement between the employer company and the employee was merely the availability of the loan facility through the trust arrangements, why should there be a perceived need for tax indemnity? If the employee was content to receive *only* the benefit of a loan, why should both parties enter into an arrangement to indemnify the loan advanced against possible tax arising. In indemnifying the employee, the employer was working to guarantee an end result, being the amount paid to the employee *as a net amount* through the trust mechanism should remain intact. The request for and the grant of tax indemnity suggests that a tacit understanding existed between the employer and the employee that the funds made available through the trust arrangements might be a form of payment that could give rise to a tax liability, and the granting of the indemnity was the employer's acknowledgement of this risk.

Termination of sub-trusts

145. The case history of Mr Evesham's sub-trust also serves as an example of what happened when a sub-trust was to be terminated. It would appear Mr Evesham acted on Mr Turquoise's advice to terminate his sub-trust very soon after his employment ended with Rangers. In fact, it was PricewaterhouseCoopers Legal who drafted the Deed of Assignment dated 3 June 2008 (4/28/98-100), between Trident Trust Company Ltd and Mrs Evesham, as the sole beneficiary of the sub-trust, to effect the assignment of all receivable owed by Mr Evesham. The steps taken to accomplish the termination of Mr Evesham's trust were: (1) change of beneficiaries according to Mr Evesham's wishes as the Protector of the sub-trust from 'widow and children alive at death' to his current wife; (2) the trust property in the sum of £2,930,083, being the principal of loans to Mr Evesham together with accrued interest of £400,000, was transferred to Mrs Evesham; (3) a Deed of Assignment between Trident and Mrs Evesham was effected to release Mr Evesham of the entirety of his indebtedness.

146. Mr Glastonbury's sub-trust was wound up, but there is no documentation to show how the termination was achieved. On his file is a letter dated 21 December 2005 from Moore Stephens van den Boomen, the player's Dutch solicitors, to Mr Magenta and Mr Red in respect of the trust arrangements and of a step-plan envisaged for the lifespan of the sub-trust. The main body of the letter illustrates the plan:

> '… This sub-trust will be used to receive payment of half the amount of £268,000 agreed on as well as the Champions League bonus at the end of this month. The concept of a trust is unfamiliar in the Netherlands. From a Dutch fiscal perspective a trust is usually treated as a tax transparent entity as a result of which the entity is disregarded for taxation … and the responsibility of tax matters will be shifted to Mr Glastonbury in person. As you will understand, the player does not want to face unpleasant surprises in future as a result of the method of payment of his remuneration.
>
> If we understand correctly the step-plan would be as follows: (1) Incorporation of the fund trust; (2) Funding of the sub-trust by Rangers; (3) Granting of loans on stated dates by the sub-trust to Mr Glastonbury; (4) Forgiving the loans by the sub-trust at the termination of the contract with Mr Glastonbury; (5) Winding up of the sub-trust.
>
> It is of importance to Mr Glastonbury to receive certainty about the UK tax consequences of the payments by Rangers for the net amount of £268,000 (exclusive of Champions League bonus) agreed on. … We understand the positions to be as follows: (i) that the structure of the sub-trust is in the interest of Rangers in order to arrange that part of the remuneration to Mr Glastonbury that is not taxable in the UK. (ii) Initiative and responsibility in this respect rests entirely with Rangers … [to] provide the abovementioned certainty to the player by providing a warranty of all possible tax consequences.' (11/91/19)

It is not clear whether the termination of sub-trust 91 took the steps according to the understanding laid down in the letter. While the actual mechanism cannot be ascertained, some important aspects of the player's understanding and expectations of the trust arrangements are illustrated by the content of the letter. The understanding was: (1) the trust arrangement was '*a method of payment of his remuneration'* for half of the amount *agreed*; (2) that the structure of the sub-trust was 'in the interest of *Rangers* [rather than the player] in order *to arrange that part of his remuneration*'; (3) that the loans would be *forgiven* and the trust terminated at the end of the contract; (4) that Rangers had to give *certainty* to the player and indemnify him against all possible UK tax consequences.

147. In Mr Winchester's case, the process to terminate his sub-trust 43 was initiated in 2005, whereby Mr Winchester, as Protector of his sub-trust, named his daughter to be the Protector. A deed of addition dated November 2005 was effected by the daughter as the Protector to make Mr Winchester a beneficiary. Mr Winchester was

under the impression that the trust had been terminated in 2005, and it only came to light in 2007 that somehow the process did not come to completion at the time. In August 2007, Mr Red wrote to explain what happened in 2005 and the way forward to terminate the trust, quoting from the trustees, it says:

> 'There was an executed deed of addition dated 17 November 2005 making Mr Winchester a Beneficiary of the sub-trust. However, there is no Letter of Wishes or further instructions from Mr Winchester on file that would have indicated to the Trustees that the sub-trust was to be closed. The sub-trust therefore remains in place as there is an outstanding loan.' (5/43/21)

By 2007, the original trustees Equity who were involved in the Deed of Addition of 2005 were no longer acting for the main Trust, so the proposal was that Mr Winchester's daughter, as the Protector of the sub-trust 43, would remove Equity as trustees and appoint Trident. Mr Red then explained the final steps:

> 'Once the trustees have changed and the sub-trust assets transferred to the new Trustees, we can ask the new Trustees to consider distributing the assets and closing the sub-trust down. I'll forward appropriate draft paperwork for this once the change of Trustees has been made.' (5/43/21)

148. In the case of Mr Newark (sub-trust 52), an email from Mr Louth of 24/7/2006, a lawyer in Amsterdam who also acted for Mr Winchester and in the light of the complications experienced, wrote to Mr Magenta in respect of the anticipated process of winding up Mr Newark's sub-trust.

> 'With reference to the information you have forwarded to Mr Newark, please be informed as follows.
>
> We do experience a lot of problems with the actual termination of trust structure once a football player has ceased to be a UK resident employee of Glasgow Rangers. In that respect, we are still awaiting confirmation of Mr Winchester and the structure has been winded [sic] up.
>
> Therefore, I would like to attach to the documents that you have prepared those documents that are required to unwinded [sic] the structure once the loan and appointment of new trustee have been completed. I would in that respect ask you to give me a package that would enable:
>
> - resignation of Mr Newark as Protector;
> - a letter whereby Mr Newark confirms he has ceased to be an employee of the Rangers Football Club, ceased to be tax resident UK and consequently the funds can be distributed to principal beneficiary.
>
> There will be no actual cash distribution but the distribution of the receivable, the loan arrangement collapses.' (6/52/26-27)

Mr Red replied on 26/7/2006 to Mr Magenta in relation to Mr Louth's email to advise:

> '… from 6 April 2006, the sequence of events outlined [in Mr Louth's email] is no longer effective from a UK tax point of view. Rangers can no longer support withdrawal from the trust arrangements in this way.
>
> Our advisers have suggested that another sequence involving distribution to employee's family may still be effective but I have not seen any details or looked at it at any depth. I can, if required, ask our advisers for more detail, but this is unlikely to come quickly since I believe they will have to do considerably more work to develop their idea.' (6/52/26)

In cross-examination, Mr Red was asked two questions in sequence: (1) that his involvement in this episode was to 'work out how the trust [could] be brought to an end from a tax efficient point of view'; and (2) that part of what he was 'trying to achieve [was] getting the money to … Mr Newark without him incurring a charge to tax'. Mr Red answered in the affirmative to both questions (Day 2/ 118.2-10). No documentation was produced to show how the termination of Mr Newark's sub-trust was eventually achieved. However it was accomplished, the aim would have been to place the money with Mr Newark without any adverse financial consequences to him.

149. In the case of Mr Lichfield (sub-trust 56), there is a lack of documentation to illustrate how the termination of his sub-trust was achieved. It was suggested by Mr Red that the trustees dealt directly with his advisers. Mr Louth acted for Mr Lichfield as well, and the only document on file giving information regarding the termination of the trust comes from Mr Louth's letter to the Complex Personal Tax Return Team of HMRC. The letter was dated 29 June 2007, and was the second letter in the correspondence between Mr Louth and HMRC concerning Mr Lichfield's personal tax affairs. In this brief letter, Mr Louth stated, 'At the discretion of the Trustees, the loan advanced to Mr Lichfield was waived in November 2005' (7/56/13). Mr Louth's earlier letter dated 6 June 2007 was a 2-page letter responding to HMRC's questions on the nature of the loans advanced via the trust mechanism.

150. In the case of Mr Bristol (sub-trust 64), the termination of his sub-trust was achieved by him appointing a new protector in his place. The trust deed was amended to make Mr Bristol a beneficiary from the date he ceased to be Protector. The exact way where the trust property was assigned to Mr Bristol is not clear. In his letter dated 7 August 2007 to Equity, Mr Red was dealing with a few matters, of which sub-trust 64 was one:

> 'In respect of sub-trust 64, I enclose copies of correspondence between yourselves and Mr Bristol later than the letter of 23 January mentioned in your letter of 8 June, which makes clear that the protector was replaced, the loan was repaid and the funds then distributed to Mr Bristol. I trust you can now agree that no further action needs to be taken on this sub-trust'. (7/64/18)

We have not seen the correspondence that had been enclosed with Mr Red's letter, but the reference suggests that there had been a chain of correspondence between the trustees and Mr Bristol, of which Mr Red was privy to. Equity replied to Mr Red's letter of August 2007 on 19 November 2007, and addressed the matter of sub-trust 64 towards the end as follows:

> 'The 64th Sub Trust was established by a Declaration of Trust made by Equity Trust (Jersey) Limited dated 21 January 2004. By a Deed of Amendment dated 23 January 2004 Mr Bristol was specifically included as a principal beneficiary 'only after he shall have ceased to be the Protector'. Mr Bristol resigned as Protector of the Sub-Trust in favour of Ms Chippenham by way of written notice to Equity Trust (Jersey) Limited dated 26 January 2004.
>
> In these circumstances, as in the case of the previous Sub-Trust, a discretionary distribution can be made to Mr Bristol by way of gift of all the Sub-Trust assets thereby bringing the Sub-Trust to an end. There is currently a small balance of £85.15, which we propose to utilise against the costs of closing rather than make a payment, please let me know if you agree with this approach.' (7/64/20)

Whether it was by way of a gift, as Equity seemed to be proposing, or by way of repayment of loans and then a distribution of funds, as Mr Red seemed to be suggesting, the end result to the employee would be the same. The trust assets would be appointed to the employee, with the effect that the loans and all the accrued interest would be written off.

151. In the history of Murray Group Remuneration Trust since its implementation in 2001, the six sub-trusts mentioned above would appear to be all the cases of trust termination to date. The six cases all concerned foreign players, who for tax reasons or otherwise, deemed it preferable to terminate their sub-trusts on leaving the UK at the end of their employment with Rangers. In each of these cases, it was the employee who initiated the termination process, and seemed to have done so by intimating the decision to their employer Rangers. Thereafter, the relevant parties concerned – the trustees, the Appellants, the employee, the family member – would work in concert to achieve the ultimate aim of placing the trust property absolutely in the hands of the employee. The employee's wish to terminate his sub-trust would trigger the mechanism for the further and specific steps to be taken to achieve that ultimate purpose. All receivables in the sub-trust would be assigned absolutely to the employee, with the corollary that all loans to the employee were thereby written off. Those further and specific legal steps were devised in conjunction with the trustees, the Appellants, and the employee's advisers. The actual steps taken appeared to have differed from case to case depending on the legislation ruling at the relevant time. Notwithstanding the lack of documentation regarding the legal steps that were taken to give effect to the termination, the ultimate aim that emerged from the evidence was singular and clear. The ultimate aim, without exception, was to render the funds in each sub-trust the absolute property of the departed employee.

The Role of the Protector

152. The Respondents submit that the general context and purpose usually associated with the appointment of a protector are absent in the Murray Group Remuneration Trust (MGRT). The protector is appointed by the settlor of a trust to watch over the trustees. It is an additional measure to ensure that intentions of the settlor are carried through for the benefit of the beneficiaries. The settlor names the class of beneficiaries, and the duties of the protector are essentially fiduciary, in that he is there to protect the interests of the beneficiaries against the trustees.

153. In respect of all the sub-trusts in MGRT, this standard 'role-play' for the settlor and the protector of a trust does not seem to obtain. In fact, on a closer analysis, the roles of the settlor and the protector are somewhat fused into the person of the employee within the setting of a sub-trust. The employee as protector has 'procured' the creation of the sub-trust by virtue of an agreement to enter into the trust arrangements, as the Respondents submit. The employee as protector then names the beneficiaries for each sub-trust with his letter of wishes, while conventionally it is the settlor who can name the beneficiaries. In this unconventional 'role-play', the employee seems to be playing the role of the settlor under the cloak of the protector: *first* in causing the sub-trust to be set up through his express agreement to enter into this arrangement, and *secondly* in naming the beneficiaries for the sub-trust. These are the two essential acts that define the settlor in a conventional trust. My understanding of the Respondents' submissions is that, in the 'unconventional' setting of the MGRT, the employee is therefore acting as the settlor, by virtue of being the person who carries out the two defining acts normally attributed to the role of the settlor – (1) of causing the creation of the trust, and (2) of naming the beneficiaries.

154. According to Underhill and Hayton (at paragraph 1.79), the powers conferred on a protector are normally fiduciary 'unless expressly or necessarily implied otherwise in the trust instrument *or from the circumstances*, as where the settlor or a beneficiary is a protector with power to protect his own selfish interests' [emphasis added]. If we take the unconventional setting of MGRT and examine it under the light of this statement, we have the employee as the protector whose powers are not confined to being fiduciary. He is in reality also the settlor, though not in name but 'from the circumstances' as described by Underhill and Hayton, and has therefore the powers to protect his own interests.

155. In each of the instances narrated above regarding the termination of a sub-trust, the evidence suggests that the powers of the employee as the protector were not exercised in a fiduciary sense in guarding the interests of the named beneficiaries against the trustees. The powers expressed by the protector/employee accord more to the description by Underhill and Hayton '*from the circumstances*, as where the settlor … is a protector with power to protect his own selfish interests'. The instances of sub-trust termination afford examples of how this power was played out in reality.

(i) The employee initiated the process of termination; he was playing the role of the settlor in this action.

(ii) The employee resigned as protector and appointed an originally named beneficiary to be the new protector; he was playing the role of the settlor again in this action, because it is the settlor who appoints a protector.

(iii) The new protector then named the employee as a beneficiary; in this action the new protector was playing the role of the settlor for the naming of a beneficiary is a defining act of a settlor.

(iv) The employee received the distribution of the trust property in the release of the loans; in this action the employee was playing the role of a beneficiary.

156. The way the sub-trust is set up with the employee as the protector appears to be in effect a cloak for the employee to don in this unconventional 'role-play' scripted by Baxendale Walker. Donning the cloak of the Protector, the employee was actually acting as the settlor. He then took off his cloak and donned it on one of his named beneficiaries, and the two effectively swapped roles, when the employee then assumed the role of a beneficiary. In this unconventional 'role-play' within the setting of the sub-trust, the employee seemed to be moving in and out of the roles of the settlor and the beneficiary under the cloak of the protector, like a character in a pantomime, leaving the audience somewhat bemused regarding his *bona fide* role.

157. One aspect of the role of the Protector as defined by Underhill and Hayton at paragraph 1.91 is that 'a protector may have power to direct asset management functions, but only so long as the directions do not personally benefit him'. It is accepted that the sub-trust deeds did not confer powers on the protector/employee to direct asset management functions, but in reality for the sub-trusts with assets other than loan capital, the protectors did direct the management of the assets, contrary to the provisions of the deeds.

158. Mr Gold's sub-trust (15) is the only sub-trust where the allocated funds have not turned into 'loans' for the employee. In paragraph 20 of Mr Gold's Witness Statement, he stated: 'I consider the money in the trust to be in a certain way my money but I knew it was not actually my money as I could not dispose of it myself'. (Day 7/85.1-3) He was asked how the statement was prepared, and the reply was: 'I spoke to someone connecting to this. My lawyer was there. And then we made up this statement and I read it and my lawyer gave permission to sign' (Day 7/113.11-14). In cross-examination, Mr Gold's understanding of his role as the protector of the sub-trust funds was variously tested. Mr Gold was not happy with the interest being received on the sub-trust funds placed on deposit, and he was asked the action he took in this respect. His replies to some of counsel's questions are as follows:

> 'No, I never wanted to invest it [the money in the sub-trust] in something else. I always said I want the money there on a deposit. Get a good interest rate. And I didn't want to take any risk at all with the money.' (Day 7/103.8-11)

> ‘I thought the money in the trust would be something extra for a later stage.’ (Day 7/115.13)
>
> ‘Normally, I checked *my* – the money on the account in the trust. Then all of a sudden I realised that the interest rate was quite low. Then I actually contacted Mr Dover [his lawyer] and asked what happened with the interest.’ [emphasis added] (Day 7/119.11-14)
>
> ‘I made the complaint here. My accountant contacted the trustees, [as] the people responsible for it. And that’s actually when I received, then, the information that I could not actually change it after what happened.’ (Day 7/125.20-23)

159. Mr Gold was then asked the question whether: ‘In the final analysis, would you consider that you look after the money or do you think the trustees look after the money?’ His reply was:

> ‘I think it’s a combination. I think the trustees look after the money… But there’s also the fact that I think it is up to me, because I ask them to put the money on an interest rate and not actually to invest it in property or shares or whatever. So I think they listen to what I ask them to do.’ (Day 7/126)

160. In the case of Mr Violet (sub-trust 29), when a sum of money of around £158,000 was allocated to his sub-trust in early 2006, he did not take out the amount as a loan. He ‘repaid’ £82,000 against some of the earlier loans to enable a flat costing £240,000 to be purchased by the sub-trust. In relation to the purchase, Mr Violet said, ‘what I paid for the flat was 240,000. And it was trust money that paid for that’ (Day 5/36.14). Mr Violet’s reply seemed to suggest that he understood the flat as his purchase, and that the he used the trust money to make that purchase. We also heard evidence that the choice of the investment in the form of a flat was entirely his and his wife’s. Mr Violet said his wife ‘was very instrumental in the purchase of the flat’ (Day 5/37.6), and the sub-trust took ownership of the flat after all the decisions and arrangements for purchase had been made by the couple.

161. On a much bigger scale, Mr Black (sub-trust 1) took control and gave direction for the property development of Bel Azur in France. His case is complicated by the fact that he was undoubtedly an excluded person. By provisions of the Trust Deed dated 20 April 2001 (15/1-16), the meaning of ‘Beneficiaries’ at clause 1.1.4 (15/4) states that ‘no Excluded Person shall be a Beneficiary’; and the meaning of ‘Excluded Person’ is defined at Schedule 2 (15/16) as ‘any person connected with the Founder’ (clause 1.2) or ‘any Participator in the Founder, the Founder’s parent company or group companies’ (clause 1.3). The Founder means ‘Murray Group Management Limited’ (MGM), and Mr Black is an excluded person by virtue of being a major shareholder of MGM.

162. The purchase and development of Bel Azur involved the creation of a Luxembourg company, Bel Azur Properties SARL (BAP), and there were references in the Appellants’ internal communications regarding its ownership by the main Trust

or by Mr Black's sub-trust. The MGM Board Minute dated 1 September 2005 (1A/1/77) gave clarity with the Chairman of the meeting (Mr Blue) 'reported that Equity Trust (Jersey) Limited, the Trustees of the Trust, had confirmed that BAP was wholly owned by the Trust and that beneficial ownership of BAP was held by the Trust.' Mr Yellow was appointed 'Power of Attorney' over the Luxembourg company. In terms of funding, the following two examples give some indication of the Group's assistance in financing and Mr Black's role as the guarantor for a loan facility. The first example came from the email exchange on 22 April 2005 from Equity to Mr Red requesting funds as share capital for the Luxembourg Company to be set up. Mr Red forwarded email to Mr Yellow and remarked: 'There's ample funds in the RT to cover this at the moment. I've told the Trustees to go ahead and get the details to us asap.' (1A/1/23). The second example was a guarantee to the Bank of Scotland, which provided the loan facility to meet the deposit required to be held with the notary; a letter from Mr Black to the Bank dated 14 June 2005 states: 'I acknowledge receipt of the offer letter issued to Bel Azur Properties SARL, of which I am a guarantor in respect of the repayment of all sums due under this loan facility.' (1A/1/53)

163. In his evidence, Mr Black spoke of his involvement in the Bel Azur project: 'I was involved and it wasn't just the buying. I then had to get the builder. … I already had the tradesmen. I knew what to do … It was a business opportunity. It was easy to manage because it was next door [to where Mr Black's own villa was]' (Day 5/143-144). The refurbished property was sold at a profit, and when asked what happened to the 'profits', Mr Black's reply was: 'I was distributed and I've used it – invested it' (Day 5/150.10); and later on explained that: 'Everybody got paid off . Then there's an amount left which … the trustees agreed to give me a loan' (Day 5/151.8-9).

164. The substantive point to be drawn, in this and the other two cases concerning Mr Gold and Mr Violet, is that the protector appeared to direct asset management functions with regard to the Trust funds, or to their sub-trust funds. In the case of Mr Black, he was an excluded person and in the case of Mr Gold and Mr Violet, this 'asset management' power is not conferred by the terms of the sub-trust deed. These are the only examples where the Trust funds or the sub-trusts have held assets other than loan capital. In the two sub-trust cases, the protector appeared to consider he had a certain form of 'ownership' over the trust funds. Mr Gold corrected himself in time not to call the trust funds 'my money' by substituting 'my' with 'the' in giving evidence. In a manner of speaking, Mr Violet seemed to think he (as 'I') paid for the flat with the trust money. The employee/protector seemed to direct the trustees in carrying out their asset management functions, and as Mr Gold said, 'they [the trustees] listen to what I ask them to do'.

165. From the evidence, it would appear that the employee in his role as the protector could draw down the money in full as loans; he could leave the money as investment on deposit; he could deploy the money towards an alternative form of investment in real estate. He could direct the trustees to act in accordance with his wishes in connection with management of asset in his sub-trust; he could initiate the termination of the sub-trust; he could name another person to be the protector in his place; he could end up (with a few legal steps) being the beneficiary and have the

trust property appointed to him. In this unconventional sub-trust setting, the protector could 'play' the role of the settlor and swap roles with a beneficiary. Setting aside what the legal remit for a protector is, the role of the protector as seen in the setting of the sub-trust arrangement, seems to be a lever to allow the employee freedom of access and *de facto* control over the trust funds.

Summary of Findings-in-Fact

166. The salient findings-in-fact are summarised as follows:

(i) The Appellants implemented the trust scheme in 2001 with the understanding that it was for the purposes of avoiding PAYE and NIC.

(ii) Baxendale Walker was the architect of the scheme and this type of scheme was the reason behind the *Langley Report of 2003* commissioned by the Law Society. The Appellants continued to seek the advice of Baxendale Walker during his period of suspension and after he was struck off by the Law Society. The Jersey courts had been hearing cases on Baxendale Walker-advised trusts.

(iii) HMRC opened enquiry into the use of the MGRT in January 2004. The progress of the enquiry was protracted and chequered due to key documents being withheld or actively concealed.

(iv) The impasse in obtaining information was broken in the autumn of 2007 by a separate enquiry conducted by the City of London Police into Rangers, which had resulted in information being made available to HMRC for the first time, such as the *side-letters*, from the seized documents related to MGRT.

(v) It would appear that the side-letters were actively concealed in the course of HMRC's investigation because they answered the central question raised by the enquiry regarding the basis of *determining* the amounts to be contributed to the main Trust and the sub-trusts. The side-letters also evidence the existence of some form of contractual agreement between the employer and the employees.

(vi) Mr Red was an incredible witness. It would appear that he was obstructive in his conduct during the HMRC's enquiry, and obscurantist in the way he gave evidence on what could be called a 'virtual reality', one that conformed to his own understanding of how the trust scheme should have functioned to stay within the bounds of legitimacy as a tax-saving scheme. It would also appear that he tried to influence Mrs Crimson (and possibly Mr Scarlet) in their giving of evidence.

(vii) The auditors of Rangers did not express an opinion on the efficacy of the trust scheme and relied on the information given to them by the management; there appeared to be a lack of candour from the management towards the auditors over the remuneration trust payments, for example, in respect of the nature of Mr Purple's loan advanced on the occasion of his employment being terminated.

(viii) The trustees' functions in reality were passive and perfunctory and consisted primarily in the processing of loan requests without any exercise of discretionary powers.

(ix) The loan requests were prepared by the Appellants and signed by the employees and served as 'instructions' to the trustees in allocating the funds arriving in the main Trust into the respective sub-trusts for remitting into the personal bank accounts of the employees.

(x) Loans were invariably granted; the trustees acted 'in breach of trust' in granting loans without the exercise of discretionary powers; the trustees have been indemnified by the Appellants to act in breach; the scheme depended on the trustees to advance loans in breach of trust to achieve its purpose.

(xi) There was control of the trustees by the Appellants in the power of appointment and removal, in the direction of how the main trust contributions should be allocated, in the interest rate to be set for the loans, in the way that loans should be processed, and in setting the terms and conditions for these loans to be advanced to the employees of the Appellants.

(xii) Mrs Crimson was an ineffectual witness. Her ineffectualness, ironically, was an effective testimony of the subservient position of her role as a trustee and representative of the trustee company. The trustees acted as a 'cipher' in the scheme, and their role was to process the trust payments as directed by the Appellants, and to act in accordance to the wishes of the protector/employees.

(xiii) The loan structure was criticised by Jersey Financial Services Commission as not being 'commercial'; it was designed not to be commercial to achieve its purpose; no security was ever requested; no interests ever required to be paid; no expectations of repayment from employees; no intentions of enforcement for repayment by the trustees.

(xiv) For bonus payments to ordinary employees, there appeared to be a 'choice' between having the bonus paid via the trust or the payroll; there was 'consent' from the employees if the trust route was chosen; and there was the understanding that if the trust route was not chosen, the bonus would be paid through payroll.

(xv) For salary increase to ordinary employees, there appeared to be an agreement of an increase, and in cases where the trust mechanism was used, 'what was to be done' was to address the salary increase as a discretionary bonus for processing through the trust mechanism.

(xvi) For bonus payments to the footballing employees, there appeared to be a schedule agreed for the start of each season and lodged with SFA as a matter of normal practice. The bonus entitlement should be the same for each player in the team squad in accordance with the schedule agreed. It would appear that the bonus and appearance money for players with a sub-trust had been paid via the trust mechanism while other players without a sub-trust received their entitlement through payroll.

(xvii) The UEFA bonus for 2005/06 was the subject of intense cross-examination. It would appear that the Appellants' witnesses (Mr Red, Mr Scarlet and Mr Magenta) tried to suggest that 2005/06 was 'exceptional' and that no bonus schedule was agreed until Rangers reached the qualifying stage. Circumstantial evidence suggests that 2005/06 had not been an 'exceptional' year for bonus agreement being in place.

(xviii) Mr Scarlet was an unreliable witness. His account of the UEFA bonus settlement was somewhat fraught with implausibility. He was an elusive witness, and attributed to 'a lack of understanding and his need to rely on others' or a lapse of memory for the convenience of not answering inconvenient questions. From the documentary evidence, he demonstrated full command of the details and intricacies in the use of the trust scheme; he had the authority to decide whether a sub-trust was to be set up for a player or not (as in the three aborted numbers to settle UEFA bonuses); he gave detailed instructions to manage the interchange of payment between trust mechanism and payroll; he represented Rangers in agreeing pay deals with the players and their agents; he was deferred to in termination situations to decide whether the trust mechanism was to be used; he represented Rangers in ending the trust arrangements unilaterally with the two players when the legislation for 'Disguised Remuneration' came in.

(xix) The trust payments made under the terms of the side-letters appeared to be, in effect, a way of structuring a remuneration package. A percentage of the agreed remuneration would be paid by the trust mechanism, and in some instances, the amounts per annum paid via the trust exceeded the sums going through payroll.

(xx) The Appellants, the players and their agents seemed to be in full agreement that the trust payments should be taken into account in setting the agency commissions; all parties concerned gave effect to the trust payments as part of the remuneration package in achieving the 'ballpark figure' in arriving at a pay deal agreement. Rangers factored in the trust payments in setting the insurance premium to cover a player's earnings during a period of injury. These are facets illustrating how the trust payments were regarded in the 'real world' of business transactions.

(xxi) In the termination of employment of some 35 employees, it would appear that payment in lieu of notice, transfer fee entitlement, inducement payment were paid through the trust mechanism. What would appear to be s403 payments were also settled via the trust with the £30,000 exemption being utilised through payroll.

(xxii) On the occasions when the trust arrangement and the payroll were used interchangeably to settle the contractual obligations by the Appellants, the underlying contractual obligations had not altered as such. The trust arrangements were effectively converted into payroll payments, and this points towards the trust mechanism was utilised in effect as an alternative method of discharging an obligation that would have been processed otherwise through the payroll.

(xxiii) The example of Mr Evesham's sub-trust operation illustrates how the trust was used to arrange and re-arrange part of his remuneration package, to meet his bonus entitlement, to set the insurance premium against his injury. His sub-trust also illustrates how indemnity would be granted in relation to the trust payments and the steps that could be taken to terminate the sub-trust.

(xxiv) In the request and the granting of indemnity, there appeared to be an underlying agreement between the Appellants and the employees that the deployment of the trust mechanism was exposing the employees to some kind of financial risk. That tacit agreement between the parties came in the form that the employer was under some obligations to guarantee the *net* payments to the employees, and it is evidenced by communications from the employees to the employer in this respect, including Mr Scarlet, that the agreement to use the trust mechanism was to *oblige* the employer in the Appellants' effort to make savings in tax.

(xxv) The act of terminating a sub-trust was initiated by the employees. The further and specific steps were taken depending on the legislation in force at the time, and invariably the ultimate purpose of terminating the sub-trusts in each and every case was to deliver the *same* result of releasing the loans, thereby rendering the trust funds (in the form of loan capital) the absolute property to the employees.

(xxvi) The role of the protector appeared to be a design to give the employee the key to exercise the powers accorded to a settlor over his sub-trust. In more than one manner, the protector had played the role of the settlor, in procuring the creation and termination of his sub-trust, in appointing a new protector in his place, in the naming of beneficiaries including himself.

(xxvii) The employee/protector had control and access to the his sub-trust funds through the request of loans, the performance of asset management functions, the termination of the sub-trust, and the assignation of the trust property to himself. In his role as protector of his own sub-trust, the employee was accorded the freedom of access and *de facto* control of the trust funds.

(xxviii) The Respondents have registered three major areas where the Appellants have not discharged the onus of proof in respect of the production of documents: (a) regarding the rationale in the adoption and implementation of the trust scheme; (b) regarding the pay negotiation process that resulted in a contract being signed with trust payments being incorporated as part of the agreement; (c) regarding the compromise agreement that should exist to set out the terms of severance on the termination of employment in each of the cases identified where trust payments appeared to have been used as part of the termination settlement.

Extra Findings-in-Law

The *Ramsay* Principle / Approach

167. The recent decision of *CIR v Mayes* [2011] EWCA Civ 407 is thought of as having significantly 'weakened' the *Ramsay* principle. *Mayes* has swayed the outcome of the main Decision, and by adopting the line taken in *Mayes*, the majority Decision focuses on the 'legal reality' of the loan. To give legal effect to the legal event of the loan, the money advanced to the employees as loans is treated as *not* being made 'unreservedly at the disposal' of the employees. If there is no unreserved disposal, there is no emolument.

168. To think of *whether* the *Ramsay* principle applies or not to a particular scheme can lead to the assessment of the strength of the principle in a score-sheet manner. The principle is therefore spoken of as having been strengthened if the Revenue won, or weakened if the taxpayer won. In tracking the legal history where the *Ramsay* principle has been invoked, I have found Lord Nicholls' observation in *Barclays Mercantile Business Finance Ltd v Mawson* [2004] UKHL 51 at [33] particularly helpful in clarifying the nature of the 'doctrine':

> '[T]he *Ramsay* case did not introduce a new doctrine operating within the special field of revenue statutes. On the contrary, as Lord Steyn observed in *McGukian* (1997), … it rescued tax law from being "some island of literal interpretation" and brought it within generally applicable principles.'

169. Just because in *Mawson* and *Mayes*, the court has found in favour of the taxpayers does not mean that the *Ramsay* principle has been weakened. If *Ramsay* has brought tax law within generally applicable principles, it is more accurate to think of *how* the *Ramsay* principle applies to a particular case, than *whether* the principle applies or not. After all, Lord Nicholls, who made the above observation on *Ramsay*, had applied the principle to find in favour of the taxpayer in *Mawson.* In cases where the Revenue has lost, it is not so much that the *Ramsay* principle does not apply, but rather, that after applying the *Ramsay* principle, the law, given its purposive construction and applied to the fact viewed realistically, has found in favour of the taxpayer. In *MacNiven v Westmorland Investments Ltd* [2001] UKHL 6, Lord Nicholls has remarked at [7] that he prefers to say 'the *Ramsay* approach' instead of 'the *Ramsay* principle'. If the term 'the *Ramsay* approach' had gained wider currency than 'the *Ramsay* principle', the focus might have rested more assuredly on *how* the approach applies, than on *whether* the principle applies, and the tendency to assess the strength of the 'principle' in a score-sheet manner might have been greatly lessened.

170. The *Ramsay* approach is not a panacea for the Revenue against tax avoidance. As has been observed, *Ramsay* did not lay down a special doctrine of revenue law striking down tax avoidance schemes on the grounds that they are artificial (*Mayes*, at para 74). In the instant case, the fact that the scheme has been characterised by the Respondents as for tax avoidance, and variously acknowledged by the Appellants' witnesses as for that purpose, does not mean that the scheme could not be found to be

effective in law. The outcome of each case depends on its own peculiar fact and on the application of the law to the fact viewed realistically.

171. While the *Ramsay* approach has been used to bear upon *Mayes* and the present case, there are essential differences between the two cases, in fact and in law, that limit the direct relevance of the judgment in *Mayes* to the instant case. In respect of the facts, the focus in *Mayes* concerns Step 3 and Step 4, with the contention from HMRC that these two Steps were 'a single, wholly self-cancelling, pre-ordained transaction for tax avoidance purposes having no commercial purpose whatsoever' [32]. The court in *Mayes* was asked to find whether these two steps could be elided with their self-cancelling features, thereby neutralising the tax consequences brought about by each of the two steps. In the instant case, while it is suggested that there is a scheme with a sequence of steps, it is not the argument advanced in relation to *Ramsay* that there are any self-cancelling steps within the scheme to be disregarded.

172. The critical distinction between *Mayes* and the instant case concerns the nature of the legislation of which the court is asked to make a purposive construction. In *Mayes*, the legislation under Chapter I, Part XIII ICTA 1988 'adopts a formulaic and prescriptive approach'. As a result, '[no] overriding principle can be extracted from the legislation, or from the authorities, that some types of transaction should be ignored in the application of the Chapter' [57, quoting Proudman J's decision at 47].

173. More specifically, Proudman J used two examples to illustrate how 'unfair tax results' can arise from this piece of prescriptive legislation. A non-UK resident taxpayer taking out a policy effects a partial surrender (Step 3) while remaining non-resident; he then becomes UK tax-resident before effecting a total surrender (Step 4); the gain arising from Step 3 falls outwith the UK tax regime, but he will be entitled to claim the corresponding deficiency relief arising from Step 4 as a UK taxpayer. In contrast, a UK-resident taking out a policy effects Step 3 while being a UK-resident; he then becomes non-UK resident when he effects Step 4; he will be liable to the UK tax on the gain arising from Step 3, but denied the 'compensating corresponding deficiency' on total surrender when Step 4 is taken, by virtue of his being non-UK tax-resident. She concludes from the examples: 'Both illustrate the formulaic and prescriptive nature of the legislation' [53, quoting Proudman J's decision at 27].

174. Proudman J describes the features in this piece of highly prescriptive legislation that have precluded the court from eliciting any purposive construction as follows:

> 'The legislation does not admit a purposive interpretation that might ameliorate [the unfair tax results]. It shows a lack of interest in (a) attributing gains to a person who made them, and (b) not attributing gains to a person who did not make them, and (c) timing the taxation of the gain fairly. Instead it operates mechanically according to a series of statutory formulae.'[52, quoting Proudman J's decision at 23]

175. The counsel acting for Mr Mayes comments specifically on the nature of this special tax regime as one with the 'capability for producing results counter to commercial reality'; as being able to 'work in an arbitrary way unrelated to

commercial gains and losses'; and as 'a highly prescriptive way of exacting tax on the basis of a formulaic arithmetical approach to transactions' [38]. Similarly, Proudman J describes this specific lack of reference to exact tax according to a commercial reality in the following words: 'the gains to be taxed are gains *attributed* ("treated") by the legislation rather than real ones' [quoted at 43].

176. The final conclusions of Proudman J are quoted at [57], and they are particularly informative as regards the inherent difference between the legislative code in *Mayes* and that in the present case:

> '44. … This is legislation which does not seek to tax real or commercial gains. Thus it makes no sense to say that the legislation must be construed to apply to transactions with reference to their commercial substance. ….
>
> 47. … [the legislation] adopts a formulaic and prescriptive approach. No overriding principle can be extracted from the legislation, or from the authorities, that some types of transaction should be ignored in the application of the Chapter.'

177. On the scale of prescriptiveness and precision, the legislation in *Mayes* sits at one end of the spectrum, for being not only highly prescriptive, but also formulaic in its arithmetic approach in quantifying the attributable gains and corresponding deficiency relief. For this reason, 'no overriding principle can be extracted from the legislation, or from authorities'; the court is precluded from any further purposive construction of the said legislation by its very prescriptiveness. Furthermore, if the purpose of the legislation is to exact tax on *deemed* gains attributable to a transaction, with no reference to the commercial reality of the transaction, the court cannot disregard Step 3 and Step 4 on the grounds that these steps were inserted without commercial reality. It is in this context that the court has to give effect to Step 3 and Step 4, by virtue of their being the very steps prescribed in the relevant legislation with all its precision. It is in this context that Mummery LJ gives his ruling in respect of Step 3 and Step 4: 'They were genuine legal events with real legal effects' [78].

178. In contrast, the legislative code for the present case sits at the opposite end of the spectrum with regard to its prescriptiveness. The term 'emoluments' is one of the most inclusive definitions to be found in the tax legislation, and the interpretation of when a payment constitutes an emolument has been derived entirely from case law. Under section 131(1) of ICTA 1988, emoluments included 'all salaries, fees, wages, perquisites and profits whatsoever'. The tax law rewrite project brought in the term 'earnings', and is defined under s62(2) ITEPA 2003 as:

> (a) any salary, wages or fees,
>
> (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.

The definition of 'earnings' is intended to follow the former definition of 'emoluments' under s131(1) of ICTA, with sub-section (c) 'anything else that constitutes an emolument of the employment' being a reference for bringing in the case law meaning of 'emoluments'. Sub-section (c) is there to ensure that anything that counts as an emolument in the existing case law, and not listed in the express terms of the legislation, continues to be included in the new definition of 'earnings'.

179. The legislative code faced by this Tribunal is therefore qualitatively different from that faced by the court in *Mayes*. In *Mayes*, the court can make no further purposive construction of the legislation, other than to give legal effect to the legislative prescriptions. In the instant case, faced with the definition for earnings under one head as 'anything else that constitutes an emolument', the Tribunal is not only expected, but required, to give a purposive construction to the term 'emoluments', and apply that finding in law to the fact of the case, viewed realistically.

180. The kernel of the majority Decision is delivered in paragraph 223: 'In our view … we have to regard the trust structure and the loans as "… genuine legal events with real legal effects".' This is quoting a sentence in Mummery LJ's judgment in *Mayes* at [78]: 'They were genuine legal events with real legal effects.' In this respect, I am reminded of Walton J's comment in *Garforth v Newsmith Stainless Ltd* [1979] STC 129 at 133A: 'It is no use extracting from any case a mere sentence or two without putting those sentences in their context'. The context for Mummery LJ's sentence concerns the subject 'they', referring precisely to Step 3 and Step 4 (and no more) in a tax scheme that has been designed to follow a highly prescriptive legislative code. For three reasons therefore, I do not consider Mummery LJ's judgment directly relevant to the present case. First, the trust structure and the loans do not compare like for like with Step 3 and Step 4 in a highly engineered scheme. Secondly, the present Tribunal is not asked to disregard the trust structure or the loans, as was the case with Step 3 and Step 4 in *Mayes*. Finally, the critical issue has never been whether the trust structure and the loans are genuine legal events; the Respondents have made their submissions on the premise that the trust structure and the loans are not shams.

181. Toulson LJ's comments in *Mayes* are cited extensively in the majority Decision in making the observation that the *Ramsay* approach 'is circumscribed inasmuch as there are already specific statutory provisions affecting *loans*' (para 191 MD). In my view, the benefits code in relation to the taxation of loans is *only* of relevance if the end result of emoluments is considered not to apply to the payments in the scheme. In other words, the legislative code for emoluments has *primacy* over the benefits code in the present case. It follows therefore, that the primary code in respect of emoluments should be fully construed in its own right in the first instance, without being 'circumscribed' by the existence of the secondary code regarding the taxation of loans as a benefit-in-kind. To allow the secondary legislative code to hamper the construction of the primary code is to put the cart before the horse, and it runs the risk of sidestepping the central issue of emoluments that is in front of this Tribunal.

182. Even if the legislative code regarding the taxation of loans is to be assessed on its own terms for its relevance to the present case, (putting aside its secondary nature

for the moment), the Respondents submit that the 'soft loans' being advanced to the employees in the present case do not fall within the provisions of Part 3, Chapter 7 of ITEPA 2003. The legislation deals with taxable benefits of loans that are employment related, but concern 'hard loans' that have a commercial reality, and seeks to tax the differential between the interest at the official rate and the actual interest *paid*, as a benefit-in-kind to be treated as earnings. Furthermore, the Respondents submit that while separate provisions under s188 of ITEPA apply to a loan being released or written off during employment, section 189 specifically provides that section 188 does not apply if the loan written off falls to be charged as employment income by virtue of other provisions in the Income Tax Acts. There is no evidence that the loans in the present case conform to the description of 'hard loans' in the legislation for the benefits code to apply, and insofar as interest payments are concerned, no interests have ever been paid by any of the borrowers in the instant case. Within the benefits code itself, section 189 is an acknowledgement of the subordinate nature of the benefits code for loans to the legislative code for earnings. On both counts, the specific statutory provisions affecting loans, as referred to in the majority Decision, have no direct relevance to the instant case.

183. Before taking leave of *Mayes*, it is instructive to highlight the distinction drawn by both Proudman J and Mummery LJ of the types of transactions involved in *Mayes* and those involved in *Ramsay*. Proudman J's observation is related at [56]: 'that [the ICTA] legislation, proceeding on a formulaic approach without an overriding purpose that some types of transaction may not count, did not include terms (such as 'loss' in *Ramsay*) capable of being construed as commercial concepts.' In a similar vein, Mummery LJ remarks at [77], 'on the proper construction of the ICTA provisions for the taxation of life policies, the statutory requirements as to the transactions to which the provisions were intended to apply were far removed from the kind of case in which the focus is simply on an end result, such as a loss.'

184. There is an instructive distinction to be made of the types of transactions in the case history regarding the use of the *Ramsay* approach. In the instance of *Mayes*, the focus is on the steps in the scheme; in *Ramsay*, the focus is on 'an end result', on the concept of loss. In fact and in law, the essentials between *Mayes* and the present case are different, and the overarching focus of the present case is *not* on the steps in the scheme, but on the end result. The ultimate question for this Tribunal is whether the payments going through the trust structure deliver the end result of emoluments.

185. In *Garforth*, a case-law construction is given for a payment being an emolument if the money is 'unreservedly at the disposal' of the employee [134J]. This is the construction that Mr Thornhill's submissions turn on, and on the premise that the payments through the trust structure are loans, Mr Thornhill submits that they cannot be characterised as being placed 'unreservedly at the disposal' of the employee; and since there is no unreserved disposal, there is no emolument.

186. Walton J's construction of emoluments in *Garforth* as payments made 'unreservedly at the disposal' of the directors does not appear to be offered in the context that it is a condition that *must* be fulfilled, for a payment to constitute an

emolument. This seems to be what Warren J is clarifying at [40] in the Upper Tribunal Decision for *Aberdeen Asset Management Plc* [2012] UKUT 43:

> ' … neither Walton J nor Rowlatt J was purporting to lay down a definition of "payment". Walton J was really saying no more than that it was a sufficient condition for there to be a payment that the funds were unreservedly at the disposal of the directors; he was not laying it down as a necessary condition in order for there to be a "payment"…'.

187. That 'unreservedly at the disposal' is only meant to be a sufficient but not a necessary condition for a payment to constitute an emolument is an interpretation consistent with the observation Walton J makes in *Garforth* at [132d]: 'that the word "payment" is a word which has no one settled meaning but which takes its colour very much from the context in which it is found.' Mr Thomson has advanced other propositions relevant to the fact of the case as alternatives for constructing the meaning of 'payment' that constitutes an emolument. However, the main line of argument by the Appellants is funds loaned from the sub-trust are not 'unreservedly at the disposal' of the employees, and it is this line of argument that the majority Decision has found on. It therefore seems efficacious for the dissenting opinion to engage directly with this line of argument. Furthermore, for the purpose of adopting a *Ramsay* approach in the instant case, the construction of 'unreservedly at the disposal' also affords a ready focus on *an end result* for an analysis of the composite transaction. For the avoidance of doubt,. while I cannot subscribe to my colleagues' conclusion that 'we are unable to make further Findings-in-Fact in support of there being an orchestrated scheme extending to the payment of wages or salary absolutely and unreservedly to the employees involved' (para 232 MD), I do not consider it necessary to focus on both 'absolutely' and 'unreservedly'. It is *sufficient* to establish 'payment' as 'emolument' on the condition of 'unreservedly' alone; it is not necessary to construct the meaning of 'absolutely' for the purpose of the instant case.

188. At this juncture, it is opportune to relate the judgment by Jonathan Parker LJ in *DTE Financial Services Ltd v Wilson* [2001] EWCA Civ 455 in respect of the use of the *Ramsay* approach in a PAYE context. The arguments advanced by the two parties are juxtaposed at [39] to [41]:

> '[39] ... Mr Thornhill [acting for DTE] submits that the concept of "payment" in a PAYE context is not a commercial concept which is susceptible to a *Ramsay* approach; rather (he submits) it is a legalistic concept.
>
> [40] Mr Thornhill further submits that to adopt a *Ramsay* approach to the workings of the PAYE system would be to introduce confusion and uncertainty into a system where simplicity and certainty are of paramount importance. The 1988 Act and the regulations made pursuant to it lay down a complete code, he submits, and there is no scope for (in effect) adding to or varying that code through the application of a *Ramsay* analysis.'

At [41] the Revenue's argument by Mr Glick of a composite transaction applying to the facts of the case is outlined, and the judgment continues:

> '[42] So far as the *Ramsay* issue is concerned … the only question … is whether it is legitimate to apply the *Ramsay* principle – or, if one prefers, adopt a *Ramsay* approach – to the concept of "payment" in the context of the statutory provisions relating to PAYE. In my judgment it plainly is. I accept Mr Glick's submission that in the context of the PAYE system the concept of payment is a practical, commercial concept. …
>
> [43] Nor can I accept Mr Thornhill's submission that to apply the *Ramsay* principle to the PAYE system will inevitably introduce confusion and uncertainty into the statutory code. The true position, as I see it, is that for those employers who operate the PAYE system in a straightforward manner, and who do not resort to the complexities of tax avoidance schemes, there will be neither confusion nor uncertainty; whereas for those employers who choose to operate such schemes the effect of applying the *Ramsay* principle is to restore the certainty which the legislature intended.'

189. Two specific findings in law in *DTE* are of direct application to the instant case. First, it sets a clear precedent for the use of a *Ramsay* approach in a PAYE context. Secondly, it defines the concept of payment in a PAYE context as a *practical, commercial* concept, and specifically negates the submission that it is a *legalistic* concept.

190. Viewing the matter through *Ramsay* eyes, the composite transaction in the instant case, as I see it, consists of the following key stages:

(i) An agreement (by way of a side-letter for example) is entered into between an Appellant company and an employee, whereby the company (as the employer) undertakes to fund the main Trust to enable a specified sum of money to be allocated to the employee's sub-trust by a specified date.

(ii) A sub-trust with the employee as the Protector is set up by executing a deed.

(iii) A standard loan request letter, prepared by the employer company and signed by the employee, is forwarded to the trustees by the employer company.

(iv) Fund is contributed to the main Trust by the employer company to be allocated to the sub-trust in accordance with the amount of the loan request letter.

(v) Trustees remit the specified sum of money into the personal bank account of the employee by the specified date.

Stages (iii), (iv) and (v) happened within a matter of days, and the timing of these three stages was referential to the date(s) specified in the side-letter.

191. In *DTE*, the summary conclusion reached by the commissioners upon the fact of the case is quoted in agreement in Parker LJ's judgment at [41]:

> 'The company decided that Mr MacDonald should have a £40,000 bonus; Mr MacDonald got that bonus; that is – in both senses – the beginning and the end of the matter.'

Parker LJ also refers to the 'admirable candour' at [17] with which 'DTE's accounts for the year ended 30 April 1995 record: "Bonus payments were made in the form of assignments of interests in Offshore Trusts".' Such admirable candour has allowed the commissioners to reach a conclusion concerning the beginning and the end of the matter with summary aptness. In the instant case, the Appellant company agreed with the employee that a certain sum of money should be paid to him through the trust arrangements, and he received the said sum of money through the trust by the agreed date. This could have been the beginning and the end of the matter, but for two facts: (1) that admirable candour is not available to assist the Tribunal in ascertaining the real nature of the transaction with similar ease; (2) the cash payment was addressed in the form of a loan. While the beginning of the matter does point to an entitlement of the employee, the end of the matter only concludes with a loan; we have not reached the end result of funds being placed 'unreservedly at the disposal' of the recipient employee. In this respect, I make no distinction among the five categories of payments made via the trust mechanism. The categorisation has been adopted for the narration of evidence, and all the trust payments attain the same 'end result' for purpose of viewing the transaction through *Ramsay* eyes.

192. In the present case, it is common ground that the trust structure and the loans are not shams. 'Given that a document or transaction is genuine, the court cannot go behind it to some supposed underlying substance,' says Lord Wilberforce at [323G]. This is the cardinal principle established by *IRC v Duke of Westminster* [1936] AC 1. However, Lord Wilberforce also gives his qualifications to this cardinal rule, by stating that '[the *Westminster* doctrine] does not compel the court to look at a document or a transaction in blinkers, isolated from any context to which it properly belongs' [323G]. Lord Wilberforce then goes on to give his guidance to the triers of fact at [324B]:

> 'For the commissioners considering a particular case it is wrong, and an unnecessary self limitation, to regard themselves as precluded by their own finding that the documents or transactions are not 'shams', from considering what, as evidenced by the documents themselves *or by the manifested intentions of the parties*, the relevant transaction is. They are not, under the *Westminster* doctrine or any other authority, bound to consider individually each separate step in a composite transaction intended to be carried through as a whole.' (emphasis added)

193. The dichotomy that exists between the *legal* reality and the *commercial* reality of a document or a transaction lies at the heart of the difficulty in adopting the *Ramsay* approach. In *MacNiven v Westmoreland Investments Ltd* [2001] UKHL 6, STC [2001] 237, Lord Hoffman gives his learned reflections on this issue:

> '[39] My Lords, I venture to suggest that some of the difficulty which may have been felt in reconciling *Ramsay* with *IRC v Duke of Westminster* … arises out of an ambiguity in Lord Tomlin's statement that the courts cannot ignore "the legal position" and have regard to "the substance of the matter". If "the legal position" is that the tax is imposed by reference to a legally defined concept, such as stamp duty payable on a document which constitutes a conveyance on sale, the court cannot tax a transaction which uses no such document on the ground that it achieves the same economic effect. *On the other hand, if the legal position is that tax is imposed by reference to a commercial concept, then to have regard to the business 'substance' of the matter is not to ignore the legal position but to give effect to it.*
>
> [40] The speeches in *Ramsay* and subsequent cases contain numerous references to the "real" nature of the transaction and to what happens in "the real world". … you have to be careful about the sense in which they are being used. Otherwise you land in all kinds of unnecessary philosophical difficulties about the nature of reality and, in particular, about how a transaction can be said not to be a "sham" and yet be "disregarded" for the purpose of deciding what happened in "the real world". *The point to hold onto is that something may be real for one purpose but not for another….*
>
> [41] Thus in saying that the transactions in *Ramsay* were not sham transactions, one is accepting the juristic categorisation of the transactions as individual and discrete and saying that each of them involved no pretence. … They had a legal reality. But in saying that they did not constitute a "real" disposal giving rise to a "real" loss, one is rejecting the juristic categorisation as not being necessarily determinative for the purposes of the statutory concepts of "disposal" and "loss" as properly interpreted. The contrast here is with the commercial meaning of these concepts. And in saying that the *income tax legislation was intended to operate "in the real world"*, one is again *referring to the commercial context* which should influence the construction of the concepts used by Parliament.' (emphasis added)

194. The judgment decisions from the Court of Appeal on *DTE* and from the House of Lords on *Ramsay* and *MacNiven* are binding authorities; they give me leave to set aside any contravening interpretations that might have been advanced by some lower courts on the issue of 'reconciling' the *Westminster* doctrine with the *Ramsay* principle. For ease of reference, I will first summarise the dicta from Lord Wilberforce, Parker LJ, and Lord Hoffmann that seem to bear directly upon the present case, before moving on to their application to the fact of the case.

(i) That the triers of fact are not precluded by their own finding that the documents or transactions are not 'shams', from considering what the relevant transaction is, as evidenced by the documents themselves *or by the manifested intentions of the parties.*

(ii) That the concept of payment in a PAYE context is a *practical, commercial* concept, *not* a *legalistic* concept.

(iii) If the legal position is that tax is imposed by reference to a commercial concept, then to have regard to the *business 'substance'* of the matter is not to ignore the legal position but to give effect to it.

(iv) How can a transaction be said not to be a 'sham' and yet be 'disregarded' for the purpose of deciding what happened in 'the real world'? *The point to hold onto is that something may be real for one purpose but not for another*.

(v) That the income tax legislation is intended to operate 'in the real world', one is again *referring to the commercial context* which should influence the construction of the concepts used by Parliament.

195. As a trier of fact in the present case, I understand it as *wrong and unnecessarily self-limiting* [Lord Wilberforce] therefore not to remove the 'camouflage clothing' [Lord Upjohn] to consider what the relevant transaction really is, as evidenced by the manifested intentions of the parties. The manifested intentions of the parties in this case (employers, trustees and employees), as evidenced by my findings in fact, are:

(i) The Appellant companies as employers agreed a remuneration entitlement with the employees in net terms; they intended to pay the relevant employees for their services by using the trust mechanism; they intended to use the trust arrangements to deliver the equivalent *net* sums of money into the hands of the employees that would have been due after PAYE and NIC deductions; they intended the trustees they had appointed to comply with the workings of the scheme to achieve the purpose of placing the agreed sums of money; they intended the trustees to act 'in breach of trust' by advancing the sums of money addressed as loans within a loan structure that has no commercial reality; they intended to indemnify the trustees fully for acting in breach of trust.

(ii) Trident as trustees intended to comply fully with the instructions from the Appellants and the wishes of the employees; they intended the funds to be remitted to the employees in accordance with the loan requests prepared by the Appellants and signed by the employees; they intended never to exercise any discretion in advancing these loans; they intended to act 'in breach of trust' by advancing loans that have no commercial reality; they intended not to request any security against these loans; they intended never to collect any interest payment on these loans; they

intended these loans never to be recalled or repaid by the employees against their wishes; they intended their role to be that of a mere 'cipher'.

(iii) The employees intended the trust arrangements to deliver funds into their hands without any ties or strings attached in reality; they were intended *de facto* control over the funds in their sub-trust through their role as Protector; they intended to be insured against any financial contingencies for entering the arrangements and were given the requisite indemnities by their employers; they intended to have the free disposal of the funds as they wished, and they were accorded that freedom in reality by the peculiarities of the loan structure; they intended never to repay the loans or to account for how the money had been disposed of; the employees' intentions were given their full accord in reality, as it was the manifested intentions of all the parties concerned that the employees should have the control, the unfettered access and disposal of the funds assigned to their sub-trusts.

As evidenced by 'the manifested intentions of the parties', the relevant transaction in the present case is that of the payment of earnings from the beginning, if the legislation is to be given its purposive construction. The transaction delivers the end result of unfettered access and unreserved disposal of the funds paid into the employees' sub-trusts, if the fact of the payments is viewed realistically.

196. In viewing the fact of the payments realistically, I draw on the qualifications made by Walton J in *Garforth* for the construction of 'unreservedly at the disposal':

> 'If moneys are placed by one person *unreservedly* (and I think that for present purposes I do not have to go very deeply into that qualification, … so there is *no question here of any fetter whatsoever*) at the disposal of any other person, that, I think, must be equivalent to payment.' [134d] (emphasis added)
>
> 'It seems to me that the simple point is that the moneys were *unreservedly at the disposal* of the directors from the time the bonus was declared or, if it be later, from the time when the moneys were credited to the accounts of the directors.' [134j]

In the parenthesis, Walton J is trying to qualify what he means by 'unreservedly', and 'no question of any fetter whatsoever' connotes more to the physical absence of checks and restraints, than to the legal garb in which the funds are wrapped. The construction of 'unreservedly at the disposal' – in the sense of absence of fetters – pays heed to the physical reality of control. In the context of payments, the litmus test for 'unreservedly at the disposal' is the absence of fetters: freedom of access, control of application. In terms of timing, in accordance with Walton J's construction, the payments were unreservedly at the disposal of the employees from the time the funds were allocated to their sub-trusts.

197. A construction of 'unreservedly at the disposal' as the physical absence of fetters – looking at the reality of control –is a way of giving effect to the concept of payment in a PAYE context as a *practical* and *commercial* reality [Parker LJ]. There are other aspects from my findings of fact that point to the commercial reality of the payments through the trust mechanism as part and parcel of an employee's earnings. The evidence regarding the footballing employees provides some pertinent examples. All the players with a sub-trust had a 'commercial price' which allowed them to expect and command a certain level of earnings. A player was bought and sold between clubs according to this commercial price. Knowing his price, a player had expectations regarding his earnings when his contract was negotiated or re-negotiated. His agent knew his client's commercial price and used it to strike the best pay deal for him. The agent's own interests were tied to the final pay deal reached as his fees were calculated as a percentage of the gross earnings, or increase in gross earnings. Rangers knew the price of a player in insuring him against injury. The Football Management Committee discussed the price of a player to the Club for decision-making. In each of these contexts, the commercial price being used for a player took full account of the trust payments as part and parcel of his earnings.

198. One of Lord Hoffmann's dicta is: 'the income tax legislation was intended to operate "in the real world", one is again referring to the commercial context which should influence the construction of concepts used by Parliament.' The commercial context outlined above has influenced my construction of the concept of payment that should be applied to the trust arrangements. In the real world where the player and his agent try to command a price in terms of earnings, the clubs which buy and sell him have to reach an agreement about that price, and the insurer refers to that price to set the premium, the trust payments to the player are regarded in this real world as part of his earnings. A purposive construction of the income tax legislation is to give meaning to the trust payments in their commercial context, and in that commercial context, the trust payments have been regarded consistently as part of the player's earnings.

199. I now turn to Lord Hoffmann's critical analysis on when a genuine legal transaction can be disregarded. As applied to the present case, his question is: 'How can a transaction [a loan] be said not to be a 'sham' and yet be 'disregarded' for the purpose of deciding what happened in 'the real world'?' The response to this question encapsulates the differences between the dissenting opinion and the majority Decision. Lord Hoffmann's dictum is: 'The point to hold onto is that something may be *real for one purpose but not for another*.' He explains at [41] what these two contrasting purposes are by using the transactions in *Ramsay* as an example. When the transactions were said to be not sham transactions, 'one is accepting the juristic categorisation of the transactions as individual and discrete', and that 'they had a legal reality'. When the transactions were said to be not a 'real' disposal giving rise to a 'real' loss, it is this juristic categorisation that is being rejected. When should the juristic categorisation be rejected? The condition for its rejection is when it is not 'determinative for the purposes of the statutory concepts of 'disposal' and 'loss' as properly interpreted'. He finishes his explication by stating simply: 'The contrast here is with a commercial meaning of these concepts.'

200. Adopting Lord Hoffmann's approach to view the fact in the instant case, we have two contrasting purposes for the loans advanced through the trust mechanism. When the loans are said not to be shams, we are accepting the juristic categorisation of the loans, and acknowledge that they have a legal reality. When the loans are said not to be 'real' loans giving rise to a 'real' liability, it is this juristic categorisation that is being rejected. The reason for its rejection is that the juristic categorisation is not determinative for the purposes of interpreting the statutory concepts of payments as earnings. The contrast here is with a commercial meaning of these concepts: *the loans are real for juristic purpose, but not real for commercial purpose.*

201. The features of the loans under the trust arrangements have been detailed in my Findings-in-Fact at *supra* paragraph 60. That the loans lack reality in the commercial context is not only borne out by examining the fact pertaining to the loans, but also independently vouched for by the opinion of third-party regulators, the Jersey Financial Services Commission (FSC). The regulators' assessment represented a highly valid opinion from the 'real world' regarding the commercial reality of the loans. The original trustees Equity, on taking legal advice, asked the Appellants to introduce new measures to make the loans commercially 'real'. Equity's request was not complied with – it could not be complied with because the trust arrangements hinged on the fact that the loans are not meant to be commercially real. Put simply, the employees would not have entered the agreement to receive payments via the trust mechanism had the loans been commercially real. Trident replaced Equity because Trident was willing to operate the loan scheme under the terms of the Appellants to deliver funds to the employees wrapped in the legal garb of a loan with no commercial reality.

202. The law, in accordance with the reasoning of Lord Hoffmann, as applied to the instant case, can be summarised as follows:

> (i) The income tax legislation is intended to operate 'in the real world', one is referring to the commercial context which should influence the construction of concepts used by Parliament.
>
> (ii) How can the loans be said not to be 'sham' transactions, and yet be 'disregarded' for the purpose of deciding what happened in 'the real world'?
>
> (iii) Because the loans are real for one purpose and not for another.
>
> (iv) The loans are real for juristic purpose, but not real for commercial purpose.
>
> (v) The juristic purpose of the loans is rejected because it is *not* determinative for the purposes of the statutory concept of 'payment' as properly interpreted.

203. With reference to the commercial context, the loans stand to be disregarded in the construction of the concept of 'payment' for the purpose of the income tax legislation, which is intended to operate 'in the real world'. It is granted that the loans

are not shams; they are real for juristic purposes. In all the instances where the employees terminated their sub-trusts, the 'further and necessary steps' (as Mr Studer submits) required to be taken were taken for the sub-trusts to be terminated. The ultimate reason for taking these further and necessary legal steps was to align the juristic purpose with the commercial purpose of the funds – by releasing the loans and render the funds absolute property to the employees. Mr Thornhill submits that these instances of sub-trust termination with loans released are 'exceptions' to be regarded each on their own. Mr Thomson submits that these are 'examples' to illustrate how the matter would be dealt with when the employees wanted to dissolve the trust arrangements. If these cases are 'exceptions', they are exceptions that prove the rule, for I see in each and every case the consistent outcome of the loans being released. I consider this singular and consistent outcome as indicative and reflective of the commercial purpose underlying the trust arrangements, and that the funds were ultimately intended to be the absolute property of the employees by all parties concerned: the employers, the trustees and the employees.

204. Concerning the scheme, Mr Thornhill's submissions seek to persuade that every step has an individual legal identity with its own separate tax consequences:

(i) That the side-letters were letters of undertaking that obliged the Appellant companies to make contributions into the employees' sub-trusts; they could not amount to being contractual obligations for PAYE purposes.

(ii) That the Appellants could only recommend the employees for consideration by the trustees to grant a loan; that the Appellants have no control over that matter as it was up to the discretion of the trustees.

(iii) That the loan requests by the employees represented a request and it was not an entitlement to the loan being granted.

(iv) That the employees obtained nothing more than the benefit of a loan at the end of the day.

(v) That the receipt of money was characterised as a loan; it remained a debt until further and specific steps were taken to release the employee of the loan.

(vi) That the sum received being nothing but a loan, it could not be construed as payment made 'unreservedly at the disposal' of the employees.

(vii) That even if the loans were made in breach of trust, the loans were voidable but not void.

(viii) That even if the trust structure were to fall, what remains is still a loan; and the loan stands regardless of the trust.

205. I am not persuaded by Mr Thornhill's submissions, for the reason that his approach is exemplary of the formalism in Lord Nicholls' remark in *Mawson* at [28]:

> 'The particular vice of formalism in this area of law was the insistence of the courts in treating every transaction which had an individual legal

identity (such as payment of money, transfer of property, creation of a debt, etc) as having its own separate tax consequences, whatever might be the terms of the statue.'

206. I am persuaded by Mr Thomson's submissions that the facts should be viewed realistically to give effect to the overall intention of the employers, the expectations of the employees, and the nature of the money advanced. In this regard, the steps encompassing the scheme are viewed as a composite transaction, whereby payments made through the trust mechanism achieved the end result of placing the funds 'unreservedly at the disposal' of the protector/employees.

(i) That the side-letters established the contractual obligation and entitlement between the employers and the employees to the effect that the former undertook to make available specified sums of money to reach the relevant sub-trusts on specified dates. The timing and the amount formed part of that contractual obligation.

(ii) That the loan requests were triggers for the payments specified by the side-letters to be processed.

(iii) That the loan requests were accompanied by contributions to the main Trust. The Appellants sought to distance the linkage between contributions to the main Trust and allocation of funds to the sub-trusts for loan advancement. The reality is that the two steps were conjoined, with the loan requests *determining* the amounts and to which sub-trusts would the headline contributions be allocated.

(iv) That the loan requests were the only documents for each transaction to reach the trustees, who would allocate contributions into the sub-trusts according to the loan requests so that there would be the exact amounts for each loan request to be processed. The Appellants had control over the application of trust funds, not the trustees.

(v) That the trustees did not exercise, were not expected to exercise, any discretion in the granting of loans; that their real functions consisted in processing payments to the employees through their sub-trusts. They acted as a cipher for the payments; they were there to provide a 'trust veil' for the payments.

(vi) That the employees had in effect unfettered access to and absolute control of the money allocated to their sub-trusts through their role as Protector.

(vii) That the payments through the sub-trusts were money made 'unreservedly at the disposal' of the employees, if the facts are viewed realistically. Though every sum of money remitted to the employee's personal account is legally characterised as a loan, the loan has no commercial reality; no security is required; it is never expected to be repaid by the employee; repayment will never be enforced by the trustees; no interest is ever due for payment; interest is a 'paper debt' to augment the inheritance tax benefit on death.

(viii) That no action will ever be taken regarding the loan once it has been advanced through the sub-trust. The only action that has been evidenced in respect of the loan during the lifetime of an employee has been to release it; when an employee wanted to terminate his sub-trust, the 'further and specific' legal steps were taken to write off the loan.

207. To give a purposive construction of the legislation for 'emoluments' is to construe the concept of payment as a commercial concept. To view the loan as a concept of payment is to view the fact accorded to the loan structure realistically in a commercial context. When the relevant statutory provisions are purposively construed and applied to the transaction, viewed realistically, I have arrived at a different conclusion from my colleagues. The key steps in the reasoning that have led me to my dissenting opinion are as follows:

(i) The *Ramsay* approach in this case focuses on an end result like 'loss' in a composite transaction that involves five key stages. The distinction differentiates the findings in fact and in law of the present case from *Mayes*, which focuses on the steps instead of the end result in the scheme.

(ii) The legislative construction of 'emoluments' is to be derived from case law, and it sits at the opposite end of the spectrum in terms of prescriptiveness when it is compared with the legislative code in *Mayes*. A purposive construction for 'payment' that would constitute 'emolument' is demanded of the court in the present case.

(iii) Walton J's construction of emoluments in *Garforth* as payments made 'unreservedly at the disposal' of the employee is adopted, in common with that advanced by the Appellants and found on by the majority.

(iv) 'Unreservedly' is taken to mean the physical absence of fetters: freedom of access and control of application in line with the qualification of 'no question here of any fetter *whatsoever'* afforded by Walton J.

(v) *DTE* sets a clear precedent for the use of a *Ramsay* approach in a PAYE context. It defines the concept of payment in a PAYE context as a *practical, commercial* concept, not a *legalistic* concept, and further differentiates the subject matter of the present case from that in *Mayes*.

(vi) The subject matter in *Mayes* is that of *attributable* gains and corresponding deficiency relief – these are concepts *deemed* to have arisen and are not meant to have reference to any commercial concept in the real world. *Mayes* does not deal with the kind of *practical, commercial* concept like 'payment' in the instant case; the findings in law from *Mayes* cannot be directly applied to the instant case.

(vii) Lord Wilberforce's dictum (as a qualification to the cardinal status of the *Westminster* principle) that 'it is wrong, and an unnecessary self limitation' for a trier of fact not to give regard to 'the manifested intentions of the parties' to establish the relevant transaction is followed here. The

manifested intentions of the parties: the employer, the trustees and the employee, are examined to establish the true nature of the composite transaction.

(viii) Lord Hoffmann's critical analysis of when a genuine legal transaction can be disregarded is followed to arrive at the conclusion that the loans while not shams, stand to be disregarded for the construction of a 'commercial' concept of payment for PAYE purposes. The reasoning consists of the following steps:

(a) The income tax legislation is intended to operate 'in the real world'.

(b) How can the loans be said not to be 'sham' transactions, and yet be 'disregarded' for the purpose of deciding what happened in 'the real world'?

(c) Because the loans are real for one purpose and not for another.

(d) The loans are real for juristic purpose, but not real for commercial purpose.

(e) The juristic purpose of the loans is rejected because it is not determinative for the statutory concept of 'payment' as properly interpreted.

(ix) The loans stand to be disregarded in the construction of the concept of 'payment' for the purpose of the income tax legislation, which is intended to operate 'in the real world'.

(x) The legislative construction of 'payment' for PAYE is a commercial and practical concept; the loans are real for juristic purpose, but not real for commercial purpose; the loans therefore stand to be disregarded for constructing the meaning of 'emoluments'; the end result achieved by the trust payments is the commercial reality of placing funds 'unreservedly at the disposal' of the employee; the trust payments are emoluments.

208. By following the reasoning in these binding authorities, I have arrived at the end result of 'emoluments'. To disregard the loans on the grounds that they are not real for commercial purpose, paradoxically, is *not* to ignore the legal position but to give effect to the legal position of the tax legislation. In other words, by disregarding the juristic purpose of the loans, the juristic purpose of the tax legislation is paradoxically restored. A blinkered adherence to the juristic purpose of the loans in the absence of any commercial reality carries the imponderable stake of stripping the tax legislation of its intended legal effect. The paradox is that in order to give legal effect to the tax legislation, the legal effect of the loans in this instant case has to be disregarded. Both Lord Hoffmann and Parker LJ have made pronouncements on this paradox, and theirs should be the last word to this part of the dissenting opinion:

> '[I]f the legal position is that tax is imposed by reference to a commercial concept, then to have regard to the business 'substance' of the matter is not to ignore the legal position but to give effect to it.' [*MacNiven* at 41]

> 'The true position, as I see it, is that for those employers who operate the PAYE system in a straightforward manner, and who do not resort to the complexities of tax avoidance schemes, there will be neither confusion nor uncertainty; whereas for those employers who choose to operate such schemes the effect of applying the *Ramsay* principle is to restore the certainty which the legislature intended.' [*DTE* at 43]

Other Issues

The 'Trust Veil'

209. Mr Studer made extensive submissions on the validity of the Trust and the sub-trusts, on the legal workings of the various Deeds of Amendments and Adherence, and the supposed duties of the founder, the trustees, and the protectors. As I see it, the Trust in the instant case is similar to the 'corporate veil' described in the First-Tier Tribunal's decision on *Aberdeen Asset Management plc* [2010] UKFTT 524. It is observed that Mr Artis, representing HMRC, 'disclaimed any attempt to lift the corporate veil. Collapsing the DOS [Discounted Options Scheme] into a composite transaction did not pierce the corporate veil' [34]. It is common ground that the loans have been made 'in breach of trust', and as such, they are void, but not voidable; and that even if the trust structure were to fail, the juristic purpose of the loans remains unaffected. There is no need to pierce the 'trust veil' in the present case. I have not related Mr Studer's submissions therefore because I see the issues as residing with the loans, not with the trust structure.

The *Sempra* Decision

210. The Special Commissioners' decision on *Sempra* is heavily relied upon by the Appellants and extensively cited in the majority Decision. I have not relied on *Sempra* as it is a decision from a court of first instance and is not binding on this Tribunal; I have focused instead on the relevant binding authorities from the House of Lords and the Court of Appeal. In respect of *Ramsay*, I do not consider that *Sempra* has been adequately tested for the application of the *Ramsay* principle to be of any assistance in the present case. The appeal by the Revenue in *Sempra* was not heard because the parties concluded with a settlement before its progress to an appellate court. Lastly, the Special Commissioners made a finding of fact that the trustees had a continuing discretion and were not a mere cipher, and *that* is not a fact replicated in my findings of fact in respect of the trustees in the present case to allow a like-for-like comparison with *Sempra*.

The Deduction of Tax at Basic Rate after the Issue of P45

211. The terms of the Statutory Instrument 2003/2682 allow the employer to deduct only basic rate tax on severance payments that are paid to the employee after the Form P45 has been issued. The severance payments have to fall within the charging provisions of s403 ITEPA 2003. In the normal course of event, a Compromise Agreement is the steering document that sets out, *inter alia*, the different monetary components in a termination package. Payments in lieu of notice, inducement

payment, or a percentage share of the transfer fee, for example, fall under s62 with PAYE and NICs being payable. Only payments that fall within the terms of s403, such as compensation for loss of office (which is not under the terms of a prior contractual arrangement), will qualify for s401 exemption up to £30,000, with the excess being charged to income tax (and no national insurance contributions are payable). In the event that s403 payment is made after the issue of P45, the employer is obliged to deduct only basic rate tax, and the employee will account for any additional tax due thereon. In the normal course of event, a s403 settlement is reached by following the *Gourley* principle to arrive at the *net of tax* position for the employee, and a Compromise Agreement usually includes a tax indemnity clause in the employee's favour so that any unforeseen tax liabilities will be met by the employer to safeguard the *net* settlement sum for the employee.

212. The Appellants have applied that the assessments for termination payments should be reduced to basic rate in accordance with the provisions of SI 2003/2682 (para 209 MD). In the absence of a compromise agreement, it cannot be ascertained whether a sum is to be assessed under s62 or s403, and the statutory instrument only applies to a s403 payment. Furthermore, if a tax indemnity clause exists to guarantee the *net* position achieved through the trust payments, then any additional tax that should have been discharged by the employee for a s403 payment received after the issue of P45 falls squarely back on the employer. For these two basic reasons, I do not consider the application of SI 2003/2682 of relevance in revising the quantum of the assessments.

The Inheritance Tax Position

213. The question whether 'HMRC would regard the loans as debts on an employee's estate in the event of death' was raised at the close of Mr Thomson's submissions, and it is noted that HMRC 'preferred not to commit itself' (para 230 MD). While the subject matter of the instant case is that of 'emoluments', the outcome in respect of 'emoluments' has its inevitable ramifications on the inheritance tax position regarding the treatment of the sub-trust 'debts' in an employee's estate. The 'debts' will take the form of the principal sums loaned plus the interests accrued thereon until the date of death. As is noted in the majority Decision, '[t]he overall indebtedness increased over the years: in one case it exceeded 20 times the employee's salary' (para 126). The longer the employee lives, the bigger his indebtedness to the sub-trust, given that the interest element of his indebtedness will have longer to accrue. This 'artificial' indebtedness, if it were to be given effect, could then reduce and may even exceed the true value of the employee's estate, to the extent that any inheritance tax payable will be greatly reduced or nullified. If the juristic purpose of the loans in the present case *were* to be ruled as the relevant purpose for construing 'payment' for income tax purposes, then the logical conclusion to follow from this premise would be to give effect also to this artificial indebtedness for inheritance tax purposes.

214. If a purposive construction to 'payment' as a commercial concept is to be given by disregarding the juristic purpose of the loans, a contrary outcome for the inheritance tax position regarding the debts in the sub-trusts will follow as a corollary.

If this position is adopted, then the Special Commissioners' decision in *Phizackerley v Revenue & Customs Comrs* [2007] STC (SCD) 328, and the provisions of s103 FA1986 should be of relevance in determining the inheritance tax position of the debts arising in the sub-trusts. The provisions of s103 FA1986 under the heading of 'Treatment of certain debts and incumbrances' are as follows:

> '(1) Subject to subsection (2) below, if, in determining the value of a person's estate immediately before his death, account would be taken, *apart from this subsection*, of a liability consisting of a debt incurred by him or an incumbrance created by a disposition made by him, that liability shall be subject to abatement to an extent proportionate to the value of any of the consideration given for the debt or incumbrance which consisted of –
> (a) property derived from the deceased…' (emphasis added)

215. The provisions of s103(1)(a) *except* the deduction of debts that are 'property derived from the deceased'. If the trust payments are to be construed as delivering the end result of 'emoluments' for the employee for income tax purposes, then the debts arising in his sub-trust are 'property derived from the deceased [the employee]', with the effect that the principal sums and the interests accrued therefrom would *not* qualify as a reduction against the true value of the employee's estate under the terms of s103(1)(a) of FA 1986.

The Contingency of Recoverability

216. In paragraph 218 of the majority Decision, it is stated that: 'The form of the loan document is sufficient in our view to create a liability to repay.' Further on, it states: 'That the loans were recoverable, on whatever basis, appears to us to be critical when considered in relation to the principles affecting "payment" in *Garforth*.' The *recoverability* of the loans, pertaining to their juristic purpose, is not in dispute, but I differ from my colleagues, and disagree that this juristic *recoverability* is the final destination of the intended arrangements. I question how this *recoverability* is intended to be translated in reality – in the sense of *enforcement* of the loan repayment. I draw the distinction between the *recoverability* of the loans being real for their juristic purpose, and the *enforcement* of the loans being a remote contingency designed not to materialise for their commercial purpose. This is back to the same point, about the loans being real for juristic purpose but not real for commercial purpose, and the *recoverability* and *enforcement* divide is simply another facet to illustrate how the loans are real for one purpose and not real for another. However, if one is to entertain the contingency of the loans being enforceable as a factor to be considered in its own terms, rather than being encompassed in the characterisation of the loans being not real as a commercial concept, then the case from *IRC v Scottish Provident Institution* [2004] UKHL 52, [2005] STC15 gives authority in the disposal of a commercially irrelevant contingency.

217. In *IRC v Scottish Provident Institution* [2004] UKHL 52, [2005] STC15, the components in the scheme included a commercially irrelevant contingency to create a risk that the scheme might not work as planned. The crux of the matter in *Scottish Provident* is whether the scheme, with this built-in contingency, could be claimed to be a single composite scheme, given that a composite scheme is supposed to work

from beginning to end as one transaction in a pre-ordained manner without any uncertainty. It is on the basis of this 'uncertainty' that the Special Commissioners concluded that the existence of the contingency 'obliged them to treat the options as separate transactions' [16]; (and hence the characterisation of self-cancelling transactions within a composite scheme could not be applied). Lord Nicholls makes the observation in his judgment that a court hearing an appeal on a question of law is not entitled to disturb a finding of fact made by the Special Commissioners, but he continues by asking 'the question of law' as follows:

> 'The question of law is whether, in a case in which they [the options] were in fact exercised so as to cancel each other out, the existence of this contingency prevented the commissioners from applying the statue to the scheme as it was intended to operate and as it actually did operate.' [16]

218. Lord Nicholls' conclusion to this question of law is to look at the scheme 'as it was *intended to operate*', and 'as *it actually did operate*', and on that basis, the Special Commissioners' decision was overturned. Lord Nicholls' assessment of the case for its wider relevance to the *Ramsay* principle is as follows:

> '[23] We think that it would destroy the value of the *Ramsay* principle of construing provisions such as s150(A) of the 1994 Act as referring to the effect of composite transactions if their composite effect had to be disregarded simply because the parties had deliberately included a commercially irrelevant contingency, creating an acceptable risk that the scheme might not work as planned. We would be back in the world of artificial tax schemes, now equipped with anti-*Ramsay* devices. The composite effect of such a scheme should be considered *as it was intended to operate* and *without regard to the possibility that*, contrary to the intention and expectations of the parties, *it might not work as planned*.' (emphasis added)

219. There are differences in the nature of the contingency component in the transaction between *Scottish Provident* and the instant case. In *Scottish Provident*, the contingency was inserted as one of the steps in the scheme, and the implication of that contingency was whether it introduced an element of 'uncertainty' for the scheme *not* to be regarded as a composite transaction. In the present case, the contingency element was attached to the *end result*, with the funds placed in the hands of the employees being addressed as loans and carrying that contingency of recoverability. The implication of that contingency is whether it affects the end result of 'emoluments' arrived at by taking the *Ramsay* approach. While registering the differences between the two cases, I see the application of *Scottish Provident* to the instant case, insofar as the contingency element is concerned, is to give regard to how '[the scheme] was *intended to operate*' in assessing its composite effect, 'without regard to the possibility… that it might not work as planned'.

220. From my findings of fact, the juristic purpose of the loans that gives rise to their recoverability is totally devolved from the commercial purpose that gives rise to the contingency of repayment enforcement. The contingency of repayment enforcement

is designed *not* to materialise; it can be interpreted as an 'anti-*Ramsay* device' in the form of 'a commercially irrelevant contingency' [Lord Nicholls]. In respect of how the scheme was 'intended to operate', it was the 'manifested intentions of the parties' that the loans would never be enforced for repayment – that is how the scheme was intended to work. For those employees who took a more cautionary approach towards this remote contingency, they were given the assurance that in the unlikely event that the loans were enforced for repayment, Rangers would indemnify them against the loan repayment (as in the cases of Mr Evesham and Mr Coventry). To date, no loan repayment has ever been enforced; and from the witnesses' evidence, whether it was Mr Grey or his clients, or the corporate employees, the understanding was clear: the loans would not be enforced and were intended to be renewed indefinitely till the death of the employees. As a House of Lords judgment, *Scottish Provident* gives authority to disregard the contingency of repayment enforcement of the loans as commercially irrelevant. In determining the composite effect of the transaction, regard is to be given to how the scheme was 'intended to operate'. The composite effect of the transaction in the instant case – the end result of 'emoluments' – is therefore undisturbed once Lord Nicholls' judgment is followed through, by disregarding the commercially irrelevant contingency of the loans being enforced for repayment.

Conclusion

221. As a summing up of the case law that has shaped my dissenting opinion, two tenets emerge from my findings-in-law that address directly the two questions set out for my findings-in-fact (*supra* para 14):

(1) Whether upon the true interpretation of the contractual arrangements, there have been payments made to the employees via the trust?

(2) Can these trust payments be characterised as having been made 'unreservedly at the disposal of the employees'?

The first tenet relates to 'the quest' in finding 'the realities of the arrangements that were agreed' [Lord Morris], and the dicta I follow in establishing the real nature of the transaction are from:

(a) Lord Upjohn, that 'having ascertained the real nature of the transaction, you cannot … disguise it by using camouflaged clothing';

(b) Lord Wilberforce, that 'it is wrong and an unnecessary self-limitation' not to give regard to 'the manifested *intentions* of the parties' in the face of documents or transactions that are not 'shams';

(c) Lord Nicholls, that in the face of a commercial irrelevant contingency, regard is to be given to 'how [the scheme] was *intended* to operate'.

The second tenet from the case law addresses the other question I pose for my findings-in-fact and concerns how the composite effect of a transaction is to be determined, and the dicta I have followed are from:

(a) Jonathan Parker LJ, that the concept of 'payment' for the purpose of the tax legislation is a *practical* and *commercial* concept;

(b) Lord Hoffmann, that 'a transaction can be said not to be a "sham" and yet be "disregarded" for the purpose of deciding what happened in "the real world". The point to hold onto is that something may be real for one purpose but not for another';

(c) Lord Nicholls, that 'the composite effect of such a scheme should be considered as it was *intended* to operate, and without regard to the possibility that … it might not work as planned'.

These are the two chief tenets derived from the case law I have relied on, and they have guided me in my reasoning to arrive at the end result that the trust payments are to be construed as 'emoluments' for the purposes of the tax legislation.

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

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