Neutral Citation Number: [2023] EWCA Civ 1179

Case No: CA-2022-002051

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL (TAX AND CHANCERY CHAMBER)
Mr Justice Leech and Upper Tribunal Judge Thomas Scott
[2022] UKUT 00198 (TCC)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12 October 2023

Before :

LORD JUSTICE LEWISON
LORD JUSTICE NUGEE
and
LADY JUSTICE WHIPPLE

- -

Between :

(1) BCM Cayman LP **(2) BlueCrest Capital Management Cayman Limited**	**Appellants**
- and -	
The Commissioners for His Majesty's Revenue and Customs	**Respondent**

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- -

Jonathan Peacock KC, John Brinsmead-Stockham KC and Edward Hellier (instructed by **Slaughter and May**) for the **Appellants**
Rupert Baldry KC, Thomas Chacko and James Kirby (instructed by **the Solicitor for HMRC**) for the **Respondents**

Hearing dates : 25 & 26 July 2023

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Approved Judgment

LADY JUSTICE WHIPPLE:

INTRODUCTION

1. This is the appeal of BCM Cayman LP (the "Cayman LP") and BlueCrest Capital Management Cayman Limited ("Cayman Ltd"), together the "appellants", against the decision of the Upper Tribunal (Leech J and Judge Thomas Scott), [2022] UKUT 00198 (TCC) reported at [2022] STC 1586. The UT dismissed the appellants' appeal against the decision of the First-tier Tribunal (Judge John Brooks), [2020] UKFTT 0298 (TC). The UT granted permission to appeal to this Court.

2. The appeal concerns the appellants' tax returns for the years ending 30 November 2007 to 31 December 2013. Having opened enquiries into those years, on 31 March 2017 HMRC sent closure notices to the appellants. Allowing for certain adjustments to reflect what are now agreed deductions, HMRC's case is that the appellants owe £32,247,848 in corporation tax. The appellants dispute that liability raising a number of challenges which are summarised at [24]-[28] below.

3. The appellants were represented by Jonathan Peacock KC, John Brinsmead-Stockham KC and Edward Hellier (none of whom appeared below). The respondents, HMRC, were represented by Rupert Baldry KC and Thomas Chacko (who did appear below) and James Kirby (who did not appear below). I am grateful to all counsel and their respective legal teams for their expert presentation of this appeal.

BACKGROUND

Facts

4. The facts were agreed in a statement of facts and issues set out in full by the FTT at [8] of its decision. It is only necessary in this judgment to summarise the key facts, which I take substantially from the UT's decision at [2]-[9].

5. The BlueCrest group carries on the trade of investment management. At the start of the period under consideration here, a UK limited partnership, BlueCrest Capital Management LP ("UK LP" or the "UK Partnership") carried on part of that trade. In 2007 certain members of the UK Partnership wished to sell part of their interests, amounting to 19% of the equity. The remaining members agreed to acquire those interests with a view to providing an "equity pool" for other members or employees of the group. Cayman LP (also referred to as the Cayman Partnership) was formed in the Cayman Islands as a limited partnership to hold the interests of the buyers. Cayman Ltd was incorporated in the Cayman Islands to become a general partner of Cayman LP. Cayman Ltd was wholly owned by BlueCrest Capital Management Cayman Holdings Ltd ("Cayman Holdings"). The Cayman Partnership was governed by a deed of partnership (the "Cayman LP Deed" or the "Cayman Partnership Deed").

6. The sellers assigned their combined 19% interest in the UK Partnership to Cayman Ltd and it then contributed that interest to the Cayman LP as a capital contribution. Cayman LP became a party to the UK LP's amended and restated deed of partnership (the "UK

LP Deed" or the "UK Partnership Deed"). As a limited partnership under Cayman law, Cayman LP did not have separate legal personality.

7. To fund the acquisition, Cayman Ltd borrowed $200 million from the Royal Bank of Scotland plc ("RBS") (the "Loan") and issued $165 million in loan notes (the "Loan Notes") to the sellers. RBS became a member of the Cayman Partnership (and was identified as the "Corporate Limited Partner" in that Partnership). RBS also entered into a swap transaction with Cayman Holdings governed by the 2002 ISDA Master Agreement which the parties called the "Total Return Swap" or "TRS".

8. On 11 June 2008 RBS assigned its interest in Cayman LP to Fyled Energy Ltd ("Fyled") (later renamed Morgan Stanley Montrose Investments Ltd), which became the Corporate Limited Partner in the Cayman Partnership. The TRS was novated with the effect that RBS was replaced by Fyled as the counterparty. Cayman Holdings also entered into the "Financial Contract" (together with a side letter) with another counterparty, Morgan Stanley Cooper Ltd ("MS Cooper"), a company incorporated in the UK and wholly owned by the Morgan Stanley Group. These new arrangements collectively replaced the original TRS. I shall refer to the original and the modified arrangements collectively as the "TRS arrangements" which I will discuss in greater detail below.

9. The UK LP allocated profits in the UK Partnership to the members of the UK Partnership in the order of priority specified in the UK Partnership Deed. It allocated profits to Cayman LP to cover the monthly payment of interest due under the Loan before allocating the remaining profits to the limited partners in agreed proportions.

10. Cayman LP allocated profits in the Cayman Partnership to the members of the Cayman Partnership in the order of priority specified in the Cayman Partnership Deed. It allocated profits to Cayman Ltd to pay the interest due on the Loan, then it allocated profits to pay off the 15% interest due under the Loan Notes, before then allocating profits to the limited partners (excluding the Corporate Limited Partner) in agreed proportions. The Corporate Limited Partner only became entitled to a profit allocation in one of two circumstances, specified in the Cayman Partnership Deed: if there was a trigger event (which never occurred during the currency of these arrangements), or if the UK LP made "Superprofits" in excess of a given benchmark (which did occur during the currency of these arrangements, and which gives rise to the current appeal).

11. On 1 December 2008 the business of the UK Partnership was transferred to BCM LLP (the "UK LLP"). There was a later reorganisation of the UK LLP involving a move to Guernsey in April 2010 which is not relevant for present purposes.

12. On 30 November 2010 Fyled ceased to be a partner of Cayman LP and the Financial Contract was terminated. That brought an end to the TRS arrangements.

13. It was common ground below that the analysis was no different for RBS than for Fyled, and further, that the move of the business from the UK LP into the UK LLP made no difference to the outcome. The UT therefore addressed the issues on the basis that the relevant profit allocations were made by UK LP, without separately analysing the position for the successor UK LLP. Neither party suggested that approach was wrong, but both accepted that the Limited Partnership Act 1907 governed the LP whereas the Limited Liability Partnerships Act 2000 governed the LLP, so that the analysis was to that extent, at least, different for the LLP.

Superprofits

14. The Cayman LP Deed provided for Superprofits to be allocated to the Corporate Limited Partner in the event that the UK Partnership made profits in excess of a certain level. In the event that Superprofits were paid to Cayman Ltd, under the terms of the Cayman LP Deed, Cayman Ltd would allocate them to the Corporate Limited Partner and that allocation would trigger a payment by the Corporate Limited Partner or its associate to Cayman Holdings under the TRS arrangements. Cayman Holdings would then use the funds which it received from the Corporate Limited Partner to subscribe for capital in Cayman Ltd which Cayman Ltd would use in turn to prepay its borrowings (the Loan and the Loan Notes).

15. In the event, the UK Partnership did not make Superprofits when RBS was the Corporate Limited Partner of the Cayman Partnership. But it did make Superprofits after Fyled became the Corporate Limited Partner on 11 June 2008. Superprofits were paid to Fyled on three occasions, once in the year ending 30 November 2008 when the investment business was being carried on by UK LP, in the amount of £13,138,385; and twice in the year ending 30 November 2009 when the investment business was being carried on by UK LLP, in the aggregate amount of £33,988,539 (see FTT [8(41)]).

16. The purpose of the allocation of Superprofits to the Corporate Limited Partner was to enable Cayman Ltd to prepay part of the Loan and of the debt due under the Loan Notes. We were shown two documents which were before the FTT and the UT which evidenced that purpose. The first is the disclosure document submitted by Ernst & Young LLP to HMRC on 13 July 2007 under the Disclosure of Tax Avoidance Scheme ("DOTAS") rules (see Part 7 of the Finance Act 2004). That document described a "bespoke tax planning arrangement", indicating that "the structure described effectively enables pre-tax income to be applied to fund repayment of the debt …". The second is a report for the BlueCrest Group prepared by EY on 5 July 2007, the day before the arrangements were implemented. It summarised the structure and anticipated tax treatment. This was stated at paragraph 15:

> "New partners may in future be introduced to [Cayman LP]. [Cayman LP] will operate as a 'second tier' partnership, giving individuals the ability to share in group profits and to potentially benefit from capital appreciation without being introduced directly into [UK LP]".

Documents

17. Many agreements were executed by the appellants and related parties in order to give effect to these arrangements. For the purposes of this appeal, it is unnecessary to consider most of them in detail. The exceptions are the partnership deeds governing the UK LP (and its successor, the UK LLP) and Cayman LP, and the documents setting out the TRS arrangements.

18. The original deed governing the UK LP was dated 4 August 2000. It was restated on 6 July 2007 (the restated version is the "UK LP Deed" as I have referred to it in this judgment). Recital (G) of the UK LP Deed recorded that the General Partner of the UK LP (BlueCrest Capital Management Ltd, or "UK LP General Partner") wished to admit Cayman LP as special limited partner to the UK Partnership. The partners in the UK LP

were listed by name, including Cayman LP which was designated the "Special Limited Partner". The signature page for the UK LP Deed was never produced in evidence before the FTT, for reasons which were unclear, but it was common ground in this appeal that Cayman Ltd had signed the UK LP Deed on behalf of Cayman LP. Cayman Ltd was designated the "New GP" under the UK LP Deed. The business of the UK LP was defined as investment management, and clause 6.2 provided that the Partnership (meaning the UK LP General Partner, the Limited Partners including the Special Limited Partner, and any Further Limited Partners) could engage in such activities and transactions as the UK LP General Partner considered necessary or advisable for the purposes of the business. By clause 9.1, the partners in the UK LP acknowledged that each of them had contributed to the capital of the partnership and agreed that any Further Limited Partner would contribute not less than £100 to the capital of the partnership. Clause 12.1 provided for allocations of profits: priority went to working capital and ordinary expenses of the partnership, then ordinary profits (known as income profits) were allocated, then there was an allocation to Cayman Ltd as Special Limited Partner of an amount sufficient to meet the interest due on its borrowings, then the remainder of profits, including capital profits (or Superprofits) were allocated. Cayman LP's allocation was set out in a letter from UK LP General Partner to Cayman Ltd dated 6 July 2007, which specified 19% of the income profits and 19% of the capital profits as its entitlement for the purposes of clause 12.1. Clause 13 addressed partnership accounts and distributions, with a distribution to Cayman Ltd at the end of every month to enable it to meet the interest due on its borrowings, consistently with the allocation provisions in the previous clause. Clause 20 provided that the UK LP General Partner could admit new partners as "Further Limited Partners" on condition that a Deed of Adherence in the prescribed form (shown at Schedule 1) was executed prior to such admission. By clause 27, the General Partner could amend the deed. By clause 30, the UK LP Deed was governed by English law.

19. Materially similar arrangements existed in the UK LLP's Deed. The BCM LLP Deed was dated 1 December 2008. Cayman LP was named as a party to that Deed, acting through Cayman Ltd as its general partner.

20. The Cayman LP Deed was also dated 6 July 2007, between Cayman Ltd as General Partner, Andrew Dodd as Original Limited Partner and RBS as Corporate Limited Partner. TRS was defined as the total return swap between the Corporate Limited Partner and Cayman Holdings, of even date. Clause 6 of the Cayman LP Deed defined the business of the Cayman LP as being to invest in an investment management business through being a limited partner in UK LP, and conferred discretion on the General Partner to do such acts as were necessary and advisable to carry out the business of the Cayman Partnership. By clause 9, any Further Limited Partner would contribute at least $100 to the capital of the partnership and would execute a Deed of Adherence; such Further Limited Partner was required to execute a Deed of Adherence (clause 20). Clause 12 dealt with allocations of partnership profits: priority went to working capital and day to day expenses of the partnership, next an amount sufficient to meet the interest on Cayman Ltd's borrowings was allocated to Cayman Ltd as General Partner, then the remainder of the profits were allocated; any Superprofits were allocated to the Corporate Limited Partner; remaining profits were allocated according to the letters of allocation. By clause 18.4, the general partner had "fiduciary responsibility" for the safekeeping of all the funds and assets of the partnership. By clause 30, the governing law was Cayman Islands law.

21. The Cayman LP Deed was replaced on 11 June 2008, with Fyled named as the Corporate Limited Partner, on terms otherwise materially identical to those in the earlier version of the Cayman LP Deed.

22. The TRS arrangements involved a number of documents. The TRS between Cayman Holdings and RBS dated 5 July 2007 provided that in the event that Superprofits were allocated to the Corporate Limited Partner under clause 12 of the Cayman LP Deed, the Corporate Limited Partner was required to pay those amounts to Cayman Holdings less a retention amount (originally 12.5%, pursuant to the Fee Letter between Cayman Holdings and RBS dated 5 July 2007). By the terms of the Subscription Deed between Cayman Holdings and Cayman Ltd dated 6 July 2007, Cayman Holdings was required to use the whole of that sum to contribute further capital to Cayman Ltd. The Loan Notes provided that in the event of Superprofits, some or all of the principal had to be repaid by Cayman Ltd. By a Deed of Subordination and Covenant dated 6 July 2007 between various BlueCrest entities including Cayman Ltd, and RBS, in the event that Cayman Ltd paid off the capital outstanding under the Loan Notes, Cayman Ltd was obliged to repay capital outstanding under the Loan in the ratio of at least 1:2 as between Loan and Loan Notes. This matched the terms of the Loan pursuant to which Cayman Ltd was obliged to use "at least 33% of the Excess Benchmark Profits to repay principal under the Loan". The Loan was amended in June 2008 to require repayments of capital in the event of Superprofits regardless of any repayment of Loan Notes. Fyled took over the TRS, but when the TRS came to an end, it was replaced by a "Financial Contract" pursuant to which MS Cooper, another company in the same corporate group as Fyled, paid Cayman Holdings an amount equal to the sums received by Fyled less the retention amount, which could be 5.6% or 11.2%.

23. The consequence of the TRS arrangements was, in practical terms, that Cayman Ltd was required to pay any Superprofits it was allocated by UK LP to the Corporate Limited Partner which was then obliged to pay that amount (or, under the Financial Contract, whose associate was obliged to pay that amount) less an agreed amount to Cayman Holdings, which was required to contribute that amount as capital to Cayman Ltd, which used that money to meet its obligations under the Loan Notes and Loan.

ISSUES

24. Before the FTT, a number of issues were raised. On the appellants' appeal to the UT, only two of those issues remained, which issues are also the subject of this appeal (see UT [12]):

    a. Profit allocation: was Cayman Ltd liable to corporation tax in relation to Superprofits allocated by UK LP under the UK Partnership Deed?

    b. Interest deductibility: was Cayman Ltd entitled to relief on the interest on its $365 million of borrowings on the basis that the interest related to trading loan relationships?

25. The UT decided against the appellants on both issues. That was to uphold the FTT which had come to the same overall conclusions.

26. So far as the profit allocation issue is concerned, in this Court the appellants advance two grounds of appeal:

a. The UT erred in law in concluding that Cayman Ltd was the only partner in Cayman LP which was also admitted as a partner in UK LP; rather, all the partners in Cayman LP including the Corporate Limited Partner were partners in UK LP so that distributions of Superprofits by UK LP went to Fyled *qua partner* in UK LP. This was referred to at the appeal hearing as Issue 1(a) but I shall refer to it as the "**Partnership issue".**

b. Even if only Cayman Ltd was a partner in the UK LP, the UT erred in law in concluding that Cayman Ltd (as general partner of Cayman LP) should be charged to corporation tax on the Superprofits allocated to it, given that Cayman Ltd did not receive that money in its own right but rather as fiduciary or representative for the Corporate Limited Partner (Fyled). This was referred to at the appeal hearing as Issue 1(b) but I shall refer to it as the **"Fiduciary issue".**

27. So far as the interest deductibility issue is concerned, the appellants originally advanced two grounds of appeal but one, relating to Cayman Ltd's permanent establishment in the UK, was not pursued, leaving only one ground of appeal under this broad heading: that the UT erred in law in concluding that the loan relationships which Cayman Ltd had entered into were non-trading loan relationships for the purposes of the relevant statute and that in consequence the appellants were not entitled to deduct the interest under the provisions applying to trading loan relationships. This ground had a number of different facets and was referred to in the skeleton arguments and at the hearing as Issue 3 or Issue 5. It turns on whether the Loan and the Loan Notes were "trading loan relationships" under the legislation and I shall refer to this as the "**Interest Deduction issue**".

28. By their Respondents' Notice, HMRC argued that the UT's decision on the profit allocation issue should be upheld on the alternative basis that these arrangements, viewed realistically, were caught by the relevant legislation, construed purposively, applying the approach in *Ramsay* (*W T Ramsay v Inland Revenue Commissioners* [1982] AC 300). The FTT had rejected HMRC's *Ramsay* argument (see FTT [115]-[136]) and the UT had not considered it necessary to deal with the argument given the dismissal of the appeal on other grounds (UT [99]). This was referred to as Issue 2 at the appeal but I shall refer to it under the heading of "***Ramsay***".

29. Before turning to these issues, I would wish to pay tribute to the careful and detailed analysis undertaken by the FTT and the UT. Each tribunal had to deal with a large number of complex issues, only a sub-set of which now come before this Court on appeal. Each tribunal produced detailed and closely reasoned decisions, which I have found to be of considerable assistance in reaching my own conclusions. Although the arguments presented to this Court were in some respects different from those advanced below, and although in relation to some arguments which are renewed in this Court I have adopted reasons which differ from one or other tribunal below, as will become clear, overall I agree with the FTT and the UT that this appeal must be dismissed.

PROFIT ALLOCATION

The Partnership Issue

30. The question is whether all the partners in the Cayman LP (including RBS, then Fyled as Corporate Limited Partner) became members in the UK LP (and its successor LLPs), or not. If RBS/Fyled was a partner in UK LP then, so the appellants argued, the allocation

of Superprofits by UK LP was to Fyled directly, as a partner in the UK LP, and any suggestion that the allocation was to Cayman Ltd alone or for onward transmission to RBS/Fyled simply fell away.

The First-tier and Upper Tribunal

31. The FTT had approached the question whether RBS or Fyled was a member of the UK LP by asking whether the Cayman LP was a sub-partnership or whether all of the members of Cayman LP also became partners in UK LP (see FTT [110]). The FTT held that there was no evidence that RBS or Fyled intended to become a partner in UK LP (FTT [112]). Further, having regard to the various documents, the FTT held that the arrangements could best be described as a sub-partnership with Cayman Ltd becoming a partner of UK LP (FTT [113]); only Cayman Ltd was a partner in UK LP and it alone was liable for corporation tax on Superprofit allocations (FTT [114]).

32. The UT approached the matter differently. It held that the question of whether a relationship of partnership exists was one of mixed fact and law to be determined by reference to substance and reality and not solely by reference to the contractual documents, citing Carr LJ in *Sotheby's v Mark Weiss Ltd* [2020] EWCA Civ 1570 at [84]:

> "… In determining whether or not a statutory partnership exists, it is important to look at the substance of the relationship, not the words used by the parties to describe it (see *Mann v D'Arcy* [1968] 1 WLR 893 at 899; *Protectacoat Firthglow Ltd v Szilagyi* [2009] IRLR 365 at [61]). …"

33. The UT accepted that it was possible for the members of one partnership to become members of another partnership, citing *Major v Brodie* [1998] STC 491 (UT [28]) but that was not the automatic result (UT [30]). Rather, the position was summarised in Halsbury's Laws of England (5th Ed) at p 111 which emphasised the need for consent in the following passage:

> "Subject to any agreement express or implied between the partners, no person may be introduced as a partner without the consent of all existing partners. … An attempt by one partner to introduce a new partner without consent amounts only to an assignment of part of his share in the partnership. It may create a sub-partnership between the newcomer and the person who introduced him, but it does not confer on the newcomer the rights of a partner …"

(see UT [31]). The UT noted that the UK LP and the Cayman LP were limited partnerships in which the limited partners had no rights or obligations to participate in management of partnership assets beyond their liability to contribute capital and held that the FTT had adopted a legitimate approach by looking at whether there was a sub-partnership (UT [35]). The UT's own approach was put in this way:

> "37. In order to establish that the Cayman Partnership was more than a sub-partnership and the partners also became limited partners in the UK Partnership it was necessary, in our judgment, for the Appellants to satisfy the test in Halsbury's Laws (above)

> and to prove by admissible evidence on a balance of probabilities that Fyled intended to become a member of the UK Partnership and was admitted to the partnership with the consent of the other partners in the UK Partnership. We accept that it would have been possible to prove these facts by showing that [Cayman Ltd] had Fyled's authority to perform whatever acts were necessary to make Fyled a member of the UK Partnership and carried out these acts. We also accept that it would have been possible for the limited partners in the UK Partnership to authorise [the UK LP General Partner] to admit Fyled to the UK Partnership on the same basis."

34. The UT noted that the FTT had sifted through the documents looking for any evidence that Fyled had intended to join the UK LP and that it had in fact joined the UK LP. The FTT had applied the correct approach in substance (UT [38]). It did not follow from the fact that Cayman LP had no separate personality in Cayman law that all the partners in Cayman LP were intended to or did become partners in the UK LP (UT [59]). It was equally possible that only Cayman Ltd became a partner in UK LP; alternatively, that the partners in the Cayman LP created a sub-partnership. Determining the right answer depended on the evidence and was a question of substance and reality (UT [60]). So far as RBS was concerned, the FTT was right to find that only Cayman Ltd became a partner in UK LP for a number of reasons (UT [61]). The position was even more clear-cut for Fyled and the FTT was right to find that Fyled did not become a partner in the UK LP (UT [62]). It had been open to the FTT to find that Cayman LP was a sub-partnership although that was not necessary to determine the issue; it was enough simply to find that RBS and Fyled were not partners in UK LP (UT [65]). The FTT had arrived at the correct decision on the basis of sound reasons (UT [66]).

Submissions

35. Cayman LP had no separate legal personality in Cayman law and was constituted by all its partners from time to time. The appellants' case was that all those partners were partners in the UK LP and the UK LLP. This was a matter of legal principle, supported by *Major v Brodie* and by passages in various respected texts, for example, Lindley and Banks on Partnership (20th edition), at para 4-27:

> "Since under English law a firm does not have separate legal personality, it cannot, as such, be a member of another firm.
>
> Thus, where a firm purports to become a partner, this will, as a matter of law, constitute each of the members of that firm as a partner in his own right…"

That passage has been updated in the 21st edition of the same publication - see para 4-42 of that edition - to include a reference to the UT's decision in this case and, in consequence, to add a qualification to the statement of principle set out above. Mr Peacock said that qualification was incorrect, in line with his wider arguments on appeal. Mr Peacock also relied on this passage from The Law of Partnership in Scotland by J B Miller (2nd ed, 1994) at p 38:

> "Therefore, under English law, where the partners of one firm enter collectively into a partnership with others in another

business or venture the partners as individuals and natural persons are entering into that relationship and not the firm itself."

36. Alternatively, the appellants argued that as a matter of substance and reality the same position was reached. The focus should be on the documents and there was no proper place for evidence of intention; in taking account of such subjective evidence the FTT and the UT had erred in law. The UK Partnership Deed designated Cayman LP, not Cayman Ltd, as a partner and that was strong objective evidence that the intention was to include all the partners in Cayman LP in the UK Partnership. The Cayman LP Partnership Deed supported that analysis because it described the business of Cayman LP as being to invest in an investment management business through being a limited partner in the UK LP (clause 6). Cayman Ltd entered the UK Partnership Deed in its capacity as general partner for the Cayman LP, with the authority of the other partners in Cayman LP to do that. That meant that RBS was a partner in the UK LP from the outset. Fyled took over RBS' role and it became a partner in the UK LP. Fyled was a member of Cayman LP at the point that Cayman LP became a member of UK LLP on 1 December 2008 and so became a partner in that entity at that point. The UK LP/LLP General Partner had a discretion to admit future partners into the UK LP even without observing the formalities laid down in the UK Partnership Deed. RBS and Fyled had made a capital contribution to the UK LP in the form of their capital contributions to the Cayman LP.

37. HMRC emphasised that partnership is the relationship between persons carrying on a business in common with a view to profit. Whether a person is admitted as a partner depends on that relationship and on what the parties decide. It is not a question of legal principle but of mixed fact and law depending on the circumstances of the case.

38. HMRC sought to uphold the UT's conclusion, based as it was on an assessment of fact as to the substance and reality of the arrangements. The FTT's conclusion that Cayman LP was a sub-partnership was a legitimate conclusion which this Court should not disturb.

39. Specifically in relation to the period when the UK business was carried on by UK LLP, HMRC submitted that the Limited Liability Partnerships Act 2000 precluded an unincorporated body (as Cayman LP was) from becoming a member of an LLP.

40. Finally and alternatively, if RBS/Fyled were partners in UK LP or UK LLP, there remained an issue under the legislation, properly construed in line with *Ramsay*. On this scenario, there would be one "omnibus" partnership because the partners in Cayman LP would be members of UK LP and UK LLP as well; that being so, regard should be had to the TRS arrangements when considering the allocation of profits within the UK LP. The reality was that the Superprofits ostensibly allocated to RBS/Fyled went round in a circle to come back to Cayman Ltd, and were to be viewed as allocated to Cayman Ltd, not RBS or Fyled, anyway.

Discussion

Legal Principle

41. *Major v Brodie* concerned two partners, Mr and Mrs Brodie, who entered into a Scottish law partnership known as Skeldon Estates. They borrowed money in their own names and contributed that money to Skeldon Estates. They then formed a second partnership with Mr Murdoch known as W Murdoch and Sons by a partnership agreement which

referred to them as "Mr and Mrs Brodie … trading as 'Skeldon Estates' …". The funds borrowed were used in the business conducted by W Murdoch and Sons. The issue was whether Mr and Mrs Brodie were entitled to tax relief on the interest on their borrowings. HMRC argued that they were not so entitled, because the money had been advanced to them as partners in Skeldon Estates but had been used for the purposes of a separate trade (namely W Murdoch and Sons) in which Mr and Mrs Murdoch were not partners. Park J rejected that argument. In a passage at p 510 h-j (which informed the proposition at 4-27 of the 20th edition of Lindley and Banks to which I have referred at [35] above), he reasoned as follows:

> "Suppose that A and B were the partners in partnership X, an English partnership. Suppose further that an agreement was entered into between (1) partnership X and (2) C to form another partnership, partnership Y. It was submitted that the analysis under English Law would be that partnership Y had three members, A, B and C, not two. I am willing to assume that that is right. However, A and B would be partners in partnership with Y in their capacity as members of partnership X. …"

42. Mr Peacock relies on that passage to argue that the partners in Cayman LP are also partners in the UK LP and the UK LLP. It seems to me that the analysis, starting with that passage, is different for each of the UK entities. So far as UK LP is concerned, the UK LP Deed was restated on 6 July 2007, Fyled replaced RBS on 11 June 2008 and at some point after that (and before 30 November 2008, when the UK business was assumed by UK LLP) the first payment of Superprofits was made. Mr Peacock's argument that Fyled was a partner in UK LP necessarily, therefore, rests on the proposition that *future* partners of Cayman LP automatically became partners in the UK LP and the reference to Cayman LP in the UK LP Deed (notably in recital G, see [18] above), meant the partners in Cayman LP "from time to time". That was not the situation under consideration in *Major v Brodie,* where Mr and Mrs Brodie were already partners in Skeldon Estates when W Murdoch and Sons was formed; *Major v Brodie* is clearly distinguishable on that factual basis alone. As a matter of general principle, the argument for this period anyway faces significant hurdles: a partnership is a relationship which subsists between persons carrying on a business in common with a view of profit (section 1 of the Partnership Act 1890). There must be an agreement between the partners to carry on business together, as confirmed by <u>Lindley and Banks on Partnership</u> (21st edition) at para 2-33:

> "Partnership, although often called a contract, is more accurately described as a relationship *resulting from* a contract. This was made clear in the original statutory definition introduced into the House of Lords but not, ultimately, in the Act itself. Nevertheless, the origin of the relationship in an agreement, whether express or implied, was clearly established before the Act and may legitimately be inferred from its provisions …"

43. A contractual agreement would naturally require the parties to that agreement to be known and identified at the time of the agreement. If parties are admitted in future, that would give rise to a fresh agreement at that point. It follows that whenever a partner is admitted to or leaves a firm, a new firm comes into existence. In confirmation of that proposition, <u>Lindley and Banks</u> (21st ed) cites Lord Lindley's statement that "any change amongst [the partners] destroys the identity of the firm" (para 3-06) and Eichelbaum CJ's

statement in *Hadlee v Commissioner of Inland Revenue (NZ)* [1989] 2 NZLR 447 at 455 that "in law the retirement of a partner or the admission of a new partner, constitutes the dissolution of the old partnership, and the formation of a new partnership" (para 3-07). The authors suggest that "the firm name is a convenient method of describing a group of persons associated together in business at a certain point of time: no more and no less" (para 3-17).

44. For the first period, there was no agreement, express or implied, between the partners of UK LP and Fyled. The effect of any agreement would anyway have been to bring the original partnership to an end and replace it with a new partnership. That is a wholly unrealistic analysis on these facts. Fyled was not a partner in UK LP.

45. For the second period, the position is different in that Fyled was a partner in Cayman LP from 11 June 2008 and before the UK investment business was transferred to UK LLP (on 1 November 2008). I turn then to *Major v Brodie.* I think Park J was right to say, in the context of his example, that A, B and C would be members of partnership Y: as the authors of <u>Lindley and Banks</u> point out (see [43] above), a partnership name is simply a convenient way of referring to the partners and based on that proposition and it is reasonable to suggest that a reference to partnership X must in context be understood to mean A and B as partners in X. Further, in *Major v Brodie* there was good reason to interpret the partnership agreement in that way given that each of Mr and Mrs Brodie's names did appear in the agreement establishing that second partnership, and given that the money they had borrowed had in fact been used in the trade conducted by the second partnership. But Park J was plainly considering the position for a general partnership as W Murdoch and Sons appears to have been. He was not considering the position of limited partners in a limited partnership, whose role is limited and circumscribed by statute. In this case, Cayman LP was governed by Cayman law, referred to by the Cayman law experts as the "2007 ELP law" (ELP standing for exempt limited partnerships); they agreed that Cayman LP's business was carried on by its general partner (Cayman Ltd) and that the limited partners (including Fyled) were *prohibited* by Cayman law from taking part in Cayman LP's business (see FTT [135(5) and (6)]). That not only distinguishes this case from *Major v Brodie,* but would appear to be determinative of this argument against the appellants.

46. Further, the business of Cayman LP was defined at clause 6 of the Cayman LP Deed to be one of investment in the investment management business of UK LP "through being a limited partner in UK LP" (there is no reference in clause 6 to UK LLP but for present purposes I would be willing to accept that the clause should be understood to extend to the successor LLP as well); clause 6 contains no suggestion at all that Fyled participated in the activity of investment in UK LP/LLP.

47. In any event, UK LLP is a UK corporate body governed by the Limited Liability Partnership Act 2000 which imposes a number of requirements, including (in the version of the Act in force at the relevant time) the requirement that members must subscribe their name to the incorporation document (sections 2(1) and 4(1)), that their name and address must be stated in that document (section 2(2)(e)) and that notice of any change of name or address of a member must be delivered to the registrar (section 9(1)(b)). Section 18 of the 2000 Act (at the relevant time) defined "name" and "address" by reference to an individual or a corporation (or Scottish firm, which in distinction with a firm formed in England and Wales does have separate legal personality). Although Schedule 1 to the Interpretation Act 1978 defines a "person" to include a body of persons

unincorporate, that definition is subject to a contrary intention appearing (see section 5 of the Interpretation Act 1978). I agree with HMRC that the various provisions of the 2000 Act to which I have referred do contain a contrary intention so that only persons, in a legal sense, can be members of an LLP. Cayman LP was an unincorporated body under Cayman Law. It could not be a member of the UK LLP. In theory, Fyled could have been a member of the LLP, but its name and address are not stated in the LLP Deed, and nor were details of any change ever delivered to the registrar. By contrast, Cayman Ltd's details were set out in the LLP Deed in compliance with the statutory requirements; it was a member of the LLP.

48. *Major v Brodie* does not therefore assist the appellants. The passages from Lindley and Banks and JB Miller's Scottish text do not assist either. That case and those passages relate to the position of general partners under the 1890 Act and not to the present context involving a limited partnership (Cayman LP) and its relationship, if any, with a limited liability partnership (UK LLP). As a partner in a Cayman limited partnership, and under Cayman law, Fyled cannot participate in the business of UK LLP. Under English law, an unincorporated body such as Cayman LP cannot be a partner in an LLP. These are powerful reasons for rejecting the appellants' submissions. Fyled did not become a partner in UK LP or UK LLP, simply by virtue of its membership of Cayman LP.

Substance and Reality

49. The FTT and the UT were invited to approach this issue as a matter of substance and reality, based on the evidence before them. I doubt that the appellants could ever have succeeded in establishing their case given the issues of principle standing in the way of it, but in case I am wrong in my conclusions so far, I shall address the appellants' alternative arguments. They say that the FTT and the UT wrongly had regard to subjective evidence, for example, from Mr Dodd as to what he thought was intended when these arrangements were entered into. This is disputed by HMRC who suggest that it is permissible to have regard to extrinsic evidence on the question of identity of a contracting party, referring to *Hamid (trading as Hamid Properties) v Francis Bradshaw Partnership* [2013] EWCA Civ 470, 148 Con LR 205, and that the FTT and UT only took account of evidence which was relevant and admissible in reaching their conclusion.

50. The principles were summarised in *Hamid* (per Jackson LJ at [57]):

> "… (i) Where an issue arises as to the identity of a party referred to in a deed or contract, extrinsic evidence is admissible to assist the resolution of that issue. (ii) In determining the identity of the contracting party, the court's approach is objective, not subjective. The question is what a reasonable person, furnished with the relevant information, would conclude. The private thoughts of the protagonists concerning who was contracting with whom are irrelevant and inadmissible. (iii) If the extrinsic evidence establishes that a party has been misdescribed in the document, the court may correct that error as a matter of construction without any need for formal rectification. (iv) Where the issue is whether a party signed a document as principal or as agent for someone else, there is no automatic relaxation of the parol evidence rule. The person who signed is the contracting party unless (a) the document makes clear that he signed as agent

> for a sufficiently identified principal or as the officer of a sufficiently identified company, or (b) extrinsic evidence establishes that both parties knew he was signing as agent or company officer."

51. Because Superprofits were only ever paid during the period of Fyled's involvement, the focus of this part of the appeal is on the UT's conclusions that as a matter of substance and reality, Fyled was not a partner in UK LP or UK LLP (UT[62]):

> "62. It is also necessary to consider the substance of the relationship between the various parties once Fyled became a partner in the Cayman Partnership. In our judgment, the position in relation to Fyled is even more clearcut. Whatever the position may have been in relation to RBS, the FTT was right in our judgment to find that Fyled did not become a partner in the UK Partnership. We have reached this conclusion for the following reasons:
>
> (1) There was no evidence before the FTT (and no evidence before us) that Fyled intended to become a member of the UK Partnership at any time after 11 June 2008: see [112]. No officer or employee of Fyled gave evidence that it had such an intention and we were not taken to any documents which provided evidence to support such a finding.
>
> (2) Even if [Cayman Ltd] intended to enter into the amended and restated UK Partnership Deed on behalf of both the existing and future members of the Cayman Partnership on 6 July 2007, it had no authority to do so on Fyled's behalf at that date. Some action was required either to ratify or approve that decision on Fyled's behalf after it became a Cayman partner. However, there was no evidence that [Cayman Ltd] considered it necessary or advisable for Fyled to become a partner of the UK Partnership or that it took any steps to make Fyled a partner after 11 June 2008.
>
> (3) Indeed, if it had been [Cayman Ltd's] intention that Fyled should join the UK Partnership on or before 11 June 2008, there is no reason why it could not have required Fyled to execute a Deed of Adherence and contribute £100 under clause 9.2 or even made the contribution and executed the Deed of Adherence itself. However, Fyled did not execute such a deed or make such a contribution.
>
> (4) There was no evidence before the FTT (and no evidence before us) that any of the partners in the UK Partnership intended to admit Fyled as a partner or consented to its admission. There was no evidence either that [UK LP General Partner] considered it necessary or advisable to admit Fyled as a partner in the UK Partnership in order to carry on its Business.

> (5) But, as we have stated, [UK LP General Partner] had no authority to admit Fyled as a Further Limited Partner unless it complied with clause 9.2 and clause 20 and entered into a Deed of Adherence. Moreover, if it had been [UK LP General Partner's] intention to admit Fyled as a party, there is no reason why it could not have required Fyled to execute a Deed of Adherence and contribute £100 pursuant to clause 9.2 or, indeed, required [Cayman Ltd] to take those steps on Fyled's behalf.
>
> (6) [UK LP General Partner] did not comply with the obligation under clause 4.2 to ensure compliance with section 9(1) of the Limited Partnership Act 1907. If it had been the intention of the parties that Fyled would become a member of the UK Partnership, it would have complied with this duty.
>
> (7) It is no answer to suggest that RBS had already acquired a partnership interest in the UK Partnership and then assigned it to Fyled. For the reasons which we have set out above, the FTT was correct to find that RBS did not become a partner of the UK Partnership. But even if it had, RBS only assigned a partnership interest in the UK Partnership to Fyled and no more: see clause 2 of the deed of assignment. Moreover, even if RBS had assigned a partnership interest in the UK Partnership to Fyled, there was no evidence before the FTT (or before us) that it had complied with clause 19.2 of the UK Partnership Deed (above)."

52. I do not think this passage offends the principles described by Jackson LJ in *Hamid.* The references to the lack of evidence about intention at UT [62(1) and (4)] are not forays into the private thoughts of the protagonists so much as observations from those involved in setting up these arrangements about what they were seeking to and expected to achieve, which might be considered as part of an objective enquiry to determine who was party to the agreements establishing UK LP and UK LLP. In circumstances where the UK Partnership Deed was completely silent about RBS or Fyled, I think it was permissible to look for evidence outside those documents. But even if I am wrong about that, I consider the UT's remaining reasons (at UT [62(2), (3), (5)-(7)]), which are reliant on the terms of the documents only, amply justify the conclusion that Fyled never became a partner in the UK LP.

53. In my view, the following points are of particular significance: first, that Cayman Ltd signed the UK LP Deed and the UK LLP Deed. I can see no difficulty in holding Cayman Ltd to its own signature on the document, and concluding that it was a partner in both partnerships acting in its capacity as general partner. That the Partnership Deed at times distinguishes between the Cayman LP and Cayman Ltd (for example in relation to distribution of profits under clause 13) is consistent with Cayman Ltd's role as general partner of Cayman LP. That Cayman Ltd did not contribute capital on its own account is likewise consistent with that analysis. Secondly, both the UK LP Deed and the UK LLP Deed contained express provisions for the admission of partners, which provisions were not complied with by Fyled. Clause 20 of the UK LP Deed provided for Further Limited Partners to sign a Deed of Adherence; the General Partner had no discretion to waive that requirement. Clause 9 imposed capital requirements, and although the UK LP General Partner had discretion to waive that requirement, it could only do so on terms

that were to be specified in the Deed of Adherence - which serves to emphasise the necessity of a Deed of Adherence. Fyled never executed a Deed of Adherence. The UK LLP Deed stated that Cayman LP acted through its general partner, Cayman Ltd; Cayman Ltd was a signatory to that Deed, Fyled was not. Fyled did not make a capital contribution (as required by clause 7). Fyled was not named in the Deed as a partner and never signed a Deed of Adherence (as required by clause 16) under this Deed either. Thirdly, the contemporaneous documents such as the DOTAS disclosure and the E&Y memo (see [16] above) indicate an intention to keep the Cayman LP partners out of the UK LP, and conflict with the appellants' submissions.

54. For these reasons, I think the UT was right to uphold the FTT's conclusion that as a matter of substance and reality RBS/Fyled were not partners in the UK LP or the successor LLP. That conclusion was supported, overwhelmingly, by the evidence before the FTT taken as a whole. As the UT said, the FTT had sifted through the documents looking for any evidence of an intention to join RBS or Fyled to the UK LP or LLP, and had been unable to find any.

Conclusion on the Partnership Issue

55. I have concluded that no legal principle operates to make Fyled a partner in the UK LP or the UK LLP simply by virtue of its membership of Cayman LP. As a matter of substance and reality Fyled did not become a partner in the UK LP or the UK LLP. It follows that when Superprofits were allocated by the UK LP or the UK LLP, they were not allocated to Fyled because Fyled was not a partner. The Superprofits in question were allocated to Cayman LP, acting through its general partner, Cayman Ltd.

56. It is not necessary to reach any conclusion about whether the Cayman LP operated as a sub-partnership. I agree with the UT that this might be one possible way of looking at the arrangements and that the FTT was entitled to approach the matter in that way. But it is not necessary for present purposes to find a way of explaining the relationship of RBS/Fyled to the UK Partnership. It is sufficient for present purposes merely to conclude that RBS/Fyled were not partners in the UK Partnership. Further, it is not necessary to consider HMRC's *Ramsay* argument in the context of the Partnership issue, because the issue is resolved against the appellants on the evidence: there was no "omnibus" partnership and so no possibility of profit allocation by UK LP (or LLP) to Fyled directly.

The Fiduciary Issue

57. It is necessary to consider next the capacity in which the right to those Superprofits accrued to Cayman Ltd: was Cayman Ltd acting in a fiduciary or representative capacity when it received the Superprofits?

Legislation

58. The relevant charging provisions are now contained in Part 2 of the Corporation Tax Act 2009 (CTA 2009). Section 2 imposes the charge to corporation tax. Section 5 brings the profits of a non-UK resident company into charge in the UK if that company carries on a trade in the United Kingdom through a permanent establishment in the United Kingdom (which, as is now common ground, Cayman LP did). Section 6 provides:

"**6 Profits accruing in fiduciary or representative capacity**

(1)A company is not chargeable to corporation tax on profits which accrue to it in a fiduciary or representative capacity except as respects its own beneficial interest (if any) in the profits.

(2)The exception under subsection (1) from chargeability does not apply to profits arising in the winding up of a company."

59. The corporation tax regime applicable to corporate partners is contained in Part 17 of CTA 2009. Sections 1257 to 1259 contain general provisions about tax on partnerships, and specifically about how a firm's profits will be calculated. By section 1258, for corporation tax purposes, a firm has no separate legal personality distinct from its members. The profits and losses of the firm are to be calculated and allocated to the members in the manner set out at sections 1259 to 1262:

"**1259 Calculation of firm's profits and losses**

(1) This section applies if a firm carries on a trade and any partner in the firm ("the partner") is a company within the charge to corporation tax.

(2) For any accounting period of the firm, the amount of the profits of the trade ("the amount of the firm's profits") is taken to be the amount determined, in relation to the partner, in accordance with subsection (3) or (4).

(3) If the partner is a UK resident –

a. Determine what would be the amount of the profits of the trade chargeable to corporation tax for that period if a UK resident company carried on the trade, and

b. Take that to be the amount of the firm's profits.

(4) If the partner is a non-UK resident –

a. Determine what would be the amount of the profits of the trade chargeable to corporation tax for that period if a non-UK resident company carried on the trade, and

b. Take that to be the amount of the firm's profits.

(5)The amount of any losses of the trade for an accounting period of the firm is calculated, in relation to the partner, in the same way as the amount of any profits.

…

1262 Allocation of firm's profits or losses between partners

> (1) For any accounting period of a firm a partner's share of a profit or loss of a trade carried on by the firm is determined for corporation tax purposes in accordance with the firm's profit-sharing arrangements during that period.
>
> This is subject to sections 1263 and 1264.
>
> …
>
> (4) In this section and sections 1263 and 1264 "profit-sharing arrangements" means the rights of the partners to share in the profits of the trade and the liabilities of the partners to share in the losses of the trade."

60. CTA 2009 is the product of the tax law rewrite project. It came into force on 1 April 2009. It was in force when the second and third allocations of Superprofits were made. Although at one stage the parties submitted that the predecessor provisions were relevant, it is now common ground that the provisions set out above merely repeat and clarify the legislation which went before. It is not therefore necessary to set out the earlier legislation which was contained in sections 8(1) and 114 Income and Corporation Taxes Act 1988.

The First-tier and Upper Tribunal

61. This issue was not addressed by the FTT in their decision (an oversight criticised by the UT). This issue was addressed by the UT at [67]-[98]. The UT held that the allocation of the profits of UK LP took place under section 1262 of CTA 2009 and that those provisions were part of an "entirely separate free-standing regime for the taxation of profits accruing under a partnership" (UT [96]). The UT held that section 6(1) of CTA 2009 had no application (UT [96], [98]). Accordingly, it was not necessary to establish whether Cayman Ltd had a beneficial interest (or received those moneys in a merely fiduciary or representative capacity) in order for Cayman Ltd to be liable for corporation tax on the whole amount (UT [97]). The issue was one of allocation under the UK LP Deed and on that basis, the entire profit allocation to Cayman Ltd was chargeable to corporation tax (UT [98]).

Submissions

62. The appellants' case is that the distribution of profits by Cayman Ltd to the Cayman LP partners took place under Cayman law which was the law governing the Cayman LP. On that issue, the FTT was assisted by experts called by the parties whose views were agreed in a Joint Memorandum dated 25 July 2019 and a Joint Report dated 5 September 2019. The FTT made findings which resolve the Cayman law position in the appellants' favour at FTT [135(4)] and [136], in the following terms (emphasis added):

> "135. As is clear from that Joint Report, dated 25 July 2019, the Cayman Island Law experts, Mr Goucke for the Cayman Appellants and Mr Said for HMRC, agree that under Cayman Islands law:
>
> …

> (4) [Cayman Ltd], as General Partner of [Cayman LP], *holds the assets on trust for the partnership*, [UK LP], in accordance with the terms of the applicable partnership agreement of [relevant Cayman LP], pursuant to s6(2) of the 2007 [Exempt Limited Partnership or "ELP"] Law and later amended to be s7(8) of the 2007 ELP Law;
>
> …
>
> 136. Accordingly, as the experts agree, *as a matter of Cayman Islands law, the profit sharing agreements were confined to the [Cayman LP Deed] under which [Cayman Ltd's] entitlement to profits of [Cayman LP] did not include those allocated to RBS and subsequently Fyled. …*"

63. The appellants submitted that the UT failed to give proper effect to these findings which are determinative of the allocation issue in their favour. Further, the UT misconstrued the statutory provisions because it is clear that section 6(1) of CTA 2009 is the charging provision which must be read with the computational provisions contained in Part 17 of the same Act. The right to Superprofits did not accrue to Cayman Ltd in its own right. It received that money merely as fiduciary or representative for the Corporate Limited Partner in Cayman LP and comes within the exception at section 6(1) of CTA 2009. That was the right answer, both technically according to the letter of the law, and by reference to the scheme of the tax legislation more generally given that partnerships are transparent for tax purposes (noting section 1258 of CTA 2009: "a firm is not to be regarded for corporation tax purposes as an entity separate and distinct from the partners"). Although there are circumstances where a partner might be liable for tax even though acting in a fiduciary capacity, for example, where that partner is a discretionary trustee, the general position is that the person beneficially entitled to partnership profits is liable for tax on them, and in this case, the beneficial interest in the Superprofits was with Fyled. By issuing closure notices to Cayman Ltd, HMRC had assessed the wrong person.

64. HMRC advanced two main arguments in response. First, they submitted that the appellants' arguments were wrong as a matter of partnership law. One partner does not act as fiduciary for another partner when receiving profits or income belonging to the partnership. Rather, partnership assets are held and applied by the partners for the purposes of the partnership and in accordance with the partnership agreement; partners hold the beneficial interest collectively as principal and agent for their partners and not in a fiduciary capacity. Mr Baldry relied on a number of sources to support his argument, the leading authority in support of his case being *Piddocke v Burt* [1894] 1 Ch 343, which concerned an application under the Debtors Act 1869. The question raised was whether one partner receiving money on account of himself and his co-partner received it in a fiduciary capacity (per Chitty J at p 345). Chitty J dismissed the application (at p 346):

> "…it appears to me that I should be straining the law if I were to hold that a partner receiving money on account of the partnership – that is, on behalf of himself and his co-partners -received it in a fiduciary capacity towards the other partners. …".

65. Secondly and alternatively, HMRC say that *Ramsay* applies. The exception under section 6(1) of CTA 2009 for fiduciaries or those who are acting in a representative capacity

must be construed purposively to take into account the entirety of the arrangements; the consequence is that the TRS arrangements must be taken into account to reveal the reality of these arrangements, namely that the Superprofits paid to Cayman Ltd and then paid by Cayman Ltd to RBS/Fyled are, by a sequence of pre-ordained transactions, returned to Cayman Ltd minus a retention amount; on a realistic view, it is Cayman Ltd, not RBS/Fyled, to whom the beneficial interest in the Superprofits accrues; it follows that Cayman Ltd falls outside the section 6(1) exception.

66. In reply to HMRC's case, the appellants argue that *Piddocke v Burt* is distinguishable, or alternatively is wrongly decided and should not be followed. It is common for partners to act in a fiduciary relationship in receiving funds which belong to the partnership, and that is what occurred here. They reject HMRC's *Ramsay* argument as simply wrong, for reasons I shall outline further below.

Discussion

67. I would accept the appellants' basic premise that section 6(1) of CTA 2009 is a charging provision and that section 1262 of CTA 2009 is a computational provision. I would further accept that the two provisions must be read together and that computation issues only arise once established that tax is chargeable. That means that section 6(1) is very much in focus and the UT were wrong to say that the question of beneficial ownership was irrelevant.

68. Section 6(1) is the logical starting point in the analysis. It is necessary to decide what the references to "fiduciary or representative capacity" in section 6(1) mean, and whether Cayman Ltd was acting in such a capacity when the Superprofits were paid to it. That involves consideration of HMRC's *Ramsay* arguments and it is to those arguments that I now turn.

The *Ramsay* Approach

Submissions

69. HMRC's argument as I have summarised it at [65] above emerged during the course of argument as a result of questions put by Lord Justice Lewison. It was not presaged in HMRC's Respondents' Notice (which instead advanced a *Ramsay* argument set in the context of the Partnership issue only, which argument I have not determined, see [56] above). However, Mr Baldry accepted that the *Ramsay* argument could be put in this alternative way and positively advanced the argument as part of his case. The argument put this way was not considered by either tribunal below.

70. Mr Peacock did not object to this late development of the *Ramsay* argument although he disputed the correctness of it. He made four points by way of answer. First, he said that the Court should not have regard to the TRS arrangements; it should look no further than the Cayman LP Partnership Deed, clause 18.4 of which states in terms: "The General Partner shall have fiduciary responsibility for the safekeeping of all of the funds and assets of the Partnership…". Secondly, he said that the rights of the partners were matters for Cayman law, as the FTT had found as a fact, a finding with which this Court could not interfere. To support that point, Mr Peacock relied on three authorities considered by the FTT: *Dreyfus v Inland Revenue Commissioners* (1929) 14 TC 560, *Memec Plc v Inland Revenue Commissioners* [1998] STC 754 and *HMRC v Anson* [2015] UKSC 44, [2015] STC 1777. He said that the FTT had found that the general partner

acted as trustee of the partnership assets (see FTT [135(4)], noting clause 18.4 again) and that Cayman Ltd's entitlement to profits "did not include those allocated to RBS and subsequently Fyled" (see FTT [136]); he said that these findings were dispositive. Thirdly, he argued that even if the TRS arrangements were taken into account, they did not support the conclusion that Cayman Ltd had a beneficial interest in the Superprofits because at best the TRS arrangements give Cayman Ltd a contractual right to further capital to be contributed by Cayman Holdings, which could not be equated with a profit share under the partnership. Fourth, he reiterated a broader point made at the outset of his submissions to the effect that HMRC's arguments risked double taxation and offended the scheme of the statute, given that the Corporate Limited Partner will already have accounted for tax on the Superprofits received by it and the same money should not be subject to tax for a second time in Cayman Ltd's hands, alternatively should not be taxed in the hands of the general partner but rather, consistently with the transparency principle applying to partnerships, should be taxed in the hands of the ultimate recipient.

Ramsay Authorities

71. The *Ramsay* approach has been described and applied in many cases. It is famously encapsulated in the following passage in *Barclays Mercantile Finance Ltd v Mawson (Inspector of Taxes)* [2004] UKHL 51, [2005] 1 AC 684 (per Lord Nicholls):

> "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 the statute, upon its true construction, applies to the facts as found. As Lord Nicholls of Birkenhead said in *MacNiven v Westmoreland Investments Ltd* [2003] 1 AC 311, 320, para 8: "The paramount question always is one of interpretation of the particular statutory provision and its application to the facts of the case.""

72. In that case at [36], Lord Nicholls made reference to *Collector of Stamp Revenue v Arrowtown Assets Limited* [2003] HKCFA 46, where Ribeiro PJ said:

> "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."

73. The Court was referred to *UBS AG v Revenue and Customs Commissioners* [2016] UKSC 13, [2016] 1 WLR 1005, and in particular to paragraphs [61]-[67] of Lord Reed's speech. At [68] he said:

> "… The point is that the facts must be analysed in the light of the statutory provision being applied. If a fact is of no relevance to the application of the statute, then it can be disregarded for that purpose. If, as in *Ramsay,* the relevant fact is the overall economic outcome of a series of commercially linked transactions, then that is the fact upon which it is necessary to focus. If, on the other hand, the legislation requires the court to focus on a specific transaction, as in *MacNiven*[1] and *Barclays Mercantile,* then other transactions, although related, are unlikely to have any bearing on its application."

74. The Court was also referred to *Rossendale Borough Council v Hurstwood Properties (A) Ltd and Others* [2021] UKSC 16, [2022] AC 690, a rating case in which Lord Briggs and Lord Leggatt (in a joint judgment) said this at [12] and [15]:

> "12. Another aspect of the *Ramsay* approach is that, where a scheme aimed at avoiding tax involves a series of steps planned in advance, it is both permissible and necessary to not just consider the particular steps individually but to consider the scheme as a whole. Again, this is no more than an application of general principle. Although a statute must be applied to a state of affairs which exists, or to a transaction which occurs, at a particular point in time, the question whether the state of affairs or the transaction was part of a preconceived plan which included further steps may well be relevant to whether the state of affairs or transaction falls within the statutory description, construed in the light of its purpose. …
>
> …
>
> 15. In the task of ascertaining whether a particular statutory provision imposes a charge, or grants an exemption from a charge, the *Ramsay* approach is generally described - as it is in the statements quoted above - as involving two components or stages. The first is to ascertain the class of facts (which may or may not be transactions) intended to be affected by the charge or exemption. This is a process of interpretation of the statutory provision in the light of its purpose. The second is to discover whether the relevant facts fall within that class, in the sense that they "answer to the statutory description" (*Barclays Mercantile* at para 32). This may be described as a process of application of the statutory provision to the facts. It is useful to distinguish these processes, although there is no rigid demarcation between them and an iterative approach may be required."

[1] *MacNiven (Inspector of Taxes) v Westmoreland Investments Ltd* [2001] UKHL 6, [2003] 1 AC 311

75. Mr Baldry relied on two older cases decided by this Court, as illustrations of the *Ramsay* approach at work. The first is *DTE Financial Services Ltd v Wilson (Inspector of Taxes)* [2001] EWCA Civ 455, [2001] STC 777 where the Court broke down a series of steps in a composite transaction to identify what was in reality a way for DTE to pay its employee a bonus, which was "the beginning and end of the matter" (see Jonathan Parker LJ at [41]). The second is *PA Holdings Ltd v Revenue and Customs Commissioners* [2011] EWCA Civ 1414, [2012] STC 582, where it was held that steps inserted to create the form of dividends or distributions had no fiscal effect because the payments remained emoluments for the purposes of the statute, purposively construed (per Moses LJ at ([67]-[70]).

Discussion

76. HMRC's *Ramsay* argument in the context of section 6(1) is new. HMRC do not require the Court's permission to raise it (given that it arises as part of their Respondents' Notice as a further or alternative ground for upholding the UT, see CPR 52.13 and related rules, recently considered in *Braceurself Ltd v NHS England* [2023] EWCA Civ 837 at [31] in particular). But the point has been raised late and the Court is concerned to ensure that it does not prejudice the appellants. Mr Peacock did not suggest he was prejudiced. Anyway, the point goes to the construction of the statute and is, at least substantially, a point of law. To the extent that it has a factual component, no further findings of fact will be required because it will be for this Court to arrive at a "realistic view" of the contractual arrangements which are well documented by both tribunals below and in evidence before us. I am therefore satisfied that it is appropriate for this Court to consider and determine the point.

77. How then should the legislation be construed to achieve its purpose? The scheme of Part 2 of CTA 2009 is to impose a charge to corporation tax on companies (section 2(1)) on all profits wherever arising (section 5(1)), including profits of a non-UK resident company which carries on a trade in the United Kingdom through a permanent establishment to which profits are attributable under section 19 (section 5(2)). Income tax and capital gains tax are excluded to the extent that corporation tax is charged (sections 3 and 4). Section 6(1) of CTA 2009 creates an exception to the general rule that corporation tax is due on such profits, in relation to profits accruing in a fiduciary or representative capacity (and except to the extent that the company has a beneficial interest in such profits). That exception is itself subject to a further exception for profits on the winding up of a company which are subject to corporation tax even though accruing to the liquidators as fiduciaries, section 6(2). The scheme of these provisions is plainly to cast the corporation tax net wide. The exceptions are specific and limited. The fiduciary exception deals with the situation where the beneficiary, on whose behalf the company holds the profits as fiduciary or representative, will be liable to tax on those profits (income or corporation tax, depending on the identity of that beneficiary). The exception does not apply, for obvious reasons, to the extent that the company itself has a beneficial interest in the profits which accrue to it as fiduciary or representative.

78. The concepts of fiduciary ownership and beneficial interest or ownership are concepts of domestic law, but not specifically of tax law. As legal concepts, they are familiar in business and commercial arrangements. Further, they are concepts which depend on the reality, in fact and law, of given arrangements: a person does not become a fiduciary simply by being badged as one; moreover, once a person is a fiduciary, they owe obligations to the beneficiary which are recognised by equity. In my judgment, the

statutory question contained in section 6(1) of CTA 2009 is whether, as a matter of reality (ie on a "*realistic view*" to borrow a phrase from *Arrowtown Assets*), the company to which the profits accrue is acting in a fiduciary or representative capacity, or not.

79. In answering that statutory question, it seems to me that regard must be had to the totality of the transactions, including the TRS arrangements. It is difficult to imagine that the architects of the legislation could have intended anything other than that. It would be absurd not to regard the arrangements as a whole, because it would allow the charging provisions to be circumvented with ease, by a company simply badging itself as fiduciary or representative. The concepts of fiduciary or representative are themselves concepts of substance and not merely of form, requiring the totality of the arrangements to be considered. In *Rossendale* the court looked through a lease to answer the statutory question by reference to the person standing behind the lessee; in *DTE v Wilson,* the court looked through trust arrangements to characterise the payment as a bonus to an employee; in *PA Holdings* the court held that payments badged as dividends were in reality emoluments for tax purposes. What is proposed in this case is much less radical: it is simply to ask whether, in reality, Cayman Ltd was acting as fiduciary (or representative), taking all the arrangements into account.

80. I am not persuaded by Mr Peacock's objections to this approach. First, I do not accept that clause 18.4 provides the answer. That clause states that Cayman LP holds the *partnership assets* on trust. That is not a surprising provision: to the extent that the partnership possesses assets, the general partner will often hold them on trust for the partners. This case does not, however, concern partnership assets. It concerns the allocation of partnership profits which is a different aspect of partnership, and which clause 18.4 does not address. Secondly, he says that the Cayman Partnership Deed has been considered by foreign law experts and this Court is bound by the FTT's findings of fact based on that expert evidence. I accept that the FTT made findings of foreign law and I would not go behind those findings. But the foreign law experts' evidence was about the profit-sharing arrangements in Cayman LP; that was a non-tax issue and, indeed, an issue of Cayman law on which those experts were well qualified to comment; by contrast, the *Ramsay* argument raises an issue of domestic law, relating to the meaning and application of the domestic statute, and that is a tax issue governed by UK law. There is a distinction between non-tax and tax issues, as emphasised by Lord Reed in *Anson* at [51] where he criticised the court below for "elid[ing] two distinct issues", namely the non-tax foreign law issue and the tax domestic law issue. Accepting the Cayman law experts' views on the non-tax issue about profit sharing arrangements, the domestic law issue still remains: did Cayman Ltd act as fiduciary or in a representative capacity for the purposes of section 6(1) of CTA 2009 when the right to Superprofits accrued to it? That issue is not resolved by the foreign law experts or by any findings of the FTT based on that expert evidence.

81. Mr Peacock's remaining points address the position if the TRS is taken into account. I am not persuaded by his third point, that there is a difference to be drawn, in the context of section 6(1), between the Superprofits which Cayman Ltd receives from UK LP and pays out to the Corporate Limited Partner under the terms of the Cayman Partnership Deed and the capital contribution which Cayman Ltd gets back from Cayman Holdings. The TRS arrangements, on one view (and in my view, which I venture is a real world view), are simply the rebadging of the Superprofits, from profit share to capital contribution, a bit like the rebadging in *PA Holdings* which failed. Fourth, turning to Mr

Peacock's wider point, I am not persuaded that there is a risk of double taxation or that this approach conflicts with the scheme of the legislation. Although Mr Peacock says that Fyled is likely to have accounted for corporation tax on the Superprofits already, the Court has no information on the tax treatment of these receipts in Fyled's hands. Certainly, the assumption underpinning the scheme was that the Corporate Limited Partner would account for corporation tax on receipt of the Superprofits, and would then claim a deduction against tax on payment out to Cayman Holdings. That assumption underpins the scheme as it was described in the DOTAS disclosure and the EY document (see [16] above). I would therefore be willing to assume as at least probable that Fyled has accounted for tax on the receipts (and that Fyled or another company in the group has taken a deduction against tax for any onward payment). But even if that is accepted as probable, the problem is not one of double taxation, so much as tax inefficiency as a result of poor design of the arrangements. As Mr Baldry submitted, once established that there were two separate partnerships, each with its own separate partnership business, and each generating profits which fell into the charge to tax at the point of allocation by the general partner, the arrangements can be seen to be highly tax inefficient: Cayman Ltd pays tax on what it receives as the beneficiary of UK LP's profit allocation – ie the whole of the Superprofits - and Fyled pays tax on what it receives as the beneficiary of Cayman LP's profit allocation – ie the whole of the Superprofits. That is not double taxation inimical to the scheme of taxation so much as two instances of single taxation on separate entities. But in any event, I think it is difficult for Mr Peacock to invoke the scheme of the legislation in his client's defence in circumstances where the whole scheme was devised to avoid tax in the first place, which is not an outcome consistent with the scheme of the tax legislation either.

82. Once the totality of arrangements including the TRS is considered, it is clear that the Superprofits paid to Cayman Ltd are returned to Cayman Ltd, by a series of pre-ordained transactions, in the form of a capital contribution from Cayman Holdings. To address the statutory question raised by section 6(1): on a realistic view, Cayman Ltd does not act in a fiduciary capacity when it obtains the Superprofits which it pays (pursuant to a contractual obligation under the Cayman Partnership Deed) to RBS/Fyled; rather, it retains the beneficial interest in the Superprofits throughout, because those Superprofits are returned as capital from Cayman Holdings and are then used by Cayman Ltd to repay its borrowings. There is no significance to be attached to the difference between what is paid out by Cayman Ltd to the Corporate Limited Partner and the lesser amount which is returned to Cayman Ltd by way of capital contribution from Cayman Holdings: that difference represents the fee paid by Cayman Ltd to the Corporate Limited Partner for its participation in these arrangements and is simply a cost of putting these arrangements in place.

Conclusion on Ramsay in context of fiduciary issue

83. Cayman Ltd's right to receive Superprofits did not accrue to it in a fiduciary or representative capacity. Rather, on a realistic view, it was the beneficial owner of those Superprofits. Section 6(1) imposes a charge to corporation tax on those profits in Cayman Ltd's hands.

84. Given that conclusion, it is not necessary to determine HMRC's first argument relating to the nature of a partnership (see [64] above). HMRC's proposition that partnership does not, or at least not necessarily, give rise to a fiduciary relationship between partners, and the appellants' answer that the case law supporting that proposition is distinguishable

or wrongly decided, raise potentially significant issues of partnership law. I leave them to one side with some relief, to be considered on another day in another case where they might make a difference to the outcome.

Conclusion on the Profit Allocation Issue

85. The Superprofits were allocated to Cayman Ltd which was a partner in UK LP, in its capacity as general partner for Cayman LP. On a proper construction of section 6(1), Cayman Ltd was not acting as fiduciary or representative of the Corporate Limited Partner when the right to Superprofits accrued, but rather in its own right, as the ultimate beneficiary of that profit share. Further, the Corporate Limited Partner in Cayman LP was not a partner in the UK LP, rather there were two separate partnerships engaged in two separate businesses with the tax consequences which flowed from that design.

INTEREST DEDUCTION

Legislation

86. Cayman Ltd was a non-resident company trading in the UK through a permanent establishment. It was entitled to a deduction for any allowable expenses incurred for the purposes of its permanent establishment (section 29 of CTA 2009). The Finance Act 1996 introduced provisions for determining how profits and losses arising to a company from its loan relationships are to be brought into account for corporation tax purposes. Those provisions are now contained in Part 5 of CTA 2009. Section 297 provides, so far as relevant:

> "**297 Trading credits and debits to be brought into account under Part 3**
>
> (1) This section applies so far as in any accounting period a company is a party to a loan relationship for the purposes of a trade it carries on.
>
> (2) The credits in respect of the relationship for the period are treated as receipts of the trade which are to be brought into account in calculating its profits for that period.
>
> (3) The debits in respect of the relationship for the period are treated as expenses of the trade which are deductible in calculating those profits.
>
> …"

87. The question which arises is whether these loans were "for the purposes of a trade" which Cayman Ltd as general partner for Cayman LP carries on (applying section 297(1)). If the loan is for non-trading purposes, different rules apply (see section 300 which cross-refers to Chapter 16 of CTA 2009, and section 301 which defines non-trading debits as debits for any accounting period in respect of a company's loan relationships that are not brought into account under section 297(3)). HMRC accept that the non-trading loan relationship rules apply but the appellants maintain they are entitled to deduct under the trading loan relationship rules.

88. Although Section 298 defines the meaning of trade in the context of a creditor relationship in terms that require the creditor relationship to occur "in the course of activities forming an integral part of the trade" there is no equivalent provision for debtor relationships, and thus no statutory definition of what "for the purposes of a trade it carries on" as it appears in section 297(1) means in the context of a debtor relationship.

The First-tier and Upper Tribunal

89. The FTT referred to evidence from witnesses that Cayman Ltd had borrowed to acquire an interest in UK LP rather than the trade that was being carried on by UK LP and held that "in the present case the sum received from RBS was not used for the purposes of the trade of [UK LP] …". Accordingly, the Loan and the Loan Notes were not trading loan relationships for the purposes of Part 5 of CTA 2009 (FTT [210]-[211]).

90. The UT disposed of a range of arguments under this heading at [100]-[168]. Of those, the only one which is renewed in this Court is that relating to the status of the loans, specifically, whether they were trading or non-trading loans (this had been Issue 5 before the UT). The UT noted the FTT's findings and held these were findings of fact which the FTT was entitled to make (UT [156]). In consequence, the UT was satisfied that the borrowing in question was for the purpose of investing in UK LP, and not for the purposes of the trade carried on by UK LP (UT [158]). Further, there was no suggestion that the borrowing in question was used by UK LP as its working capital; rather it was used to fund the acquisition of the 19% share in UK LP and was paid to the sellers of that share which meant that this case was distinguishable on its facts from *Major v Brodie* (UT [159]). The FTT had reached a conclusion open to it for the right reasons (UT [166]).

Submissions

91. The appellants submit that the question is one of law, not fact. A person who borrows to acquire an interest in a trading partnership is necessarily borrowing for the purpose of the trade that partnership carries on, satisfying section 297(1). The cases relied on by HMRC can be distinguished as relating to the "wholly and exclusively" test as it appears elsewhere in the legislation, but that test does not appear in section 297(1). Nor does section 297(1) contain any "integral part of the trade" test as appears in section 298 in the context of creditor relationships, showing that there is a relatively low bar to be applied when it comes to showing that loans are for the purposes of the trade. The bar is cleared even where the trading purpose of the partnership is a subsidiary purpose for which money was borrowed.

92. The appellants say that Cayman LP (by Cayman Ltd) became a partner in UK LP through the assignment of a pre-existing partnership interest so as to carry on the trade of UK LP in partnership with its other partners and to share in the profits of the trade. Cases such as *Shiner v Revenue and Customs Commissioners* [2020] UKFTT 295 (TC) draw a false distinction between borrowings at partnership level and borrowings at the partner level.

93. The appellants further argue that there is a contradiction in HMRC's case, which rests on section 5(2) of CTA 2009 which makes a non-UK company liable to corporation tax "if it carries on a trade in the United Kingdom through a permanent establishment in the United Kingdom" – so accepting that there is a UK trade in existence – while at the same time denying that the loans taken out by Cayman Ltd are trading loan relationships for the purposes of section 297(1) of CTA 2009.

94. HMRC argue that the relevant trade for corporation tax purposes is UK LP's activity of investment management, and that Cayman Ltd's borrowings do not advance *that* trade at all. Rather, the money borrowed was used to invest in UK LP through the purchase of the 19% share in that partnership which was a different business carried on by a different partnership. HMRC rely on a series of cases which are of general application and are not limited to the meaning of "wholly and exclusively", rather they assist on the wider question of what "for the purposes of a trade" means. In short, they show that there must be a close nexus or a direct link between the borrowings and the way they are used, so as to qualify only if they are used in the trade; borrowing simply to purchase a share in the partnership as an investment is not sufficient. Further and in any event, the FTT's findings at FTT [210] were of fact not law and are determinative of the position: the borrowings were not for the purposes of UK LP's (or any other) trade.

Discussion

95. The various cases relied on by HMRC are helpful in illustrating the meaning of "for the purposes of a trade" and I accept HMRC's submission that they are not limited to the narrower question of explaining the meaning of that phrase where it occurs in the context of the "wholly and exclusively" test. *CIR v Anglo-Brewing Company Ltd* (1925) 12 TC 803 concerned payments to employees made voluntarily on the company ceasing to trade; Rowlatt J said at p 813 that "for the purposes of the trade" means "for the purpose of keeping the trade going, and of making it pay…". He concluded that because there was no such purpose behind the payments in this case, they were not deductible expenses of the trade. That case was cited with approval in *CIR v Cosmotron Manufacturing Co Ltd* [1997] 1 WLR 1288 where the Privy Council discussed the English law test of "wholly and exclusively for the purposes of a trade" and held that it was not materially different from the Hong Kong legislation which referred simply to the "production of profits" and "for the purpose of producing such profits …". It was said in *Strong & Co of Romsey Ltd v Woodifield* [1906] AC 448, which concerned damages paid to a customer who was injured by a falling chimney, that "it is not enough that the disbursement is made in the course of or arises out of or is connected with the trade or is made out of the profits of the trade. It must be made for the purposes of earning profits …" (per Lord Davey at p 453). The point was addressed by Millett LJ in *Vodafone Cellular v Shaw* [1997] STC 734 where at p 742 he said "the words for the purposes of the trade mean to serve the purposes of the trade. They do not mean for the purposes of the taxpayer but for the purposes of the trade, which is a different concept …". In *HMRC v Vaines* [2018] EWCA Civ 45, [2018] STC 297, this Court held that expenditure to preserve and protect the reputation of one of the partners was not expenditure wholly and exclusively incurred for the purposes of the partnership's trade (see Henderson LJ at [32]: "from his personal point of view, therefore, it was expenditure which brought him peace of mind and enabled him to continue in his chosen career. But that does not turn it into expenditure which was wholly and exclusively incurred for the purposes of [the partnership]'s trade."). In *Cassells v Stewart* (1881) 6 App Cas 64, the House of Lords held that the sale by one partner to another of his beneficial interest in the partnership was permitted by the partnership agreement and was effective: "… this subject-matter here is in no sense a property or interest of the partnership. The share of an individual partner is his own property, not the property of the firm …" (per Lord Selbourne LC p 73-4). The case shows that the partnership share of an individual partner belongs to that partner personally and not to the firm, and that dealings with that share are not part of the firm's trade.

96. *Major v Brodie* is consistent with these cases, as the FTT and the UT held. In that case there was no suggestion that the loans were used to purchase a share of the first or the second partnership as an investment; rather, the money was borrowed and used to support the day to day operations of the second partnership. This was explained by Park J at p 509 f:

> "So the [loan] money which was contributed by Mr and Mrs Brodie to Skeldon Estates partnership is used wholly for the purposes of the trade of farmers carried on by Skeldon Estates partnership in common with Mr Henry Murdoch under the firm name of W Murdoch & Son. …"

97. In the light of these authorities, I think the FTT in *Shiner* was entitled to draw the distinction it did between borrowing in order to invest and borrowing for the purposes of the partnership's trade (see at [50] where FTT Judge Beare distinguished between "expenses which a partner incurs in his capacity as an investor in a partnership and expenses which that partner incurs in pursuing the trading purposes of that partnership").

98. The FTT did not err in its approach. It was entitled to conclude that there was a distinction to be drawn between borrowing to acquire an interest in UK LP and borrowing for the purposes of the trade being carried on by UK LP (see [210]) and to conclude that the purpose of Cayman Ltd's borrowings was not for UK LP's trade. I would agree with the UT that these were findings of fact. But even if they were findings of mixed fact and law, I can see no reason to upset or doubt those findings: Cayman Ltd's borrowings plainly were for the purpose of permitting it to invest in the UK LP. They did not have any effect on the trade being conducted by the UK LP and were not for the purposes of UK LP's trade.

99. Once established that there are two separate partnerships (and not one single "omnibus partnership" – a conclusion reached as part of the resolution of the Partnership Issue, see [55] above) it follows that each partnership has a different business activity. There is no contradiction in imposing liability to corporation tax on Cayman Ltd under section 5 (on the basis that Cayman Ltd's profit share from the UK LP falls into UK tax) and treating Cayman Ltd's right to deduction of interest on its loan relationships as non-trading in character (on the basis that those borrowings were incurred to enable Cayman Ltd to conduct its separate business of investing in the UK LP and were not for the purposes of UK LP's trade).

Conclusion on Interest Deduction Issue

100. The UT was correct to hold that the appellants are not entitled to deduct interest on the Loan or the Loan Notes under section 297(1) of CTA 2009.

SUMMARY AND DISPOSAL

101. My conclusions on the profit allocation issue are:

    a. There is no principle of law which would automatically make Fyled a partner in the UK LP or UK LLP. As a matter of substance and reality, Fyled was a partner only in the Cayman LP.

b. UK LP/LLP allocated Superprofits to Cayman Ltd, whose right to that allocation was not as fiduciary but, construing the statutory provisions purposively and considering the reality of the arrangements entered into including the TRS (pursuant to the *Ramsay* approach), as beneficial owner.

102. It follows that Cayman Ltd is liable to corporation tax on the Superprofits and the closure notices (as adjusted) were correctly issued to Cayman Ltd.

103. My conclusion on the interest deduction issue is that interest paid on the Loan and the Loan Notes was not for the purpose of UK LP's trade and so was not deductible by Cayman Ltd pursuant to the provisions governing trading loan relationships.

104. I would dismiss this appeal.

LORD JUSTICE NUGEE:

105. I agree.

LORD JUSTICE LEWISON:

106. I also agree.