NCN: [2021] UKFTT 0320 (TC)

TC08261

CORPORATION TAX – capital gain realised on sale of property – whether payment to director/former shareholder who was controlling party was deductible – jurisdiction in circumstances where no claim made to use loan relationship deficit before issue of closure notice or expiry of two year time limit - whether payment was a distribution – whether amount deductible as expense or loss from non-trading loan relationship – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2018/07755

BETWEEN

SHINELOCK LTD **Appellant**

-and-

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

TRIBUNAL: JUDGE JEANETTE ZAMAN

The hearing took place on 27 to 28 January 2021 and 2 July 2021. With the consent of the parties, the form of the hearing was a remote video hearing, which took place (at different times) on the Tribunal's video platform and on Microsoft Teams. A face to face hearing was not held because of the ongoing restrictions arising from the COVID-19 pandemic. The documents to which I was referred are described in the decision notice.

Prior notice of the hearing had been published on the gov.uk website, with information about how representatives of the media or members of the public could apply to join the hearing remotely in order to observe the proceedings. As such, the hearing was held in public.

Patrick Boch, counsel, for the Appellant

Christopher Vallis, litigator of HM Revenue and Customs' Solicitor's Office, for the Respondents

DECISION

Introduction

1. Shinelock Ltd ("Shinelock") has appealed against amendments made by HMRC to its self-assessment for the accounting period ended 31 March 2015. The amendments increase the corporation tax payable by £18,854.

2. Shinelock had bought 8 Trumpsgreen Road, Virginia Water (the "Property") on 31 March 2009 for £725,000 and disposed of it for £1,030,000 on 4 December 2014. It had paid £305,000, ie an amount equal to the difference, on 15 December 2014 to Mr Ayaz Ahmed (the "Payment"). The purchase of the Property had been funded from a combination of a loan from Habib Bank and funds provided by Mr Ahmed. Mr Ahmed had been the sole shareholder of Shinelock until 30 September 2014 (and had later re-acquired the shares), and had been a director of the company until December 2014. Shinelock did not bring any chargeable gain into account in its self-assessment for the year ended March 2015.

3. HMRC concluded that Shinelock had realised a chargeable gain on the disposal of the Property which was subject to corporation tax (the chargeable gain being calculated as £94,270 once deductions for incidental costs of both the purchase and sale were allowed and indexation relief applied). The tax on this chargeable gain was £18,854. HMRC amended Shinelock's self-assessment to give effect to this conclusion.

4. During HMRC's enquiry into Shinelock's self-assessment, Shinelock's position had been to argue that the Property was beneficially owned by Mr Ahmed, not Shinelock, such that any chargeable gain could only have been realised by Mr Ahmed (who had not been UK resident at the relevant time). By the time of the hearing (and as explained further below) Shinelock's position was that it had been the beneficial owner of the Property but the Payment was deductible and this fully offset the chargeable gain. The deductibility argument was based on Shinelock having a non-trading loan relationship deficit (a "NTLRD") of the amount of the Payment. It relied on alternative arguments in respect of loan relationships between Shinelock and Habib Bank and between Shinelock and Mr Ahmed.

5. In its skeleton argument HMRC applied for Shinelock's argument that there was a NTLRD which offset the chargeable gain to be struck out on the basis that no claim had been made to use such a deficit within two years of the end of the accounting period as required by the legislation, no late claim had been accepted by HMRC and this issue was outside the "matter in question" before the Tribunal. HMRC argued that the Tribunal did not have jurisdiction to consider this ground of appeal.

6. I have concluded that this Tribunal does have jurisdiction to consider Shinelock's loan relationship argument, for the reasons set out below. However, I have concluded that although the Payment was not a distribution it was nevertheless not deductible as a loan relationship debit and accordingly there was no NTLRD to offset the chargeable gain. The appeal is dismissed.

Background

7. The arguments raised by both parties have developed and changed since HMRC opened the enquiry into Shinelock's return. I have set out some of this history, as it is relevant to the position taken by both parties in relation to whether there is a valid claim to use a NTLRD to be set off against profits of Shinelock in the deficit period, ie the period ended March 2015, and the consequences for the argument raised by HMRC as to jurisdiction of this Tribunal.

8. HMRC wrote to Shinelock on 4 May 2016 stating that they were checking the company's tax return for the period ended March 2015. Shinelock instructed Hansuke Consulting

("Hansuke"), and the position taken in correspondence from Hansuke at the outset was that Shinelock was the legal owner of the Property but Mr Ahmed was the beneficial owner and Mr Ahmed was not resident in the UK for tax purposes (and had not been resident in the UK for any tax year since 1991).

9. In their first letter, sent on 17 August 2016, Hansuke set out that:

> "As a result of his funding and guarantee for the bank loan, AA took on the risk associated with the property. In return for this risk, he would receive the full value of the gain on the subsequent disposal of the property."

10. There was some further correspondence and on 20 December 2017 Mr Martin Roberts of HMRC wrote to Shinelock setting out HMRC's understanding of the facts and the points at issue in order to try to bring matters to a conclusion. (Hansuke subsequently responded with corrections to some of those facts.) That letter included (in the context of points in issue):

> "34. In terms of the overall arrangement to distribute money arising from the profits or gains of the company it is worth noting that how the company wishes to distribute its post-tax profits or gains is a different issue from when and how they arose and on whom they should be taxed in the first place."

11. On 8 March 2018 Mr Roberts wrote to Shinelock setting out HMRC's "current view of the matter", which was that Shinelock was the beneficial owner of the Property and liable to corporation tax on the gain. The additional corporation tax was calculated as £19,796.70, plus interest. As well as explaining why HMRC concluded that Shinelock was the beneficial owner, HMRC acknowledged that a trust deed which had been provided did evidence an agreement that Mr Ahmed (rather than anyone else) would be entitled to the net profits or gain on the sale of the Property.

12. On 23 April 2018 Hansuke wrote to HMRC setting out that whilst Mr Ahmed contended that he was the beneficial owner of the Property, they had been instructed to accept that the gain be subject to corporation tax in the hands of Shinelock. That letter then explained that the legal and beneficial ownership position had since been aligned, and the pooling arrangement ended. The letter concluded by requesting that HMRC issue the assessment that they had previously outlined.

13. On 14 May 2018 Mr Roberts responded to Hansuke stating that he had arranged for an assessment to be raised for an overall gain of £94,270. He explained:

> "As stated in our letter dated HMRC's view is that the company was both the beneficial owner and legal owner of the property at Trumps Green. For clarification, paragraph 34 of my letter dated 20/12/2017 referred to how money accumulated in a company is distributed by way of dividends paid to shareholders out of accumulated profits, on which tax has already been accounted for. There was no reference to a contract."

14. That paragraph omits the date of HMRC's previous letter to which reference is made. However, from the context I infer this was the letter of 8 March 2018 – that was Mr Roberts' immediately preceding letter and set out his current view of the matter which included that Shinelock was both the beneficial and legal owner of the Property.

15. HMRC issued what was labelled as a closure notice to Shinelock on 15 May 2018. The computation on that notice set out the income of Shinelock (unamended), being the trading profit and an equal amount of trading loss brought forward. It also included the chargeable gains showing total profits of £94,270, profits chargeable to corporation tax of that amount and corporation tax payable (at 20%) of £18,854.

16. Hansuke stated on 4 June 2018 that Shinelock would be appealing on the grounds that there were still ongoing discussions as to the company's affairs.

17. HMRC responded on 7 June 2018, explaining their conclusion Shinelock was the beneficial owner of the Property. The background facts in that letter do not mention any loans from Mr Ahmed to Shinelock, but in referring to Shinelock's contentions HMRC refer to Shinelock's position that Mr Ahmed provided the funds for the purchase. In setting out HMRC's view the letter notes that a trust document and the accounts show that Mr Ahmed would be entitled to the profits of a sale, but stated that how a company distributes its post-tax profits is a matter for them.

18. On 22 June 2018 Hansuke wrote to HMRC as follows:

> "As you will appreciate, on the assumption that our client accepts HMRC's assertion that the Company was the beneficial owner of the disposed property, then we need to further conclude on the tax treatment of the agreement between AA and Shinelock Limited. This agreement required the Company to make a payment on the sale of the property amounting to the capital gain accruing on the property at the time of the disposal. This is an agreement between AA as a provider of the financial guarantee to the bank financing the Company at the time of the acquisition of the property. This agreement has been explicitly cited in all of the Company's statutory financial accounts prepared in accordance with UK GAAP since 2010 till date. The loan finance used by the Company to acquire the property gives rise to a loan relationship, and any payments made by the Company to obtain the guarantee results in a non-trade loan relationship debit ("NT LRD") which needs to be reflected in the Corporation Tax computation, hence the appeal against the assessment that you have issued.
>
> The payment made by Shinelock on disposal amounted to £305,000, i.e. the gain on disposal computed as the difference between the sale and purchase price of the property. This transaction between AA and the Company is, by definition, a connected party transaction and the debit must therefore be restricted to the amount that would have been payable to a guarantor of the loan had the contract been at arm's length. It is our view that this payment is at or less than arm's length basis, considering the amount of the loan was 105% of the value of the property and the Company had only a net worth of £100 at the time that it acquired the property."

19. The letter then set out that "Accordingly, the calculation the tax should be as follows" and included a computation showing a deduction of the NTLRD offset in the year of £94,270 and the remaining NTLRD carried forward of £210,730.

20. HMRC offered a review of the decision on 2 July 2018, and that letter included HMRC's position that Shinelock did not have a loan relationship with Mr Ahmed, and stating that s465 Corporation Tax Act 2009 ("CTA 2009") explicitly excludes distributions from being dealt with within the loan relationship rules.

21. Hansuke responded on 30 July 2018, asking for a review.

22. Mr Roberts sent a letter to Shinelock on 17 September 2018, stating that the matter would be reviewed independently. He set out HMRC's updated view of the matter, stating that he was required to set this out. That again explained HMRC's reasoning on beneficial ownership, but also responded to the argument put as to the non-trading loan relationship debit. That letter included

> "In respect of the NTLR debit

Your view

49. As part of your appeal you have asked for the gain realised to be treated as an NTLR debit. That is as the cost of AA guaranteeing and providing security for the loan. Your view is that the cost of that guarantee was equal to the value of the gain.

50. You then wish to deduct this cost from the profits of the company in APE 31/03/2015 and carry forward any excess.

51. You view there being a single borrowing arrangement at the time the property was acquired and the cost being deductible under CTA2009 section 307(4)(a) which includes the cost of bringing a loan relationship into existence which includes fees or commission for a loan guarantee.

52. You note CFM33060 on loan relationships which says: "As with credits, the amounts relievable as debits on loan relationships are those that, when taken together, fairly represent, for the accounting period in question, the losses arising to it from its loan relationships and related transactions."

HMRC view

53. This was not a NTLR debit, but was instead a distribution of post-tax profits following the gain realised by the company when the property was disposed of.

54. There was a gain made on the disposal by the company. This is as argued in points 10 to 48. The director then received a distribution out of post-tax profits."

55. If what you are arguing is correct then your view has changed substantially: a. That AA did not make a gain on the disposal of the asset., and b. Instead AA received a payment for guaranteeing the loan.

56. However, this is inconsistent with your view that AA was the beneficial owner of the property and realised a gain personally when it was disposed of.

57. Also as noted above, the loan was made to the company, and there have been no references in the loan agreements to show that AA personally guaranteed the loan. The documents show that the loans were primarily secured against the assets of the company. AA's person liability is not referred to.

58. As it is, the loan was made without the need for a payment to be made to AA and so was made available without the need to incur the expenditure. No liability for the expenditure had been recognised in the accounts at the time. The arrangement was also not reflected in the tax computations.

59. Even if it were deductible: a. It would need to have been deducted when incurred on the acquisition of the property in 2009. b. Any NTLR debit would have been deductible at that point, which was not done and even had it been done you would not be able to offset the gain against the carried forward NTLR amount. c. You have not shown that the fair value of the transaction was established and represented a bargain at arm's length. As no payment was required to in order to obtain and secure the loan, this is likely to be nil.

In summary [NTLR]

60. This was not a NTLR debit, but was instead a distribution of post-tax profits following the gain realised by the company when the property was disposed of."

23. HMRC issued their review conclusion letter on 1 November 2018, upholding the assessment.

24. Shinelock's grounds of appeal (in the Notice of Appeal of 29 November 2018) were that Shinelock was not taxable on the capital gain on the sale of the Property because either:

(1) an amount equal to the gain was a deductible cost (under the loan relationship regime or otherwise), or

(2) Mr Ahmed was the beneficial owner of the Property so the gain was taxable only in his hands.

25. The parties entered ADR and the ADR process concluded in June 2019.

26. HMRC then served their Statement of Case (the "SOC") on 1 August 2019. The SOC emphasised the legal separation between Shinelock and Mr Ahmed (as director and controlling party), and set out HMRC's position that Shinelock was the beneficial owner of the Property (as well as legal owner). The SOC also stated at [51] that Shinelock "has not evidenced that Mr A Ahmed had a contractual entitlement to the gain element of the proceeds". Addressing any loan relationship argument, HMRC's position was that the loan relationship was between Shinelock and the bank; any guarantee Mr Ahmed had provided (which they disputed) was not sufficient to create a loan relationship, and the arrangement between Shinelock and Mr Ahmed does not constitute a non-trading loan relationship and the payment to Mr Ahmed cannot be set off against the capital gain.

27. There was further correspondence between the parties in which Shinelock challenged whether the SOC properly addressed the matters in dispute between the parties in the light of the ADR.

28. The parties agreed a Statement of Agreed Facts (the "SAF") dated 22 July 2020.

29. In Mr Boch's skeleton argument dated 31 December 2020 he set out Shinelock's position that the Payment was deductible either under the loan relationship provisions (with alternative arguments as to whether the relevant loan relationship was that between Shinelock and the bank and/or between Shinelock and Mr Ahmed) or under the property income rules in Part 4 CTA 2009.

30. In HMRC's skeleton argument dated 19 January 2021 Mr Vallis set out HMRC's position that:

(1) the Tribunal does not have jurisdiction to consider the loan relationship argument as Shinelock had not made the necessary claim under s459 CTA 2009 to set off the Payment against the gain by the time the closure notice was issued. Such a claim needed to be made within two years of the end of the accounting period (s460), whereas Shinelock did not mention the possibility of using a the NTLRD until 22 June 2018. The Tribunal only has the power to allow or disallow a claim if it was the subject of a decision contained in a closure notice (by virtue of s50(7A) Taxes Management Act 1970 ("TMA 1970");

(2) the Payment was a distribution and not deductible for corporation tax;

(3) if s307 CTA 2009 can be relied on (which HMRC denied), the loss is only £27,500 and not £305,000; and

(4) the Payment is not deductible under Part 4 CTA 2009.

31. During the hearing Mr Boch stated that Shinelock had decided not to pursue the property income argument.

ISSUES

32. The issues between the parties were as follows:

(1) Whether the Payment was a distribution – Mr Vallis submitted that the Payment was a distribution within one of paragraphs B, E or F of s1000(1) Corporation Tax Act 2010 ("CTA 2010"). Mr Boch submitted that the Payment was not a distribution - it was required to be made, it is outside any of the paragraphs in s1000(1) and it was made at a time when Mr Ahmed was no longer a shareholder and the loans from him to Shinelock did not constitute securities for this purpose.

(2) In relation to Shinelock's argument that the chargeable gain was offset by a NTLRD the issues were:

(a) Whether there was such a NTLRD in any event, ie whether there was a debit of £305,000 to be brought into account under s307 CTA 2009:

(i) Mr Boch submitted that Shinelock had a NTLRD, with the debit either being a loss or expense in respect of the loan relationship between Mr Ahmed and Shinelock (the amount lent being £277,500, ie £175,000 + £72,500 + £30,000) or an expense incurred under or for the purpose of the loan relationship between Shinelock and the bank.

(ii) HMRC's position was:

(A) it accepted that the accounts of Shinelock had been prepared in accordance with GAAP;

(B) there was agreed to be a loan relationship between Mr Ahmed and Shinelock (of £175,000) and between Shinelock and the bank, but the Payment, if it was a debit, was not a loss or expense within s307(3) in relation to either of those loan relationships; and

(C) alternatively, it not being agreed by HMRC that the £72,500 or £30,000 were loans from Mr Ahmed to Shinelock or that the loan (which they did accept had been made) of £175,000 had been repaid, the loss (or expense) arising to Shinelock was £27,500.

(b) Whether a claim had been made by Shinelock as required by s459 CTA 2009 to use such NTLRD in the period ended March 2015:

(i) Mr Boch did not argue that Shinelock had in fact made a claim before the closure notice was issued or within two years of the end of the period ended March 2015. His submission was that Shinelock had made a valid claim to offset this NTLRD on 22 June 2018, which had been accepted by HMRC by its conduct, and it was within the jurisdiction of this Tribunal to consider that claim and the substantive issues as to the loan relationship argument irrespective of the fact that no claim had been made by Shinelock before HMRC issued the closure notice, or HMRC was estopped from arguing that no in-time claim had been made. Alternatively, if this Tribunal did not have jurisdiction, or if the claim was found not to have been made or not to have been allowed, the question of the existence of a NTLRD should be determined by the Tribunal in any event as this was relevant for accounting periods after the period in issue.

(ii) Mr Vallis submitted that under section 50(7A) TMA 1970, the Tribunal only has jurisdiction in respect of claims if they are the subject of a closure notice. Since the closure notice in this case did not have to take account of a

claim (as no such claim had been made at the time the closure notice was issued), the Tribunal does not have jurisdiction to consider such a claim now. Alternatively, such a claim was not within the "matter in question" before the Tribunal in this appeal. Furthermore, HMRC denied that a valid claim had been made, that even if the letter of 22 June 2018 constituted such a claim, it was more than two years after the end of the period in issue and HMRC had not agreed to accept a late claim and the Tribunal does not have jurisdiction to extend the time limit for the making of a claim.

33. HMRC's arguments on jurisdiction constituted an application for the appeal to be struck-out. Those arguments, first put in HMRC's skeleton argument, were heard at the resumed hearing in July 2021. Whilst logically I ought to address my reasoning on that argument first, given that I have heard submissions and evidence in relation to all of the matters in issue, and indeed concluded that I do have jurisdiction, I have instead addressed the question of jurisdiction as the first of the matters in the Discussion further below, but set out first the evidence, my findings of fact and the relevant legislation.

34. In reaching my decision I have taken into consideration all of the submissions (written and oral) made by both parties, but I have not considered it necessary to refer to all of them expressly in this decision notice.

EVIDENCE

35. I was provided with a hearing bundle (a pdf of 477 pages), a supplemental bundle (of 44 pages) and several bundles of authorities (before both the first two days of the hearing and the resumed hearing).

36. The hearing bundle and supplemental bundle included the SAF to which I have already referred, a Statement of Issues (on which neither party relied), correspondence between the parties, exchanges of emails relating to the purchase of the Property, copies of loan offers, security documents, an ADR Exit Document dated 19 June 2019, various unaudited accounts of Shinelock, extracts from the tax returns of Mr Ahmed and witness statements. Both parties served two skeleton arguments.

37. There were witness statement from Mr Ahmed and Mr Roberts, both of whom attended the hearing and were cross-examined on their evidence.

38. The witness statement of Mr Ahmed is dated 15 January 2020. Mr Ahmed is a chartered accountant, and from 2000 to 2016 he had been Group Chief Financial Officer of Habib Bank Limited, where he was based at its head office in Karachi. He was a director of Shinelock from 2008 until 31 December 2014 and the accounts of Shinelock refer to him as the ultimate controlling party.

39. Mr Ahmed had been the point of contact for Shinelock with Habib Bank (which had provided some of the funding to Shinelock for the purchase of the Property), he dealt with the various advisers and he was also the owner of various other property-owing companies, including in particular Helptravel Ltd ("Helptravel"). In correspondence with HMRC, Hansuke (in their letter of 17 August 2016) described Mr Ahmed as the "controlling mind" behind the purchase of the Property and the timing of the disposal.

40. Whilst the hearing bundle included copies of the loan offers made by Habib Bank (as described further in Facts) and some email correspondence dealing with arrangements for the purchase of the Property, there was little documentary evidence available (either in the form of board minutes of Shinelock, intra-group loan agreements, or email records of loans being agreed). Mr Ahmed's explanation was that most emails had been sent to or by him at his Habib Bank email address and he no longer had access to those records. Furthermore, as a family

company (he was shareholder and was a director along with his wife and two children) there was less formality about some of the decision-making.

41. It could be seen from the evidence before me that the property-owing companies did convene board meetings to consider and approve the accounts annually. There were also examples of some companies having passed a resolution which was required for third parties (eg on 16 December 2008 Mr Ahmed confirmed that at a meeting of the board of directors of Gainsbow Estates Limited the company had decided to confirm to NatWest Bank that none of the properties being charged to them would be subject of any other charge without their express approval).

42. I do not consider that Mr Ahmed's departure from Habib Bank (in the context of his employment there) is a complete explanation for the absence of documentation – as Mr Vallis pointed out, it is apparent that some emails were sent to Mr Ahmed's personal email account and so those were available.

43. The significance of this is that much of Mr Ahmed's explanations, in particular about the funding of Shinelock (from himself and arrangements with Helptravel) was uncorroborated. One challenge put to Mr Ahmed by Mr Vallis (which Mr Ahmed denied) was that the transactions took place (be it the purchase of a property, making of a loan, making of a payment) and then he (in his own capacity and as shareholder and director of the various entities) then figured out the details (including how to characterise payments) afterwards. I concluded that Mr Ahmed was honest; but I was troubled by the absence of records, and the generality with which some of the funding was approached, in particular where it was said that loans were novated or assigned between these companies under common ownership. There was no documentary evidence of the loans that were referred to between the Mr Ahmed and the various property-owning companies, or loan agreements between those companies, or notices of assignment or novation.

44. I accept Mr Vallis' challenge was (at least to some extent) made out on the facts – eg, Mr Ahmed's evidence was that he had bid himself on the Property at auction and later decided (obtaining appropriate approvals) that Shinelock would acquire the Property, not him personally. Furthermore, arrangements such as the pooling arrangement for rents (described in the SAF) are consistent with an approach which treated all of the companies as a single economic arrangement belonging to Mr Ahmed.

45. I have taken these reservations into account when making my findings of fact.

46. The witness statement of Mr Roberts was dated 5 December 2019. He had become involved in December 2017 when the (open) enquiry was transferred to him. His witness statement walked through the correspondence between HMRC and Shinelock.

47. This witness statement stood as Mr Roberts' evidence-in-chief. Cross-examination was limited, being confined to:

(1) HMRC's position as to whether there had been an agreement between Shinelock and Mr Ahmed as to the payment of the gain (looking at when this had been accepted, and drawing attention to the apparent changes in HMRC's position from the Exit Document (which accepted this), to the SOC (which didn't), to the SAF (which did) and then to the challenge in HMRC's skeleton; and

(2) Mr Boch referred to the claim under s460 CTA 2009 to use the NTLRD in the same year, and asked whether this point had occurred to Mr Roberts before the skeleton argument was prepared. He said no, because he hadn't read anything from Shinelock or its advisers that they were making a claim.

48. Mr Roberts was a reliable and credible witness. I accept his evidence, but this does not preclude me from making my own findings as to whether or not there was a claim and reaching my own conclusions as to whether or not that was allowed by HMRC.

FACTS

49. The parties have agreed a SAF which is set out (without footnotes) as an appendix hereto (and forms part of this decision notice). I have made additional findings of fact on the basis of the evidence before me.

Bank financing

50. On 9 April 2009 Habib Bank had offered a loan facility of £950,000 to Mr Ahmed (on the terms and conditions of a facility letter of the same date) (the "Ahmed Loan Offer"). That offer would be open for acceptance for 14 days. The facility letter stated that the loan would be a term loan of the lesser of £950,000 and 75% of the market value of the "Scheduled Properties". The purpose of the loan was "to enable [Mr Ahmed] to purchase an investment property and redeem existing mortgages over two flats owned by [Mr Ahmed]". The "Scheduled Properties" were defined as the Property, 9 West Court and 27 West Court. The facility was to be secured by a first legal charge over these Scheduled Properties and by an assignment of all the rents due from them.

51. As set out at [36] of the SAF, 9 West Court and 27 West Court were owned by Helptravel.

52. On 16 April 2009 Habib Bank offered a loan facility of £950,000 to Shinelock, on the terms of a facility letter (the "Shinelock Loan Offer"). As with the Ahmed Loan Offer, this would be a term loan of the lesser of £950,000 and 75% of the market value of the "Scheduled Properties". The purpose of the loan was to enable Shinelock to purchase the Property, and to provide funds to redeem existing mortgages over two flats owned by Helptravel. The Scheduled Properties were the Property, 9 West Court and 27 West Court, and the facility was to be secured by a first legal charge over the Property and third party first legal charges over 9 West Court and 27 West Court, as well as an assignment of all the rents due from the Scheduled Properties.

53. The Shinelock Loan Offer makes no reference to Mr Ahmed. It does refer to Helptravel, both referring to it as the owner of 9 West Court and 27 West Court in the context of the purpose of the loan, and also in the conditions requiring such documentation as the bank may consider necessary whether between Shinelock and/or Helptravel and/or the bank in the context of part of the facility being used to redeem the existing mortgages of Helptravel on these two flats and Helptravel providing third party security over these flats, noting that "no group relationship is understood to exist" between Shinelock and Helptravel.

54. Shinelock accepted the Shinelock Loan Offer.

Decision that Shinelock purchase the Property

55. Mr Ahmed's evidence was that in March 2009 (and until after April 2015) he had been a UK non-resident for over 15 years and was exempt from UK CGT. This was not challenged by HMRC and I accept this evidence.

56. Mr Ahmed could have bought the Property in his personal capacity without the involvement of Shinelock – he had been the successful bidder at auction (and the auction contract made him liable if Shinelock did not complete the purchase), he had paid the deposit from his own bank account (as Shinelock did not have an account at that time), and had an offer letter of funding from Habib Bank (ie the Ahmed Loan Offer).

57. Other options available to him included procuring that a company (of which he would be the shareholder) acquired the Property. Mr Ahmed's evidence was that as he was the CFO of

a listed bank, he did not want to be associated with an offshore structure, and so any company he used would be a UK-resident company. He offered Shinelock the opportunity to purchase the Property – Shinelock would not receive the actual rental income but the amounts allocated to it from the pooling arrangement. The board of directors of Shinelock agreed.

Funding of Shinelock

58. As can be seen from the Shinelock Loan Offer, Habib Bank would only provide a loan of up to 75% of the market value of the secured properties. Additional funding (using this work neutrally at this stage) of £277,500 was provided by Mr Ahmed to Shinelock.

59. Habib Bank also required additional security. Mr Ahmed arranged for two properties owned by Helptravel, 9 West Court and 27 West Court, to be offered as security, but both were subject to mortgages with another lender. To avoid the need for an intercreditor agreement to be entered into, Shinelock was prepared to buy both of those properties from Helptravel. However, 9 West Court had already been identified for potential sale. The plan was therefore that Shinelock would buy 27 West Court from Helptravel, and would give security over it to Habib Bank, and that 9 West Court would be offered as security by Helptravel for a temporary period and would later be replaced by different security.

60. There was disagreement between the parties as to the character of the £277,500 provided by Mr Ahmed to Shinelock. The SAF includes:

> "12. AA provided cash of approximately £280,000 to the Appellant as follows:
>
> The deposit on exchange of contracts of £72,500, when AA attended the auction on 31 March 2009. This amount was paid from the personal account of AA on the day of the auction;
>
> A loan of £175,000 to purchase 27 West Court on 12 May 2009; and
>
> £30,000 for Stamp Duty Land Tax ("SDLT") on 2 June 2009, which was transferred to the Appellant's account."

61. I have throughout ignored this reference to "approximately £280,000" and referred to the amount as £277,500, as that is the agreed amount in question. Shinelock's position was that all three of these amounts set out in [12] of the SAF had been loaned from Mr Ahmed to Shinelock, and that these amounts had been repaid by the end of 2009, by a combination of assignments/novations involving Helptravel together with the repayment of £118,000 by bank transfer from Shinelock to Mr Ahmed.

62. Whilst the SAF at [12] refers to HMRC agreeing that there was a loan from Mr Ahmed to Shinelock of £175,000 (and thus to this extent it was accepted that there was a loan relationship between Mr Ahmed and Shinelock), HMRC did not accept:

(1) that Mr Ahmed had loaned the additional £72,500 or £30,000 (although they did accept that these amounts had been provided as described above),

(2) the description of loans having been assigned or novated between Shinelock and Helptravel, or

(3) that the £175,000 (or the £72,500 or £30,000 if these were found to have been lent) had been repaid prior to the disposal of the Property and the making of the Payment (ie part of HMRC's alternative argument was that the Payment included repayment of the £175,000 and other amounts found to be loaned from Mr Ahmed).

63. Dealing first with the £72,500 and the £30,000, it was agreed by HMRC that Mr Ahmed had funded these amounts which had assisted with Shinelock's purchase of the Property. Mr

Ahmed's evidence was that these amounts were lent by him to Shinelock. There is no documentation to support that; but, similarly, there is no documentation to support a different characterisation. It is clear that this was not the subscription price for shares (as no new shares were issued) and I consider that the only other potentially plausible characterisation would be that these were capital contributions to the company. Having considered Mr Ahmed's evidence, and having regard to the lack of evidence to support any contrary conclusion, and indeed the lack of any obvious rationale for providing these amounts in a different form to the £175,000 which had been loaned, I have concluded that these amounts were lent by Mr Ahmed to Shinelock. He had therefore loaned £277,500 to Shinelock.

64. The next disputed fact concerns the repayment (or otherwise) of this loan.

65. Shinelock's position was that this had all been repaid by the end of 2009, ie the year in which the Property was purchased. Mr Ahmed stated that after completion of the acquisition of the Property, and Shinelock's purchase of 27 West Court from Helptravel, Shinelock owed £843,000 to Habib Bank and what he described as a "net amount" of £117,000 to himself. That net amount was then repaid in November 2009 by bank transfers (totalling £118,000).

66. This outcome appears to have been based on the following:

(1) The SAF records at [16] that Shinelock drew down £843,875 from Habib Bank; and at [37] that £162,457.85 was required to redeem the mortgages on the West Court properties.

(2) Mr Ahmed said that Shinelock provided some of the moneys drawn down from Habib Bank to redeem those mortgages, and that resulted in Helptravel owing Shinelock £163,000.

(3) Mr Ahmed said that no funds needed to move in respect of the £175,000 he advanced to Shinelock – he lent this amount to Shinelock, which applied it as purchase price for 27 West Court and was thus payable to Helptravel, and Helptravel then applied this to repay pre-existing debt owed to Mr Ahmed. In that way, the amount previously owed by Helptravel to Mr Ahmed was replaced by a new debt of the same amount from Shinelock to Mr Ahmed.

(4) The "net amount" of £117,000 is, I infer, the difference between the "approximately £280,000" owed by Shinelock to Mr Ahmed and the £163,000 owed by Helptravel to Shinelock. Using the agreed actual numbers, such a "net amount" (not accepting at this stage that it is right to characterise the transactions in this way) is £115,042.20.

(5) Mr Ahmed's evidence was that £118,000 was then repaid by Shinelock to him in November 2009.

67. Some difficulty is caused by the lack of contemporaneous documentation, other than a couple of e-mail trails, and the rounding of numbers. I accept (and consequently find as facts) that:

(1) Some of the moneys drawn down by Shinelock from Habib Bank were applied to redeem the mortgages on the West Court properties and that as a result of this Helptravel owed £162,457.85 to Shinelock.

(2) The arrangements relating to the £175,000 were as described by Mr Ahmed, this being supported by some of the contemporaneous email exchanges setting out the money flows on completion. No cash (or bank transfers) moved in respect of this amount, and the result was that Shinelock owed £175,000 to Mr Ahmed. This outcome is in any event an agreed fact.

(3) Shinelock repaid £118,000 to Mr Ahmed in November 2009, this evidence of Mr Ahmed being supported by evidence of two bank transfers totalling that amount having been made.

68. This leaves the position that by the end of November 2009 (i) Shinelock owed £159,500 to Mr Ahmed, and (ii) Helptravel owed £162,457.85 to Shinelock. Mr Ahmed said this all "netted off" such that the full loan had been repaid. This would require me to accept that Shinelock assigned the right to receive the Helptravel debt to Mr Ahmed. There was no documentary evidence of this. The position is not helped by the fact that I had some (but not all) of the accounts of Shinelock which do not show these various loans (a matter which is explained by Mr Boch on the basis that everything was repaid within the year so there was nothing to record at the balanace sheet date), there were no accounts of Helptravel, the loans were undocumented and there was no written evidence (eg emails, notice of assignment) of the assignment. Whilst I do recognise that Mr Ahmed looked at matters on this net basis, effectively conflating the companies which he owned together, I am not satisfied that the Helptravel loan was assigned by Shinelock to him. I have already noted that there is much to be said for Mr Vallis' challenge that transactions occurred and then Mr Ahmed (in his personal capacity and as director/shareholder) sought to work out afterwards how to record matters.

69. This means that I am not satisfied that the full amount of the £277,500 loan from Mr Ahmed to Shinelock had already been repaid prior to the sale of the Property and the making of the Payment. I would add that I do not regard this of any particular significance but having heard the evidence on the matter make this finding as the primary fact-finding Tribunal.

Agreement to pay any capital gain to Mr Ahmed

70. The SAF records at [11]:

> "There is a contract stating that the Appellant had to pay any capital gain to AA in return for financing or guarantees provided by AA. The contract was in the form of a verbal agreement, rather than a formal written document."

71. The SAF deals further with this point about "financing or guarantees" later, recording as follows:

> "48. AA did not provide a personal guarantee to the Appellant for its loan from the bank to purchase the property.
>
> 49. There is no documentation showing that AA was responsible for any loan payments to the bank in his personal capacity.
>
> 50. The loan facility agreement confirms that HT was required to provide a guarantee, by way of a charge over the two properties referred to above, the West Court properties, to the Appellant to purchase the property.
>
> 51. Per the loan facility, HT's liability was limited to these two properties.
>
> 52. Any default on the loan by the Appellant did not transfer any legal responsibility on AA for amounts not paid.
>
> 53. AA did not provide the guarantee directly for the loan to purchase the property. These were provided by the Appellant and by HT (by the security over properties owned by HT at the time the loan was taken out)."

72. Mr Ahmed explained that if Shinelock had not agreed to pay him the amount of any gain realised on the Property then he would not otherwise have given his assistance to Shinelock in the form of providing loans, arranging for the purchase of 27 West Court from Helptravel or arranging for Helptravel to give security over 9 West Court. His rationale was that he could otherwise have bought the Property himself, and all the gain would then belong to him in any event.

73. The existence of the agreement between Shinelock and Mr Ahmed is an agreed fact. However, it raises further questions:

(1) The verbal agreement itself is lacking in detail (unsurprisingly given its status as a verbal agreement) and little detail was agreed between the parties when preparing the SAF. The point where this is most evident is the reference to the "gain". This was calculated between Mr Ahmed and Shinelock when the Payment was made as £305,000, ie the difference between the purchase and sale price of the Property, with no regard to the fact that this did not reflect the economic gain realised by Shinelock (which was agreed to be £260,178 at [23] of the SAF, after the costs and expenses of purchase and sale were taken into account).

(2) Mr Ahmed said that it was essential that Shinelock agree to pay him the gain, as otherwise he could have bought the Property himself. The challenge by Mr Vallis was as to the intention of the parties in reaching this agreement, and what the payment was for (eg a fee for the loan, or for middle man services), with him putting it to Mr Ahmed that the purpose was to transfer the gain into Mr Ahmed's name for tax purposes. I do not accept Mr Ahmed's explanation – he was the sole shareholder of Shinelock, he and his family were the directors, and he treated the assets of the various property-owing companies he owned as effectively belonging to him. There was no need for there to be an agreement to ensure that the gain was paid out to him by Shinelock; economically he would benefit from it whilst it was within Shinelock, and he could then control what happened to it (eg it could be distributed to him as shareholder or re-invested).

(3) Shinelock's agreement is said to be "in return for financing or guarantees" provided by Mr Ahmed. However, there were no direct guarantees provided by Mr Ahmed, only by virtue of the security provided by Helptravel.

(4) Mr Ahmed's evidence was that there was one arrangement between himself, Habib Bank, Shinelock and Helptravel. His own activities were more than "middle man" or support services – he arranged the funding with the bank for Shinelock, lent money himself and arranged for Helptravel (a third party to Shinelock) to grant security over one of its own properties. It was in return for this that Shinelock agreed to pay him the gain. This evidence goes beyond the agreed facts. On the basis of the evidence before me:

(a) Habib Bank advanced monies to Shinelock pursuant to a bilateral agreement between itself and Shinelock, albeit one which acknowledged that the properties over which it was taking security included one which was not owned by Shinelock.

(b) Leaving aside any arrangements which existed between Habib Bank and Mr Ahmed in relation to his role as CFO within that group, the only contract relevant to this appeal to which Habib Bank was party was the secured loan advanced to Shinelock. Habib Bank then had legal charges over the Property, 9 West Court and 27 West Court. There was no agreement between Mr Ahmed and Habib Bank in relation to this security.

(c) Mr Ahmed was the sole shareholder of Shinelock; he assisted it with its proposed purchase of the Property in his capacity as such.

74. This agreement was referenced in the accounts of Shinelock. I was provided with a copy of the accounts of Shinelock for some of the potentially relevant periods:

(1) The accounts for Shinelock for the period ended 31 March 2010 (the "2010 Accounts"), ie the year in which Shinelock acquired the Property, were prepared in accordance with the provisions applicable to companies subject to the small companies'

regime. They showed fixed assets of £929,000, bank loans and overdrafts of £988,371 (all of which are listed as secured debts), share capital of £72,000. There is then a note of related party disclosures:

> "Name of the ultimate controlling party during the period: A Ahmed. Name of related party: A Ahmed. Relationship ultimate controlling party. "Description of the transaction. Financial Guarantee. Balance at 01st April 2009 0. Balance at 31st March 2010 929,000. All asset purchases are financed by or guaranteed by the ultimate controlling party in exchange for capital gains, if any, thereon."

(2) Those for the period ended 31 March 2011 continued to record the fixed assets of £929,000. The notes then show the bank loans and overdrafts as being £988,371 (ie exactly the same amount as in the 2010 Accounts), but also state that for 2010 this was £921,398, which does not reflect what had been stated in the 2010 Accounts. No explanation is contained in the accounts for why the amount was now being recorded differently. The notes also include a related party disclosure, identifying Mr Ahmed as ultimate controlling party and related party, describing the transaction as a Financial Guarantee and stating:

> "All assets purchased by the company are financed by or guaranteed by the ultimate controlling party in exchange for capital gains, if any, thereon."

(3) This disclosure is also set out in the accounts for the period ended 31 March 2016.

(4) The accounts for the period ended 31 March 2018 include a note that

> "All assets held by the company are financed by or guaranteed by the [Ultimate Controlling Party] in exchange for Capital gains, if any."

Accounts for the accounting period ended 31 March 2015

75. Somewhat surprisingly, neither party referred me to the accounts of Shinelock for the accounting period ended 31 March 2015 (the "2015 Accounts"), nor was there a copy of such accounts in any of the bundles. No explanation was offered for this omission.

76. I did have a copy of Shinelock's tax return and computation for that year, and Mr Ahmed's witness statement included a comparison of different accounting treatments. As set out in Issues and considered further in the Discussion, HMRC have not challenged whether or not the accounts of Shinelock for this period were prepared in accordance with GAAP. This does not mean that the accounting treatment was irrelevant. At this stage I deal only with my findings as to what those accounts showed.

77. The tax computation filed by Shinelock alongside its tax return for the year ended March 2015 does not include any notes. Furthermore, I bear in mind that the tax return (and computation) was prepared on the basis of Shinelock's then position that the Property had been beneficially owned by Mr Ahmed and, moreover, that these were not the profit and loss account of Shinelock required to be prepared by the Companies Act.

(1) The first page of the computation had a summary of figures transferred to the return, showing trading and professional profits (Box 3): £2,695, trading losses brought forward (Box 4): £2,695, net trading and professional profits (Box 5): £0, profits before other deductions and reliefs (Box 21): £0 and total profits chargeable to corporation tax (Box 37): £0.

(2) There is then a summary page dealing with the trading losses brought forward, setting out the amount to be carried forward.

(3) There is then a page setting out the Adjustments, setting out profit before tax: £2,695, and a line item under Additions of Net loss on sale of fixed assets: £0 and a single line item under Deductions of Non-trade interest received: £0, giving an adjusted trading profit for the period: £2,695.

(4) The detailed profit and loss sets out totals for turnover, cost of sales and thus gross profit (of £25,052). There is then a page detailing expenses (of £22,367).

78. From this review of the tax computation, the existence of a line item of "Net loss on sale of fixed assets" is the only potentially relevant item (albeit that the adjustment is recorded as nil).

79. The accounting treatment had been explained by Shinelock to HMRC at various times, including during the ADR process. I do not have notes of those meetings, only those explanations in correspondence. HMRC did not serve their SOC until after the ADR process concluded without resolution. Following receipt of that SOC, there was then a series of correspondence in which Shinelock was seeking to clarify the matters in issue, and obtain various confirmations from HMRC as to their position on certain matters. This correspondence was not, therefore, pleadings or witness evidence, but it does shed some light on what Shinelock says was the accounting treatment adopted.

80. In a letter dated 29 October 2019, sent by Bushra Ahmed, Mr Ahmed's wife and one of the directors of Shinelock, she referred to the accounting treatment and included an annexure describing the net basis adopted. That annexure explained:

(1) FRS102 permitted the accounts to be drawn up on either a net basis or a gross basis.

(2) Shinelock was satisfied that the conditions for using a net basis were met and accordingly accounted for the gain arising on sale of the Property on a net basis ie the gain on sale and related expenses was not recorded in the company's financial statements in the year ended March 2015. "So the items shown as a, b and c below were all netted and excluded from the financial statements." Correspondingly, Mr Ahmed as the beneficiary also showed the gain on sale arising from the sale of the Property in his tax return in the appropriate period.

(3) The gross basis would require Shinelock to show the gain on sales and the relevant costs of business as separate items. The entries would consist of a) the gain on sale of the Property (amounting to £305,000, difference of selling and buying price b) Cost of property acquisition and sale (SDLT £29,000, other costs £15,822 totalling £44,822) c) Cost of Financial guarantee/assistance contractually payable and paid to AA £305,000.

81. Mr Ahmed explained in his written and oral evidence:

(1) Shinelock adopted simplified GAAP for small companies. The first principle is that you have to show substance over form, and the wording of GAAP is "must". This was the reason that the Property was considered to be beneficially owned by him. The second principle is that you do not show certain transactions. If you have a contingent liability which is highly uncertain and cannot be estimated readily, then you do not record it, but only give a description in the accounts.

(2) At the time of the purchase of the Property, you would have no provision for the Payment in the accounts as it is not possible to estimate reliably as you don't know whether there will be a gain. As there was a contingent liability, it was necessary to make a disclosure, and that is what the disclosure in the accounts (which can be seen from the 2010 Accounts onwards) does.

(3) At the time of sale of the Property, the liability becomes certain and you therefore book it. However, it is not recorded as an expense because it is netted-off. In the intervening period, the position is the same as the period of acquisition. GAAP does not allow you to show the notional gain as a market value movement because it is highly uncertain. An estimate would have been a foolish action.

82. Mr Ahmed's witness statement included a comparison of what he said was the gross and net basis:

Financial year	2010		2011-2014		2015	
	Net	Gross	Net	Gross	Net	Gross
Balance Sheet						
Asset recorded on cost	Yes	Yes	Yes	Yes	No (sold)	No (sold)
Revaluation	No	No	No (not entitled)	No (not entitled)	No	No
Liability	No	No	No	No	No	No
Contingent liability	Yes	Yes	Yes	Yes	No	No
Profit and loss account						
Gain on sale	0	0	0	0	0	£305,000
Cost of NTLR/guarantee	0	0	0	0	0	£-305,000
Net effect on reported pretax profit						nil

83. Mr Vallis challenged Mr Ahmed's explanation. I did not have the benefit of any expert evidence to assist me. I bear in mind that s307(2) CTA 2009 provides that the general rule is that the amounts to be brought into account as credits and debits are those that are "recognised in determining the company's profit or loss for the period" in accordance with GAAP.

84. I accept that the 2015 Accounts were prepared on the net basis. However, I do have some difficulty with what that meant in terms of presentation:

(1) The absence of the actual accounts means that I am not able to corroborate that the net basis used was that as illustrated by Mr Ahmed in the table above. In particular, I cannot check that there are line items for "Gain on sale", or "Cost of NTLR/guarantee". So, when Mr Ahmed says that the entries are 0, does this mean that there is a line item, but with the amount recorded as £0 or that there is no line item and nothing appears at all.

(2) Mr Ahmed said that the contingent liability (to pay the gain to him) is not shown in the 2015 Accounts on either the net or the gross basis. I infer the rationale is that by 31 March 2015, the liability crystallised and the payment had been made. But this would suggest that no contingent liability is recorded in future years either; but that is not the case as the disclosure is set out in later accounting periods.

(3) The letter of 29 October 2019 says that the gain was not recorded and refers to the gross amounts as having been "netted and excluded". I do not follow how the three amounts in question can be so netted (as the method adopted for computing the gain means that the three amounts do not net out to zero); but in any event, the reference to these amounts, one of which is the liability to Mr Ahmed of £305,000 being "excluded" implies that there was no entry at all made.

85. On the basis of the evidence before me, I infer (contrary to the table to Mr Ahmed's witness statement) that the 2015 Accounts did include a related party disclosure stating that the capital gain (if any) was payable to Mr Ahmed (as such a disclosure was included in both prior and subsequent years) and that there was no line item labelled sale of the Property (or similar) but that instead adjustments were made on the balance sheet to fixed assets/bank loans.

Departure of Mr Ahmed from Shinelock

86. Mr Ahmed was a director of Shinelock from 2008 until 31 December 2014. His evidence at the hearing (which was not challenged) was that he has not been re-appointed. The absence of such re-appointment differs from some of the explanations in the bundle, but as the matter was addressed directly by Mr Ahmed in evidence and not challenged I find that he has not since been re-appointed.

87. Mr Ahmed sold all of the shares in Shinelock to Tahir Sadiq on 30 September 2014. Mr Sadiq was then appointed as a director of Shinelock in January 2015.

88. The explanation for this was that Mr Ahmed was under consideration to be appointed as CEO of a UK subsidiary of Habib Bank and it would be inappropriate for him to have a relationship with a borrower (ie Shinelock). Mr Ahmed therefore sold his shares to Mr Sadiq, a friend of his, with an option to buy them back (which he later did). It then became unfeasible for Mr Ahmed to move back to the UK (because of the CGT liability which would have arisen) and so he did not take this position.

89. I accept that explanation. I did not have any further details as to the terms of the sale or the buy-back, or the option arrangement.

RELEVANT LEGISLATION

Enquiries, closure notices and jurisdiction

90. Paragraph 24 of Schedule 18 Finance Act 1998 ("FA 1998") provides that HMRC may, if they give notice, enquire into a company's tax return. Such an enquiry is brought to an end by the issue of a closure notice.

91. Paragraph 32 of Schedule 18 provides:

> "An enquiry is completed when [HMRC] by notice (a "closure notice") inform the company that they have completed their enquiry and state their conclusions."

92. Paragraph 34 sets out the requirements as to the form and contents of the closure notice:

> "(1) This paragraph applies where a closure notice is given to a company by an officer.
>
> (2) The closure notice must—
>
> (a) state that, in the officer's opinion, no amendment is required of the return that was the subject of the enquiry, or
>
> (b) make the amendments of that return that are required—
>
> (i) to give effect to the conclusions stated in the notice, and
>
> (ii) in the case of a return for the wrong period, to make it a return appropriate to the designated period.
>
> (2A) …
>
> (3) An appeal may be brought against an amendment of a company's return under sub-paragraph (2) …"

93. The relevant provisions dealing with the review procedure and appeals to the Tribunal are set out in TMA 1970:

"**49B Appellant requires review by HMRC**

(1) Subsections (2) and (3) apply if the appellant notifies HMRC that the appellant requires HMRC to review the matter in question.

(2) HMRC must, within the relevant period, notify the appellant of HMRC's view of the matter in question.

(3) HMRC must review the matter in question in accordance with section 49E.

(4) The appellant may not notify HMRC that the appellant requires HMRC to review the matter in question and HMRC shall not be required to conduct a review if—

(a) the appellant has already given a notification under this section in relation to the matter in question,

(b) HMRC have given a notification under section 49C in relation to the matter in question, or

(c) the appellant has notified the appeal to the tribunal under section 49D.

(5) In this section "relevant period" means—

(a) the period of 30 days beginning with the day on which HMRC receive the notification from the appellant, or

(b) such longer period as is reasonable.

49C HMRC offer review

(1) Subsections (2) to (6) apply if HMRC notify the appellant of an offer to review the matter in question.

(2) When HMRC notify the appellant of the offer, HMRC must also notify the appellant of HMRC's view of the matter in question.

(3) If, within the acceptance period, the appellant notifies HMRC of acceptance of the offer, HMRC must review the matter in question in accordance with section 49E.

(4) If the appellant does not give HMRC such a notification within the acceptance period, HMRC's view of the matter in question is to be treated as if it were contained in an agreement in writing under section 54(1) for the settlement of the matter.

(5) The appellant may not give notice under section 54(2) (desire to repudiate or resile from agreement) in a case where subsection (4) applies.

(6) Subsection (4) does not apply to the matter in question if, or to the extent that, the appellant notifies the appeal to the tribunal under section 49H.

(7) HMRC may not notify the appellant of an offer to review the matter in question (and, accordingly, HMRC shall not be required to conduct a review) if—

(a) HMRC have already given a notification under this section in relation to the matter in question,

(b) the appellant has given a notification under section 49B in relation to the matter in question, or

(c) the appellant has notified the appeal to the tribunal under section 49D.

(8) In this section “acceptance period” means the period of 30 days beginning with the date of the document by which HMRC notify the appellant of the offer to review the matter in question.

…

49E Nature of review etc

(1) This section applies if HMRC are required by section 49B or 49C to review the matter in question.

(2) The nature and extent of the review are to be such as appear appropriate to HMRC in the circumstances.

(3) For the purpose of subsection (2), HMRC must, in particular, have regard to steps taken before the beginning of the review—

(a) by HMRC in deciding the matter in question, and

(b) by any person in seeking to resolve disagreement about the matter in question.

(4) The review must take account of any representations made by the appellant at a stage which gives HMRC a reasonable opportunity to consider them.

(5) The review may conclude that HMRC's view of the matter in question is to be—

(a) upheld,

(b) varied, or

(c) cancelled.

(6) HMRC must notify the appellant of the conclusions of the review and their reasoning within—

(a) the period of 45 days beginning with the relevant day, or

(b) such other period as may be agreed.

(7) In subsection (6) “relevant day” means—

(a) in a case where the appellant required the review, the day when HMRC notified the appellant of HMRC's view of the matter in question,

(b) in a case where HMRC offered the review, the day when HMRC received notification of the appellant's acceptance of the offer.

(8) Where HMRC are required to undertake a review but do not give notice of the conclusions within the time period specified in subsection (6), the review is to be treated as having concluded that HMRC's view of the matter in question (see sections 49B(2) and 49C(2)) is upheld.

(9) If subsection (8) applies, HMRC must notify the appellant of the conclusion which the review is treated as having reached.

49F Effect of conclusions of review

(1) This section applies if HMRC give notice of the conclusions of a review (see section 49E(6) and (9)).

(2) The conclusions are to be treated as if they were an agreement in writing under section 54(1) for the settlement of the matter in question.

(3) The appellant may not give notice under section 54(2) (desire to repudiate or resile from agreement) in a case where subsection (2) applies.

(4) Subsection (2) does not apply to the matter in question if, or to the extent that, the appellant notifies the appeal to the tribunal under section 49G.

49G Notifying appeal to tribunal after review concluded

(1) This section applies if—

(a) HMRC have given notice of the conclusions of a review in accordance with section 49E, or

(b) the period specified in section 49E (6) has ended and HMRC have not given notice of the conclusions of the review.

(2) The appellant may notify the appeal to the tribunal within the post-review period.

(3) If the post-review period has ended, the appellant may notify the appeal to the tribunal only if the tribunal gives permission.

(4) If the appellant notifies the appeal to the tribunal, the tribunal is to determine the matter in question.

(5) In this section "post-review period" means—

(a) in a case falling within subsection (1)(a), the period of 30 days beginning with the date of the document in which HMRC give notice of the conclusions of the review in accordance with section 49E(6), or

(b) in a case falling within subsection (1)(b), the period that—

(i) begins with the day following the last day of the period specified in section 49E (6), and

(ii) ends 30 days after the date of the document in which HMRC give notice of the conclusions of the review in accordance with section 49E (9).

…

49I Interpretation of sections 49A to 49H

(1) In sections 49A to 49H—

(a) "matter in question" means the matter to which an appeal relates;

(b) a reference to a notification is a reference to a notification in writing."

94. Section 50 TMA 1970 is headed Procedure and the sub-sections to which I was referred are:

"50(6) If, on an appeal notified to the tribunal, the tribunal decides–

(a) that the appellant is overcharged by a self-assessment;

(b) that any amounts contained in a partnership statement are excessive; or

(c) that the appellant is overcharged by an assessment other than a self-assessment,

the assessment or amounts shall be reduced accordingly, but otherwise the assessment or statement shall stand good.

…

50(7A) If, on an appeal notified to the tribunal, the tribunal decides that a claim or election which was the subject of a decision contained in a closure notice under section 28A of this Act should have been allowed or disallowed to an extent different from that specified in the notice, the claim or election shall be allowed or disallowed accordingly to the extent that the tribunal

decides is appropriate, but otherwise the decision in the notice shall stand good.

50(8) Where, on an appeal notified to the tribunal against an assessment (other than a self-assessment) which–

(a) assesses an amount which is chargeable to tax, and

(b) charges tax on the amount assessed, the tribunal decides as mentioned in subsection (6) or (7) above,

the tribunal may, unless the circumstances of the case otherwise require, reduce or, as the case may be, increase only the amount assessed; and where any appeal notified to the tribunal is so determined the tax charged by the assessment shall be taken to have been reduced or increased accordingly.

...

50(10) Where an appeal is notified to the tribunal, the decision of the tribunal on the appeal is final and conclusive."

Distributions

95. The relevant provisions of CTA 2010 are:

"**1000 Meaning of "distribution"**

(1) In the Corporation Tax Acts "distribution", in relation to any company, means anything falling within any of the following paragraphs.

A Any dividend paid by the company, including a capital dividend.

B Any other distribution out of assets of the company in respect of shares in the company, except however much (if any) of the distribution—

(a) represents repayment of capital on the shares, or

(b) is (when it is made) equal in amount or value to any new consideration received by the company for the distribution.

For the purposes of this paragraph it does not matter whether the distribution is in cash or not.

C Any redeemable share capital issued by the company—

(a) in respect of shares in, or securities of, the company, and

(b) otherwise than for new consideration (see sections 1003 and 1115).

D Any security issued by the company—

(a) in respect of shares in, or securities of, the company, and

(b) otherwise than for new consideration (see sections 1004 and 1115).

E Any interest or other distribution out of assets of the company in respect of securities of the company which are non-commercial securities (as defined in section 1005), except—

(a) however much (if any) of the distribution represents the principal secured by the securities, and

(b) however much (if any) of the distribution represents a reasonable commercial return for the use of the principal.

F Any interest or other distribution out of assets of the company in respect of securities of the company which are special securities (as defined in section 1015), except—

(a) however much (if any) of the distribution represents the principal secured by the securities, and

(b) however much (if any) of the distribution falls within paragraph E.

G Any amount treated as a distribution by section 1020 (transfers of assets or liabilities).

H Any amount treated as a distribution by section 1022 (bonus issues following repayment of share capital).

(2) In the Corporation Tax Acts "distribution", in relation to a close company, also includes anything treated as a distribution by section 1064 (certain expenses of close companies treated as distributions).

(3) See also section 1072 (which extends the meaning of "distribution" in relation to members of a 90% group).

…

1005 Meaning of "non-commercial securities"

For the purposes of paragraph E in section 1000(1) securities of a company are non commercial securities if the consideration given by the company under the securities for the use of the principal secured by them represents more than a reasonable commercial return for the use of that principal.

…

1015 Meaning of "special securities"

(1) Securities of a company are special securities for the purposes of paragraph F in section 1000(1) if they meet any of conditions A to E.

(2) Condition A is that the securities are issued as described in paragraph D in section 1000(1) (securities issued otherwise than for new consideration).

(3) Condition B is that—

(a) the securities—

(i) are convertible (directly or indirectly) into shares in the company, or

(ii) carry a right to receive shares in or securities of the company, and

(b) the securities are neither listed on a recognised stock exchange nor issued on terms which are reasonably comparable with the terms of issue of securities listed on a recognised stock exchange.

(4) Condition C is that under the securities the consideration given by the company for the use of the principal secured depends (to any extent) on the results of—

(a) the company's business, or

(b) any part of the company's business.

(5) Condition D is that the securities are connected with shares in the company (see section 1017(2)).

(6) Condition E is that the securities are equity notes—

(a) issued by the company ("the issuing company"), and

(b) held by a company which—

(i) is associated with the issuing company, or

(ii) is a funded company (see section 1017(3)).

…

1020 Transfers of assets or liabilities treated as distributions

(1) This section applies if on a transfer of assets or liabilities—

(a) by a company to its members, or

(b) to a company by its members,

the amount or value of the benefit received by a member exceeds the amount or value of any new consideration given by the member.

(2) The company is treated for the purposes of the Corporation Tax Acts as making a distribution to the member of an amount equal to the excess.

(2A) But the company is not treated as making a distribution under subsection (2) if the transfer of assets or liabilities—

(a) is a distribution by virtue of paragraph B in section 1000(1), or

(b) would be such a distribution in the absence of sub-paragraph (a) of that paragraph (distribution representing repayment of capital on the shares).

(3) For the purposes of subsection (1) the amount or value of a benefit, or of any consideration, is determined in accordance with the market value.

…

1113 "In respect of shares"

(1) In this Part "in respect of shares in the company" , in relation to a company which is a member of a 90% group, means in respect of shares in—

(a) that company, or

(b) any other company in the group.

(2) Nothing in subsection (1) requires a company to be treated as making a distribution to any company which is in the same group and is UK resident.

(3) For the purposes of this Part a thing is regarded as done in respect of a share if it is done to a person—

(a) as the holder of the share, or

(b) as the person who held the share at a particular time.

(4) For the purposes of this Part a thing is also regarded as done in respect of a share if it is done in pursuance of a right granted, or an offer made, in respect of a share.

…

1114 "In respect of securities"

(1) In this Part "in respect of securities of the company", in relation to a company which is a member of a 90% group, means in respect of securities of—

(a) that company, or

(b) any other company in the group.

(2) Nothing in subsection (1) requires a company to be treated as making a distribution to any company which is in the same group and is UK resident.

(3) For the purposes of this Part, except where the context otherwise requires—

(a) interest paid by a company on money advanced without the issue of a security for the advance, or

(b) other consideration given by a company for the use of money so advanced,

is treated as if paid, or given, in respect of a security issued for the advance by the company.

(4) For the purposes of this Part a thing is regarded as done in respect of a security if it is done to a person—

(a) as the holder of the security, or

(b) as the person who held the security at a particular time.

(5) For the purposes of this Part a thing is also regarded as done in respect of a security if it is done in pursuance of a right granted, or an offer made, in respect of a security.

…

1117 Other interpretation

(1) In this Part, except where the context otherwise requires—

"security" includes securities not creating or evidencing a charge on assets, and

"share" includes stock, and any other interest of a member in a company.

(2) Subsection (1) does not affect the meaning of "share" in section 1054 (building society payments).

(3) For the purposes of this Part a distribution is treated as made out of assets of a company if the cost falls on the company.

…"

Loan relationships

96. The loan relationships provisions are contained in CTA 2009, the relevant provisions of which are:

"292 Overview of Part

(1) This Part sets out how profits and deficits arising to a company from its loan relationships are brought into account for corporation tax purposes.

(2) For the meaning of "loan relationship" see section 302 and Part 6 (relationships treated as loan relationships etc).

(3) For how such profits and deficits are calculated and brought into account, see —

(a) section 296 (profits and deficits to be calculated using credits and debits given by this Part),

(b) section 297 (trading credits and debits to be brought into account under Part 3),

(c) section 299 (charge to tax on non-trading profits),

(d) section 300 (method of bringing non-trading deficits into account),

(e) section 301 (calculation of non-trading profits and deficits from loan relationships: non-trading credits and debits), and

(f) Chapter 16 (non-trading deficits).

(4) For the priority of this Part for corporation tax purposes, see Chapter 17.

…

295 General rule: profits arising from loan relationships chargeable as income

(1) The general rule for corporation tax purposes is that all profits arising to a company from its loan relationships are chargeable to tax as income in accordance with this Part.

(2) But see section 465 (exclusion of distributions except in tax avoidance cases).

296 Profits and deficits to be calculated using credits and debits given by this Part

Profits and deficits arising to a company from its loan relationships are to be calculated using the credits and debits given by this Part.

…

300 Method of bringing non-trading deficits into account

(1) Any non-trading deficit which a company has from its loan relationships must be brought into account in accordance with Chapter 16 (non-trading deficits).

(2) For the meaning of a company having such a deficit and how it is calculated, see section 301.

(3) This section and Chapter 16 apply even if none of the company's loan relationships is regarded as a source of income as a result of this Part.

301 Calculation of non-trading profits and deficits from loan relationships: nontrading credits and debits

(1) Whether a company has non-trading profits or a non-trading deficit from its loan relationships for an accounting period is determined as follows, using the non-trading credits and non-trading debits given by this Part for the accounting period.

(2) In this Part—

(a) "non-trading credits" means credits for any accounting period in respect of a company's loan relationships that are not brought into account under section 297(2), and

(b) "non-trading debits" means debits for any accounting period in respect of a company's loan relationships that are not brought into account under section 297(3).

(3) But see also—

(a) section 330 (debits in respect of pre-trading expenditure), and

(b) section 482(1) (under which credits or debits to be brought into account under Chapter 2 of Part 6 (relevant non-lending relationships) are treated as nontrading credits or debits).

(4) A company has non-trading profits for an accounting period from its loan relationships if the non-trading credits for the period exceed the non-trading debits for the period or there are no such debits.

(5) The non-trading profits are equal to those credits, less any such debits.

(6) A company has a non-trading deficit for an accounting period from its loan relationships if the non-trading debits for the period exceed the non-trading credits for the period or there are no such credits.

(7) The non-trading deficit is equal to those debits, less any such credits.

302 "Loan relationship", "creditor relationship", "debtor relationship"

(1) For the purposes of the Corporation Tax Acts a company has a loan relationship if—

(a) the company stands in the position of a creditor or debtor as respects any money debt (whether by reference to a security or otherwise), and

(b) the debt arises from a transaction for the lending of money.

(2) References to a loan relationship and to a company being a party to a loan relationship are to be read accordingly.

…

307 General principles about the bringing into account of credits and debits

(1) This Part operates by reference to the accounts of companies and amounts recognised for accounting purposes.

(2) The general rule is that the amounts to be brought into account by a company as credits and debits for any period for the purposes of this Part are those that are recognised in determining the company's profit or loss for the period in accordance with generally accepted accounting practice.

(3) The credits and debits to be brought into account in respect of a company's loan relationships are the amounts that, when taken together, fairly represent for the accounting period in question—

(a) all profits and losses of the company that arise to it from its loan relationships and related transactions (excluding interest or expenses),

(b) all interest under those relationships, and

(c) all expenses incurred by the company under or for the purposes of those relationships and transactions.

(4) Expenses are only treated as incurred as mentioned in subsection (3)(c) if they are incurred directly—

(a) in bringing any of the loan relationships into existence,

(b) in entering into or giving effect to any of the related transactions,

(c) in making payments under any of those relationships or as a result of any of those transactions, or

(d) in taking steps to ensure the receipt of payments under any of those relationships or in accordance with any of those transactions.

(5) For the treatment of pre-loan relationship and abortive expenses, see section 329.

(6) Subsection (2) is subject to the provisions of this Part and, in particular, subsection (3).

308 Amounts recognised in determining a company's profit or loss

(1) References in this Part to an amount recognised in determining a company's profit or loss for a period are references to an amount recognised in—

(a) the company's profit and loss account, income statement or statement of comprehensive income for that period,

(b) the company's statement of total recognised gains and losses, statement of recognised income and expense, statement of changes in equity or statement of income and retained earnings for that period, or

(c) any other statement of items taken into account in calculating the company's profits and losses for that period.

(2) If, in accordance with generally accepted accounting practice, an amount is shown as a prior period adjustment in any statement within subsection (1), it must be brought into account for the purposes of this Part in calculating the company's profits and losses for the period to which the statement relates.

(3) Subsection (2) does not apply to an amount recognised for accounting purposes by way of correction of a fundamental error.

…

457 Basic rule for deficits: carry forward to accounting periods after deficit period

(1) The basic rule is that the deficit must be carried forward and set off against non-trading profits of the company for accounting periods after the deficit period in accordance with subsection (3) and section 458.

(2) That rule does not apply to so much of the deficit as–

(a) is surrendered as group relief under Part 5 of CTA 2010, or

(b) is the subject of a claim by the company under section 459 (claim to set off deficit against profits of deficit period or earlier periods).

(3) So much of the amount carried forward from the deficit period as is not the subject of a claim under section 458(1) must be set off against the non-trading profits of the company for the next accounting period after the deficit period.

(4) Those profits are reduced accordingly.

(5) In this Chapter "non-trading profits", in relation to a company, means so much of the company's profits as does not consist of trading income for the purposes of section 37 of CTA 2010 (deduction of trading losses from total profits of the same or an earlier period).

458 Claim to carry forward deficit to later accounting periods

(1) The company may make a claim for so much of the amount carried forward from the deficit period as is specified in the claim to be excepted from being set off against non-trading profits of the first accounting period after the deficit period ("the first later period").

(2) Any such claim must be made within the period of 2 years after the end of the first later period.

(3) Subsection (4) applies if any amount is carried forward from the deficit period under section 457(1) which–

(a) cannot be set off under section 457(3) against non-trading profits of the first later period, or

(b) is the subject of a claim under subsection (1).

(4) That amount is treated for the purposes of this Part as if it were–

(a) an amount of non-trading deficit from the company's loan relationships for the first later period, and

(b) an amount which falls to be carried forward and set against non-trading profits of later accounting periods under section 457(1).

(5) Accordingly, section 457 and this section apply as if the first later period were the deficit period.

459 Claim to set off deficit against profits of deficit period or earlier periods

(1) The company may make a claim for the whole or part of the deficit–

(a) to be set off against any profits of the company (of whatever description) for the deficit period, or

(b) to be carried back to be set off against profits for earlier accounting periods.

(2) No claim may be made under subsection (1) in respect of a deficit which is surrendered as group relief under Part 5 of CTA 2010.

(3) Subsection (1) does not apply if the company is a charity.

(4) For time limits and other provisions applicable to claims under subsection (1), see section 460.

(5) For what happens when a claim is made under subsection (1)(a), see section 461.

(6) For what happens when a claim is made under subsection (1)(b), and for the profits available for relief where such a claim is made, see sections 462 and 463.

460 Time limits and procedure for claims under section 459(1)

(1) A claim under section 459(1) must be made within–

(a) the period of 2 years after the deficit period ends, or

(b) such further period as an officer of Revenue and Customs allows.

(2) Different claims may be made in respect of different parts of a nontrading deficit for any deficit period.

(3) But no claim may be made in respect of any part of a deficit to which another such claim relates."

DISCUSSION

97. I have set out above the Issues to be determined. I deal first with HMRC's application for the proceedings to be struck-out for lack of jurisdiction, and then address the substantive matters relevant to the appeal, namely whether the Payment was a distribution by Shinelock and, if not, whether Shinelock is able to set a NTLRD against its profits for the period ended March 2015.

98. The burden of proof is on Shinelock to establish, on the balance of probabilities, that it has been overcharged by the amendments made to its tax return by the closure notice.

Jurisdiction

99. HMRC submitted that the Tribunal does not have jurisdiction for two reasons:

(1) a claim was not made to set off any deficit against the profits of the "deficit period" (ie in year) under s 459 CTA 2009 and, as such, the Tribunal does not have jurisdiction under section 50(7A) TMA 1970; and

(2) Shinelock's grounds of appeal fall outside the ambit of the "matter in question," which the Tribunal is required to determine by s49G(4) TMA 1970.

100. Mr Vallis therefore submitted that the appeal must be struck out in accordance with rule 8(2)(a) of the First-tier Tribunal (Tax Chamber) Rules (the "Tribunal Rules") (given that Shinelock no longer pursued the alternative argument based on the property income rules).

101. Explaining this further, Mr Vallis submitted that:

(1) at the time the closure notice was issued Shinelock had not made a s460 claim, and therefore the closure notice did not and could not reject such a claim; as no claim was made after the closure notice but before expiry of the two year period required by s460(1), the Tribunal does not have jurisdiction to consider the loan relationship argument;

(2) Shinelock's argument was akin to relying on new amendments to its return (which it was now out of time to make). Shinelock had not recorded any chargeable gain (or allowable loss) in respect of the disposal of the Property, there was no reference to a NTLRD, the enquiry did not raise any questions in relation to a NTLRD, therefore HMRC did not reach any conclusions in relation to a NTLRD. In short, Shinelock cannot appeal against a decision that has not been made;

(3) the reviewing officer (or the conclusions of the review) cannot broaden the scope of the matter in question. The Notice of Appeal is an appeal against HMRC's decision, not the conclusions of the reviewing officer; and

(4) referring to the principles established by the authorities (considered below) and the distinction drawn between reasoning and conclusions, he submitted that HMRC were not arguing that the parties were bound by the arguments in play at the time of the closure notice, rather that neither HMRC nor Shinelock can rely on a new conclusion (ie that no NTLRD was available), as this was a matter on which HMRC had not made any decision or reached any conclusion.

102. Alternatively, Mr Vallis submitted, the Tribunal has no powers in respect of the appeal brought by Shinelock. HMRC's submission was that s50(6), (7) and (7A) TMA 1970 do not apply to the particular circumstances of this appeal:

(1) s50(6) applies only where the appellant is "overcharged by a self-assessment". As a self-assessment is "the amount of tax payable by the company for that period" (paragraph 7(1) of Schedule 18 FA 1998), "overcharged" cannot refer to amounts carried forward;

(2) s50(7) applies when an appellant is undercharged to tax by a self-assessment, which is not applicable here; and

(3) s50(7A) gives the Tribunal vires to allow or disallow a claim or election where a claim or election "which was the subject of a decision contained in a closure notice…". Here, there was no such claim.

103. Mr Boch's submissions can be summarised as follows:

(1) the arrangement between Mr Ahmed and Shinelock had been explained to HMRC during the enquiry and HMRC had responded to that information, eg in Mr Roberts' letter of 20 December 2017;

(2) Shinelock had made a claim under s459, by virtue of Hansuke's letter of 22 June 2018 and HMRC had allowed such a late claim to be made (albeit that they continued to reject the substantive argument);

(3) the correspondence after the closure notice was issued is relevant to the definition of the "matter in question". HMRC's letter of 2 July 2018 sets out Mr Roberts' view of the NTLRD point. HMRC then sent a further view of the matter letter to Shinelock on 17 September 2018 (and this is the letter which was required to be sent by s49C). That letter deals with (by rejecting) Shinelock's argument that there was a NTLRD which offset the gain;

(4) alternatively, the review conclusion letter had effectively widened the scope of HMRC's view of the matter (if that was necessary) as that addressed the question of a NTLRD; and

(5) the jurisdiction granted by s49G is sufficient; and that no need to look to the powers of the Tribunal under s50 TMA 1970.

104. Paragraph 34(3) Schedule 18 FA 1998 provides that an appeal may be brought against an amendment of a company's return made by a closure notice. The appeal process is against that amendment and s49G(4) TMA 1970 provides that the Tribunal is to determine the "matter in question", which is defined in s49I(1)(a) as the matter to which the appeal relates.

105. Shinelock did not submit that it had made a claim under s459 within the period of two years after the end of the period ended March 2015; it was acknowledged that the earliest the claim had been made was on 22 June 2018, but Mr Boch submitted that this was allowed by HMRC (as they are permitted to do by s460(1)(b)). I address the substance of that argument under the sub-heading Loan Relationships further below (concluding that I accept Mr Boch's submissions on this point). The question at this stage concerns the scope of the "matter in question" given that Shinelock acknowledged that no claim had been made before the issue of the closure notice or otherwise within two years of the end of the relevant period.

106. In *Fidex v HMRC* [2016] EWCA Civ 385, Kitchen LJ considered the decision of the Supreme Court in *Tower MCashback LLP 1 v HMRC* [2011] UKSC 19 and summarised the principles as follows:

> "[45] In my judgment the principles to be applied are those set out by Henderson J as approved by and elaborated upon by the Supreme Court. So far as material to this appeal, they may be summarised in the following propositions:
>
> (i) The scope and subject matter of an appeal are defined by the conclusions stated in the closure notice and by the amendments required to give effect to those conclusions.
>
> (ii) What matters are the conclusions set out in the closure notice, not the process of reasoning by which HMRC reached those conclusions.
>
> (iii) The closure notice must be read in context in order properly to understand its meaning.
>
> (iv) Subject always to the requirements of fairness and proper case management, HMRC can advance new arguments before the FTT to support the conclusions set out in the closure notice."

107. The facts in *Fidex* concerned a situation where, in correspondence during the enquiry period, HMRC had disputed the way in which the bonds had been accounted for, maintaining that there was no difference in value between the two accounting periods and that therefore no debit was required to be brought into account under paragraph 19A(3) Schedule 9 FA 1996. They issued the closure notice, which stated the officer's position that the bonds and preference shares should not have been derecognised and there should not have been a change in basis adjustment. Fidex gave notice of appeal to the Tribunal. In its Statement of Case HMRC then argued that the debit was disallowed by paragraph 13 on the basis of the unallowable purpose rules, and that this denied the benefit of any debit that arose under paragraph 19A.

108. In applying the principles established by the authorities, Kitchen LJ explained as follows:

> "[51] The UT went on to express the view, with which I agree, that it is not appropriate to construe a closure notice as if it is a statute or as though its conclusions, grounds and amendments are necessarily contained in watertight compartments, labelled accordingly. It also emphasised, again rightly in my judgment, that while there must be respect for the principle that the appeal does not provide an opportunity for a new roving enquiry into a company's tax return, the FTT is not deprived of jurisdiction where it reasonably concludes that a new issue raised on an appeal represents an alternative or an additional ground for supporting a conclusion in the closure notice.
>
> [52] The UT recognised there were certain differences between the *Tower MCashback* case and the present, but it considered there were striking similarities too. In *Tower MCashback* the legal ground of challenge changed but the subject matter of the enquiry and of the conclusion remained the same, namely whether the LLP was entitled to the capital allowance. So too in the present case, the legal ground of challenge changed but the essential subject matter of the enquiry and of the conclusion again remained the same, namely whether Fidex was entitled to claim the benefit of the debit. Indeed the UT thought it would have been extraordinary if, in light of *Tower MCashback*, the FTT had found it had no jurisdiction in the present case.
>
> …
>
> [61] Attractively and forcefully though all of these submissions were presented, I find myself unable to accept them. The scope and subject matter of the appeal to the FTT were defined by the conclusions stated in the closure notice and the amendments required to give effect to them. HMRC were not, however, restricted on appeal to the process of reasoning by which they had reached those conclusions and they were free to deploy new arguments in support of them, subject to the exercise by the FTT of its case management powers to ensure that Fidex was not ambushed. There is no suggestion of any ambush here. Nor has it been suggested that Fidex was not able fully to present its case.
>
> [62] The FTT was therefore required to consider the closure notice, in context, and identify the conclusions it contained. That, so it seems to me, is precisely what Sir Stephen Oliver did. He properly directed himself by reference to the principles explained by the Supreme Court in *Tower MCashback* and he then proceeded to consider the closure notice in the context of the enquiry which it completed. In that regard, he noted that the enquiry was not some kind of roving investigation into Fidex's tax returns but a focused consideration of whether, having regard to the terms of the loan relationships' code in Sch 9 to the 1996 Act, the implementation of the scheme served to increase for tax purposes the loss shown in Fidex's self-assessment tax return. He continued that the stated effect of the contribution notice, by which I understand Sir Stephen to have been referring to the stated conclusion, was that it did not. I

> believe, as did the UT, that this was a conclusion to which he was perfectly entitled to come.
>
> …
>
> [68] In summary, the FTT was in my judgment entitled and indeed correct to find that the stated conclusion in the closure notice was that there was no loss in the amount of €83,849,399, and that the loss, said by Fidex to amount to €89,270,434, should therefore be reduced by the amount of the disputed loss to €5.4m. It follows that the FTT did have jurisdiction to hear HMRC's argument based upon para 13."

109. Here, on 15 May 2018 HMRC issued what they labelled the closure notice. Mr Boch observed that this notice did not give reasons for the conclusions, but (whilst that is correct) I have no difficulty in concluding that the letters of 14 May and 15 May 2018, taken together, constituted a valid closure notice.

110. HMRC's letter of 14 May 2018 set out HMRC's position that Shinelock was the beneficial owner of the Property, and HMRC's computation of the gain, ie how the £94,270 had been calculated.

111. Whilst by this time Hansuke had referred to Mr Ahmed as having provided finance and guarantees to Shinelock, this had been vague and lacking in detail (eg, as to amount, the role of Helptravel). There had been no express assertion that there was a loan relationship between Mr Ahmed and Shinelock. HMRC did not then refer to the possibility of there being such a loan relationship in their letters of 8 March 2018 or 14 May 2018.

112. Nevertheless, having considered the two documents comprising the closure notice in the present appeal, it is readily apparent that HMRC's conclusion was that Shinelock had realised a chargeable gain of £94,270 on the disposal of the Property and that this amount was a profit chargeable to corporation tax, ie that there were no losses or reliefs to offset this amount. That was the conclusion to which the amendments gave effect.

113. Whilst the closure notice was the correspondence of 14 and 15 May 2018, HMRC did not offer a review until their letter of 2 July 2018. That is apparent both from the absence of the standard language offering such a review in the letters of May 2018, and also from the fact that in the letter of 7 June 2018 Mr Roberts asked Hansuke to set out their position (with grounds of appeal) by 13 July 2018 and said that if they were unable to reach agreement he would then offer Shinelock a review of his decision.

114. Mr Roberts offered Shinelock a review of his decision on 2 July 2018. That letter says that his view of the matter remains as set out in his letter of 7 June 2018, a copy of which was attached thereto. The significance of this is that s49C(2) requires that when HMRC notify an appellant of an offer of a review they must also notify the appellant of HMRC's view of the matter in question. This letter not only therefore fulfils a statutory obligation of HMRC, but also is relevant for determining what is the "matter in question". However, having received a letter from Hansuke requesting a review, Mr Roberts then wrote to Shinelock on 17 September 2018 confirming that the matter would be reviewed and stating "I am required to present you with HMRC's latest view of the matter. I understand that I have written to you before with HMRC's view, but it is a requirement that I do so again." That letter then, as described in Background, sets outs both Shinelock's and HMRC's view on the NTLRD. It is apparent from Mr Roberts' description of Shinelock's position at [49] of that letter that he has understood the NTLRD argument to be based on a loss or expense in relation to the loan relationship between Shinelock and Habib Bank. On the basis of the correspondence between the parties, that is a fair understanding of the argument at that stage.

115. Considering the principles established by the authorities, and noting that Mr Vallis accepted the distinction between HMRC's reasoning and conclusions but argued that no conclusion had been reached on the question of whether there was a NTLRD because of the history of the matter, I have concluded that:

(1) the closure notice set out a clear conclusion by HMRC that there were no reliefs or losses of any description available to offset the chargeable gain;

(2) their reasoning had not included any consideration of whether there was a NTLRD (either in respect of a loan relationship between Shinelock and Habib Bank or between Shinelock and Mr Ahmed);

(3) in setting out their view of the matter in September 2018 HMRC did address arguments raised that there was such a NTLRD in respect of the loan between Shinelock and Habib Bank;

(4) the existence of such a NTLRD was thus squarely within the "matter in question" and the Tribunal should not be deprived of jurisdiction to hear arguments that represent an alternative ground of appeal by an appellant – this includes arguments in the alternative relying on different loan relationships; and

(5) whilst the Tribunal does not have jurisdiction to allow a late claim to be made to use a NTLRD under s459, HMRC does have such jurisdiction, and the question of whether a late claim has been allowed by HMRC is one which Shinelock should be permitted to raise as part of its argument that there was a NTLRD available to set off against the chargeable gain.

116. Mr Vallis raised an alternative argument that s50(6), 50(7A) and 50(8) did not give the Tribunal powers in relation to the NTLRD argument and that this, of itself, meant that the Tribunal did not have jurisdiction to hear the argument even if I were to conclude that it was within the "matter in question".

117. I do not agree. Section 49G(4) provides that if the appellant notifies the appeal to the Tribunal, the Tribunal is to determine the matter in question. I see no reason why that is not sufficient to satisfy the question of jurisdiction. I recognise that the position may well be different if I were to have concluded that I did not have jurisdiction to determine whether Shinelock has a NTLRD to set off against the chargeable gain in the period ended March 2015 as in that situation Mr Boch had submitted that I should nevertheless determine whether a NTLRD existed as that is relevant for future years. However, that issue does not arise.

118. HMRC's application for the appeal to be struck-out is refused.

Distributions

119. HMRC submitted that the Payment was a distribution to Mr Ahmed under one of paragraphs B, E or F of s1000(1) CTA 2010. If I were to agree, then, Shinelock's appeal must be dismissed as it is clear from s465 CTA 2009 that in that situation debits (or credits) relating to the Payment must not be brought into account for the purposes of the loan relationship rules.

120. Those paragraphs apply (very broadly) as follows:

(1) B - Any other distribution out of assets of the company in respect of shares in the company, except however much (if any) of the distribution (a) represents repayment of capital on the shares, or (b) is (when it is made) equal in amount or value to any new consideration received by the company for the distribution.

(2) E - Any interest or other distribution out of assets of the company in respect of securities of the company which are non-commercial securities (as defined in section

1005), except (a) however much (if any) of the distribution represents the principal secured by the securities, and (b) however much (if any) of the distribution represents a reasonable commercial return for the use of the principal.

(3) F - Any interest or other distribution out of assets of the company in respect of securities of the company which are special securities (as defined in section 1015), except (a) however much (if any) of the distribution represents the principal secured by the securities, and (b) however much (if any) of the distribution falls within paragraph E.

121. Despite their many differences (eg shares versus securities), all of these paragraphs apply where an amount (be it "interest or other distribution" or "any other distribution") is paid (or the distribution is made if non-cash) "out of assets of the company".

122. HMRC's position was that the Payment was a return to the (former) shareholder of Shinelock of the profit made by Shinelock in the course of its business. I consider that the overall relationship between Mr Ahmed, Shinelock and, so far as there was evidence before me, Helptravel, does provide some support for such an argument:

(1) Shinelock had all the hallmarks of being a family company, with the board of directors comprising family members, informal decision-making where matters were discussed, and board minutes were prepared so far as required by third parties, and where (on the basis of Mr Ahmed's own evidence) he made the decision to acquire the Property (and successfully bid on it at auction) and then decided afterwards how the Property should be acquired.

(2) The arrangement as to the payment of the gain was somewhat loose – it was not recorded in a written agreement between Mr Ahmed and Shinelock, and the written record of it was the note in Shinelock's accounts; and there is a striking lack of detail as to what was meant as to "gain" with both parties apparently proceeding on the basis that this was the difference between the purchase price and the sale price, with no regard being had to the (not insignificant) costs incurred by Shinelock (using borrowed funds) in making the purchase or the disposal.

123. However, crucially, HMRC have accepted at [11] of the SAF that there is a "contract stating that the Appellant had to pay any capital gain to AA". Shinelock therefore had a liability to pay this amount to Mr Ahmed and it discharged that liability (as both parties proceeded on the basis that the amount of the Payment was the gain) when, having sold the Property, it made the Payment to Mr Ahmed. I do not accept that a payment to discharge a contractual obligation can be said to be made "out of the assets" of a company for the purposes of any of the paragraphs of s1000(1). Once the liability crystallised, Shinelock had, according to the agreed facts, a liability to pay £305,000 to Mr Ahmed. The making of that payment did not deplete the assets of the company, as this discharged the liability to pay that amount. For this reason, I consider that the Payment cannot be a distribution within s1000(1).

124. Mr Boch did make submissions as to the requirements of paragraphs B, E and F which I deal with briefly:

(1) Paragraph B – If it had not been for my conclusion as to the Payment not being made out of the assets of Shinelock, I would have concluded that the Payment was within paragraph B. Mr Boch submitted that this could not be the case as paragraph B applies to a distribution "in respect of shares" whereas Mr Ahmed had not been a shareholder at the time the Payment was made. I consider that the phrase "in respect of shares" can be contrasted with that used in, eg, s1020, "to its members" (which more obviously requires that the recipient is a member at the time of the purported distribution), and s1113(3) provides that a thing is regarded as done "in respect of" a share if it is done to a person

as the holder of the share or as the person who held the share at a particular time. I am satisfied that a payment to Mr Ahmed, who had been the shareholder at the time of the purchase of the Property, for most of its ownership and until September 2014 and who then arranged for a friend to buy the shares from him in order to avoid the appearance of a conflict in respect of a potential new role at Habib Bank but ultimately re-acquired those shares, was made to him "as the person who held the share at a particular time".

(2) Paragraph F – This was Mr Vallis' primary submission on distributions, and required me to accept that the loan between Mr Ahmed and Shinelock be a security of Shinelock and that under that security the consideration given by Shinelock for the use of the principal secured depends (to any extent) on the results of Shinelock's business or any part of that business (relying on Condition C in s1015(4)). I am against him on both points:

(a) Whilst the definition of a security in s1117(1) is broad, being stated as an inclusive definition which "includes securities not creating or evidencing a charge on assets", at the very least this seems to me to require a document created by Shinelock to evidence its debt obligation (and I do not consider the disclosure in the accounts to be sufficient for this purpose, particularly as such disclosure continued to be made even after disposal of the Property, indicating that it was a somewhat generic reference to the basis on which fixed assets were acquired by the company).

(b) The agreed fact records that the gain was to be paid "in return for financing or guarantees provided by AA". This does not go so far as to record that it was a term of the loan from Mr Ahmed to Shinelock that this amount be paid, ie is not of itself sufficient to conclude that the Payment was made "in respect of" that loan (if it were a security). That is significant in the context of the fact that the guarantee to which reference was made can only be a reference to the security granted by Helptravel over 9 West Court.

(c) I do not consider that the Payment depended on the results of Shinelock's business, or any part of its business. To the extent that Shinelock was carrying on any business, it was a property rental business, benefitting from the pooling arrangement which was operated rather than the actual rents received. I do not consider that a one-off disposal of a Property, which had been owned for several years, is sufficient to constitute a property investment business. The Payment was made by reference to the "gain" realised on disposal of a single asset, whereas the results of the business related to the rents and share of the pool.

(3) Paragraph E – This applies to interest or other distributions in respect of securities which are non-commercial securities, ie where the consideration given for the use of the principal secured represents more than a reasonable commercial return for the use of that principal:

(a) The conclusions set out in relation to paragraph F on securities applies equally here.

(b) HMRC did not fully particularise their argument that the loan was a non-commercial security. There were various permutations possible on their argument - HMRC's position had been that the principal secured was only £175,000, they did not accept that there had been any repayments, and submitted that the Payment included both a repayment of principal and interest. At one level they were thus arguing that there was a principal repayment of £175,000 and a "return" of £130,000. Following this logic into the facts as I have found them, ie that Mr

Ahmed lent £277,500 to Shinelock of which £118,000 had been repaid, this would result in £159,500 of the Payment being a repayment of principal and the remaining £145,500 being a "return" on the principal. Viewed from a distance, these amounts do indicate that the return in percentage terms was high; but there was no evidence as to what a reasonable commercial return might have been. Furthermore, this approach proceeds on the basis that the Payment was made in consideration for the loan whereas the agreed facts imply that this was made in return for a wider range of assistance from Mr Ahmed, referring to financing and guarantees.

125. I have concluded that the Payment was not a distribution within s1000(1) CTA 2010. This only means that the Payment is not prevented from giving rise to a loan relationship debit by s465.

Loan Relationships

126. Mr Boch submitted that the Payment gave rise to a debit of £305,000, and submitted that this debit was required to be brought into account either as a loss (under s307(3)(a)) arising from the loan relationship between Mr Ahmed and Shinelock or an expense under s307(3)(c) incurred in bringing that loan relationship into existence (relying on s307(4)(a)) or as an expense incurred under or for the purposes of the loan relationship between Shinelock and Habib Bank (under s307(4)(a) or (c)).

127. HMRC's position was:

(1) it accepted that the accounts of Shinelock had been prepared in accordance with GAAP;

(2) there was agreed to be a loan relationship between Mr Ahmed and Shinelock (of £175,000) and between Shinelock and the bank, but the Payment, if it was a debit, was not a loss or expense within s307(3) in relation to either of those loan relationships; and

(3) alternatively, it not being agreed by HMRC that the £72,500 or £30,000 were loans from Mr Ahmed to Shinelock or that the loan (which they did accept had been made) of £175,000 had been repaid, the loss (or expense) arising to Shinelock was £27,500.

128. On the basis of the matters set out in the SAF there can be no doubt that there was a loan relationship as defined by s302 CTA 2009 between Shinelock and Mr Ahmed, and a loan relationship between Shinelock and Habib Bank. I have already made my findings as to the amount of the loan advanced from Mr Ahmed and the repayment of some of that loan.

129. Mr Boch raised an issue as to the scope of HMRC's challenge on the loan relationship argument, namely whether the accounting treatment of Shinelock was in issue at all. Mr Boch did not concede that it was. However, whilst Mr Vallis was clear that HMRC was not challenging whether or not the accounts of Shinelock were GAAP-compliant, this did not mean that HMRC accepted that there was a debit of £305,000 within s307(2) or, if there was such a debit, that such amount fairly represented Shinelock's losses or expenses within s307(3). Indeed, Mr Vallis relied on the £305,000 not being shown in the accounts of Shinelock and challenged Mr Ahmed's evidence as to the alternative accounting treatments (submitting that I should treat the evidence of Mr Ahmed on accounting with extreme care as he was not an independent expert witness).

Amounts recognised in determining company's profit or loss

130. Section 307(2) sets out the general rule that the amounts to be brought into account as credits and debits for any period are those that are "recognised in determining the company's profit or loss for the period in accordance with [GAAP]". Section 308(1) then provides that

references to an amount recognised in determining a company's profit or loss for a period are references to an amount recognised in:

> "(a) the company's profit and loss account, income statement or statement of comprehensive income for that period,
>
> (b) the company's statement of total recognised gains and losses, statement of recognised income and expense, statement of changes in equity or statement of income and retained earnings for that period, or
>
> (c) any other statement of items taken into account in calculating the company's profits and losses for that period."

131. This immediately raises the question as to what was recognised in the profit and loss account of Shinelock for the accounting period ended March 2015 in circumstances where I did not have the 2015 Accounts. I have already detailed the evidence that was before me and my findings of fact in relation thereto. I accepted that the 2015 Accounts were prepared on the net basis (and it is accepted by HMRC that this was in accordance with GAAP). I found as a fact (albeit by inference) that the 2015 Accounts did include a related party disclosure stating that the capital gain (if any) was payable to Mr Ahmed (as such a disclosure was included in both prior and subsequent years) and that there was no line item labelled sale of the Property (or similar) but that instead adjustments were made on the balance sheet to fixed assets/bank loans.

132. Does this mean that a debit of £305,000 was recognised in determining Shinelock's profit or loss for the period for the purpose of s307(2)? I have concluded it does not, albeit that I am aware that I have reached this conclusion without the benefit of expert evidence as to the accounting treatment. My reasoning is that if a net amount which is shown on the face of the accounts reflects two underlying gross amounts, both such gross amounts can be said to have been recognised (albeit that neither are shown) for this purpose. I see no reason to draw a distinction between a situation where there is then a net profit or loss of, say, £10 shown in the accounts and that where the gross amounts are equal such that the net amount recorded is £0. However, this is only the case provided that the net amount of £0 is actually shown on the accounts. In a situation where it is concluded in preparing the accounts that no entry needs to be made, either because nothing has happened or been realised, or because various amounts net off to zero and so nothing is recorded then I would not accept that the underlying gross amounts have been "recognised" for the purpose of s307(2).

133. In the present instance, my findings of fact lead me to conclude that the Payment was not recognised in Shinelock's accounts in determining the company's profit or loss for the period.

134. That conclusion is sufficient to dismiss Shinelock's appeal.

Credits and debits in respect of a company's loan relationships that fairly represent profits and losses or expenses

135. Section 307(3) provides that the credits and debits to be brought into account in respect of a company's loan relationships are the amounts that, "when taken together, fairly represent" for the accounting period in question:

> "(a) all profits and losses of the company that arise to it from its loan relationships and related transactions (excluding interest or expenses),
>
> (b) all interest under those relationships, and
>
> (c) all expenses incurred by the company under or for the purposes of those relationships and transactions.

(4) Expenses are only treated as incurred as mentioned in subsection (3)(c) if they are incurred directly—

(a) in bringing any of the loan relationships into existence,

(b) in entering into or giving effect to any of the related transactions,

(c) in making payments under any of those relationships or as a result of any of those transactions, or

(d) in taking steps to ensure the receipt of payments under any of those relationships or in accordance with any of those transactions."

136. There is considerable authority on the meaning of "fairly represents", and Mr Vallis relied on this phrase (albeit without referring to the case law) to support HMRC's alternative argument as to the amount of any loss of Shinelock. However, I have concluded that there is a more fundamental problem faced by Shinelock, which becomes evident in the context of the parties' submissions on the various limbs of s307(3), and which results from the opening lines of s307(3) taken together with those limbs. That sub-section provides that the credits and debits to be brought into account "in respect of a company's loan relationships" are the amounts that fairly represent "all profits and losses…that arise to it from its loan relationships" and "all expenses incurred…under or for the purposes of those relationships" (with s307(4) then dealing with what is meant by expenses being incurred for this purpose).

137. The Payment was agreed to be made by Shinelock to Mr Ahmed "in return for financing or guarantees" provided by him (according to [11] of the SAF). The language of that agreed fact is somewhat vague (and I have already observed that Mr Ahmed did not provide a guarantee). Mr Ahmed gave various forms of assistance to Shinelock in relation to the purchase by Shinelock of the Property – at the outset he himself had been the successful bidder at auction, he then lent money to Shinelock, arranged for Shinelock to purchase 27 West Court from Helptravel and procured that Helptravel provide security over 9 West Court to support the loan from Habib Bank. I have found as a fact that Mr Ahmed assisted Shinelock with its proposed purchase of the Property in his capacity as shareholder in the company.

138. Viewed in this light, it is difficult to conclude that, even if the Payment had been brought into account as a debit that was recognised in determining Shinelock's profit or loss, such debit was brought into account "in respect of [Shinelock's] loan relationships". The agreement by Shinelock to pay any capital gain related to a wider fact pattern than just the loans made by Mr Ahmed and Habib Bank to Shinelock.

139. This difficulty persists when seeking to assess whether Payment falls within one of s307(3)(a) or s307(3)(c). I have considered the two loan relationships separately for this purpose (as I accept Mr Boch's submission that Shinelock may seek to rely on these loan relationships in the alternative).

Loan relationship between Shinelock and Mr Ahmed

140. Considering first the loan relationship between Shinelock and Mr Ahmed, Mr Boch submitted the Payment is a debit under this relationship:

(1) it was expenditure incurred by Shinelock under or for the purpose of that relationship, namely in bringing the relationship into existence (within s307(4)(a)) - Although the Payment was made in 2014, the obligation to make that payment arose when the arrangement was agreed between Mr Ahmed and Shinelock. The obligation arose directly in bringing the loan relationship into existence. It could not be quantified at the time it arose because it was not known at that time whether, and when, a gain would be realised. However, this does not preclude the obligation to pay Mr Ahmed the gain,

if any, from having arisen at the time the loan relationship was brought into existence, and as a necessary precondition for it; or

(2) it was a loss that arose to Shinelock from that relationship in that upon the sale of the property an obligation to pay Mr Ahmed an amount equal to the gain arose from the loan relationship.

141. In submissions, Mr Boch referred to the agreement to make the Payment as having been entirely commercial, and referred to Mr Ahmed's evidence that he would not have entered into the arrangement if Shinelock had not agreed to pay him any gain. Whilst I accept that overall the arrangement made commercial sense to Mr Ahmed, I have some doubt that the same was the case for Shinelock – it was at risk of the expenses incurred in purchasing and selling the Property exceeding the amounts allocated to it from the pool, an allocation over which Mr Ahmed appears to have had complete control, in circumstances where Mr Ahmed also made the relevant decision as to whether and if so when to sell the Property. Nevertheless, I consider that this is irrelevant.

142. The Payment represents a calculation of the gain realised by Shinelock (albeit not the only possible calculation) on the sale of the Property. I consider that it is stretching the facts to say that it is a debit in respect of the loan made by Mr Ahmed which fairly represents any losses to Shinelock arising to it from that loan. Mr Ahmed's own evidence was that he provided a variety of assistance to Shinelock (which I regard as consistent with him being shareholder in the company).

143. Similarly, I do not accept that the agreement to pay any gain can be said to be an expense incurred by Shinelock directly in bringing the loan relationship into existence. It was a consequence of the wider arrangement between the parties.

144. In the light of these conclusions, it is not necessary for me to consider HMRC's alternative argument that any loss arising to Shinelock was the £27,500 difference between the amount said to have been lent by Mr Shinelock and the amount of the Payment.

Loan relationship between Shinelock and Habib Bank

145. Mr Boch's alternative submission was that the Payment was an expense incurred under or for the purposes of its loan relationship with Habib Bank. Mr Boch submitted that s307(3) does not require that expenses be incurred vis-à-vis the other party to the relationship - rather, the words "under or for the purposes of" suggest the party towards whom expenditure is incurred may be a third party, as recognised by HMRC in their guidance where examples include guarantee fees.

146. I agree that the relevant expense does not need to be payable to the other party to the loan relationship, and recognise that the funding made available to Shinelock pursuant to the Shinelock Loan Offer not only required Shinelock to have other funds (covering 25% of the value of the scheduled properties plus expenses) but also that it expressly referred to Helptravel. However, that does not mean that the incurring of the obligation to Mr Ahmed was an expense incurred directly in bringing the loan relationship between Shinelock and Habib Bank into existence. From the bank's perspective, Shinelock may have had other resources available to it, on other terms, and the arrangement between Shinelock and Mr Ahmed was directly related to the purchase of the Property but, at best, only indirectly incurred in bringing the loan relationship with the bank into existence.

Making of a claim under s459

147. Mr Boch submitted that Shinelock made a claim for part of the NTLRD to be set off against the profits of the company for the deficit period in the letter from Hansuke to HMRC dated 22 June 2018 and that this late claim was allowed by HMRC.

148. HMRC submitted that:

(1) the letter of 22 June 2018 was not a "claim" – the language used in the letter, "on the assumption that…" shows that Shinelock was asserting a possible version of events, and contingent or provisional claims are not accepted by HMRC; and

(2) it was out of time, being more than two years after the end of the period ended March 2015 and HMRC have not accepted a late claim - failure to raise the time limit is not acceptance by conduct and HMRC cannot operate outside of the confines of the law by its conduct.

Was the letter of 22 June 2018 a valid claim?

149. The basic rule for NTLRDs is that they must be carried forward and set off against non-trading profits of the company for accounting periods after the deficit period. That rule does not apply to so much of the deficit as is the subject of a claim by the company under s459. Section 459(1) provides that the company may make a claim for the whole or part of the deficit to be set off against any profits of the company (of whatever description) for the deficit period. There are no particular formalities required for the making of a claim (subject to the requirements in s460 as to time limits and procedure).

150. Hansuke's letter to HMRC of 22 June 2018 made it clear that Shinelock were asserting that the £305,000 was a debit on a non-trading loan relationship and that it was available to be offset against all of the capital gain on the disposal of the Property. The letter included a simple computation to this effect, recording a substantial amount then being available to be carried forward to subsequent years.

151. From the context, I consider that Hansuke's position was that the NTLRD arose in respect of the loan relationship between Shinelock and Habib Bank (ie rather than any assertion that there was a loan relationship between Shinelock and Mr Ahmed from which a debit arose). However, I do not consider that this affects whether or not this letter constitutes a claim for the purposes of s459. Section 301(6) provides that a company has a NTLRD for an accounting period from its loan relationships if the non-trading debits for the period exceed the non-trading credits for the period or if there are no such credits. Deficits are thus defined as being an excess of debits over credits from a company's loan relationships. Section 459 and s460 refer to a claim to use a deficit, ie the outcome of this calculation.

152. That letter was a claim by Shinelock to use the NTLRD in the period to March 2015. The only question as to its validity is whether the late claim was allowed by HMRC.

Did HMRC allow this claim to be made out of time?

153. Section 460(1) provides that a claim under s459 must be made within (a) two years after the end of the deficit period, ie by 31 March 2017, or (b) within such further period as an officer of HMRC allows.

154. Mr Vallis' argument that HMRC cannot by its conduct or by principles of estoppel operate outside the law is not relevant in this context. HMRC is empowered by s459(1)(b) to allow a late claim, and Mr Boch's submission was that this is what they had done.

155. There was no express confirmation from HMRC that they would allow a late claim. That is unsurprising in the circumstances of this appeal. Mr Roberts' evidence was that he had not read anything from Shinelock or its advisers which constituted a claim, and the explanation by Mr Vallis on behalf of HMRC as to the timing of HMRC's application that Shinelock not be permitted to rely on the loan relationship argument was that the time limit issue was only identified by HMRC when preparing their skeleton argument for the hearing in January 2021.

156. This does not necessarily mean that HMRC have not, by their conduct, allowed a late claim to be made for the purposes of s460(1)(b).

157. Having identified that the claim was made on 22 June 2018, I do not consider that conduct prior to that date is relevant.

158. Mr Roberts' letter of 2 July 2018 is significant. This correspondence was after the issue of the closure notice, and Hansuke had already informed HMRC that they would be appealing against HMRC's decision. In his letter to Shinelock dated 2 July 2018 offering a review of the decision, Mr Roberts referred to the appeal against the assessment and added:

> "Despite further correspondence, we have not been able to reach agreement on the matter. In their response of 22/06/2018, Hansuke haven't directly addressed any of the points that underpinned the assessment. Instead have stated that the gains should be offset by an NTLR debit. I cannot agree this. For there to be a NTLR debit there must be a loan relationship is that it is a money debt arising from a transaction for the lending of money. Both elements have to be present for the arrangement to be a loan relationship. Shinelock had such a relationship with the bank, and deducted interest in calculating its profits. It did not have such a relationship with Mr Ahmed since guaranteeing a debt is not the lending of money. CTA09/S465 explicitly excludes distributions from being dealt with within the loan relationships rules. My view of the matter remains as explained in my letter of 7 June 2018."

159. I consider that it is clear from this letter that at that time Mr Roberts understood that Shinelock was seeking to use a NTLRD which it said arose in the accounting period ended March 2015 to offset the gain in that same period. Mr Roberts denies the use of such a NTLRD, but on the basis that his view was that there was no loan relationship between Mr Ahmed and Shinelock. It is clear that he was also rejecting any notion that the debit was attributable to the loan relationship between Shinelock and Habib Bank. No mention is made of the time limit in s459.

160. HMRC continued to address Shinelock's arguments on the existence of a NTLRD in subsequent correspondence – this can clearly be seen from the view of the matter letter dated 17 September 2018 and the review conclusion letter dated 1 November 2018.

161. Thus, HMRC were maintaining a position that there was no NTLRD. There was no mention of the need to claim such a deficit to use it in the current year, the time limit or that no mention had been made by Shinelock of the use of such a deficit until after the expiry of the two year period set out in s460(1)(a). Significantly, there was no rejection of the claim on the express basis that it was made late.

162. I have concluded on the facts that HMRC have allowed the claim to be made to use a NTLRD (assuming that it existed) after the expiry of the two year period required by s460(1)(a) in circumstances where HMRC did not make a deliberate decision to this effect. This conclusion does not assist Shinelock given that I have concluded that there was no NTLRD.

163. I should add that the decision of the Supreme Court in *Tinkler v HMRC* [2021] UKSC 39 was released after the hearing of this appeal had concluded. In that case HMRC had appealed against the Court of Appeal's decision that Mr Tinkler was not estopped, under estoppel by convention, from denying that a valid enquiry under s9A TMA 1970 had been opened. I have considered whether or not to ask the parties for representations on this decision but decided not to do so. The decision is potentially significant in relation to the matter under appeal. Given that, without the benefit of any representations, I would decide this point in Shinelock's favour (essentially on the basis that HMRC did in fact allow a late claim to be made rather than that they are estopped from denying such allowance), it is effectively HMRC who might be said to

be prejudiced by my decision not to seek representations from the parties; but I considered that the overriding objective in rule 2 of the Tribunal Rules to deal with a case fairly and justly not only did not require me to seek such representations but also would best be served by my not reverting to the parties. I was conscious in this regard of the amount of tax at stake, the relative resources of the parties, and, most significantly, the fact that my decision on this point does not determine the appeal – I have concluded that Shinelock's appeal must be dismissed for other reasons and I would therefore be inviting representations, and thus potentially requiring the parties to incur additional costs, on a point which cannot affect that outcome.

164. Dealing briefly with *Tinkler*, in that case the Supreme Court set out and explained the principles relating to estoppel by convention. Having considered the judgment of Lord Burrows, my conclusion would be that Shinelock was not able to rely on the assertion of an estoppel – I am not convinced that HMRC assumed some element of responsibility for the common assumption that a valid claim had been made, and moreover I am not satisfied that relevant detriment was suffered by Shinelock. Shinelock was out of time to make a claim without HMRC's allowance or permission, and that was the case at the moment the letter was sent by Hansuke on 22 June 2018; unlike on the facts of *Tinkler*, if HMRC had in this case promptly identified the point and rejected the claim as late, Shinelock would have had no remedy available to them.

165. I have concluded that the decision in *Tinkler* does not prevent me from concluding on the facts that HMRC have allowed a claim to be made to use a NTLRD (assuming that it existed) after the expiry of the two year period required by s460(1)(a). As already noted, this cannot assist Shinelock in the light of my conclusions elsewhere.

CONCLUSION

166. For the reasons set out above, Shinelock's appeal is dismissed.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

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

JEANETTE ZAMAN
TRIBUNAL JUDGE

Release date: 7 SEPTEMBER 2021

Statement of Agreed Facts

Agreed Facts

Shinelock Limited and Ayaz Ahmed

1. Shinelock Limited ("the Appellant") is a private limited company with company number 02341656.

2. The Appellant was incorporated on 31 January 1989 with £1,000 share capital.

3. The Appellant's nature of business is 'Other letting and operating of own or leased real estate'.

4. The annual return made to Companies House on Form 363a shows a transfer of shares on 05/12/2008 and a holding of shares at 16/12/2008:

   (1) AA holding 71,999 shares, and

   (2) Mohsin Ahmed holding 1 share.

5. The capital and reserves on the balance sheet on the accounts for 31/03/2008 (the last before the property was acquired) shows £72,000 share capital with a negative figure for retained profit and loss of £71,900. This left shareholder's funds of £100.

6. The accounts for period ended 31/03/2015 show a reduction in share capital from £72,000 to £100. The filing at Companies House show that the reduction in capital took place on 3 September 2014.

7. Mr. Ayaz Ahmed ("AA") became a director of the Appellant company on 5 December 2008, when he was also director of Helptravel ("HT"), Larfront, Lafront Two and Gainsbow Estate Limited. He resigned as director of the Appellant on 31 December 2014.

8. AA has worked as a Qualified Chartered Accountant since 1986 when he became a member of 'the Institute of Chartered Accountants of Scotland.

9. During the years 2000 and 2016 AA worked as the Group Chief Financial Officer of Habib Bank Limited ("the bank"), where he was based at its Head Office in Karachi.

10. For the purposes of the transaction relating to the sale of the property, AA was non-UK resident.

11. There is a contract stating that the Appellant had to pay any capital gain to AA in return for financing or guarantees provided by AA. The contract was in the form of a verbal agreement, rather than a formal written document.

12. AA provided cash of approximately £280,000 to the Appellant as follows:

    (1) The deposit on exchange of contracts of £72,500, when AA attended the auction on 31 March 2009. This amount was paid from the personal account of AA on the day of the auction;

    (2) A loan of £175,000 to purchase 27 West Court on 12 May 2009; and

    (3) £30,000 for Stamp Duty Land Tax ("SDLT") on 2 June 2009, which was transferred to the Appellant's account.

8 Trumpsgreen Road, Virginia Water, Guilford, GU25 4HN ("the property")

13. The property was purchased on 31 March 2009 and registered in the Appellant's name.

14. The purchase price paid for the property was £725,000.

15. Purchase monies were obtained by the Appellant from the bank, per the terms of the loan facility dated 16 April 2009.

16. A drawdown of £843,875 was made on 13 May 2009.

17. The amount required to complete the purchase of the property (including paying stamp duty and related expenses) was £792,000.

18. Over the period of ownership of the property by the Appellant, the property was rented out for use as a restaurant by the tenants. There were two separate periods of rental, in between which the property was unoccupied:

(1) May 2009 to January 2013: Siam Food Gallery

(2) February 2013 to November 2014: Vacant

(3) November 2014 until disposal: B8 Company

19. The property was sold on 4 December 2014 for £1,030,000.

20. The Appellant was the legal and beneficial owner of the property throughout the period April 2009 and December 2014.

The gain on the sale of the property

21. The gain on sale (before expenses and indexation allowance) was £305,000.

22. The Appellant paid the gain to AA, in December 2014, in accordance with the terms of the note in the Appellant's financial accounts.

23. After expenses, the net gain of the property was £260,178.

24. The chargeable capital gain on the sale of the property is taxable on the Appellant.

25. Based on the legal and beneficial ownership being vested with the Appellant, the chargeable capital gain attributable to the company is £94,270, calculated as follows:

Disposal proceeds on 04/12/2014	£1,030,000
Net proceeds after incidental costs	£1,017,746
Cost of acquisition on 1/03/2009	£725,000
Incidental cost of acquisition	£3,568
SDLT	£29,000
Total acquisition costs	£757,568
Net gain after expenses	£260,178
Indexation at 0.2191	£165,908
Overall taxable gain	**£94,270**

26. The additional capital gains tax due on this chargeable capital gain was £18,854.00.

27. The chargeable capital gain on the sale of the property was not declared on the Appellant's Corporation Tax return for the APE 31/03/2015, which was received by the Respondent on 27/03/2016.

28. On AA's personal tax return for the year ended 5 April 2015, the chargeable capital gain was reported in the section covering "Any other information", received by the Respondents on 21/01/2016.

Tax position

29. No capital gains tax was accounted for in AA's tax return as AA was a non-UK resident.

30. No reference to income was included in AA's tax return to show that any services, including loan guarantees, had been provided to the Appellant.

31. The payment of the capital gains tax has been put on hold whilst the issue is under appeal.

32. …[Blank in original]…

Loan to purchase the property

33. The Appellant took out a loan from the bank in May 2009, with the loan facility agreement being dated 16 April 2009.

34. The original loan facility dated 9 April 2009 was between the bank and AA on identical terms to the one between the Appellant and the bank.

35. The loan facility was for £950,000 or 75% of the market value of the scheduled properties, whichever was less.

36. The purpose of the loan was to purchase the property and to redeem the mortgages over the flats owned by HT, namely 9 & 27 West Court, Osterley Middlesex.

37. The amount of loans to be repaid to Capital Home Loans to redeem the mortgage on the West Court properties was £162,457.85.

38. The loan facility taken to purchase the property was arranged between the Appellant and the bank.

39. The loan facility letter dated 16 April 2009 details the security to be provided as follows:

> *"An all monies 1st legal charge over Siam Food Gallery, Trumps Green Road, Virginia Water, Surrey GU25 4HN (a "scheduled Property" and forming part of the "Scheduled Properties");*
>
> *All monies 3rd party 1st legal charges over Flat 9 and Flat 27, West Court, Osterley, Middlesex (each a "scheduled Property" and forming part of the "Scheduled Properties");"*

40. The borrower per this loan facility is the Appellant.

41. A non-trading loan relationship ("NTLR") existed between the Appellant and the bank in relation to this loan.

42. Under section 307 CTA 09 and in accordance with GAAP, any direct costs incurred at the time the loan was brought into existence are due to be deducted.

43. The two properties referred to in 34 above, were registered to HT, another company controlled by AA.

44. Prior to completion Appellant acquired 27 West Court from HT.

45. A charge over Flat 9 West Court was registered in favour of the bank as of 14 May 2009.

46. A charge over Flat 27 West Court was registered in favour of the bank as of 14 May 2009.

47. A charge over the property was registered in favour of the bank as of 14 May 2009.

48. AA did not provide a personal guarantee to the Appellant for its loan from the bank to purchase the property.

49. There is no documentation showing that AA was responsible for any loan payments to the bank in his personal capacity.

50. The loan facility agreement confirms that HT was required to provide a guarantee, by way of a charge over the two properties referred to above, the West Court properties, to the Appellant to purchase the property.

51. Per the loan facility, HT's liability was limited to these two properties.

52. Any default on the loan by the Appellant did not transfer any legal responsibility on AA for amounts not paid.

53. AA did not provide the guarantee directly for the loan to purchase the property. These were provided by the Appellant and by HT (by the security over properties owned by HT at the time the loan was taken out).

Financial Accounts

54. The property was listed in the Appellant Company accounts for the APE 31/03/2010.

55. The loan from the bank is shown in the Appellant's accounts.

56. The financial accounts for the APE 31/03/2010 show additions to tangible fixed assets of £929,000 and bank loans and overdrafts of £988,371 under the notes (Note 3) to creditors falling due after more than one year. There are no other creditors shown in the accounts.

57. The accounts for APE 31/03/2010 reflect the state of play at the time they were signed should have included the impact of any transactions undertaken by the Appellant between the purchase of the property and 31 March 2010.

58. Loan interest has been deducted when calculating the Appellant's profits.

59. Rental income has been included and expenses have been deducted when calculating the Appellant's profits.

60. The rental income, interest charge and expenses included in the Appellant accounts were determined by AA, using a pooling arrangement consisting of all related companies (See 65 below).

61. The accounts presented to Companies House on 29 December 2010 contained an entry regarding related party disclosures stating that all asset purchases were financed by or guaranteed by the ultimate controlling party in exchange for the capital gains thereon. A similar note is contained in other years, although the financial accounts for APE 31 March 2010, was the first year any such note was included.

62. The accounts presented to Companies House on 19 January 2010 for the APE 31 March 2009, contained no entry in relation to purchased assets or the treatment of capital gains.

63. AA is the 'ultimate controlling party' as referred to in the Notes of the Appellant's accounts, where this note is included.

Rental Income and expenditure

64. The rental income for the property (along with other properties owned by companies under the control of AA) were paid into one of a number of bank accounts.

65. Interest expense related to the loans were paid from these accounts.

66. Expenses directly related to all properties were also paid from these accounts.

67. AA decided how the amounts would be distributed amongst the property owing entities.

68. For 2015, the allocation of income, interest and expenditures for each entity in the pool was as follows:

	Rent £	**Expenses** £	**Interest** £	**Profit share** £
Ulsam Limited	25,526	125	18,400	7,000
Shinelock Limited	30,572	5,839	22,038	2,695
Shineloch Limited	8,917	125	6,428	2,364
Mohstart Two Limited	25,334	150	18,433	6,751
Mohstart Limited	0	0	0	0
MR Capital Limited	21,255	681	15,322	5,253
Merakui Limited	16,356	125	11,790	4,441
Lafront Two Limited	16,305	3,191	11,754	1,360
Lafront Limited	11,719	2,279	8,448	992
Kensington Blue Limited	26,533	681	19,126	6,726
Helptravel Limited	15,908	3,477	11,467	964
Gainsbow Estates Limited	58,311	11,811	42,034	4,466
Blackpool Blue Limited	7,643	681	5,510	1,453
Bushra Ahmed	47,811	5,655	0	42,156
Ascot Blue	8,917	681	6,428	1,808
Ayaz Ahmed	12,961	0	0	12,961
Total	**334,068**	**35,499**	**197,178**	**101,391**

69. The rental income from the property was paid into a bank account specified by AA and not directly controlled by the Appellant.

Disputed Facts

70. The fact of an assessment, and not the amount calculated, is disputed in that the Parties disagree over whether tax is due and payable by the Appellant.

71. AA provided the guarantee, albeit indirectly, by arranging HT to provide the guarantee to the Appellant under a financial arrangement between AA and HT.

72. The Appellant was not in position to meet the 75% LTV condition without the assistance of the financing by AA.

73. The contract with AA was required to bring the loan into existence, as without the financing provided by AA the property could not be acquired, nor the loan condition precedent be fulfilled.

74. The amounts referred to in Para 12.1 and 12.3 above, were loans from AA to SL.

75. All three amounts referred to in Para 12 above create a NTLR between the Appellant and AA.

76. Purchase monies were obtained by the Appellant from other sources as follows:

(1) The Appellant transferred £175,000 to HT to purchase 27 West Court;

(2) HT pays AA £175,000 to settle monies it owed AA as directors' loan;

(3) AA lent the Appellant £175,000 to help purchase 27 West Court; and

(4) No monies actually changed hands as the £175,000 starts with the Appellant and reverts to the Appellant.

(5) These were recorded in the books of the three parties.

77. Costs which the Appellant claims they incurred, and claim are associated with the alleged provision of guarantees from AA, for the bank loan, to acquire and hold the property, are not as the Appellant contends an allowable business expense.

78. Costs which the Appellant claims they incurred, and claim are associated with the alleged provision of loans obtained from AA to acquire and hold the property, are not as the Appellant contends an allowable business expense.

79. The payment of the gain on the property to AA was not a payment by the Appellant in relation to any alleged guarantee or loan in relation to the property.

80. The terms of the agreement were documented in each year's financial statements and approved by the Appellant Board of Directors in each of the years' account approving meeting.

81. Note 5 for the APE 31 March 2009, filed 29 December 2010, does not amount to the details of any financing and guarantee contract between the Appellant and AA.

82. The liability towards AA arising from the Contract is a 'Contingent Liability' as defined in the definitions section of the FRSSE (Financial Reporting Standards for Smaller Entities effective June 2008) (page 97).

83. The Appellant used funds borrowed from AA to complete the purchase of the property in May 2009.

84. The Appellant used funds borrowed from AA to complete the purchase of 27 West Court in May 2009.