Neutral Citation: [2023] UKFTT 00290 (TC)

Case Number: TC08761

FIRST-TIER TRIBUNAL
TAX CHAMBER

By remote video

Appeal reference: TC/2020/02293
TC/2020/02295
TC/2020/02296

Redress payment for mis-sold swap – Scottish partnership – business transfer to company – whether right to redress payment transferred under business agreement – assessing procedure – partnership or partners –Scottish law on assignment of right to make claim -

Heard on: 29-30 September 2022
Judgment date: 14 March 2023

Before

TRIBUNAL JUDGE RACHEL SHORT
MICHAEL BELL MEMBER

Between

James O'Neil
Deborah O'Neil
May McCallum

Appellants

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Mr Elliott of Pump Court Tax Chambers instructed by McLaughlin Crolla

For the Respondents: Mr MacLeod litigator of HM Revenue and Customs' Solicitor's Office

DECISION

INTRODUCTION

1. With the consent of the parties, the form of the hearing was V (video).

2. The documents to which we were referred are:

   (1) A main bundle of documents comprising 325 pages

   (2) A supplemental bundle comprising 86 pages

   (3) A joint bundle of authorities

   (4) Additional authorities provided by the parties on or just before the hearing.

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.

PRELIMINARY ISSUES

Late served documents – accounting records

3. Accounts (unsigned) for the Partnership for the periods ending 6 April 2012 and 31 October 2012 and for the Blackpool Promotions Limited ("the Company") for the periods ending 31 October 2012, 31 October 2013 and 30 April 2015 were served by the Appellants on 23 September 2022. The Appellants accepted that the documents had been served late but stressed that since HMRC's arguments relied on accounting evidence, it was important that these documents should be put in evidence and there was no prejudice to HMRC.

4. HMRC said that they were prejudiced because they had not had sufficient time to consider the new documents and were not aware of the arguments which the Appellants were going to put in respect of the new evidence.

5. The Tribunal concluded that the accounting documents should be admitted notwithstanding the fact that they had been served late because it appeared to the Tribunal that the accounts for both the Partnership and the Company were potentially highly relevant to the issues under appeal. Any disadvantage to HMRC could be mitigated by allowing HMRC time during the short adjournment on the first day of the hearing to consider the documents and raise any queries.

Late served documents – authorities

6. The Appellants also served an additional bundle of authorities on 28 September 2022, including one case authority, extracts from a textbook on partnership law and an accounting standard (FRS). HMRC objected to all of the documents being included because they had been served late but particularly objected to the inclusion of the FRS which they said should be the subject of expert submissions on accounting evidence.

7. The Tribunal concluded that the new authority and textbook extract should be allowed but rejected the inclusion of the FRS in the light of HMRC's objections and on the understanding that no expert accounting evidence was to be produced to the Tribunal.

Joined appeals

8. The Tribunal has directed that three appeals should be joined. The parties agreed that the issues for determination were the same in each case although the quantum of any potential tax charge differed.

Late appeals

9. Due to the COVID pandemic the Appellants' appeals were made late. HMRC confirmed to the Appellants that it would not oppose an extension to the time limits within which the appeals should have been made. The Tribunal has therefore treated the appeals as made in time

Scots law advice requested

10. The Partnership which is the focus of these appeals is a Scottish law partnership. The agreement under which business assets were transferred by the Partnership to the Company was governed by Scottish law. This appeal turns on the interpretation of the provisions of that agreement. During the course of the Tribunal hearing, it became apparent that there were potentially some significant differences in the legal concepts applied to the assets and their transfer under the agreement for Scots and English law purposes.

11. The Tribunal therefore requested that the parties obtain Scots law advice on these issues from a jointly appointed and dual qualified Scottish and English lawyer. That advice was obtained on 30 November 2022 and is relied on in this Decision. Both parties provided additional submissions having considered that Scots law advice.

ISSUES UNDER APPEAL

12. The Appellants' appeals concern the treatment of a redress payment ("the Redress Payment") made by RBS in respect of a mis-sold Interest Rate Hedging Product ("the Swap"). The parties do not dispute that the Redress Payment is taxable, but do not agree about which entity should be treated as receiving and therefore bearing tax on the Redress Payment. The Appellants argue that the Redress Payment should be treated as received by and taxable on the company, Blackpool Promotions Limited ("the Company") to which the business of Blackpool Promotions and Leisure Travel ("the Partnership") was transferred under a Business Purchase Agreement ("the Agreement") dated 22 May 2012. The Respondents argue that the Redress Payment should be treated as received by and taxable on the Partnership as a "post-cessation trading receipt".

13. The main issue in dispute between the parties is whether on the proper interpretation of the Agreement the person entitled to the Redress Payment is the Partnership or the Company.

14. The assessments under appeal for each Appellant are:

(1) Mr James O'Neil on 26 September 2017 in the sum of £67,493.11 amended by review on 30 March 2020 to £73,305.62.

(2) Mrs Deborah O'Neil on 26 September 2017 in the sum of £67,491.11 amended by review on 30 March 2020 to £73,305.62.

(3) Mrs May McCallum on 26 September 2017 in the sum of £70,444.36 amended by review on 30 March 2020 to £76,260.87.

(4) Each of the Appellants appealed against those amended assessments by appeal to the Tribunal on 29 June 2020.

15. At the hearing Mr MacLeod clarified that HMRC's position was that the Redress Payment was taxable on the Partnership as a post-cessation trading receipt, not as "other income" of the partners in the Partnership.

16. In response, Mr Elliott contended that a procedural issue was also in point; whether HMRC had followed the correct procedure by assessing the partners of the Partnership rather than the Partnership itself.

Penalties

17. HMRC have also charged penalties on each of the Appellants on the basis that failure to include their share of the Redress Payment in their self-assessment tax returns for the 2014-15 tax year was "careless".

18. The penalties have been calculated on the basis that the disclosure to HMRC was "prompted" and a reduction of the penalty level to 30% has been applied.

19. Penalties were issued to:

(1) Mr O'Neil on 7 November 2017 amounting to £21,991.68 (as amended on review).

(2) Mrs O'Neil on 7 November 2017 amounting to £21,991.68 (as amended on review).

(3) Mrs McCallum on 7 November 2017 amounting to £22,878.26 (as amended on review).

20. The Appellants argue that failure to disclose the Redress Payment was not careless given the lack of clarity at the time about how such payments should be taxed.

21. On behalf of the Appellants Mr Elliott also argues that HMRC, who have the burden of proof to demonstrate that the penalties have been properly applied, have failed to plead their case so the penalties should be dismissed.

LAW AND AUTHORITIES

22. Assessment procedure:

(1) Taxes Management Act 1970 ("TMA 1970")

(a) s12AC –Notice of Enquiry

(b) s28B – Completion of Enquiry into Partnership Return

(c) s29- Assessment where loss of tax discovered

(d) s30B-Amendment of Partnership Return where loss of tax discovered

(e) s34- Ordinary time limit of 4 years

(2) Income Tax (Trading and Other Income) Act 2005 ("ITTOIA")

(a) s5 – Charge to tax on profits of a trade, profession or vocation

(b) s242-246 – Charge to tax on post-cessation receipts

23. Interpreting the Agreement

(1) *Arnold v Britton* [2015] AC 1619

(2) *Wood v Capita Insurance Services Ltd* [2017] UKSC 24

24. Chose in action

(1) *Gallemos Ltd (in receivership) v Barratt Falkirk Ltd* [1989] S.C 239

(2) *Gadhavi & Others v HMRC* [2018] UKFTT 600 (TC)

(3) *MG Rover Group Ltd v HMRC* [2014] UKFTT 327 (TC)

25. Scottish legal advice

(1) At the request of the Tribunal the parties jointly instructed Mr Denis Edwards to provide Scot's law advice concerning the transfer of the right to make a legal claim before a claim has been activated. Mr Edwards provided detailed advice which compared the English law concept of a "chose in action" with Scot's law and concluded that:

> (a) There is no Scot's law equivalent of a chose in action, although Scot's law does recognise the possibility of transferring the right to make a claim: "Scots law recognises the assignation of a right to sue even if an action based on the claim has not yet been raised and even if the value of the claim has not yet been quantified".
>
> (b) Scot's law takes a "generous view of the assignment of rights" but in order to perfect the assignment of a right "intimation" has to be given to the debtor "The real right in the incorporeal moveable asset [the claim] only passes following intimation of the assignation to the debtor" and
>
> "The test of the matter is what would happen to the incorporeal moveable asset (that is, the right to sue the debtor) if the assignor became bankrupt before notice of the assignation was given to the debtor. While the assignee would have a contractual right to the debt – that is, a personal right to make the claim against the assignor – the assignor's trustee in bankruptcy would claim that the asset remained part of the estate of the assignor. I consider that the trustee's claim would prevail. Property, in other words, the real right or right *in rem* in the incorporeal moveable asset had not passed to the assignee in the absence of notice to the debtor"
>
> (c) As to what constitutes "intimation" [notification] for Scot's law purposes, no particular form of intimation is required, but there must be some intimation.

(2) Mr Edwards also helpfully provided some general comparisons between English and Scots law including in respect of the concept of beneficial ownership saying:

> "In Scots law, classically, a person owns property absolutely or not at all (leaving aside issues arising from rights in security over property). Putting matters at a high level of generality, concepts of trusts and innovative securities which lead to qualifications of absolute ownership (for example, the institution of floating charges on a company's assets) have been introduced into Scots law by statute."

26. Cessation of partnership

(1) *Chahal v Mahal* [2005] EWCA Civ 898

(2) Lindley & Banks on Partnership

27. Penalties

(1) HMRC to plead its case

    (a) *Burgess v HMRC* [2015] UKUT 578 (TCC)

(2) Carelessness

    (a) *Lovell v HMRC* [2019] UKFTT 0042(TC)

    (b) *Wilkinson v HMRC* [2020] UKFTT 0362 (TC)

    (c) *Revenue Scotland v Begbies* [2019] UT 35

BACKGROUND FACTS

28. The Partnership is an unincorporated Scottish partnership, the partners of which were the Appellants. The profits of the Partnership were shared equally between the partners.

29. The Partnership commenced trading on 1 April 1983 and its business initially consisted of transporting customers to Blackpool for holidays. Between 2005 and 2007, the Partnership acquired four hotels ("the Properties") and, from that time, it carried on a business of hotelier and travel agent.

30. The Partnership was a customer of RBS. In late May 2006 and spring 2007, the Partnership entered into two loan agreements with RBS. As a condition of receiving the loans, the Partnership was required to take out the Swap.

31. Following a fall in interest rates, in 2009 the Partnership sought advice from Brodies Solicitors LLP ("Brodies") and was advised that the Swap was inappropriate for the business. Following a fire at a property adjacent to one of the Partnership's hotels, in 2010 the Partnership sought further advice from Brodies in relation to the Swap and the potential restructuring of the Partnership's loans. From September 2010, the Partnership was advised and represented by JC Rathbone Associates ("Rathbones").

32. In late 2011- early 2012, the Partnership was advised to consider selling its business (other than the Properties) to a limited company to facilitate the termination of the RBS loans.

33. On 22 May 2012, the Partnership entered into the Agreement with the Company owned by Lythe Holdings Ltd, which at the time was owned by James O'Neil (70%), Deborah O'Neil (20%) and May McCallum (10%). Under the Agreement, the Partnership sold the entire business (except for real property) to the Company for £6 million.

34. Following the transfer of the business, the Partnership's only assets were the Properties.

35. On 8 August 2012, RBS wrote to the Partnership stating that they had agreed with the Financial Services Authority to undertake a review of interest rate swaps sold since 1 December 2001.

36. In October 2012, Santander agreed to make loans to the Company. The Swap was terminated on the payment of a termination fee by the Company. In the same month, the Properties were transferred to Lythe Holdings Ltd. ("Lythe")

37. On 10 March 2014, RBS made an offer for redress in the amount of £521,757.81 (being £540,300 less withheld tax of £18,542.68). The terms of the offer were that the payment could only be made to the partners of the Partnership and not to any third parties. Following negotiation, this offer was accepted and payment of £521,757.81 (the Redress Payment) was made on 22 April 2014 into a new joint account held by Mr and Mrs O'Neil with Santander.

38. The Redress Payment was not included in the Company's return for the year ended 31 October 2014, (nor was it included in the Appellants' return for the period ended 5 April 2015). However, the accounting position of the Company was reviewed by the Company's accountants, and on the understanding that the Redress Payment was taxable on the Company, the Company paid the additional tax due to HMRC.

AGREED MATTERS

39. The Redress Payment is a taxable sum.

40. The asset in question from which the Redress Payment arises is the Claim Right.

41. The Redress Payment was made into a newly created joint bank account in the names of Mr and Mrs O'Neil on 22 April 2014.

42. The Partnership is subject to Scottish law and has a legal identity separate from that of its partners.

43. The Agreement is governed by Scots law.

44. The Partnership had no ongoing business after 31 October 2012.

45. Payment to terminate the Swap agreement early was made by the Company after 22 May 2012.

EVIDENCE

46. We heard no oral evidence and saw no written evidence from Mr O'Neil's other two partners in the Partnership, Mrs O'Neil and Mrs McCallum.

47. We saw no evidence about the transfer of the properties to the holding company on 31 October 2012.

48. We did not see any bank statements from the Partnership or the Company.

49. We heard oral evidence from:

Mr McLaughlin

(1) We saw Mr McLaughlin's witness statement of 23 June 2022 which was admitted and taken as read.

(2) Mr McLaughlin was cross-examined by Mr MacLeod.

(3) Mr McLaughlin was not involved with advising the Appellants until August 2014, sometime after the events which are most relevant to this appeal. He took over from the Appellants' former accountant WDM but stated that he had struggled to obtain an orderly hand over; WDM provided only the bare minimum of information as part of the hand over. He was not made aware of any of the details of the transfer of the business from the Partnership to the Company either by Mr O'Neil or WDM. He was not aware that the Partnership had taken any action against RBS or was part of the FSA review programme.

(4) He became aware of the Redress Payment only when he received a letter from HMRC on 26 June 2017.

(5) He described Mr O'Neil as "someone who is not comfortable with computers or email" and "a sound businessman who does not possess detailed information in relation to his business".

Mr O'Neil

(6) Mr O'Neil's witness statements of 17 June 2013 and 21 January 2021 were admitted and taken as read subject to corrections made by Mr O'Neil:

(a) In his most recent witness statement about the entity which had paid off the Swap and the entity to which he considered advice was being given by Rathbones in 2013; the witness statement referred to the Partnership but Mr O' Neil said this should be a reference to the Company.

(b) In his witness statement of 2013 references to himself as the party to the Swap and the entity taking legal advice from Rathbones about how to exit the Swap should be a reference to the Company.

(7) Mr O'Neil told us that the Partnership business had been started by him in the 1980s and had been built into a successful business. He described himself as someone who did nothing by computer or email, all his business dealings were done in meetings or by phone.

(8) RBS had told him that if he wanted them to make the Loans, he had to enter into the Swap. Mr O'Neil realised in 2009 that something was going wrong with the Swap and that large payments had been made to RBS. He discussed this with his advisers Brodies in 2009 and 2010 (as made clear in the invoices from Brodies).

(9) At that time, as a result of a fire at one of the hotels owned by the Partnership, RBS were likely to revalue the property at nil which would trigger the covenants in the RBS loans. In 2011 at a meeting with an RBS representative he was told that the Properties would need to be revalued. In early 2012 on the advice of Brodies it was decided to transfer the Partnership business to the Company and refinance the Properties. As a result of the Partnership being moved to the "GRG" business at RBS, it became very difficult for Mr O'Neil to raise any issues with them.

(10) He knew about the claims being made against banks for mis-selling through the "Bully-Banks" internet group and realised that the Partnership had the basis for a claim against RBS in 2012.

(11) His intention at the time when the Partnership business was transferred was that everything to do with the business should be transferred to the Company other than the hotel buildings, which were transferred to the holding company, Lythe, in October 2012. The Partnership stopped doing anything at that time. It had no bank account and no funds.

(12) Payments under the Swap were made by the Company after the Partnership business had been transferred in May 2012 and the Company paid the early termination sum under the Swap in October 2012.

(13) At the time when the business was being transferred Mr O'Neil did not want to rock the boat with RBS. He was not in a position to do anything to make the relationship difficult with RBS until the hotels had been refinanced with Santander in October 2012.

(14) He had discussions with RBS in September 2013 about the Redress Payment claim and RBS confirmed that they were reviewing the claim.

(15) When he heard about the offer letter from RBS in March 2014 stating that a payment was going to be made by RBS, he asked if it could be made in the name of the Company. He was told that it could not; it could only be paid by cheque in the names of himself and his wife. A decision had to be made within a very short time about accepting the payment and he had no choice but to accept the payment in the form in which it was made in April 2014.

(16) He told his wife and mother, Mrs McCallum about the payment and also spoke to his then accountants, WDM about it. He assumed that they had told his new advisers about the payment and that they would deal with it in the Company's accounts.

Mr Brian Cox (HMRC)

(17) We saw Mr Cox's witness statement dated 19 November 2021 which was admitted and taken as read.

(18) Mr Cox was cross-examined by Mr Elliott.

(19) Like Mr McLaughlin, Mr Cox was not involved with the Partnership or the Company at the time of the relevant events or when HMRC first raised their enquiries and assessments. He took over managing the enquiry from a colleague in July 2019. Much of Mr Cox's evidence amounted to a second-hand reiteration of actions taken by those at HMRC who were involved in the original investigation.

(20) Mr Cox's own views of the evidence provided to his colleagues were that:

(a) No evidence had been provided that the Claim Right was an asset of the Partnership before the Agreement was implemented.

(b) No reference was made to the Redress Payment in the Company's accounts.

(c) It was not possible for the Partnership to assign the Claim Right and RBS would only make the Redress Payment to the Partnership.

(d) No consideration was paid for the Claim Right as part of the Agreement.

(e) No third-party consent was sought or obtained from RBS to transfer the Claim Right.

(f) The Appellants have not provided HMRC with any documentary evidence that the Claim Right was assigned, transferred or novated to the Company as part of the Agreement or at any other time.

Comments on the oral evidence

50. It is fair to say that other than the evidence from Mr O'Neil, very little first-hand evidence was produced to the Tribunal from those most directly involved in the transfer of the business from the Partnership to the Company in 2012. The advisers with whom Mr O'Neil had discussed the Redress Payment, his former accountants WDM, were not willing or able to provide any contemporaneous correspondence in support of Mr O'Neil's evidence.

51. Mr MacLeod described Mr O'Neil's evidence as at odds with some of the documentation and full of prevarication and embellishment. Mr O'Neil described himself as not a details man who left most of the negotiations and commercial details to his advisers. We have to agree that overall Mr O'Neil's evidence did not add much substance to the arguments being made on behalf of the Appellants.

Written evidence

52. We saw:

(1) The Agreement dated 22 May 2012:

(a) Clause 2: Agreement to sell and purchase

"Subject to the terms of this Agreement, the Seller as beneficial owner agrees to sell, free from all Encumbrances, and the Buyer agrees to purchase, with effect from the Effective Time, the Business comprising of the Assets as a going concern and including all other property, rights and assets owned by the Seller and used, enjoyed or exercised or intended to be used, enjoyed or exercised exclusively in the Business at the Effective Time, save for the Excluded Assets."

(b) Clause 8: Passing of title and risk and Third-Party Consent

"8.2 In so far as any Assets are not delivered or formally transferred, novated or assigned to the Buyer at Completion and until such time as they are formally transferred, novated or assigned to the Buyer:
8.2.1 the Seller shall be deemed to hold all such Assets on trust for the Buyer; and
8.2.2 to the extent permissible under law or the terms of any relevant agreement
8.2.2.1 the Seller shall use all reasonable endeavours to ensure at its cost that the Buyer shall be entitled to the benefit, use and enjoyment of those Assets, to receive the income therefrom, and to have the right of enforcement of the Business Claims, if any, relating to those Assets; and …"

(c) Definitions:

"**Assets**" are defined as including (inter alia) the "Business Claims":

"**Assets**" – the Business and all of the assets of the Business including the Goodwill, the Moveable Assets, the Fixed Assets, the benefit (subject to the burden) of the Contracts, the Records, Book Debts, the Stock, the Business Information, the IT System, the Business Name, the Business Intellectual Property Rights, the Business Claims, the cash in hand and at the bank of the Seller, excluding the Excluded Assets."

The "**Business Claims**" are defined as (inter alia) all of the Seller's rights, entitlements and claims against third parties arising directly or indirectly out of or in connection with the operation of the Business:
"Business Claims" – "all of the Seller's rights, entitlements and claims against third parties arising directly or indirectly out of or in connection with the operation of the Business or relating to the Assets, including rights under any warranties, conditions, guarantees or indemnities or under the Sale of Goods Act 1979, but excluding any rights, entitlements and claims relating to the Excluded Assets."

(2) The Swap confirmation – 10 May 2007 "GB Rollercoaster Base Rate Collar", including a schedule of payments and clauses and definitions:

(a) ""status of parties" The other party is not acting as a fiduciary for or an adviser to it in respect of this Transaction"

(b) No restrictions on transfer or assignment are included in the confirmation terms.

(3) The RBS letters

(a) To Mr O'Neil (of "The Firm Blackpool Promotions") of 8 August 2012 "Review of interest rate hedging products as agreed with the FSA" saying

> "We are writing to you as a retail classified customer who purchased a relevant product which may be within the scope of the review..... The first thing we will do is determine whether or not you meet the sophistication test as agreed with the FSA..... Where we conclude you may not have met the sophistication test, the next step will depend on the kind of product you purchased.....if you purchased a standard product, we will write to you to ask if you would like the sale to be reviewed.....The outcome of this review may be that we are satisfied that the product you purchased is appropriate for your circumstances and was properly sold" and
>
> "Frequently asked questions.....
>
> "What happens if I have already made a formal complaint to the bank about my hedging rate product? If you are a non-sophisticated customer, your complaint will be considered as part of the Review Process"

(b) Mr O'Neil's response of 14 August 2012 in the name of "the Firm of Blackpool Promotions" providing confirmation that he fell within the definition of a non-sophisticated customer and the timing and level of any redress payments.

(c) RBS "request acknowledgement" dated 3 September 2013 confirming that the Partnership's Swap would progress to the next stage of their review.

(d) RBS letter to Brodies 10 March 2014 "Provisional determination of basic redress" including

> (i) terms of payment "please note payments can only be made to the customer name on the front of this letter and not to any third parties"
>
> (ii) Tax "you should include the gross interest and tax deducted figures together with the remaining balance of the provisional basic redress payment in the accounts of your business and report this information to HMRC in either your own or your business' tax return as appropriate".

(4) Invoices from Brodies from 2010-2012 containing high level details of works done for the Partnership and including references to discussions about the terms of the Swap from RBS for example:

(a) "detailed examination of your collar rate agreement" March 2010

(b) "pursuing collar rate deal enquiries" June 2010

(c) "all liaison with RBS" March 2012

(d) "Perusing RBS offer letter" April 2012

(e) "all work to discharge obligations to |RBS in respect of business borrowing and hedging" October 2012

(5) J C Rathbones "Hedge Review Report" 7 March 2013 addressed to the Partnership.

(6) Emails and correspondence from Mr O'Neil's advisers including:

(a) Emails between Rathbones and Brodies of October 2010 concerning setting up the Partnership as a client, including this statement by Jackie Bowie of Rathbones "Thanks very much for introducing your client this morning..... In the meantime, I will start my investigations with RBS".

(7) Accounts of the Company and the Partnership:

(a) Company management accounts for the year to 30 April 2019

(b) Company accounts 6 December 2011 to 31 October 2012 (payment of interest and termination fee under Swap)

(c) Partnership accounts 1 June 2011 to 6 April 2012

(d) Partnership accounts 7 April 2012 to 31 October 2012 (completely blank)

(8) Correspondence between the parties from June 2017 to March 2020.

THE APPELLANTS' ARGUMENTS

Procedural issues

Should the assessments be on the partners or the Partnership?

53. The Appellants say that s 12AC/28B or s30B and s 30B(2) TMA 1970 are the provisions which apply if a notice of enquiry is to be made into a partnership return; if HMRC are arguing that the Redress Payment is a post-cessation receipt of the Partnership, they should have followed this procedure.

54. In the context of a discovery assessment, the correct procedure is that set out at s 30B TMA 1970, entailing a notice to the representative partner to amend the partnership return, not the individual partners' returns in the first instance.

55. HMRC have followed the wrong procedure in relying only on s 245 ITTOIA to amend the individual partners' returns if the assessment is on the basis of a "post-cessation" receipt.

The asset – the Claim Right

56. Was it in existence at the time of the Agreement?

(1) The Appellants say that there was a subsisting claim against RBS at the time of the Agreement; Mr O'Neil was aware of the right to make a claim against RBS evidenced by the invoices from Brodies where that claim was discussed and his discussions with RBS during 2010 and 2011.

(2) That subsisting claim (referred to here as the Claim Right) was a chose in action; a claim does not need to be quantified or substantiated to be a chose in action, see *Gadhavi* and *M G Rover*.

(3) Even though Scot's law does not recognise the concept of a chose in action, the Scot's law advice demonstrates that a right can be assigned before a claim has been raised.

(4) The Claim Right arises at the time when the right to sue arises (not when the claim is actually made). Arguably this is in May 2007 when the first payment was made under the Swap. (See *CFC & Dividends GLO* [2019] EWHC 338)

(5) As evidence by the correspondence with RBS, the Claim Right arises from the Partnership's rights to make a claim against RBS, not the decision of the FSA to make a payment.

57. Has the Swap/Claim Right been assigned to the Company?

(1) The Swap has been transferred under the Agreement; the Company made the payments under the Swap after May 2012 including the termination fee.

(2) It was the intention of Mr O'Neil that the Claim Right should also be transferred to the Company. Even if this was not legally effective for Scot's law purposes because there was no "intimation" to RBS, the Claim Right was transferred (Clause 8 of the Agreement) as between the Company and the Partnership. The Company has a right to make a claim against the Partnership for the Redress Payment and should be the entity which suffers tax on it.

(3) It is possible to transfer the Claim Right without transferring the Swap. There is no champerty issue. The Appellants rely on the First-tier Tribunal decision in *MG Rover* concerning the ability to transfer future rights to VAT repayments without the transfer of the business from which the VAT claim arises [208] of *MG Rover.*

(4) They also rely on that decision to support their position that even if the Claim Right was not in existence at the time of the Agreement, it is possible to transfer future rights under a transfer agreement [219] of *MG Rover*.

58. The drafting and interpretation of the Agreement

(1) The Appellants say that the drafting of the Agreement is broad and was clearly intended to cover all of the assets of the Partnership other than the Properties.

(2) Clause 2 – the Claim Right is a "Business Claim" as defined by the Agreement, it is an "Asset" and was transferred under the Agreement to the Company.

(3) Clause 4.1 it is not connected to or part of the "excluded assets" (the properties).

(4) Clause 8 – if Claim Right has not been effectively transferred, there is a deemed transfer of beneficial ownership under Clause 8.2

(5) When considering how the Agreement should be interpreted, relying on the approach to interpretation set out in *Arnold v Britton:* clear words of contract take priority over other factors.

59. Is the accounting treatment determinative?

(1) The chose in action is a contingent right, of little or no value at the time of the Agreement, therefore it is neither surprising nor significant that it does not appear in the accounts of the Partnership at the time of the Agreement.

(2) It is not surprising that the Claim Right excluded since it had an unknown value at that date.

60. Cessation of the Partnership

The Partnership should be treated as having ceased in October 2012 at the latest.

(1) There is no requirement for written notice to terminate a partnership; see Lindley & Banks at [24]-[29] and s 32 Partnership Act 1890.

(2) In this case the Partnership was terminated by action, the decision in *Chahal* & *Mahal* supports the fact that it is possible to terminate a Partnership by action without a formal termination notice.

61. **Penalties**

(1) Have HMRC pleaded their case? The Appellants argue that they have not.

(a) The decisions in *Burgess & Brimheath* and *Begbies* make it clear that when applying penalties, the onus of proof is on HMRC and in order to meet that onus they must plead all elements of their case.

(b) In these appeals, HMRC have no provided any specific arguments about the basis on which penalties have been applied either in their statement of case or skeleton argument.

(c) The statements made by HMRC in their review letter of 30 March 2020 are not part of pleadings.

(2) Were the Appellants careless? The Appellants argue that Mr O'Neil was not careless because:

(a) Mr O'Neil says that he took legal advice from WDM about the treatment of the Redress Payment. Mr O'Neil cannot be treated as having been careless if he took and relied on legal advice. The Appellant's view was "genuine and carefully considered" as stated by HMRC's reviewing officer in their letter of 30 March 2020.

(b) At the time when the tax returns for the Partnership were completed, the legal position of payments of this type was unclear; statements made by the Bully-Banks online community suggested that the sums should not be subject to tax and later FTT decisions (*Gadhavi* [2018] *Wilkinson* [2020]) also reflect the lack of clarity about how payments like this should be taxed.

(c) In these circumstances, it was reasonable for Mr O'Neil to assume the Redress Payment should not be subject to tax. The test of reasonableness to be applied is that set out in *Lovell* [2019] in which the First tier Tribunal concluded that a penalty for carelessness should be reduced to nil on the basis of the "special circumstances" of a similar unsophisticated investor who had received a compensation payment and was not in a position to understand what the correct tax treatment should be.

(d) The Appellants stress that Mr O'Neil did not see letter RBS to Brodies referring to tax treatment of the Redress Payment and so was not aware of the potential taxability of the receipt.

HMRC'S ARGUMENTS

Procedural issues

62. S 245 ITTOIA – This is the correct basis for assessing partners who were formerly members of a partnership in the absence of partnership returns from the Partnership. S 245 states that the person liable for any "post-cessation receipt" is the person receiving or entitled to the receipts.

The asset – the Claim Right

63. ***Was it in existence at the time of the Agreement***?

(1) HMRC say that the Appellants have not provided any evidence that there was a subsisting claim against RBS at the time of the Agreement. No evidence has been produced of any actual claim being made. The Brodies invoices which the Appellants rely on are not good evidence and indicate at best that preliminary discussions had taken place about how to deal with the Swap.

(2) HMRC also rely on the Scottish law as it applies to the Agreement. Even if there was a claim at the time which could be treated as a chose in action under English law, there is no such concept in Scottish law. See the decision of the Scottish courts in *Gallemos* which concluded that there can be no effective assignment of an undefined right.

(3) For Scot's law purposes, there must be an "intimation" of the assignment of the Claim Right to RBS in order for it to be transferred to the Company and even if the Company did acquire rights to make a claim under the Agreement, there is no evidence of any notification or intimation to RBS. Any alleged assignment has not been legally perfected.

Any argument based on authorities such as *The Claimants listed in Class 8 of CFC & Dividend GLO v HMRC* ([2019] EWHC 338) is not relevant, those arguments concerned claims which existed in law but of which the appellants were not aware at the relevant time, not, as here, where no legal claim existed at the relevant time.

(4) In addition, the Appellants have not provided any evidence of the effective legal assignment of the Swap, therefore the Redress Payment was properly paid to the entity which was still the legal owner of the Swap, the Partnership.

(5) In any event, the Redress Payment made by RBS arose from obligations imposed by the FSA, not in response to any kind of claim made by the Partnership. The Partnership had no relevant "right" to transfer.

64. ***Drafting and interpretation of the Agreement***:

(1) HMRC agree with Appellants' approach to interpretation of the Agreement and rely on *Arnold v Britton* and *Wood v Capita:*

> "It has long been accepted that this is not a literalist exercise focused solely on a parsing of the wording of the particular clause but that the court must consider the contract as a whole and, depending on the nature, formality and quality of drafting of the contract, give more or less weight to elements of the wider context in reaching its view as to that objective meaning." [10]

(2) But HMRC come to a different conclusion on the interpretation of the Agreement, relying on the lack of evidence provided to support the purported interpretation of the Agreement, saying; "the Appellants' contention as to the meaning of the Agreement is not supported by reliable, credible or relevant evidence about the contemporaneous documentary, factual and commercial context."

(3) In addition, no evidence at all has been produced to support stated intentions of Mr O'Neil, HMRC point out that it is "astounding that so little evidence produced".

(4) HMRC also point out that

(a) The Agreement was dated 22 May 2012: it was some months later that RBS contacted the Partnership to intimate that it was conducting a review of the sale of interest rate hedging products;

(b) The Agreement does not refer to a claim by the Partnership which could give rise to the Redress Payment. The right to receipt of the Redress Payment is not expressed in the Agreement;

(c) The purpose of the Agreement was to regulate the transfer of the assets of the business;

(d) Clause 1 of the Agreement expressly defines various terms, including the term 'Assets';

(e) In terms of the purchase price, only £250,000 was allocated to assets.

(f) The Agreement does not extend to rights not in existence "at the time" of the Agreement (final phrase of cl 2.1)

(5) Mr McLeod noted that Agreement is subject to Scottish law, and the *MG Rover* decision on which the Appellants rely is not binding for Scots law purposes.

65. Accounting treatment

(1) HMRC say that it is significant that the Claim Right is not part of Agreement asset valuation.

(2) Nor does the Claim Right appear in accounts of the Partnership or the Company.

Cessation of the Partnership

66. HMRC accept that there is no need for a written termination notice to terminate a partnership but stress that

(a) It is a question of fact whether oral notice of termination has been given.

(b) The mere transfer out of the Partnership assets is not sufficient.

67. In response to the Appellants' reliance on *Chahal & Mahal* HMRC say that there is only a presumption of cessation when assets are transferred from a partnership to a limited company and all the partners are given shares in the limited company. If the circumstances are unusual, this presumption can be over turned. It is not clear that this presumption should apply here.

Penalties – Schedule 24 Finance Act 2007

68. HMRC's pleaded case is set out in review letter of 30 March 2020. As such, there can be no issue of "fairness" the Appellants have had adequate notice of what HMRC's case is, even if that has not been included in the pleadings.

Carelessness

69. Mr O'Neil acted carelessly because on receipt of a large payment he chose not to declare the receipt of that payment to his advisers or think to include it on his own tax return. This was despite the fact that the letter from RBS to Brodies referred to the tax treatment of the Redress Payment.

70. The Appellants have not provided any evidence that any tax advice was taken by the Partnership and/or Mr O'Neil. Mr O'Neil said that he told WDM about the payment and then assumed that it would be dealt with by Brodies.

71. No action was taken to declare the sum until the issue was raised by HMRC.

DISCUSSION AND DECISION

72. On the basis of the evidence seen and heard we find as a fact that:

(1) Mr O'Neil did not make a formal claim against RBS before the date of the Agreement or at any other time.

(2) The Partnership's position as an "unsophisticated" client who had been identified as having been mis-sold the Swap in accordance with the FSA's directions, meant that it had a right to the Redress Payment from RBS without needing to make a claim.

(3) The reason for transferring the business to the Company and the properties to Lythe was to facilitate the termination of the RBS loans and the refinancing of those loans with Santander.

(4) There were no specific restrictions on the assignment of the Swap to a third party in the Swap documentation.

(5) RBS was not notified of any transfer of either the Swap or the Claim Right to the Company.

(6) No evidence has been provided by HMRC which goes to "carelessness" of anyone other than Mr O'Neil.

(7) No evidence has been provided that Mr O'Neil took any formal advice about the correct tax treatment of the Redress Payment and relied on his accountants to deal with the payment.

(8) The Partnership business ceased on 30 October 2012 when the Properties were transferred to Lythe.

Procedural issues

73. Have HMRC correctly issued discovery assessments to the individual partners for the post-cessation receipt under s 245 ITTOIA 2005, or should the discovery assessments have been made in the name of the partnership under s 30B TMA 1970?

74. If HMRC are correct and the Claim Right was not transferred to the Company, it must have remained in the hands of the Partnership. By the time the assessments were made by HMRC in 2017, the Partnership business had ceased (see below for our detailed conclusions on this point).

75. On the basis that the post-cessation receipt was, as HMRC are arguing, received by the Partnership (through Mr and Mrs O'Neil) and the Partnership was the entity entitled to the payment from RBS, was the correct procedure the procedure set out at s30B TMA 1970, which allows HMRC to make changes to a partnership return which then has to be taken account of in determining the returns of the individual partners?

76. It is difficult to see how, in circumstances in which the Partnership business had ceased and HMRC had no evidence that the Partnership continued to exist, it can be said that HMRC should have assessed the Partnership under s 30B TMA 1970. The only possibility was for

HMRC to make an assessment in the name of the former partners as individuals. In accordance with s 245 ITTOIA 2005, it is the individual partners who, after the cessation of the Partnership, were entitled to the Redress Payment (if the Company was not so entitled).

77. We do not accept that in these circumstances HMRC could have followed any procedure other than to make an assessment under s 245 ITTOIA 2005 in the name of the individual partners.

78. The Appellants did not suggest that there were any other grounds on which the discovery assessments could be challenged. We accept that the discovery assessments made by HMRC were validly made in the name of the individual partners in 2017.

The Claim Right

Did the Claim Right exist at the time of the Agreement?

79. HMRC relied on the fact that there was no evidence that a claim had actually been notified or activated by Mr O'Neil on behalf of the Partnership at the time of the Agreement. The Brodies invoices just suggested that he had been considering taking some action but no action had actually been taken. We agree with this is a matter of fact.

80. We disagree with this analysis not because we do not accept that no action had been taken to initiate a claim by Mr O'Neil, but because:

(1) In fact, no action was required by the Partnership in order for the Redress Payment to be made. As HMRC themselves said, the right to the Redress Payment arose merely as a result of the Partnership falling into the category of an "unsophisticated client" which had been party to a Swap which was recognised by the FSA as having been mis-sold.

(2) On that basis, in our view the better analysis is that the right to the Redress Payment arose at the earliest at the time when RBS recognised, as a result of the action of the FSA, that the Swap had been mis-sold to the Partnership: evidenced by their letter of 8 August 2012. We note that even this letter is couched in conditional terms; a repayment would only be made if RBS confirmed that the Partnership was within the category of unsophisticated clients who were eligible for a redress payment.

(3) We have considered whether, in line with the first-tier decision in *Gadhavi*, we should treat the Claim Right as arising at the time when the Swap was entered into, as set out at [75] of the *Gadhavi* decision. We agree with the Tribunal in that case that being party to a swap (or any other kind of agreement) confers on both parties rights, including a potential right to make a claim against the other.

(4) We note at this stage that the Swap document which we saw was drafted in very limited terms and that there is nothing in the terms of the Swap itself (the very brief terms of which we saw) to suggest that the Partnership would be able to make a claim for mis-selling.

(5) However, we do not agree that, in circumstances in which a regulatory body such as the FSA determines that a regulated entity is obliged to make compensation payments to a certain limited class of clients, that right exists from the time when the relevant agreement (here the Swap) was entered into. On the contrary it seems to us more likely that without the FSA's intervention claimants such as the Partnership would otherwise not have been in a position to make a claim against the banks who have sold derivative products to them. In our view the FSA's intervention does not

necessarily reflect the existing rights of the Partnership; it may in fact be providing the Partnership with rights which it would not otherwise have.

(6) Rather than making a claim, in order to fall within the terms of the FSA compensation, clients such as the Partnership had to demonstrate that they fell within the category of clients to which the FSA determination applied. The Partnership did confirm that it fell within that category and that is the basis on which the Redress Payment was paid to the Partnership as evidenced by the FSA letter of 10 March 2014.

(7) Even if (which we doubt) Mr O'Neil had made a formal claim on behalf of the Partnership against RBS prior to the date of the Agreement, the FSA Redress Payment arises not as a result of that claim, but from the independent decision of the regulator. The Redress Payment is not conditional on any prior claim having been made, although the RBS correspondence does make clear that if a previous claim has been made, it will be subsumed within this compensation process as stated in RBS' letter of 8 August 2012.

81. There are two conclusions to be drawn from this analysis:

1. No claim was made or required to be made by the Partnership. Its right to redress relied not on the terms of the Swap, but on it falling within a certain category of clients who had entered into certain types of derivative transactions; and

2. The nature of the FSA determination meant that the Redress Payment could only be paid to the Partnership because only the Partnership had qualified as an "unsophisticated client" at the time when the Swap was entered into. It appears to us as a matter of regulatory law RBS would have been acting outside its ambit had it made the Redress Payment to any other entity.

Therefore, we have concluded that the Claim Right should be treated as arising at the earliest on 12 August 2012, several months after the date of the Agreement, (although we can see an argument that the actual date when any claim was crystallised was the later date when RBS confirmed that the Partnership fulfilled the conditions for compensation) and could only be a Claim Right in the name of the Partnership.

82. This does not necessarily mean that there was not a (separate) chose in action which was transferred to the Company as part of the Agreement, but that chose in action did not give rise to the Redress Payment.

Scots law advice – the need for intimation

83. Having concluded that the right under which the Redress Payment was made did not exist at the time of the Agreement, we do need to go on to consider other aspects of the parties' arguments. In case we are found to be wrong in our conclusion about the source of the Redress Payment, we briefly consider those alternative arguments here, particularly by reference to the Scots law advice provided by Mr Edwards.

84. Mr Edwards accepted that while Scots law did not recognise a "chose in action" it did recognise that a right to sue could be assigned even if a claim had not yet been raised. Therefore, if it can be argued that the Claim Right existed at the time of the Agreement, it could have been transferred as part of the Agreement for Scots law purposes.

85. But, in order for such a right to be validly legally transferred, according to Mr Edwards, there needs to be some "intimation" to the debtor, RBS in this case, that the claim has been transferred. Without any intimation, while there may be a transfer of rights between the

Partnership and the Company, that would merely give the Company the right to make a claim against the Partnership for the Redress Payment and would not transfer the right to the Redress Payment itself.

86. We saw no evidence that notice had been given to RBS of either the Swap or the Claim Right having been assigned to the Company. On the contrary, the actions of RBS suggest that as far as they were concerned the Swap remained in the name of the Partnership, evidenced by:

(1) the correspondence from RBS about the settlement offer and

(2) the issuing of the cheque in the partners' names.

87. The Appellants suggested that various of the actions undertaken by Mr O'Neil on behalf of the Partnership should be treated as intimation for these purposes, including the closure of the Partnership's bank account with RBS and the making of subsequent payments under the Swap from the Company's bank account.

88. We note that other than Mr O'Neil's oral statements, we saw no corroborating evidence about which entity paid the Swap payments and termination fee. Mr O'Neil said that these payments were made by the Company and that the Partnership's bank accounts had been closed down, but we did not see the bank accounts of the Company showing these payments.

89. In any event, we do not accept that this is sufficient to amount to intimation, even though the Scots law does not require intimation to be in any specific form. In our view, whatever form the intimation may take, there does at least need to be a clear indication to the counterparty (RBS) that a transfer has occurred. Here, on the contrary, in circumstances in which Mr O'Neil could have made clear to RBS that there had been a transfer (such as in his letter of 14 August 2012), no such statement was made.

90. On the basis of the evidence which we have seen, and the Scottish law analysis we have concluded that neither the Swap nor the Claim Right was legally assigned to the Company because there was no intimation to RBS.

91. Mr Elliott referred us to the decision in *MG Rover* to suggest that the Claim Right could be transferred even if the Swap was not (the champerty question). We have already concluded that for Scot's law purposes there can have been no legal transfer of either the Claim Right or the Swap.

92. In any event, we do not agree that the decision in *MG Rover* is applicable to these facts. We have considered in particular the conclusions of the Tribunal Judge at paragraph [219] of that decision in which she concludes that rights to future entitlements to repayments of VAT should be treated as included in one of the relevant assignment agreements:

> "Everything to do with the business was intended to be transferred … including any unanticipated future entitlement to tax repayments arising out of anything which had happened prior to the transfer date".

93. The Judge came to this conclusion because: the relevant assignment agreement referred to liabilities "arising thereafter of any nature whatsoever" and the tenor of what was a "friendly transfer" suggested that the intention was to transfer everything to do with the business. Can the same be said in this case?

94. It is true that the Agreement is also between closely related parties, but

(1) there is no specific reference in the Agreement to any assets or liabilities arising after the date of the Agreement and

(2) the Judge had already accepted, as we do not, that the VAT reclaim rights were choses in action (ie they may have been unanticipated in that the quantum could have been anything from nought to many thousands of pounds, but there was no doubt that the legal basis for making a claim existed at the time of the assignment agreement).

(3) For the reasons we have set out above, we do not think that the Claim Right can be treated as a chose in action at the time of the Agreement.

The terms of the Agreement

95. We accept the Appellants' argument that even if the Swap and the Claim Right were not legally assigned to the Company, the intention of the parties and the understanding of the Company (evidenced by its payment of the interest payments and termination payment under the Swap) was that the Swap should be transferred with the rest of the business assets under the Agreement.

96. The parties took a different view of the interpretation of the operative clauses of the Agreement, but our view is that on a straightforward reading of those provisions, clauses 2 and 3 the intention of the parties was the all of the assets and liabilities of the Partnership other than the Properties should be transferred.

97. We accept Mr O'Neil's explanation that his intention was to move all of the business of the Partnership to the Company other than the property.

98. Both parties referred to Clause 8.2.2 of the Agreement which attempts to deal with the situation in which assets have not been legally transferred to the Company. Despite the Agreement having been made subject to Scots law, the clause refers to the seller holding assets which have not been transferred on trust for the buyer, which appears rather odd.

99. The advice which we saw from Mr Edwards stated that Scots law does not recognise the difference between legal and beneficial ownership:

> "In Scots law, classically, a person owns property absolutely or not at all (leaving aside issues arising from rights in security over property). Putting matters at a high level of generality, concepts of trusts and innovative securities which lead to qualifications of absolute ownership (for example, the institution of floating charges on a company's assets) have been introduced into Scots law by statute."

We have concluded that clause 8.2 is not legally effective in the context of an agreement governed by Scots law and the Appellants cannot rely on its provisions to argue that either the Swap or the Claim Right were subject to some kind of equitable transfer.

Is the absence in the Agreement of the value of the Claim Right at the time of the sale significant?

100. We do not consider that the valuation placed on the assets of the Partnership at the time of the Agreement without any reference to the very large Redress Payment is crucial to the Appellants' argument because, even if the Claim Right existed at the date of the Agreement the value of the Claim Right was unknown; the quantum of the Redress Payment became clear only at the time when the offer letter was received from RBS in April 2014.

Is the fact that payment was made into an account in the name of Mr and Mrs O'Neil not the Company significant?

101. We accept Mr O'Neil's evidence that he was given no choice by RBS about the form in which the payment would be made. This supports the fact that RBS had not been notified of

the assignment of the Swap and therefore from their perspective the legal owners of the Redress Payment were the partners in the Partnership and not the Company.

Cessation of the Partnership

102. On this point we agree with HMRC that there is little or no evidence other than the oral statements of Mr O'Neil to suggest when or indeed if the Partnership was terminated.

103. Mr O'Neil told us that his other two partners were aware of the termination and shared his emotion at the ending of that business, but we heard nothing about how or when this was communicated to them.

104. Nor did we see any evidence of how or when the properties were transferred to the holding company. The Partnership accounts which we saw were blank for the period post 7 April 2012, but we saw no other evidence of the termination of the Partnership's business.

105. We saw the accounts of the Company recording the making of the Swap payments and the termination fee, but we did not see the Company's bank account from which those payments were made.

106. The parties referred us to the decisions in *Chahal v Mahal* to suggest that in the normal course, it is possible to terminate a partnership by conduct or by inference:

> "the law, like business common sense would presume, in the absence of any reason to the contrary, that the transfer of all the business assets of a partnership to a limited company... raises the presumption that the partnership is thereby determined" [29]

107. This is a presumption and depends, crucially, on there being a clear understanding between all the partners that cessation has occurred. In the *Mahal* case the judge decided that in the absence of any clear knowledge of the situation by one of the three partners to the partnership, there could be no inference that the partnership had ceased, even although all of its assets had been transferred out to a limited company. We are in a similar situation here; we have no direct evidence from anyone other than Mr O'Neil about what the intentions for the partnership were.

108. For those reasons we do not agree with the Appellants that the Partnership can be treated as ceasing on the date when the Agreement was entered into. At best, on the basis of the evidence which we have seen, it is possible to conclude that the Partnership was not carrying on any business activities after the date when the properties were transferred to Lythe and the Swap termination payment was made in October 2012.

109. Other than that, we do not feel able to come to any definitive conclusion about when the Partnership should be treated as ceasing on the basis of evidence provided by the Appellant.

Conclusion

110. The right to a payment from RBS did not depend on anyone making (or having) a claim, it depended only on the Partnership being a party to the Swap and falling into the category of "unsophisticated investor". That right (the Claim Right) arose at the time when the FSA notified RBS that they were treating the Swap as having been mis-sold to them as un unsophisticated investor and that compensation was therefore due. That was after the date of the Agreement. Therefore, the legal right giving rise to the Redress Payment did not exist at the time of the Agreement.

111. In addition, the legal conditions for transfer of the Swap and the Claim Right to the Company were not complied with for Scottish law purposes because there was no intimation of the transfer to RBS.

112. Clause 8.2.2 of the Agreement cannot be relied on because the Scottish law which governs the Agreement does not recognise the concept of property held on trust.

113. At best, the Company has a right under Scots law to make a claim against the Partnership for any payments it has made under the Swap and for the Redress Payment, but that does not mean that it is the Company rather than the Partnership which should be paying tax on the Redress Payment.

Penalties

Have HMRC pleaded their case in sufficient detail

114. We have concluded that HMRC have not pleaded their case in sufficient detail in their statement of case or skeleton argument, but they did do so before the Tribunal, and the Appellants were aware of the issue and responded to those arguments at the Tribunal.

115. Mr Elliott referred us to the decision in *Burgess* which sets out the requirements for HMRC not merely to accept the burden proof in demonstrating that a penalty is due, but also to plead their case as to why it is due in sufficient detail to allow a taxpayer to respond to that pleading, *Burgess* at [53]

> "in the absence of a positive case put by HMRC in relation to the competence and time limit issues, the FTT erred in law in not finding that HMRC had not discharged the burden of proof in those respects".

116. HMRC's "pleadings" referred to by Mr MacLeod amounted to this sentence in their review letter of 30 March 2020 at 7.3.2 "I consider that your behaviour was careless in that you did not advise your accountants of the redress payment until the matter was raised by HMRC". (A similar sentence is included in the review letters of the same date to the other partners).

117. Mr Elliott argued that this statement should not be treated as having been made "in the proceedings" and pointed out that the Appellants had notified HMRC of this issue in their letter of 23 June 2022 pointing out that "if HMRC seek to defend the penalties they are obliged to prove carelessness and we note that HMRC's evidence does not expressly address this subject".

118. We agree that there is no reference to the basis on which HMRC have raised the penalties on the partners in either HMRC's statement of case or skeleton argument.

119. The position is not as extreme as in *Burgess*, in which HMRC assumed that the relevant issues were not in dispute and so they were not addressed before the Tribunal at all; Mr MacLeod did provide oral arguments about the basis on which carelessness penalties had been applied before the Tribunal and the Appellant responded.

Conclusion

120. The decision in *Burgess* turns on whether the Appellant has been denied a fair hearing because of HMRC's failure to plead its case. We have concluded that despite the absence of any specific pleadings relating to carelessness in HMRC's appeal documents, the fact that the Appellants had been made aware of HMRC's case in their review letter and the fact that HMRC addressed their case at the Tribunal means that there has not, in fact, been any unfairness to the Appellants in this case and we are not rejecting HMRC's case on that basis.

Carelessness

121. If we do accept that HMRC should be treated as having pleaded their case, we need to consider whether they were correct to issues penalties on each of the partners of the Partnership under paragraph 3 Schedule 24 Finance Act 2007 for careless behaviour. We deal with each of the partners in turn:

Mr O'Neil

(1) We have concluded that Mr O'Neil did act carelessly in failing to properly consider the tax treatment of the Redress Payment. We note the Appellants' reliance on the first-tier decision in *Lovell* but think that Mr O'Neil was in a different position that than the Appellant in that case:

(a) Mr O' Neil told us that he spoke to his former accountants, WDM about the receipt of the Redress Payment, but we did not see any evidence of him requesting or receiving formal advice from them. After he had transferred his business affairs to McLaughlin Crolla, he simply assumed that they would have been told about the payment by WDM and would deal with it. He did nothing to check that this had been done.

(b) Unlike Mr Lovell, he seems to have relied entirely on the information he gleaned from entities such as Bully Banks on line. He said he did not own a computer or use the internet, yet he seems to have had access to the Bully Banks' advice on the tax treatment of the Redress Payment.

(c) It may be correct that there was confusion in the market at the time about how these payments should be taxed, but that does not absolve a taxpayer from making any enquiries at all about how a significant sum should be taxed, or at least notifying it to HMRC on the white space of their tax return.

(d) In our view, even if Mr O'Neil was not a details man, he should have made some follow up enquiries about the Redress Payment. We are not convinced that he had considered the tax position for himself and decided that it was sufficiently uncertain that it was reasonable for him not to declare it.

(e) The Appellant referred to HMRC's statement in their letter of 30 March 2020 that the Appellant's accountants had provided a carefully considered view, we note that this statement was made in the context of the penalty reductions which were available and premised on the fact that Mr O'Neil himself had not notified his accountants of the Redress Payment until prompted by HMRC.

Mrs O'Neil/Mrs McCallum

(2) We have to come to a different conclusion for the other two partners in the Partnership. We saw absolutely no evidence at all about their decision-making process in completing their tax returns and HMRC did not suggest that they merely relied on Mr O'Neil. HMRC simply made no submissions on this point but assumed that each of the partners should be dealt with in the same way.

(3) Given that careless behaviour is specific to an individual, we can see no basis on which we can accept HMRC's contentions in respect of Mrs O'Neil and Mrs McCallum in the face of a total lack of evidence about their decision-making processes and no suggestion that we should look to Mr O'Neil as the person they relied on.

Conclusion

122. The assessments on each of the Appellants relating to the Redress Payment are valid and are confirmed.

123. The penalties applied to Mr O'Neil are confirmed.

124. The penalties applied to Mrs O'Neil and Mrs McCallum are cancelled on the basis that HMRC have not pleaded their case in respect of the basis of these penalties.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

125. 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.

RACHEL SHORT
TRIBUNAL JUDGE

Release date: 14th MARCH 2023