[2020] UKFTT 0513 (TC)

TC07983

CAPITAL GAINS TAX AND INCOME TAX – whether a loss arising as a result of two forward contracts over securities (and a related acquisition and disposal) which led to a loss in respect of shares or certificates of deposit and a matching gain in respect of gilts was allowable for capital gains tax purposes or deductible against miscellaneous income – no, because the principle outlined in WT Ramsay v IRC applied to the transactions – in addition, in the case of the shares, the loss was not allowable because it arose in connection with arrangements which had securing a tax advantage as a main purpose – whether the acquisition and disposal under the forward contracts were by way of bargain made at arm's length – yes, because the terms of both contracts, together, could be taken into account for that purpose –whether the consideration paid for the shares under one of the forward contracts was given wholly and exclusively for the shares - the position was unclear - further evidence and submissions would have been required if that question had been relevant to the outcome of the appeals - appeals dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2017/08515; TC/2017/09249; TC/2017/09046; and TC/2018/08516

BETWEEN

SIMON PADFIELD (1)
SATNAM BHOGAL (2)
ALLAN DUNN (3)
CONOR MCCLOSKEY (4) **Appellant**

-and-

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

TRIBUNAL: JUDGE TONY BEARE

The hearing took place on 24, 25, 26 and 27 November 2020. With the consent of the parties, the hearing was held by way of a video hearing on the Tribunal video platform. A face-to-face hearing was not held because of the COVID 19 pandemic and because the matters at issue were considered appropriate to be dealt with by way of a video 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.

The documents to which I was referred included various bundles – a documents bundle of 2940 pages (the "DB"), a case law authorities bundle of 1319 pages, a legislation authorities bundle of 34 pages and various legislative provisions and supplementary documents which were sent to me by email during the course of the hearing on behalf of the parties. Together, these contained the written evidence, legislation and case law relevant to the hearing.

Mr Michael Sherry, counsel, instructed by RPC, for the Appellant

Mr Christopher Stone and Ms Anna Greenley, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents.

DECISION

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INTRODUCTION

1. This decision relates to four appeals which are the lead appeals in respect of a structure known as the volatility investment strategy (the “VIS”).

2. Each of the appeals is against a closure notice issued by the Respondents in respect of the tax year ending 5 April 2012 and each closure notice seeks to deny the relevant Appellant a loss claimed by the relevant Appellant in his tax return in respect of that tax year. In the case of two of the Appellants – Mr Simon Padfield (“SP”) and Mr Allan Dunn (“AD”) – the loss which has been claimed is an allowable loss for the purposes of capital gains tax (“CGT”). In the case of the other two Appellants - Mr Conor McCloskey (“CM”) and Mr Satnam Bhogal (“SB”) – the loss which has been claimed is a miscellaneous income (“MI”) loss, so-called because it is claimed to be a loss arising from a transaction the income from which, had it arisen, would have been subject to income tax pursuant to one of the provisions mentioned in Section 1016 of the Income Tax Act 2007 (the “ITA 2007”) and therefore capable of offset against the income arising from such transactions.

3. The VIS structure was sold to each Appellant by a body corporate named Redbox Tax Associates LLP ("Redbox").

THE RELEVANT FACTS AND ISSUES

4. My task in reaching this decision has been made easier by the fact that the parties have reached agreement on the issues involved in the appeals, as well as on certain relevant facts. I will supplement the latter with my own findings of fact later on in this decision but, for the moment, the agreed facts and issues are as set out below.

5. The appeals concern the tax treatment of arrangements which are divided into two types, namely:

(1) the CGT type; and

(2) the MI type.

6. The facts set out in this section include both facts which are common to all of the Appellants and facts which are specific to each Appellant (as identified).

7. The two types of transactions (CGT type and MI type) are so-called because of the type of loss that could potentially result from the transactions. Where the transactions which are described in greater detail below were of the CGT type, the nature of the securities disposed of was shares, such that their disposal would result in an allowable capital loss. Where the transactions which are described in greater detail below were of the MI type, the nature of the securities disposed of was certificates of deposit, such that their disposal would result in losses that could be set-off against MI.

MATTERS COMMON TO ALL APPELLANTS

8. Each Appellant entered into a forward purchase contract for the purchase of securities from a bank (Schroder & Co Limited ("Schroders")).

9. Each Appellant simultaneously entered into a forward sale contract for the sale of securities to Schroders.

10. The contracts which are mentioned in paragraphs 8 and 9 above contained identical triggers (linked to the level of the FTSE 100 Index) and provided for the delivery of securities on the same day. Although the price payable for the securities to be delivered under the contracts was set at the outset, the nature and value of the securities depended upon the trigger, which was set by reference to the level of the FTSE 100 Index at the closing time on the "valuation date", some 10 to 15 days later. Lower and upper barriers were set by reference to a percentage movement of the FTSE 100 Index from a given starting level.

11. There were three possible outcomes, dependent upon the movement of the FTSE 100 Index, as follows:

(1) if the FTSE 100 Index at the valuation time was equal to or greater than the lower barrier and equal to or lower than the upper barrier, both the forward sale contract and the forward purchase contract resulted in a small gain to the participant. The securities passing under both contracts were gilts;

(2) if the FTSE 100 Index at the valuation time was below the lower barrier, the forward purchase contract produced a large loss and the forward sale contract produced a similar-sized gain. The securities passing under the forward purchase contract were shares, in the case of the CGT type, and certificates of deposit, in the case of the MI type. The securities passing under the forward sale contract were gilts; and

(3) if the FTSE 100 Index at the valuation time was above the upper barrier, the forward purchase contract produced a large gain and the forward sale contract produced a similar-sized loss. The securities passing under the forward purchase contract were gilts and the securities passing under the forward sale contract were shares, in the case of the CGT type, and certificates of deposit, in the case of the MI type.

12. The terms of the forward purchase and sales contracts were such that, whichever way the FTSE 100 Index moved, any gains arising arose on the gilts and any losses arising arose on the shares or certificates of deposit.

13. The forward contracts were documented under ISDA master agreements for derivative instruments.

14. In consideration of Redbox's introductory services, each Appellant paid Redbox a commission, which was calculated as a percentage of the forward price payable to, and by, Schroders under the forward contracts (as referred to in paragraphs 8 and 9 above). In respect of each Appellant, a contribution was paid to a "fighting fund", which was managed by a company called VIS FF Limited ("VISFF"). As part of the arrangements, each Appellant was required to retain an independent financial advisor (an "IFA"). The fee payable by each Appellant to his IFA was initially paid to, and then settled by, Redbox. The commission paid to Redbox entitled each Appellant to enter into a series of pairs of forward contracts with Schroders during a period of up to 180 days from the date of the first pair of forward contracts, and was payable even if the Appellant entered into only one pair of forward contracts. A further commission was payable if the series of pairs of forward contracts exceeded 4 in number and extended beyond 180 days, or if the Appellant wished to enter into another series of pairs of forward contracts, whether during or after the 180 day period.

15. Each Appellant entered into pairs of forward contracts of the type described above, making gains and losses. Any Appellant who made a small gain on each of a pair of contracts (as described in paragraph 11(a) above) entered into another pair of contracts within the same tax year. On each occasion on which the result of the transactions fell within paragraph 11(b) or paragraph 11(c) above, the Appellant did not enter into a further pair of contracts within the same tax year. The respective losses incurred by the Appellants were claimed by them in their respective tax returns. In closing the enquiries into the tax returns submitted by the Appellants in respect of the tax year ending 5 April 2012, the Respondents have denied each Appellant the losses he claimed.

16. The issues to be determined by me are as follows:

(1) whether the separate identity of the contracts should be disregarded such that the Taxation of Chargeable Gains Act 1992 (the "TCGA") and Section 152(1) of the ITA 2007 are applied to the overall economic outcome of the transactions (with the effect that there are no allowable losses or deductible losses (as the case may be) on the transactions for the purposes of that legislation) rather than separately to each contract ("Issue 1");

(2) alternatively, in respect of Appellants who used the MI type of the arrangements, whether I should read Section 152(1) of the ITA 2007 as saying:

"A person may make a claim for loss relief against miscellaneous income if in a tax year ("the loss-making year") the person makes a **real economic** loss in any relevant transaction" (emboldened words to be read in) ("Issue 2");

(3) alternatively, in respect of Appellants who used the CGT type of the arrangements, whether Section 16A of the TCGA operates to disallow any loss ("Issue 3"); and

(4) further and in any event, in respect of the Appellants who used the CGT type of the arrangements, if the separate identity of the contracts should not be disregarded, whether the contracts were entered into otherwise than by way of a bargain made at arm's length for the purposes of Section 17 of the TCGA, with the effect that the chargeable gain and allowable loss are calculated using the market value of the relevant securities, with the result that there was no chargeable gain or allowable loss on the completion of the transactions ("Issue 4").

17. In respect of AD only, a further issue arises, namely whether, in calculating the alleged loss for the purposes of the TCGA on the sale of the shares acquired under the forward purchase contract, the full amount paid for the shares, or only a part paid (which was equal to the market value of the shares on the date of acquisition), was given wholly and exclusively for the acquisition of the shares for the purposes of Section 38 of the TCGA ("Issue 5").

18. Before setting out the agreed facts in further detail, there are two preliminary points that I should make.

19. The first is that, in the rest of this decision, each pair of forward contracts is referred to as a "trade". That is simply for the sake of convenience and is not intended to suggest in any way that the relevant Appellant was carrying on a trade or entering into an adventure in the nature of a trade when he entered into the transactions in question.

20. The second is that, in the description of the relevant issues set out above, I have reversed Issue 3 and Issue 4 because, for reasons which will become apparent in due course, I think that the question of whether Section 17 of the TCGA applied to the two forward contracts making up a trade is best considered alongside the question of whether Section 38 of the TCGA applied to the acquisition by AD of the shares which gave rise to the loss in his case.

MATTERS SPECIFIC TO SP

21. SP used the CGT type of the arrangements.

22. At the start of the tax year ending 5 April 2012, SP owned an interest in a property (called Padfield Court). On 21 July 2011, SP sold his interest in Padfield Court for £1,347,839. SP returned a chargeable gain of £903,904 on that disposal in his tax return for the tax year ending 5 April 2012, but the amount of the chargeable gain has subsequently been agreed as £917,596.

23. On 26 July 2011, SP signed a letter of engagement with Schroders, containing:

(1) a form of appointment;

(2) a cash charge; and

(3) an ISDA master agreement.

24. Also on 26 July 2011, SP entered into an agreement with JL Strategies, an IFA.

25. On 26 July 2011, SP signed an "introductory services" agreement with Redbox agreeing to pay Redbox a commission of 6.5% of £912,500, and wrote a cheque number 100021 dated 26 July 2011 payable to Redbox for £59,312.50. The 6.5% commission payable to Redbox was actually made up of a fee for Redbox of 5.5% of £912,500 (£50,187.50) and a fighting fund contribution of 1% of £912,500 (£9,125).

26. On 26 July 2011, SP transferred to his account at Schroders the sum of £20,075.00. This was required by Schroders as collateral to cover the difference between the amount for which SP was to contract to purchase securities from Schroders and the amount for which SP was to contract to sell securities to Schroders (£930,750 - £912,500 = £18,250) plus a margin of 10%

of the difference (in respect of expected dealing costs) (10% of £18 250 = £1,825). The deposit was held in SP's account at Schroders over which Schroders had a charge.

Trade 1

27. At 15.31 on 25 August 2011, SP entered into two contracts with Schroders - a forward purchase contract and a forward sale contract. The purchase price was set at £930,750 and the sale price at £912,500. The valuation time, which would determine what was bought and sold under the forward contracts, was the closing time of the FTSE 100 Index on 26 September 2011. For each contract, the "lower barrier" was set at 93% of the "index reference level", being the "closing price" of the FTSE 100 Index on the date the trade was entered into, and the "upper barrier" was set at 107% of the "index reference level".

28. On 26 September 2011, the FTSE 100 Index closed between the upper and lower barrier levels, at 5089.37.

29. On 26 and 27 September 2011, SP bought gilts from Schroders in fulfilment of the forward purchase contract for £930,750.00 and Schroders sold those gilts on behalf of SP for £932,791.25 so that SP made a profit of £2,041.25 on the disposal of those gilts.

30. On 26 and 27 September 2011, SP sold gilts to Schroders in fulfilment of the forward sale contract for £912,500.00 and Schroders bought those gilts on behalf of SP for £910,462.44 so that SP made a profit of £2,037.56 on the disposal of those gilts.

Trade 2

31. At 11.33 on 4 October 2011, SP entered into two contracts with Schroders - a forward purchase contract and a forward sale contract. The purchase price was set at £930,750 and the sale price at £912,500. The valuation time, which would determine what was bought and sold under the forward contracts, was the closing time of the FTSE 100 Index on 3 November 2011. For each contract, the "lower barrier" was set at 90.4% of the "index reference level", being the "closing price" of the FTSE 100 Index on the date the trade was entered into, and the "upper barrier" was set at 109.6% of the "index reference level".

32. On 3 November 2011, the FTSE 100 Index closed above the upper barrier level, at 5545.64.

33. On 4 November 2011, SP bought gilts from Schroders in fulfilment of the forward purchase contract for £930,750.00 and Schroders sold those gilts on behalf of SP for £1,824,682.82 so that SP made a profit of £893,932.82 on the disposal of those gilts.

34. On 4 November 2011, SP sold shares to Schroders in fulfilment of the forward sale contract for £912,500.00 and Schroders bought those shares on behalf of SP for £1,825,545.57 so that SP made a loss of £913,045.57 on the disposal of those shares.

35. On 13 November 2012, SP submitted his tax return for the tax year ending 5 April 2012 and included a claim under Section 16(2A) of the TCGA for an allowable (capital) loss of £912,500 on the disposal of shares on 4 November 2011. His claim was based on the market value of the shares he was required to deliver under the forward sale contract (as specified in the contract) rather than the actual amount paid for those shares including an external brokerage charge.

MATTERS SPECIFIC TO CM

36. CM used the MI type of the arrangements. At the start of the tax year ending 5 April 2012, CM was a director and shareholder of a company called CM Utilities Ltd.

37. On 5 October 2011, CM signed an "introductory services" agreement sent to him by Redbox on 8 September 2011 agreeing to pay Redbox a commission of 5.5% of £2,000,000 plus £1,000 that would be paid on CM's behalf to an IFA. As set out at paragraph 39 below, the 5.5% commission was actually made up of a fee for Redbox of 4.5% of £2,000,0000 and a fighting fund contribution of 1% of £2,000,000.

38. On 7 November 2011, Schroders produced an undated cash charge to be given by CM in its favour. CM signed this to execute it as a deed (although the date of execution is not shown).

39. On 8 November 2011, Redbox emailed CM's accountant and told him that the amount now payable by CM to Redbox was £111,000 comprising a fee for Redbox of 4.5% of £2,000,000 (£90,000), a fighting fund contribution of 1% of £2,000,000 (£20,000) and the cost of an IFA (£1,000).

40. On 9 November 2011, £111,000 was transferred from an account held by CM Utilities Ltd to Redbox. This amount was charged to CM's director's loan account with the company.

41. On 9 November 2011, Redbox emailed CM's accountant and told him that the amount that was payable by CM to CM's account at Schroders (the account over which Schroders had a charge) was £44,000. This was the deposit required by Schroders as collateral to cover the difference between the amount for which CM was to contract to purchase securities from Schroders and the amount for which CM was to contract to sell securities to Schroders (£2,040,000 - £2,000,000 = £40,000) plus a margin of 10% of the difference (in respect of expected dealing costs) (10% of £40,000 = £4,000).

42. On 11 November 2011, CM signed a letter of engagement to confirm that he accepted the terms set out in a letter sent to him by Schroders on 8 November 2011, which laid out the terms on which Schroders had agreed to provide certain investment services to CM.

43. On 24 November 2011, Ashfield Financial Planning, an IFA, ("Ashfield") wrote to CM offering to arrange investments in securities offered by Schroders as an "execution only" transaction.

44. On 6 December 2011, CM signed an ISDA master agreement dated 7 November 2011, which was signed on behalf of Schroders on 8 November 2011; and Schroders' form of appointment, which was signed by Schroders on the same day.

45. On 19 December 2011, CM emailed Ashfield to accept the terms of their letter.

46. On 19 January 2012, £44,000 was transferred from an account held by CM Utilities Ltd to Schroders. This amount was charged to CM's director's loan account with the company.

<u>Trade 1</u>

47. At 14.30 on 14 February 2012, CM entered into two contracts with Schroders - a forward purchase contract and a forward sale contract. The purchase price was set at £2,040,000 and the sale price at £2,000,000. The valuation time, which would determine what was bought and sold under the forward contracts, was the closing time of the FTSE 100 Index on 28 February 2012. For each contract, the "lower barrier" was set at 98.04% of the "index reference level", being the "closing price" of the FTSE 100 Index on the date the trade was entered into and the "upper barrier" was set at 101.96% of the "index reference level".

48. On 28 February 2012, the FTSE 100 Index closed between the upper and lower barrier levels, at 5927.91.

49. On 28 and 29 February 2012, CM bought gilts from Schroders in fulfilment of the forward purchase contract for £2,040,000 and Schroders sold those gilts on behalf of CM for £2,044,877.96 so that CM made a profit of £4,877.96 on the disposal of those gilts.

50. On 28 and 29 February 2012, CM sold gilts to Schroders in fulfilment of the forward sale contract for £2,000,000.00 and Schroders bought those gilts on behalf of CM for £1,995,110.83 so that CM made a profit of £4,889.17 on the disposal of those gilts.

Trade 2

51. At 15.07 on 6 March 2012, CM entered into two contracts with Schroders - a forward purchase contract and a forward sale contract. The purchase price was set at £2,040,000 and the sale price at £2,000,000. The valuation time, which would determine what was bought and sold under the forward contracts, was the closing time of the FTSE 100 Index on 20 March 2012. For each contract, the "lower barrier" was set at 98.70% of the "index reference level", being the "closing price" of the FTSE 100 Index on the date the trade was entered into, and the "upper barrier" was set at 101.20% of the "index reference level".

52. On 20 March 2012, the FTSE 100 Index closed above the upper barrier level, at 5891.41.

53. On 20 and 21 March 2012, CM bought gilts from Schroders in fulfilment of the forward purchase contract for £2,040,000.00 and Schroders sold those gilts on behalf of CM for £3,998,946.32 so that CM made a profit of £1,958,946.32 on the disposal of those gilts.

54. On 20 and 21 March 2012, CM sold certificates of deposit to Schroders in fulfilment of the forward sale contract for £2,000,000.00 and Schroders bought those certificates of deposit on behalf of CM for £3,999,999.89 so that CM made a loss of £1,999,999.89 on the disposal of those certificates of deposit.

55. On 15 May 2012, CM signed a deed of gift by way of assignment over his rights to a final dividend of £650,000 in respect of the whole issued ordinary share capital in CM Utilities Ltd in favour of The Conor McCloskey Life Interest Settlement 2012. The dividend was paid into a Co-operative Bank privilege account held in the names "Mr C & Mr V G McCloskey" on 23 May 2012 and was recorded on his tax return in respect of the tax year ending 5 April 2013 as MI.

56. On 30 January 2013, CM submitted his tax return for the tax year ending 5 April 2012 and included a claim under Sections 152(1) and (3) of the ITA 2007 for loss relief against MI to be deducted for the loss-making tax year (the tax year ending 5 April 2012) and subsequent tax years. The amount claimed was the loss of £2,000,000 on the disposal of the certificates of deposit on 20 March 2012. The claim was based on the market value of the certificates of deposit he was required to deliver under the forward sale contract (as specified in the contract) rather than the actual amount paid for those certificates of deposit.

MATTERS SPECIFIC TO SB

57. SB used the MI type of the arrangements. At the start of the tax year ending 5 April 2012, SB had a one-third interest in the Auto Electro partnership and was a director and shareholder of a company called Autoelectro Ltd.

58. On 14 September 2011, SB and VISFF entered into a fighting fund agreement by which VISFF would provide services in relation to the VIS promoted by Redbox.

59. On 26 September 2011, SB signed an "introductory services" agreement sent to him by Redbox on 14 September 2011 agreeing to pay Redbox a commission of 6.35% of £323,443 plus £1,000 that would be paid on SB's behalf to an IFA. The 6.35% commission payable to Redbox was actually made up of a fee for Redbox of 5.35% of £323,443 (£17,304.20) and a fighting fund contribution of 1% of £323,443 (£3,234.43).

60. On 7 October 2011, Autoelectro Ltd declared a final dividend by ordinary resolution of £671,000, to be paid on 15 October 2011 to the shareholders, including SB.

61. On 10 October 2011, SB (as settlor) made a settlement with SB, his wife, Balbir Kaur Bhogal ("BB"), and Gopal Singh Bhogal ("GB") (as the original trustees) known as the Satnam Singh Bhogal 2011 Settlement (the "discretionary trust"). Prior to that, the trustees gave SB authority to execute on behalf of the discretionary trust.

62. On 12 October 2011, SB assigned his right to the dividend to the discretionary trust. Also on 12 October 2011, SB wrote to Autoelectro Ltd, on behalf of the trustees, to state that the trustees had been assigned the dividend and that the company was authorised to deduct £55,805 from the total dividend of £223,443 to repay SB's loan account. The balance of £167,638 was to be paid to an account confirmed by the trustees. The dividend was paid on 19 October 2011.

63. On 17 October 2011, SB (as settlor) made a settlement with SB, BB, and GB (as the original trustees) known as the Satnam Singh Bhogal Settlement 2011 (the "IIP trust") of which SB and BB were the beneficiaries. Also on 17 October 2011, SB signed a mandate on behalf of the trustees to "[h]ereby mandate the income of the Trust Fund to the beneficiary so entitled."

64. On 19 October 2011, a partnership agreement was made between, inter alia, SB and the IIP trust for the partnership to carry on business as Autoelectro Group with SB enjoying 10/3% (or 3 1/3 %) of the partnership's profits and losses, except any of a capital nature, and the IIP trust 30%.

65. On 26 October 2011, Schroders produced an undated cash charge to be given by SB in its favour and SB signed this to execute it as a deed (although the date of execution is not shown).

66. On 2 November 2011, SB signed a letter of engagement to confirm that he accepted the terms set out in a letter sent to him by Schroders on 8 November 2011, which laid out the terms on which Schroders had agreed to provide certain investment services to SB.

67. On 2 November 2011, SB also signed Schroders' form of appointment, which was signed by Schroders on 9 November 2011.

68. On 4 November 2011, SB signed an ISDA master agreement dated 26 October 2011, which had been signed on behalf of Schroders on 26 October 2011.

69. By 25 November 2011, £6,792.30 was paid to SB's account at Schroders, over which Schroders had a charge. This was the deposit of the amount required by Schroders as collateral to cover the difference between the amount for which SB was to contract to purchase securities from Schroders and the amount for which SB was to contract to sell securities to Schroders (£329,911.86 - £323,443 = £6,468.86) plus a margin of 5% of the difference (in respect of expected dealing costs) (5% of £6,468.86 = £323.43).

<u>Trade 1</u>

70. At 15.45 on 14 December 2011, SB entered into two contracts with Schroders - a forward purchase contract and a forward sale contract. The purchase price was set at £329,911.86 and the sale price at £323,443.00. The valuation time, which would determine what was bought and sold under the forward contracts, was the closing time of the FTSE 100 Index on 18 January 2012. For each contract, the "lower barrier" was set at 95.40% of the "index reference level", being the "closing price" of the FTSE 100 Index on the date the trade was entered into, and the "upper barrier" was set at 104.60% of the "index reference level".

71. On 18 January 2012, the FTSE 100 Index closed above the upper barrier level, at 5702.37.

72. On 18 and 19 January 2012, SB bought gilts from Schroders in fulfilment of the forward purchase contract for £329,911.86 and Schroders sold those gilts on behalf of SB for £646,597.29 so that SB made a profit of £316,685.43 on the disposal of those gilts.

73. On 18 and 20 January 2012, SB sold certificates of deposit to Schroders in fulfilment of the forward sale contract for £323,443 and Schroders bought those certificates of deposit on behalf of SB for £646,906.38 so that SB made a loss of £323,463.38 on the disposal of those certificates of deposit.

74. On 30 January 2013, SB submitted his tax return for the tax year ending 5 April 2012 and included a claim under Sections 152(1) and (3) of the ITA 2007 for loss relief against MI to be deducted for the loss-making year (the tax year ending 5 April 2012) and subsequent tax years. The amount claimed was the loss of £323,443 on the disposal of certificates of deposit on 18 January 2012. The loss claim was based on the market value of the certificates of deposit he was required to deliver under the forward sale contract (as specified in the contract) rather than the actual amount paid for those certificates of deposit including an external brokerage charge.

75. In his tax return for the tax year ending 5 April 2012, SB returned his share of the partnership's profits as £6,749 together with £60,740 of partnership's profits that were allocated to the IIP trust, but attributed to him as MI. SB also returned his remuneration and benefits as a director of Auto Electro Ltd as £7,692 together with other income of £248,270 arising in the discretionary trust, but attributed to him as MI.

MATTERS SPECIFIC TO AD

76. AD used the CGT type of the arrangements.

77. At the start of the tax year ending 5 April 2012, AD owned share options which entitled him to acquire 2.3% of the share capital of a company called Ioko 365 Ltd ("Ioko"). On 3 May 2011, the entire issued share capital of Ioko was acquired by Kit Digital Inc.. AD's share of the consideration for the disposal was £1,341,711.70, including £1,010,595.19 in cash. AD returned a chargeable gain on the cash element of the consideration from that disposal in his tax return for the tax year ending 5 April 2012 of £960,522. AD also returned chargeable gains of £1,119 on disposals of other shares during the tax year ending 5 April 2012.

78. On 11 November 2011, AD and VISFF entered into a fighting fund agreement by which VISFF would provide services in relation to the VIS promoted by Redbox.

79. On 16 December 2011, AD signed an "introductory services" agreement sent to him by Redbox on 11 November 2011 agreeing to pay Redbox a commission of 4.9% of £1,100,000. As set out at paragraph 83 below, £56,100 was required to be transferred to Redbox on 25 January 2012. According to a letter from AD's tax adviser dated 27 May 2014, this was made up of £31,900 for Redbox (of which £1,000 was for AD's financial adviser) plus £24,200 for Schroders. The £24,200 for Schroders was the deposit required by Schroders as collateral to cover the difference between the amount for which AD was to contract to purchase securities from Schroders and the amount for which AD was to contract to sell securities to Schroders (£1,122,000 - £1,100,000 = £22,000) plus a margin of 10% of the difference (in respect of expected dealing costs) (10% of £22,000 = £2,200). The deposit was held in AD's account at Schroders over which Schroders had a charge.

80. On 11 January 2012, AD signed an "execution only" client agreement sent to him by Ashfield with a letter dated 9 January 2012 consenting to the conditions set out in the agreement.

81. On 16 January 2012, Schroders produced an undated cash charge to be given by AD in its favour; AD signed this to execute it as a deed (although the date of execution is not shown).

82. On 20 January 2012, AD signed Schroders' form of appointment and an ISDA master agreement with Schroders dated 16 January 2012.

83. On 25 January 2012, AD transferred £56,100 to Redbox.

84. As well as entering into a series of pairs of forward contracts with Schroders on his own account, AD also entered into a contemporaneous and similar separate series of transactions with Schroders as nominee for five other individuals who had also been option holders in Ioko until 3 May 2011. The amounts paid to, and received from, Schroders in respect of both AD's transactions as principal and AD's transactions as nominee were all debited and credited to a single account AD held with Schroders. In the description that follows of AD's transactions with Schroders, those designated as the "A" trades were AD's transactions as principal, and those designated as the "B" trades were AD's transactions as nominee for fellow former option holders in Ioko.

<u>Trade 1A</u>

85. At 15.20 on 14 February 2012, AD entered into two contracts as principal with Schroders - a forward purchase contract and a forward sale contract. The purchase price was set at £1,122,000 and the sale price at £1,100,000. The valuation time, which would determine what was bought and sold under the forward contracts, was the closing time of the FTSE 100 Index on 28 February 2012. For each contract, the "lower barrier" was set at 97.57% of the "index reference level", being the "closing price" of the FTSE 100 Index on the date the trade was entered into, and the "upper barrier" was set at 102.43% of the "index reference level".

<u>Trade 1B</u>

86. At 15.20 on 14 February 2012, AD entered into two contracts as nominee with Schroders - a forward purchase contract and a forward sale contract. The purchase price was set at £530,400 and the sale price at £520,000. The valuation time, lower barrier and upper barrier were identical to those in Trade 1A.

<u>Outcome of Trade 1A and Trade 1B</u>

87. On 28 February 2012, the FTSE 100 Index closed between the upper and lower barrier levels, at 5927.91.

88. On 28 and 29 February 2012, AD bought 980,425 gilts from Schroders in fulfilment of his forward purchase contract as principal for £1,122,000 and 463,474 gilts from Schroders in fulfilment of his forward purchase contract as nominee for £530,400. Schroders sold all of those 1,443,899 gilts on behalf of AD for £1,653,753.85, with £1,122,919.00 (980,425/1,443,899) relating to Trade 1A, so that AD made a profit of £919.00 (£1,122,919.00 - £1,122,000.00) on the disposal of the gilts which were the subject of the forward purchase contract as principal.

89. On 28 and 29 February 2012, AD sold 959,439 gilts to Schroders in fulfilment of his forward sale contract as principal for £1,100.00.00 and 453,553 gilts to Schroders in fulfilment of his forward sale contract as nominee for £520,000. Schroders purchased all of those 1,412,992 gilts on behalf of AD for £1,618,637.45, with £1,099,074.80 (959,439/1,412,992) relating to Trade 1A, so that AD made a profit of £925.20 (£1,100,000.00 - £1,099,074.80) on the disposal of the gilts which were the subject of the forward sale contract as principal.

Trade 2A

90. At 15.20 on 2 March 2012, AD entered into two contracts as principal with Schroders - a forward purchase contract and a forward sale contract. The purchase price was set at £1,122,000 and the sale price at £1,100,000. The valuation time, which would determine what was bought and sold under the forward contracts, was the closing time of the FTSE 100 Index on 16 March 2012. For each contract, the "lower barrier" was set at 98.00% of the "index reference level", being the "closing price" of the FTSE 100 Index on the date the trade was entered into, and the "upper barrier" was set at 101.40% of the "index reference level".

Trade 2B

91. At 16.00 on 2 March 2012, AD entered into two contracts as nominee with Schroders - a forward purchase contract and a forward sale contract. The purchase price was set at £530,400 and the sale price at £520,000. The valuation time, lower barrier and upper barrier were identical to those in Trade 2A.

Outcome of Trade 2A and Trade 2B

92. On 16 March 2012, the FTSE 100 Index closed between the upper and lower barrier levels, at 5965.58.

93. On 16 and 19 March 2012, AD bought 986,391 gilts from Schroders in fulfilment of his forward purchase contract as principal for £1,122,000 and 466,294 gilts from Schroders in fulfilment of his forward purchase contract as nominee for £530,400. Schroders sold all of those 1,452,685 gilts on behalf of AD for £1,654,951.25, with £1,123,732.27 (986,391/1,452,685) relating to Trade 2A, so that AD made a profit of £1,732.27 (£1,123,732.27 - £1,122,000.00) on the disposal of the gilts which were the subject of the forward purchase contract as principal.

94. On 16 and 19 March 2012, AD sold 963,866 gilts to Schroders in fulfilment of his forward sale contract as principal for £1,100.00.00 and 455,646 gilts to Schroders in fulfilment of his forward sale contract as nominee for £520,000. Schroders purchased all of those 1,419,512 gilts on behalf of AD for £1,617,443.27, with £1,098,263.75 (963,866/1,419,512) relating to Trade 2A, so that AD made a profit of £1,736.25 (£1,100,000.00 - £1,098,263.75) on the disposal of the gilts which were the subject of the forward sale contract as principal.

Trade 3A

95. At 14.00 on 20 March 2012, AD entered into two contracts as principal with Schroders - a forward purchase contract and a forward sale contract. The purchase price was set at £1,122,000 and the sale price at £1,100,000. The valuation time, which would determine what was bought and sold under the forward contracts, was the closing time of the FTSE 100 Index on 27 March 2012. For each contract the "lower barrier" was set at 98.80% of the "index reference level", being the "closing price" of the FTSE 100 Index on the date the trade was entered into, and the "upper barrier" was set at 101.20% of the "index reference level".

Trade 3B

96. At 14.00 on 20 March 2012, AD entered into two contracts as nominee with Schroders - a forward purchase contract and a forward sale contract. The purchase price was set at £530,400 and the sale price at £520,000. The valuation time, lower barrier and upper barrier were identical to those in Trade 3A.

Outcome of Trade 3A & Trade 3B

97. On 27 March 2012, the FTSE 100 Index closed between the upper and lower barrier levels, at 5869.55.

98. On 27 and 28 March 2012, AD bought 985,636 gilts from Schroders in fulfilment of his forward purchase contract as principal for £1,122,000 and 465,937 gilts from Schroders in fulfilment of his forward purchase contract as nominee for £530,400. Schroders sold all those 1,451,573 gilts on behalf of AD for £1,655,745.42, with £1,124,271.60 (985,636/1,451,573) relating to Trade 3A, so that AD made a profit of £2,271.60 (£1,124,271.60 - £1,122,000.00) on the disposal of the gilts which were the subject of the forward purchase contract as principal.

99. On 27 and 28 March 2012, AD sold 962,106 gilts to Schroders in fulfilment of his forward sale contract as principal for £1,100.00.00 and 454,814 gilts to Schroders in fulfilment of his forward sale contract as nominee for £520,000. Schroders purchased all of those 1,416,920 gilts on behalf of AD for £1,616,643.34, with £1,097,720.59 (962,106/1,416,920) relating to Trade 3A, so that AD made a profit of £2,279.41 (£1,100,000.00 - £1,097,720.59) on the disposal of the gilts which were the subject of the forward sale contract as principal.

Trade 4A

100. At 16.06 on 28 March 2012, AD entered into two contracts as principal with Schroders - a forward purchase contract and a forward sale contract. The purchase price was set at £1,122,000 and the sale price at £1,100,000. The valuation time, which would determine what was bought and sold under the forward contracts, was the closing time of the FTSE 100 Index on 4 April 2012. For each contract, the “lower barrier” was set at 98.70% of the “index reference level”, being the “closing price” of the FTSE 100 Index on the date the trade was entered into, and the “upper barrier” was set at 101.27% of the “index reference level”.

Trade 4B

101. At 16.06 on 28 March 2012, AD entered into two contracts as nominee with Schroders - a forward purchase contract and a forward sale contract. The purchase price was set at £530,400 and the sale price at £520,000. The valuation time, lower barrier and upper barrier were identical to those in Trade 4A.

Outcomes of Trade 4A and Trade 4B

102. On 4 April 2012, the FTSE 100 Index closed below the lower barrier level, at 5703.77.

103. On 4 and 5 April 2012, AD bought 3,834 shares from Schroders in fulfilment of his forward purchase contract as principal for £1,122,000 and 1,812 shares from Schroders in fulfilment of his forward purchase contract as nominee for £530,400. Schroders sold all of those 5,646 shares on behalf of AD for £32,387.03, with £21,992.89 (3,834/5,646) relating to Trade 4A, so that AD made a loss of £1,100,007.11 (£1,122,000 - £21,992.89) on the disposal of the shares which were the subject of the forward purchase contract as principal.

104. On 4 and 5 April 2012, AD sold 19,243 gilts to Schroders in fulfilment of his forward sale contract as principal for £1,100.00.00 and 9,097 gilts to Schroders in fulfilment of his forward sale contract as nominee for £520,000. Schroders purchased all of those 28,340 gilts on behalf of AD for £32,408.12, with £22,005.27 (9,097/28,340) relating to Trade 4A, so that AD made a profit of £1,077,994.73 (£1,100,000.00 - £22,005.27) on the disposal of the gilts which were the subject of the forward sale contract as principal.

105. On 14 November 2012, AD submitted his tax return for the tax year ending 5 April 2012 and included a claim under Section 16(2A) of the TCGA for an allowable (capital) loss of

£1,100,000 on the disposal of shares on 5 April 2012. The claim was based on the market value of the shares he was required to acquire under the forward purchase contract as principal (as specified in the contract) rather than the actual consideration obtained when those shares were sold for him by Schroders.

THE RELEVANT LEGISLATION

106. It is common ground between the parties that, pursuant to Section 50 of the Taxes Management Act 1970 (the "TMA"), the onus is on the Appellants to establish that the CGT allowable losses or the MI losses, as the case may be, have been realised.

107. As regards the losses which have been claimed in respect of the CGT type of the arrangements, the relevant legislation is:

(1) Section 1 of the TCGA, which imposes the charge to CGT on chargeable gains;

(2) Section 2(2) of the TCGA, which entitles a taxpayer to deduct allowable losses to be set off against chargeable gains arising in the same or a succeeding tax year;

(3) Section 16 of the TCGA, which provides that allowable losses are generally to be calculated in the same way as chargeable gains and requires that the taxpayer must give notice to an officer of the Board of the Respondents quantifying the amount of a loss before the loss can be allowable;

(4) Section 16A of the TCGA, which stipulates that a loss accruing to a person directly or indirectly in consequence of, or otherwise in connection with, any arrangements the main purpose, or one of the main purposes, of which is to secure a tax advantage is not an allowable loss;

(5) Section 17 of the TCGA, which provides that a person's acquisition or disposal of an asset shall be deemed to be for a consideration which is equal to the market value of the asset where, inter alia, he acquires or disposes of the asset otherwise than by way of a bargain made at arm's length; and

(6) Section 115 of the TCGA, which provides that a gain which accrues on the disposal by any person of, inter alia, gilt-edged securities shall not be a chargeable gain.

108. In addition, in relation to the losses claimed by AD, Section 38 of the TCGA is also relevant. That section provides that, in determining whether expenditure incurred on the acquisition of an asset is deductible in computing the chargeable gain which arises on the disposal of that asset, only expenditure incurred by the relevant disponor (or on his or her behalf) which is "wholly and exclusively for the acquisition of the asset" may be taken into account.

109. As regards the losses which have been claimed in respect of the MI type of the arrangements, the relevant legislation is:

(1) Section 152 of the ITA 2007, which provides that:

(a) a person may make a claim for loss relief against MI if, in a tax year, that person makes a loss in a "relevant transaction" – namely, a transaction which, if there were profits or other income arising from it, would have given rise to a liability to income tax for that person under one of the provisions mentioned in Section 1016 of the ITA 2007 (with two specified exceptions which are not pertinent to this case); and

(b) the loss so arising may be deducted from the relevant person's MI in the same or any subsequent tax year; and

(2) Section 1016 of the ITA 2007, which contains a list of various provisions the profits or income falling within which give rise to MI. That list includes Chapter 11 of Part 4 of the Income Tax (Trading and Other Income) Act 2005 (the "ITTOIA") – which applies to profits and gains from the disposal of certificates of deposit – and Chapter 5 of Part 5 of the ITTOIA – which deems the income arising in certain settlements to be the income of the settlor.

THE EVIDENCE

110. I now turn to summarise the evidence which was provided to me in the course of the hearing. That evidence took the form of the documents set out in the DB and the testimony of three witnesses – SP, AD and Mr David Cass, an officer of the Respondents who was a technical consultant within the Respondents in relation to various tax schemes. Two of the witnesses, AD and Mr Cass, gave oral evidence at the hearing. SP was precluded from doing so by virtue of illness but his witness statement was included in the DB and I have therefore included its contents in my summary of the witness evidence.

111. For reasons which will become apparent when I turn to analyse the evidence in the course of reaching my findings of fact, this was a somewhat unusual case in that the testimony of the witnesses added very little to the information contained in the DB.

THE DOCUMENTARY EVIDENCE

112. The documentation in the DB, to the extent that it related to the transactions into which each Appellant entered, was broadly the same in relation to each Appellant. As is apparent from the agreed facts set out in paragraphs 5 to 15 and 21 to 105 above, the DB showed that:

(1) each Appellant entered into the following documents:

(a) an "introductory services" agreement with Redbox which required him to pay a commission to Redbox. Although the "introductory services" agreement did not mention it, the commission included a contribution to a fighting fund, which was then passed on by Redbox to VISFF, the manager of the fighting fund. Each "introductory services" agreement made it clear that the relevant Appellant was required to appoint an IFA in connection with his participation in the VIS structure. The "introductory services" agreement in relation to SP and AD made no mention of how the fee of the IFA was to be discharged but the "introductory services" agreement in relation to CM and SB expressly stipulated that the relevant Appellant was required to pay the fee for the IFA to Redbox for Redbox to pass on to the relevant IFA;

(b) an "execution only" investment mandate with Schroders. This required him to execute Schroders' engagement letter, a form of appointment, a cash charge and an ISDA master agreement;

(c) an agreement with his IFA;

(d) the fighting fund agreement with VISFF, the material terms of which were that:

(i) VISFF was a special purpose vehicle established for the sole purpose of managing the fighting fund;

(ii) in so doing, in return for a fee paid out of the fighting fund, VISFF would provide various services in connection with the VIS structure, as specified in a schedule to the relevant agreement. Those services included:

(A) collecting the various fighting fund contributions and managing the fund so arising;

(B) appointing tax advisers to the fund;

(C) on the basis of advice from the tax advisers, preparing disclosure bundles detailing the VIS structure and pro forma wording for the tax return of each participant in the VIS structure;

(D) procuring that the tax advisers advised in connection with enquiries from the Respondents in relation to the VIS structure (although the tax advisers could cease to do so in relation to a participant who did not follow their prior advice);

(E) procuring that the tax advisers, along with Reid and Co ("Reid"), the principal in which was Mr Mark Reid, a director of VISFF and a director of, and shareholder in, the holding company of VISFF, would negotiate and agree a test case in relation to the VIS structure with the Respondents and then run the test case so long as the quantum of the fund remained sufficient; and

(F) providing updates to each participant in relation to the progress of the test case;

(iii) each participant agreed to provide his or her contribution to the fund and not to withdraw that contribution except as specifically provided in the agreement;

(iv) each participant agreed to co-operate with VISFF (and to provide VISFF with all relevant documents) in relation to any enquiries raised by the Respondents in respect of the VIS structure; and

(v) the test case would be run until either it was successfully won or successfully settled with the Respondents or until no further legal avenues of appeal remained or until the fund ran out of money or (at the discretion of VISFF) if senior counsel advised that, on the balance of probabilities, the test case would not succeed. For this purpose, "success" was defined as achieving the tax reliefs envisaged for the participant by Mr Sherry in his opinion of 2 November 2009;

(2) for each trade, the relevant Appellant was sent draft term sheets for the pair of forward contracts by Schroders. Upon confirmation from the relevant Appellant that the term sheets were satisfactory, the relevant trade was implemented and confirmations recording the terms of the trade were executed by both parties;

(3) for each trade, a few days after the relevant trade was implemented and before the date on which the trade was due to complete, the relevant Appellant sent a letter to Schroders, authorising Schroders:

(a) to purchase, on his behalf, the securities that he would in due course be obliged to deliver to Schroders under the forward sale contract which formed part of the trade and to debit his account with the purchase price for those securities; and

(b) to sell, on his behalf, the securities that he would in due course be entitled to acquire from Schroders under the forward purchase contract which formed part of the trade and to credit his account with the proceeds of the sale of those securities;

(4) the relevant trade would then be completed and Schroders would make the purchase and sale referred to in paragraph 112(3) above. The transactions described in the forward contracts and the transactions referred to in paragraph 112(3) above would then be recorded in advice notes which were sent to the relevant Appellant;

(5) for most of the trades, the gap between the trade date and the settlement date was between 3 weeks and a little over 1 month. However, AD's third trade, which was executed on 20 March 2012 (after the valuation date for his second trade on 16 March 2012 but before the settlement date for that trade on 22 March 2012) had a term of just under two weeks and AD's fourth trade, which was executed on 28 March 2012 (after the valuation date for his third trade on 27 March 2012 but before the settlement date for that trade on 2 April 2012) had a term of just over two weeks; and

(6) the valuation date for AD's fourth trade was 4 April 2012.

113. The DB contained some of the correspondence which passed between Redbox or Schroders and the relevant Appellant or the relevant Appellant's advisers as and when the results of the trade were known. For example:

(1) Mr Adrian Jones of Schroders wrote to CM on 29 February 2012 to inform CM that the first trade had generated a profit on the gilts, and CM responded later that day to say:

"Thanks. When do you trade again and what gain was made";

(2) Ms Katie Malley of Redbox wrote to CM on 20 March 2012 to say that CM's second trade had given rise to a loss, saying:

"I can confirm that the above client has realised a loss on their transaction";

(3) Ms Malley wrote to AD's adviser on 4 April 2012 in similar terms, saying:

"I can confirm that the above clients made an investment loss";

(4) when Ms Malley wrote to AD's adviser to say that AD's first trade had given rise to a profit, she went on to say:

"Schroders have confirmed that term sheets for a second transaction will be issued today based on the assumption that your clients will wish to trade again? Please confirm"

and AD responded to say:

"Chased the guys – yes we want to trade again"; and

(5) the heading to, and terms of, an email from SP's adviser to Mr Jones of 28 September 2011 revealed that Mr Jones had already sent term sheets for SP's second trade to SP before SP had confirmed that he wished to trade again following his first trade.

114. The DB contained an exchange of emails which took place in relation to AD's fourth trade. When the term sheets for that trade were sent by Ms Malley to AD's adviser, Mr Meredith, on 27 March 2012 – the valuation date for AD's third trade and before the settlement date for that trade on 2 April 2012 – AD responded to Ms Malley, Mr Jones and Mr Meredith on 28 March 2012 by saying:

"Here we go fingers crossed".

115. The DB contained various examples of situations where, pursuant to the obligations of VISFF under the fighting fund agreement, Reid had provided advice to the Appellants as to

how to complete their tax returns and how to respond to enquiries which had been made by the Respondents. For example:

(1) on 9 December 2013, Reid wrote to SP's tax adviser and recommended, as the response to the question as to how SP had become aware of the VIS structure, the answer that SP was due to receive cash from the sale of some land, that he had sought advice from his advisers on how to maximise the return on that cash and that he had decided to invest in the VIS structure because it could maximise that return; and

(2) the letter from CM's tax advisers of 27 February 2017 revealed that the reason why the assignment by CM of the dividend which was payable on 31 May 2012 had been said in CM's tax return to be to his wife, as opposed to the settlement of which he was the settlor, was that CM had been provided with an incorrect narrative for that return by Reid.

116. The DB contained a summary prepared by Meredith Tax LLP, adviser to SB and AD, summarising three different types of the VIS structure – a long strategy, a short strategy and a "range-bound" strategy, which was the one adopted by the Appellants. The long strategy and the short strategy were materially different from the "range-bound" strategy in that they each involved what amounted to a bet on the movement of the FTS 100 Index over a relatively short period of time. In each of those versions, the relevant investor stood to lose a significant amount of money or to win a significant amount of money, depending on whether his or her prediction of the movement in the FTSE 100 Index proved correct. Any gain would arise in tax exempt form. In contrast, the "range-bound" strategy was described as being much less speculative in nature, with a smaller upside and downside capacity compared to the long strategy or the short strategy. This was because, under the "range-bound" strategy, in the case where the FTSE 100 Index fell outside the range between the two barriers, the strategy would give rise to a substantial loss and a gain of nearly the same amount so that the net commercial exposure was limited. That summary also stated that Meredith Tax LLP did not give investment advice or provide investment products of any description and that, before a decision to take part in one of the investment strategies outlined in the summary was made, it would be necessary to take financial advice from a qualified financial adviser.

117. The DB contained a memorandum from Mr Jones to the Principal Risk Committee within Schroders of 9 November 2009 which described the MI type of the VIS structure. In that memorandum, Mr Jones said that:

(1) the gilts which were required to settle any forward contract would be sourced from the market in accordance with established procedures and that certificates of deposit which were required to settle any forward contract would be sourced from Schroders' own book or the market;

(2) Schroders would need to hedge in the market the risk arising to it from each trade;

(3) any credit risk on the relevant participant in the VIS structure would be covered by cash collateral;

(4) the structure had a similar economic profile to "range-bound" structures which were available in the market and which the Structured Products team at Schroders had marketed in the past although the key difference was that the structure relied on two forward contracts instead of a note; and

(5) the proposed fee for the transactions would be similar to other investment business – 0.5% per annum on the fixed purchase price or sale price, pro-rated down dependent on the term of the transaction and subject to a minimum fee per contract of 0.175% per annum.

In addition, under the heading "Reputational Risk", Mr Jones referred to the fact that "for most participants there will be a tax benefit if the investment benefit fails to materialise. Indeed even if the investment pays off this has been structured, on the instructions of the promoters, such that it is delivered in the form of Gilts and therefore outside the scope of taxation". That section concluded with confirmation that, on the basis of Mr Sherry's opinion, the structure was not notifiable. In the section headed "Advice", Mr Jones informed the committee that Schroders' advice in connection with the structure would be confined to "the mechanics of the transactions and the investment risks. In particular, we will not comment on the post tax effect of the transactions in the clients [sic] hands";

118. The DB contained an e-mail from Mr Jones to, inter alia, Messrs Reid and Emblin of Redbox of 7 December 2009 which revealed that, in relation to a hypothetical 31 day trade where the lower barrier was 96.5% of the initial FTSE 100 Index and the upper barrier was 103.5% of the initial FTSE 100 Index, the trade could give rise to an attractive return for a person who was prepared to place 1% of the settlement amount at risk if the FTSE 100 Index was between those two barriers on the valuation date – 0.5%, equating to 7.95% per annum.

119. The DB contained an email from Ms Susan Cooper of Schroders to Mr Jones of 18 January 2010 in which Ms Cooper noted that:

(1) the potential probability of gain in any trade forming part of the VIS structure was in the range of 20% to 35%, so that the potential probability of loss in any such trade was in the range of 65% to 80%;

(2) as she understood it, the likelihood of gain in relation to the potential amount at risk was sufficient for a trade to be attractive to an investor with a certain appetite for risk even if that investor had no use for any loss which might arise from the trade;

(3) she thought that that was consistent with the advice from Mr Sherry in his advice on the VIS structure that "the economic reality of the Arrangements absent tax considerations is such that it is a commercially viable investment opportunity"; and

(4) she wished to explore with Mr Sherry, in the context of the rules relating to the disclosure of tax avoidance schemes, whether the likelihood of profit relative to the likelihood of loss was sufficient.

120. The DB contained an email from Ms Cooper to Mr Jones of 29 January 2010 in which Ms Cooper said that, following a consultation with Mr Sherry:

(1) her understanding of the structure was that the probability of a loss arising from a trade under the VIS structure would be no greater than 70% and that Mr Sherry had advised that a likelihood of profit of at least 30% meant that the trade would not be a notifiable proposal for the purposes of the disclosure provisions; and

(2) on the basis of that and Mr Sherry's advice that Schroders were not promoters of the structure, she was content for Schroders to enter into trades under the structure.

121. The DB contained:

(1) a letter from Mr Jeff Millington of Smith & Williamson LLP to Ms Bell of the Respondents on 26 November 2013 which stated that "[the] banks set the barrier levels based on perceived chances of making a profit, which was in the range of 50% to 60% for all investments made"; and

(2) various emails from Mr Jones to advisers of participants entering into the VIS structure which attached term sheets for the forward contracts comprising the relevant trade, along with a covering email indicating the probability of profit and loss in the

relevant trade. Two of those emails referred to a probability of profit of approximately 50%, whilst a third referred to a probability of profit of 60%;

122. The DB contained:

(1) An email from Mr Jones to a Mr Jan Karkowski of Matrix Structured Finance LLP ("Matrix") in which Mr Jones informed Mr Karkowski that the reason why the term sheets for the long and short strategy showed the potential returns from those strategies in a different way from the way that the term sheet for the "range-bound" strategy showed that strategy's potential return was that Schroders' Compliance Department wanted potential participants in the long or short strategy "to know that for a small movement the wrong way they will lose all their money";

(2) an email from Mr James Collings, Head of Compliance at Schroders, to Mr Jones, in which Mr Collings said that only the description of the "range-bound" strategy and not the description of the short or long strategy was to be published on Schroders' public website and available to Schroders' retail clients;

(3) an email from Mr Jones to Mr Collings of 16 February 2010 in which Mr Jones explained to Mr Collings that "[the] size of the transaction will be driven by the level of the potential loss or gain required"; and

(4) an email from Mr Jones to a Mr Robert Newbury of Schroders of 28 January 2011 in which Mr Jones explained to Mr Newbury that the revised version of the VIS structure using different underlying securities – ie shares instead of certificates of deposits – "addresses a different form of tax in that this will now be addressing a CGT issue and not miscellaneous IT".

123. The DB contained:

(1) an email from Mr Jones to his colleagues at Schroders of 29 October 2009 which outlined how Messrs Reid and Emblin (along with Matrix) had approached him to assist in the VIS structure and which noted that:

"Whilst miscellaneous income is not something that effects [sic] most people it is my understanding that the developers of this strategy have a means of converting income into miscellaneous income and as a result will then execute the above planning";

(2) the memorandum from Mr Jones to the Principal Risk Committee within Schroders of 9 November 2009 referred to in paragraph 117 above, which noted that "it is expected that any clients introduced to this strategy will have carried out planning, in which S&Co has no involvement that will convert income into Miscellaneous Income for tax purposes" and an email from Mr Jones to Ms Cooper of 11 January 201 in which Mr Jones pointed out that, although the proposal to convert income into MI was part of the overall planning, Schroders would have no involvement in that aspect of the structure;

(3) an email from Mr Meredith to SB of 16 September 2011(copied to various people at Redbox) which referred to both the documentation for the VIS structure and the documentation for the establishment of, and the assignment of the dividend to, the discretionary trust and which also referred to the establishment of the IIT and the establishment of the new partnership. That email referred to the fact that the final wording of the two trust documents was being discussed with Mr Reid;

(4) emails from Mr Meredith to Messrs Reid and Emblin and Ms Malley on 5, 6 and 7 October 2011 which referred, in relation to SB, to the process of establishing the trusts, the need for the discretionary trust to be established before the dividend assignment and the need for the dividend assignment to be made before the dividend was paid;

(5) two letters from advisers named Friend LLP to an unnamed participant in the VIS structure of 23 January 2013, the first of which outlined the tax risks associated with entering into the VIS structure and the second of which informed the recipient how to go about converting into MI a dividend which would otherwise have been taxable under another part of the tax legislation so that the income could be accessible to the loss arising from the VIS structure; and

(6) an email from Thursfield & Co, CM's advisers, to the Respondents of 12 January 2017 which confirmed that CM had chosen to assign the dividend to the settlement in order for the dividend to be treated as MI in his hands and therefore to be accessible to his MI loss carried forward from the previous tax year and that CM had been advised of this treatment by Reid.

124. The DB contained, as an exhibit to the witness statement of Mr Cass, a table showing, in relation to each participant, the profit or loss arising from each trade into which the relevant participant had entered, the allowable loss or MI loss claimed in respect of the relevant participant's final trade and the commission and fee paid by the relevant participant to Redbox and the relevant participant's IFA (where known). In the case of each participant apart from participants 27 to 33, the trades entered into under the VIS structure had given rise to a commercial pre-tax loss before taking into account the commissions and fees paid to Redbox and the relevant participant's IFA. In other words, with the exception of those specified participants, in each case where the relevant participant's first trade under the structure had not given rise to a commercial pre-tax loss, the commercial pre-tax loss arising from the relevant participant's final trade under the structure had exceeded the aggregate profit made before then from trades under the structure. So far as the specified participants (that is to say, participants 27 to 33) were concerned, with the exception of participants 27 and 29, where the commission and fee paid to Redbox and the relevant participant's IFA were stated in the table as being unknown, each of the specified participants made a commercial pre-tax loss from his or her participation in the structure overall.

125. In fact, there were some small (albeit immaterial) differences between the figures recorded for each Appellant in the table mentioned in paragraph 124 above and the figures recorded for each Appellant in the agreed facts. Based on the figures which appear in the agreed facts, the position of each Appellant under the VIS structure was as follows:

(1) SP made a commercial pre-tax loss of £15,033.94 before taking into account the commission to Redbox of £59,312.50. (The DB contains no record of the fee paid by SP to his IFA);

(2) SB made a commercial pre-tax loss of £6,777.95 before taking into account the commission to Redbox and IFA fee of £21,538.63;

(3) CM made a commercial pre-tax loss of £31,286.44 before taking into account the commission to Redbox and IFA fee of £111,000; and

(4) AD made a commercial pre-tax loss of £12,148.65 before taking into account the commission to Redbox and IFA fee of £31,900.

THE WITNESS EVIDENCE

126. I now turn to the witness evidence.

127. The only witness called by the Appellants to give oral testimony was AD. In his witness statement made before the hearing, AD said as follows:

(1) in the course of his career, he had qualified as a chartered accountant and then worked on private equity transactions and mergers and acquisitions before eventually ending up as chief finance officer of the company which became Ioko;

(2) around the time he disposed of his shares in that company, he had become aware of the VIS structure through a former associate of his called Mr Duncan Meredith. He was aware that Mr Meredith had become a specialist in advising high net worth individuals on a variety of portfolio investment opportunities. He had concluded from his discussions with Mr Meredith that "principally, the major benefit of VIS was that gains could be made by the operation of certain sophisticated 'volatility' investment strategies". He wanted to undertake the transactions which could produce sizeable gains but was concerned about the downside net exposure and he was advised that, in the event that he lost under the transactions, he would be able to offset any losses he made against the chargeable gain that he had made on the disposal of Ioko. He said that "[the] overall risk profile of the transactions was therefore mitigated by that factor";

(3) he did not want to leave the cash which he had realised on the disposal of Ioko in a bank account, which would give rise to low interest. In addition, he already had relatively low-risk low-yield investments and was eager to diversify his investment portfolio. He wanted to create a blended approach in his portfolio by making some high income and riskier investments;

(4) although he was generally risk averse, he was prepared to undertake the VIS transactions principally because of the income generation opportunities and the fact that very little capital was exposed. Although he did discuss the potential upside tax benefits that would arise if the transactions failed, it was absolutely clear to him that he could win under them;

(5) he had discussed how the VIS transactions operated with his professional advisers, including Mr Meredith and, although he was a layman, his understanding "was that one effectively bet against the FTSE 100 Index performing outside of a specified range. If…you were outside of the range, you made money. If you were inside of the range, you lost money". As it was some 6 to 7 years since the transactions, he did not recall the precise details;

(6) after conducting several trades, he eventually decided that the VIS transactions were not worth pursuing any longer. He said that "[it] became clear to [him] that, contrary to what some advisors had claimed, your ability to outperform the market is not permanent". He realised that no-one could predict what was going to happen in the long term and, by that time, he "wanted certainty on a long term form of income stream". His risk profile had changed by that point;

(7) by the time that he had stopped, he had realised a sizeable loss. The advice he received was that, when read in conjunction with his overall economic position, it made commercial sense not to participate in any further VIS transactions. In addition, he was no longer convinced by the long-term efficacy of the transactions. Overall, his principal objective of realising large gains from the VIS transactions had failed but the "ancillary benefit" of mitigating his CGT liability had been realised;

(8) he did not regret entering into the VIS transactions "as I would certainly have, notwithstanding the potential capital gains tax benefits, considered a high-income play in the market at that time" and the fact that very little capital was required to enter into the transactions was a very attractive feature of the transactions; and

(9) he did not consider that he was entering into any form of aggressive tax planning. The main reason why he entered into the VIS structure was that he was advised that it

could generate substantial income gains for him. He knew that he might make a loss but he was aware that any such loss could be mitigated by being offset against the chargeable gain which he had recently made. He subsequently took the commercial decision, based on the advice which he received from his professional advisers at the time, not to participate in any further transactions.

128. At the hearing, AD gave the following testimony:

(1) the professional advisers to which he had alluded in his witness statement were Meredith Tax LLP and Reid;

(2) he was numerate and readily able to understand the concepts of profit and loss. His training and experience meant that he was financially sophisticated;

(3) whereas the letter written by his advisers, Garbutt & Elliot, to the Respondents on 23 December 2013 said that, following the sale of his shares in Ioko, he was seeking a liquid investment that might offer a better return than deposit rates that were available at the time (albeit by taking a higher risk) and had discovered the VIS structure on the internet, he had in fact heard about the VIS structure from Mr Meredith;

(4) whereas he had said in his witness statement that Mr Meredith was a specialist in advising high net worth individuals on a variety of portfolio investment opportunities, Mr Meredith was in fact a tax adviser and had not provided any advice to him in relation to other possible investment opportunities. As far as he could recall, Mr Meredith had only ever suggested the “range-bound” strategy to him, and not the long strategy or the short strategy;

(5) he did not recall receiving advice in relation to the VIS proposal from his IFA, Ashfield;

(6) he could not answer the question as to why there was a need for a fighting fund in relation to the VIS structure. He had simply signed the fighting fund agreement without thinking about it;

(7) at the same time as he entered into the VIS structure, a number of ex-colleagues of his from Ioko, who had also made chargeable gains in connection with the disposal of that company, also entered into the VIS structure. Some of those colleagues, such as Mr Paul Hodgson and Mr Christian Hall, had their own contracts with Redbox and had entered into trades with Schroders directly – which is to say, other than through him as their nominee - whereas others, such as Mr David Lewis, Mr David Wood, Miss Elizabeth Frost, Mr Peter McGettigan and Mr Stephen Wilson, were the principals behind the trades into which he had entered as nominee with Schroders. The reason why the latter group of people had not entered into the trades with Schroders directly was that the sums which they wished to invest in the structure were beneath a threshold level. The commission charged to AD by Redbox had been reduced to reflect the fact that AD had introduced other participants in the structure to Redbox;

(8) he regarded his investment in the VIS structure as being the commission paid to Redbox, together with the amount which he was required to transfer to Schroders as collateral at the inception of his first trade. In other words, he saw the commission to Redbox as being very much part of the investment in respect of which his return was to derive. Thus, he saw himself as investing £56,100 at the outset, when he transferred that amount to Reid’s client account;

(9) he knew that each trade comprising the VIS structure might give rise to a profit or a loss but he did not the probability of each of those outcomes. He also did not know how

the spread between the two barriers had been set for each trade although he accepted the general proposition made to him by Mr Stone that the larger the profit which might arise from a trade, the smaller the chance of profit arising from that trade would be;

(10) in addition, he had not discussed with Mr Meredith in advance of entering into the VIS structure what profit would arise in the event that the FTSE 100 Index at the valuation time was between the two barriers. His recollection was that he thought that he could make a return of 20% per annum;

(11) he said that the reason why £1.1million had been selected as the disposal price under the forward sale contract in each of his trades as principal – and the basis for the calculation of Redbox's commission – was that, if the relevant trade had given rise to a loss, that amount would mean that the allowable loss covered the chargeable gain which he had recently made in connection with the disposal of Ioko, together with a little bit of headroom;

(12) he accepted that:

(a) the aggregate commercial profit of £9,863.73 which arose on his first three trades was considerably less than the commercial pre-tax loss which arose on his fourth trade;

(b) the reason why his third and fourth trades had had a much shorter term was that he wanted to have the opportunity to get two trades done before the end of the tax year ending 5 April 2012;

(c) the outcome for which he hoped when entering into each trade was that the FTSE 100 Index would be either above the higher barrier or below the lower barrier so that the trade resulted in a commercial pre-tax loss; and

(d) the assumption made by Ms Malley in her email to Mr Meredith of 27 March 2012, that he would wish to enter into another trade because his third trade had given rise to a profit and his response to that email of "Here we go fingers crossed" indicated that the principal objective of his entering into the VIS structure was to realise an allowable loss for CGT purposes.

129. The Appellants' second witness was SP. As I have noted above, SP was precluded by illness from giving oral testimony at the hearing. However, Mr Stone said that the Respondents were content for SP's witness statement to be included in the evidence, subject to their being allowed to identify for the record the statements in that witness statement on which they would have wished Mr Stone to cross-examine SP, had SP attended the hearing.

130. SP said the following in his witness statement:

(1) he had realised a chargeable gain on the sale of Padfield Court by July 2011;

(2) following discussions with his advisers at around that time, he had been made aware of the VIS structure, which provided him with an opportunity to make a profit or loss. He understood that, if he did make a loss, that loss would be capable of offset against the chargeable gain which he had just made;

(3) he had a limited recollection of what he had been told at the time by his advisers but the main thing he recalled was that the structure was effectively a gamble. He was not risk averse, as had been shown in his approach to investing in Padfield Court, and therefore he was willing to entertain a transaction which was risky but might be to his benefit;

(4) having received independent advice, he was satisfied that it made commercial sense to proceed with the VIS structure. However, he said that he recalled that, at one point during the transactions, he was advised to stop as he was in an overall beneficial commercial position. Given that he had made his chargeable gain, it did not make sense to him to continue pursuing any risky investment strategies, as he was satisfied that his overall position had been improved under the VIS structure. He had discussed with his advisers whether he could develop his activity in these types of investment moving forward but other changes in his professional life meant that that course of action was not viable; and

(5) he did not consider that he was entering into any form of aggressive tax planning. The main reason why he had entered into the VIS structure was that he had been advised that it could generate reasonable gains for him. The fact that he could make a loss was a risk but he was aware that any such loss could be mitigated by being offset against his chargeable gain.

131. In his submission on the evidence at the hearing, Mr Stone said that, had SP been present at the hearing, he would have wished to cross-examine SP in relation to the statements in paragraphs 130(2) to 130(5) above.

132. The only witness called by the Respondents to give oral testimony was Mr Cass. In his witness statement made before the hearing, Mr Cass said as follows:

(1) he had first become aware of the VIS structure in July 2012 when a colleague wrote to him about the entries in a tax return of one of the participants in the structure. He and Ms Jeannie Bell, who was the case director within the Respondents with responsibility for the participants in the structure, and Ms Ursula Crosbie, the customer relationship manager for Schroders, had attended a meeting with Schroders in June 2013 where they learned that Redbox was the promoter of the structure. His initial reaction upon hearing the details of the structure had been that the structure was clever;

(2) Ms Bell and he had then attended a meeting with Messrs Reid and Emblin of Redbox on 6 September 2013 at which Messrs Reid and Emblin suggested that participants in the structure were looking only for an investment return, a view which they continued to maintain throughout the enquiry into the structure but which he did not believe;

(3) he had prepared a summary illustrating the economics of the trades into which each participant had entered which revealed that, of the 57 participants who had entered into the VIS structure with Schroders:

(a) 52 of them had used the structure once each;

(b) 4 of them (participants 9, 24, 38 and 40) had used the structure both for themselves as principal and as nominee for others. Of those 4, 3 of them had used the structure once and the other (participant 38) had used the structure twice, once on his own account and once as a nominee;

(c) 1 of them had used the structure twice on his own account.

(At the hearing, Mr Cass mentioned that, since preparing the table, he had become aware of 1 other person who had entered into the VIS structure with Schroders but he was not questioned about that participant by either counsel and I have not taken that participant into account in the rest of this decision);

(4) the above meant that the structure had been used 59 times. In every one of those 59 times, the participant had continued to enter into trades under the structure until a

trade gave rise to a loss. That loss had arisen on the first trade on 18 occasions, on the second trade on 22 occasions, on the third trade on 9 occasions, on the fourth trade on 9 occasions and on the fifth trade on 1 occasion;

(5) in addition, in none of those 59 times did the participant continue to enter into trades under the structure once a trade had given rise to a loss (although, as noted above, 2 of the participants had used the structure twice);

(6) he had seen no evidence to substantiate the assertion that the probability of profit in any trade was always in the 50% to 60% range suggested by Mr Millington in his letter to Ms Bell of 26 November 2013 although he had seen limited correspondence between Schroders and the advisers to participants which showed that Schroders were instructed by the participants as to the probability of profit they required;

(7) he conceded that:

(a) he had no qualifications in statistics or in law and had never worked in a job which involved statistical analysis; and

(b) it could be seen from a comparison between the tax consequences of a FTSE 100 Index-linked future and the tax consequences of a bet on the FTSE 100 Index that it was possible to achieve the same economic outcome by different routes with different tax consequences;

(8) he exhibited a table which he had prepared on the basis that each trade had a probability of profit of 55% and that a participant who realised a loss from a trade would cease to enter into further trades. This showed that there was a 91% probability that a participant would have realised a loss by the end of his or her fourth trade, a 95% probability that a participant would have realised a loss by the end of his or her fifth trade, a 97% probability that a participant would have realised a loss by the end of his or her sixth trade, and a 98% probability that a participant would have realised a loss by the end of his or her seventh trade. He accepted that the table was not based on anything as sophisticated as a weighted average of probabilities. He had simply come up with 55% as the probability of profit because he had seen one piece of evidence suggesting that there had been a 50% probability of profit and another suggesting that there had been a 60% probability of profit and he had just chosen a mid-point between those two;

(9) he accepted that the return to which a trade would give rise in the event that the FTSE 100 Index was within the two barriers exceeded the return which the participant could obtain by depositing with a bank the amount which was the difference between the forward sale price and the forward purchase price. However, he said that this failed to take into account the very real possibility that the participant might lose the whole of that difference in the event that the FTSE 100 Index was outside the two barriers. In his view, rather than comparing the trade with an investment with a bank, the more appropriate comparison was with a wager on the value of the FTSE 100 Index at the closing time on the valuation date. He said that, viewed in that light, the returns offered by the trades were inadequate, even before taking into account the commission which each participant had to pay to Redbox and the fee which each participant had to pay to his IFA; and

(10) to demonstrate his point, he made a comparison between the aggregate profit made by AD under his first 3 trades of £11,226 to the aggregate profit of £28,440 which AD would have made had he wagered an amount equal to the difference between the forward sale price and the forward purchase price on red or black (or odds or evens) on an American roulette wheel and won 3 times in a row. He said that he accepted that the probability of success of the participants of between 50% and 60% was slightly higher

than the 47.4% probability of success on the roulette wheel but noted how much greater the return would have been in the latter case. He said that the trades made sense only because the participants were able to save tax when they made a loss whereas a person losing at roulette or in making any other wager would not have that benefit available to him or her.

FINDINGS OF FACT

PRELIMINARY OBSERVATIONS

133. Before setting out my conclusions of fact, I should make some preliminary observations in relation to the approach which I have adopted in weighing the evidence in these appeals.

<u>The relative weight to be attached to particular evidence</u>

134. In making his submissions on the facts, Mr Stone referred me to various passages in the High Court decision in *Kimathi & Others v The Foreign and Commonwealth Office* [2018] EWHC 2066 (QB) ("*Kimathi*"). In *Kimathi*, in the course of summarising some important principles to be adopted in approaching the evidence at a hearing, Stewart J adverted to the principle set out in three earlier first instance decisions - *Gestmin SGPS SA v Credit Suisse (UK) Limited* [2013] EWHC 3560 (Comm), *Lachaux v Lachaux* [2017] EWHC 385 (Fam) and *Carmarthenshire County Council v Y* [2017] WLR 136 – to the effect that contemporary documents will generally be a more reliable guide to the true facts than the recollection of witnesses.

135. At paragraph [96] in *Kimathi*, Stewart J noted as follows:

> "The best approach from a judge is to base factual findings on inferences drawn from documentary evidence and known or probable facts. "This does not mean that oral testimony serves no useful purpose... But its value lies largely... in the opportunity which cross-examination affords to subject the documentary record to critical scrutiny and to gauge the personality, motivations and working practices of a witness, rather than in testimony of what the witness recalls of particular conversations and events. Above all, it is important to avoid the fallacy of supposing that, because a witness has confidence in his or her recollection and is honest, evidence based on that recollection provides any reliable guide to the truth…"
>
> For that reason, a witness, however honest, rarely persuades a judge that his present recollection is preferable to that which was taken down in writing immediately after the incident occurred. Therefore, contemporary documents are always of the utmost importance..."
>
> "...I have found it essential in cases of fraud, when considering the credibility of witnesses, always to test their veracity by reference to the objective fact proved independently of their testimony, in particular by reference to the documents in the case, and also to pay particular regard to their motives and to the overall probabilities..."
>
> Mostyn J said of the latter quotation, "these wise words are surely of general application and are not confined to fraud cases... it is certainly often difficult to tell whether a witness is telling the truth and I agree with the view of Bingham J that the demeanour of a witness is not a reliable pointer to his or her honesty.""

136. As I will explain further below, this is a case where there are some significant discrepancies between, on the one hand, the agreed facts and the facts revealed by the DB and, on the other hand, the evidence of SP and AD. In my view, were it necessary for me to choose the relative weight which I should attach to each of the documentary evidence and the witness evidence, the principle summarised above indicates that I should give more weight to the former. In any event, as will be seen when I come to analyse the evidence and reach my findings of fact, I believe that the documentary evidence in this case is so consistent and

compelling that it is hardly necessary to apply this principle in concluding that the documentary evidence should prevail to the extent that it is inconsistent with the evidence of SP or AD.

Adverse inferences

137. A second observation concerns the question of when adverse inferences should be drawn from the failure of a person to give evidence at the hearing. Mr Stone accepted that the illness of SP was a good reason for SP's failure to attend the hearing and therefore it would be inappropriate for me to draw any adverse inference from that. However, he submitted that I should draw such an adverse inference from the fact that none of SB, CM, Mr Reid or anyone else from Redbox had been called to give evidence in the proceedings.

138. In that regard, he referred me to the summary of the applicable principles in this area, set out by Brooke LJ in the Court of Appeal in *Philip Harry Wisniewski (a minor) v Central Manchester Health Authority* [1998] Lexis Citation 18, to the following effect:

"(1) In certain circumstances a court may be entitled to draw adverse inferences from the absence or silence of a witness who might be expected to have material evidence to give on an issue in an action.

(2) If a court is willing to draw such inferences they may go to strengthen the evidence adduced on that issue by the other party or to weaken the evidence, if any, adduced by the party who might reasonably have been expected to call the witness.

(3) There must, however, have been some evidence, however weak, adduced by the former on the matter in question before the court is entitled to draw the desired inference: in other words, there must be a case to answer on that issue.

(4) If the reason for the witness's absence or silence satisfies the court then no such adverse inference may be drawn. If, on the other hand, there is some credible explanation given, even if it is not wholly satisfactory, the potentially detrimental effect of his/her absence or silence may be reduced or nullified."

139. In the view of Mr Stone, there was a case to answer in these proceedings because the burden of proof was on the Appellants and the Respondents had produced prima facie evidence to show that the purpose of the VIS structure was the avoidance of tax. It followed that, in addressing that question, I should draw an adverse inference from the fact that there was no credible explanation for the failure of the people mentioned above to give evidence at the hearing.

140. In response, Mr Sherry submitted that, on the contrary, there was a perfectly cogent reason for the non-attendance at the hearing of the people referred to above and that therefore no such adverse inference should be drawn. He said that this case involved a lengthy and detailed summary of the agreed facts and that, given the comprehensive nature of that summary, there were no relevant factual matters on which the relevant people needed to give evidence. Thus, there was a credible explanation for the absence of evidence from the people in question. More specifically, in the case of SB and CM, who had entered into the MI type of the arrangements and not the CGT type of the arrangements, so that Section 16A of the TCGA was not in point in relation to them, the motives of SB and CM in entering into the arrangements were wholly irrelevant. Similarly, the motives of Mr Reid and Redbox in designing the arrangements had no relevance to the purposes of the arrangements as entered into by SP and AD.

141. In my view, Mr Sherry is right in saying that there is no provision in the MI code which is equivalent to Section 16A of the TCGA. This means that the motives of SB or CM in entering into the MI type of the arrangements do not have the same obvious relevance to the tax consequences of the VIS structure for them as do the motives of SP and AD in relation to the tax consequences of the VIS structure for SP and AD. However, it is not quite as straightforward as saying that the motives of SB and CM in entering into the VIS structure

were wholly irrelevant to those tax consequences. As I discuss further below, in paragraphs 219 to 231, the motives of a participant in entering into the VIS structure do have considerable relevance to the primary issue in these appeals – the question of whether, in applying the TCGA or the MI loss provisions, the transactions which occurred under the structure in relation to the loss-making trade by that participant should be treated as separate transactions or instead as a single composite self-cancelling transaction. I therefore believe that, contrary to the submissions of Mr Sherry, the evidence of SB and CM would have been very relevant to the primary issue which I need to address and I have drawn an adverse inference from the failure of either of them to give evidence at the hearing.

142. The same is true in the case of Mr Reid and Redbox. It is plain from the documents in the DB that Mr Reid and Redbox were at the heart of the VIS structure. Since they were so intensively involved in the design and marketing of the structure, it is my view that they would have had meaningful evidence to provide in relation to the purpose of the arrangements, a question which, quite apart from being relevant to the question of statutory construction and application as described above in relation to SB and CM, is plainly relevant to the question of whether the loss made by SP and AD fell within Section 16A of the TCGA. As I will explain in paragraph 272 (and, in particular, paragraph 272(4)) below, when it comes to identifying the main purposes of any arrangements, the purpose of those who designed the relevant arrangements and the way in which the relevant arrangements were marketed to prospective participants in the arrangements are highly relevant (see Nugee J in *Seven Individuals v The Commissioners for Her Majesty's Revenue and Customs* [2017] STC 874 ("*Seven Individuals*") at paragraph [104]). I have therefore also drawn an adverse inference from the failure of Mr Reid or anyone else from Redbox to give evidence in these proceedings.

143. Notwithstanding the above, the same can be said about these adverse inferences as I have already said in relation to the relative weight to be attached to the documentary evidence as compared to the witness evidence. In short, the agreed facts and the documentary evidence are plain enough and speak for themselves so that these adverse inferences are not of much moment.

THE SPECIFIC FINDINGS OF FACT

144. Based on the agreed facts set out in paragraphs 5 to 15 and 21 to 105 above and the evidence set out in paragraphs 110 to 132 above, I make the following findings of fact, setting out after each finding the reason or reasons for that finding:

(1) the VIS structure was devised and marketed as a single arrangement so that:

(a) both forward contracts into which an Appellant entered in the course of each trade were part of the same arrangement; and

(b) each trade under the structure into which an Appellant entered was part of the same arrangement

\- see paragraphs 14, 25, 37, 59, 79 and 112(1)(a) above;

(2) for CM and SB, the technique for turning what would ordinarily have been dividend income taxable under Chapter 3 of Part 4 of the ITTOIA into income taxable as MI was the subject of advice from Reid and was an integral part of the overall arrangement comprising the VIS structure – see paragraph 123 above;

(3) as a result of the netting provisions in the contract between Schroders and each Appellant, the acquisition price payable by Schroders under the forward sale contract within each trade was capable of offset against the acquisition price payable by each Appellant under the related forward purchase contract within that trade. Accordingly, the

only amount which the relevant Appellant stood to lose from each trade was an amount equal to the difference between the two acquisition prices, together with any dealing costs and Schroders at all times held security for that amount because the relevant Appellant was required to advance that amount to his account at Schroders at inception and that account was the subject of a charge in favour of Schroders - see paragraphs 13, 23, 26, 38, 41, 44, 65, 68, 69, 79, 81 and 82 above. As regards the charges, some of the charges in the DB were undated but the parties agreed at the hearing that each charge would have been binding on the relevant Appellant by the time that the first trade under the structure by that Appellant was executed and, in any event, it is inconceivable that Schroders would have been prepared to enter into trades with an Appellant without first ensuring that there was effective security over the money in the relevant Appellant's account to cover the difference between the two acquisition prices and any dealing costs. I therefore find as a fact that that was the case;

(4) by the time that the valuation date for each trade arose, the relevant Appellant had sent a letter of authority to Schroders, specifying that Schroders was to purchase, on behalf of the relevant Appellant, the shares, certificates of deposit or gilts which were the subject of the forward sale contract in that trade and to sell, on behalf of the relevant Appellant, the shares, certificates of deposit or gilts which were the subject of the forward purchase contract in that trade, so that:

> (a) the relevant Appellant knew before the valuation date for each trade that his obligations under the forward sale contract in that trade would be met out of securities purchased on his behalf by Schroders; and
>
> (b) there was never a moment in time when the relevant Appellant held the shares, certificates of deposit or gilts which he acquired under the forward purchase contract in each trade other than through the agency of Schroders and other than subject to the authority to Schroders to dispose of those securities to Schroders or to a person identified by Schroders

– see paragraph 112(3), and the references to the exercise of that authority in the description of the agreed facts in paragraphs 29, 30, 33, 34, 49, 50, 53, 54, 72, 73, 88, 89, 93, 94, 98, 99, 103 and 104;

(5) the gilts which were the subject of any forward contract were bought and sold in the market and the certificates of deposit and shares which were the subject of any forward contract were bought and sold from or to Schroders' own book or the market – see paragraph 117(1) above. (The relevant document referred only to gilts and certificates of deposit and did not refer to shares because it was dealing only with the MI type of the arrangements but it is reasonable to conclude that the same practice as is outlined in that paragraph in relation to certificates of deposit was adopted in relation to the shares which were the subject of one of the forward contracts in each loss-making trade under the CGT type of the arrangements);

(6) Schroders hedged in the market the risk arising to it from each trade – see paragraph 117(2) above;

(7) on each occasion that an Appellant entered into a trade under the VIS structure, there was a 50% to 60% probability that the trade in question would give rise to a profit – see paragraphs 119 to 121 above.

This finding of fact has not been altogether straightforward. The relevant evidence suggests that the barriers were initially set in such a way as to give rise to a 30% probability of profit in each trade but were then adjusted to give rise to a greater probability of profit of between 50% and 60% in each trade. However, it is unclear how widespread the higher probability of profit was. The evidence set out in paragraphs 119 and 120 suggests that Mr Sherry was content for the VIS structure to be marketed on the basis of the lower probability of profit without then falling within the disclosure rules and the evidence set out in paragraph 121 is specific to particular transactions and participants. On balance, I have decided that the evidence relating to the higher probability of profit is sufficiently compelling for me to make this finding.

At the hearing, Mr Stone suggested that the increase in the profit which arose under each of AD's first, second and third trades meant that the probability of a profit's arising under the relevant trade was reducing as each such trade was executed. Similarly, Mr Stone pointed out that the increase in the potential profit under CM's second trade as compared to the actual profit made by CM under his first trade was an indication that the probability of profit under that trade was much lower than under CM's first trade. However, apart from the anecdotal evidence referred to above, and a concession from AD in cross-examination that, as a general matter, the larger the potential profit arising out of a transaction, the lower the probability that that potential profit would arise (and vice versa) – as to which, see paragraph 128(9) above – Mr Stone did not produce any direct statistical evidence to support that proposition.

Mr Stone also drew my attention to a statement in a presentation by Schroders in relation to the VIS structure (or notes carrying a similarly-structured return profile) to the effect that "[in] broad terms the wider the band that triggers the payout the lower the return if FTSE is within the band". However, the spread between the two barriers was in fact greater under AD's fourth trade than it was under AD's third trade. Moreover, Mr Sherry pointed out that the correlation between likelihood of profit and the width of the spread between the two barriers was not as simple as Mr Stone was suggesting because one also needed to take into account expected market volatility at the time when the trade commenced. For instance, it might well be that a narrower spread between the two barriers might be used in a trade with a shorter duration without in any way affecting the likelihood of profit.

Bearing the above in mind, and pausing to observe also that, whilst Mr Stone made his submission as a general proposition but did not seek to set out exactly what specific impact his general proposition had had on the likelihood of profit in the trades in this case, I can see no reason to doubt the conclusion that I have reached above, based on the contemporaneous documents referred to in paragraph 121(2) above;

(8) notwithstanding the finding of fact set out in paragraph 144(7) above, each Appellant intended from the time when he embarked on his first trade under the VIS structure to continue to enter into trades under the structure until a trade made a loss – see paragraphs 14, 15 and 132(3) to 132(5) above;

(9) given the finding of fact in paragraph 144(8) above, there was no practical likelihood that an Appellant would ever realise a pre-tax profit from his participation in the VIS structure, after taking into account the commissions he paid to Redbox and the fees he paid to his IFA in relation to the structure.

In his submissions at the hearing, Mr Sherry pointed out that Mr Cass, by his own admission, had no expertise in economics or statistics and that therefore Mr Cass's conclusions in relation to the statistical probability of loss in the case of each Appellant should be discounted as non-expert speculation. I have heeded that advice and have not relied in reaching this conclusion on any of the statistical evidence provided by Mr Cass. However, even if the probabilities provided by Mr Cass are discounted, Mr Sherry did not challenge the figures relating to each participant in the VIS structure which Mr Cass provided at pages 160 to 170 of the DB (see paragraph 124 above). And those figures do not involve any form of statistical analysis. They merely involve arithmetic.

I have summarised those figures in paragraph 124 above and, notwithstanding the immaterial discrepancies between the figures in the table in relation to each Appellant and the figures set out in the agreed facts – to which I have referred in paragraph 125 – the figures are compelling. They show that, with the possible exception of participants 27 and 29, where the commission to Redbox and the IFA fee were stated in the table as being unknown:

(a) each of the participants made a commercial pre-tax loss from his or her participation in the structure overall; and

(b) nearly all of the participants realised a commercial pre-tax loss simply from the trades alone – as a result of the fact that the commercial loss realised on the final trade was greater than the aggregate commercial profit arising from any preceding trades - before taking into account the commission paid to Redbox (including the relevant Appellant's contribution to the fighting fund) and the fee paid to his IFA.

I would add that that table does not take into account any additional fees which the relevant participant would have paid to other "intermediary" advisers, such as Meredith Tax LLP (in the case of AD and SB) and Castle Court (in the case of SP), in addition to the commissions and fees referred to above.

In the circumstances, given my finding of fact that each Appellant intended, from the time he embarked on his first trade under the VIS structure, to continue to enter into trades under the structure until a trade made a loss, I believe that it is reasonable to conclude that there was no practical likelihood that an Appellant's participation in the VIS structure would generate a net pre-tax profit for any Appellant once the commission to Redbox and the fee to his IFA were taken into account;

(10) AD entered into the trades under the VIS structure with the sole purpose of realising an allowable loss from his participation in the structure.

I have reached this conclusion notwithstanding (i) the statement by AD's advisers in their letter to the Respondents of 23 December 2013 to the effect that AD was seeking a liquid investment which might offer a better return than deposit rates and had discovered the VIS structure on the internet and (ii) subsequently, the statement by AD in his witness statement and in his initial evidence at the hearing to the effect that he had entered into the VIS structure on the basis of advice from an investment adviser and that he was seeking an investment which would generate a commercial profit. In his witness statement and his initial evidence at the hearing, AD said that his aim in entering the VIS structure was to make a commercial profit although he recognised that he might end up making a commercial loss, in which case he was comforted to have been told by his adviser that his loss could be offset against his chargeable gain on the disposal of Ioko.

In other words, AD's witness statement and initial evidence depicted a purpose in entering into the VIS structure which had nothing to do with tax. AD said that he would have entered into the structure even if the benefit of the allowable loss had not been available and that any tax benefit which he might realise as a result of the structure would be merely incidental. In addition, he said that he ceased to enter into trades under the VIS structure because he began to doubt the wisdom of looking for a return on the basis of the FTSE 100 Index and wanted certainty in terms of an income stream. Finally, he said that he had no idea that the structure was in any way aggressive from the tax perspective.

I regret to say that I cannot accept this portrayal of AD's purpose in entering into the VIS structure. By the time that he came to the end of his oral testimony, AD admitted that that initial characterisation of his purpose was not correct but I do not need to place any reliance on that admission for the purposes of making this finding of fact because of the overwhelming evidence to the contrary which was presented to me in the course of the hearing.

That evidence can most conveniently be divided into three groups – facts which were relevant to each of the Appellants (including AD), facts which were relevant specifically to AD and can be derived from the DB and facts which were relevant specifically to AD and can be derived from AD's testimony. They are as follows:

<u>Facts which were relevant to each Appellant (including AD)</u>

(a) each Appellant had either realised a chargeable gain or MI shortly before entering into the VIS structure (in the case of SP, AD and SB) or entered into the VIS structure as part of a proposal in which income which would otherwise have been taxable under a different part of the tax legislation was converted into MI so as to be accessible to the MI loss (in the case of CM) – see paragraphs 22, 55, 60 to 64, 77, 123, 127(2) and 130(1) above;

(b) on each occasion that an Appellant realised a commercial profit from a trade under the VIS structure, he immediately entered into another trade under the structure – see paragraphs 14, 15, 27 to 34, 47 to 54, 85 to 104 and 124 above. The same was true on each of the other 55 occasions that the VIS structure was used by participants other than the Appellants – see paragraphs 132(3) to 132(5) above;

(c) as soon as an Appellant realised a loss from the VIS structure, he ceased to enter into further trades under the structure– see paragraphs 14, 15, 27 to 34, 47 to 54, 85 to 104 and 124 above. The same was true on each of the other 55 occasions that the VIS structure was used by participants other than the Appellants – see paragraphs 132(3) to 132(5) above;

(d) the VIS structure was designed so that all gains which arose as a result of a trade under the structure would arise on gilts and would therefore be exempt from tax whereas all losses which arose as a result of a trade under the structure would arise on shares or certificates of deposits and would therefore give arise to an allowable loss for CGT purposes or a loss for MI purposes, as the case may be– see paragraphs 11, 12, 116 and 117 above;

(e) in circumstances where a trade under the VIS structure gave rise to a loss, the real commercial loss which arose was considerably less than the allowable loss or the MI loss, as the case may be, which arose because a significant part of the allowable loss or the MI loss was matched by an equal and opposite gain on gilts– see paragraphs 11, 12, 116 and 117 above;

(f) there was no practical likelihood that an Appellant's participation in the VIS structure would leave that Appellant in the position of having made a pre-tax profit from his involvement in the structure, once the commission paid to Redbox (including his contribution to the fighting fund) and the fee paid to his IFA were taken into account – see paragraph 144(9) above;

(g) before entering into his first trade within the VIS structure, each Appellant knew, or should reasonably have known, that:

(i) the VIS structure was aggressive from the tax perspective and would give rise to litigation with the Respondents; and

(ii) the relevant Appellant would need to follow instructions in relation to the process of completing his tax return and dealing with enquiries from the Respondents in relation to the trades under the structure.

This is because the above features were apparent from the fighting fund agreement into which each Appellant entered prior to embarking on the VIS structure – see paragraphs 14, 25, 37, 39, 58, 59, 78, 79, 83,112(1)(d) and 115 above. Each Appellant therefore knew or should have known that the VIS structure was not merely an anodyne investment designed to make a commercial pre-tax profit;

(h) Schroders were clearly aware that the structure was aggressive from the tax perspective so far as its counterparties were concerned. That was why the relevant personnel at Schroders were so concerned about whether or not Schroders might be regarded as a promoter of the structure and whether or not the structure was notifiable – see paragraphs 117, 119 and 120 above;

(i) in his email to Mr Collings of 16 February 2010, Mr Jones observed that the size of each trade would be driven by, inter alia "the level of potential loss or gain required" – see paragraph 122(3) above. As investors normally "require" only profits and not losses, the reference to "loss" in that sentence is telling;

(j) in his email to Mr Newbury of 28 January 2012, Mr Jones explained that the reason for the change in the underlying securities from certificates of deposit to shares was to "[address] a CGT issue" – see paragraph 122(4) above – thereby revealing the link between the trades under the structure and the desire to realise a loss;

(k) as I have indicated in paragraph 142 above, given that they could have shed some light on the purposes of each Appellant in entering into the VIS structure, I have drawn an adverse inference from the failure of Mr Reid or anyone else from Redbox to give evidence in these proceedings;

Facts which were relevant specifically to AD and can be derived from the DB

(l) AD entered into the trades comprising the VIS structure not by discovering the VIS structure on the internet or on the basis of advice from an investment adviser, as he originally said, but on the basis of advice from a tax adviser, Meredith Tax LLP – see paragraphs 116, 128(1), 128(3) and 128(4) above;

(m) the essence of the VIS structure, as a "range-bound" strategy, was that, despite the large notional amounts involved in each trade, very little capital needed to be invested into it in comparison to the long strategy or the short strategy because of the way that the two forward contracts comprising each trade acted as a hedge for each other – see paragraphs 116 and 127(4) above. The fact that very little capital had to be exposed was said by AD in his witness statement to be one of the attractions of the structure. However, an investment which did not require much capital was an unlikely candidate for someone who was looking to invest the large amounts of surplus cash which had arisen from the disposal of Ioko, as AD alleged;

(n) the terms of the email from AD to Ms Malley of 28 March 2012, saying "Here we go fingers crossed" in relation to what turned out to be his final trade made it clear that AD was hoping that that trade would give rise to an allowable loss – see paragraph 114 above.

(o) similarly:

(i) the exchanges recorded in paragraphs 113(1) and 113(4) suggest that there was a working assumption that, if a trade gave rise to a profit, the relevant Appellant would wish to enter into a further trade; and

(ii) the manner in which Ms Malley informed both AD and CM that a trade had given rise to a loss – "I can confirm that the above client has realised a loss" and "I can confirm that the above clients made an investment loss" – suggests that a loss was the desired outcome. Whilst, in different circumstances, it might be possible to construe Ms Malley's language as simply and neutrally informing the relevant Appellant of the outcome of the particular trade, the use of the word "confirm", when taken together with the other evidence summarised in this paragraph 144(10), strongly suggests that a loss was the desired outcome and that Redbox was pleased to be able to say that that loss had now been delivered – see paragraphs 113(2) and 113(3);

(p) the term of each trade into which AD entered got progressively shorter as the end of the tax year approached and the trades showed no sign of generating an allowable loss. In fact, each of AD's third trade and fourth trade was executed before the settlement date for the previous trade (but after the valuation date for that previous trade) and the valuation date for the fourth trade was 4 April 2012, the day before the end of the tax year - see paragraphs 85 to 104 and 112(5) above. The inescapable conclusion is that the timing of these trades was set in order to maximise the possibility that a trade would give rise to an allowable loss before the end of the tax year;

<u>Facts which were relevant specifically to AD and can be derived from AD's testimony</u>

(q) at the hearing, AD said that the amount which had been specified as the purchase price under his initial forward sale contract (and which was therefore the basis of the calculation of the commission which he had paid to Redbox) had been selected on the basis that, if the trade gave rise to a loss, that loss would cover the chargeable gain which had arisen in connection with the disposal of his interest in Ioko – see paragraph 128(11) above;

(r) at the hearing, AD said that he was one of several people who had realised chargeable gains in connection with the disposal of Ioko who entered into the VIS structure – see paragraph 128(7) above; and

(s) at the hearing, AD said that he had had no discussions with Mr Meredith as to the extent of the profit which he might derive from his participation in the VIS structure or the likelihood that the VIS structure would give rise to a positive return and he had no idea as to how the spread between the two barriers in each trade had been set – see paragraphs 128(9) and 128(10) above. For a man of his financial experience and acumen, those were notable omissions.

Given the overwhelming evidence described above, it is simply not credible that AD had any purpose apart from the realisation of a loss when he decided to participate in the VIS structure. I find it telling that, in his witness statement, his recollection at this distance in time was that "[if]…you were outside of the range, you made money. If you were inside of the range, you lost money" (see paragraph 127(5)). In fact, of course, the position was the reverse. But AD's recollection that falling outside the range was the desired outcome rather reveals the fact that participation in the structure justified the commissions and fees associated with the structure only if the FTSE 100 Index at some point fell outside the barrier. That was when the serious value – the benefit of the loss – arose. My conclusion is that, in saying that he had a commercial non-tax purpose in entering into the VIS structure, AD was simply following the script which had been prepared for him and the other participants in the structure by Redbox – see paragraphs 115(1) and 132(2);

(11) SP entered into the trades comprising the VIS structure with the sole purpose of realising an allowable loss from his participation in the structure.

As was the case with AD, SP's witness statement suggested that he too wanted to invest in the VIS structure with the purpose of deriving a commercial profit and not a loss but that the only significance of a loss was that, if it arose, it could be set off against his prior chargeable gain. SP also said that he had no idea that the VIS structure was aggressive from the tax perspective.

Although I did not have the benefit of SP's oral testimony at the hearing, the facts set out in paragraphs 114(10)(a) to 144(10)(k) above are as applicable to SP as they are to AD.

In addition, it appears that a similar process to the one referred to by AD in his testimony (as recorded in paragraph 144(1)(q) above) occurred in relation to SP. The attendance note recording the outcome of the meeting between SP and his adviser, JL Strategies, on 26 July 2011 at which SP's involvement in the VIS structure was discussed (at page 1359 in the DB) included the words "considered investment amount and we agreed that £912,500 was appropriate". Bearing in mind that the chargeable gain made by SP in July 2011 was shown in his tax return for the tax year ending 5 April 2012 as amounting to £903,904 (see paragraph 22 above), it is clear that the nominal amount of SP's investment in the structure was selected with the quantum of that chargeable gain in mind.

Finally, it was clearly assumed by Schroders that, when SP's first trade was profit-making for SP, SP would wish to enter into another trade – see paragraph 113(5) above.

Given the above facts, it is inconceivable that SP's purpose in entering into the trades under the VIS structure was that he wished to derive an attractive pre-tax return. Instead, I have concluded that, as was the case with AD, SP's sole purpose in entering into the trades under the VIS structure was to realise an allowable loss in order to shelter a previously-derived chargeable gain; and

(12) I make the same finding of fact in relation to the purpose of each of SB and CM in entering into the trades under the VIS structure although, in each of their cases of course, the purpose was to derive a loss which was deductible against MI and not an allowable loss for CGT purposes.

I make this finding of fact because, as will be seen in paragraphs 219 to 231 below, I consider that the purpose of each of SB and CM in entering into the trades under the VIS structure is material to Issue 1 in this case – namely, the application of the principle applied in *WT Ramsay Ltd v Inland Revenue Commissioners* [1982] AC 300 ("*Ramsay*") to the transactions undertaken by each Appellant.

My finding in this regard is based on the facts set out in paragraphs 144(10)(a) to 144(10)(k) above and my finding of fact in paragraph 144(2) above to the effect that the creation of MI was an integral part of the overall arrangement so far as SB and CM were concerned. In addition, I have drawn an adverse inference from the failure of SB and CM to give evidence in these proceedings, although, as I have noted in paragraph

143 above, the adverse inference is hardly material given the compelling documentary evidence before me.

145. I need now to say something about the pricing of the trades and the two forward contracts comprising each trade.

146. This isn't relevant to the question of whether or not each Appellant had the purpose of making a profit when he entered into the trades under the VIS structure, as I have already concluded that the evidence against that proposition is too compelling to permit that. As such, it has no relevance to Issue 1, Issue 2 or Issue 3. However, the commerciality of each trade and each forward contract in that trade is potentially relevant to:

(1) the question of whether the acquisition or disposal which occurred under each forward contract was a bargain at arm's length; and

(2) the question of whether the price paid by AD under the forward purchase contract in his final trade was wholly and exclusively for the shares which he acquired under that contract.

It is therefore highly relevant to each of Issue 4 and Issue 5.

147. The first question which needs to be answered is whether the evidence shows that the trades into which the Appellants entered under the VIS structure were on terms which were "at the money" for both parties to the trade. By "at the money", I mean that the relevant trade made sense on a pre-tax basis for each party to the trade – both Schroders and the relevant Appellant. Each trade clearly made sense on a pre-tax basis for Schroders as its only purpose in entering into a trade was to derive a pre-tax profit. It is therefore safe to assume that each trade was either "at the money" for both parties or "in the money" for Schroders and "out of the money" for the relevant Appellant. Whether or not a trade made commercial sense for the relevant Appellant on a pre-tax basis would broadly have been a function of three things – the creditworthiness of Schroders, the probability of any prospective profit relative to the probability of any prospective loss and the amount of any prospective profit, relative to the amount of any prospective loss.

148. If we leave aside for the moment the first of those things, I made a finding of fact in paragraph 144(7) above in relation to the probability of prospective profit arising in respect of each trade for the relevant Appellant. That finding was that there was a probability of prospective profit of between 50% and 60%. However, without knowing the quantum of any prospective profit, relative to the quantum of any prospective loss, which might arise from the trade in question, the probability of prospective profit relative to the probability of prospective loss does not determine whether the trade would have made commercial sense in pre-tax terms for the relevant Appellant.

149. In that regard, there has been very little evidence for me to go on. On the one hand, there is the email described in paragraph 118 above, which suggests that there were circumstances in which a trade might give rise to a meaningful amount of profit. On the other hand, Mr Cass made the very reasonable point that a comparison between the potential profit which might arise from a trade and the return which the relevant Appellant might expect to derive from a bank was not a sound one, given that the Appellant stood to lose the entirety of the amount which he had invested in a trade (effectively, his capital) whereas, in the absence of an unexpected catastrophe, an investment in a bank would have resulted in a return of his capital. Thus, the potential loss involved in a trade was much greater than the potential loss involved in a bank deposit. I have concluded that the fact that most of the participants in the VIS structure (including each of the Appellants) ended up making a pre-tax commercial loss from their involvement in the structure, even before taking any commissions and fees into account,

suggests that, even if the probability of prospective profit might have been greater than 50%, the amount of any prospective profit was insufficient, relative to the amount of any prospective loss. I therefore tend to agree with Mr Cass that the amount of profit which each participant stood to make from his participation in each trade was insufficient to justify the level of risk undertaken by that participant that he or she would lose his entire investment in the trade and that therefore the relevant Appellant would not have been prepared to enter into that trade if he had not believed that he would be able to utilise, against his chargeable gains or MI, any loss arising from that trade. Although Mr Sherry rightly pointed out that Mr Cass had no expertise in statistics, and, as noted above, I have not taken into account Mr Cass's statistical analyses in reaching my findings of fact, I did find Mr Cass's comparison between the amount of profit made by AD in his first three trades and the amount of profit which AD would have made had he put the difference between the two purchase prices under the forward contracts on red or black at roulette on each occasion quite persuasive.

150. I have therefore concluded that the Appellants have not satisfied me that the terms of each trade were such that the relevant Appellant would have been prepared to enter into the relevant trade if the relevant Appellant had not had chargeable gains or MI to shelter. Mr Sherry submitted that, because the forward contracts in each trade were similar to other transactions into which Schroders entered with other counterparties in the market, as recorded in the internal Schroders memorandum referred to in paragraph 117 above, that must mean that the trades in this case made commercial sense for the Appellants in pre-tax terms. I disagree. That memorandum said only that the "economics" of the trades were similar to other transactions available in the market and had a "similar economic profile". Moreover, it made clear that those economics were generally delivered by way of a note and not by way of two forward contracts. All that the memorandum was saying was that the type of economic risk involved in the trades – which is to say, a return based on whether the FTSE 100 Index was below, within or above two barriers at a particular moment in time - was the same as the type of economic risk which was available in the market and which Schroders had offered before, albeit generally in the form of notes. The memorandum said nothing about the exact pricing under the specific contracts making up each trade as compared to the pricing under those market contracts.

151. Bearing in mind that the burden in these appeals is on the Appellants, if the Appellants wanted to establish that the trades in this case were on terms which made sense for each Appellant on a pre-tax basis, they should have produced evidence of the equivalence between the pricing under the trades in question and the pricing under the equivalent trades into which Schroders entered in the market. As they have not done that, I am unable to find that each trade made commercial sense on a pre-tax basis for the relevant Appellant and was one into which the relevant Appellant would have agreed to enter had he not had chargeable gains or MI against which to set off any loss arising from the trade.

152. Conversely, of course, the Appellants have satisfied me that each trade was one which a person with chargeable gains or MI to shelter and who believed that any loss arising out of the trade (together with its related acquisition and disposal) would be capable of offset against that chargeable gain or MI would have been prepared to enter. So much is clear from the fact that there were 57 participants who were prepared to enter into the VIS structure, believing that, once the utilisation of the loss arising from any trade was taken into account, the trade not only made commercial sense in and of itself but also justified the commissions and fees which the relevant participant had to pay in order to participate in the trade.

153. In summary, whilst I have not been provided with sufficient evidence to be able to conclude that each trade made commercial sense for Schroders' counterparty in pre-tax terms, I find as a fact that each trade made commercial sense in post-tax terms for a prospective

counterparty with a chargeable gain or MI to shelter and who believed that the trade could deliver the loss which would do that.

154. There is a third question in this context though, and that is whether, leaving aside the fact that each trade made commercial sense on a post-tax basis for a specific class of potential counterparty, the terms of each forward contract in a trade were such that any person would have been prepared to enter into that forward contract on its own without also entering into the other forward contract in that trade. No evidence or submission was advanced in support of that proposition on behalf of the Appellants. Even the limited evidence to which I have referred in paragraphs 148 to 150 above was dealing with the economic profile of each trade as a whole and not referring to the two constituent forward contracts making up each trade and, in any event, as I have already said, those statements were about economic profile and not about pricing. In addition, the fact that:

(1) Mr Jones articulated to Mr Karkowski the concerns of Schroders' Compliance Department about the risks involved in the long and short strategies – see paragraph 122(1) above;

(2) Schroders' Head of Compliance did not want details of the long or short strategy published on its website and available to its retail investors – see paragraph 122(2) above;

(3) whilst 57 participants used the "range-bound" strategy – see paragraphs 132(3) and 132(4) above - no evidence has been adduced to show that anyone ever entered into the long or short strategy;

(4) AD made it plain in his witness statement that one of the attractions of the "range-bound" strategy was the limited risk to which it gave rise – see paragraph 127(4); and

(5) AD in his oral testimony said that he could not recall Mr Meredith's having mentioned the long or short strategies to him – see paragraph 128(4),

suggest very strongly that, even before considering whether the pricing of each forward contract in a trade in this case meant that any person would have been prepared into that forward contract on its own without also entering into the other forward contract in that trade, the generic single forward contract structure which was the basis for the long and short strategies had limited appeal. Accordingly, I have concluded that the Appellants have not satisfied me that the terms of each forward contract in a trade were such that any person would have been prepared to enter into that forward contract without also entering into the other forward contract in that trade at the same time.

155. I will return to the conclusions set out in paragraphs 145 to 154 above when I consider Issue 4 and Issue 5 below.

DISCUSSION

156. As outlined in paragraphs 16 and 17 above, there are five issues which fall to be determined in this decision. I will deal with each of them in turn.

ISSUE 1 - CHARACTERISATION

Introduction

157. This issue, as described in the terms adopted by the parties in paragraph 16(1) above, is whether the separate identity of the contracts should be disregarded such that the TCGA and Section 152(1) of the ITA 2007 are applied to the overall economic outcome of the transactions (with the effect that there are no allowable losses on the transactions for the purposes of that legislation) rather than separately to each contract.

158. This issue is the central issue for me to determine in this decision as the other issues fall away in the event that I find in favour of the Respondents in relation to it.

159. Before dealing with the rival submissions of the parties on this issue, I should just record that I was slightly surprised to discover at the hearing that neither party appeared to have taken into account in reaching its stated position the fact that, in each loss-making trade, there was an actual commercial pre-tax loss as a result of the difference between the loss arising by virtue of one of the forward contracts (together with its related acquisition or disposal) and the profit arising under the other (together with its related acquisition or disposal). Instead, as the terms of the issue agreed by the parties and set out in paragraphs 16(1) and 157 above indicate, both parties were proceeding on an "all or nothing" basis pursuant to which either the whole of the allowable loss or the MI loss should be held to be available (the Appellants' position) or none of the allowable loss or the MI loss should be held to be available (the Respondents' position).

160. I do not think that it is possible entirely to ignore the fact that that real commercial pre-tax loss arose and I shall deal later on in my analysis with the impact which I think it should have on the tax analysis. (Although Mr Stone submitted that I did not need to address that question in this decision because of the approach adopted by each of the parties, I do not see how I can reach an appropriate determination under Section 50 of the TMA in relation to the closure notice issued to each Appellant without doing so. That is because, if I were to conclude that not all of the loss claimed by each Appellant and denied by the Respondents should be available but that some part of it should be, then I would be failing in my duty under that section to reduce the over-charge in the relevant assessment "accordingly" if I did not reflect that conclusion in my decision.).

161. Be that as it may, I should start this section of my decision by saying that, whilst I will need to deal in due course with the difference between the loss and the profit if I decide that the Respondents' position on the fundamental point is correct, the fact that that difference exists is of no significance to my determination of the fundamental point. This is because the answer to the question of whether the loss arising by virtue of one of the forward contracts in a loss-making trade (together with its related acquisition or disposal) should be negated to the extent that there was a profit arising as a result of the other forward contract in that trade (together with its related acquisition or disposal) will be the same regardless of whether the profit was equal to the loss or was slightly less than the loss. At the hearing, Mr Sherry agreed that he was not seeking to rely in any way on the fact that there was in fact a small difference between the loss and the profit arising in the course of a loss-making trade (together with its related acquisition and disposal).

<u>The submissions of the parties</u>

The nature of the transaction

162. Mr Sherry started by saying that the Appellants entirely accepted the principle set out in *Ramsay*, and repeated in many other decisions since *Ramsay*, to the effect that statutes were to be construed purposively and then applied to the facts when viewed realistically. That was a general principle of statutory construction and application. However, as Lord Nicholls explained at paragraph [36] in his decision in *Barclays Mercantile Business Finance Limited v Mawson* [2005] STC 1 ("*BMBF*"), that did not mean that, in the application of any taxing statute, transactions or elements of transactions which had no commercial purpose were to be disregarded. That would be going too far because it would elide "...the two steps which are necessary in the application of any statutory provision: first, to decide, on a purposive construction, exactly what transaction will answer to the statutory description and secondly, to decide whether the transaction in question does so. As Ribeiro PJ said in *Collector of Stamp Revenue v. Arrowtown Assets Limited* [2003] HKCFA 46 at [35], (2004) 6 ITLR 454 at [35]:

'[T]he driving principle in the *Ramsay* line of cases continues to involve a general rule of statutory construction and an unblinkered approach to the analysis of the facts. The ultimate question is whether the relevant statutory provisions, construed purposively, were intended to apply to the transaction, viewed realistically.'" The same point had been expressed by Lord Keith of Kinkel in *Craven v White* [1988] 3 WLR 423 ("*Craven*") at page 430C to 430E.

163. Mr Sherry said that the dispute between the Appellants and the Respondents was how the *Ramsay* principle should apply to the facts in this case.

164. In that regard, the Appellants were not seeking to place any reliance on the fact that the forward purchase and the forward sale in each trade had been documented in two separate agreements instead of in a single agreement which gave rise to both the forward purchase and the forward sale. On the contrary, he said that he was perfectly content for the position to be analysed on the assumption that both the forward purchase and the forward sale had been contained in a single agreement because, even in that case, it was still necessary to take into account the terms of that single agreement and those terms were that securities in the form of gilts, shares or certificates of deposit were being bought and sold. In addition, the securities which were acquired from Schroders under the forward purchase were then sold on behalf of the relevant Appellant and the securities which were sold to Schroders under the forward sale were acquired on behalf of the relevant Appellant. Thus, both as regards each forward and as regards the related acquisition or disposal which accompanied the relevant forward, there were real transactions in securities taking place in the context of each trade.

165. Mr Sherry said that, in that respect, the present facts were readily distinguishable from the facts in *Ramsay*, where there was essentially a closed box and the taxpayers had walked into the offices of the arrangers, signed some papers and emerged with a supposed allowable loss in their briefcases. In *Ramsay*, there were no "real world" transactions - no need to go into the outside world to satisfy any of the transactions or to realise the fruits from any of the transactions.

166. In contrast to *Ramsay*, there were real transactions in the relevant securities in this case. The internal Schroders documents showed that the gilts required to settle one of the forward contracts in each trade would be bought and sold in the market, whilst the certificates of deposit required to settle the other would be bought and sold from Schroders' own book or in the market. This showed that each trade gave rise to genuine transactions between the relevant Appellant and Schroders or between the relevant Appellant and the market. Moreover, those documents showed that Schroders was taking genuine market risk which it needed to hedge.

167. The above meant that each acquisition and disposal of securities had a meaningful legal effect and could not simply be disregarded. Another way of looking at this would be to ask how the relevant Appellant would have been taxed if, instead of entering into both forward contracts with Schroders, he had entered into one of the contracts with another bank. In that case, each of Schroders and the other bank would undoubtedly have required a much greater amount of security from the relevant Appellant but the validity of each forward contract as a distinct contract in its own right would not have been susceptible to challenge. Since that was the case, the same outcome must follow where both contracts were with the same counterparty.

168. Mr Sherry pointed out that it was insufficient for the Respondents to say that there was a composite transaction in this case without explaining what that composite transaction was. It certainly wasn't simply the two forward contracts because each of those was linked to another transaction with Schroders or the market and the gain or loss was a function of both each forward contract and the transaction with Schroders or the market which related to the securities that were the subject of that forward contract. In the case of the forward sale contract, the related transaction was that the subject securities were acquired on behalf of the relevant

Appellant and, in the case of the forward purchase contract, the related transaction was that the subject securities were sold on behalf of the relevant Appellant. The two forward contracts, in and of themselves, were not self-cancelling. Instead, they required the delivery of two different types of securities so that the securities acquired under the forward purchase contract were not the same as the securities sold under the forward sale contract. Thus, it was not as straightforward as simply saying that *Ramsay* applied.

169. He added that, in addition to *BMBF*, the decision in *MacNiven (Inspector of Taxes) v Westmoreland Investments Ltd* [2003] 1 AC 311 ("*Westmoreland*") demonstrated that, even in circular transactions, it was still necessary to focus carefully on the relevant statutory provision and to identify its requirements before one could decide whether the circular payments should be disregarded or treated as irrelevant for the purposes of the statute. In *Westmoreland*, the House of Lords had avoided the sweeping generalisation referred to in paragraph 162 above to the effect that all transactions undertaken for the purposes of tax avoidance should be disregarded and held that a payment of interest made solely to reduce the borrower's tax liability and made out of money borrowed from the creditor was nevertheless treated for tax purposes as having been "paid" because it gave rise to a liability to tax in the hands of the recipient (or would have done so if the recipient had been a taxable entity) and therefore it answered the statutory description.

170. Once one followed the initial fundamental step in the process of construction, which was to identify the concept to which the relevant statute was referring, then the right answer to that question in this case was that the acquisitions and disposals of the various securities should be respected. The relevant question was not what was the TCGA as a whole and/or the ITA 2007 as a whole meant to achieve but rather what were the specific provisions in those Acts which were pertinent to the facts in this case meant to achieve. And, in this case, the relevant provisions of the TCGA and/or the ITA were aimed at identifying the gains and losses arising from real acquisitions and disposals and exempting (and not allowing) those gains and losses which arose from the acquisition and disposal of gilts. It was not sufficient merely to say that the transactions in question gave rise to no real economic loss. Instead, one had to give effect to the clear purpose of the relevant provisions, which was that gains and losses on gilts should be outside the tax net, whilst gains and losses on shares and certificates of deposit should not.

171. Further examples of circumstances where the courts had eschewed the broad-brush approach of simply saying that Parliament could not have intended a particular outcome and had instead focused on the language in the specific provisions could be found in the decision of Mann J at first instance in *Westbrook Dolphin Square Ltd v Friends Life Ltd (No 2) (Westbrook Dolphin Square Residential 1 Ltd intervening)* [2015] 1 WLR 1713 at paragraphs [130] to [135] and in the judgment of Henderson LJ in *Rossendale Borough Council v Hurstwood Properties (A) Ltd and others* [2019] 1 WLR 4567 at paragraphs [73] to [79] ("*Rossendale*").

172. The latter case showed that, where there was no allegation that a document was a sham – as was the case here – one needed to consider the true legal nature of the transaction in question and not simply its economic effect. It was not a case of saying that Parliament cannot have intended to allow this sort of thing. This did not mean that one had to look a document or transaction in blinkers, isolated from the context in which it belonged. But it did mean that the true legal nature of the transaction could not simply be disregarded. Here the true legal nature of the transactions was that they involved acquisitions and disposals of securities and the only reason for the discrepancy between the tax outcome and the commercial outcome was the exemption which attached to the gains arising on the gilts. There was nothing in Section

115 of the TCGA to warrant an interpretation of that section which prevented it from applying in a case where there was an equal and opposite loss on the disposal of other securities.

173. In *Inland Revenue Commissioners v Fitzwilliam and others* [1993] 1 WLR 1189, three members of the House of Lords had held that, although certain steps in a linear transaction were pre-ordained and formed part of a pre-planned tax avoidance scheme, that did not suffice, in and of itself, to prevent the sought-for exemption from applying because each step had a legal and commercial effect which could not simply be disregarded (see Lord Keith of Kinkel at page 1203D to page 1204G, Lord Ackner at page 1226G and Lord Mustill at page 1228H).

174. The decision of the Court of Final Appeal of the Hong Kong Special Administrative Region in *Collector of Stamp Revenue v. Arrowtown Assets Limited* [2003] HKCFA 46 at [35], (2004) 6 ITLR 454 ("*Arrowtown*") contained an illuminating summary of the case law relating to the application of the *Ramsay* principle by Lord Millett NPJ, in the course of which he noted that "the subject is to be taxed…in accordance with the legal consequences of his acts and not in accordance with some supposed 'substance of the transaction'" (see paragraph [107]).

175. In his response, Mr Stone submitted that the application of the *Ramsay* principle to the present facts was straightforward because:

(1) in considering the application of *Ramsay*, it was not necessary to look at the entire VIS structure and determine if that was a composite whole. Instead, it was merely necessary to look at the two forward contracts comprising the loss-making trade;

(2) it was common ground that those two forward contracts were only ever going to be entered into together. Indeed, Mr Sherry had accepted that the two forward contracts should be seen as part of the same arrangement and that they might just as well have been set out in a single agreement. This was not a case like *SPI* where one had to consider whether a commercial contingency might mean that only one of the contracts would be entered into without the other;

(3) in the case of the CGT type of the arrangements, this was not a case like *Rossendale* where a particular provision in the legislation was being construed in the light of the *Ramsay* principle for the first time. Instead, the *Ramsay* case itself had determined that a loss for the purposes of the CGT legislation meant a real economic loss; and

(4) although no binding authority existed in relation to the construction of the MI provisions, that legislation ought to be construed in precisely the same way as the CGT legislation so that only a real economic loss could constitute a loss for that purpose.

176. Mr Stone said that many of the authorities on which Mr Sherry sought to place reliance related to linear transactions, where the question at issue was whether a step in the overall transaction could be disregarded. Those cases were of limited relevance in a case such as this, where the question was whether two transactions giving rise to equal and opposite effects should be respected as two transactions or should be regarded as a single net transaction. Instead, the three most relevant authorities were *Ramsay*, *Inland Revenue Commissioners v Scottish Provident Institution* [2004] 1 WLR 3172 ("*SPI*") and *Schofield v The Commissioners for Her Majesty's Revenue and Customs* [2012] EWCA Civ 927 ("*Schofield*").

177. The similarity between the facts in *Ramsay* and the facts in this case was marked. In *Ramsay*:

(1) the taxpayer had made a chargeable gain which it wished to shelter;

(2) the method chosen to do this was to purchase a ready-made scheme the general nature of which was to create out of a neutral situation two assets one of which would decrease in value for the benefit of the other;

(3) those assets, like particles in a gas chamber with opposite charges, had a short life. Having served their purpose, they cancelled each other out and disappeared;

(4) the taxpayer merely had to state the amount of the gain which he wished to counteract and the necessary particulars were inserted into the scheme. The scheme required nothing to be done by the taxpayer except the signing of the scheme documents and the payment of fees;

(5) the decreasing asset was sold so as to create the desired loss and the increasing asset was sold yielding a gain which it was hoped would be exempt from tax; and

(6) at the end of the series of operations, the taxpayer's financial position was precisely as it was at the beginning except that he had paid a fee and certain expenses to the scheme promoter,

see *Ramsay* at pages 321F and 321G, 322C to 322F and page 332D. In this case, subject to the point that the loss and gain arising in the loss-making trade were not exactly equal, the above description aptly summarised the facts.

178. Lord Wilberforce in *Ramsay* made it clear that the cardinal principle that a court cannot go beyond a genuine transaction to some supposed underlying substance was subject to the limitation that a transaction should not be considered in blinkers and isolated from the context in which it properly belonged. The court needed to ascertain the legal nature of the transaction which had occurred and, if that emerged from a combination of transactions, it was that combination which could be regarded – see Lord Wilberforce in *Ramsay* at pages 323G to 324D and the similar views of Lord Fraser of Tullybelton in *Ramsay* at pages 338H to 339G. In this case, the two forward contracts comprising the loss-making trade were interdependent and it would be artificial to treat them as independent of each other. In fact, the two forward contracts were, if anything, more interdependent than the transactions in *Ramsay* because they were executed at the same time and completed at the same time and therefore it was not a case like *Ramsay* where the connection was being made between transactions taking place at different times.

179. *SPI* was another case where two transactions fell to be regarded as a single transaction because of their circularity. In *SPI*, each call option, when viewed in isolation, gave rise to an entitlement to gilts but the two transactions, when viewed together, did not. Counsel for the taxpayer in that case had conceded that, if there was no genuine commercial possibility that the two options might not be exercised together, then the scheme was bound to fail. Thus, he was relying exclusively on the existence of the contingency to avoid the outcome which the Appellants were seeking to avoid in this case. However, in this case, there was no contingency which might mean that one of the forward contracts might be entered into without the other.

180. Mr Stone drew my attention to the following points in relation to *Ramsay* which had been made by Lord Reed JSC in *UBS AG v The Commissioners for Her Majesty's Revenue and Customs* [2016] 1 WLR ("*UBS*"), at paragraphs [61] to [68]:

(1) prior to *Ramsay*, interpretation of fiscal legislation had been based predominantly on linguistic analysis and the courts had treated every element of a composite transaction which had an individual legal identity as having its own separate consequences. This had allowed tax avoidance schemes to flourish;

(2) the significance of *Ramsay* was that it did away with both of these features by extending to tax cases the purposive approach which was orthodox in other areas of the law and established that the analysis of the facts depended on a purposive construction of the statute;

(3) thus, in *Ramsay*, the terms “loss” and “gain” as used in the CGT legislation “were purposively construed as referring to losses and gains having commercial reality” and, “since the facts concerned a composite transaction forming a commercial unity, with the consequence that the commercial significance of what had occurred could only be determined by considering the transaction as a whole, the statute was construed as referring to the effect of that composite transaction”;

(4) this new approach was particularly important in relation to tax avoidance schemes as a result of two factors noted in *BMBF* at paragraph [34] – namely, that tax is generally imposed by reference to economic activities or transactions which exist in the “real world” and that tax avoidance schemes commonly include elements which have been inserted without any business or commercial purpose but are intended to have the effect of removing the transaction from the scope of the charge;

(5) as Carnwath LJ had said in the Court of Appeal in *BMBF* at paragraph [66], where a taxing statute has the character of drawing its lifeblood from “real world transactions with real world economic effects” and a transaction or an element in a composite transaction has no purpose other than tax avoidance, it can usually be said that to allow the tax treatment to be governed by transactions which have no real world purpose of any kind is inconsistent with that fundamental characteristic;

(6) on some occasions, it had been decided that elements inserted into a transaction without any business or commercial purpose did not prevent the composite transaction from falling within a charge to tax or bring the composite transaction within an exemption from tax, but it all depended on the construction of the provision in question and some enactments conferred relief from tax even where the transaction in question formed part of the wider arrangements undertaken solely for the purpose of obtaining the relief;

(7) the ultimate question was whether the relevant statutory provision, construed purposively, was intended to apply to the transaction, viewed realistically (as noted by Ribeiro J in *Arrowtown* at paragraph [35]);

(8) the reference to reality in this context had nothing to do with the concept of sham because tax avoidance was the spur to entering into genuine transactions; and

(9) the facts must always be analysed in the light of the statutory provision being applied. “If, as in Ramsay, the relevant fact is the overall economic outcome of a series of commercially linked transactions, then that is the fact upon which it is necessary to focus”.

181. In Mr Stone’s view, the comments summarised in paragraph 180(3) above in relation to *Ramsay* demonstrated how the TCGA was to be applied in this case to the CGT type of the VIS structure and there was no relevant distinction between that approach to the construction of the TCGA and the approach to the construction of the legislation relating to MI losses. Moreover, although it was unnecessary to find that the present structure was a tax avoidance scheme in order for the *Ramsay* principle to apply – because *Ramsay* was merely setting out the generally-applicable approach to the construction of statutes - the principle did have particular importance in tax avoidance cases, for the reasons set out in paragraphs 180(4) to 180(6) above.

182. Finally, Mr Stone pointed to a passage from Lord Fraser of Tullybelton in *Furniss v Dawson* [1984] AC 474 (“*Furniss*”) at page 512 (which was quoted by Lord Templeman in *Ensign Tankers (Leasing) Limited v Stokes* [1992] 1 AC 655 (“*Ensign*”) at page 674E) as showing that the mere fact that a transaction had enduring legal consequences did not prevent it from being disregarded when it came to the application of the legislation to the scheme of which that transaction formed part. He said that this demonstrated that the mere fact that the

transactions in securities in this case had legal effects did not preclude them from being treated as self-cancelling when it came to the application of the legislation.

Section 115 of the TCGA

183. Mr Sherry said that an inherent feature of his analysis was that, so far as the gilts were concerned, the transactions properly fell within Section 115 of the TCGA because there was both an acquisition and a disposal of the gilts. The fact that the transactions in the gilts had a genuine commercial reality meant that this case could be distinguished from *SPI* and *UBS* where there were commercially-irrelevant contingencies which could simply be disregarded. The Respondents' approach in this case was effectively to rob those gilts transactions of the benefit of that exemption, at least in the case of the loss-making trades, because the Respondents' approach involved lumping in together both the transactions in gilts and the transactions in shares or certificates of deposit. Whilst it was a truism to say that CGT was a gain on real gains and losses, the gains and losses in the case of the loss-making trades were real, because they arose from real acquisitions and disposals.

184. Mr Stone said that, as regards the application of the exemption in Section 115 of the TCGA to the gain on the gilts which were the subject of the profit-making forward contract in a loss-making trade, there was no relevant point of distinction between the facts in this case and the facts in *Schofield*. In *Schofield*, the taxpayer entered into four options, two of which were closed out before he ceased to be UK resident and the other two of which were closed out after that. Of the first two options to be closed out, one of them, relating to the FTSE 100 Index, was closed out at a loss of some £11.3 million, whilst the other, relating to gilts, was closed out at a profit of some £11.4 million. If those two options had been respected as independent transactions, the gain on the latter option would have fallen within Section 115 of the TCGA, because it related to gilts. However, because the options were seen as part of a composite arrangement, the courts at all three levels up to and including the Court of Appeal determined that that composite transaction did not give rise to a loss. After referring to the decision in *Ramsay*, Sir Andrew Morritt C concluded:

"[36] In my view the citations from the speeches of Lords Wilberforce and Fraser I have set out at [31] to [35] above are wholly inconsistent with the argument of counsel for Mr Schofield. The First-tier Tribunal concluded as matters of fact that the four options in this case were parts of an overall pre-ordained scheme designed to produce neither a gain nor a loss. In those circumstances it is wrong to adopt the step by step approach for which counsel for Mr Schofield contended and consider only Option 1…

[39] Where the *Ramsay* principle does apply the conclusion may be expressed in a number of different ways; for the purposes of ss 1 and 2, TCGA no asset, no disposal, no loss or all three. Counsel for HMRC contended that the relevant transaction was the four options together and such a transaction does not constitute a disposal to which ss 1 and 2, TCGA apply. This accords with the conclusion of Lord Fraser in *Ramsay* itself (see [1981] STC 174 at 182, [1982] AC 300 at 339), and I am content to accept it."

185. The same sentiments were echoed by Hallett LJ at paragraphs [42] and [43].

186. Mr Sherry's submission to the effect that Section 115 of the TCGA had to apply to the gain arising on the gilts which were the subject of the profit-making forward contract in this case was directly at odds with the decision in *Schofield*. It could not possibly be right to say that, in a composite transaction such as the present one, the independence of the constituent transactions needed to be respected. It was of the essence in both *Ramsay* and *Schofield*, in each of which a taxpayer was denied a loss for tax purposes which was much greater than the real loss which he or she had suffered, that there were two limbs, one of which was said to give rise to an allowable loss for tax purposes and the other of which was said to give rise to a tax-

free gain. In *Ramsay*, the tax-free gain which was disregarded was a gain on the disposal of the debt, whilst in *Schofield*, the tax-free gain which was disregarded was a gain on the disposal of options relating to gilts.

Tax mitigation or tax avoidance?

187. Mr Sherry pointed out that, in *Ensign*, Lord Templeman had said:

"There is nothing magical about tax mitigation whereby a taxpayer suffers a loss or incurs expenditure in fact as well as in appearance. A taxpayer who carries out a "bed and breakfast" transaction by selling and repurchasing shares establishes a loss for capital gains tax because he has actually suffered that loss at the date of the transaction. In "back to back" transactions the taxpayer is entitled to any reduction in tax which Parliament has attached to each transaction" (see page 676C).

188. In saying this, Lord Templeman was distinguishing between acceptable tax mitigation - which had the reduction of tax as its purpose but nevertheless involved transactions which gave rise to a real loss or real expenditure - and unacceptable tax avoidance, which involved transactions that pretended to be something other than what they were. The forward contracts in this case fell very much on the tax mitigation side of the line as the transactions in the securities had real consequences. Mr Sherry added that this was an example of a "back-to-back" transaction which Lord Templeman had expressly blessed as an example of acceptable tax mitigation and where "the taxpayer is entitled to any reduction in tax which Parliament has attached to each transaction".

189. The same distinction between acceptable tax mitigation and unacceptable tax avoidance had been echoed by Lord Goff in *Ensign* when he said:

"Like my noble and learned friend, Lord Templeman, I approach this case on the basis that there is a fundamental difference between tax mitigation and unacceptable tax avoidance. Examples of the former have been given in the speech of my noble and learned friend. These are cases in which the taxpayer takes advantage of the law to plan his affairs so as to minimise the incidence of tax. Unacceptable tax avoidance typically involves the creation of complex artificial structures by which, as though by the wave of a magic wand, the taxpayer conjures out of the air a loss, or a gain, or expenditure, or whatever it may be, which otherwise would never have existed. These structures are designed to achieve an adventitious tax benefit for the taxpayer, and in truth are no more than raids on the public funds at the expense of the general body of taxpayers, and as such are unacceptable. Again, examples have been given in the speech of my noble and learned friend."

190. In *Inland Revenue Commissioners v Willoughby* [1979] 1 WLR 1071 ("*Willoughby*"), at page 1079B and following, Lord Nolan had endorsed the distinction drawn by Lord Templeman and Lord Goff in *Ensign* between acceptable tax mitigation and unacceptable tax avoidance. In that case, the mere fact that the holder of a personal portfolio bond whose return was based on underlying investments obtained a more favourable tax treatment than he would have done had he held the underlying investments directly did not mean that the holder was participating in tax avoidance. Since the holder held a bond and not the underlying investments directly, he had no legal or equitable interest in the underlying investments and that legal reality had to be respected in applying the tax legislation. The House of Lords in that case rejected the proposition that, just because the economic result produced by the bond was the same as it would have been if the underlying investments had been held directly, the tax treatment of the returns should be identical. In the same way, I should reject the Respondents' proposition in this case that the Appellants should be subject to tax on the economic outcome of the two forward contracts comprising the trade, taken together. That proposition paid insufficient respect to the legal reality of the transactions themselves, along with the related acquisition and disposal.

191. In response, Mr Stone said that the passage in *Ensign* in which Lord Templeman distinguished between acceptable tax mitigation and unacceptable tax avoidance supported the Respondents' case and not the Appellants' because there was no "real world" loss in this case. Lord Templeman in *Ensign* was saying that it was not acceptable for a taxpayer to claim a loss for tax purposes when, in reality, no "real world" loss had arisen.

192. Moreover, Mr Sherry's description of the forward contracts in this case as being "back-to-back" was misconceived as the transactions comprising each trade were not "back-to-back". "Back-to-back" transactions were linear in nature whereas these were simply circular and self-cancelling transactions. Therefore, any observations in the prior case law in relation to "back-to-back" transactions were not relevant to this case.

Legislative connected transactions and anti-avoidance

193. Mr Sherry submitted that, where Parliament wished to link transactions, it had shown that it was perfectly capable of doing so. Two examples were the "associated operations" rule for the purposes of inheritance tax and the provisions relating to options in Sections 144 et seq. of the TCGA. Thus, if Parliament had wished to treat "back-to-back" transactions which matched each other as if they were a single transaction, then it would have done so. The fact that it hadn't meant that the intention of the legislation was to respect the independent effect of each such transaction. He added that there was now a targeted anti-avoidance rule (a "TAAR") within the MI rules and that even that did not stipulate that a loss was required to be a real economic loss before it could qualify for relief under Section 152 of the ITA 2007. This was therefore not a case where the Parliamentary draftsman could be said to have slipped up in drafting the provision. It remained the case that, subject only to the general anti-avoidance rule (the "GAAR"), which had been introduced since the facts in the present appeals had arisen, a subject was entitled to arrange his affairs so as to reduce his liability to tax.

194. Mr Stone said that he didn't follow the relevance of Mr Sherry's point in this regard. He said that the *Ramsay* principle was a principle of statutory construction and therefore operated by way of supplement to any legislative provisions.

The excess loss

195. Finally, Mr Stone noted that the Appellants had always put their case on the basis that the entire loss arising in respect of the shares or the certificates of deposit was allowable or deductible and had not pleaded in the alternative that such part of that loss as was not matched by the equal and opposite gain on the gilts should be allowable or deductible in the event that I were to find against them on their primary submission. However, he accepted that, despite the absence of any pleading to that effect, the issue before me was the closure notices in which the Respondents had denied the losses in their entirety and that therefore it was within the scope of my jurisdiction to determine that the net loss remained available to the Appellant in each case. Having said that, his view was that that net loss was a fee to Schroders for Schroders' agreement to participate in the trade and was not a loss on the subject shares or securities. This was because the net loss, which was represented by the difference between the two forward sale prices, was paid by each Appellant at the start of his participation in the VIS structure knowing that he would never get it back, as the loss which it represented was bound to arise sooner or later. Thus, it was very similar to the commission paid at inception by the relevant Appellant to Redbox. In any event, both counsel agreed that no evidence had been produced of there being fees paid separately to Schroders for its role in the trades.

<u>Conclusion</u>

Main question

196. After listening to the rival submissions of the parties, I have reached the conclusion that the Respondents are right to say that the facts in this case fall fairly and squarely within the principle laid down by *Ramsay* and applied in both *SPI* and *Schofield*. However, I disagree with the Respondents insofar as they have suggested that the composite self-cancelling transaction in this case comprised solely the two forward contracts making up the loss-making trade. Mr Sherry was quite right when he pointed out that each trade gave rise to four transactions in securities – an acquisition and disposal of gilts and an acquisition and disposal of shares or certificates of deposit. Although it was the two forward contracts which, by their terms, created the opportunity for a gain and a loss, each forward contract, in and of itself, involved either an acquisition or a disposal and related to different subject securities from the other forward contract. For that reason, the two forward contracts were not circular and self-cancelling just by themselves. Instead, I believe that the circular self-cancelling composite transaction in this case was made up of the four transactions in securities which occurred in connection with each loss-making trade – which is to say, the sale under the forward sale contract, the purchase under the forward purchase contract, the acquisition of the securities required in order to discharge the forward sale contract and the disposal of the securities acquired under the forward purchase contract. Together, those transactions amounted to a single composite transaction which was self-cancelling to the extent that the gain arising from one of the disposals which occurred in the course of those four transactions was equal and opposite to the loss arising from the other disposal which occurred in the course of those four transactions.

197. I will start my explanation of this conclusion by saying that my task in relation to this issue is, first, to decide, on the basis of a purposive construction of the relevant statutory provisions, exactly what transaction will answer to the statutory description in those provisions and, secondly, to decide whether the particular transaction in this case does so. So much is common ground. Where the parties part company is in identifying how that task should be undertaken on the particular facts of this case.

198. The relevant statutory provisions for this purpose are, in the case of the CGT type of the arrangements, Sections 1, 16 and 115 of the TCGA and, in the case of the MI type of the arrangements, Sections 1 and 115 of the TCGA and Section 152 of the ITA.

199. Starting with the CGT type of the arrangements, Section 16 of the TCGA refers to losses and so the transactions to which it applies are those which give rise to losses. In *Ramsay*, the House of Lords held that, in determining whether a transaction has given rise to an allowable loss for CGT purposes, it is necessary to consider whether there is a "real world" loss and not simply a loss for tax purposes. As was noted by Lord Wilberforce in *Ramsay*, CGT was created to operate in the real world and is a tax on gains and not arithmetical differences. So, if the section is to apply in this case, there needs to be a transaction which gave rise to a "real world" loss.

200. Leaving aside for the moment the fact that there was a slight difference in the amount of the loss which arose as a result of the loss-making forward contract (together with its related acquisition from, or disposal to, Schroders or the market) and the amount of the gain which arose as a result of the profit-making forward contract (together with its related acquisition from, or disposal to, Schroders or the market), the answer to the above question turns on whether:

(1) the disposal of securities which gave rise to the loss should be considered independently of, and separately from, the disposal of securities which gave rise to the profit so that the former is a "transaction" to which the section applies; or whether

(2) all four of the transactions comprising the two forward contracts making up the loss-making trade (together with their related acquisition and disposal) should be treated together as a single composite transaction taken together so that there was no "real world" economic loss to which the section can apply.

201. Mr Sherry maintains that each of the two forward contracts (and its related acquisition or disposal) should be treated as separate transactions for this purpose – so that the correct answer is the one in paragraph 200(1) above - but I consider that there is clear and plentiful authority to the contrary.

202. The leading (and oldest) authority to that effect is the decision in *Ramsay*. Although it is not contended by the Respondents that the forward contracts comprising each loss-making trade (together with their related acquisition and disposal) were shams, and I do not consider that they were, it is still incumbent on me to determine, from a consideration of the documentation and the intentions of the parties, the nature of the transaction or transactions which were undertaken – see Lord Wilberforce in *Ramsay* at page 324B. In doing so, I am not bound to consider individually each individual transaction comprising the composite whole. Having done so, it is my view that, leaving aside for the moment the fact that the loss arising as a result of the loss-making forward contract within the loss-making trade (and its related acquisition or disposal) was slightly greater than the profit arising as a result of the profit-making forward contract within that trade (and its related acquisition or disposal), the two forward contracts within that trade (together with their related acquisition and disposal) amounted to a single composite self-cancelling transaction which gave rise to neither a gain nor a loss.

203. As Lord Wilberforce put it in *Ramsay*:

"To say that a loss (or gain) which appears to arise at one stage in an indivisible process, and which is intended to be and is cancelled out by a later stage, so that at the end of what was bought as, and planned as, a single continuous operation, there is not such a loss (or gain) as the legislation is dealing with, is in my opinion well and indeed essentially within the judicial function".

204. In *Ramsay* itself, although there was a single scheme, the gain and loss arose at different stages in the scheme, which is why Lord Wilberforce referred in the extract set out above to there being two stages. In this case, the gain and loss arose at more or less the same time – there was a slight difference in that the disposal which occurred under the forward sale contract was treated as occurring on the valuation date under the relevant trade, when the obligation to make the disposal became unconditional, whereas the disposal of the securities acquired under the forward purchase contract occurred slightly later, when the contract to dispose of them was made – but, in essence, the gain and loss were simultaneous. Thus, the self-cancelling nature of the transaction is, if anything more apparent than in the case of the transaction in *Ramsay*.

205. Although Section 152 of the ITA has not been the subject of similar extensive judicial consideration, I believe that it is plain that it should operate in the same way. That is to say, on a proper construction of the provision, a transaction falls within the provision only if it gives rise to a real loss. If an apparent loss is cancelled out by an equal and opposite gain arising on another transaction within the same composite transaction, then there is no such loss.

206. To be clear, this conclusion is not a case of saying that the transactions which occurred in this case are to be taxed by reference to their economic substance. It is instead based on my analysis of the legal nature of the transaction which occurred – see Lord Wilberforce at page 323G to page 324B in *Ramsay* and Lord Fraser of Tullybelton at page 338H to page 339G in *Ramsay*.

207. The reasons why I say that this is the legal nature of the transaction which occurred is as follows.

208. The evidence shows that the VIS structure was conceived as a single integrated scheme designed to deliver an allowable loss or an MI loss to a taxpayer with chargeable gains or MI to shelter. Indeed, the promoters of the scheme included within the scope of their remit a device for converting, into MI, income which would otherwise have been chargeable to income tax under a different part of the tax code. From the perspective of each Appellant, the specific transactions which occurred as part of the scheme were of no interest. Instead, for each Appellant, it was simply a case of signing the various pieces of paper which were sent to him by Redbox and Schroders for signature. The transactions which then ensued took place without the further involvement of the relevant Appellant and within the sealed box which had been devised by Redbox and was then managed by Schroders. The relevant Appellant merely needed to be told at the end of each trade if the relevant trade had secured the loss which he sought and, if it had not, offered the opportunity to enter into a further trade which might have that result.

209. In this regard, I think that a critical part of the package of documents which was executed by each Appellant in the case of each trade was the letter of authority which the relevant Appellant executed shortly after the trade date and which authorised Schroders to buy and sell on his behalf the securities which were the subject of the two forward contracts. That authorisation was executed before the relevant Appellant knew whether the subject matter of the particular forward contract was going to be gilts or shares/certificates of deposit. The execution of that authorisation, when considered together with the other documents executed by the relevant Appellant, meant that the relevant Appellant was in an identical position to the taxpayer in *Ramsay*. In other words, all he had to do was to sign the various documents which had been sent to him and pay his "entrance fee" to Redbox and Schroders and the anticipated result was that he would eventually walk away with a loss which could be used against his chargeable gain or MI.

210. I believe that the authorisation described in the preceding paragraph negates the point made by Mr Sherry in his submissions to the effect that the forward contracts themselves were not self-cancelling. I agree with him that the related acquisition and disposal which took place in connection with the disposal and acquisition pursuant to the two forward contracts need to be seen as part of the composite transaction to which the relevant statutory provision applies before the present facts can be equated to the facts in *Ramsay*. However, in my view, the existence of that authority shows very clearly that they were part of that composite transaction. The authority meant that the Appellant himself had no need to worry about acquiring the securities which were needed to satisfy his obligations under the forward sale contract or about disposing of the securities which he acquired under the forward purchase contract. All of that was handled behind the scenes by Schroders pursuant to the authority.

211. Once one determines that the composite transaction in this case comprised not just the two forward contracts but actually the two forward contracts (together with the related acquisition and disposal), as I have done, the present facts are indistinguishable from those in *Ramsay*. In this regard, I agree with the submissions of Mr Stone as outlined in paragraphs 175 to 178 above. Moreover, I believe that the conclusion which I have reached is supported not only by *Ramsay* but also by the decisions in *Schofield* and *SPI*.

212. In *Schofield*, there were also multiple interdependent linked transactions forming part of a single arrangement which the taxpayer argued were separate and commercially independent contracts and which, together, were claimed to have given rise to an allowable loss for CGT purposes that was considerably in excess of the real economic loss which had been suffered by

the taxpayer (because of the existence within the composite arrangement of an option which was said to have given rise to a tax-free gain under Section 115 of the TCGA). In the passages which I have set out in paragraphs 184 and 185 above, the Court of Appeal emphatically rejected that approach. Again, I can see no meaningful distinction between the facts in *Schofield* and the facts in this case.

213. In *SPI,* the House of Lords held that, once the commercial contingency which might have led to the taxpayer's failing to exercise its gilts call option against the bank was disregarded - as the House of Lords then proceeded to do on the basis that that contingency was "commercially irrelevant" - the two call options should be regarded as a self-cancelling single transaction which did not create an entitlement to gilts. Indeed, it is noteworthy that counsel for the taxpayer in *SPI* accepted that, if there was no genuine commercial possibility that the two options might not be exercised together, then the scheme must fail – see paragraph [19] in S*PI*. Thus, the only question in issue in *SPI* was whether the risk that one of the options might not be exercised could prevent the two options from being treated as self-cancelling. Once the House of Lords held that that risk could be discounted, the outcome was inevitably that the scheme failed.

214. It seems to me that the present case mirrors the facts in *SPI* in much the same way as it does the facts in *Ramsay* and *Schofield*, albeit without the commercial contingency which exercised the courts in *SPI*. This is because, once the FTSE 100 Index was outside the barriers at the valuation time, the two forward contracts in this case (together with their related acquisition and disposal) automatically gave rise to a loss and a profit.

215. For completeness, I would add that I recognise that the facts in this case involved a contingency of a different sort – that contingency's being the risk that a particular trade (together with its related acquisition and disposal) might give rise to a profit instead of a loss and that a further trade (together with its related acquisition and disposal) would then need to be executed. I consider that that contingency has no relevance to the question which I am here addressing and Mr Sherry rightly did not seek to rely on it in order to distinguish the present facts from the facts in the three cases mentioned above. This is because we are here addressing solely the tax consequences of the trade which took place when the FTSE 100 Index was outside the barriers at the valuation time – that is to say, when the contingency comprising the risk that the FTSE 100 Index might be within the barriers at the valuation time had not materialised – together with its related acquisition and disposal. And, as regards each loss-making trade which ensued when the FTSE 100 Index was in the desired place, there was no contingency. Instead, the two forward contracts (together with their related acquisition and disposal) operated to cancel each other out in the same way as did the options in each of *Schofield* and *SPI*, subject only to the net loss which arose as a result of the fact that, in this case, the loss-making forward contract (together with its related acquisition or disposal) gave rise a to a slightly larger loss than the profit to which the profit-making forward contract (together with its related acquisition or disposal) gave rise.

216. However, even if the fact that, at the inception of each trade, it was possible that that trade (together with its related acquisition and disposal) might give rise to a profit could somehow be seen as a contingency which was relevant to the determination of whether or not the forward contracts involved in a loss-making trade (together with that trade's related acquisition and disposal) were self-cancelling, I regard that contingency as the equivalent of the contingency which existed in *SPI*. That is to say that the contingency was commercially irrelevant because the purpose of the relevant Appellant in entering into the VIS structure was to realise a loss and the relevant Appellant was always going to continue to enter into trades until that occurred. It was therefore inevitable that, sooner or later, a trade (together with its related acquisition and disposal) would give rise to a loss (and highly likely that that loss would in fact eradicate any profits which might have arisen under the structure before then). The way

in which the scheme had been devised meant that there might be some "false starts", when the level of the FTSE 100 Index at the valuation time meant that a trade (together with its related acquisition and disposal) gave rise to a profit and so the relevant Appellant had to try again. But that was a contingency which was irrelevant to the scheme. It was the equivalent of the commercially irrelevant contingencies which did not detain the House of Lords in *SPI* or the Supreme Court in *UBS*.

The submissions of the Appellants

217. In the course of his submissions, Mr Sherry sought to distinguish the present facts from the facts in *Ramsay*. His arguments on that front can be distilled into five points:

(1) first, he said that, whereas the transactions in *Ramsay* took place in a closed box and simply involved some shuffling of paper, the transactions in this case took place in the "real world" in that, in this case, there were genuine acquisitions and disposals of securities;

(2) secondly, he said that each forward contract (together with its related acquisition or disposal) in this case had legal effects which could not simply be disregarded;

(3) thirdly, he said that, since each trade in this case involved a real acquisition and disposal of gilts, treating the profit arising on the gilts as cancelling out the loss arising on the shares or certificates of deposit would mean that the clear purpose of Section 115 of the TCGA – to exempt gains arising on gilts – was being thwarted;

(4) fourthly, he said that, because the transactions in this case gave rise to a real gain and a real loss and were not pretending to be something other than what they were, the transactions should be characterised as falling within the category of tax mitigation, which was said by both Lord Templeman and Lord Goff in *Ensign* to be acceptable, and not tax avoidance, which was said by the two Law Lords to be unacceptable; and

(5) finally, he said that, when Parliament wished to connect together two or more transactions, it had shown that it was perfectly capable of doing so and therefore, in the absence of any relevant legislation having that effect in this case, it would be inappropriate to treat the transactions comprising a trade (together with its related acquisition and disposal) as one composite transaction.

218. All five of the above points are inter-related and, for the reasons which follow, I do not agree with any of them.

"Real world" transactions

219. In relation to Mr Sherry's first point, the starting point is Millett NPJ's description of the decision in *Ramsay* at paragraph [106] in *Arrowtown* as follows:

"*Ramsay* and its sister case *Eilbeck v Rawling*, which were heard at the same time, both concerned circular self-cancelling paper transactions which were designed to return the taxpayer to the position from which he started. If the series of transactions were regarded as a whole, the taxpayer made neither gain nor loss beyond the fees he paid for the scheme. If each transaction in the series was considered separately, however, they were said (incorrectly as it happened, for both schemes failed on technical grounds) to produce an allowable loss and an exempt gain. The loss was not independent of the gain; it was entirely dependent on, and merely reflection of, the gain. It was quite impossible to have the one without the other."

220. The crucial phrase in that passage is "paper transactions". In his submissions, Mr Sherry said that this case was distinguishable from *Ramsay* because, whereas the loss which was claimed in that case arose from simply shuffling some pieces of paper, the loss which is claimed in this case arose out of "real world" acquisitions and disposals.

221. In that regard, Mr Sherry made much of the fact that, in relation to each trade, the subject gilts and shares/certificates of deposit were actually bought and sold either from or to Schoders itself or from or to the market. In addition, he said that Schroders had had to hedge its exposure from the trades with the market. All of these things, he said, showed that this case involved genuine transactions in the relevant securities, as opposed to the paper transactions which had occurred in *Ramsay*.

222. I have no doubt that the trades in this case (and the related transactions in securities) were genuine transactions and actually occurred. The documents were not shams. However, there are two reasons why that does not turn them into "real world" transactions for the purposes of the analysis on this issue. One is that there is a difference between, on the one hand, saying that transactions actually occurred and, on the other hand, saying that those transactions were "real world" transactions. The other is that my task in this decision is to consider whether, on a realistic view of the facts, each Appellant entered "real world" transactions so far as the relevant Appellant was concerned. It is irrelevant whether the counterparty to those transactions might or might not be said to have entered into "real world" transactions.

223. To start with the second of those points, since the transactions were genuine transactions, they might be said to have been "real world" transactions so far as concerned Schroders and the market participants who bought securities from, and sold securities to, the Appellants through the agency of Schroders or who entered into hedging transactions with Schroders in relation to the trades. However, whether or not the transactions which actually occurred were "real world" for Schroders or the market participants is neither here nor there in the context of this case. Instead, I am required to identify whether the transactions which occurred were "real world" so far as each Appellant was concerned. That feature can be seen not only in *Ramsay* itself – where there was no attempt by the House of Lords to analyse the transactions from the viewpoint of the entities who participated in them other than the taxpayer – but also in each of *Schofield* and *SPI*, where the nature of the relevant options for the relevant bank was not considered. That was because, even if the relevant bank could be said, by entering into the various options, to have been transacting in the "real world", that was simply not relevant in determining the tax treatment of the taxpayer in each of those two cases.

224. That being the case, it is very clear that, for each Appellant himself, the transactions which occurred under each forward contract (and the related acquisition or disposal) in the course of each loss-making trade had no "real world" existence. On the contrary, as was the case in *Ramsay*, each Appellant was sent a package of documents to execute and played no further role in the proceedings. Putting this another way, to the extent that the genuineness of the transactions which occurred could be said to be "real world" in any sense, they were "real world" only for Schroders and the market participants. So far as the relevant Appellant was concerned, the transactions were all taking place offstage behind the scenes and were of no moment to the relevant Appellant. They were simply part of the closed box into which the relevant Appellant had paid his entrance fee.

225. Reverting to the first of the two points, the mere fact that transactions in the name of each Appellant actually occurred does not mean that the relevant Appellant in each case was transacting in the "real world". If that were correct, the same would have been said in *Ramsay* about each of the advance of the two loans to C Limited by the taxpayer, the disposal of loan L2 by the taxpayer and the liquidation of C Limited. Each of those transactions actually occurred and yet they were held not to be "real world" transactions for the taxpayer in that case. The reason why that was the outcome in *Ramsay* and is also the case in relation to these transactions is that the relevant taxpayer had no interest in the transactions which occurred within the closed box that generated the loss because the taxpayer had no purpose other than the generation of a loss for tax purposes. There was no business purpose to the transactions.

226. That the absence of a business purpose to a transaction prevents the transaction from being "real world" for this purpose was explained by Millett NPJ in describing *Ramsay* in his decision in *Arrowtown* at paragraph [116]:

"Whatever else the word 'loss' in the capital gains tax legislation might mean, therefore, it did not include a 'loss' which the taxpayer sustained only in the course of a preconceived series of transactions deliberately designed to produce neither loss nor gain. But why not? It was not, in my opinion, because the word 'loss' is an ordinary English word understood by businessmen and accountants rather than a technical legal term: there is no hint in Lord Wilberforce's speech of any such distinction. Nor was it because of some perceived distinction between 'the real world' and the 'world of make-belief'. These are forensic expressions which yield no criterion for distinguishing between them. The key lies in Lord Wilberforce's approval of the United States decisions and his indication that they encapsulated a process of thought which it would not be inappropriate for the courts of the United Kingdom to adopt. It was because it is the likely (though not inevitable) result of a purposive construction of fiscal legislation that it should normally be confined to transactions which have some purpose beyond the mere generation of tax relief. The no business purpose test provides a practical criterion for distinguishing between transactions which operate 'in the real world' and transactions which operate in 'the world of make-belief' and an appropriate criterion for distinguishing between losses of a kind which were within the contemplation of the legislature when granting relief from tax and losses which were not. It also provides a defensible rationale for leaving intermediate steps out of account, not because they did not take place, but because they fell outside the legislative intent."

227. In other words, the taxpayer in *Ramsay*, like the Appellants in this case, had no business purpose in entering into the transactions in question and this meant that the relevant transactions were not "real world" transactions.

228. Similar views are set out elsewhere in the applicable case law. Examples include Lord Keith of Kinkel in *Craven* at page 430E, Lord Hoffmann in *Westmoreland* at paragraphs [40] and [41], Lord Nicholls in *BMBF* at paragraphs [34] to [38] and Lord Reed JSC in *UBS* at paragraphs [64] to [67]. Each of those extracts shows clearly that the mere fact that *Ramsay* described a principle of statutory construction which is generally applicable and is not confined to tax law does not mean that whether or not the relevant taxpayer had a tax avoidance purpose is wholly irrelevant to the application of that principle in any particular case.

229. It is true that the *Ramsay* principle can apply in circumstances where there is no tax avoidance but that is precisely because it is a generally-applicable principle of statutory construction. That is why Mr Stone submitted that I did not need to find that the transactions which are the source of these appeals involved tax avoidance in order for the Respondents to succeed. What is not true is that the existence of a tax avoidance purpose will always be wholly irrelevant in determining whether the *Ramsay* principle applies. Whilst there are cases, such as *BMBF* and *Westmoreland*, where the existence of a tax avoidance purpose has been held to be irrelevant in the application of the principle, there are other cases, such as *Ramsay* itself, *Inland Revenue Commissioners v Burmah Oil Co Ltd* 54 TC 200, *Furniss* and *SPI*, where the existence of a tax avoidance purpose has been fundamental to the application of the principle in negating the relevant scheme.

230. It is this dichotomy between circumstances where a tax avoidance purpose has been held to be relevant to the application of the principle and circumstances where a tax avoidance purpose has been held to be irrelevant which led Lord Hoffmann in *Westmoreland* to come up with his inventive distinction between "commercial concepts" and "legal concepts" in the tax code. Although that has now been discredited as an appropriate approach to cases in this area, it is still something of a truism to say that a tax avoidance purpose is generally more likely to be relevant when considering the application to transactions of a statutory provision which is dealing with a commercial concept like losses and gains (as in *Ramsay, Schofield, SPI* and this

case) and less likely to be relevant when addressing the application to transactions of a statutory provision which is closely articulated and therefore more "legal" in nature, such as the provision which was at issue in *Rossendale* – see the dicta of Millett NPJ in *Arrowtown* at paragraphs [144] to [151] (and particularly paragraph [149]), Lord Nicholls in *BMBF* at paragraph [38] and Henderson LJ in *Rossendale* at paragraph [74].

231. In summary, I reject the proposition that the transactions in this case took place in the "real world". In my view, the self-cancelling nature of the forward contracts (together with their related acquisition and disposal) and the absence of a business purpose so far as each Appellant was concerned meant that no loss arose in this case to the extent that that it was matched by a gain.

Genuine legal effects

232. For similar reasons, I do not agree with Mr Sherry's second point of distinction between the facts in this case and the facts in *Ramsay*. I do not think that the fact that the transactions in securities forming part of the VIS structure took effect in law makes any difference. As Lord Fraser of Tullybelton made clear in *Ensign* at page 512, the mere fact that a transaction has enduring legal effects does not mean that it cannot be disregarded when it is part of a self-cancelling composite transaction (or, in the case of a linear composite transaction, it has been inserted for no purpose other than the avoidance of tax). In *Ramsay*, the two loans which the taxpayer made to C Limited also took effect in law, as did the sale of L2 (the loan in respect of which the gain arose) and the winding up of C Limited. However, as the relevant transactions were self-cancelling, the legal effect of each transaction was nullified. That is not to say that they were shams. As Lord Wilberforce and Lord Fraser of Tullybelton pointed out in *Ramsay*, the mere fact that the transactions which took place were not shams does not preclude a finding that the transaction to which the legislation needs to be applied is the composite whole (see paragraphs 202 to 206 above).

233. The same can be said of the House of Lords decision in *SPI*. The House of Lords in that case did not say, as it could very easily have said once it had discounted the contingency, that each of the two call options in that case was not self-cancelling because each of them gave rise to legal consequences. Instead, it simply proceeded on the basis - which everyone involved in the case, including the taxpayer, accepted - that, once the contingency was discounted, the transaction which had taken place did not give rise to an entitlement to the gilts. The same is true is determining the legal effects of the two forward contracts (together with their related acquisition and disposal) in this case.

234. Mr Sherry sought to rely on *Willoughby* as an example of a case where the fact that the legal reality – the taxpayer held a bond whose return was governed by the return on the underlying investments – was not the same as it would have been if the underlying investments themselves had been held by the taxpayer was respected by the courts and accepted as justifying the difference in tax treatment – see page 1080A et seq. in *Willoughby*. He said that seeking to tax the two forward contracts (together with their related acquisition and disposal) in this case by reference to their economic outcome was the same as the Respondents' failed argument in *Willoughby* which was based on the economic equivalence of the two posited scenarios in that case. I see a clear difference between the two situations. In *Willoughby*, the fact that the taxpayer held a bond meant that, if the issuer of the bond were to become insolvent, he would be in a very different legal and economic position from the one in which he would have been if he had held the underlying investments directly. In contrast, in this case, the terms of the two forward contracts, coupled with the netting provisions in the contractual documentation, and the authorisation to Schroders to make the necessary acquisition and disposal of the subject securities, meant that the true legal effect of the structure was that the only loss which arose

from the trade was the amount by which the loss arising as a result of the loss-making forward contract (together with its related acquisition or disposal) exceeded the profit arising as a result of the profit-making forward contract (together with its related acquisition or disposal).

235. The crucial point in this context is that, in analysing what has occurred, one needs to look at the two forward contracts comprising a trade (together with the related acquisition and disposal) as a composite whole and not as four distinct transactions. In this regard, I should stress that looking at the two forward contracts as part of a composite whole (comprising the two forward contracts and the related acquisition and disposal) is not the same as postulating that the acquisition and disposal which occurred under the two forward contracts were independent transactions albeit set out in a single agreement. At the hearing, Mr Sherry said, quite rightly, that it would make no difference to the analysis if the terms of the two forwards had been contained in a single agreement instead of in two separate agreements. But that is not the point. The point is not whether the legislation should be applied to the two forwards on the basis that they arose under a single agreement instead of under two agreements. Instead, it is whether the legislation should be applied to the transactions which occurred pursuant to the two forwards, together with the related acquisition and disposal, on the basis that, because of their self-cancelling nature, they were in fact a single composite transaction. In that instance, the legal effects of all four transactions are to be determined as if the four transactions were one.

236. Finally in relation to the legal effects of the two forward contracts and the related acquisition and disposal, Mr Sherry suggested that I should consider what the position would have been if, instead of entering into both contracts with Schroders, the relevant Appellant had entered into one of the contracts with another bank. He said that, in that case, the validity of each contract would have had to have been respected and that therefore the same should be true even though both contracts in this case were with Schroders. My views on that submission are as follows:

(1) as I have already noted in paragraph 154 above, no evidence was produced at the hearing to the effect that the terms of each forward contract comprising a trade were such that either the relevant Appellant or a hypothetical bank would have been prepared to enter into that contract on those terms without at the same time entering into the other contract with the same counterparty or that the increased collateral requirements which that would have entailed would have been acceptable to the relevant Appellant commercially. It is therefore impossible for me to draw any conclusion as to whether any such hypothetical separation of the two forward contracts comprising a trade was a realistic possibility;

(2) in any event, in the absence of that evidence, as I have already said at paragraph 154 above, I have some reservations over whether the terms of each forward contract comprising a trade in this case were such that the relevant Appellant or any bank would have been prepared to enter into the relevant forward contract on those terms without also entering into the other forward contract with the same counterparty;

(3) leaving aside the two points made above, I am necessarily required to address in this decision the transactions which actually occurred (and the legal effects to which those actual transactions gave rise) and not some alternative hypothetical transactions which might or might not have occurred (together with the legal effects to which those hypothetical transactions would have given rise). The facts before me are such that the same bank was the counterparty to both forward contracts. This meant that the collateral which each Appellant was required to provide was considerably reduced. It also meant that the credit exposure faced by the Appellant to his counterparty bank was

commensurately reduced. It is on the basis of those facts and the other evidence before me that I have reached the conclusion that the two forward contracts in this case, together with the related acquisition and disposal, should be regarded as self-cancelling to the extent that the gain arising as a result of the one forward contract (together with its related acquisition or disposal) was matched by the loss arising as a result of the other (together with its related acquisition or disposal). I note that, at the end of its decision in *SPI*, the House of Lords adopted a similar approach in declining to deal with the hypothetical scenario under which only one of the options existed (see paragraph [26] in *SPI*); and

(4) if the two contracts had been with separate counterparty banks, then it is possible that the fact that the relevant Appellant would then have had a significant credit exposure to each of the banks might have made a difference to the analysis but those are not the facts of this case and it is therefore unnecessary for me to reach a conclusion on that question.

The exemption in Section 115 of the TCGA

237. My conclusion in relation to Mr Sherry's first two points of distinction are the reason why I do not agree with the third. Mr Sherry submitted that, because Section 115 of the TCGA, construed purposively, is intended to take transactions in gilts outside the CGT net, treating the transactions in securities which took place in this case as self-cancelling would deprive the section of its intended effect. I agree with Mr Sherry that Section 115 of the TCGA, properly construed, does indeed apply to exempt gains arising from transactions in gilts. But that is no different from saying that, in *Ramsay*, the provision which is now Section 251(1) of the TCGA was designed to take debts other than debts on a security outside the tax net or that, in *Schofield*, Section 115 of the TCGA was designed to take options relating to gilts outside the tax net. Each of Section 251(1) of the TCGA and Section 115 of the TCGA have to be read in the context of the TCGA as a whole. They do not exist in a vacuum. And, if the transactions which have occurred are properly construed as giving rise to no gain or loss because they are self-cancelling, then there is no gain to which the relevant section can apply.

238. In *Ramsay*, the provision which is now Section 251(1) of the TCGA would have applied to the gain which arose on the debt (if in fact the debt had been a simple debt and not a debt on a security, as it was ultimately held to be) as long as, when the transactions which took place were properly analysed, they involved the realisation of a gain on that debt. The provision was held not to apply because no such gain arose. That was because the gain which arose on the debt was cancelled out by the loss which arose on the shares. In *Schofield*, Section 115 of the TCGA would have applied to the gain which arose on the gilts option as long as, when the transactions which took place were properly analysed, they involved the realisation of a gain on that gilts option. In the same way, Section 115 of the TCGA would have applied in this case to the gain which arose on the acquisition and disposal of the gilts if such a gain had really arisen. However, no such gain did actually arise because, by virtue of the scheme as a whole, the gain arising in respect of the gilts was matched (and in fact exceeded in each case) by the loss arising in respect of the shares or certificates of deposit.

Tax mitigation or tax avoidance?

239. Turning to Mr Sherry's fourth point, I do not see how the quotations from Lord Templeman and Lord Goff which I have set out in paragraphs 187 to 189 above support his proposition that the loss which arose on the disposal of the shares or the certificates of deposit in this case were real losses or that the VIS structure, when viewed as a whole, amounted to acceptable tax mitigation. The VIS structure was plainly and simply tax avoidance. To echo the words of Lord Goff, this was not a case where the relevant Appellant "[took] advantage of the law to… minimise the incidence of tax". Instead, it involved "the creation of complex artificial

structures by which, as though by the wave of a magic wand, the taxpayer [conjured] out of the air a loss… which otherwise would never have existed". I believe that Lord Goff (and Lord Templeman for that matter) would have regarded it as a structure "designed to achieve an adventitious tax benefit for the taxpayer, and in truth …no more than raids on the public funds at the expense of the general body of taxpayers".

240. In this context, the language used by Lord Nolan in *Willoughby* at page 1079B is highly instructive. In that passage, Lord Nolan described acceptable tax mitigation as "[taking] advantage of a fiscally attractive option afforded… by the legislation, and genuinely [suffering] the economic consequences that Parliament intended to be suffered by those taking advantage of the option" and, conversely, unacceptable tax avoidance as a reduction in tax liabilities "without incurring the economic consequences that Parliament intended to be suffered by any taxpayer qualifying for such reduction in his tax liability". I do not see how the loss which arose as a result of each Appellant's acquisition and disposal of the shares or certificates of deposit which were the subject of the loss-making forward contract in this case can be said to have genuinely been suffered by the relevant Appellant to the extent that that loss was matched by an equal and opposite gain on the gilts which were the subject of the other forward contract, or that Parliament would have intended that loss, to the extent that it was so matched, to qualify as allowable for CGT purposes or deductible against MI (as the case may be). In this case, we are some way from the "socially desirable objectives" to which Lord Nolan referred at page 1079E in *Willoughby* and some way from a situation where a taxpayer has sought to take advantage of a tax exemption in the way in which he or she structures an investment.

241. I should just add in relation to the question of acceptable tax mitigation as compared to unacceptable tax avoidance that I do not agree with Mr Sherry's characterisation of the two forward contracts comprising a trade in this case as "back-to-back". "Back-to-back" transactions take place in a linear context. They involve at least 2 contracts on similar terms and at least 3 parties. They arise where A enters into a contract with B and then B enters into a matching contract on the same (or substantially similar) terms with C. In contrast, two contracts on completely different terms and relating to different subject securities which are both between the same parties – such as the forward contracts in this case - are not in any sense "back-to-back". Thus, to the extent that Lord Templeman appeared to be blessing "back-to-back" transactions in the extract from *Ensign* cited above, that has no relevance to the present case.

Legislative connected transactions and anti-avoidance

242. Finally, in relation to Mr Sherry's last point, like Mr Stone, I did not understand the relevance of the fact that the UK tax legislation contains certain provisions which link two or more transactions. I also did not see the relevance of the fact that there may now be a GAAR which would apply in these circumstances or that there may be a TAAR within the MI rules which does not require a loss to be a real loss before it can qualify for relief under Section 152 of the ITA 2007. It is quite clear from the authorities that the *Ramsay* principle is a principle of statutory construction which can, in certain cases, link together two or more transactions and treat them as one composite whole. *Ramsay*, *Schofield* and *SPI* are all examples of that. The fact that Parliament hasn't seen fit to legislate in order to link transactions of the nature with which this case is concerned is neither here nor there. So too is the fact that this case might now fall within the GAAR or might not fall within a TAAR.

The excess loss

243. If the gain arising in respect of the gilts which were the subject of the profit-making forward contract in each loss-making trade were exactly equal to the loss arising in respect of the shares or certificates of deposit which were the subject of each loss-making forward contract in that trade, then the conclusion I have reached in paragraphs 196 to 242 above would

be sufficient to reach a conclusion on Issue 1 and also a conclusion to the present appeals. However, as I have mentioned already in the course of this decision, that was not the case. In each case, the gain was close to, but not as large as, the loss. This means that, in order properly to dispose of this appeal, it is necessary for me to consider whether the excess loss which arose in each case should, subject to my consideration of the other issues which follow, be allowable for CGT purposes or deductible for MI purposes.

244. In that regard, Mr Sherry made no submissions in relation to the appropriate treatment of the excess in the event that I should find against the Appellants on the central question in Issue 1, whilst Mr Stone submitted that I should conclude that the excess was not an allowable loss in respect of the subject shares or a loss deductible against MI in respect of the subject certificates of deposit but should be regarded instead as merely a fee to Schroders.

245. As I have already trailed in paragraphs 159 and 160 above, I was a little surprised that neither side appeared to have given any thought to this aspect of the case although that may be because they both considered the excess in question in each case to be de minimis. Moreover, I was interested to note that, in *Ramsay* itself, the same occurred. In that case, the gain made by the taxpayer on the loan L2 was £172,731 and the loss made by the taxpayer on the shares in C Limited was £175,647. However, I could see no consideration by the House of Lords as to whether the difference of £2,916 which existed after netting off the gain and loss remained allowable for the taxpayer.

246. It seems to me that the process required by the *Ramsay* principle – that of considering whether the relevant statutory provision, purposively construed, applies to the transaction, viewed realistically – necessarily requires one to identify the specific transaction which has occurred in this case. In that regard, there do seem to me to be only two possible options in this case. Either the excess loss should be treated as a loss arising in respect of the subject shares or the subject certificates of deposit or the excess loss should be treated as a fee.

247. I do not find this an easy question to answer but, on balance, I think that, on a realistic view of the facts, the excess is more appropriately to be regarded as a fee paid to Schroders in return for Schroders' agreement to enter into the various transactions comprising the structure than it is to a loss on the subject shares or the subject certificates of deposit. I agree with Mr Stone's submission that, as the excess took the form of the payment which each Appellant made at the start of his participation in the VIS structure and would never get back, because the loss which it represented was bound to arise sooner or later, it was very similar to the commission paid at inception by the relevant Appellant to Redbox. There was a difference, of course, in that the commission paid to Redbox at inception was paid to Redbox itself whereas the amount paid to Schroders at inception was held in the relevant Appellant's account at Schroders, subject to a charge in favour of Schroders. However, the key point is that both amounts were paid once and for all at the beginning of the process and would not be refunded. (The money paid to the Appellant's account at Schroders would always end up with Schroders and not be refunded because, viewed realistically, the Appellant was going to continue to enter into trades until a loss-making trade occurred.)

248. For completeness, there are two final points which I should make in relation to the characterisation of the excess loss as a fee, as follows:

> (1) first, I accept that the above conclusion perhaps sits a little uneasily with the fact that both parties agree that any profits which an Appellant realised from a profit-making trade (together with its related acquisition and disposal) occurring before the loss-making trade occurred were exempt from tax because they fell within Section 115 TCGA 1992. I would be inclined to wonder whether, on the basis of the analysis in this section of the decision, those profits might not more aptly have been seen as adjustments to the fee paid

to Schroders at the start. However, I do not think that that agreed analysis in relation to the profits dissuades me from my conclusion that the excess loss, when viewed realistically, was a fee; and

(2) secondly, both counsel agreed that there was no evidence that Schroders had charged each Appellant a separate fee for entering into each trade even though the internal Schroders document referred to in paragraph 117(5) above referred to a fee. It therefore seems likely that the fee was built into the margin between the acquisition prices under the two forward contracts in each trade. I do not think that the fact that the fee element of the margin in each trade may well have been less than the full margin in that trade alters my conclusion that the margin as a whole should be characterised as a fee so far as each Appellant was concerned because that is what it was, when viewed realistically.

Conclusion on Issue 1

249. On the basis of the conclusions and reasons set out in paragraphs 196 to 248 above, I have concluded that no part of the loss claimed by each Appellant in respect of the VIS structure was allowable for CGT purposes or deductible for MI purposes.

250. This conclusion means that the appeals fail and that, strictly speaking, it is unnecessary for me to address any of the other issues which are set out in paragraphs 16 and 17 above. However, because both parties made submissions in relation to them, I will address them in the sections which follow.

ISSUE 2 – SECTION 152 OF THE ITA 2007

Introduction

251. The second issue which the parties agreed I should address was whether, in respect of Appellants who used the MI type of the arrangements, Section 152(1) of the ITA 2007 should be read as saying:

"A person may make a claim for loss relief against miscellaneous income if in a tax year ("the loss-making year") the person makes a **real economic** loss in any relevant transaction" (emboldened words to be read in).

Conclusion

252. Although this was stated to be an issue that I needed to address in addition to, and separately from, Issue 1, I do not see how that can be the case. Issue 1 involved a question of statutory construction. In the course of dealing with that issue, I have concluded that, as a matter of construction, Section 152 of the ITA 2007, like Section 16 of the TCGA, is to be read on the basis that the word "loss" in the relevant provision should be construed as referring to a real economic loss or a "real world" loss – see paragraphs 196 to 248 above. In reaching that conclusion, I believe that I have answered the question in Issue 2 in the affirmative.

ISSUE 3 - SECTION 16A OF THE TCGA

Introduction

253. This issue is relevant only to SP and AD, as participants in the CGT type of the arrangements.

254. Section 16A of the TCGA, which is described in paragraph 107(4) above, is a TAAR. It stipulates that a loss is not an allowable loss for CGT purposes if:

(1) it accrues to a person "directly or indirectly in consequence of, or otherwise in connection with, any arrangements"; and

(2) "the main purpose, or one of the main purposes, of the arrangements is to secure a tax advantage".

255. There is no dispute between the parties as to the identity of the relevant "arrangements" for the purposes of the section in the case of each of the two Appellants – they agree that the relevant arrangements are the transactions involved in the VIS structure in which the relevant Appellant participated. Nor is there any disagreement between the parties that the loss which arose to each Appellant from those arrangements was a "tax advantage", as defined for the purposes of the section. The only issue between them is whether it can properly be said that the main purpose, or one of the main purposes, of each Appellant in participating in the VIS structure was to secure the loss which is claimed to have arisen in connection with the last trade under the structure.

<u>The submissions of the parties</u>

The arguments for the Appellant

256. Mr Sherry said that Section 16A of the TCGA did not apply in this case because:

(1) the "arrangements" covered everything which had occurred in relation to the VIS structure for the relevant Appellant – that is to say, each forward contract, each transaction in securities related to that forward contract and each trade under the structure; and

(2) the main purpose of the arrangements as so described was to acquire and dispose of securities.

257. He said that the statement in paragraph 256(2) above was based on the fact that that was the legal effect (or consequence in law) of the various transactions comprising the arrangement. That is what those transactions actually did. Moreover, given that the loss arising out of the arrangements was, of necessity, uncertain at the outset and dependent on extraneous events, the arrangements could not be said to have "secured" that loss when it arose.

258. Thus, in Mr Sherry's view, the sole purpose of the transactions comprising the arrangements was the commercial purpose of acquiring and disposing of securities. It was not the securing of a tax advantage. To say otherwise would be to confuse the motive of the Appellant in entering into the relevant transactions with the purpose of those transactions.

259. In addition, even if the right way of looking at this issue was to take motive into account in determining purpose, a profit-making motive for each Appellant could not be discounted. Notwithstanding the admission made by AD in giving his oral testimony, the documentation showed that the profit-making trades (together with their related acquisitions and disposals) into which SP and AD entered were capable of giving rise to attractive returns if one disregarded, in the case of each of SP and AD, the eventual loss-making trade (together with its related acquisition and disposal) and the commissions and fees associated with the structure. Thus, the fact that each of SP and AD could reasonably expect to make a profit from each trade (and that trade's related acquisition and disposal) at the time of entering into that trade suggested that it wasn't at all clear that the relevant Appellant had solely a loss-making motive in entering into the trades.

260. Finally, even if one were to regard the relevant Appellant's loss-making motive in entering into the structure as being one of the purposes of the arrangements, that purpose was not a "main" purpose. The only "main" purpose was the commercial purpose described above. This could be demonstrated by the fact that the transactions in securities had to occur first before any tax advantage could arise out of them.

261. In this regard, the extension, to the phrase "the main purpose", of the phrase "one of the main purposes", was apt to cover circumstances where there were two or more purposes of equal import so that each of them could fairly be said to be a "main purpose". It was not apt to cover a tax advantage purpose such as the one in this case which was clearly ancillary to the commercial purpose, so that the tax advantage purpose could not accurately be described as one of the main purposes.

262. If the legislation had intended to disallow losses in every circumstance where the taxpayer was motivated by a desire to realise a loss, then the provision would have been much more radical in its drafting than was the case. It would then have provided for an investigation into the taxpayer's state of mind. As drafted, however, the statute was there to police action and not thought.

263. In summary, Mr Sherry's position was that:

(1) the sole purpose of the arrangements was the commercial purpose of acquiring and disposing of securities – the relevant Appellant's motive in entering into the arrangements was irrelevant;

(2) even if the right way of applying the legislation was to take into account motive in determining purpose, the fact that each trade could give rise a commercial profit in and of itself, before taking into account any subsequent trade or the commissions and fees paid in connection with the structure, meant that the relevant Appellant could be said to have a commercial motive in entering into each trade; and

(3) even if one were to conclude that the Appellant's loss-making motive meant that securing a loss was one of the purposes of the relevant Appellant in entering into the arrangements, that loss-making purpose was not a main purpose or one of the main purposes of the arrangements.

The arguments for the Respondents

264. Mr Stone submitted that the language used in the section showed that arrangements might have more than one main purpose and that, as long as securing a tax advantage was one of those main purposes, the section applied. This meant that it was insufficient for SP and AD to show that one of the main purposes of the arrangements was a commercial purpose. Instead, they had to show that the loss arising from the arrangements was not a main purpose.

265. It was clear from the decision of Lightman J in *Inland Revenue Commissioners v The Trustees of the Sema Group Pension Scheme* [2002] STC 276 ("*Sema*") at paragraph [48] and the judgment of Rimer LJ in *Lloyds TSB Equipment Leasing (No 1) Limited v The Commissioners for Her Majesty's Revenue and Customs* [2014] STC 2770 ("*Lloyds*") at paragraph [65] that a transaction could be carried out for commercial reasons and yet still have, as its main object, the obtaining of a tax advantage.

266. Moreover, there was nothing in the section to support Mr Sherry's proposition that the phrase "one of the main purposes" was confined in its application to situations where there were two or more purposes of equal import. Instead, each significant purpose could be a main purpose. If there were two purposes in entering into arrangements and one of them was a 60% purpose whilst the other was a 40% purpose, both purposes were main purposes because they were both significant. Just because one was of lesser importance than the other did not automatically mean that it could not be a main purpose (see also *Lloyds* at paragraph [52]).

267. In this case, given that the Appellants had realistically to accept that securing the loss was at least one of the purposes of the arrangements, they had to show that that purpose was

not a main purpose of the arrangements and was no more than "icing on the cake", as Lightman J had put it in *Sema* at paragraph [53].

268. In fact, said Mr Stone, there was no commercial purpose at all to the transactions which had taken place.

269. Mr Stone said that the language of the provision referred to the purpose of the arrangements, as opposed to the purpose of the relevant taxpayer in entering into the arrangements. In *Seven Individuals* at paragraphs [97] to [104], Nugee J had addressed that point in the context of the similarly-worded Section 74ZA of the ITA 2007. In that case, the taxpayer was advancing the proposition that the relevant test was wholly subjective in nature – that is to say, that the purpose of the arrangements was to be found exclusively in the subjective purpose of the taxpayer. In contrast, the Respondents in that case submitted that the test was more nuanced than that. They submitted that the purpose of the arrangements was to be derived both from the motives of the taxpayer and "the wider context of why the arrangements took the form they did, how those who devised the arrangements hoped they would work, and the way in which they were promoted to potential participants."

270. Given the nature of the dispute in *Seven Individuals*, it was clear that Mr Sherry's submission that the purpose of the arrangements was to be identified wholly objectively and by reference solely to the legal effects (or consequences in law) of the transactions comprising the arrangements could not be right. It was plain from the decision in *Seven Individuals* that the subjective motives of the relevant taxpayer had considerable relevance to the answer even though those motives were not determinative. In addition, if the purpose of arrangements were to be determined solely from legal effects (and consequences in law) of the transactions making up the arrangements, then that would drive a coach and horses through the relevant provision.

271. In this case, each of the oral evidence of AD, the agreed facts and the various documents in the DB demonstrated that the subjective purpose of both AD and SP in entering into the arrangements was to realise a loss to set off against chargeable gains.

272. In addition, the arrangements had not been designed by the Appellants but were instead designed by a third party, Redbox, and widely marketed as a structure for generating losses to shelter chargeable gains. The absence of anyone from Redbox as a witness in the proceedings could lead only to the inference that the evidence of any such person would not have been helpful to the Appellants.

273. In followed that the only realistic view of the facts was that the only purpose of the arrangements was to secure the loss which each of SP and AD had realised. In the absence of that loss, the structure made no economic sense. The realisation of the loss could not be seen as mere "icing on the cake" because it was the whole reason for the structure in the first place. It was too fundamental to be merely an incidental purpose. In addition, there was no commercial reason for the transactions in securities comprising the arrangements. The relevant Appellant had no interest in buying and selling the securities which were the subject of the forward contracts and therefore those acquisitions and disposals were not the purpose of the arrangements.

Conclusion

274. I consider that the right answer in relation to this issue is obvious.

275. I would start by setting out what I consider to be the relevant legal principles. These are based on the proposition that the case law relating to statutory provisions using the phrase "main objects" is equally applicable to statutory provisions using the phrase "main purposes". That appeared to be common ground at the hearing and, in any event, I consider it to be correct. The relevant legal principles are as follows:

(1) the mere fact that arrangements may have a commercial purpose as one of their main purposes does not mean that the arrangements cannot also have the securing of a tax advantage as one of their main purposes – see Lightman J in *Sema* at paragraph [48] and Rimer LJ in *Lloyds* at paragraph [65];

(2) in determining whether the securing of a tax advantage is one of the main purposes of the arrangements, it is merely necessary to consider the importance or significance of that purpose. There is no authority for the proposition that there can be more than one main purpose to arrangements only in a case where there are two or more purposes to those arrangements which are of equal significance. Instead:

(a) it is simply a case of identifying which purposes are important enough to be described as "main purposes"; and

(b) a purpose can be a "main purpose" even if it is of less importance than another "main purpose".

As noted by Rimer LJ in *Lloyds* at paragraph [52], "in any particular case there may be a hierarchy of objectives motivating the transaction…and … the inquiry must then be as to which of them are 'main' and which are not";

(3) in determining whether the securing of a tax advantage is a main purpose of the arrangements, "it is necessary to consider with care the significance to the taxpayer of the tax advantage". Only if the tax advantage is mere "icing on the cake" will it not be a main purpose (see Lightman J in *Sema* at paragraph [53]);

(4) the purposes of arrangements are to be determined by reference to the subjective intentions of the taxpayer in entering into the arrangements, coupled with certain objective elements as determined from the evidence. That evidence includes the features of the arrangements, the way the arrangements were marketed and the views of those who were involved in creating, promoting and advising on the arrangements – see Nugee J at paragraphs [97] to [104] in *Seven Individuals*; and

(5) in that regard, the purposes of the arrangements mentioned in Section 16A of the TCGA are not to be divined simply by reference to the legal effects (or consequences in law) of the transactions comprising the arrangements. That approach might be the right one in the case of certain statutory provisions but it is not appropriate in relation to a statutory provision like Section 16A of the TCGA where there would otherwise be a tax advantage if the section were not engaged. As noted by Nugee J in *Seven Individuals* at paragraph [101], to do that would be illogical, because "the statutory question cannot be answered by looking at what the effect of the arrangements is, as *ex hypothesi* the effect of the arrangements is to generate an entitlement to [the tax advantage in question]", and also contrary to prior authority - see Nugee J in *Seven Individuals* at paragraphs [97] to [104] and, in particular, paragraphs [100] to [104], referring to *Inland Revenue Commissioners v Brebner* [1967] AC 18.

276. Given the above legal principles and my findings of fact in relation to the purposes of each of SP and AD in participating in the VIS structure, the only possible conclusion to be drawn is that, putting the position at its very weakest, securing an allowable loss for tax purposes was one of the main purposes of the arrangements into which each of SP and AD entered when he participated in the VIS structure.

277. In fact, I consider that securing that allowable loss was the only main purpose of the arrangements. I have already found as a fact that the subjective purpose of each of SP and AD was to realise an allowable loss from the arrangements and there is nothing in the other evidence to suggest that there was any other purpose to the arrangements. The fact that the

arrangements were devised and marketed specifically for the purpose of giving rise to a loss, by individuals who did not attend the hearing to give evidence to the contrary, tends also to support my conclusion.

278. Mr Sherry submitted that the probability of profit which might arise from each trade meant that each of SP and AD had a main purpose of securing a commercial profit. I do not agree. In the first place, the relevant question in this regard is not what the main purpose of any particular trade might have been but rather what the main purpose of the arrangements as a whole actually were. I have already found that there is overwhelming evidence to show that the only purpose of each of SP and AD in entering into the arrangements as a whole was to realise an allowable loss and that, as soon as the transactions giving rise to that allowable loss occurred, the commercial loss arising from those transactions was almost certain to give rise to a commercial pre-tax loss from the arrangements as a whole once the commissions and fees paid by the relevant Appellant were taken into account (and did in fact give rise to such a commercial pre-tax loss). In the second place, the fact that each Appellant was seeking to realise an allowable loss each time he entered into a trade under the arrangements meant that, in any event, the only purpose of each trade was also to secure that allowable loss. Any commercial profit which happened to arise from the trade was simply a legal effect or consequence. It was not a purpose because it was not what the relevant Appellant was seeking when he entered into the arrangements.

279. Thus, even if I had found in favour of the Appellants in relation to Issue 1, I would have held that the losses realised by SP and AD under the VIS structure were not allowable losses.

ISSUE 4 – SECTION 17 OF THE TCGA

Introduction

280. Issue 4, as it is set out in paragraph 16(4) above, is whether, in respect of the two Appellants who used the CGT type of the arrangements, if the separate identity of the forward contracts should not be disregarded, the contracts should be treated as having been entered into otherwise than by way of a bargain made at arm's length for the purposes of Section 17 of the TCGA, with the effect that the chargeable gain and allowable loss which arose as a result of each loss-making trade (together with its related acquisition and disposal) should be calculated using the market value of the relevant securities, with the result that there was no chargeable gain or allowable loss on the completion of the transactions.

281. I should say at the outset that, as was the case with Issue 2, I am not entirely sure about the terms of reference of this issue. According to the agreed facts set out in paragraph 103 above, at least some of the acquisitions under the forward purchase contract in AD's final trade were completed on 5 April 2012. The forward purchase contract had, however, become unconditional on 4 April 2012, which was the valuation date under that contract, as that was the date when the value of the securities which were to be delivered under that contract and the nature of those securities were both identified. This means that the date when the acquisition and disposal under the forward purchase contract occurred (and therefore the date when the market value of the securities which were acquired under that contract had to be determined) was therefore 4 April 2012 (see Section 28 of the TCGA).

282. The agreed facts do not record the date or dates on which Schroders disposed of the shares which were acquired under the forward purchase contract on behalf of AD but it seems likely to me from the terms of paragraph 103 that at least some of those shares were not disposed of until 5 April 2012 or possibly even later.

283. Once the forward purchase contract became unconditional on 4 April 2012, the obligation of Schroders under the forward purchase contract was to deliver shares with a "Value" of

£22,000 to AD. The terms of the contract required that "Value" to be determined by reference to market value on the "Exchange Business Day" following the valuation date (which slightly begs the question of how any of the shares could have been delivered under the forward purchase contract on the valuation date itself). Be that as it may, shares with a market value of £22,000 on the "Exchange Business Day" following 4 April 2012 were unlikely to have had a market value of £22,000 on 4 April 2012. The two values could conceivably turn out to have been the same, by coincidence, but it is much more likely that there would have been a difference between the two. On that basis, it seems likely to me that there might well have been a difference between the market value of the shares on the date when they were deemed to be acquired under the forward purchase contract (4 April 2012) and the amount received for those securities when they were sold. The same point may be made in relation to SP's final trade. In that case, the shares giving rise to the loss were acquired on 4 November 2011 but those shares were deemed to have been sold on the day before that when the forward sale contract became unconditional.

284. Notwithstanding the above, since I am addressing this issue only hypothetically – given my conclusion in relation to Issue 1 – I am content to reach no concluded view on that particular question and to consider the answer to this issue only as a matter of principle.

<u>The submissions of the parties</u>

The arguments for the Appellants

285. Mr Sherry said that it was plain that each forward contract between an Appellant and Schroders was a bargain made at arm's length because, at the time of entering into the first trade under the VIS structure:

(1) there was no prior connection or relationship between the relevant Appellant and Schroders; and

(2) the relevant Appellant and Schroders had separate and distinct interests.

286. Mr Sherry said that it was not part of his case that each of the two forward contracts in a trade was on terms such that both the Appellant and Schroders would have been prepared to enter into that contract in the absence of the other forward contract. Instead, he was saying simply that the two forward contracts, taken together, were a bargain made at arm's length because the parties were not otherwise connected and each of them was doing the best deal that he or it could, for itself. In other words, there was no bounty between them. The two examples of a bargain otherwise than on arm's length which were set out in Section 17 of the TCGA were a gift or a transfer into a settlement. In Mr Sherry's view, that was the kind of transaction to which the section was intended to apply.

287. In support of this view, Mr Sherry referred to paragraph [13] in the decision of Lightman J in the High Court in *Mansworth v Jelley* [2002] STC 1013 ("*Jelley*"), where Lightman J had said as follows:

"…the phrase 'bargain at arm's length'…connotes a transaction between two parties with separate and distinct interests who have each agreed terms (actually or inferentially) with a mind solely to his own respective interests".

288. In this case, in order for the Respondents to succeed in their contention, they would need to show either that Schroders was not acting solely in its own interests in entering into a trade or that the relevant Appellant was not acting solely in his own interests in doing so. Clearly, neither of these were the case.

289. In *Jelley*, Lightman J had been referred to the decision of Ferris J in *Bullivant Holdings Limited v Inland Revenue Commissioners* [1988] STC 905 ("*Bullivant*") although he had not

found it of much assistance on the facts of *Jelley*. Nevertheless, the decision in *Bullivant* was of assistance in the present case. In *Bullivant*, the taxpayer had acquired shares at a price which was less than the market value of the shares at the time of acquisition. He had been able to do so because the shares had been acquired as part of a composite transaction in which the taxpayer's counterparty had obtained a benefit by virtue of another part of the transaction. The taxpayer's subsequent attempt to argue that the undervalue meant that the shares had not been acquired by way of a bargain made at arm's length failed because there was no element of bounty involved in the counterparty's agreement to sell the subject shares at an undervalue. In the course of his decision, Ferris J had noted as follows:

"A process under which a party has to yield in respect of one part of a composite transaction in order to obtain the much desired benefits of another part of the same transaction is of the essence of a genuine commercial bargain."

290. In summary, Mr Sherry said that, if there were two transactions in securities forming part of the same composite transaction and each of those transactions was on off-market terms such that value flowed one way under one of the transactions and then the same value flowed the other way under the other transaction, then each transaction should be regarded as taking place by way of a bargain made at arm's length. That was because each party in that case was prepared to transact on the terms of each contract as that was in its own commercial interests. There was no element of bounty involved.

The arguments for the Respondents

291. Mr Stone said that the language in Section 17 of the TCGA was not focused on the contract pursuant to which the relevant asset was being acquired or sold. Instead, it was focused on the acquisition or disposal which occurred pursuant to the contract. Thus, the relevant question was not whether each forward contract had been entered into at arm's length but rather whether the shares which were the subject of each forward contract had been acquired or, as the case may be, disposed of at arm's length.

292. The Respondents were not disputing that each Appellant and Schroders entered into the trades comprising the VIS structure because it was in his or its own commercial interests. It was in each Appellant's commercial interests to realise a loss whilst it was in Schroders' commercial interests to realise the profit which it expected to derive from the trade. However, the same could not be said about each acquisition and disposal.

293. When one looked at the particular bargain pursuant to which the shares in question were acquired or sold under the relevant forward contract, that made no commercial sense. SP had disposed of shares worth £1.825 million for £912,500 and AD had paid £1.122 million to acquire shares worth £22,000. Neither SP's disposal nor AD's acquisition could be said to meet the test set out in *Jelley* under which "two parties with separate and distinct interests…[had] each agreed terms (actually or inferentially) with a mind solely to his own respective interests".

294. It was clearly not in the interests of SP to sell shares at such a large under-value or in the interests of AD to acquire shares at such a large over-value. If an acquisition or disposal was taking place by way of bargain made at arm's length, then one would expect the price paid for the shares in question to be at or around the market value of the shares and not wildly above or below that value. The only reason for the discrepancy in this case was that the parties were aware that there would be a matching disparity between the price paid, and the value of the gilts delivered, under the other forward contract. The situation in this case was similar to that in *Hardy and Moxon v The Commissioners for Her Majesty's Revenue and Customs* [2017] UKFTT 0754 (TC) where there was no evidence of a negotiation between the parties as to the price at which the subject shares would be sold and instead the parties were simply following a script which required a sale at a particular sum. In this case, there had been no negotiation

between, on the one hand, each of SP and AD and, on the other hand, Schroders as to whether the price paid on the relevant disposal or acquisition was in the respective commercial interests of each party to the disposal or acquisition. Instead, the parties had simply agreed the price for the relevant disposal and acquisition as part of a pre-determined, pre-structured scheme that did not leave any scope for separate bargaining.

295. Mr Stone added that, even if the Appellants had produced evidence to show that the terms of each forward contract were identical to the terms of other forward contracts which were entered into in the market without the related forward contract, that would not be determinative of this question in favour of the two Appellants. He accepted that, in that event, the existence of those other transactions would be part of the evidence to be taken into account but one would still need to consider the specific circumstances in this case in order to determine whether the disposal and acquisition had taken place by way of a bargain made at arm's length.

Conclusion

296. Before starting on my analysis in relation to this issue, I think it would be helpful to reiterate the factual conclusions which I drew in paragraphs 145 to 154 above as those conclusions are relevant both to this issue and to Issue 5, to which I will come next.

297. Those conclusions may be summarised as follows:

(1) the Appellants have not satisfied me that each trade made commercial sense on a pre-tax basis for the relevant Appellant and was one into which the relevant Appellant would have agreed to enter had he not had chargeable gains or MI against which to set off any loss arising from the trade see paragraphs 147 to 151 above;

(2) conversely, I am satisfied that each trade was one which a person with chargeable gains or MI to shelter and who believed that the trade (together with its related acquisition and disposal) would give rise to a loss to set off against that chargeable gain or MI would have been prepared to enter – see paragraphs 152 and 153 above; and

(3) the Appellants have not satisfied me that the terms of each forward contract in a trade were such that any person would have been prepared to enter into that forward contract without also entering into the other forward contract in that trade at the same time – see paragraph 154 above.

298. I would start my analysis on this issue by observing that there is a natural link between the question of whether an acquisition has been by way of a bargain made at arm's length – ie Issue 4, so far as it pertains to AD - and the question of whether the consideration paid on that acquisition was wholly and exclusively for the asset acquired – ie Issue 5. I will elaborate on the precise nature of that link when I set out my conclusions in relation to Issue 5 below. For present purposes, I will say only that that link can perhaps best be seen in the decision of the First-tier Tribunal in *Price and others v The Commissioners for Her Majesty's Revenue and Customs* [2013] UKFTT 297 (TC) ("*Price FTT*"), and the decision of the Upper Tribunal on appeal in that case, in *Price and others v The Commissioners for Her Majesty's Revenue and Customs* [2015] UKUT 164 (TCC) ("*Price UT*").

299. In that case, in order to realise an allowable loss for CGT purposes, the taxpayer had paid approximately £6 million for shares which were worth £600 and then sold those shares for £522 a few days later. The reason why the taxpayer was prepared to do that was that, as part of the same composite scheme but pursuant to different transactions within it, he received an amount which was broadly equal to the excess purchase price by way of a loan from a settlement in which he was a beneficiary, which loan was subsequently waived. (I should say for completeness that the case involved other taxpayers and not all of them received value from the related settlement in the same precise form but the essence of the scheme was that, as part

of the same composite arrangement, the relevant taxpayer overpaid for the shares and then received a matching benefit elsewhere in relation to a settlement).

300. The scheme could achieve its objective only if Section 17 of the TCGA did not apply to the purchase of the shares. To that end, the arrangement had been structured in such a way that it was hoped that Section 17 of the TCGA would be disapplied by the operation of Section 144ZA of the TCGA. In fact, the First-tier Tribunal in *Price FTT* decided that it did not need to address the question of whether Section 144ZA of the TCGA applied to exclude the application of Section 17 of the TCGA. Instead, Section 17 of the TCGA did not apply because the acquisition was, in any event, by way of a bargain made at arm's length. However, it held that the part of the purchase price which exceeded the market value of the shares had not been paid wholly and exclusively for the shares and therefore it reduced the loss to £48 – the difference between the market value of the shares when they were acquired (£600) and the disposal proceeds of £522 – pursuant to Section 38 of the TCGA.

301. On appeal, the Upper Tribunal was content to assume that the First-tier Tribunal had been right in concluding that Section 17 of the TCGA did not apply on the relevant facts and declined to express any view on that question (see *Price UT* at paragraph [13]). The Upper Tribunal then went on to uphold the decision of the First-tier Tribunal in relation to Section 38 of the TCGA.

302. The key part of the case so far as Issue 4 is concerned is the conclusion in *Price FTT* that Section 17 of the TCGA did not apply. The reason for that was that, "having regard to the scheme as a composite whole each party to the scheme acted in his or its own separate and distinct interests". In particular, each participant in the scheme "obtained in respect of his outlay (£6m), the benefit of the trusts of which he was a beneficiary, and, in return for the expense of the sums which ended up in the pockets of [the other participants in the scheme], obtained the ability to present himself a [sic] having obtained an allowable loss" (see *Price FTT* at paragraphs [55] to [58]).

303. Although the decision in *Price FTT* is not binding on me, I agree with the way that the First-tier Tribunal in that case applied Section 17 of the TCGA on the facts in that case. The First-tier Tribunal did not seek to break down, into separate items, each constituent part of the overall composite transaction. Instead, it reached the view that, because each party to the overall composite transaction was demonstrably acting in its or his own commercial interests, the acquisition of the shares which took place as part of the composite transaction was by way of a bargain made at arm's length. The decision is of particular relevance to the present case in that, as the extract from the decision set out above demonstrates, the First-tier Tribunal recognised that the perceived tax benefit to each participant was a factor which could be taken into account in determining whether the acquisition of the shares at such an over-value was being effected by way of a bargain made at arm's length.

304. The same approach was adopted by Ferris J in *Bullivant*, where the taxpayer had acquired 50% of the shares in a company (HBH) from the sellers of those shares (H and W) for a cash payment of £25,000, even though it was subsequently agreed by both the taxpayer company and the Respondents that that price was considerably lower than the market value of the relevant shares at the time (£350,000). In that case, H and W were selling their shares in HBH as part of a composite transaction pursuant to which they were able to sell their shares in another company (Bullman) to an unrelated purchaser (Reed) for £500,000. The Special Commissioner in that case held that H and W were acting in their own commercial interests in disposing of their shares in HBH at such an undervalue because they wanted to sell their shares in Bullman for £500,000 and the package deal which had been offered to them whereby they were able to sell their shares in both companies for the consideration offered to them was the best deal they could do and therefore made commercial sense. In particular, the taxpayer company could not afford to pay any more than it did pay for the shares in HBH and there was no other potential purchaser for the shares. As such, the Special Commissioner in *Bullivant*

held that the acquisition and disposal of the shares was by way of bargain made at arm's length. Ferris J held that it could not be said that the true and only reasonable conclusion that could have been reached on the facts was one which was contrary to the Special Commissioner's determination.

305. Although the facts in *Bullivant* were much less relevant to this case than the facts in *Price FTT*, it again shows that, where an acquisition or disposal is occurring as part of a composite transaction, the terms of the whole of that composite transaction and not merely the terms of the relevant acquisition or disposal need to be taken into account in determining whether the acquisition or disposal is by way of a bargain made at arm's length.

306. If I now turn to apply the principle expressed in the above cases to the facts in this case, it is apparent that, in determining whether the disposal of shares by SP or the acquisition of shares by AD was occurring otherwise than by way of a bargain made at arm's length, I need to take into account the entire trade within which the relevant disposal or acquisition was taking place and, indeed, all of the trades into which the relevant Appellant entered in the course of his participation in the VIS structure.

307. I should make it clear at this juncture that taking into account the entire trade and all of those other trades for this purpose is in no way inconsistent with the hypothesis underlying my consideration of this issue – which is to say, the hypothesis that, contrary to my conclusion in relation to Issue 1, the forward contracts making up a loss-making trade (together with the related acquisition and disposal) are not to be regarded as a single self-cancelling composite transaction. The issue of whether all of the contracts forming part of a composite transaction should be taken into account in determining whether a disposal or acquisition occurring under one of the transactions forming part of that composite transaction occurred otherwise than by way of bargain at arm's length is completely different from the issue of whether the composite transaction should be characterised in a way which differs from its form. In other words, it is perfectly possible to respect the independence of two or more transactions which form part of a composite transaction but still take into account the existence and terms of the other transactions within that composite transaction in determining whether or not a particular acquisition or disposal taking place within the composite transaction is by way of a bargain made at arm's length.

308. Given the second of the conclusions on the facts which are set out in paragraph 297 above, I have reached the conclusion that the disposal by SP and the acquisition by AD in the course of the loss-making trade which brought to an end the relevant Appellant's participation in the VIS structure was by way of a bargain made at arm's length. It is quite clear that each of Schroders and the relevant Appellant was acting in its or his own commercial interests in agreeing to the terms of the forward contract which led to the relevant disposal or acquisition, as the case may be. In Schroders' case, this was because of the profit-making opportunity which arose as a result of the terms of the trade as a whole and, in the case of the relevant Appellant, this was because of the opportunity to shelter chargeable gains which arose from those terms as a whole.

309. For completeness, I should record that the discussion above has been focused on the terms of Section 17(1)(a) of the TCGA but that there is nothing in the facts of this case to suggest that Section 17(1)(b) of the TCGA is in point and neither counsel has suggested that that is the case.

ISSUE 5 -SECTION 38 OF THE TCGA

<u>Introduction</u>

310. Issue 5 is whether, in calculating the alleged allowable loss realised by AD on the sale of the shares acquired under the forward purchase contract in AD's final trade, the full amount paid for the shares, or only a part paid (which was equal to the market value of the shares on the date of acquisition), should be regarded as having been given wholly and exclusively for the acquisition of the shares for the purposes of Section 38 of the TCGA.

The submissions of the parties

The arguments for the Appellant

311. Mr Sherry said that the sum paid by AD under the forward purchase contract was wholly and exclusively incurred by AD on the shares which he acquired under it because there was nothing else that he acquired under the contract. At the time of entering into the contract, which was, by definition, prior to the valuation time under the contract, neither party knew what securities were to be transferred under the contract or what the value of those securities on delivery would be. In the event, it transpired that the price which AD was required to pay under the contract was much greater than the value of the shares which were delivered to him under the contract. However, the position could very easily have been that he was acquiring gilts under the contract at an under-value. The fact was that the only thing that AD acquired under the contract pursuant to his payment of the purchase price was the shares. The focus of Section 38 of the TCGA was on the object of the expenditure rather than on whether the person incurring the expenditure had made a good deal.

312. Moreover, once one accepted that each forward contract in the trade was a bargain made at arm's length, then the terms of each such forward contract needed to be respected. The only thing that AD was doing under the contract was paying the contractual acquisition price and the only thing that Schroders was doing under the contract was delivering the subject shares. The symmetry required by the chargeable gains legislation meant that the whole of the price paid by the purchaser in that instance should be regarded as the price paid for the shares. (He recognised that, in this particular case, Schroders was likely to be regarded for tax purposes as transacting on trading account and therefore as being outside the scope of the chargeable gains legislation, but that did not detract from the general principle involved here).

313. The Respondents were seeking to rely on the Upper Tribunal decisions in *Price FTT* and *Price UT* to show that the difference between the price paid by AD and the value of the shares must have been for something other than the shares themselves. However, the facts in *Price FTT* and *Price UT* were distinguishable from the facts in the present case. In *Price FTT* and *Price UT*, there was a single composite arrangement under which it was clear that the difference between the price paid for the shares (approximately £6 million) and the value of the shares (£600) had been paid for the value received from the settlement which had been created as part of the composite transaction. In contrast, in this case, the question under Section 38 of the TCGA arose only once the composite transaction challenge had failed and each forward contract was being seen as separate and distinct from the other. In that case, the terms of the forward purchase contract had to be seen in isolation as one under which AD agreed to pay £1.222 million in return for receiving either shares worth £22,000 or gilts worth £2.2 million. It was wrong to analyse the payment under a contract on those terms where the eventual out-turn was that the low-value shares were delivered as being partly for the shares and partly for the opportunity to have acquired the high-value gilts.

The arguments for the Respondents

314. Mr Stone said that, under the terms of the forward purchase contract in AD's final trade, AD had paid £1.222 million for shares worth £22,000. AD could have acquired the relevant shares in the market for £22,000. Instead, he had paid £1.222 million for them. The obvious

inference to be drawn from that was that the difference between the two amounts must have been for something else and not for the shares.

315. That something else in this case was the fact that AD was going to be able to sell gilts at an equal and opposite over-value under the forward sale contract in the trade.

316. In *Price UT*, the Upper Tribunal had addressed the fact that, under a single composite scheme, the taxpayer had purportedly paid approximately £6 million for an asset which was worth £600 but then received a benefit from a settlement of approximately £6 million. The Upper Tribunal had concluded that the right question to ask was not why had the taxpayer paid the £6 million but rather what had the taxpayer paid the £6 million for (see *Price UT* at paragraphs [59] to [77]). A person would not normally pay £6 million for an asset worth £600 unless he was making a gift or entering into a bad bargain, wrongly believing the asset to be worth £6 million. Both of those options were ruled out in *Price UT* and could similarly be ruled out in this case. Once they were, the only realistic explanation of the facts was that there was some other quid pro quo for the difference. In *Price UT*, that was the benefit received from the settlement. In this case, it was the gain which AD stood to make under the forward sale contract in the trade (and its related acquisition).

317. Similarly, in *Drummond v The Commissioners for Her Majesty's Revenue and Customs* [2009] STC 2206 ("*Drummond*"), the taxpayer, as part of a scheme to realise an allowable loss, had paid £1.96 million for 5 policies which the parties knew to have a value of just £1.751 million at the time of purchase. An examination of the facts revealed that, in reality, the difference between the price paid and the value of the assets acquired was attributable to various services received by the taxpayer and therefore the Court of Appeal upheld the decision of the Special Commissioner and Norris J in that case to the effect that part of the purchase price had not been paid wholly and exclusively for the policies (see *Drummond* at paragraphs [31], [33] and [34]).

318. Finally, Mr Stone said that, even if evidence had been provided to establish that the terms of the forward purchase contract in AD's final trade made commercial sense in isolation – that is to say, without there having been the forward sale contract in the same trade – because AD stood to profit by a significant amount as well as to lose by a significant amount, it could not be said that the amount equal to the difference between the price paid by AD and the value of the shares was wholly and exclusively for the shares. In that case, a more accurate analysis would be that the difference had been paid for the chance that AD might, instead of acquiring £22,000 of shares under the contract, have acquired £2.2m of gilts under the contract.

Conclusion

319. At the start of my conclusion in relation to Issue 4, I observed that there was a natural link between the question of whether an acquisition was by way of a bargain made at arm's length – ie Issue 4 - and the question of whether the consideration paid on that acquisition was wholly and exclusively for the asset acquired – ie Issue 5. The nature of that link is that, if:

> (1) the consideration given for the acquisition of an asset is greater than the market value of that asset; and
>
> (2) in order to reach the conclusion that the acquisition was by way of a bargain made at arm's length, it is necessary to take into account the terms of another transaction or other transactions taking place within the same composite transaction which compensate the payer for the excess in the amount of the acquisition price over the market value of the asset acquired,

then it follows inevitably that the consideration paid for the asset which is the subject of the acquisition was not given wholly and exclusively for the asset so acquired.

320. This is apparent from the decisions in each of *Drummond*, *Price FTT* and *Price UT*. In each of *Price FTT* and *Price UT*, once it was necessary to have regard to the benefit received by the taxpayer from the settlement in order to conclude that the acquisition of the shares at an over-value was by way of a bargain made at arm's length, the only possible conclusion was that the element of over-value was not being given wholly and exclusively for the shares in that case but was instead being paid for something else.

321. The same is also apparent from the terms of the following hypothetical example. Imagine an arrangement under which there are two transactions, each of which is on off-market terms in and of itself but which, together with the other transaction, makes commercial sense for both parties. For example, let us assume that A agrees to sell to B for 100 a house worth 90 and, at the same time, B agrees to sell to A for 30 a car worth 20. The above decisions show that each of those acquisitions and disposals is by way of a bargain made at arm's length because each party is acting in its own commercial interests, taking into account the deal as a whole, and there is no element of bounty involved.

322. However, the fact that, in order to make sense of the terms of each transaction, it is necessary to take into account the terms of the other transaction means that, by definition, not all of the consideration of 100 paid by B for the house is wholly and exclusively for the house. 10 of that 100 is in fact being paid for the opportunity for B to sell his car at an over-value of 10 to A. Likewise, only 20 of the consideration paid by A can be said to be paid wholly and exclusively for the car. The remaining 10 is paid for the opportunity for A to sell his house at an over-value of 10 to B.

323. The conclusion I draw from this example, and the facts in the three cases referred to above, is that I do not agree with Mr Sherry's submission to the effect that that just because the acquisition made by AD under the forward purchase contract was by way of a bargain made at arm's length, it inexorably follows that the whole of the consideration paid by AD under that contract was given wholly and exclusively for the acquisition of the shares. That will demonstrably not be the case if the only reason why the acquisition is to be regarded as being by way of a bargain made at arm's length is because of some compensation moving the other way from Schroders to AD under the forward sale contract as part of the same composite transaction.

324. Having established that that is the correct principle to apply in this case, the next stage is to observe that, as I have noted in paragraph above:

(1) the Appellants have not satisfied me that the terms of each forward contract in a trade were such that any person would have been prepared to enter into that forward contract without also entering into the other forward contract in that trade at the same time – see paragraph 297(3) above; but

(2) conversely, I am satisfied that each trade was one into which a person with chargeable gains or MI to shelter and who believed that the trade (together with its related acquisition and disposal) would give rise to a loss to set off against that chargeable gain or MI would have been prepared to enter – see paragraph 297(2) above.

325. Those findings of fact mean that it is not possible for me to reach a positive conclusion at this stage as to whether the consideration given by AD for the shares under the forward purchase contract in AD's final trade was given wholly and exclusively for the shares. The answer depends entirely on whether some part of that consideration should be seen as being given for a benefit which passed to AD from Schroders under the forward sale contract in the trade. It is perfectly possible that some of that consideration was given for something within that forward sale contract, given that the terms of the forward purchase contract gave rise to an

acquisition by way of bargain made at arm's length only by taking that contract into account as well.

326. There is not very much more that I can say with any certainty on this issue given the paucity of evidence with which I have been provided. If this issue were to be crucial to the determination of the appeal, I would have to ask for additional evidence and submissions from the parties on the extent to which the two forward contracts inter-related and their respective values at inception before I could reach a conclusion on whether some part of the consideration passing under the forward purchase contract might be said to have been given other than wholly and exclusively for the acquisition of the shares.

327. Mr Stone submitted that, contrary to the conclusion which I have just reached, the answer on this issue was clear. He said that, once one reached the conclusion that the two forward contracts needed to be considered together as a single package in order to make commercial sense of the bargain between the parties, as I have done, then it was plain that the amount by which the acquisition price under the forward purchase contract of £1.222 million exceeded the market value of the shares delivered under that contract of £22,000 should be seen as being given wholly and exclusively for the right to sell gilts under the forward sale contract with a market value of £22,000 for a sale price under that contract of £1.1 million. In other words, he submitted that the position was identical to the hypothetical example which I have discussed in paragraphs 321 and 322 above.

328. I am not persuaded that that simple approach to the question is correct. It would of course be correct if the terms of the forward purchase contract had simply provided unconditionally from inception that AD would pay £1.222 million for shares worth £22,000 and the terms of the forward sale contract had simply provided unconditionally from inception that AD would sell gilts worth £22,000 for a payment of £1.1 million. In that case, the situation would be exactly the same as in my hypothetical example and on all fours with the situation in *Price FTT* and *Price UT*. Thus, it would be plain that the only possible reason for the overpayment under the forward purchase contract was the ability to receive an equivalent overpayment under the forward sale contract.

329. However, that is not what the terms of each contract in this case said. Instead, the "heaven or hell" basis on which each contract was constructed meant that the market value of the securities to be delivered under the contract was unknown at the date when the contract was executed. As far as both parties were concerned as at that date, the market value of the securities which were eventually required to be delivered might vastly exceed the payment made for them or might be vastly below the payment made for them. Thus, each forward contract could easily have given rise to the opposite result once the valuation time occurred and the level of the FTSE 100 Index at that time was known.

330. Given the above, I believe that the mere fact that the forward sale contract has to be taken into account in order to conclude that the acquisition under the forward purchase contract was a bargain made at arm's length does not automatically mean that the whole of the excess in the acquisition price over the value of the shares on delivery should be treated as having been given for the right to sell gilts at an over-value under the forward sale contract and therefore otherwise than wholly and exclusively for the shares. Instead, a much more nuanced approach is needed. The answer is more likely to depend on the extent to which each forward contract was "out of the money" or "in the money" for AD at the time when it was executed. It is perfectly conceivable that none (or not all) of the excess of the acquisition price over the market value of the shares on the settlement date would fall to be disallowed on this basis.

331. Following on from this, if the evidence had shown that each forward contract was "at the money" for each party at the time it was executed and would have been entered into by parties

dealing at arm's length even in the absence of the other forward contract, then my view is that the entire amount paid by AD for the shares under the forward purchase contract would properly be seen as being wholly and exclusively for the shares in question. I say that because, in that case, AD would have entered into a contract which made commercial sense on a self-standing basis and he would not be receiving anything other than the shares in return for the payment of his acquisition price. That being the case, the logical conclusion would be that the whole acquisition price was being given for whatever securities were eventually delivered under the contract. Any other conclusion would mean that AD was not being treated fairly under the CGT regime because he would be being prejudiced by being denied base cost in the event that the condition worked against him but being subject to tax on the full profit made in the event that the condition worked the other way. In addition, as Mr Sherry pointed out, it would come as a surprise to those taxpayers who have entered into contracts on similar terms to the forward purchase contract in the market to discover that they might be deprived of base cost in a case where the market value of the subject securities on delivery turned out to be lower than the acquisition price because their gamble had not paid off.

332. It follows from this that I therefore also do not agree with the submission by Mr Stone to the effect that, even in a case where each forward contract was capable of standing on its own and should therefore be considered in isolation, as I have just done, the amount paid by AD for the shares should not be regarded as being given wholly and exclusively for the shares because the shares were worth only £22,000 and therefore the excess over £22,000 must have been paid for something else. Mr Stone identified that "something else" as being the opportunity to make a windfall equal to the difference between £2.2 million and £1,222 million if the FTSE 100 Index at the valuation time was above the upper barrier. I do not think that that analysis can be right because, in that case, it would not be as if AD had agreed to pay any amount up front in return for the opportunity to acquire gilts at an under-value or as if there was an option involved. Instead, there would simply be a conditional contract under which AD agreed at inception to pay £1.222 million in return either for shares worth £22,000 or gilts worth £2.2 million but with neither party's knowing which of those outcomes it would be.

333. It also follows from this that, if it had been established at the hearing that the terms of the forward purchase contract in AD's final trade made commercial sense without regard to the terms of the forward sale contract in that trade, then I would have been inclined to find in favour of AD on this point. In that case, I would have said that whatever consideration was paid by AD under that contract should be regarded as having been given wholly and exclusively for the securities which he then acquired, whether those securities were shares worth £22,000 or gilts worth £2.2 million.

334. Having said that, as the independence of the two forward contracts has not been established, the analysis set out in paragraphs 331 to 333 above is all theoretical.

CONCLUSION

335. My conclusions in relation to each issue are therefore as follows:

(1) Issue 1 – in relation to each disposal of shares or certificates of deposit which has taken place in connection with a loss-making trade and in respect of which an Appellant has claimed an allowable loss for CGT purposes or a loss deductible against MI, the two forward contracts comprising that trade, together with the acquisition and disposal relating to that trade, should be characterised as a composite self-cancelling transaction, with the result that no allowable loss or loss deductible against MI should be regarded as having arisen;

(2) Issue 2 – Section 152 of the ITA 2007 is to be construed as applying only to real economic losses and therefore not to losses cancelled out by profits arising from transactions within the same composite self-cancelling transaction;

(3) Issue 3 – even if my conclusion in relation to Issue 1 is wrong, so that an allowable loss would otherwise be regarded as having arisen to each of SP and AD in connection with the trade in question, that loss fell within Section 16A of the TCGA and therefore was precluded from being an allowable loss;

(4) Issue 4 – if my conclusion in relation to Issue 1 is wrong, the acquisition or disposal arising under each forward contract comprising the final loss-making trade under the VIS structure for each of SP and AD occurred by way of bargain made at arm's length and therefore Section 17 of the TCGA did not apply to it; and

(5) Issue 5 – given the absence of the requisite evidence, it is not possible for me to reach a conclusion on whether any part of the consideration given by AD on the acquisition of the shares under the forward purchase contract in his final trade was not given wholly and exclusively for the shares. Therefore, if I had not reached the conclusions which I have on Issue 1 and Issue 3, I would have sought further evidence and submissions from the parties before reaching a conclusion on this issue.

336. Finally, I have set out in the Appendix details of an application which was made on behalf of the Appellants during the hearing which I did not uphold.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

337. 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 "Tribunal Rules"). 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.

TONY BEARE
TRIBUNAL JUDGE

RELEASE DATE: 23 DECEMBER 2020

APPENDIX

1. At 23:08 on Wednesday 25 November 2020 - after Mr Sherry had completed his submissions on behalf of the Appellants and before Mr Stone had started his submissions on behalf of the Respondents - I received an email from RPC which attached an ex parte application on behalf of the Appellants for me to recuse myself from the hearing. The grounds for the application were that my interventions during the course of the evidence given by AD were such that the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that I was biased.

2. Early the next morning, I directed RPC to forward their application to the Respondents and I subsequently conducted, by way of video, a hearing of the application involving solely Mr Sherry and Mr Stone.

3. The submissions made by Mr Sherry on behalf of the Appellants at that hearing were as follows:

(1) my interventions during AD's evidence were such that I had crossed the threshold test outlined at paragraph [103] in *Magill v Porter* [2001] UKHL 67– namely, that "the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that I was biased";

(2) at paragraphs [39] to [45] in *Serafin v Malkiewicz* [2020] UKSC 23 ("*Malkiewicz*"), the Supreme Court had noted that:

(a) a judge's interventions should be as infrequent as possible during the cross-examination of witnesses and that a judge should remain above the fray and neutral while evidence was being elicited; and

(b) the quality of the written judgment could not render a trial fair in circumstances where the judge's interventions at the hearing prejudiced the exploration of the evidence;

(3) in *Michel v The Queen* [2009] UKPC 41, Lord Brown of Eaton-under-Heywood, delivering the judgment of the Privy Council, had observed at paragraph [31] that:

"The core principle, that under the adversarial system the judge remains aloof from the fray and neutral during the elicitation of the evidence, applies no less to civil litigation than to criminal trials";

(4) in *Jones v DAS Legal Expenses* [2003] EWCA Civ 1071, the Court of Appeal had stressed that "interventions should be as infrequent as possible when the witness is under cross-examination" because "the very gist of cross-examination lies in the unbroken sequence of question and answer";

(5) whilst the Appellants accepted that a judge was entitled to put questions to a witness, those questions should properly be put at the end of cross-examination and should normally be open questions. In this case, my interventions in the course of AD's evidence had been neither infrequent nor out of the fray of cross-examination; and

(6) as had been noted by Jay J at paragraphs [11] to [17] in *HM Solicitor General v Edward William Ellis* [2020] EWHC 2987 (QB), it was right to be cautious in determining whether there might have been an appearance of possible bias and that, unless the conclusion that a fair-minded observer might conclude that there was a real possibility of bias could be ruled out, the judge ought to recuse himself.

4. In response, Mr Stone on behalf of the Respondents, said as follows:

(1) the decision in *Malkiewicz* showed that a distinction should be drawn between apparent bias (to be determined by reference to the fair-minded and informed observer) and an unfair trial (to be determined by objective judicial assessment);

(2) the Supreme Court's focus in *Malkiewicz* was on the latter. It was prepared to assume that the definition of "bias" given by Leggatt LJ at paragraph [17] in the earlier case of *Bubbles & Wine Ltd v Lusha* [2018] EWCA Civ 468 ("*Lusha*") as being "prejudice against one party or its case for reasons unconnected with the legal or factual merits of the case…" was correct. That being the case, it concluded that the transcript in *Malkiewicz* did not suggest that the judge had been biased. Instead, it went on to address the question of whether the judge's interventions had given rise to an unfair trial;

(3) the relevant question here, as in *Malkiewicz*, was not whether I might appear to a fair-minded and informed observer to have been biased – in the sense set out in *Lusha* -– but rather whether my interventions might so hamper my ability properly to evaluate and weigh the evidence before me as to impair my judgment - see also paragraphs [145] to [147] of the Court of Appeal decision in *The Mayor and Burgesses of the London Borough of Southwark v Maamefowaa Kofi-Adu* [2006] EWCA Civ 281 ("*Kofi-Adu*") and paragraph [93] in *Luis Roberto Demarco Almeida v Opportunity Equity Partners Limited* (Privy Council Appeal No 48 of 2004 ("*OEPL*");

(4) in any case, given the stage the hearing had reached, the appropriate approach at this point was to proceed to finish the hearing and then, if the Appellants lost, they would be able to raise their allegation as a ground of appeal; and

(5) in *OEPL*, the Privy Council approved of the following summary of the relevant principles in the area of judicial intervention from the Australian case of *Galea v Galea* (1990) 19 NSW LR 263 ("*Galea*"):

(a) greater latitude to judicial intervention will be accepted where a judge is sitting alone because it is conventionally inferred that a trained judicial officer, who has to find the facts himself or herself, will be more readily able to correct and allow for preliminary opinions formed before the final decision is reached;

(b) the question which the appellate court has to address in each case is whether a litigant has been denied a fair trial because the judge has closed his or her mind to further persuasion, moved into counsel's shoes and into the perils of self-persuasion;

(c) the decision on whether unfairness has been reached must be made in the context of the whole trial and in the light of the number, length, terms and circumstances of the interventions. It is important to distinguish between interventions which suggest that an opinion has finally been reached which could not be altered by further evidence or argument and interventions which are put forward to test the evidence and to invite further persuasion;

(d) the time of the intervention is also relevant. An intervention early in the process is less readily excused than one occurring later; and

(e) where a judge is confronted by a witness who is both deceitful and evasive, there is no principle that he is not at liberty to express his measured displeasure at being trifled with. There is no unfairness if a reasonable disinterested bystander who heard the exchanges would have concluded not that the judge was prejudiced but that an exceptionally irritating witness had eventually succeeded in irritating the judge.

5. After retiring briefly to consider the parties' respective submissions, I concluded that it would not be appropriate for me to recuse myself from the hearing.

6. The primary reason for this conclusion was that I was required to bear in mind in making my decision the overriding objective in Rule 2 of the Tribunal Rules, to the effect that cases should be dealt with fairly and justly. In my view, it would be neither fair nor just at this stage in the proceedings for me to recuse myself, with the result that the hearing would have to be re-convened and re-argued at a future date. The Appellants had already made their submissions and presented all of their evidence. All that remained was for the Respondents to do the same and then for the Appellants to make their closing submissions.

7. In those circumstances, I considered that the fair and just approach was to continue with the proceedings and leave the Appellants to challenge my decision on the relevant grounds if they lost, should they so wish.

8. In addition, I did not consider that my interventions in the course of the cross-examination of AD:

(1) could lead the fair-minded and informed observer to conclude that I might be "prejudiced against one party or its case for reasons unconnected with the legal or factual merits of the case" – which was the definition of bias set out in in *Lusha* (see paragraph 4(2) above); or

(2) fell foul of the principles expressed in *OEPL*.

In particular, my interventions were largely confined to a late stage in AD's evidence, when AD had been maintaining for some time in the course of his oral evidence that his purpose in entering into the VIS structure had been to derive a commercial profit and not to realise an allowable loss for tax purposes despite overwhelming evidence to the contrary in the agreed facts and the DB (see paragraphs 127, 128 and 144(10) of the decision). In the circumstances, I concluded that a degree of incomprehension on my part was forgivable, bearing in mind the principle stated in *Galea* noted at paragraph 4(5)(e) above.