



Neutral Citation: [2026] UKFTT 00404 (TC)

Case Number: TC 09823

FIRST-TIER TRIBUNAL  
TAX CHAMBER

Appeal reference: TC/2022/11562

**Heard on:** 18 December 2025  
**Judgment date:** 18 March 2026

Before

**TRIBUNAL JUDGE HARRIET MORGAN**

Between

**MR SURJIT SINGH RAI**

Appellant

and

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

Representation:

For the Appellant: Mr Keith Gordon, of counsel

For the Respondents: Mr Imran Afzal KC, of counsel, instructed by the General  
Counsel and Solicitor to HM Revenue and Customs  
(“HMRC”)

## DECISION

1. The hearing was to consider an application made by the appellant to the tribunal on 10 March 2025 to raise two further grounds of appeal (“**the application**”). I refer to the new grounds as “the s 687(2) ground” and the “s 685(6) ground” (collectively “**the new grounds**”). On 9 April 2025, HMRC provided a response to the application, in which they objected to it. On 11 April 2025 the appellant replied to the response. On 28 July 2025, the tribunal informed the parties that the application would be considered at a hearing.

2. The appeal relates to the “transactions in securities” legislation contained in the Income Tax Act 2007 (“**ITA**”). References to statutory provisions in this decision are to ITA unless otherwise stated. In summary:

(1) On 15 March 2016 Rushcliffe Care Holdings Limited (“**RCHL**”) reduced its share premium account by £10 million.

(2) This amount was credited to the appellant’s director’s loan account.

(3) The appellant treated this amount as a capital receipt in his self-assessment tax return and paid capital gains tax at a rate of 10% (following a claim for entrepreneurs’ relief) on the capital gain that arose.

(4) On 26 January 2022, HMRC (a) issued a “counteraction notice” to the appellant under s 698 in relation to this transaction described above, and (b) issued a notice of assessment to the appellant in relation to the tax year 2015/16 in the amount of £2,062,777.52 (“**the assessment**”).

(5) After first appealing to HMRC, on 9 May 2022, the appellant appealed to the tribunal against the assessment. There were two grounds of appeal: (a) that HMRC was out of time to raise the assessment (“**the time limit ground**”), and (b) that tax avoidance was not the main purpose or one of the main purposes driving the transaction in question (“**the main purpose ground**”).

3. The history of these appeal proceedings is as follows:

(1) On 8 May 2024 the tribunal released its decision in *Osmond & Allen v The Commissioners for HMRC* [2024] UKFTT 378 (TC) (“*Osmond*”), in which all issues were decided in HMRC’s favour. *Osmond* was effectively an informal lead case because various other cases involving the transactions in securities code, including the present appeal, were stayed pending its final resolution. The unsuccessful taxpayers in *Osmond* appealed to the Upper Tribunal (“**UT**”) which gave its decision (in favour of the taxpayers) in June 2025, and an appeal to the Court of Appeal is pending. The only issue in the appeal to the UT (and Court of Appeal) is whether a main purpose of obtaining relief under the enterprise investment scheme constitutes a main purpose of obtaining an income tax advantage. That is not relevant to this case.

(2) Following the tribunal’s decision in *Osmond*, HMRC wrote to the appellant on 21 May 2024 informing him that the decision had been released and asked him to consider whether he wished to proceed with or withdraw his appeal.

(3) On 31 July 2024, HMRC wrote to the appellant’s representative about the scope of the appeal to the UT in *Osmond* and stated that, in light of that decision, it was no longer appropriate for the present appeal to be stayed behind *Osmond*. HMRC requested confirmation as to whether the appellant wished to pursue or withdraw his appeal. No response was received at that time.

(4) On 13 September 2024, HMRC wrote to the appellant's representative noting that no response had been received to the letters of 21 May and 31 July 2024 and asking that confirmation of the appellant's position be provided by the close of business on 18 September 2024. HMRC stated that in the absence of a response it would write to the tribunal seeking progression of the appellant's appeal.

(5) On 16 September 2024, the appellant's representative responded stating that the appellant had "indicated a willingness and desire to continue the appeal" but the appellant was awaiting further information in order to take a fully considered view, and the position would be confirmed at the earliest opportunity.

(6) By 24 September 2024, HMRC had not received any further confirmation of the appellant's position and HMRC wrote to the tribunal seeking to lift the stay of proceedings.

(7) On 21 October 2024, the tribunal requested the appellant to confirm how he wished to proceed by no later than 4 November 2024.

(8) On 7 November 2024, the appellant's representative wrote to the tribunal stating that the appellant wished to continue with his appeal, that he only wished to pursue the time limit ground, and that he was no longer advancing the main purpose ground.

(9) On 25 November 2024, the tribunal issued directions to progress the appeal. The directions required lists of documents to be provided by 6 January 2025, the appellant to serve witness statements (if any) by 6 February 2025, HMRC to serve witness statements (if any) by 6 March 2025, and listing information to be provided by 20 March 2025 for a hearing in the period from 20 May to 20 September 2025.

(10) A statement of agreed facts is in the process of being agreed between the parties.

(11) On 31 January 2025, the appellant's representative emailed HMRC seeking agreement to allow the appellant to amend his grounds of appeal to include two (possibly three) further grounds. The appellant had not previously indicated any intention to advance the further grounds of appeal. At this time the appellant asked HMRC to state whether they agreed to the new grounds or not within 7 days. HMRC responded on the same day, stating that they would take instructions and endeavour to confirm the position as soon as possible, but noting it may not be possible in 7 days.

(12) On 4 March 2025 HMRC wrote to the appellant's representative explaining that they did not agree to the new grounds of appeal being raised.

(13) On 10 March 2025 the appellant made the application to the tribunal.

(14) On 20 March 2025 both parties provided listing information to the tribunal. Both parties estimated that the hearing would take one day save that the appellant anticipated one and a half days if the application were to be granted. Based on the listing information provided, both parties were available on 15 to 17 September 2025.

#### **Relevant "transactions in securities" legislation**

4. Section 684 provides:

"(1) This section applies to a person where -

(a) the person is a party to a transaction in securities or two or more transactions in securities (see subsection (2)),

(b) the circumstances are covered by section 685 and not excluded by section 686,

(c) the main purpose, or one of the main purposes, of the person in being a party to the transaction in securities, or any of the transactions in securities, is to obtain an income tax advantage, and

(d) the person obtains an income tax advantage in consequence of the transaction or the combined effect of the transactions.

(2) In this Chapter “transaction in securities” means a transaction, of whatever description, relating to securities, and includes in particular -

(a) the purchase, sale or exchange of securities,

(b) issuing or securing the issue of new securities,

(c) applying or subscribing for new securities, and

(d) altering or securing the alteration of the rights attached to securities.

(3) Section 687 defines “income tax advantage”.

(4) This section is subject to -

section 696(3) (disapplication of this section where person receiving preliminary notification that section 684 may apply makes statutory declaration and relevant officer of Revenue and Customs sees no reason to take further action), and section 697(5) (determination by tribunal that there is no prima facie case that section 684 applies).”

5. Section 685 provides:

“(1) The circumstances covered by this section are circumstances where condition A or condition B is met.

(2) Condition A is that, as a result of the transaction in securities or any one or more of the transactions in securities, the person receives relevant consideration in connection with -

(a) the distribution, transfer or realisation of assets of a close company,

(b) the application of assets of a close company in discharge of liabilities, or

(c) the direct or indirect transfer of assets of one close company to another close company, and does not pay or bear income tax on the consideration (apart from this Chapter).

(3) Condition B is that -

(a) the person receives relevant consideration in connection with the transaction in securities or any one or more of the transactions in securities,

(b) two or more close companies are concerned in the transaction or transactions in securities concerned, and

(c) the person does not pay or bear income tax on the consideration (apart from this Chapter).

(4) In a case within subsection (2)(a) or (b) “relevant consideration” means consideration which -

(a) is or represents the value of -

(i) assets which are available for distribution by way of dividend by the company, or

(ii) assets which would have been so available apart from anything done by the company,

(b) is received in respect of future receipts of the company, or

(c) is or represents the value of trading stock of the company.

(5) In a case within subsection (2)(c) or (3) “relevant consideration” means consideration which consists of any share capital or any security issued by a close company and which is or represents the value of assets which -

- (a) are available for distribution by way of dividend by the company,
- (b) would have been so available apart from anything done by the company, or
- (c) are trading stock of the company.

(6) *The references in subsection (2)(a) and (b) to assets do not include assets which are shown to represent a return of sums paid by subscribers on the issue of securities, despite the fact that under the law of the country in which the company is incorporated assets of that description are available for distribution by way of dividend.*

(7) So far as subsection (2)(c) or (3) relates to share capital other than redeemable share capital, it applies only so far as the share capital is repaid (on a winding up or otherwise); and for this purpose any distribution made in respect of any shares on a winding up or dissolution of the company is to be treated as a repayment of share capital.

(8) References in this section to the receipt of consideration include references to the receipt of any money or money's worth.

(9) In this section -

“security” includes securities not creating or evidencing a charge on assets;

“share” includes stock and any other interest of a member in a company.”

(Emphasis added.)

6. Section 687 provides:

“(1) For the purposes of this Chapter the person obtains an income tax advantage if -

(a) the amount of any income tax which would be payable by the person in respect of the relevant consideration if it constituted a qualifying distribution exceeds the amount of any capital gains tax payable in respect of it, or

(b) income tax would be payable by the person in respect of the relevant consideration if it constituted a qualifying distribution and no capital gains tax is payable in respect of it.

(2) *So much of the relevant consideration as exceeds the maximum amount that could in any circumstances have been paid to the person by way of a qualifying distribution at the time when the relevant consideration is received is to be left out of account for the purposes of subsection (1).*

(3) The amount of the income tax advantage is the amount of the excess or (if no capital gains tax is payable) the amount of the income tax which would be payable.

(4) In this section “relevant consideration” has the same meaning as in section 685.” (Emphasis added.)

7. Section 698 provides:

“(1) If -

(a) a person on whom a notification is served under section 695 does not send a statutory declaration to an officer of Revenue and Customs under section 696 within 30 days of the issue of the notification, or

(b) the tribunal having been sent such a declaration under section 697 determines that there is a prima facie case for serving a notice on a

person under this section, the income tax advantage in question is to be counteracted by adjustments.

(2) The adjustments required to be made to counteract the income tax advantage and the basis on which they are to be made are to be specified in a notice served on the person by an officer of Revenue and Customs.

(3) In this Chapter such a notice is referred to as a “counteraction notice”.

(4) Any of the following adjustments may be specified -

(a) an assessment,

(b) the nullifying of a right to repayment,

(c) the requiring of the return of a repayment already made, or

(d) the calculation or recalculation of profits or gains or liability to income tax.

(5) Nothing in this section authorises the making of an assessment later than 6 years after the tax year to which the income tax advantage relates.

(6) This section is subject to— section 700 (timing of assessments), and section 702(2) (effect of clearance notification under section 701).

(7) But no other provision in the Income Tax Acts is to be read as limiting the powers conferred by this section.”

### **New grounds**

8. The s 687(2) ground was explained by the appellant as follows:

“The Appellant received £10m from the capital reduction in March 2016. HMRC have charged the Appellant as if that £10m had been received by him as a qualifying distribution (with a credit for the capital gains tax paid). That is in accordance with section 687(1) of the Income Tax Act 2007.

However, the new ground relies on the limited exemption provided by section 687(2) (as it stood at the relevant time). That ensures that the income tax charge applies only to the extent that the company had distributable reserves. In the present case, the company’s distributable reserves were £4,240,000. This question of fact is not believed to be in dispute and is, in any event, clearly evidenced by the company’s audited accounts (which are exhibited to one of the witness statements filed on behalf of the Appellant).

The Appellant seeks permission to argue that (if his appeal is otherwise unsuccessful) the tax payable be limited in accordance with section 687(2), thereby reducing the assessment under appeal by more than 50%.

For completeness, the Tribunal is advised that a very similar ground was argued in the case heard by Judge Fairpo last month although the arguments focused on factual issues not applicable in this case. In other words, HMRC did seem to accept in that case that there was an effective cap under section 687(2).”

9. The s 685(6) ground was explained by the appellant as follows:

“The second new ground is more complex as a matter of law. However, it again turns on what are believed to be agreed facts.

The ground turns on the correct application of section 685(6) of the Income Tax Act 2007. The Appellant seeks permission to argue that the £10m received is excluded from the definition of “relevant consideration”...

...The Appellant’s argument is that, when subscribing for his shares in Rushcliffe Care Holdings Limited, by way of an earlier share-for-share exchange, he subscribed circa £35m of original share capital and share premium, £10m of which was returned to him via the capital reduction in March 2016.

Accordingly, notwithstanding that some of the assets were available for distribution by way of dividend, as a straightforward matter of fact, the Appellant received assets which do represent a (partial) return of sums paid by the Appellant (a subscriber) on the issue of the company’s shares to him.”

10. The appellant added that it wishes to highlight conflicting case law concerning the wording of s 685(6):

(1) In *Osmond*, the tribunal held at [60] that the reference to sub-s (2)(a) and (b) was in error and should refer to sub-s (4)(a) and (b).

(2) In *Hunt v HMRC* [2025] UKFTT 538 (TC), however, the tribunal held at [25] that, contrary to what happened in *Osmond*, it was not in a position to give the sub-s a rectifying construction.

(3) The appellant's case on this proposed new ground does not turn on whether the reference to sub-s (2) (rather than sub-s (4)) is correct. Instead, it focuses on the meaning of the phrase "shown to represent a return of sums paid by subscribers on the issue of securities". In other words, the tribunal will not be required to resolve the *Osmond/Hunt* point. In any event, it is noted that the *Hunt* decision is currently on appeal to the UT.

### **Application**

11. In the application and in its skeleton argument, the appellant made the following main points:

(1) The tribunal should reach its decision in accordance with the overriding objective as set out in Rule 2 of the the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ("**the Rules**") and, in the application of the overriding objective, the tribunal should seek to uphold the "venerable principle of tax law" as identified in *HMRC v Tower MCashback LLP 1* [2011] UKSC 19 ("*Tower MCashback*") at [15]. There the late Lord Walker endorsed the following statement by Henderson J (as he then was) and all six other Justices of the Supreme Court agreed with his judgment:

"There is a venerable principle of tax law to the general effect that there is a public interest in taxpayers paying the correct amount of tax, and it is one of the duties of the Commissioners [now the First-tier Tribunal] in exercise of their statutory functions to have regard to that public interest. ... For present purposes, however, it is enough to say that the principle still has at least some residual vitality in the context of section 50, and *if the Commissioners [the First-tier] are to fulfil their statutory duty under that section they must in my judgment be free in principle to entertain legal arguments which played no part in reaching the conclusions set out in the closure notice. Subject always to the requirements of fairness and proper case management, such fresh arguments may be advanced by either side, or may be introduced by the Commissioners [the First-tier] on their own initiative.*" (Emphasis added.)

(2) In a case such as this, where there are no concerns as to "fairness and proper case management", this principle points strongly to the public interest in taxpayers paying the correct amount of tax (and no more). Indeed, their Lordships were making it clear that new issues could be raised as late as the hearing itself (far later than in the present case).

(3) This venerable principle has been reinforced by a recent judgment of the Court of Appeal in *HMRC v Bluecrest Capital Management (UK) LLP* [2025] EWCA Civ 23 ("*Bluecrest*"). In that case, the taxpayer and HMRC had proceeded on a particular view of the law both in the tribunal and the UT. However, the Court of Appeal considered that that view of the law was mistaken and then proceeded to decide the case in accordance with its view as to the law. Henderson LJ said this, at [95]:

"I am not deterred from taking this course by the fact that the construction which I consider to be correct was not advanced by either side in either

Tribunal, and it only emerged as a fallback secondary position relied upon by HMRC in this court after we had drawn attention in the course of argument to what seemed to us to be the clear import of the relevant statutory wording.

*On a question of statutory interpretation, it is our duty to decide for ourselves what the legislation means, and we cannot be bound by any agreement between the parties. There may, however, be procedural issues about the fairness of permitting a party to rely on a new point of law in an appellate court after the facts have been found at first instance, and it is to that aspect of the matter that I now turn.” (Emphasis added.)*

(4) Indeed, as was later stated in that judgment, it is generally permissible for parties to raise new grounds of appeal in appellate courts and tribunals provided that they are questions of law and do not require revisiting of the evidence. Accordingly, it will be an error of law for the tribunal to decide the case without proper regard to the legal issues raised in the two additional grounds. HMRC (who have been on full notice of the new grounds for almost a year and cannot therefore claim to be prejudiced by the grounds being admitted) cannot properly object to the new grounds being admitted at first instance.

(5) The appellant acknowledges that any application to amend pleadings is seeking an indulgence from the tribunal, particularly where (as in the present case) the appellant has previously confirmed the single ground of appeal on which he was planning to rely. However, the interests of justice point strongly towards the application being granted, particularly given that tax of over £2 million is at stake.

(6) Despite the appeal having first been made in 2022, the new grounds were first canvassed when the case was at a relatively early stage of the litigation process (between the provision of the statement of case and submission of witness statements). Accordingly, the case had not been listed for a hearing and, in any event, for the reasons set out below, it is unlikely that any previously arranged hearing would have been jeopardised by the admission of the two new grounds. The appellant sought HMRC’s co-operation to agree a statement of facts but whilst this was in progress, as HMRC did not agree, the appellant had to proceed to prepare witness statements. In the course of this, the appellant identified that he did not wish to pursue the main purpose ground and that there were two further new grounds. As set out below, the delay in the appellant making an application to the tribunal was due to the fact that HMRC did not state whether it agreed to the introduction of the new grounds or not for a period of around five weeks. The tribunal must decide this application on the current facts not on speculation that there could be another application as is the effect of HMRC’s argument on finality (see below). The appellant is not re-raising an argument that had been dropped.

(7) The two new grounds of appeal do not appear to turn on any disputed fact and are thus pure questions of law. Although HMRC are of course at liberty to adduce witness evidence in relation to either of the new grounds, it is not considered that they could realistically put forward any witness who could say anything relevant to the issues raised in the two new grounds. Furthermore, even though they were aware that the appellant wished to run these two new arguments, they were content both to propose amendments to the statement of agreed facts (which the appellant has since agreed to) and to confirm that they were not proposing to put forward any witness. Similarly, whilst HMRC have suggested that, if the new grounds are admitted, the statement will need further

refinement, it is not clear what further facts HMRC would wish to introduce – even more so, given that the evidential burden of proof falls on the appellant.

(8) The first new ground of appeal is, on the face at least, a point that seems clear from a straightforward reading of the legislation. It is not thought likely that it would require much tribunal time to address it. Indeed, any tribunal hearing the substantive appeal in this case is almost certainly going to have the benefit of Judge Fairpo’s learning on this topic. (It is genuinely thought that, if this ground were admitted by the tribunal, HMRC would summarily concede on this point and contest the case only on the other grounds.)

(9) The second new ground is unlikely to require more than an hour’s legal argument for each side (and, realistically, will probably not require as much as that). In other words, the two new grounds are most unlikely to add more than half a day to the length of the overall proceedings.

(10) Four of the five of the stated elements of the overriding objective in the Rules favour the admission of the two new grounds: the fifth is neutral:

(a) dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties – this is a case involving a tax charge of over £2m. That charge could be more than halved by the admission and acceptance of the first new ground alone and, if the second new ground were admitted and accepted, would be nullified in total;

(b) avoiding unnecessary formality and seeking flexibility in the proceedings - this is self-explanatory;

(c) ensuring, so far as practicable, that the parties are able to participate fully in the proceedings - this is self-explanatory;

(d) using any special expertise of the tribunal effectively - the appellant is happy to treat this as neutral; and

(e) avoiding delay, so far as compatible with proper consideration of the issues – the delay has been caused by HMRC’s objections rather than the grounds themselves; in any event, delay is not the only factor as it is qualified by the words “so far as compatible with proper consideration of the issues”.

(11) Furthermore, at the core of the overriding objective are the concepts of fairness and justice: they both point to the appellant being able to advance legal arguments that materially affect the tax ultimately payable, particularly where (as here) HMRC cannot point to any real prejudice that they would suffer.

### **Caselaw**

12. HMRC referred to *Quah Su-Ling v Goldman Sachs International* [2015] EWHC 759 (Comm) (“*Quah*”) at [38] which sets out the principles generally to be applied in civil litigation when considering whether to allow applications to amend grounds of appeal:

“Drawing these authorities together, the relevant principles can be stated simply as follows:

a) whether to allow an amendment is a matter for the discretion of the court. In exercising that discretion, the overriding objective is of the greatest importance. Applications always involve the court striking a balance between injustice to the applicant if the amendment is refused, and injustice to the opposing party and other litigants in general, if the amendment is permitted;

b) where a very late application to amend is made the correct approach is not that the amendments ought, in general, to be allowed so that the real dispute between the parties can be adjudicated upon. Rather, a heavy burden lies on a party seeking a very late amendment to show the strength of the new case and why justice to him, his opponent and other court users requires him to be able to pursue it. The risk to a trial date may mean that the lateness of the application to amend will of itself cause the balance to be loaded heavily against the grant of permission;

c) a very late amendment is one made when the trial date has been fixed and where permitting the amendments would cause the trial date to be lost. Parties and the court have a legitimate expectation that trial fixtures will be kept;

d) lateness is not an absolute, but a relative concept. It depends on a review of the nature of the proposed amendment, the quality of the explanation for its timing, and a fair appreciation of the consequences in terms of work wasted and consequential work to be done;

e) gone are the days when it was sufficient for the amending party to argue that no prejudice had been suffered, save as to costs. In the modern era it is more readily recognised that the payment of costs may not be adequate compensation;

f) it is incumbent on a party seeking the indulgence of the court to be allowed to raise a late claim to provide a good explanation for the delay;

g) a much stricter view is taken nowadays of non-compliance with the CPR and directions of the Court. The achievement of justice means something different now. Parties can no longer expect indulgence if they fail to comply with their procedural obligations because those obligations not only serve the purpose of ensuring that they conduct the litigation proportionately in order to ensure their own costs are kept within proportionate bounds but also the wider public interest of ensuring that other litigants can obtain justice efficiently and proportionately, and that the courts enable them to do so.”

13. As HMRC submitted, although *Quah* was heard in the High Court, the tribunal has held that the principles set out in that case apply equally in tax cases before the tribunal (see *Exchequer Solutions Ltd v HMRC* [2022] UKFTT 181 (“*Exchequer Solutions*”) at [26], as applied in *IPS Umbrella Ltd v HMRC* [2022] UKFTT 81 (“*IPS*”) at [21] and [22]).

14. The parties both referred to *CNM Estates (Tolworth Tower) Ltd v Carvill-Biggs & anor* [2023] EWCA Civ 480 (“*CNM Estates*”). At [36], Males LJ recorded the approach taken by the High Court judge as follows:

“She recorded that the principles applicable to the grant of such permission were not in dispute, said that she had “a general discretion whether to permit an amendment, my essential task being to balance the prejudice to one party if the amendments are allowed against the prejudice to the other if they are disallowed”, and identified the principal relevant factors as being the lateness of the application, any reasons for delay, the adequacy of the pleading and whether it had a real prospect of success, of which the latter two were the most important. As to these, the judge held that the proposed amendment just about set out with sufficient clarity the nature of the case which CNM sought to make, but that the claim was internally incoherent and inconsistent in some respects, such that the claim was “decidedly weak” and “lacks conviction”. She weighed this against other factors, including that in view of the procedural history (which included a series of failures by CNM to comply with orders of the court even before the hearing of the preliminary issue) the Receivers could fairly claim to have been “mucked about”, that the case of wilful misconduct was “a very serious allegation to make against professional people”, and that it had been “raised at the last minute in a claim which has now been ongoing for over four years”, even though the trial was still some way off.”

15. The appellant noted that later parts of Males LJ’s judgment were a minority view. In the judgment of the majority, the Court of Appeal laid down the following guidance as regards “late” and “very late” amendments:

“67. As can be seen from *Quah Su-Ling* at [38], the courts have distinguished between “late” and “very late” amendments, a “very late” amendment being one which would cause the trial date to be lost. As Lloyd LJ observed in *Swain-Mason v. Mills & Reeve LLP* [2011] EWCA Civ 14, [2011] 1 WLR 2735, at [72], “the court is and should be less ready to allow a very late amendment than it used to be in former times, and ... a heavy onus lies on a party seeking to make a very late amendment to justify it, as regards his own position, that of the other parties to the litigation, and that of other litigants in other cases before the court”. *Quah Su-Ling* itself involved an application to make “very late” amendments and, in that context, Carr J thought it appropriate to assess the strength of the new case: see [57].

...

76. *Aside from very late amendments, we do not think the perceived strength of the case is normally a factor to be taken into account when undertaking that balancing exercise. As Carr J recognised, however, in Quah Su-Ling at [38(d)]: “lateness is not an absolute, but a relative concept”. There will therefore perhaps be cases where the quality of the delay is unclear. In such cases, it may be necessary to consider, as Carr J suggested: “a review of the nature of the proposed amendment, the quality of the explanation for its timing, and a fair appreciation of the consequences in terms of work wasted and consequential work to be done”. But even if it is necessary to adopt that approach when the amendment is on the cusp of being “late” and “very late”, it will never be appropriate to attempt to conduct a mini-trial.*

77. *The general rule is that, except in the case of “very late” amendments, unless it can be seen that a claim has no real prospect of succeeding, its merits should be determined at a full trial. The warnings against mini-trials apply with just as much force to applications to amend as they do to summary judgment or jurisdiction disputes. The CPR do not bar litigants from pursuing claims that might at an interlocutory stage be considered weak. In our view, HH Judge Eyre QC (as he then was) correctly summarised the principles applicable to the determination of an application to amend in Scott v. Singh [2020] EWHC 1714 (Comm) at [19]:*

*“The new case set out in the proposed pleading must have a real prospect of success .... The approach to be taken is to consider those prospects in the same way as for summary judgment namely whether there is a real as opposed to a fanciful prospect of the claim or defence being raised succeeding. It would clearly be pointless to allow an amendment if the claim or defence being raised would be defeated by a summary judgment application. However, at the stage of considering a proposed amendment that test imposes a comparatively low burden and the question is whether it is clear that the new claim or defence has no prospect of success. The court is not to engage in a mini-trial when considering a summary judgment application and even less is it to do so when considering whether or not to permit an amendment.” (Emphasis added.)*

16. The parties took different views on whether the application was “late” or “very late” in this case. The appellant submitted that it was made at a relatively early stage as set out above and HMRC said that it was “very late” as set out below.

17. The approach set out in the above case was applied in the tribunal in the relatively recent case of *Judd v HMRC* [2024] UKFTT 51 (TC) at [21].

18. HMRC submitted that the reasoning in *Parker Hannifin (GB) Ltd v HMRC* [2023] UKFTT 971 (TC) (“*Parker*”) is a useful demonstration of the types of scenarios

where the tribunal should permit grounds of appeal to be amended. The tribunal considered the principles in *Quah* and proceeded to allow an amendment for the following reasons:

“Having heard both parties’ submissions, I allowed the application because:

- (1) The new ground is better than merely arguable.
- (2) The issue is a concise single point of law; no evidence is required.
- (3) Although the amendment was made less than two weeks before the hearing, it did not jeopardise the hearing date.

The parties agreed that the Terms point could be considered during the time already allocated for the case; in particular, the original timetable had allowed for Mr Wallace to give evidence and be cross-examined, and this was no longer required. Allowing the amendment would therefore not delay the appeals of other tribunal users.

(4) HMRC has been aware of this point since 21 June 2021, and it was also considered by Ms Henshaw in her statutory review decision of 21 September 2021.

(5) HMRC had had the two weeks since the service of Mr Afzal’s skeleton to consider the issue, and had identified Ulster Bank as a relevant authority.

(6) It engaged a fundamental issue of principle as to how a Sch 36 Notice may be framed, which had not previously been considered by the Tribunal.”

19. In HMRC’s view there is a stark contrast between the present circumstances and those which led the tribunal to grant permission in *Parker*. HMRC also drew attention to a number of other decisions but given the different facts and circumstances I have not found it instructive to consider these.

### **Submissions**

20. HMRC submitted that there needs to be finality as regards the grounds of appeal being pursued as follows:

(1) The application must be considered in light of the fact that the appellant has already changed his grounds of appeal once before when he notified HMRC and the tribunal that he was abandoning the main purpose ground on 7 November 2024. This notification came after a significant period of delay on the appellant’s part. Despite HMRC repeatedly contacting the appellant or his representative after the tribunal’s decision in *Osmond*, the appellant did not confirm his position until roughly six months after the decision in *Osmond* was released.

(2) There cannot be an endless process whereby the appellant is allowed to keep changing his grounds of appeal. This is particularly so given that: (a) there has been significant delay on the appellant’s part; (b) as explained below, there is no credible reason why the appellant could not have raised the new grounds earlier (whether in May 2022 when the appeal was notified to the tribunal, or in November 2024 when the main purpose ground was abandoned); and (c) as explained below, the making of the application has already meant that the appeal could not be heard during the hearing window set out in the tribunal’s directions of 25 November 2024, notwithstanding that there were commonly available dates in that window, and if the application is allowed that will result in further delay.

(3) It would be unfair and inconsistent with the principle of proper case management for the appellant to be allowed to repeatedly change his grounds of appeal. That is especially so given the facts mentioned above. Fairness and proper case management require that at some point there must be finality as to the issues in dispute. The appellant has already had ample opportunity to

properly consider his case and it would not be consistent with the overriding objective (which, as stated in *Quah*, is of “the greatest importance”), and the need for litigation to be conducted efficiently, to allow the application.

(4) Whether the appellant is seeking to resurrect a previously abandoned ground, or whether he is seeking to newly raise different grounds, does not change the fact that there must be finality as regards to the entirety of the grounds of appeal being advanced.

(5) The appellant’s point that the tribunal could itself have raised the new grounds at the hearing of the appeal is misconceived. The fact that the tribunal might in principle raise additional issues does not give a taxpayer a licence to chop and change his grounds of appeal – by that token a taxpayer could keep changing his grounds at will. Moreover, it is unlikely that the tribunal would have introduced the new grounds at the hearing; the objections set out herein would still be present, and indeed would be even more acute, at that point in time. As noted in various cases (see, for example, *Tower MCashback* at [15]) a court or tribunal will take into account requirements of proper case management and fairness in deciding whether to raise new issues of its own initiative.

(6) At [29] of *Exchequer Solutions* the tribunal recognised that the “venerable principle” the appellant refers to is just one factor to be taken into account:

“It is in my view also right that the Tribunal should bear in mind its role in determining the correct amount of tax as an additional factor to take into account, although that factor on its own cannot, of course, be decisive as it is just as important in the Tribunal as it is in a Court that appeals are dealt with in a way which is efficient, procedurally fair and in accordance with the overriding objective.”

(7) In *Bluecrest*, whilst Henderson LJ relied on a new interpretation of the relevant provision the taxpayer was aware of that interpretation all along so took it at its own risk that the court may raise the correct interpretation (see [108] to [111]). Although Henderson LJ raised a new point himself, he recognised that the taxpayer knew about it and took the risk and there was no prejudice because he took a narrower construction than in the lower courts so no new evidence was needed. The appellant cannot rely on this as he seeks to do, given there were particular reasons why Henderson LJ raised this himself. The position is different here as the introduction of the new grounds would need more time and new evidence.

21. The appellant responded that (1) the finality principle HMRC refer to is not disputed by the appellant but it is not an absolute one, and (2) as explained above, new grounds can be advanced at the hearing itself (even on the tribunal’s own initiative).

22. HMRC submitted that the new grounds could easily have been raised earlier, and no explanation has been given as to why this was not done.

(1) As noted in *Butt v HMRC* [2024] UKFTT 893 (“*Butt*”) at [44]:

“it is necessary to consider whether the amended grounds of appeal could have been put forward at an earlier stage and, if they could, what the explanation is for why this did not happen.”

(2) The new grounds could have been raised earlier, and no explanation has been given as to why this did not happen. No good explanation has been provided by the appellant in relation to either of the new grounds (see *Quah* at [38(f)]).

(3) As regards the s 687(2) ground, one of the most obvious things that a taxpayer might seek to challenge when presented with an assessment under the relevant legislation is the quantum of that assessment. This ground relates to the quantum of the assessment issued by HMRC, as can be seen from the appellant's description of it as a "cap on income tax charge". There was no reason why it could not have been raised when the appeal was originally notified to the tribunal in May 2022 (or indeed in November 2024 when the main purpose ground was abandoned):

(a) Given the quantum of the assessment was an obvious matter for the appellant to check and challenge, the appellant should properly have raised this ground when originally notifying his appeal to the tribunal in May 2022. It is obvious to think about challenging the amount of the assessment when the appeal is first made but the appellant did not do so. Whilst the sums involved are large that is a further reason why the appellant should have considered making this particular challenge earlier.

(b) At the very least the point should have been raised when the main purpose ground was withdrawn in November 2024, because that decision no doubt involved a reappraisal of the grounds of challenge to the assessment. This is reinforced by the fact that a decision was taken to originally advance the main purpose ground, and then a decision was taken to withdraw that ground.

(c) It is particularly surprising that the appellant did not consider this ground at one of these earlier stages given that the main purpose ground and the s 687(2) ground are directly related, since they both relate to the concept of "income tax advantage":

(i) The main purpose ground concerns whether there was a main purpose of obtaining an income tax advantage (as required by s 684). The s 687(2) ground affects the quantum of the assessment by virtue of the amount of income tax advantage. The quantum of the assessment is based on the amount of the income tax advantage since it is the income tax advantage that is being counteracted (see s 698, and s 687 sets out how the amount of income tax advantage is to be calculated).

(ii) In turn, the appellant's decision to advance the main purpose ground presumably required consideration of the definition of an "income tax advantage", given that the ground of appeal relates to whether there was a main purpose of obtaining an income tax advantage.

(d) Indeed, it is even more startling that the appellant is raising the s 687(2) ground at this late stage given that, on his view, the ground is straightforward and there is "little dispute about the validity" (which, for the avoidance of doubt, is denied). It is surprising that such an apparently straightforward argument was not raised earlier.

(4) So far as the s 685(6) ground is concerned, this issue was also raised in *Osmond* and the proper interpretation of s 685(6) is discussed in detail in the tribunal's decision in that case. The present appeal was specifically stayed behind *Osmond*, and the appellant was informed of the decision when it was released in May 2024. There is thus no reason why the appellant could not have raised this ground at an earlier juncture. At the very latest the ground should have been raised in November 2024 when the tribunal was notified that the

appellant wished to pursue his appeal, notwithstanding the decision in *Osmond*. This is particularly so given that the appellant's position in relation to s 685(6) is inconsistent with the tribunal's interpretation of that provision in *Osmond*, as can be seen at [62] to [80] of *Osmond*. In addition, permission to introduce the s 685(6) ground should be refused because in light of (inter alia) *Osmond* the ground has no real prospect of success in any event (see below).

(5) Overall, there is no good reason for appellant's lateness in seeking to introduce the new grounds. At most, the new grounds would appear to arise out of a fresh examination of possible arguments by fresh counsel. This is precisely the sort of reason that does not find favour with the courts (see *Worldwide Corp Ltd*). That is especially so given that the appellant has already changed his grounds of appeal once (as explained above), and the present attempt to amend the grounds of appeal a further time has already resulted in significant delay and, if permitted, will result in yet further significant delay.

23. On this point, the appellant submitted that (1) HMRC were told that the new grounds emerged as a direct consequence of HMRC's initial reluctance to engage with the appellant's attempts to put forward a statement of agreed facts, (2) it is acknowledged that, in an ideal world, the grounds could have been identified sooner but this is not fatal and one has to look at the overall fairness of the situation, and (3) even if there is no good reason for the new grounds being raised only at the stage when witness statements were being prepared (and it is not conceded that there was no good reason) that is only one consideration when applying the overriding objective. Indeed, late appeals are often admitted by the tribunal when there is absolutely no good reason for the delay provided that, when stepping back, it is in the interests of justice for the appeal to be admitted. Here, there is an existing appeal in relation to which the appellant seeks two relatively simple additional legal questions to be added to the mix. The points made above in relation to HMRC's first objection are repeated.

24. HMRC submitted that the making of the application has already resulted in significant delay such that the appeal could not be heard during the existing hearing window (20 May to 20 September 2025), notwithstanding that there were dates on which both parties were available. Allowing the application will cause even further delay. HMRC referred to the comments at [38(b)] and [38(c)] of *Quah* and the comments in *CNM Estates* referred to above. HMRC made the following main points:

(1) The proposed amendments are "very late" for the purposes of the principles set out in *Quah*. At the time of the application a trial date had not been fixed; however, very shortly afterwards listing information was provided, and there were commonly available dates in the hearing window of 20 May to 20 September 2025. In substance, therefore, trial dates have been lost because of the application. If the application is allowed, very strictly the act of permitting amendments will not cause trial dates to be lost, because they have already been lost due to the making of the application, but that simply reinforces the fact that the proposed amendments are "very late". Clearly, in circumstances where the making of an application to amend grounds has resulted in hearing dates being lost, it does not lie in the mouth of the applicant to say that allowing the application would not cause hearing dates to be lost because they have already been lost by the time the application falls to be determined – that would be perverse.

(2) If the tribunal does not consider the proposed amendments to be "very late", then nevertheless, as the tribunal said in *IPS*, they "cannot be described as anything other than significant and serious" (see [23]). In *IPS* the application to

amend grounds was made by the appellant after the parties had filed and served their lists of documents and were waiting for further directions from the tribunal regarding the exchange of witness evidence. The application in the present case was made after lists of documents and witness evidence had been served.

(3) Even if an application to amend does not cause a hearing date to be lost, nonetheless the later the application is made, the less likely it is to be permitted. As stated in *Exchequer Solutions*, at [27] and [28]:

“27. *Quah Su-Ling*, of course, was a case dealing with a situation where the trial date had been lost as a result of the proposed amendment and it has to be seen in that context. *Notwithstanding that, it is clear from the principles set out at [38] by Carr J that the later a new point is raised, the higher the burden on the applicant to justify its ability to be able to rely on that new point.*

28. *However, lateness, as Carr J said, should not be looked at purely in absolute terms. That is one factor to take into account, but it must also be looked at in relative terms, taking into account the nature of the new point that is being raised, including its merits, the reasons why it has only been raised at the point that it has been raised and the consequences for the parties and for other court or, in this case, tribunal users.*” (Emphasis added.)

(4) It is not correct that there is little dispute about the s 687(2) ground, and it would not require any additional time at the hearing of the appeal. The appellant is wrong to assert that HMRC would summarily concede on this issue. Section 687(2) does not refer to the distributable reserves of the company in question as is the assumption underpinning this ground. Rather, it refers to “the maximum amount that could in any circumstances have been paid to the person by way of a qualifying distribution at the time when the relevant consideration is received”. Ascertaining that amount will turn on the evidence and will be subject to argument by both parties. For example, RCHL may have had subsidiaries which could have paid up dividends to RCHL, which would have in turn increased the amount that could have been paid by RCHL to the appellant by way of a dividend. Hence, this ground will be the subject of dispute, and so it is not the case that the ground will not add to the length of the hearing. Furthermore, the extent of the evidence that will be required to deal with the ground will depend on precisely how the parties’ positions unfold.

(5) In *Butt*, at [65], the tribunal noted that “it is relevant to consider what work would need to be done if the amendment is allowed”. If the new ground is permitted then the proper way forward would, in outline, be as follows:

(a) The appellant should formally amend his grounds of appeal and explain why, in his view, the quantum of the assessment should be reduced pursuant to s 687(2).

(b) HMRC should then amend their statement of case setting out its analysis in relation to s 687(2). This analysis might, for example, make reference to amounts which HMRC consider that RCHL’s subsidiaries could have paid to it by way of dividend and which RCHL could then have paid out as dividends.

(c) The appellant might then have an opportunity to respond to HMRC’s analysis. It might be that the relevant figures (for example, the extent to which RCHL could have obtained dividends from subsidiaries and paid these out) can be agreed, such that the dispute is limited to a point of principle, or it might be that there is also dispute about the

relevant figures. The foregoing will have an impact on the extent to which evidence is required.

(d) The parties' lists of documents may then need to be amended to ensure that they contain the relevant evidence, and it may also be that witness evidence (including possibly expert witness evidence) is required.

(e) It is only after the foregoing steps have been carried out that the case can properly be listed for a hearing.

(6) It can be seen from the foregoing that, if the appellant is permitted to raise the s 687(2) ground, then it will result in significant delay. The previously proposed hearing window, during which there were commonly available dates, has already been missed, and further delay will occur if the application is permitted. In addition, HMRC will be put to further cost, such as in amending their statement of case.

(7) That the correct figure for distributable reserves is £4.24 million is not agreed. That was the figure shown in the accounts as at 1 Dec 2015 but the transaction happened in March 2016; the figure could have changed and that figure following year was different. What the reserves were at the relevant date needs to be proved. The appellant has stated previously that HMRC is "over-complicating the matter" in relation to the s 687(2) ground, and that: "There need be no factual dispute between the parties because we accept (and will do so in any statement of agreed facts if HMRC so wish) that the aggregate distributable reserves of those companies with positive balance sheets exceeded £10,000,000." However, the latter acceptance does not necessarily mean there will be no factual dispute because the appellant might try to take other points (albeit incorrectly); for example, the appellant might try to argue that, even though the group as a whole had distributable reserves in excess of £10 million, RCHL could not compel that dividends be paid to it. The appellant could also raise other points which, for example, could require examination of the company's articles of association and of which companies have positive or negative balance sheets.

(8) It can be seen from the foregoing that, if the appellant is permitted to raise the s 687(2) ground, then it will result in significant delay. The previously proposed hearing window, during which there were commonly available dates, has already been missed, and further delay will occur if the application is permitted. In addition, HMRC will be put to further cost, such as in amending their statement of case.

(9) It is irrelevant that, as the appellant submits, the s 687(2) ground is a live ground of appeal in another case. As set out in *Quah* at [93], it is not an answer for the appellant to point to the fact that HMRC faces a similar issue in other proceedings. The appellant also states that in the other case "the factual dispute ought to be minimal or non-existent"; it is unnecessary to comment on that because, whether or not there was factual dispute in another case, does not answer whether there will be in the present case; and even if matters unfold such that there is no factual dispute between the parties in this case, nonetheless there will be delay and additional time/cost for HMRC in responding to the appellant's new arguments which will, in itself, cause prejudice to HMRC.

(10) It is difficult for HMRC to estimate precisely how long submissions relating to the s 685(6) ground will take without knowing exactly how the appellant will frame his argument (and thus the number of points that HMRC will need to respond to). However, at present, HMRC envisages that

submissions relating to this ground may take more than the two hours suggested by the appellant. In this respect it may be noted that another appeal relating to the relevant provisions, namely *Hunt, Hunt & Davis v HMRC* [2025] UKFTT 00538 (TC) (“*Hunt*”), was heard by the tribunal earlier this year. The only issue at the hearing related to s 685(6) yet the hearing took roughly 2 days. It appears that a particular argument advanced in that case, namely that the reference in s 685(6) to s 685(2) was not a drafting error, is not being advanced in this case, and thus in this case submissions in relation to s 685(6) are likely to take less time than they did in *Hunt*. Nevertheless, the length of the hearing in *Hunt* suggests that a mere additional two hours is unlikely to be adequate.

(11) In any case, once again it would not be appropriate for the s 685(6) ground simply to be added to an existing hearing without any prior steps. More specifically, the appellant should formally amend his grounds of appeal setting out his position on s 685(6), and HMRC should then amend their statement of case (which will involve HMRC incurring further cost). It is important for this process to be carried out for two related reasons:

- (a) It will enable the parties to be clear as to each other’s positions so that they can properly prepare for a hearing. Otherwise, it will be necessary to wait until skeleton arguments are served, which will leave limited time to properly consider each other’s positions.
- (b) It may be that the dispute between the parties is one of principle and does not require further evidence to be adduced, but this cannot be known for certain until the process of formally amending the grounds of appeal and the statement of case is done. The scope for factual disputes as regards the s 685(6) ground may be less than as regards the s 687(2) ground but ultimately the appellant is seeking to draw a distinction with the *Osmond* case which shows the facts are relevant. Due process needs to be followed which would take time. If additional evidence is required, then further steps will be needed.
- (c) Again, therefore, it can be seen that if the appellant is permitted to advance this ground, then this will result in further delay; and, of course, the making of the application has already caused the existing hearing window to be missed.

(12) Overall, as matters stand (without both parties having fully set out their positions) it is difficult to be certain as to how much additional time will be required at the hearing if the new grounds can be advanced. It is clear that some additional time will be required. If the application is allowed it will not be possible for the appeal to be heard in one day as was proposed previously. HMRC expect that the additional time required would be in the region of an extra three-quarters of a day to a full day (and possibly longer depending on the precise arguments advanced by the appellant). Whilst a hearing can no doubt be listed which accommodates the extra time required, as set out, various other steps would need to be undertaken before the hearing which means that the hearing of the appeal will be delayed (over and above the delay that the application has already caused). That is a powerful reason why the application should be refused, especially given that the appellant has previously changed his grounds of appeal, and there is no reason why the new grounds could not have been raised earlier. Further, the fact that the previous hearing window has been lost due to the application reinforces the fact that the application was made far too late. In the circumstances it is submitted that, contrary to the appellant’s

assertion if he is permitted to advance the new grounds then that would be contrary to the requirements of fairness and proper case management.

(13) It can be seen from the discussion above that the appellant is wrong to state that “the two new grounds of appeal proposed in the present case concern pure questions of law as applied to agreed facts. And besides possibly adding (in total and at most) half a day to the hearing length, there will be little practical downside to the application being granted”.

(14) Further, the suggestion that allowing the application “will not cause any existing listing to be lost” is not accurate. Very strictly the appeal has not yet been listed but (as noted above) listing information was provided to the tribunal and there were common dates available in the previous hearing window, but these were lost due to the lateness of the application. If the application is allowed, further delay will be suffered.

25. In response to the points made by HMRC set out above, the appellant submitted that:

(1) The tribunal encourages parties to see if they can agree applications such as this. Hence, the appellant first raised the new grounds with HMRC on 31 January 2025 and asked HMRC if they could agree to them within 7 days. It was only on 4 March 2025 that HMRC notified the appellant that they had decided not to consent to new grounds. So, in effect, the appellant waited for HMRC to respond to its new grounds during this extended period. The appellant meanwhile had to prepare witness statements and seek to agree the facts. Hence the appellant had to make a contested application to the tribunal which the appellant did within days of receiving notification of HMRC’s objection to the new grounds. It seems the reason for HMRC’s delay was to create the impression that the application was made late. But, in reality, it was HMRC’s delay which led to the application not being made until 10 March 2025.

(2) HMRC has submitted that, if no application was made, this case would have been heard in September 2025. However, that is speculative; HMRC do not explain why that is the case. HMRC offered seven potential dates in July 2025 and eight in September 2025. The appellants were able to match four of the September dates but this, in the end, proved to be academic. The parties were able to agree a date but it was conditional on whether one of the witnesses needed to be cross-examined because he was not available on the date and tribunal did not confirm any date.

(3) Given the small incremental time to address the additional grounds and the lack of likelihood that there would be any new facts being put forward by HMRC in response to the new grounds, the appellant fails to see (and does not accept) the factual basis of this objection. It is possible that the tribunal could have added half a day for new grounds but that is not known. In any event, this is not a late application which caused the hearing date to be lost; there was no actual hearing date and HMRC themselves caused the delay.

26. HMRC responded that (1) there is no basis for the appellant’s allegation that HMRC deliberately delayed providing their view on the new grounds, and (2) the appellant could have fired off an application to the tribunal and there is no indication that any chasers for a response were sent by the appellant to HMRC. The appellant simply sat there. The hearing of the *Hunt* case was in February 2025 and, whilst it is speculation, that may have had an impact on timing. The application was made on 10 March 2025 and on 20 March 2025 listing information was provided to the tribunal and the parties had common dates in September 2025. A hearing arranged by the

tribunal in the specified hearing window could have gone ahead if the appellant had not sought to amend their grounds of appeal or made the application at a much earlier stage as he should have done. The fact that the application was made very late or on the cusp of being very late such that it was not possible for this case to be heard in September 2025 is a powerful indicator that permission should be refused.

27. Finally, HMRC submitted that, as in their view the proposed amendments were made very late (or failing that were on the verge or cusp of being very late), their merits should be taken into account. They submitted that the principles to be derived from the relevant caselaw are as follows:

(1) If a proposed amendment to grounds of appeal is very late (in the sense identified at [38(c)] in *Quah*), then the merits of the proposed new grounds should be considered in determining whether permission to amend should be granted. Importantly, weak merits can be taken into account in deciding to refuse permission to amend, even if the merits are not so low that there is no real prospect of success: see *Quah* at [57] onwards, and *CNM Estates* at [67] to [77].

(2) Irrespective of whether a proposed amendment is very late or not, permission to amend must be refused if the new ground has no real prospect of success (see *CNM Estates* at [77], and *Kawasaki Kisen Kaisha Ltd v James Kemball Ltd* [2021] EWCA Civ 33 at [16] and [17]).

(3) If a proposed amendment is not very late, then, unless there is no real prospect of success, normally the merits of the new ground are not relevant; merits might however be relevant, even though strictly a proposed amendment is not very late, if it is on the cusp of going from late to very late; see *CNM Estates* at [76].

28. HMRC made the following points:

(1) At the very least both of the new grounds are weak and this reinforces the fact that permission should be refused. Indeed, in relation to the s 685(6) ground, in light of recent tribunal decisions, the proposed ground has no real prospect of success; thus permission must be refused irrespective of how late the proposed amendment was.

(2) HMRC is not taking the point that the s 687(2) ground has no real prospect of success. However, as explained above, the proposed amendments in this case were “very late” or at any rate on the cusp of being “very late”, given that, shortly after the application was made, listing information was provided and there were commonly available dates:

(a) It is appropriate to consider the merits of the s 687(2) ground. At the very least, the appellant’s argument on this ground is weak. Section 687(2) requires one to consider the extent to which RCHL could have paid dividends and, as matters stand, the appellant’s argument is simply that, in answering this question, one can only take into account RCHL’s existing distributable reserves. That is obviously a weak argument. Section 687(2) specifically asks whether the company (RCHL) could have paid dividends “in any circumstances”, which is clearly very broad and can encompass circumstances where a company could be paid dividends by its subsidiaries and then itself pay out dividends; one is not simply limited to looking at the existing distributable reserves of the company with tunnel vision.

(b) The weakness of this ground reinforces the fact that permission to amend should be refused (although, for the avoidance of doubt, even if it

is not accepted that the proposed ground is weak, the other reasons set out above are sufficient to mean that permission should be refused).

(3) As regards the s 685(6) ground:

(a) It has no real prospect of success. The appellant's interpretation of s 685(6) is inconsistent with *Osmond*, and that interpretation was subsequently followed in *Hunt*. It is trite law that the principle of judicial comity requires that the tribunal should follow an earlier decision of the tribunal unless satisfied that the earlier decision was wrong; a fortiori that is so when there is more than one decision holding the same thing on the same point. Thus, this ground has no real prospect of success and that is another reason why permission to raise it should be refused. Further, even if the tribunal does not agree that this ground has no real prospect of success, the proposed amendment was "very late" (or on the verge of being "very late"), such that the tribunal should nonetheless consider the merits of the proposed new ground.

(b) At the very least, in light of the tribunal's decisions in *Osmond* and *Hunt*, the s 685(6) argument is a weak argument. That reinforces the fact that the tribunal should not give permission for the appellant to raise the s 685(6) ground. Even if the tribunal does not accept that the s 685(6) ground has no real prospect of success, or that it is weak, nonetheless the other reasons set out above are sufficient to mean that permission to raise it should be refused.

(c) For completeness it may be noted that s 685(6) refers to s 685(2), whereas it should obviously refer to s 685(4) which defines "relevant consideration". In *Osmond* the tribunal agreed with the parties that there was a drafting error, whereas in *Hunt* the tribunal did not believe that s 685(6) contained an obvious drafting error capable of correction by the tribunal. Nonetheless, fundamentally the tribunal in both cases considered that s 685(6) is only relevant in relation to companies that can distribute share capital by way of dividend; thus the proposed s 685(6) ground is destined to fail. Should authority be required then see, for example, *Redevco Properties UK 1 Ltd v HMRC* [2023] UKFTT 665 at [50] to [56].

29. The appellant made the following further submissions in response to the points made to HMRC:

(1) An application of this nature is always going to be made later than ideal. The caselaw sets out that there is a key boundary between late and very late additions, which may cause or risk causing the hearing date to be lost. The appellant does not accept that the application was made very late for the reasons already set out but, even if that is not accepted, that is not fatal to the acceptance of new grounds; there is simply a higher hurdle to climb.

(2) In any event, as set out above, there was no lost listing of the hearing of this appeal; the point was first raised with HMRC in January 2025 when there was no listing. The parties had almost agreed a date for a hearing but the appellant did not even know if there was agreement that would be no cross-examination of the witness who was not available. If HMRC had responded more promptly when the appellant asked them to agree or object to the new grounds, the timing concern falls away. It is notable that new points can be raised at the hearing itself as well as later. As long as the other side has a fair opportunity to address points, the tribunals and courts are slow to stop new arguments being raised.

(3) There is no real prejudice to HMRC, they have plenty of time to deal with the issues, to some extent they are dealing with them in other cases and the facts are not complex. Essentially the new grounds turn on law and uncontroversial facts but if HMRC want to examine the facts they can do so.

(4) It is highly material that there is a public interest in taxpayers paying the correct amount of tax; this is a different category of litigation to regular civil litigation of the type in *Quah*.

(5) If successful, one of the grounds would be a “knock-out blow”, and the other ground would halve the amount of tax at stake. Both arguments would cause significant prejudice for the appellant if not admitted.

(6) In *CNN Estates* it is clear that, except if amended grounds/new grounds are sought very late, the merits of the case should be determined at a full trial unless the case is very weak. Neither ground is very weak.

(7) On the s 687(2) ground, (a) the holding company has distributable reserves of around £4.24 million. The facts are not controversial and are capable of agreement. HMRC dispute the reading of the legislation; that is a question of law. This point is before Judge Fairpo for consideration in another case and there is no prejudice to HMRC in dealing with it, (b) the appellant’s argument is not very weak; it is based on a straightforward reading of the statute and on the position in the balance sheet. Essentially there is a dispute over the meaning of the term “in any circumstances”. In the appellant’s view this is confined to external circumstances, such as where bank lending may have an impact on whether funds can be distributed by a company; in those circumstances a taxpayer could not say it cannot make a distribution because those words enable that to be overridden, and (c) HMRC’s references to further factual challenges are speculative. Even if it is necessary to look at the distributable reserves of the company and a number of subsidiaries, that is not a complex matter. I note that, following the hearing, the appellant raised that the tribunal has released the decision by Judge Fairpo in *Oscroft and others v HMRC* UKFTT 251 (TC) (“*Oscroft*”) in which this point was decided in favour of HMRC. The appellant’s view is that this is not material on the basis that the decision is not binding and is susceptible to challenge and judicial authority above the tribunal may decide freely on the point.

(8) The s 685(6) ground is bit more complex. It was considered in *Osmond* (see in particular [62] and [63] of the tribunal’s decision) but, whilst there are some overlaps, this is different. There have been a string of cases since *Osmond* challenging various aspects of it. The decision on the “main purpose” test was challenged successfully in the UT. In *Hunt* the tribunal disagreed. There are already some doubts about the decision in *Osmond*. Following the hearing the appellant pointed out that in *Oscroft* the time limit point was decided in favour of the taxpayer. Decisions of the tribunal are not binding authority, so it is hard to say this ground has no merit. The tribunal may decide to follow the decision in *Osmond* on this ground but judicial authority above the tribunal may decide freely on the point. The tribunal in *Osmond* did not dismiss the contrary argument to that adopted by the tribunal as weak; they said they recognised “the force of” the “robust and commonsensical interpretation of the legislation” argued for by the taxpayer but that they preferred the interpretation submitted by HMRC for the reasons they then gave. On that basis this ground can hardly be doomed to fail and the taxpayer should have the right to run it in a higher court even if the tribunal takes a similar stance to that taken in *Osmond*.

## Decision

30. I have made this decision having regard to the overriding objective in the Rules, the principles set out in *Quah* (as considered in the other cases to which the parties referred) and the principle set out in *Tower MCashback*, in effect, that it is one of the duties of the tribunal to have regard to the public interest in taxpayers paying the correct amount of tax. On the basis of those considerations and principles, I have decided that, in all the circumstances of this case, it is in the interests of justice and fairness to permit the appellant to rely on the new grounds in these appeal proceedings.

31. I note the following as regards the timing of the application:

(1) The appellant notified HMRC that he wished to rely on the new grounds on 31 January 2025, around 5 weeks before HMRC were due to submit their witness evidence (by 6 March 2025) (and shortly before the appellant was to do so on 6 February 2025) and nearly seven weeks before the parties were due to serve listing information for a hearing in the period from 20 May to 20 September 2025.

(2) HMRC knew of the appellant's intention to rely on the new grounds, therefore, a minimum of nearly four months and a maximum of nearly 8 months before, on the timetable then set by the tribunal, the date on which this appeal could be heard. In the event, it appears the parties had only very limited availability for a hearing in the hearing window (in September 2025) and it is not clear if in a date could have been selected due to a difficulty with one of the witnesses. In fact, the tribunal did not fix a date for the hearing in the hearing window.

(3) The appellant did not make the application until 10 March 2025 because he sought to agree the position with HMRC before making a formal application to the tribunal. HMRC did not reply to the appellant's request for confirmation of their stance on the new grounds until 4 March 2025, nearly five weeks after they had been informed of the appellant's intention. At that point, listing information had not yet been provided and any hearing would not have taken place until, as a minimum over two months and as a maximum over six months after the application was made. I consider it is reasonable for the appellant to seek to agree the position regarding the new grounds with HMRC and to wait until HMRC had stated their position before making the application to the tribunal. Parties are encouraged to seek to agree such matters without recourse to the tribunal where possible.

32. Both of the new grounds relate to discrete legal points of statutory interpretation. As regards the s 687(2) ground, there is a relatively limited material factual element. It may be necessary to establish the level of distributable reserves of the relevant company and a number of subsidiaries. That is a relatively straightforward factual analysis which is unlikely to be complex. It appears highly unlikely that the s 685(6) ground will involve any substantial factual dispute. It is reasonable to suppose, therefore, that (1) had the application been dealt with promptly by the tribunal, there would have been sufficient time for the parties to prepare for a hearing within the original hearing window, following the type of due process which HMRC referred to in their submissions, and (2) the eventual hearing would have been half a day to a full day longer than the parties had originally estimated (namely, one day). It has taken the tribunal some time to deal with this contested application which, of itself, has led to delay but that is not the type of delay that should be a factor weighing against the

approval of the application; inevitably such matters take time to resolve by the formal processes of the tribunal.

33. With the points made above in mind, I do not consider that the appellant can be regarded as having sought to introduce the new grounds late or very late. On that basis the merits of the new grounds are of limited relevance to the question of whether the new grounds should be admitted. As set out in the caselaw referred to above, at most the prospects of the new grounds succeeding should be considered in the same way as for summary judgment, namely, whether they have a real as opposed to a fanciful prospect of success. At the stage of considering a proposed new ground that test imposes a comparatively low burden and the question is whether it is clear that the new claim or defence has no prospect of success. The tribunal is not to engage in a mini-trial. I consider that, for the reasons set out by the appellant, it is not clear that either of the new grounds has no prospect of success. As the appellant submitted, whilst the tribunal has decided against the taxpayer on these points in other cases, it is possible that a different tribunal and/or a higher judicial authority than the tribunal may take a contrary view to that taken in those cases.

34. If the application were not approved, the appellant clearly would suffer prejudice in not being able to raise grounds which might succeed and thereby at least halve the potential tax subject to these proceedings or reduce it to nil. In this context, I am mindful that it is part of the tribunal's function to ensure that a taxpayer is subject to the correct amount of tax, neither too little nor too much. On the other hand, HMRC have not identified any significant prejudice to them as a result of the introduction of the new grounds given, in particular, that they were made aware of them at a relatively early stage in proceedings and had the opportunity to raise their objection much sooner.

35. Finally, I note that the appellant has not identified any particular, good reason for why the new grounds were not raised either at the inception of the appeal or when the appellant removed one of the original grounds. Overall, however, I consider that factor is outweighed by the other factors which weigh in favour of the admission of the new grounds. I do not accept HMRC's point that accepting these new grounds means that the appellant can go on indefinitely introducing further grounds/arguments. Any further application to introduce further new grounds would have to be considered on its own merits (as viewed in context in light of the history of the proceedings) at the appropriate time.

### **Conclusion**

36. For all the reasons set out above, the application is approved.

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

**RELEASE DATE:  
18 March 2026**