Neutral Citation: [2025] UKFTT 00300 (TC)

Case Number: TC09450

FIRST-TIER TRIBUNAL
TAX CHAMBER

Taylor House, London

Appeal reference: TC/2023/00316

Income Tax – Ramsay doctrine and s381 ITTOIA 2005 – profit income or capital – procedural validity of discovery assessment – s29(5) TMA test – distinct parts of an insufficiency of tax – Human Rights and High Income Child Benefit Charge – Appeal dismissed

Heard on: 8 – 10 October 2024
Judgment date: 10 March 2025

Before

TRIBUNAL JUDGE ROSA PETTIFER
DR CAROLINE SMALL

Between

BRIAN LYNCH

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Mr Keith Gordon of counsel, instructed by Irwin Mitchell LLP

For the Respondents: Mr Harry Winter of counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs

DECISION

INTRODUCTION

1. Over a number of tax years the Appellant took part in a marketed tax avoidance scheme. Following an investigation into the Appellant's participation in that scheme HMRC issued three closure notices and one discovery assessment.

2. The Appellant now appeals against those decisions of HMRC on various grounds. The grounds that the Appellant relies on are summarised as follows:

   (1) A challenge to the imposition of a 'dry tax' income tax charge (the **Dry Tax Charge**) arising from the Appellant's participation in the marketed tax avoidance scheme (**Ground 1**).

   (2) A procedural challenge to the discovery assessment (**Ground 2**).

   (3) A human rights challenge to the imposition of the High Income Child Benefit Charge (**HICBC**), (**Ground 3**).

3. The details of the decisions and the decisions to which the grounds relate are set out below:

Tax year	**Type of decision**	**Date of decision**	**Grounds**	**Amount of tax**
2010/11	Closure notice	14 January 2019	1 (dry tax charge)	£2,152,182.57
2011/12	Discovery assessment	15 March 2016	1 (dry tax charge) 2 (procedural challenge)	£3,657,084.66
2012/13	Closure notice	14 January 2019	1 (dry tax charge) 3 (human rights challenge to HICBC)	£2,735,679.14
2013/14	Closure notice	14 January 2019	1 (dry tax charge) 3 (human rights challenge to HICBC)	£1,397,414.75

4. The parties asked for a decision in principle as to the Appellant's liability only (not quantum) as set out in the closure notices for the tax years 2010/11, 2012/13 and 2013/14 (the **Closure Notices**). For the reasons given below we dismiss the appeal in respect of the Appellant's liability set out in Closure Notices.

5. Subject to what we say about quantum, we also dismiss the Appellant's appeal regarding the discovery assessment for the tax year 2011/12 (the **Discovery Assessment**) for the reasons given below. We reduce the quantum of the Discovery Assessment to £3,652,638 by agreement of the parties.

PRELIMINARY POINTS

Parties' submissions

6. We are grateful to Counsel for their skeletons, submissions, and willingness to engage with our questions. We set out below our summary of those submissions on the law and the facts. The parties should, however, be assured that when preparing this decision, the terms of the skeletons were reread and our notes of the hearing reviewed. Because we do not deal specifically with any point that does not mean that it was not considered in the round when reaching our decision.

Burden and standard of proof

7. Unless specified otherwise the burden of proof is on the Appellant.

8. The standard proof on all issues is the balance of probabilities.

THE FACTS

9. We set out the majority of our findings of fact in this part of our decision. Most of them require no discussion as they were not in dispute. However, where they were in dispute we provide the reasons for our findings below. We make some findings of fact in other parts of this decision where it is clearer to do so.

Grounds 1 and 2 – the Dry Tax Charge and the procedural challenge to the Discovery Assessment

Caledonian

10. NT Advisors disclosed a marketed tax avoidance scheme (**Caledonian**) to HMRC on a Disclosure of Tax Avoidance Schemes form dated 11 September 2009 (the **AAG1**). The AAG1 included some description Caledonian's arrangements. Caledonian was given a scheme reference number: 01359376.

11. In the tax years 2010/11, 2011/12, 2012/13 and 2013/14 the Appellant took part in Caledonian.

12. Caledonian involved a limited partnership called Ridgeback Investments No. 1 Limited Partnership (**Ridgeback**). Caledonian sought to generate for the partners in Ridgeback, a deduction for interest relief on a loan to invest in that partnership pursuant to s383 and s398 Income Tax Act 2007 (the **Interest Relief Claim** and **ITA 2007** respectively). Part of Caledonian involved Ridgeback entering a series of transactions involving promissory notes which were qualifying corporate bonds (the **QCBs**).

13. There is one dispute of fact that it is convenient to deal with at this stage of our decision. During his submissions (see re the 'Face Value Issue' below), Mr Gordon asserted that there was no acquisition/disposal of the QCBs at any amount less than face value. Mr Winter disagreed. Mr Winter's skeleton included a comprehensive appendix, which, by reference to numerous documents in the hearing bundle, detailed the sales and purchases of the QCBs (including their prices). The parties proceeded on the basis of those documents which were provided to HMRC by NT Advisors in the course of HMRC's investigation into the Appellant's participation in Caledonian. Despite his assertion Mr Gordon did not attempt to challenge the details set out in Mr Winter's appendix by referring to any of the documents in the hearing bundle nor in any other way. Having carefully reviewed the relevant documents, we find that they support Mr Winter's position. Furthermore, we find as fact that: a number of transactions involved the sale of the QCBs at face value; a number of transactions involved the sale of the QCBs at a price more than their face value; and a number of transactions involved the sale of

the QCBs at a price less than their face value. We set out the further details of those findings in the next paragraph.

14. The steps in Caledonian in the years that the Appellant took part in (as a ‘scheme user’) were as follows:

(1) Wylemere Limited (**Wylemere**) bought units in Ridgeback.

(2) Interest bearing loans were provided to scheme users by Tarragona Investments Limited (**Tarragona**).

(3) The scheme users used the money from Tarragona to purchase units in Ridgeback from Wylemere.

(4) The scheme users granted call options to Ocana Enterprises Limited (**Ocana**). When exercised those options guaranteed that the scheme users would make a loss on their investment in Ridgeback. Funds sufficient to enable Ocana to pay the price under the option flowed from Wylemere to Ocana (via another company).

(5) The transactions involving the QCBs were as follows:

(a) The QCBs were issued by Lugo Assets Limited (**Lugo**), (**Step 1**).

(b) Ridgeback borrowed the QCBs from Alava Assets Limited (**Alava**), (**Step 2**).

(c) The sale of the QCBs at a price more than their face value by Ridgeback to Girona Investments Limited (**Girona**), (**Step 3**).

(d) The sale of the QCBs at a price less than their face value by Girona to Nepala Lights Limited (**Nepala**), (**Step 4**).

(e) The sale of the QCBs at a price less than their face value by Nepala to Ridgeback, (**Step 5**)

(f) The sale of the QCBs at face value by Ridgeback to Girona, (**Step 6**).

(g) The sale of the QCBs at a price less than their face value by Girona to Nepala, (**Step 7**).

(h) The sale of the QCBs at a price less than their face value by Nepala to Ridgeback, (**Step 8**).

(the **QCB Transactions**). Steps 1 to 8 are also referred to as rounds.

(6) Ridgeback then returned the promissory notes to Alava. The promissory notes are qualifying corporate bonds and so no Capital Gains Tax arises for Ridgeback’s members on these transactions.

(7) Ridgeback made a profit on the QCB Transactions and loaned that profit to the scheme users to enable them to pay interest on their loans from Tarragona.

(8) Ridgeback then made distributions to scheme users in the amounts of those profits, which offset the loans from Ridgeback to the scheme users completely.

(9) Ocana then exercised all its call options: buying the scheme users’ units in Ridgeback. As set out above the scheme users made a loss. Consequently, the scheme users were unable to pay back their loans from Tarragona in full.

(10) The remaining amounts of loans from Tarragona (to the scheme users) were converted to non-interest bearing loans repayable by the scheme users in 70 years and left outstanding indefinitely.

15. The Appellant was a member of Ridgeback (a limited partnership). Also that Ridgeback conducted a non-trade business of dealing in promissory notes. Therefore, any interest income of Ridgeback flowed through to the Appellant for tax purposes in accordance with standard partnership tax principles.

16. The Appellant participated in the following rounds of QCB Transactions:

(1) UIB R1: this round ran across the tax years 2010/11 and 2011/12.

(2) UIB R9: this round ran across the tax years 2011/12 and 2012/13.

(3) UIB R13: this round ran across the tax years 2012/13 and 2013/14.

(the **Relevant Rounds**).

17. Caledonian failed to generate the interest relief on a loan to invest in Ridgeback partnership pursuant to s383 and s398 Income Tax Act 2007 (**ITA 2007**).

Facts relevant to Ground 2 only – the procedural challenge to the Discovery Assessment

18. There was a discovery.

19. The Appellant's self-assessment tax returns for 2009/10, 2010/11 and 2011/12 and the AAG1 are 'made available' for s29(5) Taxes Management Act 1979 (**TMA**) purposes pursuant to s29(6)(a) and s29(7)(a)(i) in relation to the tax returns and s29(6)(d)(i) TMA in relation to the AAG1.

20. The date on which HMRC ceased to be entitled to enquire into the Appellant's self-assessment tax return for the tax year 2011/12 was 30 April 2014.

Ground 3 – the human rights challenge to the HICBC

21. The Appellant and his wife have two children, one born in 2005 and one born in 2006. The Appellant's wife was entitled to, applied for and received (into an account in her sole name) child benefit payments for both children.

22. On the basis that the other parts of the Closure Notices and Discovery Assessment stand the Appellant (subject to the outcome of the human rights arguments below) is liable to the HICBC for the tax years 2012/13 and 2013/14. The Appellant's liability arises as he falls within 'Condition B', see s681B(4) Income Tax (Earnings and Pensions) Act 2003.

GROUND 1 – THE DRY TAX CHARGE – THE RAMSAY ARGUMENT

23. The issue to be determined is whether the Appellant can rely on the *Ramsay* doctrine to defeat the Dry Tax Charge.

The law – Ground 1 – the Dry Tax Charge – the Ramsay argument

24. The Income Tax (Trading and Other Income) Act 2005 (**ITTOIA 2005**) provides in relevant part:

> **369 Charge to tax on interest**
>
> (1) Income tax is charged on interest.
>
> (2) The following sections extend what is treated as interest for certain purposes–

…….

section 381 (discounts).

…….

371 Person liable

The person liable for any tax charged under this Chapter is the person receiving or entitled to the interest.

…….

381 Discounts

(1) All discounts, other than discounts in deeply discounted securities, are treated as interest for the purposes of this Act.

(2) In this section "deeply discounted securities" means securities to which Chapter 8 of this Part applies (profits from deeply discounted securities).

25. The ITA 2007 provides in relevant part:

398 Loan to invest in partnership

(1) This section applies to a loan to an individual that is used in one or more of the ways specified in subsection (2).

(2) The ways are—

(a) purchasing a share in a partnership,

…….

The arguments – Ground 1 – the Dry Tax Charge – the Ramsay argument

The Appellant's arguments

26. The Appellant relies on the *Ramsay* doctrine to seek to establish that there can be no Dry Tax Charge.

The Appellant's positive case – the holistic approach to s381 ITTOIA 2005

27. In relation to s398 ITA 2007 Mr Gordon says that a holistic approach must be taken to all the steps in Caledonian. Once that is done Mr Gordon adopts the outcome set out in HMRC's Statement of Case which says that:

> *..on a purposive construction of s398 ITA 2007 (which governs the relevant form of interest relief), a scheme user did not purchase a share in a partnership within the meaning of the wording of that section but purchased instead a predetermined investment return with the hope of reducing his tax liabilities.*

Therefore, the position before us was that the parties agree that the Interest Relief Claim cannot succeed because of the *Ramsay* doctrine (the **Purposive Argument**).

28. Mr Gordon further explains that aside from the tax savings, the series of transactions making up Caledonian had no commercial or other discernible purpose. As such, under a

holistic, approach all intervening steps are ignored. Thus when construing s381 ITTOIA 2005 purposively and applying it to the transaction, viewed realistically, it is not possible to say that there is any taxable discount arising within the meaning of that section. Therefore, the Dry Tax Charge cannot arise.

The Appellant's positive case – the focussed approach to s381 ITTOIA 2005

29. The Appellant's case is even if one focussed on the transactions concerning the QCBs this circular arrangement could not survive a challenge post-*Ramsay*. Or putting it another way Mr Gordon says that if such transactions generated a loss (rather than a gain) *'any argument that the technical loss arising qualifies for relief would rightly get short shrift'.*

Bifurcation of facts – why the Appellant says HMRC's case is impermissible

30. During the hearing, Mr Gordon developed the argument that HMRC's imposition of the Dry Tax Charge results in an impermissible bifurcation of facts.

HMRC's arguments

HMRC's s371 ITTOIA 2005 case

31. HMRC meets the Appellant's *Ramsay* case from a different starting point: s371 ITTOIA 2005 rather than s381 ITTOIA 2005. s371 ITTOIA 2005 provides who is liable for interest charged pursuant to s369 ITTOIA 2005. Mr Winter says that when applying s371 ITTOIA 2005 we must not look at the composite of the whole scheme but rather the transaction giving rise to the income in question: that is each occasion Ridgeback entered a sale and purchase agreement at a discount or premium (we will refer to this approach as the **Single Transaction View**): ie Step 3, Step 5 and Step 8. Consequently, Ridgeback both received and was entitled to interest income either of which is sufficient for income tax liability. Authority for this proposition comes from *UBS AG v HMRC* [2016] UKSC 13 *(**UBS**)*, *Khan v HMRC* [2021] EWCA Civ 624 *(***Khan)** and *Good v HMRC* [2023] EWCA Civ 114 (***Good***).

HMRC's response to the Appellant's s381 ITTOIA 2005 case

32. HMRC say that s381 ITTOIA 2005 cannot properly be construed to exclude from the wording *"all discounts"* discounts which form part of a pre-ordained tax avoidance scheme. Additionally, the better approach to s381 ITTOIA 2005 is as with s371 ITTOIA 2005 and that is to take the Single Transaction View (ie consider each occasion Ridgeback entered a sale and purchase agreement at a discount or premium), ie Step 3, Step 5 and Step 8.

33. For completeness, HMRC asserted and the Appellant did not demur that the Interest Relief Claim also failed pursuant to s809ZG ITA 2007 (the **Main Benefit Argument)** and s384A ITA 2007 (the **Design Argument**). HMRC did not seek to meet the Appellant's *Ramsay* argument by reliance on these arguments and so we do not address them.

34. Therefore, HMRC conclude that the fact that the discounts and premiums arise out of pre-ordained tax-driven transactions does not allow Ridgeback and therefore the Appellant to escape liability for the Dry Tax Charge.

Discussion and findings – Ground 1 – the Dry Tax Charge – the Ramsay argument

Preliminary points

35. This is a useful juncture deal with Mr Gordon's position that if the Appellant was successful on his *Ramsay* arguments then the rest of the issues in this appeal would fall away. However, insofar as the Appellant's case on s381 ITTOIA 2005 Mr Winter reminds us that it is case law (*Lomax (HM Inspector of Taxes) v Peter Dixon & Son*, Ltd 25 TC 353 ***Lomax***) rather than s381 ITTOIA 2005 (which only refers to discounts) or any other statutory provision that provides that premiums of an income nature are interest. Therefore, as the *Ramsay* doctrine is one of statutory interpretation the Appellant's *Ramsay* case can only assist him in relation to any discounts and not any premiums.

Applying the Ramsay doctrine

36. The parties agreed, as do we, that as the *Ramsay* doctrine is one of statutory interpretation the Appellant can rely on it to argue that there can be no Dry Tax Charge. However, there is a difference between the parties as to the correct starting point for our exercise in statutory interpretation. The Appellant focuses on s381 ITTOIA 2005 and HMRC on s371 ITTOIA 2005. Neither party addressed us on s369 ITTOIA 2005 which is the charge to tax on interest.

37. Considering the way Mr Gordon framed the Appellant's case the logical starting point for our discussion is s381 ITTOIA 2005. Another reason for preferring the Appellant's approach is that, it was no part of the Appellant's case that if there is a *discount* for the purposes of s381 ITTOIA 2005 that Ridgeback (and thus the Appellant) did not receive nor was entitled to the relevant interest and therefore is not the person liable for income tax pursuant to s371 ITTOIA 2005. In consequence of this latter point, we only deal with HMRC's submissions in relation to *Good* and *Khan* insofar as necessary to meet the Appellant's case on s381 ITTOIA 2005.

38. Turning to the exercise of statutory interpretation of s381 ITTOIA 2005. First, Mr Winter says that the purpose of s381 ITTOIA 2005 is to treat *all* discounts as interest for tax purposes and to tax them accordingly. Further, that it would be contrary to the use of the word *all* to exclude from the ambit of s381 ITTOIA 2005 discounts which form part of a pre-ordained tax avoidance scheme. To do so would open a lacuna whereby anyone could generate tax-free income by entering into pre-ordained transactions with promissory notes/QCBs, motivated by tax avoidance, that involved discounts of an income nature. Finally, such a lacuna would frustrate the purposes of s381 ITTOIA 2005 as it would be perverse to interpret that section in a way that specifically allows pre-ordained tax driven transactions to escape: that cannot be what Parliament intended. See the Supreme Court at [11] in *Hurstwood Properties (A) Ltd v Rossendale Borough Council* [2021] UKSC 16 (***Rossendale***): *"it is not generally to be expected that Parliament intends to exempt from tax a transaction which has no purpose other than tax avoidance".*

39. Next Mr Winter reminded us that the Supreme Court in *UBS* at [68] said:

> 68. Secondly, it might be said that transactions must always be viewed realistically, if the alternative is to view them unrealistically. The point is that the facts must be analysed in the light of the statutory provision being applied. If a fact is of no relevance to the application of the statute, then it can be disregarded for that purpose. If, as in *Ramsay*, the relevant fact is the overall economic outcome of a series of commercially linked transactions, then that is the fact upon which it is necessary to focus. If, on the other hand, the legislation requires the court to focus on a specific transaction, as in *MacNiven*

> and *Barclays Mercantile*, then other transactions, although related, are unlikely to have any bearing on its application.

Which was more recently emphasised in *Khan* at [50] where commenting on the above excerpt from *UBS* the Court of Appeal said:

> It also stresses that not all fiscal legislation is concerned with the overall effect of a series of related transactions viewed as if they were one composite transaction.

40. Mr Winter went on to argue that the Single Transaction View is what is required by the wording of s381 ITTOIA 2005. This is because the ordinary meaning of discount is the difference between (i) the amount of money which "should" be paid and (ii) the amount of money which is paid: this is a simple mathematical computation that is not concerned with a web of transactions. Therefore, the focus of s381 ITTOIA 2005 is on the transaction under which a reduced amount of money is paid.

41. Mr Gordon's submissions were not predicated on a detailed analysis of s381 ITTOIA 2005 nor did he offer any specific criticism of Mr Winter's analysis, as set out above his point of difference is with regard to the approach. However, we agree with Mr Winter's analysis as to both: (i) the purpose of s381 ITTOIA 2005; and (b) that s381 ITTOIA 2005 is not a statutory provision that is concerned with the overall outcome of a series of connected transaction but rather whether a discount has been given or not, therefore the Single Transaction View and not consideration of the composite series of transaction is required. Consequently, the Appellant's holistic approach to s381 ITTOIA 2005 does not succeed.

The focussed approach to s381 ITTOIA 2005

42. Mr Gordon does say that if we focussed on the transactions concerning the QCBs (i.e. the elements of the scheme giving rise to the "gain"), this is circular and so could not survive a challenge post-*Ramsay*. The only development of this point was that if the relevant transactions had given rise to a loss and not a gain such a loss would not attract any relief. We have explained why we consider the Single Transaction View is the correct approach. However, for completeness we agree with what Mr Winter says on this point. We must concern ourselves with the facts and the statutory provisions we are dealing with. What they say and how they apply cannot be determined by reference to a very generic example and how that would apply to an unknown mirror provision.

Bifurcation of facts

43. Mr Gordon did not set out explicitly what the impermissible bifurcation of facts were. However, we understood this argument to essentially be a complaint that the relevant facts when conducting the exercise set out in *Rossendale* at [15], need to be contradictory in order to deny the Interest Relief Claim (a lack of commerciality) and impose the Dry Tax Charge (sufficient commerciality).

44. The Supreme Court at [11] in *Rossendale* said:

> The result of applying the purposive approach to fiscal legislation has often been to disregard transactions or elements of transactions which have no business purpose and have as their sole aim the avoidance of tax. This is not because of any principle that a transaction otherwise effective to achieve a tax advantage should be treated as ineffective to do so if it is undertaken for the purpose of tax avoidance. It is because it is not generally to be expected that

> Parliament intends to exempt from tax a transaction which has no purpose other than tax avoidance.

45. As we have explained the parties agree that insofar as s371 ITTOIA 2005 it is not expected that Parliament intends to give relief to a purchase of a predetermined investment return with the hope of reducing his tax liabilities: on the Appellant's case due to a lack of commerciality in any of the steps in the whole transaction. The excerpt above reminds us that that does not mean that the transactions or elements of transactions were ineffective. Even proceeding on the Appellant's case (all the steps lacked commerciality and have been ignored for the purposes of s371 ITTOIA 2005) that does not inform the meaning of s381 ITTOIA 2005 or mean without more that those steps were ineffective: in particular Ridgeback still bought and sold the QCBs. In terms of the purpose of s381 ITTOIA 2005, as explained above, it should apply to *all* discounts including those which form part of a pre-ordained tax avoidance scheme. That includes discounts where, on the Appellant's case, the overall transaction and the individual steps (including the sale and purchase of the QCBs) were not commercial and have been ignored for the purpose of another statutory provision because they had no purpose other than tax avoidance. Therefore, no bifurcation of facts is required to achieve the Dry Tax Charge and Mr Gordon's submissions cannot disturb our conclusion in HMRC's favour.

The impact of real obligations and benefits

46. Mr Winter sought to extrapolate from [73] of *Good* the proposition that a reason not to apply a composite view was that the sale and purchases of the QCBs *"created real obligations and benefits on the participants, which did not simply cancel each other out".* In that paragraph the Court of Appeal is discussing *IRC v Scottish Provident Institution* [2004] UKHL 52. In our view the Court of Appeal is saying no more than *Scottish Provident* does not assist as there are material differences of law and fact. That does not in our view support the broader proposition that Mr Winter seeks to establish and so those submissions do not take HMRC's case any further.

Conclusion – Ground 1 – the Dry Tax Charge – the Ramsay argument

47. For the reasons given above the Appellant cannot successfully rely on the *Ramsay* doctrine to defeat the Dry Tax Charge.

GROUND 1 – THE DRY TAX CHARGE – THE CAPITAL/INCOME ARGUMENT

48. The issue to be determined is whether any discounts or premiums received by Ridgeback on the purchases or sales of the QCBs were income or capital in nature (the **Capital/Income Argument**).

The law - Ground 1 – the Dry Tax Charge – the Capital/Income Argument

49. See s369 and s381 ITTOIA 2005 above.

The arguments - Ground 1 – the Dry Tax Charge – the Capital/Income Argument

The Appellant's arguments

50. The Appellant approaches this issue by making three short and simple points which Mr Gordon says establishes that the principles in *Healey v HMRC* [2015] UKUT 140 (TTC) (***Healey***) are not applicable to this case.

(1) We should distinguish *Healey* at [54] because Mr Healey acquired the floating-rate promissory note (**FRN**) at an amount less than its face value which was a discount. Mr Gordon says that there was no acquisition/disposal of the QCBs at any amount less than face value so there are no discounts. We refer to this as the **Face Value Issue**.

(2) Again, we should distinguish *Healey* at [55] and [56] because that case involved FRNs where the interest rights had been stripped. That mechanism, whose purpose was to compensate Mr Healey for the absence of interest on his investment, is not present in this case. We refer to this as the **Mechanism Issue**.

(3) The Appellant's third point is that the present scenario aligns with the Upper Tribunal's statement at [63] *Healey* that:

> … the transaction is still one of sale and purchase of the note in its original form. That is inherently a transaction of a capital nature, if undertaken by a person who is not a trader in securities: it is the sale of an asset for its current market value.

The Appellant says that the present case involves the sale and purchase of the QCBs for their current market value in its original form by a non-trader. Consequently, we should adopt the Upper Tribunal's statement and conclude that the present transactions are inherently of a capital nature. We refer to this as the **Market Value Issue**.

HMRC's arguments

51. Mr Winter for HMRC says that the Appellant's arguments face various difficulties:

(1) Regarding the Face Value Issue Mr Winter says that this is simply not correct as a matter of fact: the QCBs were bought and sold a number of times at amounts less or more than face value.

(2) In relation to the Mechanism Issue Mr Winter rightly accepts that the mechanism by which Mr Healey avoided interest is not present in this case. However, he says that the principles from *Healey* are still relevant and applicable (we discuss those principles below).

(3) On the Market Value Issue. Mr Winter's points for HMRC are that: there is no evidence that the promissory notes were sold at market value rather the price paid was the face value with an adjustment for the particular interest payments; there is no evidence that Ridgeback was trying to achieve market value; and given that these points are not made out no reliance can be placed on the Upper Tribunal's example of a purchase of a promissory note for a discount of a capital nature in *Healey* at [63].

52. Mr Winter goes on to assert a positive case for HMRC relying on the principles in *Healey*. That is that the premiums and discounts received by Ridgeback reflected and compensated it for the interest that it would have received had it not deliberately bought and sold the QCBs in a way that allowed it to avoid receiving interest (often selling and repurchasing within a few days of each other).

Discussion and findings Ground 1 – the Dry Tax Charge – the Capital/Income Argument

Healey

53. There was no disagreement between the parties that *Healey*, unless distinguishable, was binding authority.

54. Mr Healey bought an FRN stripped of all of its interest coupons. The price Mr Healey paid was less than the face value of the FRN: in other words Mr Healey received a discount. Subsequently, Mr Healey sold the FRN along with a number of interest coupons he had bought. Mr Healey sold the FRN at a profit. The question before the Upper Tribunal was whether the profit on the discount was income or capital in nature.

55. In *Healey* the parties agreed that the reference to *all discounts* in the relevant legislation (which was the pre-cursor to s381(1) ITTOIA 2005) did not include discounts of a capital nature. That is common ground in this appeal also.

56. The Upper Tribunal in *Healey* at [22] – [47] considered a handful of key authorities which considered the true nature and tax treatment of discounts. Although none of the cases were directly on point the Upper Tribunal was satisfied that the answer to the question had to be informed by and might ultimately depend on the principles to be derived from those authorities. It also considered at [48] – [49] *IRC v John Lewis Properties PLC* [2002] EWCA Civ 1869 which was not a case about discounts but authority for the proposition that simple economic equivalence plays no part in the distinction between income and capital receipts. The principles and how the Upper Tribunal considered they applied in Mr Healey's case are set out at [52] – [57]. In broad terms (and discussed in detail below) they are as follows:

(1) Whether a discount is income or capital in nature must be answered by looking at the transaction that the taxpayer entered into, at [53] referring to *Ditchfield v Sharp* (1983) 57 TC 555 (***Ditchfield v Sharp***).

(2) It is the character of the discount that must be ascertained and not the legal rights which the taxpayer bought and sold (although they are a relevant part of the circumstances that must be taken into account), at [54].

(3) What is the purpose/function of the discount: including whether to reward for capital risk or to compensate for the absence of interest, at [55] and [61].

(4) To consider whether characterising any discount as being of an income nature falls with the trap of characterisation by economic equivalence or confusing the measure of a payment with its essential nature, at [56].

(5) Whether the approach accords with common sense, at [57].

57. The parties proceeded on the basis that *Healey* a case about discounts applied equally to premiums. Additionally, that *Lomax* confirms that premiums of an income nature can constitute interest, the consequence being they are also caught by s369 ITTOIA 2005. We agree with this approach.

58. The parties both made submissions on the basis that the sale of the QCBs at less than its face value was a discount and the sale of the QCBs at more than their face value was a premium. That approach accords with what we say about the meaning of the word discount above and the approach that the Upper Tribunal takes to the word discount in *Healey* at [54]. The same logic applies to the word premium. Therefore, we proceed on that basis.

Face Value Issue

59. We have found as fact above that in each round that Ridgeback purchased the QCBs at less than their face value twice (Steps 5 and 8). These findings dispose of the Appellant's Face Value Issue submissions: it is not correct to say there was no acquisition/disposal of the QCBs at any amount less than their face value. For completeness we note that Ridgeback sold the QCBs at more than their face value once (Step 3).

Market Value Issue

60. Regarding the Market Value Issue Mr Gordon is correct in that the QCBs are in their original form. However, we do not accept Mr Gordon's submissions that it is obvious what the market value of a promissory note is: that is a matter for evidence. Further, we heard no evidence as to the market values of the QCBs. This means that the Appellant has not shown that the QCBs were sold or bought at their market value. Consequently, the Appellant's submission on this point can go no further.

Mechanism Issue

61. As explained above the Upper Tribunal in *Healey* examined a number of authorities (which did not involve interest stripping) from which it derived various principles which it then applied to the facts in the *Healey* case. Further, as set out above it is the reason for the discount and not the mechanism by which interest was avoided that is key. Therefore, the distinction that Mr Gordon seeks to make is not a sufficient reason for us not to apply the principles from *Healey* to the facts of this appeal.

What are the nature of the premiums and discounts?

62. Ridgeback entered a number of transactions where the price was different to the face value of the QCBs. Step 3 involved Ridgeback receiving a premium and Step 5 and Step 8 involved Ridgeback receiving discounts. With regard to the purpose of the discounts and premiums we heard nothing from the Appellant about capital risk, nor anything about what Ridgeback was trying to achieve. As explained above Mr Winter's skeleton included a comprehensive appendix, which, by reference to numerous documents in the hearing bundle, detailed the sales and purchases of the QCBs (including their prices). Those documents demonstrate, and we find as fact, that for each of the Relevant Rounds the amounts of those premiums (at Step 3) added to the amounts of the discounts (at Step 5 and Step 8) equated precisely to the interest that Ridgeback would have received if it had simply held the QCBs without buying and selling them (which it did and often within a few days of each other). Similar to *Healey* as the Upper Tribunal explores at paragraph [55] this position is a slightly more complicated version of that in *Ditchfield v Sharp*:

> On analysis, the position is just a slightly more complicated version of that in *Ditchfield v Sharp*, where the intermediate purchasers of the promissory note made a profit to maturity which reflected the fact that the note bore no interest. In the present case, the right to interest was stripped out for a fixed period, and the stripped interest was payable to KB beneficially during that period. But from the perspective which matters, namely that of Mr Healey, the position was in our judgment the same in all essential respects as it would have been if he had bought a non-interest bearing note issued at a discount. In cases of that nature, as the authorities show, the conclusion that the discount is of an income

> nature is all but irresistible, unless the taxpayer adduces evidence to establish the contrary.

Again, although Mr Gordon is right to say that the mechanism in the present case is different to that in *Healey* we have addressed that point in our findings on the Mechanism Issue above. From the perspective of Ridgeback, which is what matters the position in our judgment is the same as if Ridgeback had bought a non-interest bearing note: the purpose of the premiums and discounts was to compensate Ridgeback for the foregone interest. Therefore, it is all but irresistible to conclude that the discounts and premiums are of an income nature. For the reasons set out above none of the arguments advanced by the Appellant disturb this conclusion.

63. Given the reason why Ridgeback received premiums and discounts we are content that that to characterise the discounts and premiums as being income in nature is not a result of characterisation by economic equivalence, or confusing the measure of a payment with its essential nature.

64. Again similar to the Upper Tribunal's conclusions in *Healey* at [57] the advantage of this approach is that it accords with common sense.

Conclusion on Ground 1 – the Dry Tax Charge – the Capital/Income Argument

65. For the reasons given above the Capital/Income Argument does not defeat the Dry Tax Charge.

GROUND 2 – THE PROCEDURAL VALIDITY OF THE DISCOVERY ASSESSMENT

66. The issue to be determined is whether an officer of HMRC could not have been reasonably expected, on the basis of information made available to him on or before 30 April 2014 pursuant to s29(6) TMA, to be aware of the insufficiency of tax or put more simply whether the condition in s29(5) TMA has been met.

The law – Ground 2 – the procedural validity of the Discovery Assessment

67. s29 TMA provides in relevant part:

> (1) If an officer of the Board or the Board discover, as regards any person (the taxpayer) and a year of assessment—
>
> (a) that any income which ought to have been assessed to income tax, or chargeable gains which ought to have been assessed to capital gains tax, have not been assessed, or
>
> (b) that an assessment to tax is or has become insufficient, or
>
> (c) that any relief which has been given is or has become excessive,
>
> the officer or, as the case may be, the Board may, subject to subsections (2) and (3) below, make an assessment in the amount, or the further amount, which ought in his or their opinion to be charged in order to make good to the Crown the loss of tax.
>
> …….
>
> (3) Where the taxpayer has made and delivered a return under section 8 or 8A of this Act in respect of the relevant year of assessment, he shall not be assessed under subsection (1) above—
>
> (a) in respect of the year of assessment mentioned in that subsection; and

(b) in the same capacity as that in which he made and delivered the return,

unless one of the two conditions mentioned below is fulfilled.

…….

(5) The second condition is that at the time when an officer of the Board—

(a) ceased to be entitled to give notice of his intention to enquire into the taxpayer's return under section 8 or 8A of this Act in respect of the relevant year of assessment; or

(b) informed the taxpayer that he had completed his enquiries into that return,

the officer could not have been reasonably expected, on the basis of the information made available to him before that time, to be aware of the situation mentioned in subsection (1) above.

(6) For the purposes of subsection (5) above, information is made available to an officer of the Board if—

(a) it is contained in the taxpayer's return under section 8 or 8A of this Act in respect of the relevant year of assessment (the return), or in any accounts, statements or documents accompanying the return;

(b) it is contained in any claim made as regards the relevant year of assessment by the taxpayer acting in the same capacity as that in which he made the return, or in any accounts, statements or documents accompanying any such claim;

(c) it is contained in any documents, accounts or particulars which, for the purposes of any enquiries into the return or any such claim by an officer of the Board, are produced or furnished by the taxpayer to the officer; or

(d) it is information the existence of which, and the relevance of which as regards the situation mentioned in subsection (1) above—

(i) could reasonably be expected to be inferred by an officer of the Board from information falling within paragraphs (a) to (c) above; or

(ii) are notified in writing by the taxpayer to an officer of the Board.

(7) In subsection (6) above—

(a) any reference to the taxpayer's return under section 8 or 8A of this Act in respect of the relevant year of assessment includes—

(i) a reference to any return of his under that section for either of the two immediately preceding year of assessments;

…….

(ii) where the return is under section 8 and the taxpayer carries on trade, profession or business in partnership, a reference to any partnership return with respect to the partnership for the relevant year of assessment or either of those periods; and

(b) any reference in paragraphs (b) to (d) to the taxpayer includes a reference to a person acting on his behalf.

…….

(9) Any reference in this section to the relevant year of assessment is a reference to—

(a) in the case of the situation mentioned in paragraph (a) or (b) of subsection (1) above, the year of assessment mentioned in that subsection; and

(b) in the case of the situation mentioned in paragraph (c) of that subsection, the year of assessment in respect of which the claim was made.

68. s29 TMA is a long section and so it is helpful to summarise the provisions:

(1) s29(1) TMA provides the power to make a "discovery" assessment where there has been an insufficiency of tax arising from the reasons set out in s29(1)(a) – (c) TMA (the **insufficiency of tax**).

(2) s29(3) prohibits a discovery assessment in respect of a year for which the taxpayer has delivered a self-assessment tax return unless either the condition in s29(4) or s29(5) TMA is met.

(3) s29(6) TMA supplements s29(5) TMA as it provides what information is made available to HMRC.

(4) s29(7) TMA provides further clarification about what s29(6) TMA encompasses.

The arguments – Ground 2 – the procedural validity of the Discovery Assessment

The Appellant's arguments

The s29(5) TMA condition – the test

69. Mr Gordon's first line of argument related to what HMRC must show in order to satisfy us that the condition in s29(5) TMA had been met. We heard extensive submissions on the history of s29(5) TMA and the body of case law that relates to it. The main premise of the Appellant's case is that the tests in s29(1) and 29(5) TMA are aligned. Therefore, a 'discovery assessment' is not permitted if information 'made available' per s29(6) TMA to the officer would be sufficient to justify an assessment under s29(1) TMA. Mr Gordon relies on *Corbally-Stourton v HMRC* (2008) SpC 692 at [46], *HMRC v Lansdowne Partners Ltd Partnership* [2010] EWHC 2582 (Ch) at [48], *HMRC v Lansdowne Partners Ltd Partnership* [2011] EWCA Civ 1578 (***Lansdowne CA***) at [56] and [69]. Insofar as *Sanderson v Revenue and Customs Commissioners* [2016] EWCA Civ 19 (***Sanderson***) at [24 – 25] places any doubt on that conclusion Mr Gordon says that this is a 'spanner in the works' and that that passage is not generally followed. See for example *HMRC v Hicks* [2020] UKUT 12 (TCC) from [193] and *Beagles v HMRC* [2018] UKUT 380 (***Beagles***) at [100(6)].

The s29(5) TMA condition – distinct parts of an insufficiency of tax – how s29 TMA applies

70. The Appellant's position is that where there are distinct parts of an insufficiency of tax here the Interest Relief Claim and the Dry Tax Charge then a purposive construction of s29 TMA is required (the effects of which we set out below).

The s29(5) TMA condition – the disclosure provided

71. The Appellant's case is that Caledonian at its heart was a simple scheme and we should not be distracted from that because HMRC sought further information before issuing the Discovery Assessment.

72. Mr Gordon says that the Appellant provided factual disclosure sufficient that HMRC cannot show that: an officer of HMRC could not have been reasonably expected, on the basis of information made available to him on or before 30 April 2014 pursuant to s29(6) TMA, to be aware of the insufficiency of tax; or put more simply that the condition in s29(5) TMA is met. Mr Gordon says that this is the case for each of the possible reasons why the Interest Relief Claim fails: the Purposive Argument, the Main Benefit Argument and the Design Argument. He repeats these points insofar as the Dry Tax Charge.

73. Insofar as legal disclosure we understood the Appellant's position to be that the relevant law was not sufficiently complex that it was required.

HMRC's arguments

The burden of proof

There was some discussion in HMRC's skeleton argument and HMRC made submissions regarding the operation of the burden of proof for s29(5) TMA. HMRC say that the reverse of the scenario in *Perenco Holdings v RCC* [2015] UKFTT 65 (TC) (***Perenco***) at [102] must be true: that where HMRC bear the legal burden of proof once they have established a prima facie case the evidential burden of proof passes to the Appellant. HMRC also relied on the comments in relation to burden of proof in *Jays v HMRC* [2022] UKFTT 420 (TC) (***Jays***) at [46].

The s29(5) TMA condition – the test

74. HMRC say that there is no need for a forensic examination of the case law on s29(5) TMA. They say the recent Court of Appeal decision in *HMRC v Fisher* [2021] EWCA Civ 1438 (***Fisher***) is definitive.

75. Mr Winter also relies on *Charlton* at [79] and *Jays* at [46] for the proposition that disclosure must: (a) be complete; and (b) contain the contrasting view that HMRC may take of that disclosure.

The s29(5) TMA condition – distinct parts of an insufficiency of tax – how s29 TMA applies

76. HMRC rely on the Upper Tribunal's decision in *Hargreaves v HMRC* [2022] UKUT 00034 (TCC) (***Hargreaves***) at [53 - 58] for the proposition that if the hypothetical officer could not have been reasonably expected to have had the requisite awareness of any part of an insufficiency in the tax self-assessed (for instance, the Dry Tax Charge) then a discovery assessment can still be made by HMRC in respect of the entire insufficiency (for instance both Dry Tax Charge and recovery of the Interest Relief Claim).

The s29(5) TMA condition – the disclosure provided

77. Mr Winter says that HMRC have shown that the condition in s29(5) TMA is met, meaning the Appellant is not protected by s29(3) TMA, because:

(1) Factual disclosure was insufficient because there was a disconnect between what HMRC were told and actual operation of Caledonian.

(2) Even if the Appellant's factual disclosure was sufficient legal disclosure was required due to the complexity of the legal issues involved. HMRC further argues that any legal disclosure provided was inadequate.

HMRC make these arguments in relation to: why the Interest Relief Claim fails specifically concerning the Purposive Argument, the Main Benefit Argument and the Design Argument; and the Dry Tax Charge.

Discussion and findings – Ground 2 – the procedural validity of the Discovery Assessment

The burden of proof

78. It is trite law that the burden of establishing that the condition in 29(5) TMA is met is on HMRC. We need to determine whether HMRC has shown that the taxpayer's disclosure is insufficient such that an officer of HMRC could not have been reasonably expected, on the basis of information made available to him on or before 30 April 2014 pursuant to s29(6) TMA, to be aware of the insufficiency of tax. We do not find it necessary to conduct that exercise with reference to evidential burdens or low thresholds. In the present statutory context and depending on the circumstances of a case it may be that HMRC do not have to do much to discharge their burden (this is more likely to be the case where no or minimal disclosure has been made). However, as the party with the burden, HMRC must be mindful that they do enough, see *Perenco* at [101]. The point being that if HMRC fails to persuade us that the condition in s29(5) TMA is met that even in the absence of anything from the Appellant it is open to us to find that HMRC have not discharged their burden and we must find for the Appellant. Of course if HMRC's arguments alone are sufficient to discharge their burden to succeed the Appellant must put forward their argument and we must weigh those arguments and decide whose we prefer on a balance of probabilities.

Distinct parts of an insufficiency of tax – how s29 TMA applies

79. It is useful to start with the discussion on *Hargreaves*. That is because our decision on this point determines precisely what it is necessary for HMRC to establish in this appeal.

80. In Hargreaves there were two elements of the insufficiency of tax: one part flowing from income tax and the other from capital gains tax (**CGT**). Further, the hypothetical officer would have been aware of the insufficiency of income tax but not the insufficiency of CGT. Mr Hargreaves argued at [54]:

> That awareness of an actual insufficiency in relation to income tax meant that s29(5) operated with the result that HMRC were precluded from making <u>any</u> discovery assessment under s29(1) for that tax year, including a discovery assessment relating to CGT even if the hypothetical officer could have no awareness of an insufficiency as regards CGT.

The Upper Tribunal then explains HMRC's diametrically opposite view at [55] [underlining added]:

> …..when s29(5) asks about the awareness of a hypothetical officer of the <u>"situation mentioned in subsection (1)", that is a reference back to "any" income tax or CGT not being assessed</u>. Since the hypothetical officer could not have been aware that there was any insufficiency as regards Mr Hargreaves' self-assessment to CGT ….., HMRC argue that they would not be precluded from making a discovery assessment as regards both income tax and CGT even if (which they do not accept) any insufficiency of income tax was readily apparent from the face of the Return.

Drawing on part of Arden LJ's (as she then was) judgment in *Hargreaves v HMRC* [2016] EWCA Civ 174 at [46 and 47] (a different Hargreaves case) the Upper Tribunal concludes that they prefer HMRC's view at [55] noting that it is not a straight-forward point and is not necessary to their conclusion.

81. Mr Gordon acknowledged the interpretations set out in the preceding paragraph, referring to the first as the literal interpretation (ie as set out at [54] *Hargreaves*). However, Mr Gordon also proposed a third interpretation that he referred to as the purposive interpretation, noting that this was not considered in the *Hargreaves* case. The effect of Mr Gordon's purposive construction is that HMRC must show that the s29(5) TMA condition is fulfilled in relation to each part of the insufficiency of tax separately in order for any element of a discovery assessment arising from that part of an insufficiency of tax to remain valid. He says that this is because s29(5) TMA refers to 'the situation' and not 'any situation'. However, his argument does not address the use of the word any in 29(1)(a) and 29(1)(c) TMA (provisions central to this appeal) nor the interaction between s29(5) and s29(1)(a) and s29(1)(c) TMA, see the underlined passage in *Hargreaves* [55]. Therefore, despite Mr Gordon's additional (purposive) interpretation we prefer and see no reason to depart from the interpretation set out at [55] *Hargreaves*. Of course the decisions of the Upper Tribunal and the Court of Appeal are binding on us. However, we note that the Upper Tribunal were explicit that its conclusions on this point were not necessary to their overall decision, and the Court of Appeal did not directly address the issue. Since we arrive at the same conclusions for the same reasons we do not consider it necessary to discuss whether the reasoning of the Upper Tribunal and Court of Appeal's reasoning on this point is obiter.

82. Mr Winter rightly points out that *Hargreaves* concerned a case where one insufficiency arose from income tax and the other CGT, whilst in this case both the Interest Relief Claim and Dry Tax Charge arise from income tax. Mr Winter says that these insufficiencies are still distinct and independent such that the consequences set out above flow (if we are with Mr Winter on the interpretation of s29(5) TMA Mr Gordon accepts this proposition). Further support for this can be that this can be seen from the example in *Hargreaves* at [56] which considers a scenario where two insufficiencies arise from income tax and which the Upper Tribunal saw no difficulties with. We agree with Mr Winter. Consequently, HMRC only need to show that the hypothetical officer could not have been reasonably expected, on the basis of the information made available on or before 30 April 2014 pursuant to s29(6) TMA to him to be aware of either the insufficiency of tax arising from the Interest Relief Claim or the Dry Tax Charge in order for the condition in s29(5) TMA to be met in relation to the whole insufficiency (ie arising from both the Interest Relief Claim and the Dry Tax Charge).

The test in s29(5) TMA

83. HMRC say that there is no need for a forensic examination of the case law on s29(5) TMA. They refer to *Fisher* at [126] where the Court of Appeal cites with approval the following passage which summarises the principles relating to s29 TMA:

> 126. Patten LJ, with whom Briggs and Simon LJJ agreed, summarised principles relating to section 29 of the TMA in these terms in *Sanderson v Revenue and Customs Commissioners* [2016] EWCA Civ 19, [2016] 4 WLR 67, at paragraph 17:
>
> > "The power of HMRC to make an assessment under section 29(1) following the discovery of what, for convenience, I shall refer to as an insufficiency in the self-assessment depends upon whether an officer 'could not have been reasonably expected, on the basis of the information made available to him before that time, to be aware of the insufficiency'. It is clear as a matter of authority:

(1) that the officer is not the actual officer who made the assessment … but a hypothetical officer;

(2) that the officer has the characteristics of an officer of general competence, knowledge or skill which include a reasonable knowledge and understanding of the law: see *HMRC v Lansdowne Partners LLP* [2012] STC 544;

(3) that where the law is complex even adequate disclosure by the taxpayer may not make it reasonable for the officer to have discovered the insufficiency on the basis of the information disclosed at the time: see *Lansdowne* at [69];

(4) that what the hypothetical officer must have been reasonably expected to be aware of is an actual insufficiency: see *Langham v Veltema* [2004] STC 544 per Auld LJ at [33]–[34]:

‘33. More particularly, it is plain from the wording of the statutory test in section 29(5) that it is concerned, not with what an Inspector could reasonably have been expected to do, but with what he could have been reasonably expected to be aware of. It speaks of an Inspector’s objective awareness, from the information made available to him by the taxpayer, of ‘the situation’ mentioned in section 29(1), namely an actual insufficiency in the assessment, not an objective awareness that he should do something to check whether there is such an insufficiency …;

(5) that the assessment of whether the officer could reasonably have been expected to be aware of the insufficiency falls to be determined on the basis of the types of available information specified in section 29(6). These are the only sources of information to be taken into account for that purpose: see *Langham v Veltema*, at [36]:

‘The answer to the second issue - as to the source of the information for the purpose of section 29(5) - though distinct from, may throw some light on, the answer to the first issue. It seems to me that the key to the scheme is that the Inspector is to be shut out from making a discovery assessment under the section only when the taxpayer or his representatives, in making an honest and accurate return or in responding to a section 9A enquiry, have clearly alerted him to the insufficiency of the assessment, not where the Inspector may have some other information, not normally part of his checks, that may put the sufficiency of the assessment in question. If that other information when seen by the Inspector does cause him to question the assessment, he has the option of making a section 9A enquiry before the discovery provisions of section 29(5) come into play. That scheme is clearly supported by the express identification in section 29(6) only of categories of information emanating from the taxpayer. It does not help, it seems to me, to consider how else the draftsman might have dealt with the matter. It is true, as Mr Sherry suggested, he might have expressed the relevant passage in section 29(5) as “on the basis only of information made available to him”, and the passage in section 29(6) as “For the purposes of subsection (5) above, information is made available to an officer of the Board if, but only if,” it fell within the specified categories. However, if he had intended that the categories of information specified in section

29(6) should not be an exhaustive list, he could have expressed its opening words in an inclusive form, for example, "For the purposes of subsection (5) above, information … made available to an officer of the Board … includes any of the following".'"

127. Patten LJ also endorsed, in paragraph 41, this passage from the decision of the Upper Tribunal (Norris J and Judge Berner) in *Charlton v Revenue and Customs Commissioners* [2013] STC 866:

"…….

[79] As we have described, the balance provided by s 29 depends on protection being provided only to those taxpayers who make honest, complete and timely disclosure. That balance would be upset by construing s 29(6)(d)(i) too widely. Inference is not a substitute for disclosure, and courts and tribunals will have regard to that fundamental purpose of s 29 when applying the test of reasonableness."

84. Mr Gordon says simply that HMRC have taken the passage from *Fisher* (quoting *Sanderson*) out of context and we should apply the case law that he referred us to, see above. Mr Gordon pressed particularly his argument equating the test in s29(1) TMA with the test in s29(5) TMA. The Court of Appeal in *Sanderson* at [22 - 25] made it clear that the *Lansdowne CA* decision does not alter the test enunciated by Auld LG and at [25] concludes that:

Although there will inevitably be points of contact between the real and the hypothetical exercises which sections 29(1) and (5) involve, the tests are not the same.

Materially similar arguments (equating the s29(1) and s29(5) TMA tests) were run in *Hargreaves* and the Upper Tribunal rejected at [46] those arguments by reference to [22] and [25] *Sanderson.* Therefore, even if it is correct to say that this passage (which refuses to equate the tests in s29(1) and s29(5) TMA) has not generally been followed by the Upper Tribunal or the First-tier Tribunal we agree with Mr Winter that the law of precedent means we are bound by it.

85. Mr Gordon referred us to the case of *Beagles* where the Upper Tribunal provided at [100] a summary of Patten LJ's judgment in *Sanderson* at [17 – 23] and which helpfully incorporates relevant extracts from decisions in other cases.

We endeavour to summarise the principles that we derive from Patten LJ's judgment as follows:

(1) The test in s29(5) is applied by reference to a hypothetical HMRC officer not the actual officer in the case. The officer has the characteristics of an officer of general competence, knowledge or skill which include a reasonable knowledge and understanding of the law.

(2) The test requires the court or tribunal to identify the information that is treated by s29(6) as available to the hypothetical officer at the relevant time and determine whether on the basis of that information the hypothetical officer applying that level of knowledge and skill could not have been reasonably expected to be aware of the insufficiency.

(3) The hypothetical officer is expected to apply his knowledge of the law to the facts disclosed to form a view as to whether or not an insufficiency exists (Moses LJ, *Lansdowne* [69]; Patten LJ, Sanderson [23]).

We agree therefore with Mr Firth that the test does assume that the hypothetical officer will apply the appropriate level of knowledge and skill to the information that is treated as being available before the level of awareness is tested. The test does not require that the actual insufficiency is identified on the face of the return.

(4) But the question of the knowledge of the hypothetical officer cuts both ways. He or she is not expected to resolve every question of law particularly in complex cases (Patten LJ, Sanderson [23], *Lansdowne* [69]). In some cases, it may be that the law is so complex that the inspector could not reasonably have been expected to be aware of the insufficiency (Moses LJ, *Lansdowne* [69]; Patten LJ, *Sanderson* [17(3)]).

(5) The hypothetical officer must be aware of the actual insufficiency from the information that is treated as available by s29(6) (Auld LJ, *Langham v Veltema* [33] [34]; Patten LJ, *Sanderson* [22]). The information need not be sufficient to enable HMRC to prove its case (Moses LJ, *Lansdowne* [69]) but it must be more than would prompt the hypothetical officer to raise an enquiry (Auld LJ, *Langham v Veltema* [33]; Patten LJ, *Sanderson* [35]).

(6) As can be seen from the discussion in *Sanderson* (see [23]), the level of awareness is a question of judgment not a particular standard of proof (see also Moses LJ in *Lansdowne* [70]). The information made available must "justify" raising the additional assessment (Moses LJ, *Lansdowne* [69]) or be sufficient to enable HMRC to make a decision whether to raise an additional assessment (Lewison J in the High Court in *Lansdowne* [2011] STC 372 at [48]).

Mr Gordon also referred us to *HMRC v Charlton* [2012] UKUT 770 (TCC) (***Charlton***) at [65] regarding to the level of knowledge attributed to the hypothetical officer:

65. Our conclusion on this point, therefore, is that s 29(5) does not require the hypothetical officer to be given the characteristics of an officer of general competence, knowledge or skill only. The officer must be assumed to have such level of knowledge and understanding that would reasonably be expected in an officer considering the particular information provided by the taxpayer. Whilst leaving open the exceptional case where the complexity of the law itself might lead to a conclusion that an officer could not reasonably be expected to be aware of an insufficiency, the test should not be constrained by reference to any perceived lack of specialist knowledge in any section of HMRC officers. What is reasonable for an officer to be aware of will depend on a range of factors affecting the adequacy of the information made available, including complexity. But reasonableness falls to be tested, not by reference to a living embodiment of the hypothetical officer, with assumed characteristics at a typical or average level, but by reference to the circumstances of the particular case.

86. Mr Winter accepts that although *Beagles* and *Charlton* predate *Fisher* their thrust is the same: the hypothetical officer has a reasonable knowledge of the law but is not an expert. Except for *Beagles* at [100(6)] we do not consider these further cases to be inconsistent with *Fisher* and they are a helpful explanation of how to apply the test in s29(5) TMA, including in terms of the level of knowledge attributed to the hypothetical officer and how they are able to engage with the relevant facts.

87. Turning to Mr Winter's submissions on complete disclosure and the requirement to present a contrasting view of that disclosure. We do not consider that *Charlton* at [79] does

anything more than describe the state of disclosure (complete) that prevents HMRC from relying on the condition in s29(5) TMA, to treat such a requirement as gloss on the test set out by s29(5) TMA is in our view unhelpful and potentially circular. Similarly we have not found and HMRC did not take us to any decision in the Upper Tribunal or above that supports the proposition that a taxpayer must provide the contrasting view that HMRC may take of disclosure. Whether that is required will depend on the circumstances of the case. We will consider whether HMRC have discharged their burden in relation to s29(5) TMA by reference to the formulation in *Sanderson* at [126], approved of in *Fisher* at [17] and further considered at [100(1) – 110(5)] *Beagles*.

88. We also wish to highlight the passage in *Lansdowne CA* at [69] which provides:

> But even if the information had been obtained shortly before the time for enquiry expired, I would have taken the view that an officer could have reasonably been expected to be aware that the profits stated were insufficient. The legal points were not complex or difficult. As the Chancellor points out (at [56]), awareness of an insufficiency does not require resolution of any potential dispute. After all, once an amendment is made, it may turn out after complex debate in a succession of appeals as to the facts or law, that the profits stated were not insufficient. I have dwelt on this point because I wish to leave open the possibility that, even where the taxpayer has disclosed enough factual information, there may be circumstances in which an officer could not reasonably be expected to be aware of an insufficiency by reason of the complexity of the relevant law.

This passage indicates that the question of whether ‘legal disclosure’ has been given need only be considered if a taxpayer has ‘disclosed enough factual information’.

Applying s29(5) TMA to the facts

89. Ms Sells, HMRC’s technical lead for Caledonian from November 2014, provided a witness statement and gave oral evidence. Ms Sells described her role as a technical lead as being *responsible for progressing the investigation of* [Caledonian] *and considering what challenges could be made.* [She] *also had overall oversight of the enquiries into the taxpayers who had used the Caledonian scheme*. Ms Sells’ evidence (both in her witness statement and under cross examination) consisted, in part, of her view of why the condition in s29(5) TMA was met. Her witness statement also explained (and went unchallenged) in detail and exhibited the documents that HMRC had on or before 30 April 2014 (numbering over 6,100 pages) and those they received after 30 April 2014.

90. We found Ms Sells to be a reliable and credible witness. However, the test as to whether the condition in s29(5) TMA is met concerns only the hypothetical officer. Therefore, evidence from an actual officer is not the basis on which we can make our decision.

91. As explained above our decision in relation to the application of *Hargreaves* means that if HMRC satisfy us that an officer of HMRC could not have been reasonably expected, on the basis of the information made available to him on or before 30 April 2014 pursuant to s29(6) TMA to be aware of the part of the insufficiency of tax arising from either the Interest Relief Claim or the Dry Tax Charge, then s29(5) TMA is satisfied in respect of the whole insufficiency ie the Dry Tax Charge and the Interest Relief Claim with the consequence the Discovery Assessment stands (subject to the parties’ agreed position on quantum).

92. In the context of this appeal where we have closely examined the facts and law relevant to the Dry Tax Charge, it is expedient to consider first whether HMRC can show that the s29(5) TMA condition is met in relation to the Dry Tax Charge (rather than the Interest Relief Claim).

93. Whilst we set out the most relevant parts of the AAG1 and the Appellant's self-assessment tax returns for 2010/11 and 2011/12 including the 'white space disclosures' (the **Relevant Returns**) and also summarise them below we have of course considered those documents in their entirety. [Although the Appellant's self-assessment tax return for 2009/10 falls within s29(6) TMA it contains no information relevant to this appeal.]

94. Mr Gordon says that the AAG1 alone prevents HMRC from establishing that the condition in s29(5) TMA is met. If the AAG1 is not sufficient then Mr Gordon says that the AAG1 combined with the Relevant Returns (in particular the white space disclosures) provide sufficient disclosure such that HMRC are unable to show that the condition in s29(5) TMA is met. However, we will consider that question first by reference to what is in the AAG1 and Relevant Returns. That is because they say a number of similar things. Those documents set out the broad structure of Caledonian (but do not provide full details of the QCB Transactions). Insofar as the QCB Transactions, which is the relevant part of the scheme for the Dry Tax Charge, we are told by the AAG1:

> [Ridgeback] has a business in managing money
>
> …….
>
> [Ridgeback] stockborrows a QCB (within section 117 TCGA) from Stocklender with a large impending interest payment and sells it to a thirdparty [sic]. Later the QCB is bought back and returned to stocklender. The profit made is distributed to Taxpayer enabling him to pay interest to Lender'
>
> …….
>
> Taxpayer will receive distributions from [Ridgeback]. These are assumed not remitted to the UK and also have the quality of a capital gain on a QCB (not income) and so no tax is payable upon them. [Ridgeback] has no UK-source income and manages the partnership capital (generally through investing an in particular via the stockloan and conventional sale of the QCB).
>
> …….
>
> Taxpayer anticipates that section 117 TCGA applies and that accrued income profits scheme …. applies but gives rise to minimal income.
>
> …….
>
> Taxpayer assumes that section 117 TCGA applies and the QCB is within that definition
>
> Taxpayer assumes Accrued Income Profit Scheme does apply…. But gives rise to minimal income due to the pattern of interest payments on the QCB.

95. The Relevant Returns do not go much further than the AAG1. There is mention of Girona and Nepala:

(1) From the Appellant's self-assessment tax return for 2010/11:

> Ridgeback stockborrowed a qualifying corporate bond ("QCB") (within section 117 TCGA 1992) from Lugo Assets Limited ("Lugo") with a large impending interest payment and sold it to a third party, Girona Investments Limited ("Girona"). Later the QCB was bought back by Ridgeback, from a separate party, Nepala Lights Limited ("Nepala") and returned to Lugo. The profit was distributed to me, enabling me to pay interest to the lender.

(2) From the Appellant's self-assessment tax return for 2011/12:

> Ridgeback stockborrowed a qualifying corporate bond ("QCB") (within section 117 TCGA 1992) from Alana Assets Limited ("Alana") – the debtor company being Lugo Assets Limited ("Lugo") - with a large impending interest payment and sold it to a third party, Girona Investments Limited ("Girona"). Later the QCB was bought back by Ridgeback, from a separate party, Nepala Lights Limited ("Nepala") and returned to Alana. The profit was distributed to me, enabling me to pay interest to the lender.

[We note that the references to stockborrowing from Lugo and Alana (and not Alava) appear to be inconsistent with our findings of fact above (see Step 1 and Step 2). However, as explained those findings of fact are the result of a careful examination of documents in the hearing bundle that are not disturbed by these inconsistencies. In any event, there is documentary evidence in the hearing bundle that confirms that the reference to Ridgeback stockborrowing from Lugo in (1) above is a mistake and neither party took any point in relation to either inconsistency.]

96. The Relevant Returns both go on to state:

> Ridgeback's capital gain (if any) on the QCB….
>
> …….
>
> The partnership has no UK-source income and manages the partnership capital (generally through investing and in particular via the stockloan and conventional sale and re-purchase of the QCBs).
>
> …….
>
> I believe that the accrued income profits scheme does apply due to the pattern of interest payments on the qualifying corporate bond. …. I have entered this income at Box 3 of Page Ai1 in the Additional information pages of this tax return.

The amounts entered into 'Box 3' are £24,280 and £10,461 for the Appellant's self-assessment tax returns for 2010/11 and 2011/12 respectively. The Relevant Returns also contain a non-specific catch all statement from the Appellant saying:

> I acknowledge that my interpretation of the tax law applicable to the above transactions (and the matter in which I have reported them) may be at variance with that of HM Revenue & Customs.

97. The hypothetical officer is an officer of general competence, knowledge or skill with a reasonable knowledge and understanding of the law. In our view, that would at least include knowledge of the legislation and an awareness of the AIS scheme referred to in the AAG1 and the Relevant Returns.

98. Insofar as the QCB Transactions the information from the AAG1 and Relevant Returns can be summarised as: suggesting both that profit/gain is not certain and so presenting Ridgeback engaging in business with at least some risk (see the reference to 'the gain ('if any')'); stating that any profit/gain is capital in nature; describing the sales and purchases of QCBs as conventional; and describing the application of the AIS (a scheme that in relevant circumstances taxes accrued interest as income and not capital gains) scheme as minimal and reflecting that in the Box 3 entries described above.

99. To begin considering the existence of the Dry Tax Charge the hypothetical officer would first need to be aware that Ridgeback's 'profit' from the sales and purchases of the QCBs arose via a number of fixed discounts and premiums. Furthermore, that Ridgeback's 'profit' very closely mirrored the interest it would have received if it had simply held the QCBs ie without selling and repurchasing them. As can be seen from above this information was not 'made

available' to the hypothetical officer by the AAG1 and the Relevant Returns. Therefore, we conclude that HMRC have shown that an officer of HMRC could not have been reasonably expected, on the basis of the information made available to him on or before 30 April 2014 pursuant to s29(6) TMA to be aware of the part of the insufficiency of tax arising from the Dry Tax Charge.

100. In light of our conclusions above we do not need to consider HMRC's argument that an officer of HMRC could not have been reasonably expected to be aware of the part of the insufficiency of tax arising from the Interest Relief Claim. Nor is it necessary for us to decide whether legal disclosure was required, although we note that if it was the AAG1 and the Relevant Returns do not mention *Healey* or the provisions under which the Dry Tax Charge arises.

101. For completeness, on factual disclosure we address the parties' position on the 6,100 plus pages in HMRC's possession on or before 30 April 2014. Mr Gordon said a number of things about those documents: (i) that some of them were s29(6) TMA documents and some of them were not; (ii) that they didn't contradict what was set out in the AAG1 and white space disclosures on the Relevant Returns; and (iii) that when considered alongside the AAG1 and the white space disclosures on the Relevant Returns, HMRC could not show that the condition in s29(5) TMA was met. Mr Winter, however, argued that the Appellant must establish: (i) which of those documents are s29(6) TMA documents; and (ii) if they are s29(6) TMA documents why they contain information sufficient to block a discovery assessment. Mr Gordon did not disagree with Mr Winter nor did he make any submissions regarding whether any of the 6,100 plus pages fell within s29(6) TMA (other than the documents already referred to – the AAG1 and the Relevant Returns). Therefore, we say nothing further about them.

Conclusion – Ground 2 – the procedural validity of the Discovery Assessment

102. For the reasons given above HMRC succeed on Ground 2 and the Discovery Assessment stands. However, following the agreement reached between the parties we reduce the Discovery Assessment to £3,652,638.

GROUND 3 – THE HUMAN RIGHTS CHALLENGE TO THE HICBC

103. The issues to be determined in relation to Ground 3 are:

(1) Whether the imposition of the HICBC breaches the Appellant's human rights; and

(2) If so is there a human rights compatible interpretation of the HICBC legislation pursuant to s3 Human Rights Act 1998.

The law – Ground 3 – the human rights challenge to the HICBC

104. s681B Income Tax (Earnings and Pensions) Act 2003 (**ITEPA 2003**) provides:

> (1) A person ("P") is liable to a charge to income tax for a tax year if—
>
> (a) P's adjusted net income for the year exceeds £50,000, and
>
> (b) one or both of conditions A and B are met.
>
> (2) The charge is to be known as a "high income child benefit charge".
>
> (3) Condition A is that—
>
> (a) P is entitled to an amount in respect of child benefit for a week in the tax year, and

(b) there is no other person who is a partner of P throughout the week and has an adjusted net income

for the year which exceeds that of P.

(4) Condition B is that—

(a) a person ("Q") other than P is entitled to an amount in respect of child benefit for a week in the tax year,

(b) Q is a partner of P throughout the week, and

(c) P has an adjusted net income for the year which exceeds that of Q.

105. s3(1) Human Rights Act 1998 (**HRA**) applies to this Tribunal and provides:

> So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.

106. The 'Convention rights' referred to by s3 HRA are set out in domestic law by Schedule 1 HRA and include:

Right to respect for private and family life

Article 8

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

…….

Right to marry

Article 12

Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.

…….

Prohibition of discrimination

Article 14

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

…….

Protection of property

Article 1

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public

> interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

(**Article 8**, **Article 12**, **Article 14** and **A1P1** respectively).

The arguments – Ground 3 – the human rights challenge to the HICBC

The Appellant's arguments

107. The Appellant says that subjecting him to the HICBC pursuant to Chapter 8, Part 10 ITEPA 2003 (**Chapter 8 ITEPA 2003**) is a breach of his human rights. In particular:

(1) A breach of A1P1 because the *"HICBC, when applied to non-recipients such as the Appellant, is simply an appropriation of additional money without any compensation given to the Appellant in breach of A1P1"*.

(2) Discrimination contrary to Article 14 together with A1P1 and/or Article 12. The Appellant says that this is because the HICBC discriminates against the Appellant for having exercised his protected right to marriage and/or being in a committed relationship with a person who received child benefit.

(3) A direct interference (and so breach) of the *"right to respect for family life"* (ie Article 8).

108. The Appellant says simply there is no objective or reasonable justification for subjecting him to the HICBC.

109. To remedy the breaches above the Appellant says that Chapter 8 ITEPA 2003 as it applies to him must be given a European Convention on Human Rights (**ECHR**) compliant construction pursuant to s3 HRA. Mr Gordon says that exercise begins with the determination of the fundamental feature of Chapter 8 ITEPA 2003, per [30 – 33] *Ghaidan v Godin-Mendoza* [2004] 2 AC 557. That fundamental feature is *"to claw back (though* [sic] *the tax system) Child Benefit paid to individuals with "adjusted net income" in excess of £50,000 (see ITEPA 681B). (In other words, so that Child Benefit ceases to be a universal benefit)."*. Further that the fundamental feature cannot include the extension of HICBC to non-recipients of child benefit (such as the Appellant) because such an extension results in the breaches set out above and there is no provision to compel the receiver of the child benefit to produce information to the higher earner. During the hearing Mr Gordon identified his ECHR compliant construction of Chapter 8 ITEPA 2003: s681B ITEPA 2003 should be read as if it did not include Condition B.

HMRC's arguments

110. In broad terms HMRC's case is that there is no breach of the above rights. However, if there is the Appellant remains liable for the HICBC for the tax years 2012/13 and 2013/14 because there is no remedy available to the Appellant in this Tribunal pursuant to s3 HRA.

111. HMRC say that the objective of the HICBC is recouping child benefit from family units containing a higher income person and thus obtaining tax to fund the state. Further that this is

clear from Chapter 8 ITEPA 2003 and also the explanatory notes to s8 and Sch 1 Finance Act 2012 (which inserted Chapter 8 ITEPA 2003 into ITEPA 2003).

Discussion and findings – Ground 3 – the human rights challenge to the HICBC

Introductory remarks

112. Our starting point is to establish whether there is a breach of any of the Appellant's human rights as set out above. It is only if we find that there is such a breach that we need to consider whether a conforming interpretation pursuant to s3 HRA is possible.

113. HMRC remind us that a wide margin of appreciation exists in the area of taxation, see *Zeeman v HMRC* [2020] EWHC 795 (Admin) (**Zeeman**) at [76]:

> There is ample authority both in Strasbourg and domestically to the effect that a State, especially when framing and implementing policies in the area of taxation, enjoys a wide margin of appreciation: see e.g. *Huitson v UK* (Decision 5013/12 of 15 January 2015). Indeed, it follows from the wording of A1P1 itself that the State has a right to "enforce such laws as it deems necessary to control the use of property … to secure the payment of taxes or other contributions or penalties." In the field of tax, therefore, States may be afforded some degree of additional deference and latitude in the exercise of their fiscal functions under the lawfulness test: see *NKM v Hungary* (above) at [50], *Colazzo v Italy* (Application No 36904/06) at [30]–[31], and *Cacciato v Italy* (Applications No 60633/16) at [23]-[24].

A1P1

114. HMRC proceeded on the basis that A1P1 was engaged: the imposition of the HICBC interferes with the Appellant's enjoyment of his money. Mr Winter explained that for the HICBC not to breach A1P1 it must be: (i) lawful; and (ii) proportionate, see Zeeman at [73].

115. On lawfulness Mr Winter submits that the HICBC legislation is accessible as it is publicly available and reasonably precise and foreseeable in its application, see *R (oao (St Matthews (West) Ltd) v HM Treasury* [2015] EWCA Civ 648 at [52]. Further, the HICBC legislation is not arbitrary in its application as it is also founded on a reasonable and principled objective: recouping child benefit from family units containing a higher income person and obtaining tax to fund the state, see Zeeman at [74]. Therefore the HICBC is lawful.

116. Subject to what we say about the HICBC's objective below, which does not alter our conclusion, we agree with HMRC's case on lawfulness. The Appellant made submissions about the arbitrary/irrational/capricious nature of the HICBC however, these are properly characterised as a general complaint about who is liable pursuant to Chapter 8 ITEPA 2003 and are therefore insufficient to mount a successful challenge to the lawfulness of the HICBC.

117. On proportionality Mr Winter relied on the fourfold proportionality test laid down by Lord Sumption at [20] in *Bank Mellat v Her Majesty's Treasure (No. 2)* [2013] UKSC 39 (***Bank Mellat***):

> The requirements of rationality and proportionality, as applied to decisions engaging the human rights of applicants, inevitably overlap. The classic formulation of the test is to be found in the advice of the Privy Council, delivered by Lord Clyde, in *De Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 69 at 80. But this decision, although it was a milestone in the development of the law, is now more important for the way in which it has been adapted and applied in the

> subsequent case-law, notably *R (Daly) v Secretary of State for the Home Department* [2001] 2 AC 532 (in particular the speech of Lord Steyn), *R v Shayler* [2003] 1 AC 247 at paras 57-59 (Lord Hope of Craighead), *Huang v Secretary of State for the Home Department* [2007] 2 AC 167 at para 19 (Lord Bingham of Cornhill) and *R (Quila) v Secretary of State for the Home Department* [2012] 1 AC 621 at para 45. Their effect can be sufficiently summarised for present purposes by saying that the question depends on an exacting analysis of the factual case advanced in defence of the measure, in order to determine (i) whether its objective is sufficiently important to justify the limitation of a fundamental right; (ii) whether it is rationally connected to the objective; (iii) whether a less intrusive measure could have been used; and (iv) whether, having regard to these matters and to the severity of the consequences, a fair balance has been struck between the rights of the individual and the interests of the community. These four requirements are logically separate, but in practice they inevitably overlap because the same facts are likely to be relevant to more than one of them.

118. Mr Winter also reminded us of Lord Sumption's endorsement at [20] in *Bank Mellat* of Lord Reed's minority judgment at [75]:

> In relation to the third of these criteria, …. the limitation of the protected right must be "one that it was reasonable for the legislature to impose", and that the courts were "not called upon to substitute judicial opinions for legislative ones as to the place at which to draw a precise line". This approach is unavoidable, if there is to be any real prospect of a limitation on rights being justified: as Blackmun J once observed, a judge would be unimaginative indeed if he could not come up with something a little less drastic or a little less restrictive in almost any situation, and thereby enable himself to vote to strike legislation down …….; especially, one might add, if he is unaware of the relevant practicalities and indifferent to considerations of cost. To allow the legislature a margin of appreciation is also essential if a federal system such as that of Canada, or a devolved system such as that of the United Kingdom, is to work, since a strict application of a "least restrictive means" test would allow only one legislative response to an objective that involved limiting a protected right.

119. Returning to *Zeeman* at [79] Mr Winter referred us to the following comment on the fourfold proportionality test:

> Legislation will only be regarded as infringing A1P1 rights if it can be shown to be "manifestly without reasonable foundation": *James v UK* (Application no 8793/79) (1986) 8 EHRR 123. That is the key test to be applied when considering each of the 4 elements of justification identified by Lord Sumption in the well-known passage of his judgment *in Bank Mellat v HM Treasury [2014] AC 700* at [20].

120. The Appellant complains about the HICBC's application to him. It is agreed that the HICBC applies to the Appellant as a result of s691B ITEPA 2003 and in particular Condition B. Therefore, our first task is to identify what the objective of that provision is. We agree (by reference to the legislation only) with what HMRC say above subject to one addition: in our view it is clear from the legislation that the objective also includes recoupment from the highest earner within a relevant family unit. Insofar as the Appellant's fundamental feature of the HICBC legislation can be considered an alternative it cannot be right to say that Chapter 8 ITEPA 2003 is only concerned with recouping child benefit from those it was paid to (where they are part of a higher income family unit): that is patently clear from the terms of the legislation.

121. In relation to the Appellant's 'pure' A1P1 case HMRC's arguments regarding the first limb of proportionality unnecessarily discussed a difference in treatment with uncoupled persons. Such a discussion is not necessary because the right approach to answer how the Appellant put his case, is to simply consider the Appellant's position. We set out our view of how that is done below.

122. We have a further point of difference from HMRC in approach to the Appellant's 'pure' A1P1 case. Mr Gordon rightly said in oral submissions that there is no aggregation exercise within Chapter 8 ITEPA 2003 that determines whether there is a charge to the HICBC (which in places HMRC's approach appeared to be couched in terms of). Instead the reason for looking at more than one person's income is to determine who will be liable to the HICBC. We agree with Mr Gordon's point but do not consider that this defeats HMRC's case. It does however warrant us setting out our analysis of proportionality which differs marginally from HMRC's.

123. In our view the HICBC's objective of recouping child benefit from the highest earner in family units containing a higher income person and thus obtaining tax to fund the state is sufficiently important to justify an imposition of tax (the limitation of a fundamental right). Imposing a tax is clearly rationally connected to obtaining funding for the state. Additionally, imposing liability for the HICBC on the highest earner in a family unit further rationally connects the HICBC to its objective (recouping child benefit from the highest earner in family units containing a higher income person). Therefore, we are satisfied that limbs (i) and (ii) of the fourfold proportionality test above are met. Mr Gordon says that a less intrusive measure would be for liability for the HICBC to fall onto the person who 'had' the child benefit in the first place (we understood Mr Gordon to mean the person who was entitled). However, that cannot be reconciled with what we have found the objective of the HICBC to be (recoupment from the highest earner). Therefore, on the arguments before us we find that there is no difficulty insofar as limb (iii). Finally, we are also content that limb (iv) has been satisfied as the right balance has been struck between the interference with the Appellant's right to enjoy his money (which considering limbs (i) – (iii) we do not consider to be a severe consequence) and the communal interest in recouping child benefit from the highest earner in family units containing a higher income person and thus obtaining tax to fund the state. Our conclusions are buttressed by recalling the "margin of appreciation" and our view that the HICBC cannot said to be "manifestly without reasonable foundation".

Article 14

124. HMRC accept that even if there is no direct breach of A1P1 Article 14 may be engaged if the HICBC discriminated against the Appellant on a protected ground such as marital or other status. HMRC are right to highlight that the HICBC would treat the Appellant in the same way even if he was not married and therefore the HICBC does not discriminate against the Appellant because of his marital status. Consequently, the Appellant's Article 12 (right to marry) case goes no further. However, HMRC accept that the HICBC does treat the Appellant differently as a result of his long-term relationship with a woman and this amounts to an *'other status'* for the purposes of Article 14.

125. The Court of Appeal in *R (oao of AB) v Secretary of State for the Home Department* [2024] EWCA Civ 369 recently considered Article 14, noting (relevantly) at [39] that one should ask (i) whether a complainant has *"been treated differently from other people not sharing that status who are similarly situated"* and (ii) if so, whether the difference in treatment has *"an objective and reasonable justification, in other words, does it pursue a legitimate aim and do the means employed bear a reasonable relationship of proportionality to the aims sought to be realised?"*. The Court of Appeal went on to cite the Supreme Court at [49]:

In R (SC) v SSWP at [59] it was said that:

> "59. It is also necessary to bear in mind that not all differences in treatment are relevant for the purposes of article 14. The difference is only relevant, for the purpose of assessing whether there has been discrimination, if the claimant is comparing himself with others who are in a relevantly similar situation. An assessment of whether situations are "relevantly" similar generally depends on whether there is a material difference between them as regards the aims of the measure in question."

126. When asked during the hearing to clarify who the Appellant should be compared to for Article 14 purposes Mr Gordon said a childless single person: Mr Gordon's point being that the Appellant personally has not had the benefit of the child benefit money received by his wife and so subjecting him to the HICBC was comparable to recovering that money from a person outside the ambit of the HICBC. Such a person is clearly not in a *"relevantly similar situation"*: there is a clear material difference between them as regards the aim of the HICBC of recouping child benefit from the highest earner in family units containing a higher income person and someone outside the ambit of the HICBC altogether. Therefore, on the Appellant's case there is no difference in treatment that breaches Article 14 and we do not go on to consider this issue further.

Article 8

127. It is useful to recollect that the Appellant says that it is the application of the HICBC to him (ie an imposition of tax) that results in a 'direct interference' with his right to family life.

128. HMRC highlight that the Appellant's case focussed solely on the family life element of Article 8 and accept that Article 8 is engaged. They go on to say that the HICBC is clearly in accordance with the law as it meets the requirements set out in *Sunday Times v United Kingdom* (1979) 2 EHRR 245 at [49] (***Sunday Times***): put broadly it is accessible and foreseeable (that is formulated with sufficient precision to enable the individual, with advice if needs be, to regulate his conduct). Further, that the HICBC is taxation that funds the state which is necessary in a democratic society for the economic well-being of the country. Mr Winter referred us to *Piechowicz v Poland* (2012) 60 EHRR 1038 at [212] for the proposition that Article 8 'necessity' requires 'proportionality' as to which he repeated the submissions he made with respect to A1P1.

129. We agree with HMRC's case subject to the same points we make about proportionality above.

Conclusion on Ground 3 – the human rights challenge to the HICBC

130. In light of the above our conclusion is that the HICBC does not breach of the Appellant's human rights and the Appellant remains liable for the HICBC for the tax years 2012/13 and 2013/14.

CONCLUSION

131. For the reasons given above we dismiss the appeal in respect of the Appellant's liability set out in Closure Notices.

132. Subject to what we say about quantum, we also dismiss the Appellant's appeal regarding the Discovery Assessment. We reduce the quantum of the Discovery Assessment to £3,652,638 by agreement of the parties.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

133. 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: 10th MARCH 2025