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UT (Tax & Chancery) Case Number: UT/2020/000368

Upper Tribunal
(Tax and Chancery Chamber)

Hearing venue: Rolls Building, Fetter Lane, London

Heard on: 08,09,10 and 13 December 2021 with further written submission on 16 December 2021.
Judgment date: 22 July 2022

CORPORATION TAX – acquisition by Cayman Islands limited partnership of interest in UK limited partnership – liability of general partner in Cayman partnership to corporation tax on certain profit allocations – whether Cayman partner entitled to tax deduction for interest on borrowings to acquire interest in UK limited partnership – appeal dismissed

Before

MR JUSTICE LEECH
JUDGE THOMAS SCOTT

Between

(1) BCM CAYMAN LP
(2) BLUECREST CAPITAL MANAGEMENT CAYMAN LIMITED
Appellant

and

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS
Respondents

Representation:

For the Appellant: Malcolm Gammie QC and Michael d'Arcy, instructed by Slaughter and May

For the Respondent: Rupert Baldry QC and Thomas Chacko, instructed by the General Counsel and Solicitor to HM Revenue and Customs

DECISION

I. Introduction

1. This is the decision on the appeal by BCM Cayman LP ("**BCMC LP**" or the "**Cayman Partnership**") and BlueCrest Capital Management Cayman Limited ("**BCMCL**") (together the "**Appellants**") against the decision of the First-tier Tribunal ("**FTT**") reported at [2020] UKFTT 0298 (TC) (the "**Decision**").

2. The BlueCrest group carries on the trade of investment management. At all relevant times, a UK limited partnership, BlueCrest Capital Management LP ("**BCM LP**" or the "**UK Partnership**"), carried on part of that trade. In 2007 certain members of BCM LP wished to sell part of their interests in the UK Partnership which amounted to 19% of the equity. The remaining members agreed to acquire those interests with a view to providing an "equity pool" for other members or employees of the group. BCMC LP, the First Appellant, was formed in the Cayman Islands as a limited partnership to hold the interests of the buyers. BCMCL, the Second Appellant, is a limited company and was incorporated in the Cayman Islands to become the general partner of the Cayman Partnership. BCMCL was wholly owned by BlueCrest Capital Management Cayman Holdings Ltd ("**BCMCHL**"). The Cayman Partnership was governed by a deed of partnership (the "**BCMC LP Deed**" or the "**Cayman Partnership Deed**").

3. The sellers assigned their combined 19% interest in the UK Partnership to BCMCL and it then contributed that interest to BCMC LP as a capital contribution. BCMC LP became a party to the BCM LP's amended and restated deed of partnership (the "**BCM LP Deed**" or the "**UK Partnership Deed**"). As a limited partnership, BCMC LP did not have separate legal personality and one of the principal issues which we have to determine is the effect of the arrangement whereby BCMC LP became a partner in the UK Partnership and, in particular, whether all of the partners of BCMC LP also became partners in the UK Partnership.

4. To fund the acquisition BCMCL borrowed $365 million. In particular, it borrowed $200 million from the Royal Bank of Scotland plc ("**RBS**") and issued $165 million in loan notes (the "**Loan Notes**") to the sellers. As part of the structure which was put in place at the same time, RBS became a member of BCMC LP (and was identified as the "**Corporate Limited Partner**"). RBS also entered into a swap transaction with BCMCHL governed by the 2002 ISDA Master Agreement which the parties called the "**Total Return Swap**" or "**TRS**".

5. On 11 June 2008 RBS assigned its interest in BCMC LP to Fyled Energy Ltd (later renamed Morgan Stanley Montrose Investments Ltd) ("**Fyled**"), which became the Corporate Limited Partner. The TRS was novated with the effect that RBS was replaced by Fyled as the counter-party and BCMCHL also entered into the "**Financial Contract**" (together with a side letter) with another counter-party, Morgan Stanley Cooper Ltd ("**MS Cooper**"), a company incorporated in the UK and wholly owned by the Morgan Stanley Group. These new arrangements collectively replaced the TRS.

6. BCM LP allocated profits in the UK Partnership to the members of the UK Partnership in a particular order of priority. In particular, it allocated profits to BCMC LP to cover the monthly payment of interest due under the RBS loan facility before then allocating profits to the limited partners in the agreed proportions set out in their letters of allocation or the

Deeds of Adherence which they executed on admission to the UK Partnership (subject to certain contingencies).

7. BCMC LP also allocated profits in the Cayman Partnership in a particular order of priority. In particular, it allocated profits to BCMCL to pay the interest due under the RBS loan facility before then allocating profits to pay off the 15% interest due under the Loan Notes before then allocating profits to the limited partners (excluding the Corporate Limited Partner) in the agreed proportions set out in the Deeds of Adherence which they executed on admission to the Cayman Partnership (subject to certain contingencies).

8. However, for the accounting periods between 2007 and 2011 the Cayman Partnership Deed also provided for a profit allocation to be made to the Corporate Limited Partner in the event that the UK Partnership made profits in excess of a certain level (described as "**Superprofits**"). The purpose of these profit allocations to the Corporate Limited Partner was to enable BCM LP to prepay part of the debt due to the sellers under the Loan Notes. If the UK Partnership declared Superprofits, BCMCL would make a profit allocation to the Corporate Limited Partner and that profit allocation would trigger a payment by the Corporate Limited Partner to BCMCHL under the TRS. BCMCHL would then use the funds which it received from the Corporate Limited Partner to subscribe for capital in the Cayman Partnership and BCMCL would use those funds in turn to prepay the debt due to the sellers under the Loan Notes.

9. In the event, the UK Partnership did not make Superprofits when RBS was the Corporate Limited Partner of the Cayman Partnership. But BCMC LP made a number of Superprofits allocations to Fyled. On 1 December 2008 the business of the UK Partnership was transferred to BCM LLP and in April 2010 a further reorganisation took place under which BCM UK LLP was incorporated and commenced trading in the UK. On 30 November 2010 Fyled ceased to be a partner of BCMC LP and the Financial Contract was terminated (together with the associated arrangements).

10. The FTT decided a range of issues and a number of those issues are the subject of separate appeals. The various appeals before the FTT were divided into three groups although some issues were common to more than one group (or had the potential to be so). We refer to the first group of appeals, which are the subject matter of this Decision, as the "**Cayman Appeals**". We describe the second group of appeals as the "**PIP Appeals**" and they related to the tax consequences of a "**Partner Incentivisation Plan**" or "**PIP**" established by BlueCrest in 2008. We refer to the third group of appeals as the "**IP Appeals**", which concerned the tax treatment in the hands of individual partners of certain sums received pursuant to the PIP.

11. In relation to the Cayman Appeals, two of the issues decided by the FTT are not the subject of this appeal. The FTT decided that the tax deductibility of BCMCL's borrowing costs was not to be restricted under transfer pricing/thin capitalisation rules. HMRC did not appeal against that decision. The FTT also decided that the discovery assessment made by HMRC against the Appellants was validly issued under the relevant statutory provisions. The Appellants do not appeal against that decision.

12. Two issues arise on the Cayman Appeals. First, in relation to those profit allocations which BCM LP made to BCMCL under the UK Partnership Deed and BCMCL made to the Corporate Limited Partner (the "Corporate Partner") under the Cayman Partnership Deed (because the UK Partnership made Superprofits in the relevant accounting period)

was BCMCL liable to corporation tax on those profits (as HMRC claim) or were they taxable only in the hands of the Corporate Partner (as the Appellants claim)? We describe this as the "**Profit Allocation Issue"**. Secondly, was BCMCL entitled to relief on its $365 million of borrowings? We describe this as the "**Interest Deductibility Issue**".

13. The FTT decided that BCMCL, and it alone, was liable to corporation tax on all of its profit allocations under the UK Partnership deed (including any profits which it allocated to the Corporate Partner under the Cayman Partnership Deed) because only BCMCL was a partner in the UK Partnership. The FTT also decided that BCMCL was not entitled to any trading deduction for its borrowing costs.

II. Agreed facts and issues

14. The parties were able to agree a very detailed and thorough Statement of Agreed Facts and Issues (the "**SAFI**") relating to the Cayman Appeals which the FTT set out in full: see [8]. For ease of reference, we also set out the relevant passages from the Decision:

> "**AGREED FACTS**
>
> This is the statement of facts as agreed by the parties.
>
> **Background**
>
> ***Development and operation of relevant BlueCrest structure***
>
> ***UK Partnership***
>
> (2) On 4 August 2000 a limited partnership deed establishing BCM LP (the "**BCM LP Deed**") was entered into by BCML [BlueCrest Capital Management Limited], MP [Michael Platt] and WR [William Reeves]. BCM LP was thereafter engaged in the trade of investment fund management.
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> (3) In December 2000 the fund known as BlueCrest Capital International was launched and BCM LP [BlueCrest Capital Management Limited Partnership] was appointed as investment manager. This fund was managed by the two founder partners (WR and MP) on behalf of BCM LP on a discretionary basis.
>
> (4) In 2003, Sugarquay, a company incorporated in England and Wales, acquired a 25 per cent interest in BCM LP from WR and MP. Sugarquay was the corporate vehicle through which Man Group plc (a third-party investor) acquired and held its investment.
>
> **Transactions entered into in June and July 2007**
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> (5) Over the period 2006 and 2007, three of the limited partners (Sugarquay, MP and WR) wished to sell a proportion of their interests in BCM LP, amounting to 19% of the total equity of the partnership. A structure was established in the Cayman Islands to acquire that share.
>
> (6) On 14 June 2007, BCMCL was incorporated as a Cayman Islands limited liability company. On 20 June 2007 BCMCHL, a Cayman Islands limited liability company, was incorporated, and on 4 July 2007 BCMCL became a wholly owned subsidiary. On 22 June 2007, BCMCL (as general partner) and Andrew Dodd (as the "initial limited partner") established BCMC LP through a limited partnership deed which took the form of a letter agreement.

(7) Since July 2007, BCMCHL has held 100% of the issued share capital of BCMCL. Both BCMCHL and BCMCL are resident for tax purposes in the Cayman Islands.

(8) On 5 July 2007 BCMCHL and RBS entered into a TRS [Total Return Swap], which provided for:

(a) BCMCHL to make an initial fixed payment of US$20,000 to RBS;

(b) Thereafter:

(i) BCMCHL would make a subsequent fixed payment of US$500,000 to its counterparty, namely RBS (provided the rights and obligations of the TRS had not been assigned, terminated or novated) on the earlier of six months from the date of the fixed payment of US$20,000 and five business days following the date on which a net profit was first received by RBS under the BCMC LP agreement.

(ii) Subsequently, BCMCHL would make (in summary) monthly fixed payments of US$19,230.77 under the TRS to RBS whether or not RBS became obliged to make any payments to BCMCHL.

(c) RBS was to be a limited partner of BCMC LP and RBS's payment obligation under the TRS depended upon it being allocated profits under the relevant provisions of the BCMC LP Deed.

(d) Pursuant to the terms of the "**Subscription Deed**", BCMCHL would use such monies as it received from RBS to subscribe for capital in BCMCL.

(9) On 6 July 2007, BCMCL, Mr Dodd and RBS entered into the BCMC LP Deed, a limited partnership deed relating to BCMC LP which replaced the letter agreement limited partnership deed dated 22 June 2007. The BCMC LP Deed included RBS as the "Corporate Limited Partner", designated AD as "Original Limited Partner", and, pursuant to clause 6.1, provided that the business of BCMC LP was to "*invest in an investment management business through being a limited partner in [BCM LP]*". Letters of allocation, dated 6 July 2007, were sent by BCMCL (as general partner of BCMC LP) to RBS and AD, which noted that RBS and AD had each contributed US$100 to the capital of BCMC LP.

(10) On 6 July 2007, the following further agreements were entered into to finance and implement the acquisition by BCMCL of the 19% interest in BCM LP (of which 13% was acquired from WR, 3% from MP and 3% from Sugarquay):

(a) the "**Facility Agreement**" pursuant to which RBS agreed to lend BCMCL US$200 million, for an original term of 3 years but extendable to 5 years (the "RBS Loan Facility"); pursuant to clause 3.1(a), this sum was to be used by BCMCL to acquire a 10.3% partnership interest in BCM LP from WR, MP and Sugarquay pursuant to the Deed of Assignment (see below), such partnership interest to be promptly contributed by way of capital to BCMC LP pursuant to the Deed of Contribution (see below);

(b) a loan note instrument (the "**Loan Note Instrument**"), made by BCMCL, creating and issuing US$165 million in Loan Notes which were to be issued to each of WR, MP and Sugarquay as consideration for the acquisition by BCMCL of an interest of approximately 8.7% of

the limited partnership interests in BCM LP from WR, MP and Sugarquay;

(c) the "**Deed of Assignment**", by which WR, MP and Sugarquay assigned to BCMCL the 19% interest in BCM LP with effect from 1 July 2007;

(d) the "**Deed of Adherence**", through which BCMCL became a limited partner of BCM LP;

(e) the "**Deed of Subordination**", pursuant to which the "Subordinated Creditors", namely WR, MP and Sugarquay, agreed that financial liabilities of BlueCrest entities to the "Senior Creditors", namely RBS, would take priority over those BlueCrest entities' financial liabilities to WR, MP and Sugarquay;

(f) (following BCMCL's acquisition of the 19% interest in BCM LP) the "**Deed of Contribution**", through which BCMCL made a capital contribution to BCMC LP of the interest in BCM LP which had been assigned to it pursuant to the Deed of Assignment (and consequently resigned as a limited partner in BCM LP), in consideration for BCMC LP granting it certain partnership interests as per the BCMC LP Deed; and

(g) the "**Subscription Deed**", pursuant to which BCMCHL agreed that, in the event that it received any monies from RBS (more generally, the financial trader, being the counterparty to the TRS) pursuant to the TRS, BCMCHL would apply for shares in BCMCL in an equal amount.

(11) Following the resignation of BCMCL as a limited partner of BCM LP, BCMC LP became a limited partner in BCM LP (as envisaged by clause 3.1(a) of the Facility Agreement and clause 2.2 of the Deed of Contribution), in accordance with the BCM LP Deed, which was amended accordingly on 6 July 2007. Letters of allocation, dated 6 July 2007, were sent by BCML (as general partner of BCM LP) to WR, MP, Sugarquay and BCMCL (as general partner of BCMC LP). These noted that:

(a) WR had contributed £459,525 to the capital of BCM LP, his interest in the income profits and losses of BCM LP was 7.1886%, and his interest in the capital profits and losses of BCM LP was 7.1990%.

(b) MP had contributed £463,525 to the capital of BCM LP, his interest in the income profits and losses of BCM LP was 38.8462 per cent, and his interest in the capital profits and losses of BCM LP was 39.5833%.

(c) Sugarquay had contributed £100 to the capital of BCM LP, its interest in the income profits and losses of BCM LP was 22.5437%, and its interest in the capital profits and losses of BCM LP was 22.7702%.

(d) BCMC LP had contributed £100 to the capital of BCM LP, its interest in the income profits and losses of BCM LP was 19.0000%, and its interest in the capital profits and losses of BCM LP was 19.0000%.

(12) Pursuant to the transactions described above, on 6 July 2007 the 19% interest in BCM LP was acquired from WR, MP and Sugarquay in consideration for (a) cash payments (using funds available under the RBS Loan Facility) and (b) the issuance of the Loan Notes. The payments made, which totalled US$361 million, were as follows:

(a) To WR:

(i) US$192 million in cash for a 10.11% interest; and

(ii) US$55 million in Loan Notes for a 2.89% interest;

(b) To MP:

(i) US$2 million in cash for a 0.11% interest; and

(ii) US$55 million in Loan Notes for a 2.89% interest;

(c)To Sugarquay:

(i) US$2 million in cash for a 0.11% interest; and

(ii) US$55 million in Loan Notes for a 2.89% interest.

(13) The US$361 million valuation of the 19% interest acquired in BCM LP was agreed between the parties at the time.

Financing of the transaction and repayment under the Facility Agreement and Loan Notes

(14) BCMC LP would be allocated profits by BCM LP pursuant to clause 12 of the BCM LP Deed; BCMC LP would, in turn, allocate profits to BCMCL pursuant to clause 12 of the BCMC LP Deed, and it was from this profit allocation that BCMCL would meet its obligation to pay interest under the Facility Agreement and the Loan Notes and, ultimately, in the ordinary course, repay them.

Interest payment obligations

(15) BCMCL was obliged to pay interest under the Facility Agreement, calculated by reference to the aggregate of LIBOR, a margin of 2.5% and a mandatory cost formula. Repayment of the RBS Loan Facility was to be made pursuant to clause 6. This envisaged a Termination Date between three and five years after BCMCL had utilised the facility to acquire the 19% interest in BCM LP. If the RBS Loan Facility had not been fully repaid by the Termination Date, the outstanding amount was to be repaid monthly starting on that date (the "Repayment Start Date") and ending two years later.

(16) Under the terms of the Facility Agreement there were certain "Trigger Events" which would, pursuant to clause 22, result in the loan principal becoming repayable, in instalments, earlier than would otherwise have been the case. The principal Trigger Events were: if the AUM [Assets Under Management] of funds managed by BCM LP fell below US$8.25 billion or if the AUM as at a particular month had declined by more than 30% when compared to the AUM as at the month end falling 12 months prior to that particular month. Clause 22 also provided that repayment would cease in certain situations, principally, and respectively for the Trigger Events mentioned above, if the AUM of funds managed by BCM LP increased to above US$11 billion or if the AUM subsequently increased by 10% above the level that existed when the Trigger Event occurred.

(17) BCMCL was also obliged to pay interest under the Loan Note Instrument at 15% and the amount of BCMCL's drawings under clause 13.4 of the BCMC LP Deed had to be applied for such a purpose. Where BCMCL's drawings were less than the interest due, calculated at 15%, the difference would be deferred until such time as the requisite amounts were available to BCMCL under the BCMC LP Deed or otherwise on redemption.

(18) The Loan Notes were redeemable on the Final Maturity Date in July 2017 if and to the extent that funds were available for that purpose, or at

any time before then by BCMCL on 30 days' notice. In addition, paragraphs 3.3 to 3.6 of Schedule 2 to the Loan Note Instrument provided for earlier redemption in whole or part on various events, such as a change of control of BCM LP, the derivation of "Superprofits" from BCM LP under clause 12.1(C) of the BCMC LP Deed, a Note Trigger Event (which was the same as a Trigger Event, as defined in the Facility Agreement, requiring early repayment of the RBS Loan Facility), or if there were a default by BCMCL in paying an amount due under the Loan Notes.

(19) In particular, paragraph 3.4 of Schedule 2 to the Loan Note Instrument provided that if profits of BCM LP were ever allocated to the Corporate Limited Partner in BCMC LP (i.e. RBS, then Fyled) by way of "Superprofits" pursuant to clause 12.1(C) of the BCMC LP Deed, BCMCL was required, subject to clause 5.2 of the Deed of Subordination, to redeem the whole or any part of the outstanding Loan Notes. Clause 5.2 of the Deed of Subordination, provided that repayments in respect of the Loan Notes were permitted where:

(a) no Trigger Event had occurred and was continuing; and

(b) no repayment of the RBS Loan Facility (referred to as "Loan Wind Down") had commenced and was continuing.

If those conditions were satisfied, BCMCL was permitted to make the following payments:

(1) interest payments under the Loan Notes at 15% per annum (provided that all interest payments under the Facility Agreement had been paid); and

(2) principal under the Loan Notes (provided that if such payments were to be made from "Excess Benchmark Profits", then BCMCL must first use at least 33% of the "Excess Benchmark Profits" to repay principal under the Facility Agreement).

"Excess Benchmark Profits" were defined in clause 1.1 of the Facility Agreement.

"Benchmark Profits" were defined in clause 1.1 of the BCMC LP Deed.

(20) During the period when RBS was the Corporate Limited Partner under the BCMC LP Deed, clause 7.6 of the Facility Agreement provided that if BCMCL wished to repay any amount owing under the Loan Notes from "Excess Benchmark Profits", BCMCL was required (consistently with clause 5.2 of the Deed of Subordination) to apply at least 33% of such "Excess Benchmark Profits" in prepayment of principal under the terms of the Facility Agreement.

Profit allocation provisions

(21) The provisions in the BCM LP Deed, stipulating how the profits generated by BCM LP's investment management business were to be allocated, were contained in clause 12 and operated, in summary, as follows:

(a) In the absence of any Trigger Event, BCM LP profits were to be allocated amongst the partners, pursuant to clause 12.1(A), as follows:

(i) First, an allocation to BCML as general partner to meet working capital requirements and any contingencies;

(ii) Secondly, performance-related payments as determined by BCML;

(iii) Thirdly, an allocation to BCMC LP to cover any monthly drawings by BCMCL to pay the interest due under the RBS Loan Facility;

(iv) Fourthly, the remainder, which for the purposes of the sub-clause would be increased by adding an amount equal to (iii) above, would be allocated to the partners, in the "Agreed Proportions", ie (as defined in clause 1.1 of the BCM LP Deed) the proportions set out in the letters of allocation sent by BCML (as general partner of BCM LP) to the respective partners or in their Deed of Adherence on their admission as a partner of BCM LP, provided that the amount allocated to BCMC LP would be reduced by an amount equal to (iii) above.

(b) If a Trigger Event occurred and was continuing, so that early repayments of principal became due under the Facility Agreement and the Note Instrument, clause 12.1(C) of the BCM LP Deed disapplied the provision in subparagraph (a)(iv) above and instead the "Remaining Profits" (ie such of BCM LP's as were left over after allocation in accordance with subparagraphs (a)(i)-(iii) above) were to be allocated to BCMC LP and would in turn be allocated by BCMC LP to its partners under the terms of the BCMC LP Deed, as described below.

(22) The profits of BCMC LP were agreed to be distributed among the partners of BCMC LP as follows:

(a) Clause 12.1(A) of the BC MC LP Deed provided for the following profit allocation, absent the circumstances specified in clause 12.1(B) and (C):

(i) First, an allocation to BCMCL as general partner to meet working capital requirements and any contingencies;

(ii) Secondly, an allocation to BCMCL as general partner to cover any monthly drawings by BCMCL to pay the interest due under the RBS Loan Facility;

(iii) Thirdly, an allocation to BCMCL as general partner to fund the 15% interest on the Loan Notes, and any accrued but unpaid interest on the Loan Notes from previous financial years;

(iv) Fourthly, from any remaining profits of BCMC LP, an allocation to BCMCL as general partner of such amount of the profits as BCMCL would decide, in its absolute discretion, should be used to redeem Loan Notes; and

(v) Fifthly, the remainder would be allocated to the individual limited partners, excluding the Corporate Limited Partner, ie RBS, in the "Agreed Proportions", ie (as defined in clause 1.1 of the BCMC LP Deed) the proportions set out in the letters of allocation between BCMCL and each of the individual limited partners or in their Deed of Adherence on their admission as a partner of BCMC LP.

(b) Clause 12.1(B) of the BCMC LP Deed disapplied the allocation provisions set out in subparagraphs (a)(iii)-(v) above in three cases:

(i) If a "Trigger Event" occurred; or

(ii) From the Repayment Start Date until after the Facility Repayment Date; or

(iii) During a Note Repayment Period.

(c) In any of the cases specified in clause 12.1(B), while they continued, BCMC LP's profits were to be allocated as follows:

(i) First, to meet working capital requirements and any contingencies;

(ii) Secondly, to cover any monthly drawings by BCMCL to pay the interest due under the RBS Loan Facility;

(iii) Thirdly, to the Corporate Limited Partner, ie RBS, or BCMCL as provided for in subclauses (1), (2) and (3) of clause 12.1(B);

(iv) Fourthly, to fund the 15% interest on the Loan Notes, and any accrued but unpaid interest on the Loan Notes from previous financial years;

(v) Fifthly, from any remaining profits of BCMC LP, such amount of the profits as BCMCL would decide should be used to redeem Loan Notes; and

(vi) The remainder would be allocated to the individual limited partners, excluding the Corporate Limited Partner in the "Agreed Proportions".

(d) Clause 12.1(C) of the BCMC LP Deed disapplied the allocation provisions set out in subparagraphs (a)(iv) and (a)(v) above in the event that BCM LP earned profits in excess of certain "Benchmark Profits" (see sub-paragraph (19) above) for any of the accounting periods ending 31 December 2007 through to 3 December 2011. In that event, BCMC LP's profits were to be allocated as follows:

(i) First, to meet working capital requirements and any contingencies;

(ii) Secondly, to cover any monthly drawings by BCMCL to pay the interest due under the RBS Loan Facility;

(iii) Thirdly, to fund the 15% coupon on the Loan Notes, and any accrued but unpaid interest on the Loan Notes from previous financial years;

(iv) Fourthly, in paying "Superprofits" (as defined) to the Corporate Limited Partner;

(v) Fifthly, from any remaining profits of BCMC LP, such amount of the profits as BCMCL would decide should be used to redeem Loan Notes; and

(vi) The remainder would be allocated to the individual limited partners, excluding the Corporate Limited Partner in the "Agreed Proportions".

(23) In the event, RBS never received any allocation in connection with BCM LP making "Superprofits" within clause 12.1(C), although subsequently Fyled did.

(24) Once BCMCL's debt to RBS had been repaid, or a trigger event was no longer in effect so that the repayments of loan principal were not due,

the Corporate Limited Partner in BCMC LP would no longer be entitled to share in the income profits.

(25) Following the "Note Repayment Date" (meaning the date on which all of the Loan Notes and the interest accrued thereon had been repaid and BCMCL had no further repayment obligations in respect thereof), BCMCL would use any profits allocated to it, and any other profits of BCMC LP not allocated to the Partners, solely for the benefit of BCMC LP and not distribute them otherwise. This was further formalised, for consideration of £1 from each party, by an undertaking to comply with this requirement contained in a side letter dated 6 July 2007 from BCMCL to MP, WR and Sugarquay.

Additional limited partners of BCMC LP

(26) Over time several individuals were introduced as limited partners of BCMC LP and allocated interests in the income and capital profits of BCMC LP. Specifically, on 23 November 2007, further individuals were admitted as limited partners of BCMC LP and on 1 November 2008 they were allocated "Agreed Proportions". This had no effect on BCMCL's interest in BCMC LP.

Replacement of RBS by Fyled in June 2008

(27) RBS was the original Corporate Limited Partner (as defined in the BCMC LP Deed) in BCMC LP and the counterparty to the TRS. RBS was replaced by Fyled as a party to the TRS and as the Corporate Limited Partner in BCMC LP on 11 June 2008.

(28) To this end, on 11 June 2008, the following transactions took place:

(a) By a deed of assignment, RBS assigned its entire interest in BCMC LP to Fyled.

(b) The TRS was novated to replace RBS with Fyled as BCMCHL's counter-party.

(c) The "**Financial Contract**" was entered into between BCMCHL and MS Cooper, a UK incorporated limited liability company wholly owned by the Morgan Stanley Group, with an effective date of 1 August 2008 and a termination date of 5 July 2017.

(29) The Financial Contract was effectively a replacement for the TRS, and the novation confirmation for the TRS provided that the TRS was to terminate on the date of the last fixed payment to be made by BCMCHL thereunder, no later than 31 July 2008. Under the novated TRS, the second fixed payment due from BCMCHL to its counterparty was reduced from US$500,000 to US$300,000.

(30) The Financial Contract operated in the same way as the TRS, with MS Cooper in the position of RBS, save that:

(a) Whereas from July 2007 until June 2008 profit distributions, if any, would be made by BCMC LP to RBS, they would now be made to Fyled as the Corporate Limited Partner in BCMC LP.

(b) MS Cooper would pay BCMCHL, in summary, an amount calculated as between % and 94.4% of the amount received by Fyled by way of profit allocation from BCMC LP (higher than the 87.5% which RBS would have paid under the TRS).

(31) The payments to be made by Fyled pursuant to the novated TRS, and by MS Cooper pursuant to the Financial Contract, were guaranteed by Morgan Stanley, which was the ultimate parent of both Fyled and MS Cooper.

(32) In the event, BCMC LP made one profit allocation to Fyled arising from Superprofits which triggered a payment by Fyled under the TRS. Subsequently, there were a number of profit allocations to Fyled arising from Superprofits which triggered payments by MS Cooper under the Financial Contract.

Transfer from BCM LP to BCM LLP in December 2008

(33) The business of BCM LP was transferred as a going concern to BCM LLP [BlueCrest Capital Management LLP] on 1 December 2008. Through its partnership interest in BCMC LP, BCMCL was thereafter treated as carrying on the underlying trade of BCM LLP through a PE [Permanent Establishment] in the UK.

Changes in 2009 to 2011

(34) In April 2010 a reorganisation was effected under which BCM LLP migrated to Guernsey with effect from 1 April 2010. A new entity, BCM UK LLP, was incorporated and commenced trading in the UK, and BCMC LP also became a partner in this entity, becoming entitled under clause 10.3(A)(4) of the BCM UK LLP partnership deed to be considered for profit allocations.

(35) On 30 November 2010 Fyled ceased to be a partner of BCMC LP, and the Financial Contract was terminated.

(36) In 2011, transactions were undertaken pursuant to which BCMCL would ultimately acquire the remaining interests in the relevant BlueCrest entities ultimately held by WR and Sugarquay. As part of these transactions BCMCL's existing debt arrangements were renegotiated, including the redemption of the Loan Notes and the refinancing of the remaining balance on the RBS Loan Facility of US$172 million as part of a new, syndicated loan of US$610 million.

(37) Following these transactions, BCMCL continued to receive drawings from BCM UK LLP sufficient to cover the interest payable on the part of the new, syndicated loan attributable to the refinanced balance on the RBS Loan Facility (ie US$172 million).

Repayment

(38) BCMCL made repayments of the new syndicated loan during 2011 and 2012, leaving an outstanding balance of US$197 million, which was refinanced on 9 July 2013 as part of a new loan facility. No share of BCM UK LLP profits was allocated to BCMCL after that date.

HMRC's tax enquiries

(39) HMRC opened enquiries into the Appellants' tax returns under paragraph 24 of schedule 18 to the Finance Act 1998 (the "**FA 1998**") (in respect of BCMCL) and s 12AC of the Taxes Management Act 1970 (the "**TMA 1970**") on the following dates [and a table of those dates was set out].

(40) By letter dated 31 March 2017, HMRC sent Closure Notices to the Appellants in respect of [those] enquiries.

(41) As a result of HMRC's primary analysis in respect of [the "Profit Allocation Issue"] HMRC assessed the additional profits chargeable to tax in respect of BCMCL as follows:

Accounting period	Increased profits in BCMCL tax return
Year ended 30 November 2008	£13,138,385
Year ended 30 November 2009	£33,988,539

(42) As a result of HMRC's primary analysis in respect of…the "Interest Deductibility Issue"…HMRC assessed the additional profits chargeable to tax in respect of BCMCL as follows:

Accounting period	Increased profits in BCMCL tax return
Period ended 30 November 2007	£8,085,412
Year ended 30 November 2008	£19,325,305
Year ended 30 November 2009	£16,576,629
Year ended 30 November 2010	£14,760,346
Period ended 31 December 2010	£945,990
Year ended 31 December 2011	£4,071,658
Year ended 31 December 2012	£3,528,780
Year ended 31 December 2013	£1,138,229

(43) As a result of their analysis above in respect of the Profit Allocation Issue and the Interest Deductibility Issue, HMRC contend that the following sums are chargeable by way of corporation tax in respect of the following periods. The Appellants deny that these sums are due as alleged or at all.

Accounting period	Increased amount said by HMRC to be chargeable by way of corporation tax in respect of BCMCL
Period ended 30 November 2007	£2,544,324.20

Year ended 30 November 2008	£9,687,361.06
Year ended 30 November 2009	£14,513,915.64
Year ended 30 November 2010	£3,898,001.52
Period ended 31 December 2010	£245,302.12
Year ended 31 December 2011	£833,335.96
Year ended 31 December 2012	£847,217.68
Year ended 31 December 2013	£296,333.39

(44) On the basis that HMRC have agreed to allow deductions to be taken in respect of administrative expenses incurred by BCMCL, the figures as included in the above table are required to be adjusted. The revised figures are as follows:

Accounting period	**Increased amount said by HMRC to be chargeable by way of corporation tax in respect of BCMCL**
Period ended 30 November 2007	£2,419,660.10
Year ended 30 November 2008	£9,428,891.79
Year ended 30 November 2009	£14,433,165.32
Year ended 30 November 2010	£3,755,792.32
Period ended 31 December 2010	£233,451.40
Year ended 31 December 2011	£833,335.96
Year ended 31 December 2012	£847,217.68
Year ended 31 December 2013	£296,333.39

AGREED ISSUES

This is the statement of issues as agreed between the parties.

The question for the Tribunal's determination is whether HMRC's amendments to the Appellants' tax returns, as detailed in the Closure

Notices and Discovery Amendment, should be set aside. The parties envisage that this raises the following issues for the Tribunal's determination:

(In the terminology adopted in the Appellants' Grounds of Appeal, HMRC's Statement of Case, and the Appellants' Reply, Issues 1 and 2 below fall within the "**Profit Allocation Issue**", and Issues 3 to 5 fall within the "**Interest Deductibility Issue**".)

(1) Is BCMCL liable to corporation tax on all of the profit allocations of BCM LP in respect of the 19% interest in BCM LP sold by WR, MP and Sugarquay in July 2007? In this regard was BCMC LP a partner of BCM LP and, if not, were all the partners of BCMC LP to be treated as partners of BCM LP?

(2) Did BCMCL's entitlement to the profits of BCMC LP include those allocated to RBS/Fyled (less amounts retained by Fyled as fees for its involvement in the arrangements)? In this regard:

(a) What were the "profit-sharing arrangements", within the meaning of s.1262 of the CTA 2009 [Corporation Tax Act 2009], relevant to BCMC LP?

(b) In particular, were they confined to the BCMC LP Deed, or did they encompass other contractual agreements and, if so, which other agreements?

(3) Are BCMCL's interest costs on the RBS Loan Facility and the Loan Notes, entered into by BCMCL to acquire 19% partnership interest in BCM LP, allowable deductions under the CTA 2009 in calculating BCMCL's chargeable profits for corporation tax purposes? If so, to what extent are they allowable?

[(4) Transfer pricing/thin capitalisation issues]

(5) Are the RBS Loan Facility and the Loan Notes to be classified as "trading loan relationships" or "non-trading loan relationships" for the purposes of Part 5 of the CTA 2009? In relation to this, was BCMCL party to the RBS Loan Facility and the Loan Notes (i.e. to the Sugarquay Loan, the MP Loan and the WR Loan) for the purposes of a trade it carried on (a) at the time of the loans and (b) during each accounting period when the loan interest expense was incurred?

(6) In relation to the Discovery Amendment:

(a) Was the Discovery Amendment validly made under s.30B of the TMA 1970?

(b) If so, were the adjustments made thereunder correct?"

15. In addition to the facts agreed in the SAFI, the FTT made further findings of fact in relation to the Cayman Appeals, at [12] to [100]. We refer to these findings where they are relevant to the Cayman Appeals. Where we refer to paragraphs (below) in square brackets ([x]) we intend to refer to paragraphs in the Decision (unless otherwise stated). We also adopt the defined terms and abbreviations used in the SAFI (unless otherwise stated). We use the terms "**UK Partnership**", "**UK Partnership Deed**", "**Cayman Partnership**" and "**Cayman Partnership Deed**" interchangeably with the terms used in the SAFI where those terms make it easier for the reader to understand our reasoning.

III. Issues in the Cayman Appeals

16. Insofar as they are relevant to the Cayman Appeals the FTT summarised its conclusions as follows, at [248] to [251]:

> "248. In relation to Issues 1 and 2, the Profit Allocation Issues:
>
> (1) As only BCMCL was a partner in BCM LP, and not BCMC LP or all the partners of BCMC LP, BCMCL is liable to corporation tax on all of the profit allocation of BCM LP in respect of the 19% interest in BCM LP sold by WR, MP and Sugarquay; and
>
> (2) If BCMCL had not been liable to corporation tax as set out at paragraph 248(1), above, BCMCL's entitlement to profits would not have included those allocated to RBS/Fyled and the profit sharing arrangements were confined to the BCMC LP Deed.
>
> 249. In relation to Issues 3…and 5, the Interest Deductibility Issues:
>
> (1) BCMCL's interest costs on the RBS Loan Facility and Loan Notes are not allowable deductions under the CTA 2009;
>
> …
>
> (3) The RBS Loan Facility and Loan Notes are to be classed as non-trading loan relationships as BCMCL was not party to the RBS Loan Facility or Loan Notes for the purposes of a trade it carried on either at the time of loans or subsequent accounting periods.
>
> 250. The discovery assessment was valid and adjustments made thereunder correct.
>
> 251. Accordingly, for the reasons above the Cayman Appeals are dismissed."

17. With permission of the FTT, the Appellants appealed against the FTT's conclusions on Issues 1, 3 and 5. HMRC cross-appealed by way of Respondent's Notice against the FTT's conclusion on Issue 2. In relation to the discovery assessment, the Appellants' appeal "is only made to the extent that the Tribunal concluded that the adjustments made by the Discovery Amendment were correct".

IV. The Profit Allocation Issue

18. In relation to the FTT's finding (1) (above) the Appellants advance two grounds of appeal as follows:

> "(a) The parties contracted on the basis that the partners in BCMC LP should become partners in BCM LP, and members of BCM LLP and BCM (UK) LLP, and on that basis share in the profits of the Partnership business. There was therefore no tenable basis on which the Tribunal could conclude that BCMCL alone, as general partner in BCMC LP, was a partner and member to the exclusion of other partners in BCMC LP; and
>
> (b) Even if, contrary to the parties' agreements, only BCMCL became a partner in, and member of, the Partnership, BCMCL can only be charged to corporation tax in respect of that part of BCMC LP's share of the Partnership profit to which BCMCL was beneficially entitled."

19. Given the two separate grounds of appeal, we will call the first "**Issue (1)(a)**" and the second "**Issue (1)(b)**". HMRC cross-appeal against the FTT's finding (2) on the basis that the FTT failed to apply "a *Ramsay* approach" to the profit-sharing arrangements of BCMC LP. In particular, they argued that the structure under which profits were allocated by BCMCL to the Corporate Partner and paid to BCMCHL which then subscribed for capital in BCMCL was "a clear example of money simply going round in a circle and vanishing for tax purposes".

20. As we have indicated in our introductory remarks, the Profit Allocation Issue was relevant to the profit allocations which BCMCL made to Fyled under the Cayman Partnership Deed when the UK Partnership earned Superprofits by exceeding the Benchmark Profits prescribed in the Cayman Partnership Deed. As we have also stated in our introductory remarks, the UK Partnership did not earn any Superprofits before Fyled replaced RBS as the Corporate Limited Partner but did so for the years ended 30 November 2008 and 30 November 2009.

A. Issue (1)(a): The partners in the UK Partnership

21. The Appellants challenged the FTT's conclusion that apart from BCMCL the partners of BCMC LP (the Cayman Partnership) did not become partners in BCM LP (the UK Partnership) and did not subsequently become members of BCM LLP. The Appellants did not suggest, however, that the FTT should have adopted a different approach to this issue when the business of BCM LP was transferred to BCM LLP by the time of the second allocation of Superprofits. We do not, therefore, consider the position of BCM LLP separately in addressing either Issue (1)(a) or Issue (1)(b).

(1) The Decision

22. The FTT's discussion and decision on this issue are to be found at [102] to [114]. The FTT began by noting that the relevant documents referred to BCMC LP as a partner (albeit a limited partner) in BCM LP. However, it was agreed by the Cayman law experts that (as under English law) a Cayman Islands partnership does not have separate legal personality and that it is not an entity in its own right. It was therefore necessary for the FTT to consider which of the partners in BCMC LP was, as a matter of partnership law, a partner in BCM LP. The FTT continued as follows:

> "104. In relation to this issue, *Lindley & Banks on Partnership* (20th edition, 2017) at 4-27 states:
>
> > "Since under English law a firm does not have separate legal personality, it cannot, as such, be a member of another firm.
> >
> > Thus, where a firm purports to become a partner, this will, as a matter of law, constitute each of the members of that firm as a partner in his own right, and the correctness of this analysis is indirectly confirmed by the provisions of the Partnerships (Accounts) Regulations 2008.
> >
> > However, there is no reason in principle why, internally, the firm should not be treated as if it were a single partner.
> >
> > The position is otherwise in Scotland, where the firm is a separate legal person and its ability to enter into the partnership relation is well recognised."

23. The FTT then discussed the decision in *Major v Brodie* [1998] STC 491 (which we must consider in relation to both the Profit Allocation Issue and the Interest Deductibility Issue) and summarised HMRC's analysis of the relevant transactions and documents as follows:

> "109. The relationship arising as a result was described by Mr Baldry, relying on the following passage at 5-70 of *Lindley & Banks*, as a sub-partnership:
>
> "Lord Lindley defined a sub-partnership as follows:
>
> "A sub-partnership is as it were a partnership within a partnership; it presupposes the existence of a partnership to which it is itself subordinate. An agreement to share profits only constitutes a partnership between the parties to the agreement. If, therefore, several persons are partners and one of them agrees to share the profits derived by him with a stranger, this agreement does not make the stranger a partner in the original firm. The result of such an agreement is to constitute what is called a *sub-partnership*, that is to say, it makes the parties to it partners inter se; but it in no way affects the other members of the principal firm."

24. In the light of this passage, the FTT decided that it was necessary to consider whether, as a result of the arrangements between the parties, BCMC LP could best be described as a sub-partnership of BCM LP or whether all of the partners in BCMC LP became partners in BCM LP: see [110]. The FTT decided that only BCMCL became a partner for the following reasons:

> "111. As stated above, the first step under the arrangements was for BCMCL became a partner in BCM LP. It, BCMCL, then contributed that interest to BCMC LP in accordance with Clause 2 of the Deed of Contribution under which BCMCL "on its own account" made a capital contribution to BCMC LP of its interests in BCM LP (see paragraphs 80 - 81, above) which, in my view, makes it clear that BCMCL was acting in its own capacity when it made that contribution.
>
> 112. Accordingly, the interest BCM LP held by BCMCL, which was in its own right as a partner in BCM LP is now held by BCMCL in its capacity as the general partner of BCMC LP. However, it does not necessarily follow from this that the partners of BCMC LP also became partners of BCM LP. There is no evidence from RBS that it intended to become a member of BCM LP and certainly no evidence that Fyled to which RBS transferred its interest in BCMC LP intended to become a member of BCM LP.
>
> 113. In my judgment, having regard to the various deeds and/or agreements, the arrangements between the parties can best be described as a sub-partnership with BCMCL becoming a partner of BCM LP. Although BCMCL subsequently distributed its profit allocation in respect of the 19% interest in BCM LP in accordance with the BCMC LP agreements, this can be compared to the partner described in *Lindley and Banks* that agrees to share the profits derived by him with someone other than a partner (a stranger). Clearly this has no effect on the other partners of the firm (in this case BCM LP) and does not make the person who received profits from the partner (ie the other BCMC LP members) a partner in the original firm (ie BCM LP).

> 114. Therefore, to answer Issue 1, as I consider that only BCMCL was a partner in BCM LP (rather than all the partners in BCMC LP) it, and it alone, is liable for corporation tax on its profit allocations in respect of the 19% interest it acquired from WR, MP and Sugarquay in BCM LP."

(2) Legal Principles

25. Partnership is a relationship which exists between persons carrying on a business in common with a view to profit.[1] The rights and obligations of the partners are usually regulated by contract but they are also regulated by statute and equitable principles. The question whether the relationship of partnership exists and, if so, whether a person or entity is a partner in that partnership is a question of mixed law and fact, as Harman LJ stated in *Keith Spicer Ltd v Mansell* [1970] 1 WLR 333 at 335:

> "The county court judge held that there never was a partnership, and the first point to consider, I suppose, is whether that is a decision of fact from which, on the amount at stake, there is no appeal. The judge found certain what may be called primary facts, and, as a secondary fact, so to call it, he found that they added up to no partnership. In my judgment, with respect to the old case of *Wood v. Argyle (Duke of) (1844) 6 Man. & G. 928* , which was cited to us, it is not right to say in these days that that is the kind of finding of fact from which there is no appeal. It is a finding of mixed law and fact.[2]"

26. Moreover, the existence of the necessary relationship falls to be decided by reference to substance and reality and not solely by reference to contractual interpretation of the partnership documents (although this will be an important part of the exercise). Carr LJ stated as follows in *Sotheby's v Mark Weiss Ltd* [2020] EWCA Civ 1570 at [84]:

> "The formation of a partnership creates strict and important rights and obligations between the partners (see for example s. 20 (restrictions on the use of partnership property), s. 29 (accountability) and s. 30 (duty not to compete) of the 1890 Act). In determining whether or not a statutory partnership exists, it is important to look at the substance of the relationship, not the words used by the parties to describe it (see *Mann v D'Arcy* [1968] 1 WLR 893 at 899; *Protectacoat Firthglow Ltd v Szilagyi* [2009] IRLR 365 at [61]). For a very recent summary of the relevant law, reference can be made to *Patel and another v Barlows Solicitors and others* [2020] EWHC 2753 (Ch) at [100] to [110]."

27. Mr Gammie referred the Tribunal to the decision of the Privy Council in *Agnew v HMRC* [2001] 2 AC 710 where the question for determination was whether a fixed or floating charge had been created. He cited it as authority for the proposition that "the intentions of the parties are to be drawn from the documents". If anything, the passage upon which he relied from the speech of Lord Millett reinforces the approach identified by Carr LJ (above). In that passage Lord Millett considered that the question was not simply one of construction but required the tribunal to assess the substance of the legal relationship as a matter of law once it had construed the relevant documents in order to gather the intention of the parties:

---

[1] See section 1 of the Partnership Act 1890 which is also applicable to limited partnerships because it is not excluded by the Limited Partnerships Act 1907.

[2] See also the clear statement to this effect in *Lindley & Banks on Partnership* 20th Ed at 7-11.

> "[32] Their Lordships consider this approach to be fundamentally mistaken. The question is not merely one of construction. In deciding whether a charge is a fixed charge or a floating charge, the Court is engaged in a two-stage process. At the first stage it must construe the instrument of charge and seek to gather the intentions of the parties from the language they have used. But the object at this stage of the process is not to discover whether the parties intended to create a fixed or a floating charge. It is to ascertain the nature of the rights and obligations which the parties intended to grant each other in respect of the charged assets. Once these have been ascertained, the Court can then embark on the second stage of the process, which is one of categorisation. This is a matter of law. It does not depend on the intention of the parties. If their intention, properly gathered from the language of the instrument, is to grant the company rights in respect of the charged assets which are inconsistent with the nature of a fixed charge, then the charge cannot be a fixed charge however they may have chosen to describe it."

28. The Cayman Appeals present an unusual challenge because it is necessary to consider whether members of one partnership became members of another. We accept that this is possible as a matter of general principle and that members of one partnership may be partners in another partnership (either on their own account or in their capacity as partners in the first partnership). In *Major v Brodie* (above) the issue was whether the partners in one partnership were entitled to tax relief for the interest which they paid on certain loans in the following circumstances. Mr and Mrs B formed a partnership to manage and farm S estate in Scotland. About a year later they entered into a second partnership with M (a local farmer who also owned and farmed T farm on his own account) to farm a third property, B Farm, in partnership together. Park J described the arrangements as follows in [1998] STC 491 at 507:

> "By a number of documents entered into in June and July 1987 another partnership was formed. This partnership involved an additional person, Mr Henry Murdoch, who (or whose family) I surmise to have been concerned in another farm in the locality, called Torr farm. It also involved a third farm (as well as the Skeldon Estate farm and Torr farm). This third farm was called Balgreen farm. There were several documents. Plainly they were all entered into in contemplation of each other. The following summary is not necessarily in the sequence in which they were executed, but sets them out in the order in which, as it seems to me, they can most clearly be understood.
>
> (a) Each of Mr and Mrs Brodie borrowed £225,000 from Coutts Finance Co. (In fact each drew down the borrowing in two instalments of £150,000 and £75,000 a few days apart.) So the total loans were £450,000. It was not a single loan of that sum to Skeldon Estates partnership. There were two loans of £225,000 to two separate borrowers.
>
> (b) Each of Mr and Mrs Brodie contributed or advanced to Skeldon Estates partnership the £225,000 which he or she had borrowed from Coutts. So Skeldon Estates partnership had £450,000.
>
> (c) Skeldon Estates partnership bought from the Murdoch family for a total of £300,000 Balgreen farm and the milk quota which went with it.
>
> (d) A second partnership was formed. It was called W Murdoch & Son. The critical aspects of it were as follows. (i) There were stated to be two partners. 'The Second Party' was straightforward: it was Mr Henry

> Murdoch. 'The First Party' was a little more complex. It was stated to be Mr Brodie and Mrs Brodie 'trading as "Skeldon Estates"'. So W Murdoch & Son was a partnership between (1) Skeldon Estates partnership, which was itself a partnership between Mr and Mrs Brodie, and (2) Mr Henry Murdoch. (ii) W Murdoch & Son was to carry on the business of farmers. (iii) It was to carry on that business at three farms: Balgreen, Torr, and the farmland at Skeldon estate. (iv) None of those farms was to be a partnership asset. (v) The partners were to contribute partnership capital of £220,161, doing so equally. This meant that Skeldon Estates partnership had to contribute £110,080. (Skeldon Estates partnership, though itself a partnership of two persons, was one partner in W Murdoch & Son, not two.) (vi) The Partnership Act 1890 and the law of Scotland applied.
>
> (e) The effect of sub-para (d)(iii) and (iv) was that Skeldon Estates partnership, which owned Balgreen farm and the Skeldon estate farmland, would continue to own them to the exclusion of Mr Henry Murdoch, but would make them available to be farmed by W Murdoch & Son. Conversely, Mr Henry Murdoch, who owned Torr farm, would continue to own it to the exclusion of Skeldon Estates partnership and Mr and Mrs Brodie, but would make it available to be farmed by W Murdoch & Son."

29. *Major v Brodie* is relevant to the Interest Deductibility Issue and we deal with it in that context (below). But it is also relevant to the Profit Allocation Issue because Park J held that apart from sums retained as working capital, the S partnership had used the loans made by Coutts wholly for the purposes of its trade (which it carried on as a member of the M partnership). Moreover, although he was dealing with a Scottish partnership (which had a separate and distinct legal personality) Park J also expressed the view that the position would have been the same under English law at 511:

> "In the first place I tend to the view that the tax result would be the same with an English partnership. Suppose that A and B were the partners in partnership X, an English partnership. Suppose further that an agreement was entered into between (1) partnership X and (2) C to form another partnership, partnership Y. It was submitted that the analysis under English law would be that partnership Y had three members, A, B and C, not two. I am willing to assume that that is right. However, A and B would be partners in partnership Y in their capacity as members of partnership X."

30. We agree with this analysis on the facts of *Major v Brodie*. However, the decision provides no authority for the proposition that A and B automatically become members of partnership Y simply because they are members of partnership X. Nor is it authority for the proposition that if A becomes a member of partnership Y, B must also become a member simply because he or she is also a partner in partnership X. Whether individual members of partnership X also become members of partnership Y will depend both on the construction of the relevant documents but also the substance and reality of the relationship.

31. Moreover, the question whether B has also become a member of partnership Y is not determined simply by asking whether A had authority to act on B's behalf in joining partnership Y. The general position in relation to the admission of new partners to an existing partnership is summarised in *Halsbury's Laws of England* (5th ed) at 111 as follows (footnotes omitted):

> "Subject to any agreement express or implied between the partners, no person may be introduced as a partner without the consent of all existing partners. The terms on which he is admitted are, therefore, usually determined by express agreement. An attempt by one partner to introduce a new partner without consent amounts only to an assignment of part of his share in the partnership. It may create a sub-partnership between the newcomer and the person who introduced him, but it does not confer upon the newcomer the rights of a partner as against the original firm unless the person who introduced him has implied authority to make his partners co-partners with another person."

32. The Appellants had to satisfy the FTT, therefore, not only that BCMCL had authority to commit each Corporate Limited Partner to joining BCM LP but also that it had the consent of the other members of BCM LP to admit each new Corporate Limited Partner. The conventional means by which a new partner was admitted to both the UK Partnership and the Cayman Partnership was by entering into a Deed of Adherence, although it will be necessary to examine the contractual arrangements to establish whether any other method of admission to the UK Partnership was permitted.

33. Moreover, in the present case both partnership X and partnership Y were limited partnerships (one English and one Cayman) and limited partners in both partnerships had no rights or obligations to participate in the management of the partnership assets beyond their liability to contribute capital. Neither party submitted, however, that either the FTT or this tribunal should approach this issue differently because the partnerships in question were limited partnerships. We, therefore, approach the Cayman Appeals on the basis that the FTT was entitled to apply the general principles of partnership law to the question whether all members of the Cayman Partnership became members of the UK partnership or whether only BCMCL did so.

34. Mr Baldry accepted that it was possible for the limited partners in one limited partnership to become limited partners in another limited partnership. We consider that he was right to do so and that it must in theory be possible for a limited partner in limited partnership X to become a limited partner in limited partnership Y.[3] But it follows from the nature of a limited partnership that none (or almost none) of the usual indicia of a general partnership will be present. For example, partners A and B will not be personally involved in the trade which the partnership carries on and they will not hold themselves out as partners either in their dealings with other partners or third parties.

35. The FTT approached the question whether Fyled was a member of the UK Partnership in this context by asking whether the Cayman Partnership was a sub-partnership of the UK Partnership or whether all of the partners in the Cayman Partnership also became partners in BCM LP: see [110]. In our judgment, this was a legitimate approach given that the tribunal was considering the arrangements between two limited partnerships. Given the narrow rights and obligations of limited partners, there may be no practical difference between limited partners being partners in both partnership X and partnership Y and partnership X being a sub-partnership of partnership Y.

[3] The Cayman law experts agreed that it was possible for a partnership to be a limited partner in a Cayman Islands Exempted Limited Partnership ("ELP"): see [135](2) (which we set out below). However, they did not address the question whether limited partners in one ELP could be limited partners in another ELP.

36. Put another way, the argument is that there was no need for the Corporate Limited Partner (or any other limited partner for that matter) to become a member of the UK Partnership since it is common ground that BCMCL was itself at all times a partner. Limited partners in the Cayman Partnership had no power to enforce the rights of the Cayman Partnership and no obligations to perform under the Cayman Partnership Deed. Moreover, their right to share in the profits of the UK Partnership did not depend on them becoming partners or being able to enforce its terms. It was for BCMCL as the general partner of the Cayman Partnership to enforce their rights to a profit allocation in the UK Partnership. Profit allocations made to BCMCL as a limited partner in the UK Partnership would be allocated and distributed to the members of the Cayman Partnership in accordance with the terms of the Cayman Partnership Deed.

37. In order to establish that the Cayman Partnership was more than a sub-partnership and the partners also became limited partners in the UK Partnership it was necessary, in our judgment, for the Appellants to satisfy the test in *Halsbury's Laws* (above) and to prove by admissible evidence on a balance of probabilities that Fyled intended to become a member of the UK Partnership and was admitted to the partnership with the consent of the other partners in the UK Partnership. We accept that it would have been possible to prove these facts by showing that BCMCL had Fyled's authority to perform whatever acts were necessary to make Fyled a member of the UK Partnership, and carried out those acts. We also accept that it would have been possible for the limited partners in the UK Partnership to authorise BCML to admit Fyled to the UK Partnership on the same basis.

38. But whether or not they relied on the authority of the general partner in each partnership, it was necessary for the Appellants to prove these facts and it is clear from the essential reasoning at [111] to [114] that the FTT was sifting through the documents to identify any evidence that Fyled intended to join the UK Partnership and that the partners in the UK Partnership intended to admit it as a partner. For the extended reasons which we have given in this section, we consider that in substance the FTT asked the right question and with these observations on the applicable legal principles we turn to consider whether it gave the right answer.

(3) The Appellants' Case

39. The Appellants' case on Ground 1(a) is conveniently set out in paragraphs 32(a), 36 and 39 of the Grounds of Appeal:

> "32(a) The parties contracted on the basis that the partners in BCMC LP should become partners in BCM LP, and members of BCM LLP and BCM (UK) LLP, and on that basis share in the profits of the Partnership business. There was therefore no tenable basis on which the Tribunal could conclude that BCMCL alone, as general partner in BCMC LP, was a partner and member to the exclusion of the other partners in BCMC LP;…"
>
> "36. As a matter of law, the contractual documents leave no scope for any conclusion other than that all the partners in BCMC LP (and not BCMCL alone) were, and were intended to be, limited partners in BCM LP. The BCM LP Deed referred to BCMC LP as the "Special Limited Partner" and, given that BCMC LP is not a corporate body, this can only have had the effect in law – as intended and recognised by the other partners in BCM LP – of rendering the partners in BCMC LP, which did have legal personality, partners in BCM LP."

> "39. Every time a new partner was admitted to BCMC LP, or any time that an existing partner in BCMC LP assigned its interest pursuant to the terms of the BCMC LP Deed, the new partner or assignee became a limited partner in BCM LP, because BCMC LP remained the "Special Limited Partner" of BCM LP. In particular, this is what happened when RBS assigned its interest to Fyled in June 2008, pursuant to the Deed of Assignment and as reflected in the amended version of the BCMC LP Deed, dated 11 June 2008."

40. It was common ground that Cayman law applied to determine the legal effect of the Cayman Partnership Deed. It was also common ground that the Cayman Partnership had no separate legal personality (in the same way as an English limited partnership). Mr Gammie also relied on sections 6 and 7 of the Exempted Limited Partnership Law (2002 Revision):

> "**6. Power of partner to bind the firm**
>
> Every partner is an agent of the firm and his other partners for the purpose of the business of the partnership; and the acts of every partner who does any act for carrying on in the usual way business of the kind carried on by the firm of which he is a member bind the firm and his partners, unless the partner so acting has in fact no authority to act for the firm in the particular matter, and the person with whom he is dealing either knows that he has no authority, or does not know or believe him to be a partner.
>
> **7. Partners bound by acts on behalf of firm**
>
> An act or instrument relating to the business of the firm done or executed in the firm-name, or in any other manner showing an intention to bind the firm, by any person thereto authorised, whether a partner or not, is binding on the firm and all the partners: Provided that this section shall not affect any general rule of law relating to the execution of deeds or negotiable instruments."

41. Both in his Skeleton Argument and in his oral submissions Mr Gammie's primary submission was that because the Cayman Partnership did not have legal personality, BCMCL's entry into the UK Partnership on behalf of the Cayman Partnership should be treated as the act of all of the partners from time to time in the Cayman Partnership and profit allocations to BCMCL as general partner of the Cayman Partnership should be treated as profit allocations to all of the partners from time to time in the Cayman Partnership (including Fyled). He submitted that the correct analysis was as follows (references omitted):

> "84. Accordingly, the correct analysis is that: (a) In executing the BCM LP Deed on behalf of BCMC LP, BCMCL was acting within its authority and BCMCL as general partner was entitled to bind the partners in BCMC LP.
>
> (b) Thus, all the existing partners in BCM LP intended to contract (such intention to be objectively assessed from their agreement), and did contract, with BCMC LP, and the partners in BCMC LP intended to contract (such intention to be objectively assessed from their agreement), and did contract, with the existing partners in BCM LP.
>
> (c) As BCMC LP does not have separate personality under Cayman law – as was common ground between the parties, and as noted at FTT – the partners in BCMC LP were thus contractually agreed to be limited partners in BCM LP and were entitled to profit allocations from BCM LP under

> clause 12.1 of the BCM LP Deed in the proportions set by clause 12.1 of the BCMC LP Deed. Under clause 12.1 of the BCM LP Deed, the "Special Limited Partner", i.e. BCMC LP, was allocated a share in BCM LP's profits; BCMCL was entitled to share in the profits of BCM LP solely in its capacity as general partner of BCMC LP.
>
> (d) Profit allocations by the UK Partnership to BCMC LP were therefore, in reality, profit allocations to all the partners in BCMC LP, which were also partners in the UK Partnership. BCMCL, as the general partner of BCMC LP, beneficially received its share of the allocation in accordance with the BCMC LP Deed.
>
> 85. As a matter of law, the contractual documents leave no scope for any conclusion other than that all the partners in BCMC LP (and not BCMCL alone) were, and were intended to be, limited partners in BCM LP. The BCM LP Deed referred to BCMC LP as the "Special Limited Partner" and, given that BCMC LP is not a corporate body, this can only have had the effect in law – as intended and recognised by the other partners in BCM LP – of rendering the partners in BCMC LP, which did have legal personality, partners in BCM LP."

(4) The Contractual Documents

(a) RBS

42. When BCMCL became a limited partner of BCM LP and then entered into the UK Partnership Deed, RBS was the Corporate Limited Partner of the Cayman Partnership (and not Fyled). We begin our analysis, therefore, by considering the contractual documents which are relevant to the question whether RBS became a partner in the BCM LP (the UK Partnership).

43. On 14 June 2007 BCMCL was incorporated under the law of the Cayman Islands and on 4 July 2007 it established BCMC LP (the Cayman Partnership) and became its general partner: see the SAFI, §(6). In July 2007 it became a wholly owned subsidiary of BCMCHL, also a company incorporated in the Cayman Islands: see the SAFI, §(7).

44. On 5 July 2007 BCMCL and RBS entered into the Total Return Swap. The relevant documents consisted of a fee letter addressed by BCMCL to RBS and a letter of confirmation setting out its terms and incorporating the relevant provisions of the ISDA Master Agreement. These documents contain no reference to RBS becoming a partner in the UK Partnership and the Appellants did not argue that the TRS could not have taken effect unless RBS became a partner in the UK Partnership. Indeed, as at 5 July 2007 BCMCL had not itself become the general partner of the Cayman Partnership or a limited partner of the UK Partnership.

45. On 6 July 2007 BCMCL, Mr Dodd and RBS entered into the BCMCL LP Deed (the Cayman Partnership Deed): see the SAFI, §(9). Clause 6 of the deed (which was headed "Business") provided as follows:

> "6.1 The Partnership's business shall be to invest in an investment management business through being a limited partner in BCMLP and "the Business" shall be construed accordingly.
>
> 6.2 The Partnership may execute, deliver and perform all contracts and other undertakings and engage in all activities and transactions as may in

> the sole and absolute discretion of the General Partner be necessary or advisable in order to carry on the Business (including, in particular but without prejudice to the generality of the foregoing, the provision of security over any of the assets of the Partnership).
>
> 6.3 For the avoidance of doubt, the Business shall not extend to the management of the investment or trading of the of the contributions made by the Partners to the Partnership pursuant to Clause 9 below."

46. Clauses 3.1, 9.1, 9.2 and 20 all took the same form as those same clauses in the UK Partnership Deed (as set out below). Clause 4 was in a similar form to clause 4 of the UK Partnership Deed (below) except that it referred to registration under the Exempted Limited Partnership Law (2003 Revision) (as amended from time to time). Clause 18 (which was headed "Management of the Partnership") provided as follows:

> "18.1 The General Partner shall, to the exclusion of each of the Limited Partners, have exclusive responsibility for the management and control of the business and affairs of the Partnership and shall have the power and authority to do all things necessary to carry out the purpose of the Partnership and shall devote as much of its time and attention thereto as shall be required for the proper management of the Business and shall carry on and manage the same with the assistance from time to time of agents, servants or other employees of the Partnership as it shall deem necessary."

47. On 6 July 2007, the same day, the sellers assigned their 19% interest in BCM LP (the UK Partnership) to BCMCL with effect from 1 July 2007 and on 6 July 2007, again the same day, BCMCL executed the Deed of Adherence and became a limited partner of BCM LP. BCMCL covenanted with the partners for the time being of BCM LP to observe and perform the terms and conditions of the original UK Partnership Deed: see clause 2.1. BCMCL was also credited with the sellers' original capital of $100 in BCM LP: see clause 2.2.

48. On 6 July 2007, the same day, BCMCL then executed the Deed of Contribution by which it contributed its partnership interest in BCM LP (the UK Partnership) to BCMC LP (the Cayman Partnership). Clause 2 of the Deed of Contribution provided that BCMCL was contributing its partnership interest in BCM LP "on its own account" (as the FTT noted). By letter also dated 6 July 2007 BCMCL then resigned as a partner of BCM LP (the UK Partnership).

49. On 6 July 2007, again the same day, BCML as general partner and the fifty-three limited partners of BCM LP (the UK Partnership), who included Mr Dodd, entered into the amended and restated BCM LP Deed (the UK Partnership Deed). The fifty-fourth partner was now named as BCMC LP and defined as the "Special Limited Partner". The deed, as amended and restated, provided as follows:

> **"1.1 Interpretation**
>
> Save where the context otherwise requires in this Deed the following words and expressions shall have the meanings respectively assigned to them:-
>
> "Corporate Limited Partner" means [Sugarquay] and any Further Limited Partners that are bodies corporate and are designated as Corporate Limited Partners in the Deed of Adherence executed by them, which, for the avoidance of doubt, does not include the Special Limited partner;

“Deed of Adherence” means a deed substantially in the form contained in Schedule 1 hereto and entered into between a Further Limited Partner and the General Partner pursuant to which the Further Limited Partner agrees to become a Limited partner on the terms specified thereunder;

“Further Limited Partner” means any person who has entered into a Deed of Adherence with the General Partner pursuant to Clause 20;

“Partners” means the General Partner, the Limited Partners and any Further Limited Partners; …”

3. Effective date for admission of Further Limited Partners

3.1 Each Further Limited Partner shall be a limited partner upon the terms appearing hereafter as from the date specified in the Deed of Adherence entered into between that Further Limited Partner and the General Partner.

4 Registration

4.1Any future changes to the Partnership shall be registered pursuant to the Act [the Limited Partnerships Act 1907] and the particulars to be furnished under the Act shall forthwith be notified by the General Partner to the Registrar of Companies in England and Wales in accordance with the requirements of the Act.

4.2The General Partner shall be responsible for ensuring compliance with all such registration and other requirements of the Act.

4.3Each Limited Partner undertakes to give the General Partner notice of any change to any of its details as registered with the Registrar of Companies pursuant to the Act in order that the General Partner may comply with its obligations pursuant to Clause 4.1.

6 Business

6.1 The Partnership's business shall be to carry on the business of (1) managing on a discretionary basis the investment or trading of assets belonging to other persons, (2) marketing shares or interests in such other persons, (3) activities associated therewith and (4) such other activities as may in the opinion of the General Partner be desirable (subject to prior notice of such other activities having been given to each of the Limited Partners) and "the Business" shall be construed accordingly.

6.2 The Partnership may execute, deliver and perform all contracts and other undertakings and engage in all activities and transactions as may in the opinion of the General Partner be necessary or advisable in order to carry on the Business.

6.3 For the avoidance of doubt, the Business shall not extend to the management of the investment or trading of the contributions made by the Partners to the Partnership pursuant to Clause 9 below.

9 Capital and Loan Contributions

9.1 Each of the Partners acknowledges and agrees that the General Partner and each of the Limited Partners at the date hereof have contributed to the capital of the Partnership in the amounts set out in the letters of allocation between the General Partner and each of the Partners entered into on the date hereof.

9.2 Each Further Limited Partner shall contribute upon admission to the Partnership such sum not being less than £100 to the capital of the Partnership as shall be determined in the absolute discretion of the General

Partner and specified in the Deed of Adherence executed by such Further Limited Partner.

18 Management of the Partnership

18.1 The General Partner shall, to the exclusion of each of the Limited Partners, have exclusive responsibility for the management and control of the business and affairs of the Partnership and shall have the power and authority to do all things necessary to carry out the purpose of the Partnership and shall devote as much of its time and attention thereto as shall be required for the proper management of the Business and shall carry on and manage the same with the assistance from time to time of agents, servants or other employees of the Partnership as it shall deem necessary.

18.2 The Limited Partners shall take no part in the management or control of the Business and affairs of the Partnership, and shall have no right or authority to act for the Partnership or to take any part in, or in any way to interfere in, the conduct or management of the Partnership or to vote on matters relating to the Partnership other than as provided in the Act or as set forth in this Agreement, but they shall at all reasonable times, subject to having given reasonable notice, have access to and the right to visit and inspect all the assets of the Partnership.

18.3 Without prejudice to the generality of Clauses 18.1 and 18.2 the General Partner shall have full power and authority on behalf of the Partnership and with the power to bind the Partnership thereby:-

(A) to take such actions as it deems necessary or desirable to manage the Business including, but not limited to, the opening of bank accounts and the paying or authorising the payment of distributions to the Partners and of the expenses incurred in relation to the Business out of the funds of the Partnership;

(B) to enter into, without limitation, discretionary investment management agreements and distribution agreements with clients of the Partnership and on behalf of such clients (whether as principal or agent) and otherwise conduct the Business to the extent permitted by any applicable law and the rules of any regulatory authority of which the Partnership or the General Partner is from time to time a member or by which the Partnership or the General Partner is from time to time regulated;

(C) to take such action as it deems necessary or desirable to promote or develop the Business;

(D) to engage and remunerate, on behalf of the Partnership, from funds of the Partnership, such persons, firms, or corporations, including any Associate of the General Partner or any Associate of any of the Limited Partners, as the General Partner in its sole judgment shall deem advisable or desirable for the conduct and operation of the Business; and

(E) to borrow money for any of the purposes of the Partnership and to borrow money from the Partners pursuant to Clause 9.5 and to charge the assets of the Partnership as security for money borrowed thereunder.

19 Transfer/Assignment of the Partners' Interests

19.1 No Partner may sell, assign, transfer, exchange, pledge, encumber or otherwise dispose of its interest in the Partnership (or any part thereof) unless such transfer is a Permitted Transfer or the following provisions of this Clause shall have been complied with in full…

> 19.2 Where a Partner (a "Proposing Transferor") wishes to transfer any of his interest in the Partnership (the "Sale Interest") then he shall, before transferring or agreeing to transfer the Sale Interest, give notice in writing to the General Partner of his intention (a "Selling Notice").
>
> **20 New Partners**
>
> The General Partner may at any time admit any person to the Partnership as a Further Limited Partner provided that such person executes a Deed of Adherence prior to such admission. In addition any third party purchaser that shall acquire any interest in the Partnership pursuant to Clause 19 shall execute a Deed of Adherence at the time that he completes (but as a pre-condition to) such acquisition.
>
> **29 Miscellaneous**
>
> 29.1 This Deed (together with the letters of allocation and any Deeds of Adherence) constitutes the entire agreement between the Partners and there are no other written or verbal agreements or representations with respect to the subject matter hereof."

50. There is no dispute that RBS became a partner in the Cayman Partnership and that it was a party to the original Cayman Partnership Deed. However, it was not named as a limited partner in the amended and restated UK Partnership Deed dated 6 July 2007, it made no capital contribution and no allocation letter was issued to it under clause 9.1. Moreover, it did not execute a Deed of Adherence in accordance with clause 9.2 at any time thereafter. Finally, clause 20 provided that BCML could only admit RBS as a Further Limited Partner if it had executed a Deed of Adherence before admission to the UK Partnership and clause 3.1 provided that RBS would become a limited partner as from the date specified in the Deed of Adherence. It follows, therefore, that if clauses 3.1 and 20 applied to RBS then it could not have become a Further Limited Partner in the UK Partnership.

51. Clause 4.1 also provided that any future changes to the UK Partnership should be registered pursuant to the Limited Partnerships Act 1907 and that BCM LP would be responsible for ensuring compliance with registration and the other requirements of the Act. But the Appellants did not adduce any evidence to suggest that RBS was registered as a partner in the UK Partnership nor any explanation for the failure to register it.

(b) Fyled

52. We turn, therefore, to consider the contractual documents which are relevant to the question whether Fyled became a partner in BCM LP (the UK Partnership). By a deed of assignment dated 11 June 2008 RBS assigned its partnership interest in BCMC LP to Fyled and the TRS was novated so that Fyled replaced RBS as BCMCL's contractual counter-party. Clause 1.1 defined the term "Partnership" as the Cayman Partnership and clause 2 of the deed of assignment provided as follows:

> "In consideration of the sum of US$100, which the Assignor acknowledges it has received from Fyled, the Assignor hereby assigns to Fyled with full title guarantee, free from all Encumbrances and together with all rights attaching thereto, its entire interest in the Partnership, set out in the letter of allocation provided by the Partnership to the Assignor dated 06 July 2007 and the Original Partnership Deed and which pursuant to the letter of allocation carries the right to participate after the Effective Date in all

> income and capital profits and income and capital losses of the Partnership as is set out opposite the Assignor's name in schedule 1 to this Deed (including, for the avoidance of doubt any amounts standing to the credit of the Assignor's Capital Contribution Account (as defined in the Partnership Deed)) immediately prior to the date hereof) (the "Partnership Interest")."

53. On 11 June 2008, the same day, BCMCL as the general partner and the twenty-two limited partners of the Cayman Partnership (who included Mr Dodd and Fyled) entered into the amended and restated Cayman Partnership Deed. Recital (E) recorded that RBS had assigned its limited partnership interest to Fyled and Recital (F) recorded that in association with the assignment, the partners had agreed to replace the second version of the Cayman Partnership Deed in its entirety and to regulate their relations as partner by the new deed.

54. On 11 June 2008, again the same day, BCMCHL, RBS and Fyled entered into a second letter of confirmation incorporating the relevant ISDA Novation Definitions; BCMCHL and MS Cooper entered into the Financial Contract and the side letter; and Morgan Stanley also guaranteed MS Cooper's obligations. BCMCL was not a party to any of these documents and Fyled was only a party to the confirmation. The Appellants did not suggest that any of these documents provided evidence that Fyled became a partner in the UK Partnership or that these documents could not have taken effect unless it had become so.

55. Again, there is no dispute that Fyled became a partner in the Cayman Partnership and that it was a party to the amended and restated Cayman Partnership Deed. Indeed, by the deed of assignment dated 11 June 2018 RBS assigned its partnership interest in the Cayman Partnership to Fyled. However, the deed of assignment was silent about any interest in the UK Partnership and even if the Appellants are correct and RBS did become a partner in the UK Partnership, then it failed to assign that interest to Fyled.

56. Clause 20 of the UK Partnership Deed required Fyled to execute a Deed of Adherence before it could be admitted to the UK Partnership and clause 3.1 expressly provided that it would only become a partner on the date specified in that deed. But Fyled did not contribute any capital or execute a Deed of Adherence in accordance with clause 9.2. It follows, therefore, that if clauses 3.1 and 20 also applied to Fyled, then it could not have become a Further Limited Partner in the UK Partnership either. Finally, the Appellants did not adduce any evidence to suggest that Fyled was registered as a partner in the UK Partnership or any explanation for the failure to register it.

(5) Determination

57. Mr Gammie submitted that it was unnecessary for RBS to comply with the provisions of the UK Partnership Deed because BCMC LP (the Cayman Partnership) had no legal personality of its own and by entering into the amended and restated UK Partnership Deed on 6 July 2007 the existing partners in the UK Partnership intended to contract with the individual partners of the Cayman Partnership (including RBS). He also submitted that because BCMCL had authority to act on behalf of the Cayman Partnership, the individual partners (including RBS) intended to contract (and did contract) with the existing partners in the UK Partnership.

58. Mr Gammie drew no distinction between RBS (which was a partner in the Cayman Partnership on 6 July 2007 when the existing partners of the UK Partnership entered into

the amended and restated UK Partnership Deed) and Fyled (which became a partner of the Cayman Partnership over 11 months later). He submitted that it was the intention of the partners in the UK Partnership to contract with both existing and future members of the Cayman Partnership and that BCMCL had authority to contract on their behalf (and did so).

59. Nevertheless, we continue to consider the position of RBS and Fyled separately. In doing so, we accept that BCMC LP had no separate legal personality under Cayman law as the Cayman law experts agreed and the FTT recorded: see the Decision at [135](1) (which we set out in dealing with Ground 1(b) below). However, by naming BCMC LP as a party to the UK Partnership Deed, it does not follow that all of the existing partners in the Cayman Partnership became parties to the UK Partnership Deed or were intended to become partners in the UK Partnership. It is equally possible that BCMCL was the only one to become a party to the UK Partnership Deed and a partner in the UK Partnership. Moreover, the change in the identity of the counter-party can be explained on the basis that BCMCL originally joined the UK Partnership on its own account but entered into the amended and restated UK Partnership Deed in its capacity as the general partner of the Cayman Partnership.

60. In other words, each partner in the Cayman Partnership may have intended to become a partner in the Cayman Partnership (and been admitted as a partner) but BCMCL may only have intended that it alone should join the UK Partnership and the partners in the UK Partnership may only have intended to admit BCMCL and not the other Cayman partners. The parties may also have intended to create a sub-partnership (as the FTT found). The fact that a Cayman limited partnership has no separate legal personality does not, in our view, determine the choice between these alternatives or provide the answer to the question which the FTT had to decide. In order to answer that question, it was necessary to decide, by reference to the evidence before the FTT, whether in substance and reality RBS and then Fyled intended to join the UK Partnership and, if so, whether its existing partners consented to their admission.

(a) RBS

61. We have analysed the relevant rights and obligations of the parties in section (4) (above). The second stage of the inquiry is to look at the substance of the relationship and to determine whether RBS became a partner in the UK Partnership. In our judgment, the FTT was correct to find that only BCMCL became a partner in the UK Partnership and that RBS did not become a partner for the following reasons:

(1) There was no evidence before the FTT (and no evidence before us) that RBS intended to become a member of the UK Partnership: see [112]. No officer or employee of RBS gave evidence and, as Mr Baldry pointed out in HMRC's Skeleton Argument, Mr Dodd gave evidence that he did not believe that RBS had become a partner in the UK Partnership.

(2) BCMCL had general authority to act on behalf of the Cayman Partnership for the purpose of the Business (as defined): see clause 18.1 of the Cayman Partnership Deed. It also had power to execute, deliver and perform all contracts as it considered necessary and advisable in order to carry on the business: see clause 6.2. But we were not taken to any evidence (such as minutes of a meeting or a written resolution)

to show that BCMCL considered it necessary or advisable that RBS should join the UK Partnership in order to carry on the Business of the Cayman Partnership.

(3) If it had been BCMCL's intention that RBS should join the UK Partnership on 7 July 2007, there is no reason why it could not have required RBS to be named as a party to the restated and amended UK Partnership Deed and a letter of allocation issued to it under clause 9.1. However, RBS was not named as a party and no letter of allocation was issued.

(4) There was no evidence before the FTT (and no evidence before us) that any of the partners in the UK Partnership intended to admit RBS as a partner or consented to its admission. We have referred to Mr Dodd's evidence above. Although Mr Dodd could not, of course, determine whether as a matter of law RBS became a partner in the UK Partnership he was well-placed to give evidence as to intent. He was both a partner in the UK Partnership and a partner in the Cayman Partnership and best placed to answer that question.

(5) BCML had general authority to act on behalf of the UK Partnership in relation to the Business (as defined): see clause 18.1 of the UK Partnership Deed. It also had power to execute, deliver and perform all contracts as it considered necessary and advisable in order to carry on the business: see clause 6.2. But we were not taken to any evidence (such as minutes of a meeting or a written resolution) to show that BCML considered it necessary or advisable to admit RBS as a partner in the UK Partnership in order to carry on its Business.

(6) Further, in our judgment BCML had no authority to admit RBS as a Further Limited Partner after 6 July 2007 unless it complied with clause 9.2 and clause 20 because clause 3 expressly provided that it would only become a partner as from the date specified in the Deed of Adherence. The UK Partnership Deed conferred no express authority to waive compliance with those provisions and in our judgment no such authority can be implied. Moreover, clause 6.3 expressly provided that the Business did not extend to the management of the investment or trading of the contributions made pursuant to clause 9.

(7) If it had been the intention of BCML to admit RBS as a party, there is no reason why it could not have required RBS to execute a Deed of Adherence and contribute £100 in capital pursuant to clause 9.2 or, indeed, required BCMCL to execute it on behalf of RBS (and make the capital contribution) under its authority as the general partner of the Cayman Partnership.

(8) Section 9(1) of the Limited Partnership Act 1907 required any change in the partners of a limited partnership to be registered within seven days. BCML did not comply with the obligation in clause 4.2 to ensure compliance with the requirements of the Act. If it had been the intention of the parties that RBS would become a member of the UK Partnership, it would have complied with this duty. It failed to do so and no explanation for that failure was put before the FTT (or before us).

(b) Fyled

62. It is also necessary to consider the substance of the relationship between the various parties once Fyled became a partner in the Cayman Partnership. In our judgment, the

position in relation to Fyled is even more clearcut. Whatever the position may have been in relation to RBS, the FTT was right in our judgment to find that Fyled did not become a partner in the UK Partnership. We have reached this conclusion for the following reasons:

(1) There was no evidence before the FTT (and no evidence before us) that Fyled intended to become a member of the UK Partnership at any time after 11 June 2008: see [112]. No officer or employee of Fyled gave evidence that it had such an intention and we were not taken to any documents which provided evidence to support such a finding.

(2) Even if BCMCL intended to enter into the amended and restated UK Partnership Deed on behalf of both the existing and future members of the Cayman Partnership on 6 July 2007, it had no authority to do so on Fyled's behalf at that date. Some action was required either to ratify or approve that decision on Fyled's behalf after it became a Cayman partner. However, there was no evidence that BCMCL considered it necessary or advisable for Fyled to become a partner of the UK Partnership or that it took any steps to make Fyled a partner after 11 June 2008.

(3) Indeed, if it had been BCMCL's intention that Fyled should join the UK Partnership on or after 11 June 2008, there is no reason why it could not have required Fyled to execute a Deed of Adherence and contribute £100 under clause 9.2 or even made the contribution and executed the Deed of Adherence itself. However, Fyled did not execute such a deed or make such a contribution.

(4) There was no evidence before the FTT (and no evidence before us) that any of the partners in the UK Partnership intended to admit Fyled as a partner or consented to its admission. There was no evidence either that BCML considered it necessary or advisable to admit Fyled as a partner in the UK Partnership in order to carry on its Business.

(5) But, as we have stated, BCML had no authority to admit Fyled as a Further Limited Partner unless it complied with clause 9.2 and clause 20 and entered into a Deed of Adherence. Moreover, if it had been BCML's intention to admit Fyled as a party, there is no reason why it could not have required Fyled to execute a Deed of Adherence and contribute £100 pursuant to clause 9.2 or, indeed, required BCMCL to take those steps on Fyled's behalf.

(6) BCML did not comply with the obligation in clause 4.2 to ensure compliance with section 9(1) of the Limited Partnership Act 1907. If it had been the intention of the parties that Fyled would become a member of the UK Partnership, it would have complied with this duty.

(7) It is no answer to suggest that RBS had already acquired a partnership interest in the UK Partnership and then assigned it to Fyled. For the reasons which we have set out above, the FTT was correct to find that RBS did not become a partner of the UK Partnership. But even if it had, RBS only assigned its partnership interest in the Cayman Partnership to Fyled and no more: see clause 2 of the deed of assignment. Moreover, even if RBS had assigned a partnership interest in the UK Partnership to Fyled, there was no evidence before the FTT (or before us) that it had complied with clause 19.2 of the UK Partnership Deed (above).

(c) Sub-Partnership

63. Finally, Mr Gammie submitted that it was not possible for the FTT to have found that there was a sub-partnership by applying the extract from *Lindley & Banks on Partnership* referred to by the FTT at [109]. His reasoning was as follows:

> "93. It is not possible to treat BCMCL as the sole partner in BCM LP in order to decide whether or not BCMC LP is a sub-partnership: this would be to assume the answer to the very question that is being asked, i.e. whether it is BCMCL alone, or the partners in BCMC LP, that are partners in BCM LP.
>
> 94. BCMCL, as a party to the BCMC LP Deed (expressly as general partner in BCMC LP) was not agreeing to share its share of the BCM LP profits with "strangers", to use Lord Lindley's terminology. The other partners in BCMC LP were not, and could not be, "strangers" when all the other partners in BCM LP agreed to enter into partnership with BCMC LP, as stated on the face of the BCM LP Deed."

64. For the reasons which we have set out (above) we have reached the conclusion that neither RBS nor Fyled became a partner in the UK Partnership. In arriving at that conclusion, we did not "treat BCMCL as the sole partner in BCM LP in order to decide whether or not BCMC LP is a sub-partnership". Our conclusion was based on an independent assessment of the contractual documents and the substance of the relationship between the parties. But having reached the conclusion that RBS and Fyled were not partners in the UK Partnership, it was, in our judgment, open to the FTT to conclude that the Cayman Partnership was a sub-partnership.

65. Indeed, when BCMCL, RBS and Mr Dodd entered into the Cayman Partnership Deed, BCMCL and Mr Dodd also became partners in the UK Partnership by executing the amended and restated UK Partnership Deed. We consider that the FTT was entitled to find that the Cayman Partnership was a sub-partnership given that RBS was not asked to execute the UK Partnership Deed and did not become a partner. We also consider that the FTT was entitled to find that it remained a sub-partnership when Fyled became a partner. Although other partners had joined the Cayman Partnership, there was no evidence that they complied with clauses 9.2 and 20 of the UK Partnership Deed or were registered as partners. However, the conclusion that the Cayman Partnership was akin to a sub-partnership was not itself necessary to the determination of Issue (1)(a). It was enough for the FTT to find that RBS and Fyled were not partners in the UK Partnership (as it did at [112]).

(d) Conclusion

66. Although the reasoning was quite brief, we are satisfied that the FTT arrived at the correct decision and that the reasons which it gave were sound and we have explained why we have reached that conclusion in much greater detail. The Appellants accepted that the analysis remained the same when BlueCrest's business was conducted by BCM LLP and BCM (UK) LLP. We are fully satisfied, therefore, that the appeal on Issue 1(a) should be dismissed.

B. Issue (1)(b): Profits held in a fiduciary or representative capacity

67. The Appellants also argued that even if the FTT was correct in concluding that only BCMCL became a partner in the UK Partnership, BCMCL was not liable to corporation tax on profits which were allocated to other partners in the Cayman Partnership because it was not beneficially entitled to those profits but received and held them in a fiduciary capacity. They argued that this was the effect of section 6 of the Corporation Tax Act 2009 ("**CTA 2009**") and its predecessor, section 8(2) of the Income and Corporation Taxes Act 1988 ("**ICTA 1988**").

(1) The Decision

68. Issue (1)(b) provides an alternative basis for the Appellants' appeal on the Profit Allocation Issue. If the Appellants are correct, then they would be entitled to succeed on the Profit Allocation Issue irrespective of our decision on Issue (1)(a) (subject only to HMRC's cross-appeal on Issue (2)). It is surprising, therefore, that the FTT did not address it at all in the Decision.

69. Issue (1)(b) did not appear separately in the SAFI (which we have set out in full above). We asked Mr Gammie whether it was properly before the FTT and in response to this request he produced a helpful note directing us to the relevant passages in the parties' Skeleton Arguments and their oral submissions. We make the following observations:

(1) In their Skeleton Argument for the hearing before the FTT, the Appellants took the point of principle that profits allocated to BCMCL were only taxable in its hands to the extent that it was beneficially entitled to them. However, they cited no statutory authority for this proposition (although the list of relevant legislation did include section 6 of the CTA 2009).

(2) The Appellants also made the argument that BCMCL could not be charged on profits "which as a matter of Cayman Islands' law it holds on statutory trust for the benefit of the limited partners" and in their Skeleton Argument for the hearing before the FTT, HMRC replied to the argument based on Cayman law.

(3) Counsel did address this issue in their oral submissions. In particular, Mr Gammie addressed the argument based on section 8(2) and section 6. But the fact that he did not deal with it very fully in his written submissions may explain why the FTT did not address it in the Decision.

70. We have reached the conclusion that the Profit Allocation Issue (as formulated by the parties) was wide enough to include the argument based on section 8(2) and section 6 and that Mr Gammie raised it sufficiently in argument to require the FTT to deal with it in the Decision. With some reluctance we have also reached the conclusion that the FTT's failure to address this argument in the Decision was an error of law and that the consequence is that the Decision on the Profit Allocation Issue must be set aside. However, since Issue (1)(b) is a question of law which can be determined by reference to the Agreed Facts and the Key Transaction Documents put before this Tribunal, we consider not only that we are in a position to remake that aspect of the Decision but that we should do so.

(2) The Legislation

71. The Profit Allocation Issue is relevant to the corporation tax liability of BCMCL for the years ended 30 November 2008 and 30 November 2009. For the year ended 30 November 2008 the relevant provision was section 8(2) of ICTA 1988. The CTA 2009 came into force on 1 April 2009 and took effect for corporation tax purposes for accounting periods ending on or after that day: see section 1329(1). It follows, therefore, that for the year ended 30 November 2009 the relevant provision was section 6 of the CTA 2009. We set out the relevant provisions in turn.

72. Section 8(2) of ICTA 1988 formed part of a general section headed "General Scheme of corporation tax" and it provided as follows until 31 March 2009 (emphasis supplied):

> "(2) A company shall be chargeable to corporation tax on profits accruing for its benefit under any trust, or arising under any partnership, in any case in which it would be so chargeable if the profits accrued to it directly; and a company shall be chargeable to corporation tax on profits arising in the winding up of the company, but shall not otherwise be chargeable to corporation tax on profits accruing to it in a fiduciary or representative capacity except as respects its own beneficial interest (if any) in those profits."

73. Section 114 applied to the computation of profits of a non-resident corporate partner in a UK partnership. The section in force at the relevant time was headed "Special Rules for computing profits and losses" and it provided as follows:

> "(1) So long as a trade, profession or business is carried on by persons in partnership, and any of those persons is a company, the profits and losses (including terminal losses) of the trade, profession or business shall be computed for the purposes of corporation tax in like manner, and by reference to the like accounting periods, as if the partnership were a company and, subject to section 115(4), as if that company were resident in the United Kingdom, and without regard to any change in the persons carrying on the trade, profession or business, except that—
>
> (a) references to distributions shall not apply; and
>
> (b) subject to section 116(5), no deduction or addition shall be made for charges on income, or for capital allowances and charges, nor in any accounting period for losses incurred in any other period nor for any expenditure to which section 401(1) applies; and
>
> (c) a change in the persons engaged in carrying on the trade, profession or business shall be treated as the transfer of the trade, profession or business to a different company if there continues to be a company so engaged after the change, but not a company that was so engaged before the change.
>
> (2) A company's share in the profits or loss of any accounting period of the partnership, or in any matter excluded from the computation by subsection (1)(b) above, shall be determined according to the interests of the partners during that period, and corporation tax shall be chargeable as if that share derived from a trade, profession or business carried on by the company alone in its corresponding accounting period or periods; and the company shall be assessed and charged to tax for its corresponding accounting period or periods accordingly. In this subsection *"corresponding accounting period or periods"* means the accounting period or periods of the company comprising or together comprising the accounting period of the partnership,

and any necessary apportionment shall be made between corresponding accounting periods if more than one."

74. When the CTA came into force BCMCL was liable to corporation tax on its chargeable profits as a non-resident company trading in the UK through a permanent establishment: see section 5 (which we set out in full in dealing with the Interest Deductibility Issue below). Chargeable profits were (in this case) profits from trading income arising directly or indirectly through or from the permanent establishment and attributable to it: see section 19 (which we also set out below). There was no dispute that the profits allocated to BCMCL as General Partner (including any Superprofits) were chargeable profits which fell within section 19.

75. From 1 April 2009 section 8(2) was replaced by sections 6 and 7 of the CTA 2009 which provided as follows:

"**6 Profits accruing in fiduciary or representative capacity**

(1) A company is not chargeable to corporation tax on profits which accrue to it in a fiduciary or representative capacity except as respects its own beneficial interest (if any) in the profits.

(2) The exception under subsection (1) from chargeability does not apply to profits arising in the winding up of the company.

7 Profits accruing under trusts

Profits that accrue for the benefit of a company under a trust are treated for the purposes of the charge to corporation tax under section 2(1) as accruing directly to the company."

76. The corporation tax regime applicable to corporate partners (both resident and non-resident) was set out in Part 17 of the CTA 2009. In particular, the following provisions applied to BCMCL during the relevant year:

"**1257 General provisions**

(1) In this Act persons carrying on a trade in partnership are referred to collectively as a "firm".

1258 Assessment of firms

Unless otherwise indicated (whether expressly or by implication), a firm is not to be regarded for corporation tax purposes as an entity separate and distinct from the partners.

1259 Calculation of firm's profits and losses

(1) This section applies if a firm carries on a trade and any partner in the firm ("the partner") is a company within the charge to corporation tax.

(2) For any accounting period of the firm, the amount of the profits of the trade ("the amount of the firm's profits") is taken to be the amount determined, in relation to the partner, in accordance with subsection (3) or (4).

(3) If the partner is UK resident—

(a) determine what would be the amount of the profits of the trade chargeable to corporation tax for that period if a UK resident company carried on the trade, and

(b) take that to be the amount of the firm's profits.

(4) If the partner is non-UK resident—

(a) determine what would be the amount of the profits of the trade chargeable to corporation tax for that period if a non-UK resident company carried on the trade, and

(b) take that to be the amount of the firm's profits.

(5) The amount of any losses of the trade for an accounting period of the firm is calculated, in relation to the partner, in the same way as the amount of any profits.

1262 Allocation of firm's profits or losses between partners

(1) For any accounting period of a firm a partner's share of a profit or loss of a trade carried on by the firm is determined for corporation tax purposes in accordance with the firm's profit-sharing arrangements during that period. This is subject to sections 1263 and 1264.

(2) If a firm pays charges on income, a partner's share of the charges is determined for corporation tax purposes in accordance with the firm's profit-sharing arrangements during the accounting period of the firm in which the charges are paid.

(3) For the purposes of subsection (2) a charge on income which arises from a disposal such as is mentioned in section 587B(1) of ICTA (gifts of shares, securities and real property to charities etc) is taken to be paid when the disposal is made.

(4) In this section and sections 1263 and 1264 *"profit-sharing arrangements"* means the rights of the partners to share in the profits of the trade and the liabilities of the partners to share in the losses of the trade.[4]"

(3) The Appellants' Case

77. The Appellants' case is set out in paragraphs 47 and 48 of the Grounds of Appeal. They placed particular reliance on the words which we have emphasised by underlining in section 8(2) (above). They then continued as follows:

> "48. As the Tribunal accepted at FTT [135(4)] and FTT [136], the Cayman law experts agreed that BCMCL, as general partner in BCMC LP, held its 19 per cent interest in BCM LP on trust and was not beneficially entitled to the profits that belonged to the other partners in BCMC LP. BCMCL cannot therefore be charged to corporation tax in respect of those profits. The analysis of Issue 2 remains the same whether the business is conducted by BCM LP, BCM LLP or BCM (UK) LLP."

78. The FTT set out in full the joint statement agreed between the Cayman law experts on Issue (2) (which gives rise to HMRC's cross-appeal). We have already referred to their agreement that BCMC LP had no legal personality but for ease of reference we repeat those paragraphs of the Decision in which the FTT set out the joint statement and the conclusions which it drew from the expert evidence:

[4] Section 1262 was in force in this form between 1 April 2009 and 1 April 2010. "Profit-sharing arrangements" were also defined in the same way in section 1269 of the CTA 2009 for the purposes of sections 1267 and 1268.

> "135. As is clear from that Joint Report, dated 25 July 2019, the Cayman Island Law experts, Mr Goucke for the Cayman Appellants and Mr Said for HMRC, agree that under Cayman Islands law:
>
> (1) Exempted Limited Partnerships ("ELPs") such as BCMC LP do not have their own separate legal personality;
>
> (2) a partnership can be a limited partner of a Cayman Islands ELP as a matter of Cayman lslands law, pursuant to section 4(4) of the 2007 ELP Law;
>
> (3) BCMC LP cannot own assets because an ELP has no separate legal personality;
>
> (4) BCMCL, as General Partner of BCMC LP, holds the assets on trust for the partnership, BCMC LP, in accordance with the terms of the applicable partnership agreement of the ELP, pursuant to s 6(2) of the 2007 ELP Law and later amended to be s 7(8) of the 2007 ELP Law;
>
> (5) BCMCL as General Partner carries on BCMC LP's business;
>
> (6) section 7(1) of the 2007 ELP Law prohibits limited partners from taking part in the conduct of the business of an ELP;
>
> (7) it is the Cayman Partnership Deeds which set out the contractual rights of BCMCL and the limited partners in BCMC LP to share in the profits of BCMC LP;
>
> (8) Profits of BCMC LP fall to be allocated according to the terms of Clause 12 of the BCMC LP Deed;
>
> (9) the BCMC LP Deed governs the allocation of BCMC LP's profit amongst its partners, but reference is required to the TRS, Financial Contract, Facility Agreement and Loan Notes (as the case may be) to properly understand a number of defined terms used in the profit allocation provisions in Clause 12;
>
> (10) other than for the limited purpose explained above (ie to properly understand defined terms from other agreements), reference is not required to further agreements beyond the BCMC LP Deed to ascertain the rights of the partners of BCMC LP to share in profits; and
>
> (11) if and to the extent BCMC LP became entitled to a profit allocation from BCM LP if those profits were available for allocation and distribution as before tax profits for a particular financial year, BCMCL and the other partners in BCMC LP would share in that profit, according to the allocation and distribution processes set out in Clauses 12 and 13 of the BCMC LP Deed.
>
> 136. Accordingly, as the experts agree, as a matter of Cayman Islands law, the profit sharing agreements were confined to the BCMC LP Deed under which BCMCL's entitlement to profits of BCMC LP did not include those allocated to RBS and subsequently Fyled. Therefore, had I reached a different conclusion and found in favour of the Cayman Appellants in relation to Issue 1, for the reasons above, I would have rejected HMRC's argument in relation to Issue 2."

79. Mr Gammie relied on [135](4) and [136] and submitted that the FTT had accepted that as a matter of Cayman law BCMCL held the assets of the Cayman Partnership on trust for its partners in accordance with the terms of the Cayman Partnership Deed. He also submitted that it must follow that the profits of BCM LP which were allocated to BCMCL

under the UK Partnership were also held by BCMCL on trust for the partners and in a fiduciary capacity within the meaning of section 8(2) (apart from its own beneficial interest).

(4) Determination

(a) Cayman Law

80. Mr Baldry submitted that the expert evidence of Cayman law was irrelevant for the purposes of deciding the amount of corporation tax for which BCMCL was liable. He also submitted that the purpose of admitting the expert evidence on Cayman law was to enable the FTT to consider whether the arrangement would properly be described as a partnership.

81. We agree that the expert evidence was admitted by the FTT for a different purpose and not for the purpose of determining this issue (which the FTT did not address at all). We also agree that the extent to which BCMCL was liable for corporation tax on its profits from the UK Partnership is a matter of English law. The question whether section 8(2) or section 6 applies to the profits allocated to BCMCL under the UK Partnership Deed is a question of statutory interpretation to be determined by the principles which an English court or tribunal would apply.

82. However, we are prepared to assume for the purposes of Issue (1)(b) that the question whether BCMCL held the assets of the Cayman Partnership in a fiduciary or representative capacity (and, if so, on what terms) is governed by Cayman law. The parties did not address us on the conflicts of law question whether the FTT should have applied foreign or domestic law if it had considered the issue and for good reasons. The position is very likely to have been the same if BCMCL had been the general partner of a UK limited partnership and the real issue between the parties was whether the entitlements of the partners under the Cayman Partnership Deed had any relevance at all to the amount of corporation tax for which BCMCL was liable.

(b) General Principle

83. Before we turn to the construction of sections 8(2) and 6 we begin by considering how, as a matter of general principle, partners in a general or limited partnership are taxed. The Appellants cited no authority for the proposition that a partner should only be charged to tax on profits to which he, she or it is beneficially entitled and Mr Baldry submitted that a partner's beneficial entitlement to profits and beneficial interest in the assets of a partnership were not relevant for the following reasons:

> "60. In this matter, it is not thought that BCMCL's relationship to the members of the Cayman LP are any different to those that would exist in a UK limited partnership. However, the tax consequences of the s114(2) or s1262 allocation have nothing to do with how BCMCL holds its property.
>
> 61. The question is: who is allocated a share in BCM LP's profits? It is not about the terms on which any money paid to BCMCL is then held (as to which there is a statutory trust). As with UK limited partnerships, the general partner holds its property in trust for the partnership as a whole (which is just a reflection of the ordinary rule for partnerships, that the partners hold the partnership property on trust for each other). The general partner does not participate in its business on trust for the limited partners:

> if it did, it would not be a partnership at all as recognised in the UK as there would be no business in common. It carries on its business as agent for the other partners."

84. Issue (1)(b) must ultimately turn on the construction of the relevant statutory provisions but we accept Mr Baldry's submission as a matter of general principle for a number of reasons. First, there is clear authority for the proposition that partners are generally taxed by reference to the profits stated in the partnership's profit and loss account for the relevant accounting period and allocated in accordance with the partnership deed. In *Reed v Young* [1986] STC 285 (to which Mr Gammie took us) Lord Oliver stated as follows at 289e-g:

> "The profits and losses with which we are concerned here are the profits and losses of the partnership from the carrying on of the trade as shown by its annual profit and loss account and computed in accordance with the provisions of the 1970 Act. The assessment of tax on the individual partners is by reference to their respective shares as set out in the partnership deed and has no necessary relation to what may ultimately turn out to be the proportions in fact in which the partner is called on to contribute to payment of the firm's debts, for instance, if one or more of his partners is insolvent. Thus the partnership's trading losses are conceptually quite distinct from the debts and liabilities of the firm and from the assets which are available to meet them. The point is a short one which is not susceptible of any great elaboration."

85. *Reed v Young* involved a Scottish limited partnership and the issue was whether the taxpayer could set off the losses allocated to her under the partnership deed against her income tax even though her liability to contribute to the debts of the partnership was limited. It is clear from the passage (above) that in assessing the tax for which the individual partner was liable it was irrelevant to consider whether she actually contributed to the debts of the partnership. By parity of reasoning, it is irrelevant to consider whether the profits of a partnership have been distributed to the individual partners and, if so, what amounts they have actually received. This is because the profits (or losses) of a partnership are conceptually distinct from its assets and liabilities.

86. Secondly, we agree with Mr Baldry that, whatever profit allocations it may have made, BCML, as the general partner of the UK Partnership, held the funds and other assets of the UK Partnership on trust for the partnership as a whole subject to the terms of the UK Partnership Deed. Although profits were allocated to BCMCL in accordance with clause 12 of the UK Partnership Deed, it does not follow that they were held on trust for the limited partners of the Cayman Partnership. Until BCMCL took drawings under clause 13 (below) and BCML paid the relevant funds out of its own bank account and into BCMCL's bank account, BCML continued to hold the partnership assets (including those funds) on trust for the UK Partnership as a whole.

87. Moreover, BCML did not distribute the profits allocated to BCMCL as such. Clause 12 of the UK Partnership Deed together with its letter of allocation governed BCMCL's profit allocation whereas clause 13 governed distributions and drawings. Clause 13.3 provided that 70% of the estimated profits (or losses) would be credited to BCMCL's "Distribution Account" within 30 days of the end of the relevant financial year and the remaining 30% would be distributed within 30 days of the completion of the relevant partnership accounts. It also provided that limited partners would be permitted to withdraw

amounts standing to the credit of their account from the date on which they were credited. Clause 13.4(A) also provided that a partner could withdraw "Discretionary Drawings" in advance of the end of a financial year and in anticipation of a profit allocation and Clause 13.4(B) provided that BCMCL could withdraw "Advance Drawings" to make repayments under the Facility Agreement.

88. There may have been a close correlation between the profits which were allocated to BCMCL in any accounting year and the sums which it withdrew from its Distribution Account in the same accounting year but there may not. It is clear from clause 13.4(B) that BCMCL received monthly Advance Drawings to make payments under the Facility Agreement. But it had no obligation to withdraw Discretionary Drawings under clause 13.4(A) or to withdraw the full amounts credited to its Distribution Account. For present purposes, the important point is that profits allocated to BCMCL under the UK Partnership Deed were contractually distinct from the cash which BCMCL was entitled to draw from the assets of the UK Partnership and they would not have been the same year on year.

89. Thirdly, the Cayman Partnership operated in exactly the same way. Clauses 12 and 13 of the Cayman Partnership Deed contained very similar provisions and whatever profit allocations BCMCL may have made (in particular to Fyled) it held the funds or other assets distributed by the UK Partnership on trust for the partnership as a whole and not for the individual partners. The Cayman law experts agreed this in terms in the joint statement: see [135](4) (above).[5] It is also clear from the statutory provision upon which they relied. Section 6(2) of the Exempted Limited Partnership Law (2007 revision) provided as follows:

> "Any property of the exempted limited partnership which is conveyed to or vested in or held on behalf of any one or more of the general partners or which is conveyed into or vested in the name of the exempted limited partnership shall be held or deemed to be held by the general partner, and if more than one then by the general partners jointly upon trust, as an asset of the exempted limited partnership in accordance with the terms of the partnership agreement."

(c) Section 8(2)

90. Section 8(2) was a portmanteau provision which made provision for three special situations: (1) where profits accrued to a company as a beneficiary of a trust, (2) where profits arose under a partnership and (3) where profits accrued to a company whilst it was being wound up. In relation to situations (1) and (2) the company was only chargeable to tax "in any case in which it would be so chargeable if the profits accrued to it directly". To apply the section, therefore, it is necessary to make the statutory assumption that the profits had accrued to it directly. For the purpose of applying this section to BCMCL's profits for the year ended 30 November 2008 we have to assume, therefore, that it was not a limited partner in a limited partnership but that profits accrued to it directly and were shown in its profit and loss account.

91. This is not an assumption which it is necessary to apply in situation (3) because a company in liquidation is in a special position. The drafter of the legislation obviously took the view that it might be argued that a company being wound up or in liquidation held any profits on trust for its creditors or that the liquidator would have to apply them

[5] Mr Gammie repeated this in his Skeleton Argument: see paragraph 103.

in accordance with the statutory insolvency regime (and it is now generally accepted that corporation tax may be a liquidation expense). The fact that the statutory assumption immediately before the semi-colon only applies to situations (1) and (2) explains the rather awkward syntax of the sub-section.

92. The general proviso upon which the Appellants rely then follows the three special situations (above). The question of construction for us is whether this is a general proviso which applies to all other situations apart from the three identified immediately before or whether the proviso was intended to qualify the three situations themselves. This turns on the application of the word "otherwise". Does it mean that a company shall not be chargeable to tax in any other case where profits accrue to it in a fiduciary capacity or does it mean that the three special situations identified earlier do not apply where profits accrue to the company in a representative capacity?

93. We consider that the first construction is the correct one and that the words upon which Mr Gammie relied in section 8(2) have no application to situation (2) and to profits arising under a partnership. We have reached this conclusion for the following reasons:

(1) This is the natural and ordinary meaning of the words. If the proviso was intended to qualify the three special situations identified earlier in the sub-section the word "otherwise" is redundant.

(2) The proviso has no obvious application to situation (1) (where the company is beneficially entitled to the profits and not the other way round) or to situation (3) (where the company is in liquidation). Moreover, it is difficult to see how it could apply to a partnership where the profits of necessity accrue to all of the partners in a fiduciary or representative capacity. Partnership involves a fiduciary relationship and until the assets are distributed, the partners hold all of the assets on trust for the partnership as a whole.

(3) Moreover, to apply situation (2) to BCMCL's profit allocation for the year ended 30 November 2008 we have to make the statutory assumption that it was not a limited partner in a limited partnership and that the profits accrued to it directly. If we make that assumption, the proviso can have no application.

(3) Our preferred construction is consistent with the general principle set out in *Reed v Young* that partners in a limited partnership are chargeable to tax on the profits allocated to them without regard to the assets and liabilities of the partnership and how they are held by the individual partners.

(4) Section 114(2) applies to the computation of BCMCL's profits for the year ended 30 November 2008. Section 114(2) mirrors section 8(2) in providing that its profits shall be determined in accordance with the interests of the partners during that period and corporation tax shall be chargeable as if "that share derived from a trade, profession or business carried on by the company alone".

(5) If Parliament had not intended the profits of a partner to be chargeable to corporation tax where they were allocated to a trustee of a trust or the general partner of a sub-partnership or separate partnership, it would have made express provision for this in section 114. But, as Mr Baldry submitted, the tax consequences of the profit

allocation under section 114(2) have nothing to do with how BCMCL holds its property.

(6) Finally, there is no obvious reason why Parliament would have intended that result. The arrangements which an individual partner may make for dealing with the profits and distributions allocated and then paid under the terms of a partnership have no relevance to the amount of tax which he or she should have to pay. Whether a corporate partner has assigned the benefit of its profit allocation to a creditor or third party or declared that it holds any drawings which it receives on trust for third parties should not be relevant to the computation of those profits for corporation tax purposes.

(d) Section 6

94. Section 8(2) was replaced by sections 6 and 7 of the CTA. Situation (1) became section 7, situation (3) became section 6(2) and the proviso became section 6(1). However, neither section made any reference to situation (2) and the profits arising under a partnership. Part 17 of the CTA set out the regime applicable to corporate partners and we have set out the relevant sections (above). The question of construction for us is whether the provisions of Part 17 are subject to section 6(1) and should only be applied to those profits in which a partner had a beneficial interest (if any).

95. We consider that section 6 has no application to the provisions of Part 17 and that a corporate partner's share in the profits of a trade carried on by a partnership should be determined for corporation tax purposes without reference to its beneficial entitlement to those profits. We have also reached this conclusion for the following reasons:

(1) Section 1262(1) provided that BCMCL's share of the profits of the trade carried on by the UK Partnership was to be determined in accordance with its "profit- sharing arrangements". Section 1262(4) provided that those arrangements meant the "rights of the partners to share in the profits of the trade and the liabilities of the partners to share in the losses of the trade".

(2) The partnership deed (or other constitutional documents) will usually contain the profit-sharing arrangements of the partnership. It is theoretically possible that those arrangements might include a declaration of trust or express fiduciary arrangements to which all of the partners are parties. But a declaration of trust by a limited partner of a limited partnership that it holds the assets on trust for third parties or strangers to the partnership does not fall within the definition in section 1262(4). Likewise, the partnership deed of partnership X will not ordinarily form part of the profit-sharing arrangements of partnership Y (unless the partners in partnership X are also partners in partnership Y as in *Major v Brodie*).

(3) This construction is consistent with the general principle set out in *Reed v Young* that partners in a limited partnership are chargeable to tax on the profits allocated to them without regard to the assets and liabilities of the partnership and how they are held by the individual partners.

(4) If Parliament had not intended the profits of a partner to be chargeable to corporation tax where they were allocated to a trustee of a trust or the general partner of a sub-partnership or separate partnership, then section 1262 would have expressly

provided that it was subject to section 6(1). But it contains no such qualification and, as Mr Baldry submitted, the tax consequences of the section 1262 allocation have nothing to do with how BCMCL holds its property.

(6) For the reasons which we have set out in relation to section 8(2), there is no obvious reason why Parliament would have intended that result. Moreover, Mr Gammie did not suggest that sections 6 and 7 of the CTA were intended to have a significantly different effect from section 8(2).

96. Finally, we have construed section 1262 on the basis that Part 17 of the CTA contains an entirely separate free-standing regime for the taxation of profits arising under a partnership, to which section 6(1) has no application. This construction is consistent with the Government's Explanatory Notes to the CTA 2009, which stated as follows:

> "56. There is no reference to profits arising under a partnership in contrast to section 8(2) of ICTA. Provisions for the charge to corporation tax on the profits of corporate partners are set out elsewhere in this Act and in particular in Part 17."

(e) Application

97. For the reasons which we have set out we do not consider that the words at the end of section 8(2) of ICTA (which we have underlined above) had any application to the profits of BCMCL for the year ended 30 November 2008 and that its entire profit allocation was chargeable to corporation tax because it would have been so chargeable if the profits had accrued to it directly.

98. Again, for the reasons which we have set out we do not consider that section 1262 of the CTA took effect subject to section 6(1). BCMCL's share of the profits in the UK Partnership is to be determined in accordance with its profit-sharing arrangements. We consider that those arrangements are contained in the UK Partnership Deed and do not include the rights and liabilities of the Cayman partners under the Cayman Partnership Deed. Accordingly, we find that BCMCL is chargeable to corporation tax on its total profit allocation arising under the UK Partnership for the year ended 30 November 2009 without reference to the beneficial entitlement of the partners in the Cayman Partnership. We therefore dismiss the appeal on Issue (1)(b).

C. Issue (2): The profit-sharing arrangements of BCMC LP

99. Issue (2) concerns the profit-sharing arrangements of the Cayman Partnership rather than the profit-sharing arrangements of the UK Partnership. It was HMRC's case that BCMCL's share of the profits of the Cayman Partnership should be construed to include not only those expressly allocated to it under its letter of allocation and the Cayman Partnership Deed but also the profits allocated to RBS and then Fyled on the basis that they were ultimately re-introduced to the Cayman Partnership as capital contributions by BCMCHL and then used to accelerate repayment of the Loan Notes. Issue (2) arose on HMRC's cross-appeal and it would only have been necessary for us to decide it if we had allowed the Appellant's appeal on Issue (1). Having dismissed the appeal on Issue (1), it is unnecessary for us to decide Issue (2) and, although we heard full argument on it, we do not consider that it is appropriate for us to do so (or even to express our views briefly), particularly given that a closely related issue arises on the PIP and IP Appeals (which were the subject of a separate hearing by the Upper Tribunal).

V. The Interest Deductibility Issue

D. Introduction

100. The interest payments which BCMCL claimed and which HMRC disallowed accrued between the accounting period ended 30 November 2007 and the accounting year ended 31 December 2013. Broadly speaking, until 1 April 2009 the relevant legislation was contained in ICTA 1988 and, so far as the loan relationship rules are concerned, in the Finance Act 1996 (the "**FA 1996**"). Thereafter, the relevant statutory provisions were rewritten but to the same effect in the CTA 2009.

101. It was common ground that any differences arising out of the changes to the legislation in 2009 were not material for the purposes of the Interest Deductibility Issue. We therefore consider that no useful purpose would be served by analysing the earlier legislation and we address the Interest Deductibility Issue exclusively by reference to the provisions of the CTA 2009. We begin by setting out the legislation applicable to entities such as BCMCL before turning to the relevant loan relationship rules.

(1) BCMCL: The general tax regime

102. BCMCL was a non-resident company trading in the UK through a permanent establishment as a member of a partnership. In addition to those provisions of Part 17 of the CTA 2009 set out (above) the following provisions were also relevant to its tax treatment:

> **"5 Territorial scope of charge**
>
> (2) A non-UK resident company is within the charge to corporation tax on income only if—
>
> …
>
> (b) it carries on a trade in the United Kingdom (other than a trade of dealing in or developing UK land) through a permanent establishment in the United Kingdom,
>
> …
>
> (3) A non-UK resident company which carries on a trade in the United Kingdom through a permanent establishment in the United Kingdom is chargeable to corporation tax on income on all its profits wherever arising that are chargeable profits as defined in section 19 (profits attributable to its permanent establishment in the United Kingdom).
>
> …
>
> (4) Subsections (1) and (2A) to (3B) are subject to any exceptions provided for by the Corporation Tax Acts.
>
> **19 Chargeable profits**
>
> (1) This section applies for the purposes of the charge to corporation tax on income if a non-UK resident company carries on a trade in the United Kingdom through a permanent establishment in the United Kingdom.
>
> (2) The company's "chargeable profits" are its profits that are—
>
> (a) of a type mentioned in subsection (3), and
>
> (b) attributable to the permanent establishment in accordance with sections 20 to 32.

(3) The types of profits referred to in subsection (2)(a) are—

(a) trading income arising directly or indirectly through or from the establishment…

20 Profits attributable to permanent establishment: introduction

(1) Sections 21 to 32 apply for the purpose of determining the amount of profits of a non-UK resident company that are attributable to a permanent establishment of the company in the United Kingdom.

21 The separate enterprise principle

(1) The profits of the non-UK resident company that are attributable to the permanent establishment are those that the establishment would have made if it were a distinct and separate enterprise which—

(a) engaged in the same or similar activities under the same or similar conditions, and

(b) dealt wholly independently with the non-UK resident company.

(2) In applying subsection (1) assume that—

(a) the permanent establishment has the same credit rating as the non-UK resident company, and

(b) the permanent establishment has such equity and loan capital as it could reasonably be expected to have in the circumstances specified in that subsection.

29 Allowable deductions

(1) A deduction is allowed for any allowable expenses incurred for the purposes of the permanent establishment.

(2) Expenses incurred for the purposes of the permanent establishment include executive and general administrative expenses so incurred, whether in the United Kingdom or elsewhere.

(3) It does not matter whether the expenses are incurred by, or reimbursed by, the permanent establishment.

(4) The amount of expenses to be taken into account under subsection (1) is the actual cost to the non-UK resident company.

(5) "Allowable expenses" means expenses of a kind in respect of which a deduction would be allowed for corporation tax purposes if incurred by a UK resident company.

1273 Limited liability partnerships

(1) For corporation tax purposes, if a limited liability partnership carries on a trade or business with a view to profit—

(a) all the activities of the limited liability partnership are treated as carried on in partnership by its members (and not by the limited liability partnership as such),

(b) anything done by, to or in relation to the limited liability partnership for the purposes of, or in connection with, any of its activities is treated as done by, to or in relation to the members as partners, and

(c) the property of the limited liability partnership is treated as held by the members as partnership property.

References in this subsection to the activities of the limited liability partnership are to anything that it does, whether or not in the course of carrying on a trade or business with a view to profit."

(2) The loan relationship rules

103. The FA 1996 introduced a comprehensive code for the taxation of a company's loan relationships. It was common ground that the borrowings of BCMCL which were relevant to the Interest Deductibility Issue were loan relationships. The relevant provisions of the CTA 2009 (which were in force for the relevant accounting periods) were as follows:

> **"295 General rule: profits arising from loan relationships chargeable as income**
>
> (1) The general rule for corporation tax purposes is that all profits arising to a company from its loan relationships are chargeable to tax as income in accordance with this Part.
>
> **296 Profits and deficits to be calculated using credits and debits given by this Part**
>
> Profits and deficits arising to a company from its loan relationships are to be calculated using the credits and debits given by this Part.
>
> **297 Trading credits and debits to be brought into account under Part 3**
>
> (1) This section applies so far as in any accounting period a company is a party to a loan relationship for the purposes of a trade it carries on.
>
> (2) The credits in respect of the relationship for the period are treated as receipts of the trade which are to be brought into account in calculating its profits for that period.
>
> (3) The debits in respect of the relationship for the period are treated as expenses of the trade which are deductible in calculating those profits.
>
> (4) So far as subsection (3) provides for any amount to be deductible, it has effect despite anything in—
>
> (a) section 53 (capital expenditure),
>
> (b) section 54 (expenses not wholly and exclusively for trade and unconnected losses), or
>
> (c) section 59 (patent royalties).
>
> **298 Meaning of trade and purposes of trade**
>
> (1) For the purposes of this Part a company is taken to be a party to a creditor relationship for the purposes of a trade it carries on only if it is a party to the relationship in the course of activities forming an integral part of the trade.
>
> (2) For the meaning of "creditor relationship", see section 302(5).
>
> …
>
> **302(5)** In this Part "creditor relationship", in relation to a company, means any loan relationship of the company where it stands in the position of a creditor as respects the debt in question.
>
> **300 Method of bringing non-trading deficits into account**

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

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

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

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

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

(2) In this Part—

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

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

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

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

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

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

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

(b) all interest under those relationships, and

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

380 Partnerships involving companies

(1) This section applies if—

(a) a trade or business is carried on by a firm,

(b) any of the partners in the firm is a company (a "company partner"), and

(c) a money debt is owed by or to the firm.

(2) In calculating the profits and losses of the trade or business for corporation tax purposes under section 1259 (calculation of firm's profits or losses), no credits or debits may be brought into account under this Part—

(a) in relation to the money debt, or

(b) in relation to any loan relationship that would fall to be treated for the purposes of the calculation as arising from the money debt.

(3) Instead, each company partner must bring credits and debits into account under this Part in relation to the debt or relationship for each of its accounting periods in which the conditions in subsection (1) are met.

(4) The following provisions of this Chapter contain special rules about the credits and debits to be brought into account under subsection (3)—

(a) section 381 (determinations of credits and debits by company partners: general),

(b) section 382 (company partners using fair value accounting),

(c) section 383 (lending between partners and the partnership),

(d) section 384 (treatment of exchange gains and losses), and

(e) section 385 (company partners' shares where firm owns deeply discounted securities).

(5) In those provisions "company partner" has the same meaning as in this section.

381 Determinations of credits and debits by company partners: general

(1) The credits and debits to be brought into account under section 380(3) are to be determined separately for each company partner as follows.

(2) The money debt owed by or to the firm is treated as if—

(a) it were owed by or, as the case may be, to the company partner, and

(b) it were so owed for the purposes of the trade or business which the company partner carries on.

(3) If the money debt arises from a transaction for the lending of money—

(a) it continues to be treated as so arising, and

(b) accordingly the company partner is treated as having a loan relationship.

(4) Anything done by or in relation to the firm in connection with the money debt is treated as done by or in relation to the company partner.

(5) The credits and debits in the case of each company partner are the partner's appropriate share of the total credits and debits determined in accordance with subsections (2) to (4) (without any reduction for the fact that the debt is treated as owed by or to each company partner).

(6) A company partner's "appropriate share" is the share that would be apportioned to it on the assumption in subsection (7).

(7) The assumption is that the total credits and debits determined in accordance with subsections (2) to (4) are apportioned between the partners in the shares in which any profit or loss would be apportioned between them in accordance with the firm's profit-sharing arrangements.

382 Company partners using fair value accounting

(1) This section applies if a company partner uses fair value accounting in relation to its interest in the firm.

(2) The credits and debits to be brought into account by the company partner under section 380(3) are to be determined on the basis of fair value accounting

383 Lending between partners and the partnership

(1) This section applies if—

(a) the money debt owed by or to the firm arises from a transaction for the lending of money, and

(b) there is a time in an accounting period of a company partner ("the relevant accounting period") when conditions A, B and C are met.

(2) Condition A is that—

(a) if the debt is owed by the firm, the company partner stands in the position of a creditor and accordingly has a creditor relationship, and

(b) if the debt is owed to the firm, the company partner stands in the position of a debtor and accordingly has a debtor relationship.

(3) Condition B is that the company partner controls the firm either alone or taken together with one or more other company partners connected with the company partner (see subsection (7)).

(4) Condition C is that the company partner or any other company partner is treated under section 381(3) as if—

(a) it had the debtor relationship which corresponds to the creditor relationship mentioned in subsection (2)(a), or

(b) it had the creditor relationship which corresponds to the debtor relationship mentioned in subsection (2)(b).

(5) If this section applies, for the purposes of this Part for the relevant accounting period there is taken to be a connection between—

(a) the company partner, and

(b) each company partner that is within subsection (4) (including the company partner itself if it is within that subsection),

as a result of one of them having control of the other at a time in the period for the purposes of section 466(2).

(6) The provisions of this Part about connected companies relationships apply accordingly.

(7) For the purposes of subsection (3), one company partner is connected with another at any time in an accounting period if at that or any other time in the accounting period—

(a) one controls the other, or

(b) both are under the control of the same person.

464 Priority of this Part for corporation tax purposes

(1) The amounts which are brought into account in accordance with this Part in respect of any matter are the only amounts which may be brought into account for corporation tax purposes in respect of it.

(2) Subsection (1) is subject to any express provision to the contrary."

(3) The Decision

104. Before turning to consider the arguments, it is necessary for us to make some introductory remarks about the way in which the FTT decided the Interest Deductibility Issue. We begin with the way in which the parties formulated Issues (3) and (5) in the SAFI:

> "(3) Are BCMCL's interest costs on the RBS Loan Facility and the Loan Notes, entered into by BCMCL to acquire 19% partnership interest in BCM LP, allowable deductions under the CTA 2009 in calculating BCMCL's chargeable profits for corporation tax purposes? If so, to what extent are they allowable?"
>
> "(5) Are the RBS Loan Facility and the Loan Notes to be classified as "trading loan relationships" or "non-trading loan relationships" for the purposes of Part 5 of the CTA 2009? In relation to this, was BCMCL party to the RBS Loan Facility and the Loan Notes (i.e. to the Sugarquay Loan, the MP Loan and the WR Loan) for the purposes of a trade it carried on (a) at the time of the loans and (b) during each accounting period when the loan interest expense was incurred?"

105. The FTT considered that Issue (3) turned on the interpretation of section 380 of the CTA 2009. This is evident from the conclusion at [161]:

> "161. Accordingly s 380 CTA 2009 cannot apply and there is no mechanism by which BCMCL can claim a deduction for interest on either the RBS loan or Loan Notes. As such, BCMCL is not entitled to claim a deduction for interest."

106. The FTT decided Issue (5) at [210] by concluding that the RBS Loan Facility and the Loan Notes were not "trading loan relationships" although that conclusion was expressed in somewhat broader terms at [211]:

> "211. Accordingly BCMCL cannot be entitled to relief on the interest costs on the RBS Loan Facility and the Loan Notes entered into in acquiring its 19% interest in BCM LP."

107. Finally, the FTT's decision on both Issues (3) and (5) can be seen most clearly in the summary of conclusions at [249]:

> "249. In relation to Issues 3… and 5, the Interest Deductibility Issues: (1) BCMCL's interest costs on the RBS Loan Facility and Loan Notes are not allowable deductions under the CTA 2009;…(3) The RBS Loan Facility and Loan Notes are to be classed as non-trading loan relationships as BCMCL was not party to the RBS Loan Facility or Loan Notes for the purposes of a trade it carried on either at the time of loans or subsequent accounting periods."

(3) The Grounds of Appeal

108. The Appellants were granted permission to appeal in relation to the Interest Deductibility Issue on three separate grounds which were set out in the Grounds of Appeal, paragraph 50:

(a) The FTT was wrong to conclude that there was no mechanism in the tax legislation to relieve BCMCL's finance costs.

(b) The fact that BCMCL is a non-resident company carrying on a trade in the UK through a permanent establishment does not deny it relief for the cost of financing its investment in its UK trade.

(c) On the facts found by the Tribunal, the only conclusion open to the Tribunal was that BCMCL incurred its financing costs for the purposes of its UK trade.

(4) Approach

109. Grounds (a) and (b) evidently relate to the FTT's decision on Issue (3) and Ground (c) to its conclusion on Issue (5). For this reason we will refer to them as "**Issue 3(a)**", "**Issue 3(b)**" and "**Issue 5**". However, at the hearing of the Appeals certain arguments were presented by both parties on the basis that they were relevant to all three grounds and where those submissions were made, we have attempted to consider them in the round.

110. The question whether it was necessary for the Appellants to succeed on both Issues (3) and (5) does not appear to have been addressed in the Decision. We take the view that it was necessary for the Appellants to succeed on both. This is because Issue (3) (to which Grounds (3)(a) and (b) relate) addressed HMRC's case that an entity in the position of BCMCL was not entitled to an interest deduction *at all* under the CTA 2009.

111. By contrast, Issue (5) engaged the question whether, on the facts of this particular case, BCMCL's loans were trading loan relationships. The tax deductions which BCMCL claimed in its returns, and which HMRC rejected in its adjustments, were made on the basis that the loans were indeed trading loan relationships. It must follow, therefore, that the Appellants had to succeed on both before the FTT and must do so again on the Cayman Appeals. We return to this point again (below). But with these introductory observations we turn now to deal with Issue (3)(a), Issue (3)(b) and Issue (5) separately.

E. Issue (3)(a): Does the CTA 2009 permit any allowable deduction for interest?

(1) The Decision

112. Issues 3(a) and 3(b) are different aspects of BCMCL's challenge to the FTT's conclusion at [161] that because section 380 of the CTA 2009 had no application there was "no mechanism" by which BCMCL could claim any deduction for interest on the RBS Loan Facility and Loan Notes (which for convenience we will refer to collectively as the "**Loans**").

113. Nevertheless, it was common ground that the Loans were "loan relationships" and HMRC did not seek to argue that the interest on them should be disallowed or restricted under any specific anti-avoidance provision such as section 441 CTA 2009 (which applies to loans having an "unallowable purpose"). However, despite the agreement that the Loans were loan relationships, the FTT apparently accepted HMRC's argument that "BCMCL does not come within the loan relationship provisions": see [144].

114. It is necessary, therefore, to explore in more detail how the FTT arrived at this conclusion and in doing so we make two preliminary observations about the Decision. First, while the FTT dealt with Issue (3) at length in [138] to [161] the reasoning and

conclusions are confined to [148] and [158] to [161] (and the remainder of the relevant sections of the Decision contain the legislation, case law or the arguments of the parties). Secondly, some of the reasoning is directed at Issue (5), namely, whether or not the Loans were taken for the purposes of BCMCL's trade. With those points in mind, it is necessary to begin by looking in greater detail at the FTT's consideration of Issue (3).

115. The FTT began by summarising Mr Gammie's arguments for BCMCL. His first argument was that historically, financing costs borne by a partner to finance its investment in the partnership have long been treated not as a deduction in calculating the taxable profit of the partnership but as deductible by the partner itself. That had been the case, Mr Gammie said, since Addington's Act in 1803. He referred to a description in an academic paper in which, so he said, the author stated that historically a company could obtain relief for interest against total profits on borrowings to invest in a partnership by way of a charge on income.[6] Mr Gammie contended that until this case HMRC had always accepted such an approach and were now trying to "tear up the history of the last 150 years".

116. Mr Gammie also argued that, although BCMCL was a non-resident company carrying on a trade through a UK permanent establishment which had borrowed to acquire an interest in a UK partnership business, HMRC's argument must apply equally not just to a non-UK resident company such as BCMCL but also to any UK resident company which had borrowed for the purpose of acquiring an interest in a partnership.

117. The FTT recorded that it did not understand Mr Baldry to argue otherwise: see [143]. It also recorded that it was HMRC's position that BCMCL (like any other company) could deduct interest only if it fell within the self-contained code in the loan relationship provisions, that it did not fall within the code and that the historical position could not therefore be relevant. Finally, it recorded Mr Baldry's contention that even if BCMCL came within the loan relationship provisions (contrary to his primary submission) it would not be entitled to deduct the interest, HMRC relying in this respect on *Major v Brodie* (above).

118. The FTT then set out the relevant legislation principally by reference to the provisions in force in 2008 and 2009 and contained in ICTA 1988. In broad terms these were the same provisions which we have set out (above) as the general regime applicable to an entity in the position of BCMCL. The FTT also recited certain provisions applicable under the CTA 2009. Notably, however, the FTT did not refer to any of the loan relationship rules (with the exception of section 380 itself).

119. The FTT then referred to Mr Baldry's argument in relation to "the proper approach to be adopted in relation to statutory construction" and recited extracts in support of it from *Barclays Mercantile Business Finance Limited v Mawson* [2005] STC 1 ("***BMBF***"), *MacKinlay v Arthur Young McClelland Moores & Co* [1989] STC 898 ("***Arthur Young***"), *Revenue and Customs v Lansdowne Partners Limited Partnership* [2011] EWCA Civ 1578 ("***Lansdowne***") and *HMRC v Vaines* [2018] STC 297 ("***Vaines***"). The FTT then set out its conclusions, which we also set out in full:

> "158. It is apparent from these cases, particularly *Vaines*, that it is the profits of the actual trade of the partnership, as computed at the partnership

[6] See Richard Thomas, *Retention of Tax at Source and Business Financing* (in Peter Harris and Dominic de Cogan (eds) *Studies in the History of Tax Law*, Volume 7, Hart Publishing 2015).

> level, are then allocated [sic] to the various partners according to their profit-sharing arrangements. It also makes clear that the position has not changed with the advent of self-assessment.
>
> 159. Therefore, in the case of BCMCL, a non-UK resident company carrying on a trading partnership through a UK PE, to compute its profits under s 1259(3) CTA 2009 it is necessary to determine what the trading profit of the partnership would be if a non-UK resident company carried it on and, as Mr Baldry said, this must be applied by reference to the activities carried out and the expenses incurred at the level of the partnership.
>
> 160. As such it is necessary to consider s 380 CTA 2009. This concerns the deduction of interest in calculating the profits and losses of the trade or business for corporation tax purposes, under s 1259 CTA 2009, if a trade or business is carried on by a firm and any of the partners in the firm is a company. However, s 380 CTA 2009 is only applicable where "a money debt is owed by or to the firm". In the present case interest is not due on a debt owed by a "firm", ie the partnership BCM LP, but by an individual partner, BCMCL, in its own right.
>
> 161. Accordingly s 380 CTA 2009 cannot apply and there is no mechanism by which BCMCL can claim a deduction for interest on either the RBS loan or Loan Notes. As such, BCMCL is not entitled to claim a deduction for interest."

(2) The Appellants' Case

120. The Appellants argue that the FTT was wrong to decide Issue (3)(a) against them because the loan relationship code does provide a mechanism for relief and the fact that BCMCL was a non-resident company carrying on a trade in the UK through a permanent establishment did not prevent it from taking advantage of that mechanism. Mr Gammie argued that a straightforward reading of the provisions of the CTA 2009 and, in particular, those provisions which apply to the taxation of partnerships and non-resident companies contains nothing to exclude or prevent the application of the basic provisions relating to the deduction by companies of loan interest payable in respect of their own loan relationships. In particular, he submitted that the fact that a deduction was not available under section 380 did not mean that a deduction was not available in any circumstances.

121. Mr Gammie criticised the reasoning of the FTT that debits on a corporate partner's borrowings could not be deducted because they were not deducted in computing the partnership's profits. He submitted that it produced the following nonsensical result:

(1) The loan relationships code expressly provided that debits on *partnership* borrowings were not deductible in computing partnership profits for corporation tax purposes but were deemed to be the corporate partner's own borrowings so that debits could be deducted by each corporate partner from its share of the partnership profits.

(2) However, if HMRC is correct, then debits on a corporate partner's *own* borrowings could not be deducted from its share of partnership profits because those debits were not deducted in the computation of the partnership's profits.

122. Mr Gammie submitted that his analysis not only made sense but was consistent both with the historical position and the development of the relevant provisions. He also

submitted that *Vaines* (which we consider in detail below) was not applicable because it dealt with general expenses and interest costs have always been treated differently.

(3) HMRC's Case

123. For HMRC, Mr Baldry contended both in his Skeleton Argument and in his oral submissions that at heart the Interest Deductibility Issue could be reduced to one question, namely, whether borrowings used to buy a share in a vehicle carrying on an existing trade were borrowings for the purposes of that trade. He submitted that this question was central to both Issues (3) and (5) and he described the FTT's conclusion at [161] (set out above) as a finding that "there is no mechanism that would provide for a deduction in respect of interest on loans that are not for the purposes of the trade".

124. Mr Baldry did not accept Mr Gammie's characterisation of the historical position but submitted that it was irrelevant in any event because the loan relationship code was a new and self-contained regime for the taxation of corporate interest costs. He also argued that unless interest was deductible under section 380 of the CTA 2009 there was no scope to make a deduction and that outside section 380 the ordinary regime for the taxation of partnerships applied (under which there was a single computation at the partnership level and no provision permitting a separate calculation to be carried out at partner level). He relied on *Vaines* as support for these propositions.

(4) Determination

125. In considering the Appeal on Issues (3)(a) and (b) it is critical to distinguish at the outset Issue (3) (both limb (3)(a) and limb (3)(b)) from Issue (5). With respect to Mr Baldry, the question whether BCMCL entered into the Loans for the purposes of a trade is at the heart of Issue (5) but not Issue (3). Moreover, the FTT did not decide Issue (3) (as Mr Baldry contended) on the basis that there is no mechanism for deducting interest on loans which were not incurred for the purposes of a trade. The FTT decided that unless section 380 applies there was no mechanism *at all* for an entity in the position of BCMCL to deduct interest on its own borrowings. That decision did not turn on whether the Loans were taken out or incurred by BCMCL for the purposes of a trade (unlike the FTT's decision on Issue (5)). It turned on the scope of the statutory regime.

126. Before we can address Issue (3), therefore, it is necessary to analyse the FTT's approach to the construction of the relevant statutory provisions and the relevant authorities in [148] and [158] to [161] in greater detail. We begin with *Major v Brodie*. In that case the specific issue was whether an individual was entitled to claim relief under section 362 of ICTA 1988 (which at the time gave relief for interest on loans to buy into partnerships subject to detailed restrictions). Park J explained that there was no general right to tax relief for interest paid unless it met the detailed statutory conditions and emphasised that the case was not concerned with the common situation where a trader borrowed money for the purposes of the trade: see [1998] STC 491 at 506.

127. We have set out the unusual facts of the case and summarised Park J's decision in relation to the Profit Allocation Issue (above). When it came to the Interest Deductibility Issue, the FTT dealt with Mr Baldry's submission that *Major v Brodie* was authority for the proposition that even if BCMCL came within the loan relationship provisions, it would not be entitled to deduct at [148]:

> "It is clear from *Major v Brodie* that there is no right for an individual to deduct interest in buying a share in a limited partnership other than in accordance with the legislation and, as such, it is necessary to distinguish such a case from that where a deduction is claimed for interest incurred wholly and exclusively for the purpose of the trade. However, it is clear from the legislation that such interest relief is not available for simply buying a share in a partnership."

128. With respect to the FTT we do not agree. *Major v Brodie* was relevant to Issue (5) rather than Issue (3)(a). Put shortly, Issue (3)(a) required the FTT to decide whether BCMCL came within the loan relationship provisions. That is a question of the interpretation of the relevant provisions and although the summary of Park J's comments is accurate (see [148]), it had no application to that exercise. It sheds no light either on the detailed provisions of the loan relationship code (dealing as it does with relief for individuals under a quite different provision) or on the question whether relief might be available in principle for interest in respect of borrowings by a corporate partner outside the confines of section 380.

129. The FTT then set out (with apparent approval) extracts from *BMBF*, *Arthur Young*, *Lansdowne* and *Vaines*. It relied on *BMBF* for the proposition that the *Ramsay*[7] doctrine is not a special rule but an example of the general principle of purposive construction, namely, that a provision should be construed in context and then applied to the facts realistically. The FTT also cited *BMBF* for the proposition that a question of construction does not necessarily depend on whether a concept should be classified as "commercial" or "legal".[8]

130. In *Arthur Young* Lord Oliver confirmed that the process of assessing partnership profits to tax involved three stages: (1) ascertainment of partnership profits; (2) division of that amount between the partners; and (3) calculation of the tax payable. He also observed that at stage (1) what must be ascertained is the profits of the firm and not of the individual partners given that the partnership carries on only one business (that of the firm). The issue for determination was whether moneys paid out of partnership assets to indemnify an individual partner against expenses incurred by him out of his own pocket could be deducted in ascertaining partnership profits at stage (1). Lord Oliver held that at that stage the partnership could not be treated as an entity separate from its partners in order to determine the purpose of that payment.

131. In *Lansdowne* the Court of Appeal considered the deductibility of certain fee rebate payments made by a limited partnership to its limited partners. HMRC had accepted that payments of a similar nature made to third parties were deductible expenses of the partnership. However, the Court of Appeal held that the deductibility of payments to partners was to be determined by reference to the purpose of the partners in entering into the transactions (which generated the fee rebates) and not the purpose of the partnership in paying fee rebates to partners. As in *Arthur Young*, the Court of Appeal made clear that in this context there was no warrant for treating the partnership as an entity separate from its partners.

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[7] *W T Ramsay Ltd v IRC* [1981] STC 174.

[8] See the comments of Lord Hoffman in *MacNiven v Westmoreland Investments Ltd* [2001] STC 237.

132. In *Vaines* a partner in a firm of solicitors sought to deduct from his share of partnership profits a payment which he had made in that year in respect of his potential liabilities as a partner in his previous law firm. One of his arguments concerned a "help sheet" published by HMRC in relation to doctors' practices which indicated that doctors' expenses might be allowable even if the doctor had incurred them personally and not his practice. The FTT set out in full the view expressed by Henderson LJ (with whom Newey and Sharp LJJ agreed) on this issue:

> "[35] In my view, Mr Vaines can derive no assistance from this help sheet. In the first place, it correctly emphasises the general rule that the only legal basis for giving relief for expenditure by an individual partner is as a deduction in the calculation of the profits of the partnership business. Thus, for example, if a doctor incurs expenditure relating to his individual specialisation, but the expenditure nevertheless satisfies the 'wholly and exclusively' test, it may properly be deducted in calculating the partnership profits. Secondly, however—and here there may be a small element of concessionary treatment—HMRC do not insist on the inclusion of all such expenditure in the partnership accounts. Provided that the expense in question 'would be allowable if met from partnership funds', HMRC will accept entries made in the relevant sections of the partnership tax return, by way of adjustment to the partnership accounts. Once the adjustments have been made, the expenditure will then be treated as if it had been included in the partnership accounts. There is no suggestion, however, that any expenditure by an individual doctor could be allowed as a deduction even if it failed to satisfy the 'wholly and exclusively' test. Nor is there any indication that a doctor could make such adjustments in his personal tax return, which is what Mr Vaines purported to do. At most, therefore, the help sheet provides a limited measure of practical assistance for medical partnerships. Even if similar assistance were to be provided, by analogy, for solicitors' partnerships, it could not help Mr Vaines, for two reasons. First, the payment which he made could not satisfy the 'wholly and exclusively' test, and could never have been an allowable deduction in computing the profits of SSD's trade. Secondly, Mr Vaines sought to make the deduction, without reference to SSD, in his personal tax return."

133. On the basis of these decisions and *Vaines* (in particular) the FTT arrived at the following conclusions:

(1) To ascertain the profits of a partnership, it can only be relevant to consider whether interest is deductible at partnership level rather than partner level.

(2) The ascertainment of BCMCL's profits under section 1259 of the CTA 2009 "must be applied by reference to the activities carried out and the expenses incurred at the level of the partnership".

(3) Section 380 of the CTA 2009 applied only where "a money debt is owed by or to the firm" and here the interest was due on a debt owed by an individual partner.

(4) Section 380 could not apply and there was no other mechanism whereby BCMCL could claim a deduction for interest on the Loans.

134. We do not agree with the FTT's analysis that expenses may only be deducted at the level of the partnership and not the partners and that unless a partner can claim a deduction

for interest expense under section 380 no other mechanism exists for claiming it under the CTA 2009. We do not agree with that analysis for the following reasons:

(1) We accept that *Arthur Young* and *Vaines*[9] illustrate what Henderson LJ described in *Vaines* as "the general rule that the only legal basis for giving relief for expenditure by an individual partner is as a deduction in the calculation of the profits of the partnership business". It is well-settled that the ascertainment of a partnership's profits must be carried out at the level of the firm and not by reference to expenditure by individual partners.

(2) We also accept that in ascertaining the profits of the Cayman Partnership interest paid by BCMCL was not deductible under the statutory provisions relating to partnerships. Further, that interest did not fall within the deeming provisions of section 380 because the Loans were not debts to or from the firm.

(3) However, the loan relationship code provided a detailed and self-contained regime for the taxation of corporate debt: see, in particular, section 464(1) of the CTA 2009 (above). Accordingly, statutory provisions or authorities concerned with the deductibility of interest by partners who are individuals and the historical position in relation to interest deductibility either for companies or individuals are of limited relevance in determining Issue (3)(a) which involves the construction of the loan relationship code.

(4) Where a company is a partner in a partnership, the partnership is not treated for corporation tax purposes as an entity separate and distinct from its partners: see section 1258. A corporate partner's share in the profits of the partnership is determined according to the interests of the partners during that accounting period, and corporation tax is chargeable as if that share derived from a trade carried on by the corporate partner alone: section 1262.

(5) The loan relationships code operates against that background. Section 296 provides that the profits and deficits arising to a company from its loan relationships are to be calculated using the credits and debits given by Part 5. Where a company is a party to a loan relationship for the purposes of a trade, which it carries on, section 297(2) provides that the debits in respect of the loan (such as interest) are treated as expenses of the trade which are deductible in calculating the company's profits for that period.

(6) Moreover, this provision has effect even if the loan is capital in nature and even if the debits are not incurred wholly and exclusively for trade purposes: see section 297(4). Debits in respect of a loan relationship to which a company is a party but not for the purposes of a trade which it carries on are described as "non-trading debits": section 301(2). Where the company has more non-trading debits than non-trading credits for a period it has a non-trading deficit: see section 301(1). Special rules exist for bringing into account and deducting non-trading deficits: see section 300 and Chapter 16 of Part 5.

(7) Section 307 provided the basic mechanism for bringing into account loan relationship credits and debits. For the accounting periods which are relevant to this Appeal, it

[9] It is not clear to us that *Lansdowne* added anything to these authorities.

provided the "general rule" that those debits and credits are those recognised in determining the company's profit or loss for the period in accordance with generally accepted accounting practice (being the amounts that, taken together, fairly represent in respect of its loan relationships all interest, expenses, and other profits and losses).

(8) Section 380 applies if a trade is carried on by a firm, any of the partners is a company, and "a money debt is owed by or to the firm": see section 380(1)(c). In particular, it provides that in carrying out the calculation of the firm's profits under section 1259, no credits or debits may be brought into account under the loan relationship rules in relation to the money debt or the loan relationship treated as arising from the money debt. Instead, each company partner must separately bring its "appropriate share" of those credits and debits into account, determined in accordance with special rules. Section 383 deals with the situation where a company partner is the debtor or creditor in respect of the firm's debt.

(5) Conclusions

135. We, therefore, consider that the correct answer to Issue (3)(a) as applied to BCMCL is as follows. The profits of BCM LP (the UK Partnership) are computed as if it were a company. Debits on loan relationships do not come into BCM LP's computation. If they are loan relationships of BCM LP itself section 380 provides that they are excluded from that computation and allocated to corporate partners in their own corporation tax computations. If they are loan relationships of BCMCL (or, for that matter, any other corporate partner) they form no part of the ascertainment of BCM LP's profits and there is no statutory provision which provides that they should be.

136. BCMCL's share of the UK Partnership's profits (as so calculated) is brought into charge in its corporation tax computation as a profit from a trade carried on by BCMCL alone. To enable a corporate partner to deduct its appropriate share of the loan relationship debits of BCM LP section 380 treats such a loan relationship as having the characteristics of a loan relationship entered into by the corporate partner itself for the purposes of that sole trade. However, this statutory fiction is not necessary for debits on loan relationships entered into by BCMCL itself. These debits are allowable under the loan relationship code and, in particular, under the basic relief mechanism in section 307 (as with any other loan relationship debit). Whether particular debits relate to trading or non-trading loan relationships is a separate question.

137. When section 380 is construed in context it does not operate to proscribe the general application of the loan relationship code with the effect that loans taken out by BCMCL (and other corporate partners) cannot be deducted and set off against their own profits for corporation tax purposes. It applies to allocate the credits and debits on partnership debts between individual partners to enable a calculation of BCMCL's profits to be prepared on the assumption set out in section 1262, namely, that those profits were derived from a trade which it carried on alone.

138. In answer to Issue (3)(a), therefore, we find in the Appellants' favour and we hold that the FTT erred as a matter of law in concluding that there was no mechanism in the tax legislation to relieve BCMCL's finance costs. However, for the reasons which we have given the Appellants also have to succeed on Issue (5) before an allowable deduction may be made.

F. Issue (3)(b): Can a non-resident company claim relief for interest?

(1) The Decision

139. The Appellants' second ground of appeal is that BCMCL is entitled to take advantage of any relief for the cost of financing its investment in BCM LP even though it is a non-resident company. The FTT appears to have accepted that if relief was available, it would have made no difference whether BCMCL was non-resident. The FTT stated as follows at [143]:

> "Turning to the present case, although BCMCL is a Cayman Islands company (and non-UK resident) it is carrying on trade through a UK PE and has borrowed money to acquire and become a partner in UK partnership business, BCM LP. In the circumstances, Mr Gammie says that the argument advanced by HMRC must apply equally to any UK resident company and I did not understand Mr Baldry to argue otherwise."

(2) The Appellants' Case

140. However, Mr Gammie raised an additional argument in this context. He argued that in the case of a non-resident company trading in the UK through a permanent establishment, section 29 provides that a deduction is allowed for any "allowable expenses" incurred for the purposes of the permanent establishment and that "allowable expenses" means expenses of a kind in respect of which a deduction would be allowed for corporation tax purposes if incurred by a UK resident company. Mr Gammie submitted that this would allow BCMCL to deduct the interest expenses because the Loans were taken out for the purposes of the permanent establishment.

141. We reject that argument. In particular, we do not accept that section 29 would have provided a separate mechanism for an allowable deduction. For corporation tax purposes section 464(1) expressly provides that the amounts allowed under the loan relationship rules "are the only amounts which may be brought into account for corporation tax purposes in respect of it". This makes it clear that the loan relationship code is an exclusive regime and would prevent a separate interest deduction under section 29. We do not consider that section 29 can be argued to be "an express provision to the contrary" within section 464(2). We, therefore, find against the Appellants on Issue (3)(b).

G. Issue (5): Were the Loans trading loan relationships?

(1) The Decision

142. Mr Baldry described this question as at the heart of the Interest Deductibility Issue and, indeed, it occupied a significant amount of time at the hearing before us. Nevertheless, the FTT's decision and reasons on Issue (5) were contained in the following five paragraphs:

> "207. This issue raises the question as to whether the RBS loan and Loan Notes can be classified as trading loan relationships or non-trading loan relationships. It is therefore necessary to consider whether the loan relationship rules originally introduced by FA 1996 and now contained in Part 5 of the CTA 2009 apply to BCMCL.
>
> 208. Section 297 CTA 2009 provides:

> **297 Trading credits and debits to be brought into account under Part 3**
>
> (1) This section applies so far as in any accounting period a company is a party to a loan relationship for the purposes of a trade it carries on. …
>
> 209. This raises the que[stion] of whether BCMCL entered into the arrangements to borrow $200 million from RBS so for the purpose of a trade it carried on?[10]
>
> 210. The evidence of Mr Dodd and Mr Aitchison was that it borrowed that sum to acquire an interest in BCM LP rather than the trade being carried out by that partnership. Unlike *Major v Brodie* in which the borrowing was used for the purposes of trade, in the present case the sum received from RBS was not used for the purposes of the trade of BCM LP, the trade that has brought BCMCL within the territorial scope of corporation tax. Similar considerations equally apply to interest paid in accordance with the Loan Notes.
>
> 211. Accordingly BCMCL cannot be entitled to relief on the interest costs on the RBS Loan Facility and the Loan Notes entered into in acquiring its 19% interest in BCM LP."

(2) Legal Principles

(a) History

143. There was considerable argument about the relevance of the historical development of the law in relation to interest deductibility. Mr Gammie argued that tax relief had been available for interest on borrowings to invest in a partnership since the nineteenth century and that by taking the position which they had on Issue (5), HMRC had to accept that the loan relationship provisions marked a sea change and a radical departure from the historical approach to the deductibility of interest. Mr Gammie also submitted that there was nothing in the legislative background to indicate that Parliament had intended such a sea change or departure.

144. Mr Gammie prepared a note which dealt with the general basis for deducting interest expense for tax purposes; the system of charges on income; the charges on income system adopted when corporation tax was introduced in 1965; the restrictions on income tax relief for interest expense introduced in 1969; and the introduction of the loan relationships regime. The materials which Mr Gammie put before us included an extract from advice given by the Board of Inland Revenue to government ministers on the 1969 proposals which explained that whilst changes were proposed for individuals, no changes were proposed for trading companies (which could deduct all of their interest payments as business expenses) or for investment-holding companies.

145. We can summarise the legislative position before 1996 broadly as follows. For individuals, relief had generally been given for borrowings to invest in certain types of partnership (which did not include limited partnerships) but pursuant to a series of specific statutory reliefs rather than as a general expense of the trade of the individual or the partnership. In 1969 the position for individuals was tightened up considerably. The position was different for companies, however. In addition to being able to deduct interest

[10] Some words are evidently missing.

where it qualified as a trading expense, certain interest payments were historically[11] allowed as a "charge on income" by deducting and retaining tax on the interest when paid out of taxable profits. In 1965, when corporation tax was introduced, a modified version of the charge on income regime was implemented for companies although the position for non-resident companies was more complex and a charge was available only if the liability was incurred wholly and exclusively for the purposes of a trade carried on through a branch or agency in the UK.[12] For partnerships involving companies, charges on income were not deductible in computing the profits of the partnership trade.[13]

146. In considering the relevance of the historical origins of interest deductibility, however, it is necessary to keep in mind that what we have to decide is whether a company, which borrows funds to acquire an interest in a trading partnership, is borrowing those funds for the purposes of a trade which it carries on. This issue requires us to construe the relevant provisions of the CTA 2009 dealing with loan relationships and the taxation of partnerships with corporate members and apply them to the facts of the particular case. We accept that general principles developed over time may be of assistance in construing individual provisions (as they were on Issue (1)(b)). But when new legislation is enacted, this is not necessarily the case.

147. We have formed the view that the historical development of interest deductibility does not shed any helpful light on the answer to Issue (5). Although Mr Gammie's tour of the historical developments suggested that both HMRC and the FTT had adopted a radical construction of the loan relationship code, we have already decided that the FTT's conclusion on Issue (3) involved an error of law and cannot stand. But once it is accepted that section 380 does not expressly or impliedly preclude a mechanism in the tax legislation to relieve BCMCL's finance costs, the sting of Mr Gammie's appeal to history largely falls away. The loan relationship code was not intended to re-enact the existing legislation or reflect the historical position. But equally, it did not involve any great or radical departure. As might be expected, the position is much more nuanced and in the present case the answer to Issue (5) principally turns on the facts.

(b) Section 297

148. A loan is a trading loan relationship "so far as in any accounting period a company is a party to a loan relationship for the purposes of a trade it carries on": see section 297(1). Section 298 provides a restrictive definition of these words but it only applies to creditor relationships rather than debtor relationships. It is necessary, therefore, for us to determine the meaning of the wording in section 297(1).

149. Mr Baldry said that the words "for the purposes of a trade" should be construed by reference to the authorities which dealt with the question whether particular payments were deductible trading expenses (but leaving out of account elements concerned only with the "wholly and exclusively" limb of that requirement). He relied upon the following statements of principle:

[11] Since Henry Addington's Income Tax Act of 1803.

[12] See, for example, section 338 of ICTA 1988.

[13] See, for example, section 114(1)(b) of ICTA 1988.

(1) In *Strong & Co of Romsey Ltd v Woodifield* [1906] AC 448 Lord Davey stated at 453: "[I] t is not enough that the disbursement is made in the course of or arises out of or is connected with the trade or is made out of the profits of the trade. It must be made for the purposes of earning profits."

(2) In *CIR v The Anglo Brewing Co Ltd* (1925) 12 TC 803 Rowlatt J used the following formulation at 813: "that must mean for the purpose of keeping the trade going, and of making it pay…".

(3) In *CIR v Cosmotron Manufacturing Co Ltd* [1997] 1 WLR 1288 Lord Nolan (who delivered the judgment of the Privy Council) stated at 1291D that the test was not materially different from such formulations as "in the production of profits" and "for the purpose of producing such profits".

(4) In *Vodafone Cellular Ltd v Shaw* [1997] STC 734 Millett LJ stated at 742 that: "the words for the purposes of the trade mean to serve the purposes of the trade. They do not mean for the purposes of the taxpayer but for the purposes of the trade, which is a different concept…".

150. With the exception of *Strong & Co v Woodifield* (which we discuss below), we do not consider that these formulations really assist the tribunal in deciding Issue (5). *Anglo Brewing* and *Cosmotron* both concerned payments made in the course of the closure or winding up of a trade and the dicta must be understood in that specific context. The issue in *Vodafone* was whether payments were made "wholly and exclusively" for the purposes of a trade and the dictum of Millet LJ was directed to the "exclusively" requirement (which is not the issue in the Cayman Appeals). We, therefore, consider that we must decide Issue (5) as a matter of principle and without recourse to these authorities.

(3) The Appellants' Case

151. The Appellants appealed on the basis that the only conclusion open to the FTT on the facts was that BCMCL entered into the Loans for the purposes of its UK trade. This might initially appear to be a challenge relating to findings of fact by the FTT in reliance on the principles in *Edwards v Bairstow* [1956] AC 14. However, the FTT made its finding in relation to the purpose of the Loans by relying on the Appellants' evidence and, as Mr Gammie put it in his Skeleton Argument, "the FTT correctly identified BCMCL's purpose in borrowing as a matter of fact and, indeed, no other purpose could possibly be ascribed to it". The issue, he submitted, was whether the FTT had misdirected itself as a matter of law in reaching the conclusion that borrowings by a partner in the position of BCMCL to acquire an interest in a trading partnership were not borrowings for the purposes of BCMCL's trade.

152. Mr Gammie submitted that it is commonplace that a loan taken out to acquire an existing trade (including its assets and goodwill), which the borrower intends to carry on and then does carry on, is self-evidently a loan for the purposes of a trade carried on by the borrower. He also submitted that this took place here because a corporate partner is treated as if it carried on the trade of the partnership directly in partnership with the other partners and is treated as if it acquired a fractional share of each of the partnership's assets. In his Skeleton Argument Mr Gammie advanced this argument as follows:

> "On this basis, BCMCL carried on a trade as a partner of BCM LP and BCMCL's purpose for entering into the RBS Loan and issuing the Loan

> Notes was specifically to acquire the Partnership Interest in BCM LP (i.e., BCMCL's UK permanent establishment, subsequently the Partnership Interest in BCM LLP and BCM (UK) LLP) and thereby enable it to carry on that trade. BCMCL therefore incurred the interest expense for the purpose of its UK permanent establishment and the trade that it (i.e. BCMCL) is to be treated as carrying on through that permanent establishment, which (necessarily) is the basis on which HMRC asserts that it is liable to corporation tax."

153. Mr Gammie also submitted that the decision of Park J in *Major v Brodie* was on all fours with the present case and could not be distinguished:

> "The FTT did not explain the basis on which it drew a distinction between the position of BCMCL and that of Mr and Mrs Brodie in *Major v. Brodie* [1998] STC 491, and it is respectfully submitted that there is none. Mr and Mrs Brodie entered into loans, the resultant borrowings from which were used in the farming trade of the partnership formed by the Brodies for the purposes of buying or improving farms or to provide working capital. Similarly, given the FTT's factual findings as to the purpose of BCMCL's borrowing through the RBS Loan and the Loan Notes (which, it is respectfully submitted, were manifestly correct), BCMCL entered into these loans for the purposes of acquiring and then carrying on the trade in which it was engaged through the Partnership Interest which it acquired with the loans and subsequently held."

154. Finally, Mr Gammie submitted that *Strong & Co v Woodifield* did not provide support for the distinction drawn by HMRC between borrowing to acquire a share in a partnership and borrowing to acquire a partnership trade. He submitted that when the speech of Lord Davey is considered in full, it did not bear the weight which Mr Baldry had placed on it but supported the Appellants. He relied, in particular, on the following complete passage in [1906] AC 448 at 453:

> "It has been argued that the deduction claimed was a loss connected with or arising out of the appellants' trade within Rule 3 applying to Case 1 only. Case 1 relates to trades, manufactures, adventures, or concerns in the nature of trade, and I think that the word "loss" in Rule 3 means what is usually known as a loss in trading or in speculation. It contemplates a case in which the result of the trading or adventure is a loss, wholly or partially, of the capital employed in it. I doubt whether the damages in the present case can properly be called a trading loss. I prefer to decide the case upon Rule 1, which applies to profits of trades and also to professions, employments, or vocations. I think that the payment of these damages was not money expended "for the purpose of the trade." These words are used in other rules, and appear to me to mean for the purpose of enabling a person to carry on and earn profits in the trade, &c. I think the disbursements permitted are such as are made for that purpose. It is not enough that the disbursement is made in the course of, or arises out of, or is connected with, the trade, or is made out of the profits of the trade. It must be made for the purpose of earning the profits. In short, I agree with the judgment of the Master of the Rolls."

(4) Determination

155. The starting point for our determination must be the FTT's findings of fact. The FTT found that BCMCL borrowed the sum of US $200m from RBS to acquire an interest in the UK Partnership "rather than the trade being carried out by that partnership". The tribunal distinguished *Major v Brodie* on the basis that the loan made by RBS "was not used for the purposes of the trade of BCM LP, the trade which brought BCMCL within the territorial scope of corporation tax". Finally, the FTT found that similar considerations applied to the Loan Notes: see [210].

156. We reject Mr Gammie's attempt to characterise these findings as legal conclusions. The FTT did not find that that BCMCL's purpose was to carry on a trade or to acquire part of the trade being carried out by BCM LP. The FTT found that BCMCL's purpose was to acquire an interest in the UK Partnership rather than its trade and in our judgment, this was a finding of fact which the tribunal was entitled to make. As Mr Baldry emphasised, the only trade which the UK Partnership carried on was alternative asset management and BCMCL did not carry on either that trade or a separate trade before it acquired an interest in the UK Partnership.

157. This is sufficient to dispose of Issue (5) but out of deference to the arguments advanced by Mr Gammie, we add the following observations. Although Mr Gammie repeatedly submitted that a tax deduction has been available for centuries for borrowings made for the purpose of investment (by acquiring an interest in a partnership), he was unable to produce any authority to support this proposition. The only decision to which he was able to draw our attention was the FTT's decision in *Shiner v HMRC* [2020] UKFTT 295 (TC). That case was not on all fours with the present case because it involved a claim for relief under specific provisions for interest incurred by an individual partner (in this case the trustees of certain settlements). However, the tribunal had occasion to consider the basic distinction between borrowings for the purpose of investment and borrowings for the purpose of a trade and Judge Beare stated as follows at [49] and [50]:

> "49. I would start by observing that the sole purpose of the trustee of each settlement in entering into the relevant loan agreements was to finance that settlement's capital contribution to the partnership. It was not an expense which the settlement was incurring wholly and exclusively for the purposes of the partnership's trade. Of course, had the Loans been made to the partnership directly, or had the proceeds of the Loans been on-lent by the partners to the partnership, such that the partnership had itself incurred borrowings to finance the purchase of the trading assets, then those borrowings would undoubtedly have been incurred wholly and exclusively for the purposes of the partnership's trade and the interest on those borrowings would, provided that it was reflected in the partnership's accounts, have been deductible in computing the profits of that trade. But I do not believe that, in examining the purpose for which the Loans were drawn down, it is appropriate to ignore the intervening step of the capital contributions which were made by the settlements and simply treat the purposes of the partnership as the purposes of the partners.
>
> 50. Putting this another way, I agree with Mr Rivett's distinction between expenses which a partner incurs in its capacity as an investor in a partnership and expenses which that partner incurs in pursuing the trading purposes of that partnership. Expenses falling within the second category are the ones to which Lord Justice Henderson was referring in his judgment

> in *Vaines*. In my view, his judgment has no relevance to expenses falling within the first category."[14]

158. It is unnecessary for us to decide whether this reasoning is correct and we consider *Vaines* in more detail below. But in our judgment, *Shiner* provides no support for the proposition that a partner who borrows for the purpose of investing in a partnership must be treated as borrowing for the purposes of the trade which the partnership carries on either under section 297 of the CTA or more generally. The only relevant trade in the present case was that carried on by BCM LP and it carried on that trade both before and after the Loans were made to BCMCL to enable it to acquire a 19% share in BCM LP. The identity of the individual partners in the UK Partnership (who were taxed as if they were carrying on that trade in partnership with each other) clearly changed as a result of that acquisition but the trade of BCM LP did not.

159. Moreover, *Major v Brodie* is clearly distinguishable. As Mr Gammie himself submitted, the loans in that case "were used in the farming trade of the partnership formed by the Brodies for the purposes of buying or improving farms or to provide working capital". There is no suggestion in the present case that the Loans were used by BCM LP as working capital for the UK Partnership. Indeed, it is clear that they were used to fund the purchase price of US $365m. Mr Gammie could not point to any authority (whether before or after the loan relationship code was introduced) in which an incoming partner has been able to claim relief on interest on borrowings which were used to pay the purchase price of a partnership interest which was kept by the outgoing partner and never used for the benefit of the partnership at all.

160. Finally, we do not consider that the conclusion which we have reached in relation to Issue (5) is affected by the statutory provisions for calculating the profits of a company partner for corporation tax purposes. In ascertaining the partnership profits, a firm is not generally regarded as a separate entity from its partners: see section 1258 CTA 2009. Moreover, in calculating those profits and losses where the company partner is non-resident, the amount of the firm's profits is taken to be an amount determined by calculating "what would be the amount of the profits of the trade chargeable to corporation tax for that period if a non-UK resident company carried on the trade": see section 1259(2) and (4).

161. Mr Gammie submitted that the effect of section 1259 was that a company partner is to be treated as if it carried on the activities of the partnership directly and that BCMCL should therefore be treated as if it was carrying on the trade of alternative asset management. We do not accept that submission for the following reasons:

(1) As the title to section 1259 states, the section is concerned with the calculation of a firm's profits, which are then allocated between the partners (including any company partner) pursuant to section 1262. It is highly improbable that Parliament would have intended this section to determine whether a loan relationship was a

[14] Although we have placed no weight on it in reaching our decision, we note that in *Bloomsbury Partnership Taxation 2021/22* the editors state at 3.17 that: "[A]pplying the principle of *Shiner & Sheinman*, it would appear that where a corporate partner borrows to fund the acquisition of an interest in a partnership or to provide finance for the partnership the interest would not, despite s 297, be deductible as a trade expense. Any relief would therefore arise only under the rules for non-trading deficits on loan relationships….".

trading or non-trading loan relationship. Further, a close reading of the section confirms that it was not intended to have that effect.

(2) Section 1259(1) provides that the section applies if a firm carries on a trade and any partner in the firm is a company. However, there is nothing in this subsection which requires the assumption that the company partner carries on the trade, far less that it has borrowed for the purpose of that trade.

(2) Section 1259(2) provides that the amount of the firm's profits is taken to be the amount determined in accordance with section 1259(4). Again, there is nothing in this subsection which requires those assumptions.

(3) If the company partner is non-UK resident, then section 1259(4) imposes a statutory direction to "(a) determine what would be the amount of the profits of the trade chargeable to corporation tax if a non-UK resident company carried on the trade" and "(b) take that to be the amount of the firm's profits." The subsection is not expressed to be a deeming provision and it applies by giving a statutory direction to calculate profits of the company partner as if "a non-UK resident company carried on the trade".

(4) The use of the indefinite article was, in our view, intended to ensure that the assumption in paragraph (a) extends only to the calculation of profits for the purpose of section 1259 and had no other effect. If Parliament had intended the assumption in that paragraph to have a general effect on the way profits were ascertained and the classification of loan relationships, then, at the very least, it would have used the words "if the partner itself carried on the trade" (or to the same effect). Moreover, this can be illustrated very simply by applying the section to the facts of the present case.

(5) Section 1259(1) applies to BCMCL because the UK Partnership carries on a trade and it is a company partner. Section 1259(2) provides that the amount of BCMCL's profits for the relevant years is taken to be the amount determined in relation to section 1259(4). That subsection required BCMCL and HMRC to determine the amount of the profits of the trade chargeable to corporation tax for the relevant accounting years "if a non-UK resident partner carried on the trade" and take that to be the amount of the firm's profits.

(6) Accordingly, the only assumption which must be made for the purposes of section 1259(4) is that a non-UK resident partner had carried on the trade. This does not require that the same assumption be made about BCMCL itself or applied to the ascertainment of its profits more generally.[15]

162. We accept that *Vaines* was concerned with the position of an individual partner in a limited liability partnership and does not provide direct authority on this point. However, we consider that the reasoning in that case supports the conclusion which we have reached. In that case, the taxpayer claimed that a payment was a trading deduction and, in considering whether the payment was deductible, Henderson LJ (with whom Sharp and

[15] However, as Mr Gammie pointed out HMRC must consider that BCMCL was trading in the UK through a permanent establishment, or it would not have been liable to corporation tax on its chargeable profits under section 5 of the CTA 2009.

Newey LJJ agreed) considered that "the first necessity" was to identify the relevant trade carried on by him: see [13]. After referring to the statutory provisions which provided that the profits of the firm's trade were to be calculated "as if the firm were a UK resident individual" Henderson LJ made the following comment at [17]:

> "In 2007/08, Mr Vaines was resident in the UK. It therefore follows from s 849(1) and (2) that the profits of the (deemed) partnership trade are to be calculated 'as if the firm were a UK resident individual', the 'firm' for this purpose being a collective description of Mr Vaines and his fellow partners in the (deemed) partnership of SSD. The trade in question is the actual trade of SSD, which s 863(1) treats as carried on in partnership by its members. It is not a separate trade carried on by Mr Vaines alone, but the trade of SSD carried on collectively by himself and his fellow partners."

163. Finally, Henderson LJ answered the question which he had posed at [13] and identified the relevant trade which the taxpayer had carried on at [23]:

> "Standing back from the detail, it is now possible to answer the first question which I have posed in para [13] above. The only trade which Mr Vaines carried on for income tax purposes in 2007/08, leaving aside the special provisions relating to basis periods upon which nothing turns, was the actual trade of SSD, deemed by s 863(1) to be carried on in partnership by its members. It is accordingly in the context of that deemed partnership trade of SSD, carried on collectively by Mr Vaines and his partners, that the deduction of his payment of £215,455 has to be justified.[16]"

164. The reasoning in *Vaines* supports the conclusion that the deductibility of the interest has to be justified in the context of BCM LP's trade carried on collectively by its partners. Whilst section 1273 of the CTA 2009 treats the activities of a limited liability partnership as carried on in partnership by its members, that does not operate to alter the relevant trade for the purposes of section 297.

165. Finally, we do not consider that Lord Davey's statement in *Strong & Co v Woodifield* alters this conclusion. Although Lord Davey interpreted the words "for the purpose of the trade" as meaning "for the purpose of enabling a person to carry on and earn profits in the trade" he did not go so far as to suggest that the acquisition of a share from an outgoing partner would qualify for relief. We also suggest that caution should be exercised in applying these words as if they were a statutory gloss on section 297. Lord Davey was alone in deciding the case on this basis and the other members of the judicial committee decided it on the basis that there was a failure to satisfy the additional requirement, namely, that the payment was incidental to the trade itself. In any event, this passage does not assist the tribunal to answer the critical question, namely, to identify the trade against which the purpose of the Loans must be considered.

166. Although it would have been helpful if the FTT had set out its reasoning in more detail, we consider that on the facts (as found) it reached a result which was open to it and for the right reasons. The FTT found that the purpose of the Loans was the acquisition by one partner of existing partnership interests from other partners and that this was not the purpose of the only relevant trade which the UK Partnership carried on. That trade was investment management or alternative asset management. Moreover, *Major v Brodie* was

[16] This formulation repeated the conclusion of the Upper Tribunal (of which Mr Gammie was a member) reported at [2016] UKUT 2 (TCC).

clearly distinguishable and the fact that BCM LP's profits are "taken to be the amount determined" "if a non-UK resident company carried on the trade" under section 1259 of the CTA did not require the FTT to find, as a matter of statutory construction, that the Loans were taken out for the purpose of a trade carried on by BCMCL.

(5) Non-Trading loan relationships

167. Issue (5) by its terms required the FTT to determine whether the Loans were trading loan relationships or non-trading loan relationships for the purposes of Part 5 of the CTA 2009. BCMCL had claimed debits on the basis that the Loans were trading loan relationships and appealed to the FTT against HMRC's refusal of that claim. Although the FTT expressed its conclusion at [211] in broad terms, the FTT set out its conclusion on Issue (5) more precisely in the summary of conclusions at [249]:

> "(3) The RBS Loan Facility and Loan Notes are to be classed as non-trading loan relationships as BCMCL was not party to the RBS Loan Facility or Loan Notes for the purposes of a trade it carried on either at the time of loans or subsequent accounting periods."

168. There was some debate before us as to the status and effect of the FTT's conclusion that although they were not trading loan relationships the Loans *were* to be classed as non-trading loan relationships. What is clear is that the FTT's conclusion that the Loans were to be so classed has not been the subject of any appeal by HMRC and it must therefore stand. What practical consequences this may have for BCMCL in terms of the use to which it can or might seek to put any deficits on the Loans is outside the scope of the Cayman Appeals and we do not consider that issue further.

VI. Disposition

169. In relation to the Profit Allocation Issue, we are satisfied that the FTT arrived at the correct decision on Issue (1) (a) and that BCMCL was the only partner of the Cayman Partnership to become a partner in the UK Partnership. Further, although we have found that the FTT made an error of law in failing to address Issue (1)(b), we are satisfied that BCMCL is chargeable to corporation tax on its total profit allocation arising under the UK Partnership for the years ended 30 November 2008 and 30 November 2009 without reference to the beneficial entitlement of the partners in the Cayman Partnership. We therefore dismiss the Cayman Appeal on the Profit Allocation Issue.

170. In relation to the Interest Deductibility Issue, we have concluded that the FTT erred as a matter of law in deciding that there was no mechanism under the CTA 2009 which would permit BCMCL to claim relief for interest costs in its relevant corporation tax computations. However, we have also concluded that the FTT was entitled to find that the Loans were not trading loan relationships. We also dismiss the Cayman Appeal on the Interest Deductibility Issue.

SIGNED ON ORIGINAL

MR JUSTICE LEECH
JUDGE THOMAS SCOTT

RELEASE DATE: 22 JULY 2022