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Case No: CO/5095/2018 and CO/5107/2018

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 03/04/2020

Before :

The Honourable Mrs Justice Andrews DBE

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Between :

(1) PETRUS JACOBUS LE ROUX ZEEMAN	
(2) DAVID MURPHY	**Claimants**
- and -	
THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS	**Defendants**

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Robert Venables QC and Ross Birkbeck (instructed by **N J Goodman & Co**) for the **Claimants**
Sir James Eadie QC and Sadiya Choudhury (instructed by **General Counsel and Solicitor to HMRC**) for the **Defendants**

Hearing dates: 11, 12 and 13 February 2020

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Approved Judgment

Covid-19 Protocol: This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to BAILII. The date and time for hand-down is deemed to be 10am on Friday 3 April 2020.

Mrs Justice Andrews:

INTRODUCTION

1. These two claims for judicial review, which have been ordered to be tried together, challenge the validity of primary legislation imposing charges to income tax and corresponding charges to Class 4 National Insurance contributions ("NIC") on loans or quasi-loans outstanding at the end of 5 April 2019. The relevant provisions in CO/5107/2018 (Mr Zeeman's claim) are in Schedule 11 of the Finance (No 2) Act 2017 ("the 2017 Act"), whereas those in CO/5095/2018 (Mr Murphy's claim) are in Schedule 12. Although the Defendants ("HMRC") at one point raised an objection to the claims on grounds of delay, very sensibly that was not pursued before me.

2. Mr Zeeman and Mr Murphy seek declarations pursuant to s.4 of the Human Rights Act 1998 ("HRA") that the legislation imposing these charges (collectively, "the loan charges") is a disproportionate interference with property rights protected by Article 1 of the First Protocol to the European Convention on Human Rights ("A1P1").

3. For the reasons set out in this judgment, I consider that this legislation is not incompatible with Mr Zeeman and Mr Murphy's human rights even if A1P1 is engaged, and that these claims for judicial review should therefore be dismissed. In this regard, I have reached the same conclusion as Cockerill J did in *R (Cartref and others) v HMRC* [2019] EWHC 3382 (Admin) ("*Cartref*"), in which the loan charge legislation (specifically, the relevant aspects of Schedule 11 of the 2017 Act) was unsuccessfully challenged on similar grounds, in the context of "Close Company Schemes."

4. Although there is a degree of overlap between the issues and arguments in *Cartref* and those in these claims, Cockerill J had to deal with many other issues, and the A1P1 argument was put somewhat differently before her. To the extent that the arguments have been repeated, I largely agree with her analysis and her conclusions about them. I also pay tribute to, and gratefully adopt, her detailed account of the history of this legislation, which has enabled me to shorten this judgment considerably.

DISGUISED REMUNERATION SCHEMES

5. This case is concerned with arrangements that HMRC characterise as "Disguised Remuneration" ("DR") schemes, by which an individual receives a reward for the work he performs for another (or services he provides to another) in the form of (i) a modest salary (if employed) or fee (if self-employed) which is much lower than what he would be entitled to be paid or to charge for the work or services, plus (ii) a loan which in effect makes up the difference in terms of remuneration. To take a simple example, he carries out work for which he might have charged £50,000, in return for a £10,000 salary or fee and a loan of £40,000. He is better off than he would have been if he took a salary or a fee of £50,000 for doing the same work, because the loan is supposedly free of any liability to tax or NIC. Moreover, if the salary or fee is kept low enough, he may not have to pay income tax at a higher rate. In many DR schemes, the loan represents by far the greater part of the financial compensation received by the individual in exchange for the work done or services rendered.

6. The loans are often made by trustees of Employee Benefit Trusts ("EBTs") rather than directly by the employer or customer, although the latter will be the source of the funds. In other cases, the loan may be made initially by the employer or customer and then assigned to the trustees of an EBT. The fact that the trustees of the EBT are, or become, the creditor, decreases the likelihood of the loan being called in, as the whole rationale of an EBT is to benefit past, present and future employees. There was some debate before me about whether there were any tax advantages to be gained by the employer or customer in arranging matters in this way, but for present purposes it is unnecessary to resolve it. It is common ground that, for whatever reason, the provisions of the 2017 Act that are challenged in this case do not apply to loans made by the employer or customer which have not been assigned (unless the employer or customer is acting as a trustee when he makes the loan).

7. Whilst the salary (or the net profits in the hands of the self-employed contractor) will be liable to income tax and NIC, on the face of it the loan is not income, but rather, a transaction that gives rise to an indebtedness and a liability to repay. In balance-sheet terms the value of the "asset" in the form of the money received under the loan, is balanced against the corresponding liability. Neither item would usually appear in the profit and loss account of a self-employed individual, though the cost of borrowing (e.g. from a bank) might form a deductible expense. In practice, however, the creditor does not enforce the liability for many years, if at all - and is not expected to. The individual is free to spend the money as if it were his income, and rarely makes provision for its repayment. As a matter of economic reality, the loan is part of the reward he gets in return for his work or services, often the major part.

8. The position adopted by the Claimants (and by the promoters of such schemes) is that the loan does not attract a liability to income tax unless and until it is written off, at which point it can be characterised as a benefit. However, it could theoretically remain outstanding indefinitely, even after the death of the employee or trader, without attracting any liability to tax, at least on the capital element.

9. A large number of DR schemes exist, with many different permutations. Many have not been disclosed to HMRC under the disclosure of tax avoidance schemes legislation introduced in 2004 ("DOTAS"). Sometimes the trustees of the EBT are based offshore, making it harder for HMRC to obtain information from them. HMRC's position is, and has been for many years, that these arrangements are ineffective tax-avoidance schemes. The first witness statement of Mr Philip Gilbert, who was at all material times a member of HMRC's counter avoidance directorate, explains how HMRC's views were made known to the general public and to users of such schemes. Cockerill J describes in her judgment in *Cartref* at [75]–[86] HMRC's "Spotlight" publications, going back to Spotlights 5 and 6 in November 2009, and other announcements and publications which made clear HMRC's intention to challenge arrangements where moneys which are a reward for the labour of an individual are diverted through some other form (including loans) without payment of PAYE or NIC.

10. Whilst HMRC have mounted successful challenges to certain DR schemes, and legislation was introduced which expressly imposed a liability to tax in respect of certain types of prospective arrangement, it was clear by the time of the 2016 Budget (when the introduction of the loan charge was announced) that there was still a proliferation of such schemes, and that the promoters of certain schemes were

claiming that the targeted legislation was ineffective. Mr Gilbert explains the difficulties faced by HMRC in seeking to identify such schemes and their users in order to be able to challenge them effectively. The evidence of Ms Jacqueline McGeehan, the Deputy Director of Income Tax Policy at HMRC, is that the Government introduced the loan charges as a way to draw a line under this form of avoidance and ensure that tax was paid by scheme users, to be fair to the wider taxpaying population.

THE LOAN ARRANGEMENTS IN THIS CASE

11. Mr Zeeman and Mr Murphy are both contractors. Mr Zeeman has expertise in logistics, supply chain and management consulting. Mr Murphy has expertise in Unix Systems Administration, primarily in the finance sector. They are representative of the 50,000 or so individuals, employed or self-employed, who are likely to be adversely affected by the loan charges.

12. At all material times Mr Zeeman was employed by an "umbrella company", which seconds the services of its employees to clients who require them. That arrangement has commercial advantages for the client, because he does not have to bear the economic consequences of having these individuals on his payroll. The umbrella company pays its contractors a salary, and accounts to HMRC for income tax and national insurance on that salary. Mr Zeeman's evidence is that some of the umbrella companies for which he worked offered him a lower wage, but also offered him a loan. In some cases, these loans were made by an EBT funded by the umbrella company, whereas in other cases the loans were initially made by the umbrella company, but subsequently assigned by that company to the trustees of an EBT.

13. Although he has not exhibited any of the relevant loan documentation (even by way of example) a schedule set out in Mr Zeeman's first witness statement indicates that in the period between 15 December 2006 and 4 April 2016 he received at least 42 such loans, ranging in amount from £888.89 to £195,021. Although the first loan on the list was made as long ago as December 2006, Mr Zeeman has not made a single repayment of capital, in whole or in part, on any of them. Mr Zeeman's most recent evidence appears to concede that at least some of those loans may not have been made on commercial terms.

14. Many of the loans received by Mr Zeeman were originally made by Lighthouse Trustees Ltd as trustees of the Cirrus Contractor Solutions Trust or (from 2014 onwards) by Hyrax Resourcing Ltd as trustee of the Hyrax Resourcing Trust, before being assigned to other corporate trustees. In *Revenue and Customs Commissioners v Hyrax Resourcing Ltd and others* [2019] UKFTT 175 (TC) the Hyrax arrangements, which appear to have been a fresh iteration of the Lighthouse scheme, were held to be notifiable arrangements under DOTAS.

15. There is no direct evidence as to when, and in what circumstances, Mr Zeeman's obligation to repay would arise under the loan agreements, but in the light of the length of time they have remained outstanding, the strong inference can be drawn that they are loans repayable on demand, in respect of which no demand has yet been made by the creditor. Mr Venables QC (who appeared with Mr Birkbeck for Mr Zeeman and Mr Murphy) did not demur when I suggested that these must have been "on demand" loans.

16. At all material times, Mr Murphy carried on business as a self-employed contractor and was taxable on the profits generated by his trade or profession calculated in accordance with generally accepted accounting practice ("GAAP") and subject to adjustments required or authorised by law. In the period between April 2008 and April 2010 he worked on various projects as a consultant engaged by an Isle of Man company named Rathowen Ltd ("Rathowen"). Rathowen would receive a payment from the end client for Mr Murphy's services, from which it would deduct a fee. The balance would then be used (a) to pay Mr Murphy an annual fee for his consultancy services, which is said to have been calculated on a pro rata basis to the work undertaken, and (b) to fund an EBT known as the Fernleigh Employee Benefit Trust. After a period of inactivity in 2011, Mr Murphy then worked on various assignments for another company, Newquay Professional Ltd ("Newquay"), during the calendar year 2012. Less is known about the Newquay arrangements, but they would appear to have been structured similarly.

17. Mr Murphy received loans from the EBTs set up by Rathowen or Newquay respectively, with Rathowen or Newquay contributing the funds to enable the trustees to make the loans. Mr Murphy's evidence is that he received 3 such loans, two that were each for £84,100, and one for £16,100. None of the capital has yet been repaid, and the circumstances in which it is repayable and how Mr Murphy plans to make the repayment are not addressed in his evidence. There is evidence, however, that the loans were repayable on demand, in the form of a letter to Mr Murphy from the trustee of the "David Murphy sub-fund" exhibited to Mr Gilbert's second witness statement. Like Mr Zeeman, Mr Murphy appears to accept that not all the loans were made on commercial terms. Indeed, a letter to Mr Murphy from the trustee of the Fernleigh EBT which was disclosed to HMRC by his tax consultants in 2011 (also exhibited to Mr Gilbert's second witness statement) indicates that the loans made by that EBT were interest free.

18. There is no evidence from which it would be possible to compare the sums received by way of loan with the sums that Mr Zeeman and Mr Murphy received by way of direct remuneration for work done or services rendered by them over the same period. However, the description of the Hyrax scheme in the decision of the FTT to which I have referred in paragraph 14 above suggests that the contractors who subscribed to that scheme were only paid the national minimum wage.

19. Both Mr Zeeman and Mr Murphy have said in their witness statements that they believe the loans were genuine, and that they are under an obligation to repay them. They both claim that they were not involved in tax avoidance, but in tax mitigation, and they replicate in their evidence the advice they received from specialist tax counsel on which they say they relied.

20. However, this case is not concerned with the question whether the loan charge should be imposed on sums received by Mr Zeeman and Mr Murphy as loans pursuant to the arrangements they describe, or whether their self-assessment tax returns were correctly completed. The challenge is to the legislation which introduced the loan charges.

THE SCHEDULE 11 LOAN CHARGE

21. The legislation relating to the taxation of the income of employed persons from the original version of the Income Tax Earnings and Pensions Act 2003 ("ITEPA 2003") up to and including the introduction of the Schedule 11 loan charge, has been referred to by both parties. Mr Venables sought to use it to demonstrate that it was at least arguable that the capital element of the loan was not chargeable to tax before the introduction of specific legislation in 2011 (the Disguised Remuneration Rules or "DRR") which applied only to future schemes. He submitted that this supported his contention that the loan charges are disproportionate and unreasonable. Sir James Eadie QC (who appeared with Ms Choudhury for HMRC) disputed that analysis. He submitted that these arrangements have always been ineffective tax avoidance schemes. It is unnecessary for me to decide whether that is right; all that matters for present purposes is whether that was an arguable position, and it plainly was.

22. "Employment income" is defined in s.7 of ITEPA 2003 as earnings within Chapter 1 of Part 3, any amount treated as earnings, and any amount which counts as employment income. S.9 provides that in the case of general earnings "*the amount charged is the net taxable earnings from an employment in the year*." "*Earnings*" is defined by s.62 as including "*any incidental benefit of any kind obtained by the employee if it is money or money's worth*", or "*anything else that constitutes an emolument of the employment*". The word "emolument" was used in earlier tax legislation. The release of a debt is covered by s.62(3)(a) which defines "*money's worth*" as something that is of direct monetary value to the employee.

23. At the heart of Mr Venables' submissions on these provisions lay the contention that the employee obtained no benefit (or at least none of any value) from the loan, because it was counterbalanced by the obligation to repay, however unlikely it was to be enforced. At most he gained a cashflow advantage. In support of that analysis Mr Venables relied on the fact that the employer would not be able to write off the payment of the loan in computing his own profits, whereas he would be able to treat any salary or bonuses paid outright as deductible expenses.

24. Sir James' answer to the balance sheet analysis is that it ignores the core features of these arrangements. He submitted that the reality is that the "loan" is a reward for work done or services provided, i.e. remuneration. The loan is given in return for the work; there is a correspondence in value; the employee can use the money as he wishes; and the obligation to repay can be put off indefinitely and usually is. For good measure, history shows that in practice the loans are not repaid. The fact that the employee takes a theoretical risk that he will be called on to repay the loan does not alter the true nature of the payment.

25. The construction of these provisions of ITEPA 2003 was considered by the Supreme Court in *RFC 2012 plc (In liquidation) (formerly The Rangers Football Club plc) v Advocate General for Scotland* [2017] UKSC 45, [2017] 1 WLR 2767 ("*Rangers*"). A football club entered into arrangements with each of its footballers whereby it paid him a salary, but also made payments into an EBT with a recommendation that the trustee should exercise its discretion to re-settle the sum to a sub-trust for that footballer. The footballer would be appointed protector of the sub-trust, with the power to determine who the trustees and the beneficiaries of the sub-trust would be.

He would also execute a letter of wishes naming the family members who would benefit on his death.

26. The scheme envisaged that the footballer would be able to seek unsecured loans of the amount of the fund settled on his sub-trust, repayable only on his death, and in almost all cases that is what happened. The obligation to repay would diminish the value of the footballer's estate for inheritance tax purposes. Once repaid, the assets of the sub-trust (the loan and accruing interest) would be held on trust for the benefit of members of the footballer's family whom he had selected as beneficiaries of the sub-trust. In practical terms this meant that the footballer and his family would keep the benefit of the money that was paid by way of loan.

27. HMRC assessed the payments into the EBT as taxable earnings of the footballer under ss 9(2) and 62(3)(a)(c) of ITEPA 2003 (and the equivalent provisions of its predecessor statute). The Inner House of the Court of Session, and subsequently the Supreme Court, upheld the charges to tax. The Supreme Court held that the central concept in the tax regime governing employment income was the payment of emoluments or earnings derived from employment, namely the payment of money by an employer to an employee as a reward or remuneration for the latter's work as an employee. What is taxable is the remuneration or reward for services: *Brumby v Milner* [1976] 1 WLR 29 at 35 per Lord Russell in the Court of Appeal and [1976] 1 WLR 1096 at 1098-1099 per Lord Wilberforce in the House of Lords. That was a case in which distributions of the trust fund on the termination of an EBT were held to be payments as a reward for services and taxable accordingly.

28. Lord Hodge JSC, who delivered the leading judgment in *Rangers* with which all other members of the Court agreed, confirmed that a purposive construction must be given to tax legislation in order to determine the nature of the transaction to which it was intended to apply. He also reiterated the well-known principle in *Ramsay v IRC* [1982] AC 300 that, having given the statutory provisions a purposive construction, it was then necessary to consider whether as a matter of fact the transaction answered to the statutory description. That might include looking at the overall effect of its constituent elements to ascertain the economic reality. As he put it, the analysis of the facts depends on the purposive construction of the statute.

29. At [15] and [68]-[72] Lord Hodge made it clear that provisions imposing specific tax charges do not necessarily militate against the existence of a more general charge to tax which may have priority over and supersede or qualify the specific charge. That is of some relevance to the present case, because Mr Venables made much of the fact that, over time, legislation has been introduced which specifically targeted future DR arrangements and made it clear that they would give rise to tax charges. Some of those provisions were referred to in passing by Lord Hodge but, as he said, provisions which were designed further to counter tax avoidance schemes cannot affect the interpretation of prior tax legislation.

30. Another aspect of Lord Hodge's judgment in *Rangers* which is of some importance is the way in which he dealt with the fact that it was accepted by HMRC in that case that all the elements of the transaction were genuine and had legal effect. Likewise, in the present case, HMRC have not challenged the claimants' evidence that the loans were genuine loans, giving rise to enforceable obligations to repay. However, as Lord Hodge made clear at [16] and [32], the genuineness of the legal transactions which

comprised the scheme is irrelevant to the question whether the statutory charging provisions applied to them.

31. Lord Hodge rejected the central argument by counsel for the taxpayer that it was *insufficient to give rise to a charge to income tax that the payment of money arose from the performance of the duties of an employment*, and that the employee would not be taxable unless he also had a right to receive the money and it was paid to a third party at his direction. In so doing, he reiterated that what was taxable was the remuneration or reward for services. He pointed out that the taxable person was defined in s.13 of ITEPA 2003 as the person to whose employment the earnings relate (as opposed to the recipient of the money). At [58] he summarised the fundamental principles as (i) income tax on emoluments or earnings is due on *money paid as a reward or remuneration for the exertions of the employee*, and (ii) there is no statutory requirement that the employee must receive the remuneration. At [65] he stated that it did not matter that the footballer was prepared to take a risk that the trustee of the EBT might not set up the sub-trust, or that even if it did, the trustee of the sub-trust might not make the loan.

32. The bonuses paid to executives of the football club through the same trust mechanism, which were voluntary payments to which those executives had no contractual entitlement, were also held to be taxable, again because "*the sum of money is given in respect of the employee's work as an employee."*

33. The arrangements in *Rangers*, at least so far as the footballers were concerned, were more complex than those involving Mr Zeeman, but at the heart of them was the payment of money to an EBT which the EBT then caused to be paid out to an employee by way of a loan which was repayable (albeit not on demand, but on the happening of a specific event, namely, the employee's death.) However, matters were structured in such a way that in such event his family would reap the benefit of the money and any interest that had accrued on it under the loan agreement. By means of this connected series of transactions the footballer, and ultimately his dependants, was indirectly receiving a sum of money by way of compensation or reward for his services. Likewise, in the present case, if one were to ask whether the loans were payments made as a reward or compensation for Mr Zeeman's work as an employee, the answer would plainly be yes.

34. In the light of the decision in *Rangers*, it would be extremely difficult to contend that the loans were not taxable under s.62, irrespective of the loan charge legislation. Mr Venables sought to distinguish *Rangers* on the basis that the "remuneration" in that case was the payment made by the employer into the EBT, rather than the loan subsequently made by the trustees of the sub-trust. He also relied on the fact that the central issue identified by Lord Hodge was whether the fact that the money was paid to a third party, the EBT, which had a discretion whether to agree to set up the sub-trust for the employee's benefit, made a difference to its tax treatment.

35. However, on the face of it there appears to me to be no material distinction to be drawn between *Rangers* and the present case. Both scenarios involve the employer providing money to an EBT *in return for the services of an employee*, which the EBT then loans to the employee. Indeed, in *Rangers* there was more certainty about the likelihood of repayment. The rejection of the argument that the payment was made to a third party rather than the footballer himself was only part of the reason why the

taxpayer failed. The main reason was that in substance these payments were compensation for the footballer's services. If that is the true nature of the payment it does not matter how the payment is structured, and whether it is discretionary or obligatory. The reasoning in *Rangers* would have applied just as much to the "discretionary" loans made by the sub-trust set up by the EBT as it did to the money used to fund them. However, the question for this Court is not whether the DR schemes gave rise to a pre-existing tax liability but whether there was an arguable claim that they did; and in the light of *Rangers*, HMRC plainly had a viable argument that arrangements of the type entered into by Mr Zeeman gave rise to a liability to income tax and NIC.

36. Mr Venables sought to place reliance on Chapter 7 Part 3 of ITEPA 2003, which is part of the "benefits in kind" code. It specifically applies to interest on employment-related loans (loans made or facilitated by an employer, which would include a loan made through an EBT). If such a loan falls within the definition of a "*taxable cheap loan*", i.e. a loan at a more favourable rate of interest than the specified "official rate" then (subject to certain exceptions, including loans made on ordinary commercial terms as defined by s.176) the employee will be treated as having received a taxable benefit in the form of the difference in the interest rate, and taxed on that difference. Mr Zeeman's evidence is that interest was charged on his loans at the official rate, and therefore he has not been exposed to a tax charge on the difference between that rate and a more favourable rate of interest.

37. Whilst it is true that Chapter 7 Part 3 is silent on the question of taxation of the capital element of the loan, I regard that as a neutral factor. Mr Venables submitted that this was a "powerful indication" that Parliament did not regard the capital element of employment-related loans as taxable earnings, but as I have already mentioned, Part 3 is concerned with benefits in kind. If the loans were payments by way of remuneration, and already caught by s.62, there was no need for any further provisions to address them.

38. The Finance Act 2011 introduced the DRR in Part 7A to ITEPA 2003, which (subject to transitional provisions) affected "*relevant steps*" taken on or after 6 April 2011. The DRR are described in some detail in *Cartref* at [25] – [33] and there is no need for me to repeat that description. Lord Hodge mentioned Part 7A in *Rangers* at [70], describing its provisions as "*designed to tax as employment income, among other things, the value of loans provided by third parties to employees under arrangements to reward employment*."

39. In consequence of those provisions, if an EBT made a loan to an employee on or after 6 April 2011 the employee would be liable to pay tax on the whole of that sum. These provisions did not apply to pre-existing loans, but their introduction could have left no doubt that HMRC's position was that such arrangements were taxable. Despite this, further variants of DR schemes were introduced after April 2011 which their promotors claimed were not caught by Part 7A.

40. The situation changed again in April 2017 when an amendment was made to s.554C by the Finance Act 2017 s.15, Schedule 6, to widen the definition of "*relevant step"* by the addition of paragraph 1(aa). This states that a person takes a relevant step if he acquires a right to a payment of a sum of money, or to a transfer of assets, where there is a connection (direct or indirect) between the acquisition of the right and

i) a payment made by way of loan or otherwise to a relevant person or

ii) a transfer of assets to a relevant person.

The effect of this was that if an employer assigned his rights as the creditor under a loan made to the employee to the trustees of an EBT on or after 6 April 2017, the EBT would be regarded as taking a relevant step and the loan would become taxable.

41. It is against that background that the loan charge legislation was introduced. This is described at [58]–[63] of *Cartref*. For present purposes, suffice it to say that Paragraph 1 of Schedule 11 of the 2017 Act states that a person ("P") making a "*loan*" or a "*quasi-loan"* on or after 6 April 1999 to a "*relevant person*" (which includes a current or former employee) *which has not been repaid by 5 April 2019,* is treated as having taken a relevant step for the purposes of Part 7A of ITEPA 2003. "Loan" includes any form of credit or a payment that is purported to be by way of loan.

42. "Quasi-loan" is defined in Paragraph 2(2) in terms which encompass the situation where the EBT (P for these purposes) acquires the right to repayment of the loan by assignment. In practical terms, this retrospectively applies paragraph 554C(1)(aa) to loans made to an employee and assigned by the employer to an EBT at any time after 6 April 1999.

43. The effect of Paragraph 1 of Schedule 11 is that the balances due on all qualifying DR loans made over the relevant years to an employee (i.e. all loans made by an EBT or assigned to an EBT) will be rolled up and taxed as employment income received in the 2018/2019 tax year – potentially resulting in a very substantial tax bill for the recipient. The charge does not arise if the loan is made on commercial terms, or if the loan is repaid before 5 April 2019 (or a later date where an approved repayment date has been agreed by HMRC).

44. I was told that under proposed amendments to the legislation, the loan charge would no longer apply to loans made before 9 December 2010. That was the date on which there was a written Ministerial statement indicating the Government's intention to legislate to ensure that DR avoidance schemes did not work, essentially flagging up the changes brought about by the introduction of the DRR Code. However, those amendments had not been enacted at the time of the hearing, and I therefore had to consider the claim on the basis of the loan charge legislation in its current form.

THE SCHEDULE 12 LOAN CHARGE

45. For self-employed persons, s.25 of the Income Tax (Trading and other Income) Act 2005 ("ITTOIA") provides that:

"The profits of a trade must be calculated in accordance with generally accepted accounting practice, subject to any adjustment required or authorised by law in calculating profits for income tax purposes."

46. The tax position of a self-employed trader in respect of DR schemes, particularly contractor loan schemes, was less clear than the position of an employee. There was no equivalent of Chapter 7 Part 3 of ITEPA for self-employed traders, so loans made which were interest-free or advanced at a more favourable rate than the official rate

were not expressly taxable as benefits. Moreover, Parliament did not enact specific anti-tax avoidance legislation in 2011 targeting DR schemes for self-employed traders. There is therefore no direct equivalent of the DRR Code. The first relevant specific anti-avoidance legislation relating to the self-employed trader comprised ss.23A-23H of ITTOIA, introduced by the first Finance Act 2017. They concern trading income provided through third parties. The charging provision is s.23E which applies to "*relevant benefits*" which arise to the trader ("T") or a person connected with him by reason of an arrangement to which T is a party or which relates to him (such as a trust). A relevant benefit is defined as including a payment by way of a loan. By s.23E(2)(b) the value of the benefit that T is deemed to have received is the amount lent.

47. Section 23A sets out the conditions which must be fulfilled before the charging provisions in Section 23E apply. When first enacted, these provisions applied only to relevant benefits arising on or after 6 April 2017. If it is reasonable to suppose that the "relevant benefit" (directly or indirectly) represents, has arisen or derives from, or is otherwise connected with a qualifying third party payment (as defined by s.23C) and it is reasonable to assume that T or a person connected with him will gain a tax advantage as a result of the arrangement, the relevant benefit amount is to be treated for income tax purposes as profits of the relevant trade in the tax year in which the relevant benefit arises.

48. A qualifying third party payment is defined as a payment made by T or another person, to T acting as trustee or any person other than T, if a deduction for the payment is made in calculating the profits of the relevant trade, and it is reasonable to suppose that the payment is in consideration of goods or services provided in the course of the relevant trade, or there is some other connection between the payment and the provision of goods or services in the course of the relevant trade. That would include, for example, a payment made by a client of T to a trust, which then makes the loan to T. Thus, in the case of a self-employed trader, any loans or quasi-loans made *on or after* 6 April 2017 were already taxable before Schedule 12 came into force. That brought the position of self-employed traders into line with the position of employees with effect from that date.

49. The loan charge provisions under Paragraph 1 of Schedule 12 of the 2017 Act catch loans and quasi-loans made *before* that date. It provides that loans or quasi-loans made on or after 6 April 1999 and before 6 April 2017 whose amount is outstanding immediately before the end of 5 April 2019 are to be treated as a "*relevant benefit*" for the purposes of sections 23A to 23H of ITTOIA. The effect of this is that the cumulative amount of such outstanding loans is treated for income tax purposes as part of the self-employed person's trading profits for the tax year 2018/2019. Thus Schedule 12 operates in the same way for self-employed individuals as Schedule 11 does for employees.

THE CLAIMS FOR JUDICIAL REVIEW

50. Mr Zeeman and Mr Murphy were granted permission to bring judicial review on the sole ground that the legislation is a disproportionate interference with property rights protected by A1P1, which provides that:

> *"Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.*
>
> *The preceding provision shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."*

IS THERE A POSSESSION?

51. The first question that arises is whether the Claimants have a "possession"; the second and related question is whether the legislation deprives them of that possession. Both these issues arose for determination in *R (St Matthews (West) Ltd & others) v HM Treasury and another; sub nom R (AVPCO 19 Ltd & others) v HM Treasury & Another* [2015] STC 2272 ("*St Matthews"*). The case concerned a challenge under A1P1 to the validity of retrospective tax legislation which targeted specific anti-avoidance schemes relating to stamp duty land tax ("SDLT").

52. In that case it was common ground that the imposition of a tax may interfere with an individual's enjoyment of money, and therefore that a charge to tax may engage A1P1. That had been confirmed by the European Court of Human Rights ("ECtHR") in *NKM v Hungary* [2013] STC 1104, which involved a successful challenge to the imposition of a 98% tax charge on severance payments to which public sector employees whose employment was terminated had a pre-existing statutory entitlement. In that case, what the State was giving the individual with one hand, it was effectively taking away with the other. However, in *St Matthews* the challenge was not to the legislation that imposed a liability to SDLT in the first place, but to legislation that removed an alleged right to tax relief that was asserted by the appellants but which HMRC disputed, and which had not been established.

53. In submitting that A1P1 was not engaged in *St Matthews*, HMRC relied on a substantial line of Strasbourg cases, including *Kopecky v Slovakia* (2005) EHRR 43 and *NKM v Hungary* which establish that "possessions" can be either existing possessions, or assets, including claims, in respect of which an individual can argue he has at least a "legitimate expectation" that they will be realised. However, in order to establish a "legitimate expectation" the claim must be based on a legal provision or legal act, such as a judicial decision, and <u>not</u> just an arguable claim or a genuine dispute. Thus in <u>*Kopecky*</u> the ECtHR stated at [52] that *"where the proprietary interest is in the nature of a claim it may be regarded as an "asset" only where it has a sufficient basis in national law, for example where there is settled case law of the domestic courts confirming it."* In the light of this, HMRC argued that the claim to tax relief was too nebulous to constitute a "possession" for the purposes of A1P1.

54. The appellants in *St Matthews* appreciated the difficulties with that way of putting their case, and therefore when the case reached the Court of Appeal they focused on the assertion that the money that would be used to pay the tax was the "possession" that was being interfered with by the legislation. The Court of Appeal unanimously decided that A1P1 was not engaged, but as Cockerill J put it in *Cartref,* at [137], they did not speak entirely with one voice. All three members of the court rejected the

argument that the arguable claim to tax relief was a possession. However, Vos LJ and Floyd LJ approached the alternative argument slightly differently, and Black LJ said that she agreed with them both.

55. Vos LJ rejected the argument that the money was a "possession". He pointed out that if it were an answer in a tax case to say that legislation closing a tax avoidance loophole was an interference with the money that the taxpayer would in due course use to pay the tax, that would be applicable in many, if not most cases, since taxpayers rarely pay tax first and dispute their liability later. He said, at [46]:

"Of course, the money is a possession in one sense, but it is a possession impressed with an arguable claim by HMRC, which prevents it being properly regarded as a possession for A1P1 purposes."

56. At [49] Vos LJ drew a distinction between the scenario faced by the court and a case in which the appellants were challenging the imposition of SDLT itself. He said that:

"*a disputed amount is not in the taxpayer's possession if there is an arguable claim by HMRC to it, or if the taxpayer has an arguable claim to it … the prior question of whether the taxpayer has a right to the money must be decided before the taxpayer can claim to have been deprived by the legislative changes of a possession under A1P1."*

Consequently, he decided that the legislative changes did not interfere with any of the appellants' possessions, because by the time the legislative changes were made, the money that the appellants might have used to pay the tax was already the subject of an unresolved argument or claim by HMRC. All that the legislation did was remove the appellants' argument that HMRC was not entitled to the money.

57. Floyd LJ preferred to put the matter on the basis that "*what the appellants gain by retreating to solid ground on the issue of what is a possession, they lose on the issue of deprivation.*" He pointed that the appellants would only be deprived of their money if the scheme was effective to avoid tax, but they had not established that it was effective. As he put it, arguable deprivation does not amount to deprivation.

58. In the subsequent case of *R(Rowe) v Revenue & Customs Commissioners* [2018] STC 462 ("*Rowe*"), when considering the approach taken by Vos LJ in *St Matthews*, McCombe LJ observed that in *St Matthews*, HMRC's claim to the money was not only arguable, it was unimpeachable, because the statute had removed any argument that HMRC was not entitled to the tax. He did not take issue with Simler J's description of *St Matthews* at [125] of her judgment at first instance as:

"clear binding authority that legislation can remove without any interference with possessions, a taxpayer's argument that had existed previously (that HMRC was not entitled to the money), with the result that tax is payable and the money in the taxpayer's hands must fund it."

He only expressed some doubt as to the final sentence of that paragraph, in which Simler J had suggested that that analysis would extend to a situation in which a sum may be required to be paid upfront on account of tax, where it may not be known whether HMRC had a claim to it at all. Ultimately, though, the CA in *Rowe* found it unnecessary to decide that issue.

59. There is nothing in *Rowe* to contract Vos LJ's approach in a case where HMRC did have at least an arguable claim to the money at the time when the impugned legislation was enacted.

60. In the present case, Sir James submitted that the effect of the introduction of the loan charges is that the Claimants can no longer claim that the loans they received were not subject to income tax, which HMRC has contended all along they were, and that the situation was therefore on all fours with *St Matthews*.

61. Mr Venables made it clear that he was not putting the Claimants' case on the basis that the Claimants did in *Cartref*, including their principal argument at [133]-[135] that an arguable claim to the money that would be used to pay the tax, in a case in which it is disputed that what was in play was tax avoidance, is enough to amount to a possession. It is therefore unnecessary for me to consider Cockerill J's analysis in response to that argument at [148] – [157] save to comment on one aspect on which I respectfully beg to differ. I fully understand why she was hesitant to accept a direct analogy between the situation in *St Matthews* and the complex arrangements in that case. However, I would observe (with a degree of diffidence) that I have some difficulty with the concept that an arguable claim to tax does not exist until HMRC takes positive steps to make that claim known. The claim surely arises from the legislation imposing the charge to tax and depends on its interpretation and application to the facts. It seems to me that the real distinction to be drawn is between a situation in which the State imposes an entirely new tax or charge, and a situation in which the taxpayer cannot establish that the money belongs entirely to him, because legislation already exists which HMRC contends is applicable and creates a liability to pay tax.

62. In the present case, each of the taxpayers was party to an arrangement to receive money as remuneration for his services by a means that he knew was designed and intended to prevent him having to pay the tax that would normally be charged on the same sum if it was paid as part of his salary. For the purpose of ascertaining whether these was a "possession" in this context I would draw no distinction between DR loans made in the period up to and including the tax year 2009/2010, and loans made thereafter. The proposition that a payment which is made as a reward for services is taxable was clearly articulated by the House of Lords in *Brumby v Milner* as long ago as 1975. The position of a self-employed trader such as Mr Murphy may have been less clear, perhaps, than that of an employee such as Mr Zeeman, but the nature of the payment as part of the remuneration package was precisely the same.

63. Given that the Claimants' skeleton argument did not specify what they said the possession was, I asked Mr Venables to identify the "possession" that he contended was being interfered with by the imposition of the loan charge. Mr Venables contended that the possession that was interfered with was all the taxpayer's existing possessions. The loan charge deprives the taxpayer of his money if he has the money to pay. If he does not pay the charge, then HMRC is like any other creditor and would levy execution on his other possessions. He submitted that in any case in which Parliament enacts legislation which levies a tax charge, A1P1 is engaged and it is

open to the taxpayer to contend that the interference with his property is disproportionate.

64. The Claimants' skeleton argument suggested that Vos J's analysis in *St Matthews* was wrong, and inconsistent with *NKM v Hungary*, but those arguments were not pursued at the hearing. Mr Venables accepted that the decision in *St Matthews* was binding on this court (whilst formally reserving the right to contend otherwise before a higher court) but sought to distinguish it on the basis that in that case SDLT was indisputably chargeable at the time when the relevant transaction was entered into, whereas he said that in the present case, the loan charges imposed a liability to a new tax. Parliament had not said here that where someone had relied in the past on an apparent exemption or "loophole", they were no longer entitled to do so.

65. Mr Venables also relied on the fact that the loan charges imposed by Schedules 11 and 12 of the 2017 Act did far more than simply recover all the tax that, on HMRC's analysis, should have been paid in each tax year that the loans were advanced, plus interest and penalties. They treated the outstanding cumulative balance of the loans as having been received as income or profits in a single tax year and taxed them accordingly, in many cases exposing the taxpayer to a higher rate of tax on a larger sum than he would have paid if he had been taxed on the loan in each year in which it was made. I observe that whilst this is true, that rate would be no higher than the rate levied on any other individual who received income of that amount in 2018/2019.

66. I accept that the loan charge creates a potentially greater tax liability in terms of the amount of tax that might have been levied in respect of the loan balances – though that exposure would be mitigated if the taxpayer availed himself of the opportunity to pay back a substantial part of the indebtedness before the loan charge came into operation. However, the issue of whether there is a possession cannot depend on the amount of tax that is levied under the legislation that is said to be a deprivation of that possession. It depends on whether there was at least an arguable liability to pay tax on the loans *before* the challenged legislation was enacted. In this case, there plainly was.

67. In my judgment, just as in *St Matthews*, the loan charge legislation has only deprived the claimants of an argument that they were not liable to pay tax – here, income tax and NIC - on the money they received by way of loan as part of the reward for their work. They did not have a clearly established right to that money which was taken away from them. The challenge is not to the legislation that HMRC contends initially imposed the tax charge – s.62 of ITEPA 2003 in the case of Mr Zeeman, s.25 of ITTOIA in the case of Mr Murphy. It is a challenge to legislation designed to put paid to any argument that they were *not* liable to pay income tax and NIC on certain sums that they have received indirectly by way of remuneration. There is no distinction to be drawn in this respect between a case in which the taxpayer seeks to rely on an exemption, and a case in which the taxpayer contends that there was no tax liability in the first place because he was paid in a way that lawfully mitigated his exposure to tax. The loan charge provisions do not deprive the claimants of a "possession" in the form of money or any other asset.

68. In fact, HMRC's position in this case was even stronger than that in *St Matthews.* In *St Matthews* the question whether the tax avoidance scheme was effective had not been considered by a specialist Tax Tribunal. So far as DR schemes are concerned,

although the Supreme Court's decision in *Rangers* was handed down in July 2017, it upheld the earlier decision of the Court of Session. It also reaffirmed the principle in *Brumby v Milner* that if an employee receives a sum of money from his employer as a reward for work done or services rendered, whether directly or indirectly, it is and always was taxable (under s.62 of ITEPA 2003 and its predecessor). It strongly supported HMRC's position. After the decision of the Supreme Court was promulgated, it was still possible for a taxpayer to avoid the loan charge by repaying the outstanding balances.

69. As Lord Reed put it in *UBS AG v HMRC & another* [2016] UKSC 13 at [66]:"*the ultimate question is whether the relevant statutory provisions, construed purposively, were intended to apply to the transactions, viewed realistically."* In consequence of the decision in *Rangers*, before the loan charge legislation came into effect, HMRC had at the very least a powerful argument that the tax was payable and the money in the taxpayers' hands had to fund it. The first 2017 Act signalled the sort of DR arrangements that would unarguably give rise to future liability, whilst the introduction of the loan charges was announced in good time for those who had been party to similar arrangements in the past to pay the tax or pay back the loan. There should have been no hardship at that stage, because they should have been ready to pay back the loans and any accumulated interest on demand at any time. The loan charge legislation, when it did take effect, drew a line under these types of arrangement, precluding any further argument, just as the Government intended.

70. There is no material distinction to be drawn between the position of a self-employed trader who receives remuneration in that way and the position of an employee. Accordingly, I consider that A1P1 is not engaged.

71. In *Cartref* Cockerill J reached a different conclusion so far as the "Close Company" scheme which was entered into by one of the claimants was concerned, because she was not persuaded on the evidence that, at the time when it was entered into (in the tax year 2009/2010) HMRC was claiming that a scheme structured in that way gave rise to a tax liability. Even if HMRC's attitude to the arrangements in issue were a relevant factor in determining whether the money that would be used to pay the tax is a "possession," I have no such concerns as regards the loan arrangements in the present case. The taxpayer could not properly regard himself as having the money free and clear of any charge to tax at any material time in the history of these types of DR arrangement. I do not need to analyse the position by reference to the nature and degree of warnings given by the Revenue before the legislation was enacted, in order to reach that conclusion.

72. That is enough to dispose of these claims for judicial review. However, for the sake of completeness, I will go on to consider the substantive arguments on the assumption that A1P1 is engaged.

THE A1P1 CHALLENGE

73. Any interference with the peaceful enjoyment of possessions must be both lawful and proportionate. There may be a degree of overlap between the factors that are relevant to take into consideration in assessing whether these two requirements are met, but the requirements themselves are separate and cumulative. Any such interference must strike a "fair balance" between the demands of the general interests of the community

and the requirements of the protection of the individual's fundamental rights. There must be a reasonable relationship of proportionality between the means employed and the aims pursued, and the person affected must not bear an individual and excessive burden.

74. The existence of a legal basis in domestic law (e.g. the fact that the law is contained in an Act of Parliament) does not suffice, in and of itself, to satisfy the requirement of lawfulness; the measure in question must be compatible with the rule of law. That means that it must have legal certainty (i.e. it must be clear and precise in its terms and it must be sufficiently foreseeable) and it must not operate in an arbitrary manner. A law cannot be castigated as arbitrary if it is founded on necessity, reason or principle.

75. The fact that legislation is retrospective (or retroactive) will not, in and of itself, render it incompatible with A1P1. The ECtHR has generally considered retroactive effects in its assessment of proportionality rather than when considering the lawfulness of the interference. It has held that retrospective taxation is not prohibited if it strikes a fair balance between the public and private interests involved and does not impose an unreasonable burden on the taxpayer: see e.g. *MA & others v Finland* [2003] 37 EHRR CD2 10 (where a tax rate of 75% was upheld). In <u>*NKM*</u> at [51], the ECtHR expressly recognised that retrospective taxation can be applied to remedy technical deficiencies of the law, particularly where the measure is ultimately justified by public interest considerations.

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

77. In *Colazzo* and *Cacciato* a tax of 20% was levied upon compensation paid by the Italian Government for the expropriation of land; the ECtHR held that the amount could not be considered prohibitive in terms of quantification alone, and the deduction of 20% could not be said to have the effect of essentially frustrating the award of compensation, to the extent of causing the tax burden to acquire a confiscatory nature. In other words, it did not go so far as to impair the very substance of the applicants' property rights. For those reasons, the tax did not upset the balance between the protection of the applicants' rights and the public interest in securing the payment of taxes. Both applications were rejected as manifestly ill-founded.

78. In reaching that conclusion, in both cases the ECtHR placed weight on the absence of evidence that the levying of the tax fundamentally undermined the taxpayer's financial situation. This was identified in *NKM* as a relevant factor when gauging whether a fair balance has been struck in a given case. Sir James pointed out, by way of postscript to *NKM*, that the Hungarian legislation which had been declared incompatible with A1P1 in that case was considered again after the tax rate was

lowered from 98% to a flat rate of 25% and on that occasion the ECtHR rejected the application as manifestly ill-founded: *Csolle v Hungary* (Application no 56683/13).

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

80. As in *Cartref*, the lawfulness of the loan charge legislation was not seriously in issue, nor was the question of legitimate aim or objective. Mr Gilbert's and Ms McGeehan's evidence on behalf of HMRC as to the purpose of the legislation was clear, and as Cockerill J said in *Cartref*, at [225], it cannot be sensibly impugned. Parliament wished to draw a line under this type of tax avoidance. It intended to ensure that individuals (and companies) bear their fair burden of tax, rather than throwing an unfair burden on others who do not arrange their affairs in the same way.

81. The focus of the argument was really upon proportionality. If the challenge is based upon lack of proportionality, the Supreme Court has held that the claimant faces a "high hurdle" of showing that the legislation will lead to disproportionality in "*all or almost all cases*": *The Christian Institute and Others v The Lord Advocate (Scotland)* [2016] UKSC 51 at [88].

82. Mr Venables accepted that some legislation might well have been justified to target artificial DR tax avoidance schemes, including any case where it was agreed at the outset that the loan would never be repaid (which Mr Venables submitted would be tax evasion); but he submitted that this legislation was disproportionate, and that pretended loans were not the norm. The loan charge was imposed on guilty and innocent alike.

83. I have already addressed the proposition at the heart of Mr Venables' submissions, namely, that there was no "tax avoidance" involved in these types of arrangements because any real benefits received by the taxpayers had already been taxed in full, and therefore this legislation is arbitrary and unfair. That proposition, as I have said, ignores the economic reality of the DR schemes. This is not a tax on fictitious income or benefits, but on genuine remuneration received for work done or services rendered, paid in the form of a loan. The recipients of the money have had the advantage of its use for some time, in the case of Mr Zeeman, over many years.

84. As Sir James put it, what Parliament has sought to put to rest is the unreality of the technical construct. He made the telling forensic point that the 2011 Act, which prospectively taxed DR arrangements using EBTs as the vehicle for making the loans, has not been made the subject of a similar challenge. Nor indeed was the first Finance Act 2017 which widened the ambit of "relevant steps" taken after 5 April 2017. The same anti-tax avoidance justification applied to the earlier statutes. There is nothing arbitrary about the loan charge legislation. Moreover, the introduction of the loan charge was widely heralded, and the 2017 Act gave a significant period of grace for the taxpayer to repay the loans before the loan charge operated to tax the outstanding balance. If the recipient genuinely expected to have to pay the money back on demand, this was a fair opportunity for him to do so without exposing himself to any tax liability.

85. Mr Venables also complained that the legislation was arbitrary, unfair or discriminatory because it did not apply to loans made directly by the employer to the employee, where the employee has remained the creditor. But that is also true of the DRR Code under Part 7A ITEPA, which has not been challenged. HMRC suggested that there were good reasons for concentrating on arrangements made via an EBT, e.g. because there are many perfectly innocent reasons for employers to loan money to employees, but very limited circumstances why innocent loans from employers need to be routed through a third party (and these have been specifically carved out from the loan charge legislation).

86. Regardless of whether that is right, a taxpayer who is liable to pay tax on money that he has received indirectly by way of remuneration cannot complain that legislation designed to recover that tax from him is unfair or arbitrary because the legislation should have been even wider in its remit and taxed other types of arrangements. If that argument were correct, it would be open to any participant in an arrangement whose structure is directly targeted by anti-avoidance legislation to complain that Parliament has failed to enact legislation targeting a scheme which is structured in a slightly different way.

87. As in *Cartref*, Mr Venables principally relied upon the fact that the charge is essentially retroactive, as it is based on an existing state of affairs that has been caused by historical events. The tax is levied on what he described as notional, fictitious income accruing in a single tax year rather than on any real benefit received by the taxpayer in the tax year 2018-19. He submitted that the injustice was compounded by the fact that, if the employee repays the loan, he will not receive a refund of the income tax paid on it, and contrasted this with provisions of the Corporation Tax Act 2010 in which quasi-corporation tax falls to be repaid as and when the loan is repaid. However, under those provisions there is only a short period in which the individual can enjoy the benefit of the loan without the company incurring a tax charge, and the loan is always expected to be repaid (as opposed to repayment being postponed indefinitely). There are other provisions in tax legislation where a tax charge arises in respect of money received by an individual even if he no longer retains the benefit of that sum: see e.g. s.222 ITEPA 2003. That factor does not make the legislation so unfair as to amount to an infringement of A1P1.

88. Mr Venables also made the point that was heavily relied on in *Cartref* that the loan charge ignores the time limits set by Parliament for HMRC to assess someone to tax. In a normal case HMRC has 4 years after the expiry of the relevant tax year, 6 if there is negligence by the taxpayer and 20 years in a case of fraud. Once a tax enquiry has been opened it can remain open for many years. The temporal reach of the loan charge legislation had the effect of re-opening closed years, and put those who had innocently availed themselves of what appeared to be tax mitigation on the same footing as those who were dishonest. Mr Venables submitted that if HMRC could still open an enquiry and make an assessment, they did not need the loan charge. That, of course, ignores the intention of Parliament to draw a line under this type of tax avoidance once and for all.

89. Mr Venables also relied on the fact that the loan charge did more than retrospectively claw back the tax that should have been paid in each relevant tax year, plus interest and penalties. Had it done that, or had it targeted specific sub-trust arrangements of the type entered into in *Rangers*, he said it would have been less objectionable.

However, the fact that Parliament could have chosen to enact less severe measures is irrelevant, if the legislation that it did enact was proportionate to the legitimate aim that it sought to achieve.

90. Moreover, Mr Venables suggested that it would be open to HMRC to claim the unpaid tax as well as the loan charge, and that the statutory relief against double taxation was insufficient protection against this. That proposition was disputed by HMRC, and I am not persuaded that it is right. Ms Choudhury produced a helpful and detailed note about the provisions in the 2017 Act that have been introduced with the aim of ensuring that tax is only paid once on overlapping charges, including sums due under the loan charge. This explains that (subject to transitional relief) if the loan has already been assessed to tax and the tax has been paid, the payment will be credited against the loan charge, and if the loan charge is paid in full then the other tax charge will be treated as discharged to the extent that there is an overlap. Section 554Z11C also applies to provide relief from inheritance tax where there is an overlap. There are similar generously worded provisions under s.23H ITTOIA for self-employed individuals.

91. Ms Choudhury's note points out that it is highly unlikely in any event that the amount charged under the loan charge would be greater than under a prior assessment, because it is computed on the outstanding balance of the loan amounts which would always be equal to or less than amounts that were taxable as earnings. The one circumstance she identified in which the loan charge might be greater than the amount contributed to the EBT would be if that amount was invested and earned a growth amount of capital or interest before the full amount was loaned to the employee. The growth element would not enjoy relief under the double taxation provisions because it does not overlap with any previous charge to tax; however, as the note states, this may be a purely theoretical example, because the monies contributed to the trust are rarely held long enough by the trustees for this scenario to arise.

92. Mr Venables made some subsidiary points about how the language of ss. 3, 4 and 5 of Schedule 11 (and particularly the definition of "outstanding," which is not synonymous with "subsisting") could potentially result in unfairness or hardship in an individual case. By way of example, he submitted that it appeared that a person was only protected from the loan charge if he had repaid the outstanding balance of the loan(s) in money rather than in money's worth before the statutory deadline. In the light of the provisions of the technical consultation document published in August 2016, it is clear that the limitation in s.3(3)(b) and the provisions of ss. 4 and 5 of Schedule 11 were anti-forestalling measures to prevent contrived means being used to get around the loan charge. Those were legitimate considerations well within the remit of Parliament.

93. Mr Venables also pointed to the narrowness of the exception for loans made on commercial terms; but that too is quintessentially a matter within the remit of Parliament. I need not dwell on these features of the legislation because even if Mr Venables is right and they could potentially result in hardship in an individual case, that does not mean the legislation itself is contrary to A1P1.

94. Moreover, as Ms McGeehan's evidence demonstrates, HMRC were alive to the likely impact of the loan charges on individuals, and steps were taken to support them to pay the tax and reduce the risk of insolvency. HMRC have also made it clear in a letter

from the Financial Secretary to the Treasury to MPs dated 18 July 2019 that they will not seek to tax the same income twice, and that they will not apply the loan charge to a tax year where an enquiry was closed on the basis of fully disclosed information. The evidence falls a long way short of establishing that the loan charges result in a disproportionate effect on all taxpayers to whom they apply.

95. As for self-employed traders, Mr Venables made essentially the same points, though he drew attention to the fact that unlike employees, sole traders were not liable to pay tax on the more favourable interest rate received as part of a loan made on uncommercial terms. He contended that Schedule 12 would have been a legitimate response if it only provided that the value to the taxpayer of the benefit conferred by a loan on uncommercial terms would be subject to income tax (for the future) to bring the position into line with Part 7 of ITEPA 2003. That, of course, would not meet the real mischief at which the loan charge legislation was aimed.

96. Ultimately the question for the Court is whether it was open to Parliament to introduce this legislation. I agree with Cockerill J's observations in *Cartref* at [207]-[209] and with her view that HMRC's concern about loans being used with increasing sophistication to avoid paying income tax, and the decision about where to draw the line in order to meet that concern, is classically a matter for the executive. I also agree with her that the legislation is rationally connected to its objective.

97. Retrospectivity (or, more accurately, retroactivity) was also a judgment call for Parliament. In the present case, the basis for the imposition of the tax has not changed; all that the loan charge does is alter the timing of the payment. Especially in the light of the evidence that DR schemes were not declared in the past, and tax was not accounted for when it should have been, it was well within the generous margin of appreciation for Parliament to decide that it would tackle the matter in the way that it did, and impose a present tax liability in respect of money whose use, tax-free, had been enjoyed by the recipient over a number of years.

CONCLUSION

98. In the context of tax avoidance, the decision to impose a charge on the cumulative balances of the loans that remained outstanding at close of business on 5 April 2019 is justified by a legitimate policy and is fair and reasonable in all the circumstances. This legislation puts beyond doubt the taxable nature of these loans. It comes nowhere near fundamentally undermining the financial position of all those who are affected by it, and there was no evidence to suggest that it does.

99. I therefore agree with Cockerill J's conclusions in *Cartref* that this legislation is not "manifestly without reasonable foundation" but, on the contrary, it falls squarely within the margin of appreciation afforded to the State under the second paragraph of A1P1.

100. For those reasons, if A1P1 did apply, there has been no unlawful deprivation of possessions and this challenge to Schedules 11 and 12 of the 2017 Act is therefore dismissed.