[2021] UKFTT 0445 (TC)

TC 08329/V

Corporation Tax – whether expense not wholly and exclusively for purposes of trade and disallowed by s54 Corporation Tax Act 2009 - yes — whether s1290 Corporation Tax Act 2009 excluding deductions for expenses in respect of employee benefit contributions applicable – no – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2019/05565
TC/2019/05572
TC/2019/05575

BETWEEN

(1) A D BLY GROUNDWORKS AND CIVIL ENGINEERING LIMITED

(2) CHR TRAVEL LIMITED **Appellants**

-and-

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

TRIBUNAL: JUDGE GREG SINFIELD
TRIBUNAL MEMBER JAMES ROBERTSON

The hearing took place on 20 and 21 September 2021.

Rory Mullan QC, instructed by Charterhouse (Accountants) Limited, for the Appellants

Rebecca Murray, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

With the consent of the parties, the form of the hearing was V (video) using the Tribunal video hearing service. It was attended remotely by counsel and representatives of the Appellants and Respondents.

We were provided with a hearing bundle (2830 pages), an authorities bundle (438 pages) and, in addition, two skeleton arguments of 14 pages each, all in electronic form (PDF).

Prior notice of the video hearing had been published on the gov.uk website, with information about how representatives of the media or members of the public could apply to join the hearing remotely in order to observe the proceedings. As such, the hearing was held in public.

DECISION

INTRODUCTION

1. The Appellants, A D Bly Groundworks and Civil Engineering Limited ('A D Bly') and CHR Travel Limited ('CHR Ltd'), appeal against closure notices issued by the Respondents ('HMRC') denying corporation tax deductions claimed by them in respect of certain pension liabilities which they had incurred.

BACKGROUND TO THE APPEAL

2. A D Bly is a provider of civil engineering and groundwork contracting services. At the relevant times, it had seven directors and around 220 employees. CHR is engaged in the wholesale travel agency business. It had two directors and around 20 employees.

3. In the periods under consideration, the Appellants entered into contractual arrangements with directors and other key employees which implemented an Unfunded Unapproved Retirement Benefit Scheme ('UURBS') under which the Appellants promised to provide those employees with a pension in the future. The pensions were calculated by reference to the estimated profits for the relevant year. In each case, the aggregate amount of the pensions was set at 80% or 100% of the estimated profits before tax. Both companies made provisions in their accounts in respect of their liability to make pension payments to employees in the future. Each Appellant claimed a deduction in calculating its profits to reflect that provision.

4. HMRC disallowed the deductions and issued closure notices in each case as follows:

Appellant	Date	Accounting period	Amount
A D Bly	26 March 2018	y/e 30 November 2012	£1,040,000
A D Bly	21 September 2018	y/e 30 November 2013	£4,452,997
CHR Ltd	16 August 2018	y/e 31 March 2013	£278,125
CHR Ltd	16 August 2018	y/e 31 March 2014	£259,634

5. HMRC contend that the liabilities were incurred "for the purpose of a tax avoidance scheme and not wholly and exclusively for the purposes of paying pension income to the employees" and accordingly the deduction is disallowed under section 54 of the Corporation Tax Act 2009 ('CTA 2009'). Alternatively, HMRC argue that the deduction was in respect of employee benefit contributions with the consequence that the deduction is disallowed under section 1290 CTA 2009. The Appellants contest both grounds and appealed to the First-tier Tribunal ('FTT').

6. The UURBS had been proposed to the Appellants by their accountants, Charterhouse (Accountants) Limited ('Charterhouse'). The UURBS had been notified in accordance with the Disclosure of Tax Avoidance ('DOTAS') legislation in section 304 Finance Act 2004 and allocated Scheme Reference Number 37251571.

7. Charterhouse had marketed the UURBS to other clients whose claims for corporation tax deductions had also been disallowed and there were a number of other appeals to the FTT. Several of the appeals have been designated lead appeals for the purposes of a direction under Rule 18 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009.

APPLICATION TO JOIN PARTIES

8. On 17 September 2021, ie one working day before the hearing, Charterhouse applied to add a further four cases to the Rule 18 order. The application did not provide any details about the cases or give any reasons why they should be added. I directed that the application would be considered at the hearing. I asked counsel for their submissions at the hearing. Mr Mullan QC, who appeared for the Appellants, had no instructions in relation to the application and Ms

Murray, who appeared for HMRC, opposed it on the ground that it had been made much too late and HMRC had not had any opportunity to consider whether the cases were on all fours with the existing rule 18 cases. In the absence of any information about the facts or issues in the cases or submissions on why they should be added to the rule 18 order, it was clear that the application must be refused and we say no more about it or those cases in this decision.

ISSUE TO BE DECIDED

9. The only issue in this appeal is whether the deductions claimed by the Appellants in respect of pension provisions are allowable for tax purposes. That issue is determined by the answers to two questions:

(1) were the pension provisions made by the Appellants wholly and exclusively for the purposes of a trade?

(2) if so, does section 1290 CTA 2009 apply to disallow the deductions claimed by the Appellants as deductions in respect of employee benefit contributions by the employer?

EVIDENCE

10. The evidence was contained in an electronic hearing bundle of 2,830 pages. There are clear practical, as well as environmental, benefits in having an electronic hearing bundle rather than a physical paper one spread over several lever arch files. However, in counsels' skeletons and at the hearing, we were only referred to a fraction of the pages included in the bundle. It is also regrettable that there was some duplication of documents. Parties should resist the temptation to include documents in an electronic bundle simply because they might become relevant and/or it is easy and convenient to do so rather than check for duplication. Where a large hearing bundle is necessary, parties should consider whether it would be helpful, as it would have been in this case, to agree a separate core bundle.

11. The hearing bundle included three witness statements and we heard evidence from all three witnesses. Those witnesses were:

(1) Stephen Galpin, the Managing Director and sole shareholder of CHR Ltd;

(2) Aaron McSkimming, the Managing Director of A D Bly; and

(3) Paul Helliar - a Director of A D Bly.

12. Mr Helliar was appointed a director of A D Bly on 9 September 2016 and was invited to participate in the UURBS in 2016. As he was not a director when A D Bly decided to implement the UURBS in 2012 and 2013, Mr Helliar could not say anything about the company's reasons for incurring the expense of providing an UURBS at that time. Having confirmed that in cross-examination, Ms Murray said that she did not have any further questions. We have read Mr Helliar's witness statement. Apart from his evidence that some employees had already started to draw pensions under the UURBS (a point that is also made in Mr McSkimming's witness statement), Mr Helliar's statement does not contain any material relevant to the issue of whether the provision of an UURBS for directors in 2012 and 2013 was wholly and exclusively for the purposes of A D Bly's trade and we do not consider it further in this decision.

13. The witness statements of Mr Galpin and Mr McSkimming contained many passages that were identical or materially similar save as to names, dates and amounts. Ms Murray put many examples of such passages to Mr Galpin and Mr McSkimming in cross-examination but we need only quote three examples for the purposes of illustration.

14. In paragraph 7 of his witness statement, Mr Galpin says:

> "Following these discussions the Company was advised to appoint a remuneration consultant to consider the current package for the key individuals and to consider whether this was commensurate to their contribution to the firm. The consultant considered the remuneration package in the round, taking into account the appropriate level of remuneration, the components of the remuneration and the ability of the business to adequately maintain the remuneration. Part of the package was to propose a provision for a pension on retirement and consideration was given to ensure that any provisions provided were realistic, reasonable and fair and would also provide an adequate pension to ensure that the members would be able to maintain the lifestyle that they were accustomed to upon their retirement. The remuneration consultant considered the personal circumstances of the individual members including their current retirement plans and level of pension accrued to date. It was considered by the remuneration consultant that current pension arrangements and the Lifetime limit for approved pensions at this time of £1,500,000 would be insufficient to ensure that the members would be able to maintain their current needs and lifestyle in retirement and that a provision of a pension under an UURBS agreement would resolve this and could reasonably form part of the key individual's remuneration package whilst allowing the business to continue to operate and to expand."

15. Mr McSkimming says in paragraph 9 of his witness statement:

> "Following on from the discussions, the firm were advised to appoint a remuneration consultant. This was in order to gain a fair and realistic opinion of the current remuneration package along with the proposal of a pension provision that would be adequate for the key individuals to maintain the lifestyles they were accustomed to on retirement and to consider whether this was in line with their contribution to the business. The appointed remuneration consultant considered the full remuneration package and took into account the relevant levels and components of remuneration along with the businesses (sic) ability to be able to maintain the remuneration. The remuneration consultant, after considering the personal circumstances of the individual members including their current retirement plans and level of pension accrued to date, stated that the current pension arrangements and the Lifetime limit for approved pensions of £1,500,000 at that time, would be insufficient to ensure that the members would be able to maintain their current lifestyle and needs upon retirement, but that a proposed provision of a pension under an UURBS agreement would be able to resolve this. This would reasonably form part of the key individual's remuneration package and also allow the business to continue to operate and to expand."

16. At paragraph 9 of his witness statement, Mr Galpin says:

> "Although all of the prospective members entering into the UURBS understood that there was a risk associated with the provision of a pension under the UURBS, as no funds would be set aside until the pension was to be withdrawn, the prospective members unanimously confirmed that they were prepared to take the risk on the basis that they believed it was in the best interests of growing the company and that as a result the business would be successful and they would therefore receive their pension. The UURBS therefore also worked as an incentive to retain high level staff, without having a negative effect on the commerciality of the business. This has proved to be such a commercial success that the UURBS has now been rolled out to other key members of staff."

17. McSkimming makes the same points in paragraph 12 of his witness statement:

> "I and the other prospective members entering into the UURBS knew that there was a risk accepting the provision of a pension under the UURBS, as no funds would be set aside until our pension was to be withdrawn, however the other prospective members and myself unanimously confirmed that we were prepared to take the risk as we believed it was both in the best interests of allowing the company to grow and ourselves as the business would be more successful and intern (sic) we would all receive our pension. The UURBS therefore also worked as an incentive to retain high level staff, without having a negative effect on the commerciality of the business. This has proved to be such a commercial success that the UURBS has now been rolled out to other key members of staff."

18. Paragraph 10 of Mr Galpin's statement is as follows:

> "Since making the provision the company has undergone a Management Buy Out has also been undertaken (sic). This was carried out as part of the succession planning for the business and to ensure the continued success of the business. The MBO was carried out as it was considered that this was the best way to ensure the pension obligations could be met in the future. It should be noted that the successful sale of the business through an MBO was only possible due to this historic growth and success of the business, facilitated by the making of the pension provisions."

19. Mr McSkimming says at paragraph 13 of his statement:

> "The company has undergone a Management Buy Out since making the provision, following further discussions with our Advisors regarding succession planning for the business. It was decided that this was the best way to ensure the continued success of the business and to also ensure that the pension obligations could be met in the future. This was only possible due to the growth and success the business has attained following the making of the pension provisions."

20. The witnesses, who made their witness statements separately and without knowledge of the other, did not deny that they had been assisted by Charterhouse in writing their statements. In cross-examination, both Mr Galpin and Mr McSkimming accepted that the passages in the two witness statements were strikingly similar. Mr Galpin said that he drafted the witness statement with Charterhouse and that perhaps 85% of the witness statement was Charterhouse's and 15% was his. Mr McSkimming said that they were both following the same pension planning arrangement so that was why they said the same thing. He said that Charterhouse assisted him to make his witness statement look right but the facts were true and the statement set out how he recollected that things had occurred. Mr McSkimming said that Charterhouse did not tell him what to write. We do not accept that as being literally true. The similarities between the two witness statements can only be explained by the fact that they shared a common source. Having read both of their statements and heard what the witnesses said about them in cross-examination, we conclude that, to a large extent, Charterhouse told both witnesses what to say and how to say it.

21. The evidence also included a joint statement of experts which went to the question of whether the Appellants had applied the relevant accounting standard. The experts agreed that the accounting standard that applied to A D Bly was FRS17 "Retirement benefits". CHR Ltd prepared its accounts in accordance with the FRSSE which the experts agreed had the same accounting requirements in respect of pension costs as FRS 17. The parties agreed that the question of what was the appropriate accounting standard was no longer an issue in the appeal. Nevertheless, we take account of other aspects of the experts' report in this decision.

22. In their joint statement, the experts agreed that the UURBS did not come within the definition of a Defined Contribution Scheme as it was not a "pension or other retirement benefit scheme into which an employer pays regular contributions ... and will have no legal or constructive obligation to pay further contributions …". The experts agreed that it followed that, by default, the UURBS was a Defined Benefit Scheme, which is defined as a "pension or other retirement benefit scheme other than a defined contribution scheme".

23. The experts also agreed that, as the UURBS is an unfunded scheme, there are no assets and the deficit is the value of the scheme liabilities. The experts agreed that FRS17 requires the scheme liabilities to be measured "on an actuarial basis using the projected unit method which involves estimating the future cash flows arising under the scheme liabilities based on a number of actuarial assumptions ..., then discounting the cash flows at an appropriate rate." The experts did not produce an agreed quantum of the liabilities of each Appellant under the UURBS.

FINDINGS OF FACT

24. On the basis of the written and oral evidence, we find the facts material to the issues to be decided are as set out below. As stated above, parts of the witness statements of Mr Galpin and Mr McSkimming were materially identical but we have nevertheless considered the evidence and made findings of fact separately in relation to each Appellant.

A D Bly

25. In his witness statement, Mr McSkimming stated that:

> "The Company was trading as a medium sized trading company during the periods in question, dealing in the provision of civil engineering and groundwork contracting services. At the time there were seven directors and circa 220 employees."

26. Mr McSkimming said in his witness statement that the board met to discuss the remuneration package of the key members of the company and the need to incentivise and motivate them. The board also recognised the need to retain working capital because the company was going through a period of growth and expansion. Mr McSkimming gave no date for the meeting and there were no board minutes produced as evidence of any such discussions prior to the board meetings described below. Mr McSkimming said in cross-examination that the board met once a month and meetings were always minuted so he did not understand why the minutes were not in evidence. Mr McSkimming said that the directors then met with Charterhouse to discuss issues raised in the board meeting.

27. We are not satisfied that there was a separate meeting of the directors to discuss the remuneration packages of key individuals prior to the meeting with Charterhouse. We find that there was a meeting between the directors of A D Bly and Charterhouse to discuss the establishment of the UURBS. It is clear from the terms of Charterhouse's letter of engagement dated 19 November 2012 that the meeting and the directors' decision to go ahead with the UURBS occurred before that date.

28. It is clear from Mr McSkimming's evidence that tax was discussed at the meeting with Charterhouse:

> "We were also made aware by our Advisors that although this was primarily a pension scheme, there would also be an immediate tax impact as the provision would be deductible from the company's profits for tax purposes."

29. Mr McSkimming also said:

> "The main motivation and benefit for the Company deciding to take up the planning was that it would allow for the funds, in relation to the pension

> provisions being provided for the key employees pensions, to be used by the business in the short term as working capital in order to continue its growth, until such time as the Key member retired. When the members reached the relevant retirement age, the company would then provide a pension for them. The intention was that this would be an additional incentive for the participants to remain at the company and successfully continue to grow the business."

30. On 19 November 2012, Charterhouse issued a letter of engagement to A D Bly setting out the basis on which Charterhouse were to act as advisers to A D Bly. Paragraph 1 of the letter was headed "Warning Regarding Tax Planning" and stated:

> "1.1 Any tax planning covered by this engagement letter may be considered to be aggressive tax planning by HM Revenue & Customs and as such they are very likely to raise enquiries into any transactions effected as part of the planning and may not accept the interpretation of any tax legislation that has been relied upon as part of the planning.
>
> 1.2 You should only proceed with such planning if you are prepared for such an enquiry and to pay any tax, national insurance and other duties that would be payable in the event that the planning failed to achieve its anticipated outcome. In the event that such liabilities become payable, at a date later than they would otherwise have been, then interest will be charged by HM Revenue & Customs in respect of the late paid amounts."

31. The letter continued in paragraph 2:

> "2.1 We shall assist you in establishing an unfunded unregistered retirement benefit scheme (an 'UURBS'). However, we cannot advise on the suitability of an UURBS as a mechanism for providing pensions to employees.
>
> 2.2 Counsel will be instructed to advise in respect of the taxation consequences of the matters referred to in 2.1 above.
>
> 2.3 You will be relying on the advice given by Counsel.
>
> …
>
> 2.6 We shall recommend and liaise with a remuneration consultant with a view to them producing an estimate of the overall level of rewards for specified employees including the provision that can be made for each employee who is to be rewarded by the Company by way of an UURBS."

32. A D Bly signed and returned the engagement letter on 22 November 2012.

33. Later on 22 November, Mr Chiraag Shah of Charterhouse emailed Mr Graham Arnold, the Financial Director of A D Bly, to ask him to provide specified information later that same day to enable the remuneration consultant to begin considering a level of remuneration suitable in the circumstances. Mr Arnold replied with the requested documents in less than an hour.

34. Later in the afternoon of 22 November, Mr Shah emailed Mr David McGill of Synergis Small Business Consulting ('Synergis') to provide him with the documents to enable him to consider the level of remuneration that would be reasonable for the directors of A D Bly.

35. On 24 November, Mr McGill emailed Charterhouse to request further information. Mr Shah responded on 26 November and Mr McGill provided a draft opinion to Charterhouse later the same day.

36. On 27 November, Mr Rajesh Jiwani of Charterhouse emailed Mr McGill with a few minor amendments and asked him to issue his report to the company as soon as the outstanding documents, which Charterhouse was chasing, had been received.

37. Mr McGill's final report is dated 27 November 2012. The report stated that Synergis had been appointed

> "… as remuneration consultant to [A D Bly] for the specific task of giving an opinion as to the level of pension provision that could be made, in this current financial year ending 30 November, for various directors."

There was no reference to any opinion as to the overall level of rewards for the directors.

38. The amount of the pension provision mentioned in Mr McGill's report was £1,040,000. Mr McGill agreed with the company's suggestion that 100% of A D Bly's profits for the year should be used to provide pensions for the directors, split between them as follows:

(1) Mr Anthony Bly 25%

(2) Mr Aaron McSkimming 25%

(3) Mr Arnold 12.5%

(4) Mr Mark Thompson 12.5%

(5) Mr Robert O'Connor 12.5%

(6) Mr Michael Pringle 12.5%.

39. Mr McGill made clear that his report was restricted to the issue of the commerciality of the proposed pension provision:

> "… the opinion given is based solely on the commercial suitability of the provision for the pension benefit of the director (sic) concerned. The opinion offers no financial, pension, investment or tax planning advice. These matters are for the company's relevant advisors to deal with."

40. On the following day, 28 November, the directors of A D Bly held a board meeting "to consider the possibility of the Company making an unfunded registered (sic) pension provision in respect of" the directors of the company. It was reported at the board meeting that the pre-tax profits for the year ending 30 November 2012 were projected to be £1,300,000 before making any pension provision and it was proposed that the pension provision for the directors should also be £1,300,000. The directors agreed to appoint Synergis as remuneration consultants.

41. On 29 November, Mr Arnold sent Mr Shah the minutes of the board meeting held the previous day. On the same day at 16:20, Mr Jiwani emailed the signed board minutes appointing Synergis as remuneration consultant to Mr McGill and asked him to provide his "final report following our conversation this afternoon as soon as possible". In fact, as stated above, Mr McGill of Synergis had already provided his final report on 27 November 2012 and no later report or explanation was provided to us.

42. On 30 November 2012, there was a further meeting of the directors of A D Bly. The minutes of that meeting record that the purpose of the meeting was to consider "the possibility of the company making an unfunded pension provision" in respect of the directors previously identified. The projected profit was reported to be in the region of £1,300,000 and it was agreed that the company would enter into unfunded pension agreements with the directors using all of A D Bly's projected profits for the year to provide the pensions as follows:

(1) Mr Bly 18%

(2) Mr McSkimming 18%

(3) Mr Thompson 18%

(4) Mr O'Connor 18%

(5) Mr Pringle 18%

(6) Mr Arnold 10%.

43. The board also noted that, in its report dated 27 November 2012, Synergis had advised that the level of rewards including the pension provision could reasonably be made by A D Bly. The minutes did not refer to the discrepancy between the estimated profits used as a basis for Mr McGill's advice and the higher estimated profits referred to in the minutes or to the decision to include Mr Pringle and adopt a different apportionment of the profits to that considered by Mr McGill in is report.

44. On the same day, A D Bly's sole shareholder (A D Bly Holdings Limited) passed a written resolution to make a pension provision for the directors of A D Bly and the company entered into the unfunded pension agreements with the directors. The shareholders of A D Bly Holdings Limited were the directors of A D Bly with the exception of Mr Arnold.

45. On 22 May 2013, A D Bly ceased to be the operating entity of the business and transferred the business and undertaking to A D Bly (Contracting) LLP of which A D Bly was a partner.

46. On 14 November 2013, A D Bly held another board meeting at which the directors agreed that the company would enter into further unfunded pension agreements to provide pensions for the directors. The board agreed that the pension provision would be 80% of the company's projected profits for the period ending 30 November 2013 of around £3,000,000. The board also appointed FLB Accountants LLP ('FLB') to review the remuneration package of the directors including the proposed pension provision.

47. FLB provided their report in a letter dated 26 November 2013. They noted that the management accounts for the 10 month period ended 30 September 2013 reported a profit of £105k and the uplift to £3,000,000 was expected to come from the year-end review of long term contracts. FLB was clear to limit the scope of its advice and did so in almost identical terms to Mr McGill:

> "The opinion is given based solely on the commercial suitability of the provision to be made, and does not offer any opinion on the financial, pension, investment or tax planning advice. These matters are for the company's relevant advisors to deal with, and should be taken in the context of the wider advice being offered by the advisors to the Board of Directors in making its decision."

48. On 28 November 2013, there were further meetings of the directors of A D Bly and the shareholder passed a resolution as had occurred in November 2012 to approve the unfunded pension agreements between the company and the directors in the same proportions as set out at [42] above. The minutes of the directors' meeting record that A D Bly's profits were projected to be in the region of £2.88 million before tax but the accounts for the period ended 30 November 2013 show that the company made a provision of £4,435,180 for directors' pensions being 80% of profits before tax of £5,543,975.

49. On 13 May 2014, there was a meeting of the directors to approve the signing of "replacement agreements" for those entered into to on 30 November 2012 which had been "misplaced". The replacement agreements appear to have been signed on 17 June 2014.

50. A D Bly has subsequently paid pensions to Mr Arnold, who retired on 31 December 2015, Mr Pringle, who retired on 31 August 2020 and Mr O'Connor, who retired in April 2021.

CHR Ltd

51. In his witness statement, Mr Galpin stated that:

> "The Company during the periods in question was trading as a medium sized trading company dealing in the wholesale travel agency business, there were two shareholders, two directors and circa 20 employees."

52. That statement was inaccurate. On 1 April 2011, the trade and certain related assets and liabilities of CHR Ltd were transferred to CHR Travel (London) LLP ('CHR LLP'). The Directors' Report for CHR Ltd for the year ended 31 March 2012 states that the· principal activity of the company was that of being a member of a trading LLP which undertakes wholesale travel agency business. In the year ending 31 March 2012, the accounts and management information for CHR Ltd record no cost of sales and no wages and salaries whereas there were substantial amounts shown for those items in the accounts for the year ending 31 March 2011. We conclude that CHR Ltd transferred all its employees to CHR LLP in April 2011 and had no employees during the periods under consideration in this appeal. First, it is clear from numerous documents provided by CHR Ltd in this appeal that, in 2013 and 2014, CHR Ltd had only one shareholder which was Mr Galpin. CHR LLP, however, had three partners at that time, namely Mr Galpin, Mr Timothy Walker, who was also a director of CHR Ltd, and CHR Ltd.

53. To be clear, we do not consider that that Mr Galpin was trying to mislead or was reckless about the things he said in paragraph 1 of his witness statement. Mr Galpin is a businessman and not a lawyer. From that and other passages in his witness statement and from certain answers which he gave in evidence, we gained the clear impression that Mr Galpin did not distinguish between the different legal entities. When he referred to "the Company" and "the business" he drew no distinction between the limited company and the LLP because that distinction was not relevant to him as a businessman. That did mean, however, that when he described the reasons for and commercial benefits of CHR Ltd setting up the UURBS, Mr Galpin was often talking about reasons and benefits that were properly ascribed to CHR LLP.

54. In his witness statement, Mr Galpin describes how the board met to discuss the remuneration package of the key members of the firm (which, for reasons discussed above, can only be the members and employees of CHR LLP) who it was vital to motivate, incentivise and retain. He said the board agreed that the company was undergoing a period of expansion and growth and needed to maintain working capital. We do not accept that CHR Ltd needed working capital when its trade had been transferred to CHR LLP in 2011 and it had no staff. It is clear that Mr Galpin must have been talking about working capital and key employees of CHR LLP.

55. Mr Galpin's evidence in his witness statement was that it was only after the board meeting that the company had a meeting with Charterhouse but he was less certain in his oral evidence. When asked, Mr Galpin said that he could not remember when the board meeting took place but he was in constant contact with Mr Micky Ackenson, one of the directors of Charterhouse, and they would talk it through. We do not accept that there was a separate board meeting to consider the remuneration packages of key individuals prior to Mr Galpin's discussions with Mr Ackenson about the establishment of the UURBS.

56. Mr Galpin's view of the benefits of the UURBS was materially identical to Mr McSkimming's which is unsurprising as both were formed by what they had been told by Charterhouse. Mr Galpin said in his witness statement:

> "Although this was first and foremost a pension scheme, we were made aware that there was an immediate tax consequence in the provision being deductible from the company's profits for tax purposes. At such time as the Pensions

> were withdrawn, there would then be a higher Income tax charge on the withdrawals at the relevant time. The key benefit and the reason and motivation for taking up the planning was that this would allow for the funds equivalent to the provision that was to be provided for member's pensions to be utilised by the business as working capital in order to continue its growth, until such time as the key employee retired, which was essential to the wellbeing of the Company at that time. The other key benefit was that no funds would need to be set aside for the Pension allowing the business to grow significantly e.g. opening overseas offices and investing in a bespoke computer system."

57. At the beginning of January 2013, Charterhouse met with the directors of CHR Ltd to discuss the possible pension planning for them as they had recognised that they had nothing in place for their retirement and that they were reaching an age where this was considered to be important. The directors, having considered Charterhouse's advice and to ensure some security upon reaching retirement, verbally agreed to go ahead with the planning.

58. On 10 January 2013, Charterhouse issued a letter of engagement to CHR Ltd setting out the basis on which Charterhouse were to act as advisers to CHR Ltd. Paragraph 1 of the letter was headed "Warning Regarding Tax Planning" and stated:

> "1.1 Any tax planning covered by this engagement letter may be considered to be aggressive tax planning by HM Revenue & Customs and as such they are very likely to raise enquiries into any transactions effected as part of the planning and may not accept the interpretation of any tax legislation that has been relied upon as part of the planning.
>
> 1.2 You should only proceed with such planning if you are prepared for such an enquiry and to pay any tax, national insurance and other duties that would be payable in the event that the planning failed to achieve its anticipated outcome. In the event that such liabilities become payable, at a date later than they would otherwise have been, then interest will be charged by HM Revenue & Customs in respect of the late paid amounts."

59. The letter continued in paragraph 2:

> "2.1 We shall advise you in connection with further commitments to an unfunded unregistered retirement benefit scheme (an 'UURBS'). However, we cannot advise on the suitability of an UURBS as a mechanism for providing pensions to employees. You have decided not to obtain Tax Counsel's advice in relation to the taxation consequences of entering into an UURBS and agree that our liability in respect of any advice or assistance in connection with establishing the UURBS shall be restricted to the fees charged as set out … below.
>
> 2.2 If required, we shall liaise with a remuneration consultant with a view to their producing an estimate of the overall level of rewards for specified employees including the provision that can be made for each employee who is to be rewarded by the Company by way of an UURBS."

60. On 8 February 2013, Mr Chiraag Shah of Charterhouse emailed Mr Galpin further to a telephone conversation the previous week to ask him to complete and return an information request to enable the remuneration consultant to provide Charterhouse with his opinion of the level of pension provision which CHR Ltd could provide for Mr Galpin when he retires. Mr Galpin supplied the information by email on 11 February. At that point, the information only related to Mr Galpin.

61. On 13 February 2013, Mr Shah emailed Mr Walker following a telephone conversation that afternoon to request information to enable a remuneration consultant "that the company

would appoint" to provide Charterhouse with his opinion of the level of pension provision which CHR Ltd could provide for Mr Walker when he retires. Mr Walker supplied the information by email on 14 February.

62. At 13:37 on 14 February 2013, Mr Shah emailed draft board minutes appointing Mr David McGill of Synergis as remuneration consultant, to Mr Galpin and Mr Walker and asked them to hold a board meeting, go through the minutes and return them completed and signed.

63. At 15:00 on 14 February 2013, the directors of CHR Ltd held a board meeting to consider the possibility of the company making an unfunded unregistered pension provision in respect of Mr Galpin and Mr Walker. It was minuted that the estimated pre-tax profits for the year ended 31 March 2013 were £312,000 before the proposed pension provision and that the suggested initial pension provision for the year was approximately £250,000. The board also resolved that Charterhouse should appoint Synergis as remuneration consultants to review the remuneration packages of Mr Galpin and Mr Walker for the period ending 31 March 2013.

64. At 15:15 on 14 February 2013, Mr Shah emailed Mr McGill with documents relating to the provision of a UURBS for Mr Galpin and Mr Walker. Mr Shah said that CHR Ltd was "due to hold a board meeting this week to consider your appointment and the signed board minutes will shortly be sent to you."

65. At 18:01 on 14 February 2013, Mr Shah emailed the signed board minutes appointing Synergis as remuneration consultant to Mr McGill.

66. On 16 and 18 February 2013, Mr McGill requested further information from Charterhouse before he could provide the opinion. The further information was provided by Mr Shah.

67. At 16:22 on 18 February 2013, Mr McGill provided a draft opinion to Charterhouse for their comments. Mr Shah responded with a few minor amendments within the hour.

68. On 19 February 2013, the final remuneration report to CHR Ltd was provided by Mr McGill. The remuneration report stated that Mr McGill had been appointed "to look at the possibility of making provisions in the company's accounts, for the year ending 31st March 2013, for a pension for Mr Stephen Galpin and Mr Timothy Walker, both Directors of the company and Partners in the main trading entity, CHR Travel (London) LLP." The report contained Mr McGill's opinion as follows:

> "If looking at the annual profits achieved in any one year, the amounts suggested would appear to be excessive. However three points should be made. Firstly, that no such provision has been made, in the last few years, to Timothy Walker's pension fund and only minimal contributions to Stephen Galpin's fund. Secondly, there is a £400,000 VAT rebate, this year, which has been accumulated over the last few years. Thirdly, the balance sheet is in good order.
>
> So, to my opinion: after reviewing all the relevant information, both provided and subsequently requested by myself, I suggest that the amount of £125,000 for each Director could be made in the year ending 31st March 2013."

69. Mr McGill made clear that his report was restricted to the issue of the commercial suitability of making the proposed provision for the directors and that the report:

> "… offers no financial, pension, investment or tax planning advice. These matters are for the company's relevant advisors to deal with. Finally, the opinion should be put in context with the other advice given by these advisors, prior to the Board of Directors making its decision."

70. On 27 March 2013, CHR Ltd held a board meeting at which it was reported that the estimated pre-tax profits for the year ended 31 March 2013 were £312,000 before tax. It was proposed that CHR Ltd enter into agreements with the directors to provide an UURBS for Mr Galpin and Mr Walker in amounts which Synergis had advised were reasonable and in addition to provide a smaller unfunded pension for Mr Ian Scrimgeour, a senior employee. The amounts of the pension in each case were determined under agreements as percentages of CHR Ltd's profits for the year ending 31 March 2013, being 41% for Mr Galpin, 31% for Mr Walker and 8% for Mr Scrimgeour, ie a total of 80% of CHR Ltd's profits for the year. On the same day, Mr Galpin as sole shareholder in CHR Ltd passed a written resolution to make a pension provision for the directors of CHR Ltd.

71. Also on 27 March 2013, CHR Ltd entered into Unfunded Pension Agreements with Mr Galpin, Mr Walker and Mr Scrimgeour under which CHR Ltd agreed to provide pensions for their benefit on their retirement.

72. One year later, CHR Ltd went through the same exercise of obtaining advice and assistance from Charterhouse to provide an UURBS for Mr Galpin, Mr Walker and Mr Scrimgeour at a level of 80% of the projected profits of CHR Ltd for the year ending 31 March 2014. CHR Ltd appointed FLB as a remuneration consultant. The documents relating to the 2014 UURBS were the same as those produced in 2013 save for the report by FLB which differed in wording from that provided by Mr McGill the previous year.

73. The FLB report, dated 17 March 2014, reached the conclusion that the amount to be set aside should be 80% of the pre-tax profits of CHR Ltd for the period ending 31 March 2014 which were forecast to be £225,000 thus giving a pension provision of £180,000. The FLB report also noted that:

> "… when we are considering the commercial recommendation for a pension provision, to be settled by the company at a future point in time, we must consider the Company's ability to meet the obligation from cash flow. The Company's ability to make the pension contribution is dependent on the continued profitable trading of the Partnership and the allocation of the profits from the Partnership to the corporate member.
>
> We further note that during the year ended 31 March 2013 the Company made a pension provision totalling £278,125 and that this provision has not yet been settled."

74. Like Mr McGill, FLB was clear about the matters that its report did not cover:

> "The opinion is given based solely on the commercial suitability of the provision to be made, and does not offer any opinion on the financial, pension, investment or tax planning advice. These matters are for the company's relevant advisors to deal with, and should be taken in the context of the wider advice being offered by the advisors to the Board of Directors in making its decision."

75. On 17 March 2014, CHR Ltd held a board meeting and passed a resolution that enabled the company to enter into Unfunded Pension Agreements with Mr Galpin, Mr Walker and Mr Scrimgeour. This time the pension amounts were based on percentages of CHR Ltd's estimated profit of £225,000 for the year ending 31 March 2014. The board decided to make provision for pensions in the amounts of 51% for Mr Galpin, 39% for Mr Walker and 10% for Mr Scrimgeour, ie a total of 100% of CHR Ltd's profits for the year. The minutes of the board meeting referred to the FLB report of 17 March 2014 and stated that FLB "had advised that the level of reward, including the proposed pension provisions, can reasonably be made". There was no explanation of the discrepancy between the FLB's advice that the provision should be

80% of the estimated profits and the directors' decision to allocate 100% of the profits for the year to the Unfunded Pensions Agreements.

76. As at the date of the hearing, no employee of CHR Ltd or CHR LLP had started drawing a pension.

UNFUNDED PENSION AGREEMENTS

77. All the Unfunded Pension Agreements were in identical terms, save as to names, amounts and dates, and signed as deeds. The text of the operative parts is set out in an Appendix to this decision. In summary, the agreements provided in each case that:

(1) As part of the director's reward for services for the relevant year, the company agreed to provide a pension in accordance with the terms of the agreement.

(2) The company agreed to pay a pension from the 'Payment Date' which is the director's 77th birthday or such earlier or later date as provided for in the agreement.

(3) The Payment Date is the date notified by the director to the company with at least six months' notice but cannot be earlier than the later of the director's 55th birthday and the date of the director's retirement unless the director has died before that time. There are further provisions for cases where the director has died or is still employed at the age of 77.

(4) The amount of the pension is calculated as the amount which would have been payable under an annuity contract on the assumption that the company has purchased an annuity contract from a commercial provider of annuities for a consideration equal to the Payment Sum. The company and director may agree additional actuarial assumptions to be made by an agreed actuary.

(5) The Payment Sum is said to be the Base Sum (being the proportion of the projected profits for the relevant year allocated to the director in the relevant minutes) adjusted to account for the movement of the consumer prices index, plus that adjusted sum multiplied by the total percentage rate, being the relevant rate (the higher of 2.5% and the interest rate on the most recently issued UK Government Index Linked Securities) multiplied by the number of complete 12 month periods ending prior to two months before the Payment Date.

(6) The pension is to be paid for life and increases in line with the consumer prices index.

(7) Either party may by written notice vary the company's obligations to permit/require the company to purchase an annuity or annuities at a cost of the Payment Sum as an alternative to paying the pension directly.

SECTION 54 CTA 2009 – WHOLLY AND EXCLUSIVELY

78. The first issue in this appeal is simply whether the Appellants entered into the Unfunded Pension Agreements wholly and exclusively for the purposes of their trades. Mr Mullan began his submissions with an overview of the taxation of employer financed retirement benefit schemes and sections 246 and 246A Finance Act 2004. The thrust of the submissions was that Parliament had recognised certain unregistered pension schemes and addressed the corporation tax position in relation to them but not the type of schemes under consideration in this appeal. He contended that HMRC's arguments in this appeal risked undermining a coherent legislative scheme and would make sections 246 and 246A obsolete. In relation to employer financed retirement benefit schemes, Parliament had legislated to provide that there could be no deduction until the pension was paid out. He maintained that the fact that Parliament had not chosen to tax the UURBS in this case under sections 246 and 246A in the same way as

employer financed retirement benefit schemes supported the Appellants' case. Legislative context can, of course, be useful in interpreting particular provisions but we did not find Mr Mullan's overview helpful in this case. There is no difficulty in applying section 54 CTA 2009 and the guidance in the authorities to this case that requires us to look at the general taxation of pension liabilities.

79. Section 54 CTA 2009 provides:

> "54 Expenses not wholly and exclusively for trade and unconnected losses
>
> (1) In calculating the profits of a trade, no deduction is allowed for—
>
> (a) expenses not incurred wholly and exclusively for the purposes of the trade,
>
> or
>
> (b) losses not connected with or arising out of the trade.
>
> (2) If an expense is incurred for more than one purpose, this section does not prohibit a deduction for any identifiable part or identifiable proportion of the expense which is incurred wholly and exclusively for the purposes of the trade."

80. The parties agreed that the test for determining whether an expense or, as in this case, a provision in respect of the liability to make a future payment has been incurred wholly and exclusively for the purposes of a trade is as set out in the decision of the Upper Tribunal in *Scotts Atlantic Management Ltd and another v HMRC* [2015] UKUT 66 (TCC), [2015] STC 1321 ('*Scotts Atlantic*') at [50] – [55]:

> "[50] First, '[a]s the taxpayer's 'object' in making the expenditure has to be found, it inevitably follows that (save in obvious cases which speak for themselves) the [FTT needs] to look into the taxpayer's mind at the moment when the expenditure is made' (Lord Brightman in *Mallalieu v Drummond (Inspector of Taxes)* [1983] STC 665 at 669, [1983] 2 AC 861 at 870).
>
> [51] Secondly, in so doing, the object of the expenditure must be distinguished from its effect. If the sole object of the expenditure was the promotion of the business, the expenditure is deductible, even though it necessarily involves other consequences. Thus the existence of for example a private advantage does not necessarily mean that the expenditure is disallowable. As Millett LJ said in *Vodafone Cellular Ltd v Shaw (Inspector of Taxes)* [1997] STC 734 at 742, 69 TC 376 at 437:
>
> > 'The object of the taxpayer in making the payment must be distinguished from the effect of the payment. A payment may be made exclusively for the purposes of the trade even though it also secures a private benefit. This will be the case if the securing of the private benefit was not the object of the payment but merely a consequential and incidental effect of the payment.'
>
> [52] Another way of phrasing this is that a merely incidental effect of expenditure is not necessarily an object of a taxpayer in making it. However, as Lord Brightman's well-known example in *Mallalieu* (see [1983] STC 665 at 669, [1983] 2 AC 861 at 870) of the medical consultant going to the South of France to treat a friend shows, it may be the case that in fact what would be an incidental effect in some circumstances could be an independent object in others. What the FTT must not do is to conclude that merely because there was an effect, that effect was an object.

> [53] Thirdly, '[s]ome results are so inevitably and inextricably involved in particular activities they cannot but be said to be a purpose of the activity' (Lord Oliver in *MacKinlay (Inspector of Taxes) v Arthur Young McClelland Moores & Co* [1989] STC 898 at 905, [1990] 2 AC 239 at 255) and as a result the conscious motive of the taxpayer is not decisive: 'it is of vital significance but is not the only object which the fact finding tribunal is entitled to find to exist' (Lord Brightman in *Mallalieu*). Another way of putting that is that the FTT must take a robust approach to ascertaining the purposes of the taxpayer.
>
> [54] There is one point to add: neither the statutory provision nor any of the cases indicate that the way in which an expense is incurred will determine whether the expense is deductible. The question is what is the object of the expense, not what was the object of the means of incurring it. But that is not to say that the means by which the expenditure is made cannot be one of the circumstances to be taken into account in determining its purpose.
>
> [55] A trader may have a choice of the way in which it achieves an end which is exclusively for the benefit of the trade. The choice may be influenced, or indeed wholly determined, by the tax consequences of each choice. A taxpayer is perfectly entitled to order its affairs in a way which incurs the least tax liability. The mere fact that a choice is influenced or dictated by the tax consequences does not necessarily mean that the choice involves a duality of purpose as regards the expense. The words of Millett LJ are just as relevant and applicable where there is a choice as where there is not: in each case, the question is whether the payment is made exclusively for the purposes of the trade, and that is a question of fact for the FTT."

81. The decision in *Scotts Atlantic*, which is binding on us, shows that we must determine the object of each Appellant in incurring the liability to pay future pensions to the companies' directors or, in certain circumstances, their dependants. In doing so, we must look into the minds of the companies (that is to say, the minds of the directors) when they decided to establish the UURBS and enter into the Unfunded Pension Agreements. In determining their reasons for doing so, we must be careful to distinguish between an object of entering into the Unfunded Pension Agreements and an incidental effect or mere consequence of doing so. In this case, that means deciding whether reducing profits for tax purposes in a tax year by 80% or 100% without incurring any actual expenditure during the same period was the object or one of the objects of the Appellants or merely a consequential and incidental effect of entering into the Unfunded Pension Agreements. Of course, the Appellants' motives are not necessarily determinative as some results are so inevitably and inextricably involved in particular activities, they cannot but be said to be a purpose of the activity. Where the purpose of an accounting debit is being considered in the context of section 54 CTA 2009, it is necessary to look at the purpose of the transaction which that debit records and determine the underlying reason for the debit (see *NCL Investments Ltd and another v HMRC* [2020] EWCA Civ 663 ('*NCL CA*') at [52]).

82. The Appellants' case was that they entered into the Unfunded Pension Agreements in order to reward and incentivise key employees in a way which allowed the cost of funding the pensions to be used by the companies as working capital to expand the businesses. The witnesses, who were beneficiaries of the arrangements, accepted that there was a risk that pensions might not be paid (see [16] and [17] above) but said that it was a risk that they were willing to take.

83. In his submissions on the wholly and exclusively test, Mr Mullan contended that the appellants had been careful to ensure that the amounts awarded were commercially appropriate. He contended that the trade purpose was clear and it was a case which "speaks for itself".

84. Mr Mullan stated that the Appellants did not shy away from the fact that the directors were aware of the tax treatment of the provision for the Unfunded Pension Agreements. They had been advised on this by Charterhouse and, in the case of A D Bly, by tax counsel. Mr Mullan submitted that the object was to provide pensions to key employees to benefit, incentivise and retain them while retaining money in the companies which could be used to expand the business. He said that this would make sense even if there were no tax deduction.

85. Mr Mullan also contended that even if the Appellants had incurred the liabilities under the Unfunded Pension Agreements for a dual purpose, namely providing pensions and saving tax, both aims were for the purposes of their trades. Mr Mullan relied on the dicta of Lord Upjohn in *IRC v Brebner* [1967] 2 AC 18 at 30 that "No commercial man in his senses is going to carry out a commercial transaction except upon the footing of paying the smallest amount of tax that he can."

86. HMRC's case was that the evidence showed that the purpose of obtaining a corporation tax deduction was a purpose in itself and more than incidental. In support of that submission, Ms Murray relied on nine points on the evidence set out in her skeleton which we have taken into account in our discussion below. Ms Murray submitted that a main aim or purpose of obtaining a corporation tax deduction is not, in itself, a purpose of the trade. She contended that the Appellants must show that the purpose of obtaining a corporation tax deduction was no more than an incidental purpose or effect of some trading purpose. Ms Murray said that the evidence showed that a main aim, if not the only aim, of creating the expenditure in the accounts was in order to obtain a corporation tax deduction. It was an aim in itself and one which was more than incidental.

87. At the hearing, Ms Murray made submissions on the decision of the Upper Tribunal in the case of *Peter Fisher, Stephen Fisher, Anne Fisher v HMRC* [2020] UKUT 62 (TCC) which concerned the motive defence in section 741 Income and Corporation Taxes Act 1988 ('ICTA') in relation to the transfer of assets abroad rules. After the hearing but before this decision was issued, HMRC notified the Tribunal and the Appellants that the Court of Appeal had given judgment in the further appeal of the *Fisher* case [2021] EWCA Civ 1438. HMRC contended that [91] of Newey LJ's judgment is relevant to the Appellants' submissions that expenses of a transaction intended to save tax, if that was a purpose of the transaction, are incurred wholly and exclusively for the purposes of the Appellants' trades. HMRC submitted that a main aim or purpose of obtaining a tax deduction is not, in itself, a purpose of the trade. The Appellants contended that *Fisher* was concerned with entirely different legislation and is not relevant to the issue. We agree with the Appellants. In *Fisher* in the Court of Appeal, Newey LJ was considering the motive defence in section 741 which provides that section 739 does not apply if either (a) "the purpose of avoiding liability to taxation was not the purpose or one of the purposes for which the transfer or associated operations or any of them were effected" or (b) "the transfer and any associated operations were bona fide commercial transactions and were not designed for the purpose of avoiding liability to taxation". It is, as the Appellants point out, entirely different legislation to that under consideration in this appeal. These appeals are concerned with section 54 CTA 2009 which provides a non-trade purpose exclusion rather than a non-tax avoidance defence. In our view, the differences in the wording of section 741 ICTA and section 54 CTA 2009 mean that (with no disrespect to Newey LJ) the observations at [91] of *Fisher* are of no assistance in this case.

88. There was not really any dispute that the Appellants had two purposes in mind when they decided to establish the UURBS and enter into the Unfunded Pension Agreements with the directors. Mr McSkimming and Mr Galpin maintained that the primary reason for the arrangements was to provide future pensions for key individuals in a way that did not involve any immediate reduction in working capital and, at the same time, the creation of a tax

deduction which reduced the amount of tax payable by the company. The issue is whether the companies were doing so wholly and exclusively for the purposes of their businesses or whether there was a non-business purpose.

89. Our conclusion in [20] that the witness statements were largely a product of Charterhouse and the striking similarities between them cast doubt on those passages which purport to describe the Appellants' reasons for setting up the UURBS. Both Mr McSkimming and Mr Galpin said that the boards subsequently met with Charterhouse to discuss remuneration or pension issues. The explanation given by Mr McSkimming in cross-examination for the similarities in the language used in the witness statements was that both companies were implementing the same pension planning arrangements but that cannot explain how two boards of directors formed exactly the same view before, on their evidence, any pension planning was suggested by Charterhouse.

90. It seems to us to be inherently unlikely that two separate companies with very different businesses would independently decide to do the same thing for the same reasons and in exactly the same way. We are not satisfied that both companies separately came to the conclusion that they needed to discuss the remuneration packages of key members of the business to incentivise and motivate them while maintaining working capital (see [27] and [55]). Neither Appellant produced any documentary evidence of such board meetings or discussions despite Mr McSkimming confirming that all board meetings were minuted. We do not accept that the Appellants' boards of directors met to discuss the need to motivate and incentivise certain directors by offering enhanced remuneration packages while not using any working capital before being approached by Charterhouse with the idea for an UURBS.

91. Both witnesses said the proposal put forward by Charterhouse was primarily a pension scheme although tax was also discussed at the meeting. It seems to us to be unlikely, if not completely illogical, that the Appellants would seek advice on remuneration and pensions from Charterhouse which did not purport to advise on either of those things. Charterhouse's letters of engagement stated that it could not advise on the suitability of an UURBS as a mechanism for providing pensions. In the letters, Charterhouse offered to liaise with a remuneration consultant who would produce an estimate of the overall level of remuneration, including the UURBS, for certain directors. In our view, if the Appellants had genuinely been concerned about the level of remuneration and pensions provision which they made for their directors, they would have sought advice from an executive remuneration consultancy firm and a pensions adviser rather than a firm of accountants. We are not satisfied that the Appellants sought advice about directors' remuneration from Charterhouse which then suggested that they should set up an UURBS. We find that the proposal to enter into the UURBS was brought to the Appellants as a tax planning scheme by Charterhouse.

92. In his witness statement, Mr Galpin said that the UURBS was first and foremost a pension scheme although the directors were aware of the tax benefit. If that was true then we cannot understand why the directors of CHR Ltd did not seek any pensions advice. At no point did either Appellant take advice on the most appropriate way to provide pensions for the directors. Both Appellants were advised by Charterhouse to instruct a remuneration consultant but the remuneration consultants specifically did not give pensions advice. In their reports, both Synergis and FLB stated that they did not offer financial, pension or investment advice.

93. If the Appellants had wanted to incentivise, motivate and retain key employees then we would have expected the Appellants to seek advice on the competitiveness of their remuneration packages but they did not do so. Although they are described in the papers as remuneration consultants, we were not provided with any evidence to show that Synergis and FLB had any expertise in the area and their reports clearly only addressed the "commercial

suitability" of the provisions. We were struck by the fact that the only comparative evidence of remuneration levels referred to in the reports is a reference in FLB's reports to the indication of senior salaries in the accounts of companies conducting broadly similar activities. We would have expected any remuneration consultant to carry out a much more detailed exercise and to explore comparators in depth if the true purpose was to ascertain appropriate levels of remuneration to retain, incentivise and motivate senior personnel. Accordingly, we do not accept that this was the reason for establishing the UURBS

94. Charterhouse's engagement letters show that tax was at the forefront of the Appellants' minds when they were considering establishing the UURBS. In our view, there is no other rational explanation for paragraph 1 of both letters being headed "Warning Regarding Tax Planning" and stating that "[a]ny tax planning covered by this engagement letter may be considered to be aggressive tax planning by [HMRC] and as such they are very likely to raise enquiries into any transactions effected as part of the planning ….". Mr Mullan said that the paragraph was no more than a standard warning but we disagree. The wording and prominence of the warning demonstrate that it is much more than a standard clause such as are included in Charterhouse's Standard Terms of Business attached to the engagement letters.

95. We have concluded that the provision of pensions to directors was, at best, only an incidental aim of the Appellants when they established an UURBS and entered into the Unfunded Pension Agreements. This is shown by the fact that the size of the pension provision was determined as a percentage of the profits before tax regardless of the level of those profits and without discussion of or reference to any future pensions benefit to the directors.

96. The amount of estimated profits used as a basis for making pension provisions by A D Bly in November 2012 was £1,300,000 which was significantly greater than the amount of £1,040,000 used by Synergis in making its recommendation that 100% of the profits could be used. Notwithstanding the increase in estimated profits, there does not appear to have been any discussion by the directors about whether the increase should lead to a reduction in the percentage of profits allocated to Unfunded Pension Agreements. The following year, the estimated profits of A D Bly were in the region of £3,000,000 but the FLB report and the board minutes do not record any discussion of whether the directors needed or why the company should make a pensions provision for its directors that was more than twice as large as the one made the year before. This disregard for the actual amounts of the pension provision made in relation to the individuals was shown even more clearly by the fact that the accounts for the period ended 30 November 2013 eventually included a provision of £4,435,180 for directors' pensions, being 80% of profits before tax of £5,543,975, despite that sum not being considered by FLB in its report or discussed in the directors' meetings.

97. In 2014, the directors of CHR Ltd seemed to disregard FLB's advice that the provision should be 80% of the estimated profits and decided to allocate all of the profits for the year to the Unfunded Pensions Agreements. There was no discussion or explanation for the decision to make greater provision for pensions than that recommended by FLB.

98. We are also unconvinced by the commerciality of the arrangements. Putting aside the uncertainty inherent in the scheme, it commits the Appellants to paying significant amounts in the future that must reduce the future distributable profits of their businesses (although we note that in both cases the businesses have been transferred to associated entities). The Unfunded Pension Agreements provide that the Executive may by written notice require the Appellant to use the adjusted (ie increased) amount of the provision to purchase an annuity to provide the same benefits as under the agreement. The Appellants accepted that, in fact, no annuity providing such benefits was currently available on the market. If it were than it is clear that if, as here, provisions for the Unfunded Pensions Agreements are made at rates of 80% and 100%

of profits over several years then the Appellants are accepting a potential liability to pay an amount equal to several year's annual profits adjusted for inflation as a lump sum in a single year. The witnesses had two responses to that. First, they stated that they were confident that the businesses were expanding and would be able to meet the future obligations and, secondly, that, as potential recipients of the pensions, they recognised that there was a risk that they would not be paid but believed the arrangements were in the best interest of the businesses. We do not accept that those points demonstrate that the UURBS was a commercial arrangement. In the case of A D Bly, the estimated profits figures show there is considerable volatility while the estimated profits of CHR Limited used in the relevant years remained broadly the same. In both cases, the future business risk remains substantial.

99. On the basis of the facts found and for the reasons given above, we have concluded that the Appellants' primary purpose in entering into the Unfunded Pension Agreements was to reduce their liability to pay tax without incurring any actual expenditure. It follows that the liability to pay pensions under the Unfunded Pension Agreements was not incurred wholly and exclusively for the purposes of the Appellants' trades. The fact that A D Bly is paying four pensions does not change our view that the pension provisions were not made wholly and exclusively for the purposes of the Appellants' trades.

SECTION 1290 CTA 2009 - EMPLOYEE BENEFIT CONTRIBUTIONS

100. In the event that the deductions are not disallowed by section 54 CTA 2009, the alternative basis on which HMRC seek to deny the deductions is that section 1290 CTA 2009 applies to prevent deductions in respect of 'employee benefit contributions'. In view of our conclusion that the deductions claimed by the Appellants are disallowed by section 54 CTA 2009, it is not necessary for us to decide HMRC's alternative ground for denying the deductions but, as we heard argument on the point, we deal with it briefly.

101. Section 1290 CTA 2009 is as follows:

> "1290 Employee benefit contributions
>
> (1) This section applies if, in calculating for corporation tax purposes the profits of a company ('the employer') of a period of account, a deduction would otherwise be allowable for the period in respect of employee benefit contributions made or to be made …
>
> (2) No deduction is allowed for the contributions for the period except so far as—
>
> > (a) qualifying benefits are provided, or qualifying expenses are paid, out of the contributions during the period or within 9 months from the end of it, or
> >
> > (b) if the making of the contributions is itself the provision of qualifying benefits, the contributions are made during the period or within 9 months from the end of it.
>
> (3) An amount disallowed under subsection (2) is allowed as a deduction for a subsequent period of account so far as—
>
> > (a) qualifying benefits are provided out of the contributions before the end of the subsequent period, or
> >
> > (b) if the making of the contributions is itself the provision of qualifying benefits, the contributions are made before the end of the subsequent period. …"

102. Section 1291 CTA 2009 relevantly provides:

> "1291 Making of "employee benefit contributions"

> (1) For the purposes of section 1290 an "employee benefit contribution" is made if, as a result of any act or omission—
>
> (a) property is held, or may be used, under an employee benefit scheme, or
>
> (b) there is an increase in the total value of property that is so held or may be so used (or a reduction in any liabilities under an employee benefit scheme).
>
> (2) For this purpose "employee benefit scheme" means a trust, scheme or other arrangement for the benefit of persons who are, or include, present or former employees of the employer or persons linked with present or former employees of the employer."

103. The purpose of section 1290 CTA 2009 was explained by Judge Richards in *NCL Investments Ltd and another v HMRC* [2017] 495 (TC) ('*NCL FTT*') at [56] as follows:

> "Section 1290 of CTA 2009 seeks to ensure that there is broad symmetry between the time at which a company obtains relief for an "employee benefit contribution" and the time at which the employee receives taxable "qualifying benefits" out of that contribution. …"

104. HMRC's case is that the deductions claimed were in respect of employee benefit contributions made or to be made and, as no qualifying benefits were provided or qualifying expenses paid in the relevant periods or within nine months of their end, the deductions were disallowed by section 1290(2) CTA 2009. Ms Murray submitted that there was no dispute that the Unfunded Pension Agreements were an employee benefits scheme within section 1291(2) or that no qualifying benefits had been provided or qualifying expenses paid during the relevant periods or within 9 months from the end of the periods. Under section 1291(1)(a), employee benefit contributions are made if, as a result of any act, property is held, or may be used, under an employee benefit scheme. Ms Murray contended that the relevant acts in this case were the contractual promises by each Appellant to make payments to the directors in the future as a result of which property was held.

105. Ms Murray characterised the Appellants' case as being that "any act" means that there must be a payment. She stated that the Appellants' interpretation was wrong. She submitted that if Parliament had intended "any act or omission" to mean or require a payment then it would not have removed the word "payment" from the legislation by the Finance Act 2007 which had the effect of broadening the definition of "employee benefit contribution" to include arrangements which do not involve a payment or transfer.

106. The Appellants position on the section 1290 CTA 2009 point is that there had never been any 'employee benefit contribution' for the purposes of section 1290 in this case. Mr Mullan submitted that no property was held or may be used under the arrangements in this case nor was there an increase in the value of any property so there was no employee benefit contribution within the meaning of section 1291(1). In the absence of any employee benefit contribution, section 1290 could not apply.

107. Before we consider the Court of Appeal's judgment in *NCL CA*, it is necessary to refer again to the decision of the FTT in the same case.

108. In *NCL FTT*, Judge Richards rejected the argument put forward on behalf of HMRC that the grant of share options to employees involved the making of an 'employee benefit contribution' as defined in section 1291 CTA 2009. Relevantly to this case, at [95] – [98], he held:

> "95. The first point to note is that s1290(1) and s1290(2) of CTA 2009 apply to deny or postpone a 'deduction in respect of employee benefit contributions'. The deduction at issue arises in respect of the grant of share options. Therefore, for s1290 to apply, the grant of share options must amount to an 'employee benefit contribution' within the meaning of s1291.
>
> 96. Section 1291 of CTA 2009 contains the definition of 'employee benefit contribution'. Perhaps oddly, that definition does not explain what amounts to an employee benefit contribution, but rather sets out the circumstances in which an "employee benefit contribution" is made (namely that there is an 'act or omission' that has certain specified results). However, construed in context, it seems as though the 'employee benefit contribution' is the 'act or omission' that leads to the results specified in s1291(1) of CTA 2009.
>
> 97. Therefore, the question is whether, as a result of the grant of the share options either (i) property is held, or may be used, under an employee benefit scheme' or (ii) there is an increase in the total value of property that is so held or may be used (or a reduction in any liabilities under an 'employee benefit scheme').
>
> 98. If the 'property' is regarded as the options themselves, I do not consider that limb (i) or limb (ii) set out at [97] is satisfied. The options that the EBT Trustee grants to employees simply embody a set of contractual rights that entitle employees to acquire shares from the EBT Trustee for a specified price. Those options were certainly granted in the context of Share Schemes (that are 'employee benefit schemes' as defined in s1291(2)). However, once granted, I do not consider that the options were held, or may be used under an employee benefit scheme (defined as a 'trust, scheme or other arrangements for the benefit of persons who are, or include, present or former employees…'). Rather, the options embodied contractual rights that employees held in their own names, absolutely. When the employees received their options, they had received their benefit and those options were no more held 'under' an employee benefit scheme after they were granted than was an employees' salary."

109. In *NCL CA*, HMRC argued that the grants of options were employee benefit contributions within section 1290 and 1291 CTA 2009 because shares held by trustees or acquired for the purpose would be used to fulfil their obligations to option-holders. As such, the shares were property that was held or may be used under an employee benefit scheme. In [77] and [78], the Court of Appeal rejected HMRC's submissions and upheld the FTT's view of the meaning of employee benefit contribution:

> "[77] A literal reading of s 1291(1) is capable of leading to the conclusion for which HMRC contends. In my judgment, however, such a reading ignores the context created by s 1290. The FTT was right to note that 'employee benefit contributions' is not itself directly defined. Even if it were, the choice of words used for a defined term is not to be treated as wholly neutral but may properly influence its meaning: see *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38, [2009] 4 All ER 677, [2009] AC 1101 per Lord Hoffmann at [17]. 'Employee benefit contributions' is not an empty vessel or algebraic symbol, dependent wholly on s 1291(1) for any meaning.
>
> [78] A contribution, resulting in property being held or used under an employee benefit scheme, suggests a payment or transfer from which benefits will be provided to employees. As the FTT said, this is expressly contemplated by s 1290(2)(a). In the present case, the benefit received by an employee was the option. It was the option that entitled the employee to acquire shares at a price that might be less than their market value. The

> acquisition of shares on exercise of the option was not the benefit received by the employee, but the fulfilment of an existing contractual entitlement."

110. Ms Murray submitted that the facts of this case were far removed and distinguishable from *NCL CA* and the Court of Appeal had not had the changes made by the Finance Act 2007 drawn to its attention.

111. We do not accept Ms Murray's submissions on this point as they seem to us to be indistinguishable from the arguments which the Court of Appeal rejected in *NCL CA*. To paraphrase, the benefit received by the employees was the pension rights. It is, in our view, simple and appropriate to transpose 'share option' to 'pension' in the paragraphs quoted above from *NCL FTT* and *NCL CA*. Having done so and applying the reasoning in those cases to this one, it is clear that there was no payment or transfer from which benefits will be provided and no property was held or used under an employee benefit scheme as a result of the Appellants entering into the Unfunded Pension Agreements with the directors. The creation of an unfunded contractual entitlement to a pension is not a payment or transfer from which benefits will be provided to the directors: it is merely a promise, and an uncertain one at that.

112. In her skeleton, Ms Murray also submitted in the alternative that, as a result of contractual promise, the directors held property, namely the contractual rights, which may be used to provide benefits under the scheme. Ms Murray did not press her alternative submission at the hearing and we think that she was right not to do so in the light of *NCL FTT* and *NCL CA*. Applying the reasoning in those cases, it is quite clear that the rights under the Unfunded Pension Arrangements were not held by the directors under an employee benefit scheme but held in their own names, absolutely.

113. Mr Mullan also made submissions on the wider statutory scheme and the significance of sections 246 and 246A FA 2004 in construing section 1290 CTA 2009. As we have already concluded that there is no employee benefit contribution for the purposes of section 1290 CTA 2009, we do not need to deal with those submissions.

DISPOSITION

114. For reasons given above, the Appellants' appeals are dismissed.

RELATED CASES

115. These appeals are lead cases under rule 18 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 for similar points in dispute in relation to transactions undertaken by other clients of Charterhouse. Rule 18(3)(b) provides that, subject to rule 18(4), the decision of the FTT in a lead case is binding on the parties to a related case. Rule 18(4) provides that a party in a related case may apply to the FTT for a direction that the decision should not bind that party. An application under rule 18(4) must ordinarily be made within 28 days after the date of release of the decision. However, in this case, the Tribunal previously directed that the related cases should be stayed until 60 days after the date of release of this decision and we similarly extend the time limit for making an application under rule 18(4) until 60 days after the date of release of this decision.

116. After the expiry of the extended time limit for an application under rule 18(4) and subject to any application that may be made, the FTT will issue directions under rule 18(5) for the disposal of or further steps in the related cases. The parties to the related cases may make submissions as to the appropriate directions to be made under rule 18(5). Such submissions should be served on the FTT and the other parties within 60 days of the date of release of this decision.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

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

JUDGE GREG SINFIELD
CHAMBER PRESIDENT

Release date: 26 NOVEMEBER 2021

APPENDIX

The operative parts of the Unfunded Pension Agreements

It is agreed as follows:

1 Definitions and Interpretation

In this Agreement including any Schedules:

1.1 Unless the context otherwise requires words importing one gender include all other genders and words importing the singular include the plural and vice versa;

1.2 Any reference to a statutory provision shall be deemed to include a reference to any statutory modification or re-enactment of it;

1.3 The clause headings do not form part of this Agreement and shall not be taken into account in its construction or interpretation;

1.4 Any reference to the Executive shall if appropriate include his personal representatives;

1.5 References in this Agreement to any clause, sub-clause, schedule or paragraph without further designation shall be construed as references to the clause, sub-clause, schedule or paragraph so numbered;

1.6 The 'Relevant Rate' shall mean the higher of 2.5% and the interest rate on the most recently issued UK Government Index Linked Securities prior to the Payment Date

2 This Agreement

2.1 As part of the Executive's reward for services provided in respect of the period of account ended 31 March 2013 [**date taken from agreements CHR Galpin dated 27 March 2013**] the Company has agreed to provide the pension further described in this agreement.

3 Pension Scheme Unfunded

3.1.1 If the Executive is in employment with the Company on 31 March 2013 then the Company shall pay a pension from the Payment Date in accordance with the following terms. The Payment Date means the Executive's 77th birthday or such earlier or later date as is provided for in accordance with clause 3.2.

3.1.2 From the Payment Date and during the Executive's life the Pension shall be paid to the Executive. From the Payment Date or from the Executive's death, whichever is later, the Pension shall be paid to such persons as are ascertained in accordance with clause 3.4 below.

Payment of the Pension after the death of the Executive shall be in such manner and upon such terms as are prescribed in accordance with clause 3.4 below.

3.1.3 Payment of the Pension will commence on the Payment Date and shall be payable in monthly instalments thereafter.

3.1.4 The amount of the Pension shall be ascertained in the following way:

3.1.4.1 There shall be calculated the amount of Pension which would have been payable under an annuity contract on the assumption that the Company had purchased an annuity contract from a commercial provider of annuities for a consideration equal to the Payment Sum. This calculation shall take account of the persons if any ascertained for the purpose of

clause 3.1.2 above and shall also take account of the prescribed terms if any in respect of such persons, as ascertained in accordance with the provisions of clause 3.4 below.

3.1.4.2 For the purpose of the calculation under clause 3.1 .4.1 such additional actuarial assumptions may be made as may be agreed by the Company and the Executive in writing. The calculation shall be carried out by an actuary who shall be selected by agreement between the Company and the Executive. Failing such agreement the actuary shall be nominated by the President for the time being of the Institute of Actuaries. Any such actuary shall act as an expert, and shall act at the Company's expense,

3.2.1 The Payment Date shall not be before the Executive's 55th birthday unless the Executive shall die before reaching his 55th birthday, nor shall it be before the Executive's retirement from his employment with the Company.

3.2.2 In circumstances where the Executive has died before an effective Payment Date has been reached, the Payment Date shall be (i) in accordance with any written notice provided to the Company by the Executive that sets out a Payment Date to so take effect in the event of his death (not otherwise superseded by a later received such written notice) or (ii) where no such notice has been received by the Company in accordance with any wish set out in his will or codicil thereto, failing which, the Payment Date shall be at the discretion of the Company but in that event shall not be later than two months following the date of receipt of written notice of the date of death of the Executive.

3.2.3 Subject always to clause 3.2.2, in circumstances where the Executive is in service as an employee of the Company on his 77th birthday, the Payment Date shall be (i) a date at the discretion of the Company within the period of two months following the date of retirement of the Executive from service with the Company or (ii) if earlier, such date as may be notified from time to time in writing by the Executive to the Company by not less than three months notice not otherwise superseded by a later received such written notice.

3.2.4 Subject to sub-clauses 3.2.1, 3.2.2 and 3.2.3, the Payment Date shall be the date notified as such by the Executive to the Company by way of not less than six months notice in writing not otherwise superseded by a later received such written notice.

3.3.1 The Payment Sum referred to in clause 3.1 shall be the sum found as a result of the following calculations.

3.3.2 Firstly take the sum of £128,125 (the 'Base Sum'). Establish the consumer prices index for March 2013. This amount is described here as 'RF'. Find the consumer prices index for the month in which the date two months before the Payment Date falls. This amount is described here as 'RP'. If RP is greater than RF, multiply the Base Sum by RP and divide the result by RF. The result is the 'Indexed Base Sum'. The higher of the Base Sum and the Indexed Base Sum is the 'Adjusted Base Sum'. Find the number of complete periods of 12 months commencing immediately after the end of the said period of account and ending prior to the date two months before the Payment Date. Multiply the resulting number of complete 12 month periods by the Relevant Rate (see Clause 1.6 above) to give 'the Total Percentage Rate'. Multiply the Adjusted Base Sum by the Total Percentage Rate and add the result to the Adjusted Base Sum. The result is the Payment Sum.

3.4.1 The persons described in this sub-clause are those persons falling within the description set out in sub-clause 3.4.3 as may be specified by the Executive in a written notice to the Company (which may be varied from time to time by the Executive) and the terms and conditions and proportions upon which such person or persons shall be paid the Pension or part thereof after the death of the Executive shall also be as may be specified by the Executive in such notice provided that in the reasonable opinion of the Company it is practicable to provide the pension or pensions in the manner so required.

3.4.2 Subject to sub-clause 3.4.1 upon the death of the Executive the Company shall pay the pension for life to the Executive's surviving spouse or Civil Partner.

3.4.3 The persons described in this sub-clause are the members of the Executive's family and household where "family" and "household" have the meaning given by section 721 Income Tax (Earnings and Pensions) Act 2003.

3.5.1 The pension or pensions to be paid under this agreement shall, in the case of the Executive be for life but otherwise shall be on such terms and conditions as may be specified by the Executive in a written notice to the Company (which notice may be varied from time to time by the Executive provided such variation does not increase the cost to the Company of providing the pension or pensions concerned) provided in the reasonable opinion of the Company it is reasonable to provide the pension or pensions on the terms so specified.

3.5.2 In the absence of any written notice to the contrary, the Company shall provide the pension or pensions on terms that provide for the pension or pensions to increase in line with increases in the consumer price index.

3.6 The Company may, but shall not be obliged to, enter into such reasonable arrangements as it may determine to secure the Company's obligations pursuant to this agreement.

3.7 The Executive or the Company may be giving written notice prior to the Payment Date vary the Company's obligations pursuant to this agreement, to permit or require the Company as an alternative to paying the pension or pensions to purchase instead at a cost of the Payment Sum an annuity or annuities in favour of the Executive and on his death in favour of the persons described in sub-clause 3.4 who would otherwise have received a pension with conditions comparable where possible to those that would have attached to the pension or pensions had they been paid instead.

3.8 The entitlement and rights of the Executive pursuant to this agreement shall not be capable of assignment and any such purported assignment shall be void and shall result in the Company exercising in place of the Executive all such discretions and powers as would otherwise accrue to the Executive but for the avoidance of doubt the Company shall nevertheless remain obligated to provide the pension or pensions on or before the Executive's 77th birthday or subject to clause 3.2.1 the earlier retirement from service with the Company or if the Executive shall not survive until his 77th birthday, within the period or two months following the receipt of written notice of the Executive's death.

[Clauses on Notices, Miscellaneous and Law and Jurisdiction]